

***NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT**

NO. 2018 CA 0491

SHAMROCK MANAGEMENT, LLC

VERSUS

GOM FABRICATORS, LLC

DEC 10 2019

**Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 168,673**

The Honorable John R. Walker, Judge Presiding

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**BEFORE: McCLENDON, WELCH, THERIOT, CHUTZ, AND LANIER,
JJ.**

WLD
J-concur
JEW

MA
Theriot, J. Dissents with reasons
McCleendon, J. concurs in the result Reached.

LANIER, J.

The defendant/plaintiff-in-reconvention, GOM Fabricators, LLC (GOM), appeals the judgment of the Thirty-Second Judicial District Court dismissing its reconventional demand with prejudice on the basis of prescription. For the following reasons, we reverse the judgment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff/defendant-in-reconvention, Shamrock Management, LLC (Shamrock), was awarded a contract to construct metering and measuring equipment for its customer, Chevron U.S.A. (Chevron). In connection with the Chevron contract, Shamrock solicited bids and ultimately contracted with GOM to construct various components for the Chevron project. Shamrock and GOM executed three separate construction contracts to “do all the work and provide all the materials, tools, machinery[,] and supervision necessary for the construction of” the Jack St. Malo LACT Skid; the Jack St. Malo Gas Meter and Skid; and the Big Foot Skid.

After the equipment for the Big Foot Skid was completed and delivered to Chevron’s facility in January 2012, the welds and other aspects of the equipment constructed by GOM were tested for integrity and to assure compliance with the minimum project specifications. Upon testing, it was discovered that a number of GOM’s welds on the equipment were deficient and not in compliance with the project specifications. Additionally, it was determined that a number of the pipes and fittings fabricated by GOM would have to be redone because those parts were “under a great deal of stress, tension[,] and torque,” which would have affected the extremely sensitive metering and measurement equipment installed in the project.

Chevron demanded that Shamrock remedy the defective work or pay for all charges incurred in correcting the work to meet the project specifications.

Shamrock paid Chevron for the remediation work and requested reimbursement from GOM, but GOM allegedly refused to reimburse Shamrock. Thereafter, on January 22, 2013, Shamrock filed a Petition for Damages against GOM, alleging breach of the Big Foot Skid contract between Shamrock and GOM and negligence by GOM, seeking reimbursement of its remediation costs and compensation for damage to its reputation

On August 13, 2015, GOM answered Shamrock's Petition for Damages arising out of the allegedly defective work on the Big Foot Skid, and filed a reconventional demand seeking payment of its outstanding invoices for the Jack St. Malo LACT Skid. GOM's reconventional demand alleged that Shamrock breached the parties' construction contract and "is liable ... on open account, for the full and true sum of \$253,354.10, plus attorney fees thereon of not less than 25% of all principal and interest due, plus interest thereon as well as judicial interest, and all costs of these proceedings" GOM alleged that, in conjunction with the construction of the Jack St. Malo LACT Skid, it had performed services, including construction services pursuant to its contract with Shamrock, as well as on open account.

GOM alleged that it submitted four invoices to Shamrock for its periodic work and progress on the Jack St. Malo LACT Skid,¹ all of which remained unpaid, despite amicable demand:

1. Invoice #1978, dated April 5, 2012, for "Milestone #4," in the amount of \$111,700.47;
2. Invoice #2005, dated May 2, 2012, for "Change Order #2 (Finished Firewater Piping)," in the amount of \$84,000.00;
3. Invoice #2010, dated May 4, 2012, for "GOM Change Order # 00183/GOM Change Order # 00182/Onshore Labor & Equipment 5/3/12," in the total amount of \$9,782.00; and

¹ All four invoices are for Job #1031222, identified by location simply as "JSM;" however, Jay Gauthier, Jr., GOM's project manager, testified that these invoices were specifically for the Jack St. Malo LACT Skid.

4. Invoice #2101, dated June 15, 2012, for “Milestone #5 (Receipt of Approved Vendor Data 15%),” in the amount of \$47,871.63.

For the Jack St. Malo Gas Meter and Skid project, GOM subcontracted some of the work out to a third party, Cajun Cutters, in order to meet Shamrock’s delivery deadline. Cajun cutters invoiced GOM for this work, and GOM in turn invoiced Shamrock \$116,237.25 for the work done by Cajun Cutters.² Shamrock did not pay GOM’s invoice, and GOM did not pay Cajun Cutters’ invoice. Thereafter, the parties allegedly reached an agreement whereby Cajun Cutters would seek payment directly from Shamrock for the work it performed under the subcontract, rather than from GOM. In exchange for Shamrock’s payment to Cajun Cutters, GOM would credit Shamrock’s account and release the lien on the Jack St. Malo Gas Meter and Skid. This alleged agreement was memorialized in a September 25, 2013 email sent by a representative of GOM to representatives of the parties. Thereafter, Shamrock allegedly paid Cajun Cutters \$116,237.25; Cajun Cutters credited GOM’s account for Shamrock’s payment; and GOM credited Shamrock’s account for the payment to Cajun Cutters.³

Shamrock filed a peremptory exception raising the objection of prescription, alleging that GOM’s reconventional demand was prescribed under La. C.C. art. 3494(4), which provides a three-year prescriptive period for suits on an open account. GOM opposed the exception, arguing that its reconventional demand was not prescribed because the September 25, 2013 email constituted tacit

² This June 25, 2012 invoice GOM issued to Shamrock was for Job #1131013, JSM/Gas Skid, with the description “Change Order From Cajun Cutters.”

