

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0667

HUNT GRAPHICS, INC.

VERSUS

CONTINENTAL CASUALTY INSURANCE COMPANY,
MANDEVILLE SOCCER CLUB, ELLSWORTH CORPORATION, US
190 LLC

DATE OF JUDGMENT: DEC 21 2017

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2013-13300, DIVISION H, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE ALLISON H. PENZATO, JUDGE

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* * * * *

BEFORE: WHIPPLE, C.J., McDONALD AND CHUTZ, JJ.

Disposition: REVERSED AND REMANDED.

CHUTZ, J.

Plaintiff-appellant, Hunt Graphics, Inc., appeals a summary judgment dismissing its damages claim against defendants-appellees, Mandeville Soccer Club (MSC) and U.S. 190 LLC (U.S. 190). For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

In July 2012, plaintiff occupied leased space in Unit 2-B of a building owned by U.S. 190 in Mandeville, Louisiana. Plaintiff used the space as an art studio and for storage of art prints. On or about July 18, 2012, the air conditioner condensate line located in the attic backed up and overflowed. According to Rufus Tingle, one of U.S. 190's owners, the overflow resulted from someone, possibly one of MSC's coaches, placing an iron bed frame on top of the condensate line. According to Mr. Tingle, the overflowed water traveled down the wall separating plaintiff's unit from the unit of the adjoining tenant, MSC. The water only penetrated into Unit 2-B.

On July 16, 2013, plaintiff filed suit against U.S. 190 and MSC seeking recovery for water damage to art prints.¹ Plaintiff alleged the water leak was caused by MSC. In an amended answer, U.S. 190 and MSC (collectively, defendants) asserted the affirmative defense of fraud. They alleged Michael Hunt, Jr., an officer of plaintiff, ordered the intentional destruction of artwork and moved damaged prints from a different location into Unit 2-B in order to maximize plaintiff's insurance claim. In August 2016, defendants filed a motion for summary judgment seeking dismissal of plaintiff's claims. Defendants asserted plaintiff would be unable to prove causation, *i.e.*, that water from the air conditioner damaged its prints. Defendants also argued that their affirmative

¹ Plaintiff also named additional defendants, who are not parties to the summary judgment at issue in this appeal.

defense of fraud was “corroborative of the fact that the plaintiff cannot prove its claim.”

In support of summary judgment, defendants relied on the report of Dr. Jennifer Mass, an expert in forensic art analysis. Dr. Mass, who has a Ph.D. in inorganic chemistry, conducted a scientific analysis of ten out of the hundreds of prints alleged to have been water damaged. Dr. Mass opined to “a reasonable degree of scientific certainty” that the prints were not damaged by water from the air conditioner overflow. She based her opinion on the absence on the prints of metal ions, surface soil, insulation and drywall debris she would have expected to find had they been damaged by water overflow from an air conditioner. Another factor Dr. Mass cited in support of her opinion was the horizontal flow pattern she observed on a single print. Defendants offered no further evidence in support of their allegations either that Mr. Hunt intentionally ordered the destruction of the prints or the transfer of damaged prints from a different location to Unit 2-B.

In opposition to defendants’ motion, plaintiff filed the affidavit of Dr. James P. Donahue, who has a Ph.D. in inorganic chemistry and serves as an expert in the field. Dr. Donahue believed the methodology Dr. Mass utilized in reaching her conclusions suffered from “serious” and “systematic” flaws. He was of the further opinion that the measurements she took with her x-ray instruments seemed to “affirm rather than refute the alleged source of water that damaged the prints, namely, condensate from an air handling unit.” In addition to Dr. Donahue’s affidavit, plaintiff also filed deposition testimony from several eyewitnesses concerning the occurrence, the source, and the extent of the water intrusion into Unit 2-B.

Following a hearing, the district court, without assigning reasons, rendered judgment granting defendants’ motion for summary judgment and dismissing

plaintiff's claims against them. The district court signed a written judgment in accordance with that ruling on November 21, 2016. Plaintiff now appeals.

DISCUSSION

Plaintiff argues in three assignments of error that the district court erred in finding it failed to carry its burden of proof and in granting summary judgment when it presented sufficient evidence from eyewitnesses and an expert to create genuine issues of material fact concerning causation of its damages. Plaintiff maintains the district court improperly “weighed the evidence and made credibility determinations [as between competing experts] in order to grant [defendants’] motion.” In particular, plaintiff points out that its expert, Dr. Donahue, disagreed with the conclusion of defendants’ expert, Dr. Mass, that the results of her scientific testing excluded water from an air conditioner as the source of damage to plaintiff’s prints.²

In response, defendants argue the affidavit of Dr. Donahue was insufficient to create any disputed issues of material fact because his conclusions were merely self-serving attempts to undermine Dr. Mass’ opinions and were not based on any independent scientific testing he conducted. Thus, they contend Dr. Donahue’s opinions did not constitute competent, scientific evidence sufficient to refute Dr. Mass’ opinions.³

² In its fourth assignment of error, plaintiff argues the district court erred in granting summary judgment when defendants failed to carry their burden of proof on their affirmative defense of fraud. We pretermitt consideration of this assignment in view of our disposition of plaintiff’s other assignments of error.

