NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1506

ROOFING PRODUCTS & BUILDING SUPPLY CO., LLC. D/B/A ANTIQUE BRICK COMPANY

VERSUS

CHARLES MECHWART AND STEVEN RICE D/B/A SWEET PEA'S FAMILY ROOFING CO.

Judgment Rendered: MAY 02 2014

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 584,345

Honorable Todd Hernandez, Judge

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

In this suit for the payment of amounts owed for shingles and other roofing supplies, Charles Mechwart appeals a judgment in favor of Roofing Products & Building Supply Co., LLC d/b/a Antique Brick Company ("Roofing Products") that awarded Roofing Products attorney fees in the amount of $9,083.70 in addition to the costs of the roofing supplies ($5,422.44). The attorney fees were awarded by the trial court following its determination that Roofing Supplies proved a claim on open account and were thus authorized under La. R.S. 9:2781. Because we find the record fails to establish an open account between Roofing Products and Mr. Mechwart, we reverse only that portion of the judgment of the trial court and issue this memorandum opinion in compliance with Uniform Rules, Courts of Appeal—Rule 2-16.1(B).

Roofing Products commenced this action against Mr. Mechwart and his contractor, Steve Rice d/b/a Sweet Pea's Family Roofing Co., seeking to collect amounts due for roofing materials it sold and delivered to Mr. Mechwart and which were installed by Mr. Rice on Mr. Mechwart's residence in Baton Rouge, Louisiana. In the petition, Roofing Products claimed that Mr. Mechwart had failed to pay his account with Roofing Products and sought judgment in the amount of $5,422.44, plus interest, reasonable attorney fees, and court costs pursuant to La. R.S. 9:2781.

The roofing materials at issue were ordered by Mr. Mechwart from Roofing Products on April 27, 2009, and at the time, Mr. Mechwart provided his American Express credit card and paid for the order in full. In connection with the sale using the American Express credit card, Mr. Mechwart signed the "SALES DRAFT" to pay the amounts due in connection with the sale. After the initial order was placed, the order was modified, at the request of Mr. Mechwart, to substitute different

shingles in place of the shingles that he originally selected.[1] The shingles and other roofing materials were delivered to Mr. Mechwart's residence on April 29, 2009. The delivery was received by Mr. Rice. Mr. Rice then utilized and installed the shingles and other roofing materials on Mr. Mechwart's residence. On May 4, 2009, Mr. Rice returned to Roofing Products and purchased additional shingles to finish installing the roof on Mr. Mechwart's residence.

Roofing Products received a "CHARGEBACK NOTIFICATION" from Amercian Express dated July 14, 2009, which indicated that the April 27, 2009 payment by Mr. Mechwart to Roofing Products was being revoked. The underlying basis for the revocation of payment was Mr. Mechwart's complaint that the shingles delivered (and ultimately installed on the roof of his residence) were not the shingles that he wanted or ordered. However, Roofing Products was never informed by Mr. Mechwart or Mr. Rice that the shingles delivered and installed were not what Mr. Mechwart ordered.[2] By letter dated August 4, 2009, Roofing Supplies sent a demand letter to Mr. Mechwart for the amount of $5,422.44, which it claimed was the "balance due on [his] account" for the roofing supplies.[3] When Mr. Mechwart did not pay the sum due, Roofing Products commenced this lawsuit. In addition, Roofing Products filed a Statement of Lien Claim in the mortgage records of East Baton Rouge Parish, in order to perfect a Private Works Act lien against Mr. Mechwart's residence for the sums due relating to the materials installed on the residence.[4]

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[1] According to the record, Mr. Mechwart's original order was modified because he decided that he wanted the same shingles that were on his neighbor's home.

[2] The overwhelming evidence in the record establishes that the shingles ultimately ordered by Mr. Mechwart, delivered to his residence, and installed on his residence by Mr. Rice were the same shingles as the shingles on Mr. Mechwart's neighbor's home, which were the shingles that Mr. Mechwart desired.

[3] See La. R.S. 9:2781.

[4] See La. R.S. 9:4801, *et seq.*

Mr. Mechwart filed an answer generally denying the allegations of the petition of Roofing Products and a reconventional demand against Roofing Products alleging that Roofing Products had pursued a "frivolous collection lawsuit" and recorded a Statement of Lien Claim in "bad faith," and seeking damages for the cost of removing the shingles, Mr. Mechwart's inability to refinance his home at a lower interest rate, his loss of reputation, attorney fees, and "[e]motional stress and grief."

A trial on the merits was held on September 24, 2012 and September 27, 2012. Following trial on the merits, the trial court issued written reasons for judgment finding that "[t]he evidence clearly establishes that roofing products were purchased, delivered, and then installed on [Mr. Mechwart's] home," that "five days elapsed between the time that the shingles were being placed on [Mr. Mechwart's] roof and the day that more shingles were purchased to finish the job and during this time the evidence fails to prove that [Mr. Mechwart] ever objected to the shingles not conforming to his purchase." Accordingly, the trial court rendered judgment "in favor of [Roofing Products'] claim under [La.] R.S. 9:2781 and order[ed] [Mr. Mechwart] to pay unto [Roofing Products] the sum of $5,422.44, together with interest from date of demand until paid, attorney fees in the amount of $9,083.70 and court costs." In addition, the trial court found that the "evidence fails to prove by a preponderance of the evidence any of [Mr. Mechwart's] claims in reconvention;" and therefore, those claims were "dismissed with prejudice." A judgment in accordance with the trial court's written reasons for judgment was signed on March 14, 2013, and it is from this judgment that Mr. Mechwart now appeals.