³ GOM’s Aged Receivables report, an internally prepared document dated November 21, 2016, shows that GOM applied a \$123,905.58 credit to Shamrock’s account on September 30, 2014, in relation to Shamrock’s payment to Cajun Cutters, leaving a total balance owed by Shamrock to GOM in the amount of \$245,685.77. It is unclear why GOM entered a credit of \$123,905.58, since GOM acknowledged that Shamrock only paid Cajun Cutters \$116,237.25 (the amount of Shamrock’s remaining unpaid invoice from GOM on the Jack St. Malo Gas Meter and Skid). However, Mike Fesi, GOM’s owner, and Gauthier testified that the amount of the credit appeared to be an error. (R. 124, 127-30, 235, 245-248)

acknowledgement by Shamrock of the debt owed to GOM, and again on September 30, 2014 when GOM credited Shamrock's account. Alternatively, GOM claimed that La. C.C. art. 3494(4) is inapplicable to the reconventional demand, since the reconventional demand contained claims arising from a construction contract, to which the ten-year prescriptive period for personal actions set forth in La. C.C. art. 3499 applies.

After a hearing, the trial court found that GOM's reconventional demand was a suit on an open account, subject to the three-year prescriptive period of La. C.C. art. 3494(4), and that prescription had not been interrupted by Shamrock's alleged tacit acknowledgement of the debt or the issuance of a credit by GOM. Therefore, GOM's reconventional demand, filed more than three years from the date payment was exigible, was prescribed. The trial court dismissed GOM's reconventional demand in its entirety with prejudice on September 28, 2017. GOM filed a motion for new trial, which was denied by the trial court on November 27, 2017, and this appeal followed.⁴

On appeal, GOM assigns the following trial court errors:

1. The trial court erred in applying the three-year prescriptive period of the open-account statute because the debt at issue was incurred under an ordinary construction contract with none of the hallmarks of an "open" account.
2. The trial court erred by refusing to find a tacit acknowledgment of debt when Shamrock failed to object when an email memorializing a side agreement between Shamrock, GOM, and a third party expressly stated that "Shamrock still owes \$253,354.10 on the JSM LACT unit."

⁴ The trial court initially refused to grant GOM's request for an appeal from the judgment dismissing the reconventional demand. GOM filed an application for supervisory writs, which was granted by this Court based upon a finding that the judgment dismissing the reconventional demand was a final, appealable judgment. The matter was remanded to the trial court with instructions to grant GOM an appeal. *See Shamrock Management, LLC v. GOM Fabricators, LLC*, 2017-1542 (La. App. 1 Cir. 11/30/17) (unpublished writ action).

DISCUSSION

The Louisiana Supreme Court has consistently held that the prescriptive period applicable to an action is determined by the character of the action disclosed in the pleadings. *Born v. City of Slidell*, 2015-0136 (La. 10/14/15), 180 So.3d 1227, 1232. Personal actions are subject to a liberative prescription of ten years, unless otherwise provided by legislation. La. C.C. art. 3499. One such exception to the ten-year prescriptive period for personal actions is found in La. C.C. art. 3494(4), which establishes a shorter, three-year prescriptive period for actions on an open account.

Generally, a construction contract is subject to the liberative prescription of ten years. See La. C.C. art. 3500; *Firmin, Inc. v. Denham Springs Floor Covering, Inc.*, 595 So.2d 1164, 1170 (La. App. 1 Cir. 1991). However, La. C.C. art. 3499 states that for personal actions, such as breach of contract, a liberative prescription of ten years applies “[u]nless otherwise provided by legislation.” Thus, an action on open account, while arising from a contractual relationship, is an exception to the ten-year prescriptive period for personal actions. *Dear v. Mabile*, 93-1188 (La. App. 1 Cir. 5/20/94), 637 So.2d 745, 747.

An open account is defined as “any account for 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.” La. R.S. 9:2781(D). The Louisiana Supreme Court held in *Frey Plumbing Company, Inc. v. Foster*, 2007-1091 (La. 2/26/08), 996 So.2d 969, 972 (per curiam), that the language of La. R.S. 9:2781(D) is clear and unambiguous and should be applied as written. The clear language of the statute states that an open account “includes any account,” and contracts, particularly construction contracts, are not specifically excluded. *R.L. Drywall, Inc. v. B & C Electric, Inc.*,

2013-1592 (La. App. 1 Cir. 5/2/14), 2014WL3559390, at *6 (unpublished opinion).