³ In the reply memorandum defendants filed supporting their motion for summary judgment, they requested Dr. Donahue’s affidavit be stricken. Under La. C.C.P. art. 966(D)(2), a district court is required to consider all objections to supporting or opposing documents “prior to rendering judgment,” and to “specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider.” The record contains no ruling either on the record or in writing indicating the district court held Dr. Donahue’s affidavit to be inadmissible or excluded it from consideration. Moreover, the judgment is silent on this issue. Therefore, defendants’ request to strike is presumed to have been denied. See *Barham & Arceneaux v. Kozak*, 02-2325 (La. App. 1st Cir. 3/12/04), 874 So. 2d 228, 241, writ denied, 04-0930 (La. 6/4/04), 876 So. 2d 87.

On appeal, appellate courts review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the district court's consideration of whether summary judgment is appropriate. ***Schultz v. Guoth***, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06. A motion for summary judgment shall be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) & (4). Generally, in ruling on a motion for summary judgment, a district court cannot make credibility determinations. ***Independent Fire Insurance Company v. Sunbeam Corporation***, 99-2181 (La. 2/29/00), 755 So. 2d 226, 236. The court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of material fact. ***Hines v. Garrett***, 04-0806 (La. 6/25/04), 876 So.2d 764, 765 (*per curiam*); ***Penn v. CarePoint Partners of Louisiana, L.L.C.***, 14-1621 (La. App. 1st Cir. 7/30/15), 181 So.3d 26, 30. A genuine issue is one as to which reasonable persons could disagree. All doubts should be resolved in the non-moving party's favor. ***Hines***, 876 So.2d at 765-66.

The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). But if the moving party will not bear the burden of proof at trial on the issue before the court on the motion, the moving party's burden is satisfied by pointing out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party may not rest on the mere allegations or denials of his pleadings but must produce factual support sufficient to establish he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact,

and the mover is entitled to summary judgment as a matter of law. La. C.C.P. arts. 966(D)(1) & 967(B); *Schultz*, 57 So.3d at 1006.

In this case, there was competing expert testimony regarding whether the results of Dr. Mass' testing supported a conclusion that plaintiff's prints were damaged by air conditioner condensate water. Dr. Mass opined the test results excluded that possibility. Dr. Donahue disagreed, concluding the test results supported the conclusion that the prints were damaged by condensate water. In ruling on a motion for summary judgment, it is improper for a court to determine the credibility, the weight, or the persuasiveness of competing expert opinions. See *Hines*, 876 So.2d at 765; *Independent Fire Insurance Company*, 755 So. 2d at 236. Accordingly, based on our *de novo* review, we find the district court erred in granting summary judgment since a disputed issue of material fact existed concerning the cause of the water damage to plaintiff's prints.

Moreover, the deposition testimony of the fact witnesses presented by plaintiff provided factual support for the essential element of causation, thereby creating a disputed issue of material fact, even without considering Dr. Donahue's affidavit. It is undisputed water overflowed from the air conditioner unit located in the attic and intruded into plaintiff's studio. Mr. Tingle testified he discovered the source of the water leak, which went down the wall into plaintiff's studio. He personally observed prints with water damage, stating he saw "ten or twelve things wet," which were laid out to air dry. Mr. Hunt testified the intrusion of water extended for twelve feet inside the studio. Lloyd W. Grimes, who assisted in cleaning up Unit 2-B, indicated he noticed water intruding into the hallway as he approached the studio. He stated water was "definitely" on the carpet and could be heard "squishing as you moved." Mr. Grimes picked up stacks of prints from the studio floor, the bottoms of which were "mostly wet." He explained the prints were lying on the floor because the studio's filing cabinets were full. Mr. Grimes

estimated more than five hundred prints got wet as a result of the water on the studio floor.

When an issue is one typically understandable to a lay person without assistance from an expert, expert testimony is not required. *Milton J. Womack, Inc. v. House of Representatives of State*, 509 So. 2d 62, 66 (La. App. 1st Cir.), writs denied, 513 So. 2d 1208 & 1211 (La. 1987). Moreover, the factfinder may accept or reject any expert's view, even to the point of substituting its own common sense and judgment for that of an expert witness where, in the factfinder's opinion, such substitution appears warranted by the evidence as a whole. *Dakmak v. Baton Rouge City Police Department*, 12-1468 (La. App. 1st Cir. 9/4/14), 153 So. 3d 498, 505. The source of the water damage in the instant case is not a matter necessarily requiring the testimony of an expert witness. Considering the eyewitness testimony presented by plaintiff, a factfinder reasonably could choose to reject the opinion of defendants' expert and infer, based on common knowledge and ordinary experience, at least some of plaintiff's prints were damaged by air conditioner condensate water. Therefore, the eyewitness testimony presented by plaintiff was sufficient to preclude summary judgment since it raised a genuine issue of material fact as to causation.

CONCLUSION

For the reasons assigned, the judgment of the district court granting Mandeville Soccer Club and U.S. 190 LLC's motion for summary judgment and dismissing Hunt Graphic, Inc.'s claims against them is reversed. This matter is remanded to the district court for further proceedings consistent with the views expressed in this opinion. All costs of this appeal are assessed to defendants.

REVERSED AND REMANDED.