On appeal, Mr. Mechwart essentially claims the trial court erred in finding that an open account existed between Roofing Products and Mr. Mechwart under

La. R.S. 9:2781 for the sums dues for the roofing supplies, and thus, an award of attorney fees was not authorized.[5] We agree.[6]

It is well settled that an award of attorney fees is not allowed unless specifically authorized by statute or contract. **Huddleston v. Bossier Bank & Trust Co.**, 475 So.2d 1082, 1085 (La. 1985); **State, Department of Transportation and Development v. Wagner**, 2010-0050 (La. 5/28/10), 38 So.3d 240, 241. In this case, it is undisputed that the contract of sale for roofing supplies between Roofing Products and Mr. Mechwart does not specifically authorize an award of attorney fees. Instead, Roofing Products claims that the award of attorney fees was authorized by statute, *i.e.*, La. R.S. 9:2781, which governs open accounts.

Louisiana Revised Statutes 9:2781 provides, in pertinent part, as follows:

> A. When any person fails to pay an open account within thirty days after the claimant sends written demand therefor correctly setting forth the amount owed, that person shall be liable to the claimant for reasonable attorney fees for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the claimant. Citation and service of a petition shall be deemed written demand for the purpose of this Section. If the claimant and his attorney have expressly agreed that the debtor shall be liable for the claimant's attorney fees in a fixed or determinable amount, the claimant is entitled to that amount when judgment on the claim is rendered in favor of the claimant. Receipt of written demand by the person is not required
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> D. For the purposes of this Section and Code of Civil Procedure Articles 1702 and 4916, "open account" includes any account for

[5] On appeal, Mr. Mechwart does not challenge the trial court's implicit determination that there was a contract of sale between Mr. Mechwart and Roofing Products for the roofing supplies or the trial court's determination that Mr. Mechwart was responsible for the principal sum of $5,422.44 (the total cost of the shingles and other roofing materials) on the basis that Mr. Mechwart failed to prove that he ever objected to the shingles not conforming to his purchase. See La. C.C. art. 1906, 1908, 2439, 2550, 2601, 2603, 2604, and 2605. Additionally, on appeal, Mr. Mechwart does not challenge the trial court's ruling and dismissal of his reconventional demand.

[6] Because we find merit to Mr. Mechwart's claim that this was not a suit on open account, we need not address Mr. Mechwart's alternative assignment of error that the amount of attorney fees awarded was unreasonable.

> which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions. "Open account" shall include debts incurred for professional services, including but not limited to legal and medical services. For the purposes of this Section only, attorney fees shall be paid on open accounts owed to the state.

An open account is a legal term of art, and in the normal course of business, an open account is analogous to a credit account. **Bieber-Guillory v. Aswell**, 98-559 (La. App. 3rd Cir. 12/30/98), 723 So.2d 1145, 1149. For there to be an action on an open account, there must necessarily be a contract which gave rise to that debt. *Id.* A creditor suing on an open account must prove that the debtor contracted for the sales on open account. *Id.*

In this case, the Roofing Products' petition asserted and the trial court found that this suit was a suit on an open account. After a thorough review of the record, we find the trial court's finding in this regard was manifestly erroneous. While the record in this matter establishes that there was a contract between Mr. Mechwart and Roofing Products for the sale of roofing supplies for a specific price and that Mr. Mechwart ultimately failed to pay the purchase price or the amount due under that contract, there is no evidence in the record establishing that Mr. Mechwart contracted for the sale of roofing supplies on a credit account. Roofing Products did not establish that it had an "account" with Mr. Mechwart because Roofing Products did not agree to an extension of any credit to facilitate the purchase of the shingles and roofing supplies. Instead, Mr. Mechwart paid for the order in full at the time of sale using his American Express credit card. Although this method of payment permitted him to subsequently reverse the payment, the record is devoid of any evidence that the parties intended *at the time of the sale* to create an "account" with a "balance" that was to be paid by Mr. Mechwart at a later date. The intention of the parties at the time of the sale should control the determination of whether an open account was formed. See **Gulfstream Services, Inc. v. Hot**

Energy Services, Inc., 2004-1223 (La. App. 1st Cir. 3/24/05), 907 So.2d 96, 100, writ denied, 2005-1064 (La. 6/17/05), 904 So.2d 706 (finding no open account because the record contained no evidence of the parties' intent or agreement to extend credit or create an open account in connection with the use of certain equipment). The nature of the transaction—a sale with a payment at the time of the purchase—was not subsequently converted to a sale on an open account by Mr. Mechwart's unilateral action that resulted in the reversal of the payment.

Accordingly, we find that Roofing Products did not establish that the contract of sale with Mr. Mechwart was an open account pursuant to La. R.S. 9:2781.[7] Therefore, that portion of the March 14, 2013 judgment of the trial court awarding attorney fees in the amount of $9,083.70 is reversed. All costs of this appeal are assessed equally between the parties.

REVERSED IN PART AND AFFIRMED IN PART.

[7] We have not found, nor have we been directed to, any other statute that would authorize an award of attorney fees under the facts of this case.