In determining whether a contract falls under the open account statute, the court must consider whether the total cost or price is left open or undetermined; whether other business transactions between the parties existed; whether one party extended a line of credit to another; whether there are running or current dealings; and whether there are expectations of future dealings. However, the open account statute does not require multiple transactions or for parties to anticipate future transactions. *Factor King, LLC v. Block Builders, LLC*, 193 F.Supp.3d 651, 658-59 (M.D. La. 2016).

Considering the above-listed factors in light of the facts of this case, we note the following: The “Construction Agreement” between the parties fixed the original total price for construction of the Jack St. Malo LACT Skid at \$319,144.20; however, the project was subsequently expanded and a number of change orders were issued. GOM ultimately worked on three separate construction contracts for Shamrock over a period of approximately two years. In the course of its work on the three contracts, GOM issued a number of invoices to Shamrock, only four of which remained unpaid. GOM invoiced Shamrock for the contract work upon reaching certain milestones in the projects. GOM also invoiced Shamrock for the change orders as the additional work was done.

When, as here, evidence is introduced at the hearing on the peremptory exception raising the objection of prescription, the trial court’s findings of fact are reviewed under the manifest error-clearly wrong standard of review. *Carter v. Haygood*, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1267, citing *Stobart v. State, Through DOTD*, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even

though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

Each invoice GOM submitted to Shamrock set forth a specific amount to be paid for specific work, pursuant to one of the parties' three original contracts. Despite the various change orders, the contract prices were clearly defined. There is no evidence in the record of a line of credit between GOM and Shamrock, nor is there evidence of an ongoing or future projects that Shamrock contracted with GOM to construct.

Thus, in reviewing the substance of GOM's reconventional demand in light of the clear language of La. R.S. 9:2781(D) and the evidence presented, we conclude that the trial court committed manifest error in its factual finding that the transactions between the parties constituted an open account.

With none of the factors for an open account met, it was clearly wrong for the trial court to find that an open account existed between GOM and Shamrock. Therefore, it was error to apply a three-year prescriptive period for an open account instead of applying a ten-year prescriptive period for construction contracts.

In addition to pleading a claim for liability on an open account, GOM's reconventional demand also pleads a claim for breach of contract. Specifically, GOM alleged that "pursuant to the [construction] contract ... [GOM] constructed certain oilfield equipment for [Shamrock] pursuant to [Shamrock's] contract with [Chevron]. One such piece of equipment involves the Jack St. Malo [LACT Skid]." GOM further alleged that "[i]n conjunction with its construction of the Chevron Jack St. Malo LACT Skid, [GOM] performed services, including *construction services pursuant to its contract with [Shamrock], as well as on open account.*" (Emphasis added.)

The facts, as pled by GOM in its reconventional demand, indicate that GOM sought recovery under open account and, alternatively, under breach of contract. GOM essentially alleged that under the construction contract, GOM was obligated to construct the Jack St. Malo LACT Skid, and Shamrock was obligated to compensate GOM for its services. GOM alleged that Shamrock did not compensate GOM, and therefore Shamrock was in breach of contract. This is an alternative claim from open account with an alternative remedy.

Therefore, we find that GOM alternatively pled a breach of contract claim, which is subject to a prescriptive period of ten years. The latest of the four invoices GOM submitted to Shamrock is dated June 15, 2012. GOM filed its reconventional demand on August 13, 2015, well within the ten-year prescriptive period provided under La. C.C. art. 3499 for breach of contract claims. It was error for the trial court to dismiss GOM's reconventional demand in its entirety, since the breach of contract claim has not prescribed. We therefore reverse the trial court's judgment and remand for further proceedings.

Additionally, we pretermitt discussion on GOM's second assignment of error, since the issue of whether Shamrock tacitly acknowledged the debt allegedly owed to GOM, thereby interrupting prescription, is not crucial to whether GOM's breach of contract claim has prescribed.

DECREE

The judgment of the Thirty-Second Judicial District Court dismissing GOM Fabricators, LLC's reconventional demand is reversed, and the matter is remanded for further proceedings consistent with this opinion. All costs of this appeal are to be assessed evenly between GOM Fabricators, LLC and Shamrock Management, LLC.

REVERSED AND REMANDED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0491

SHAMROCK MANAGEMENT, LLC

VERSUS

GOM FABRICATORS, LLC



THERIOT, J., dissenting and assigning reasons.

I respectfully disagree with the majority's conclusion that the trial court was clearly wrong in finding that an open account existed between GOM and Shamrock. The majority bases this conclusion on its evaluation of a number of jurisprudentially-created factors for determining whether a contract falls within the open account statute; i.e., whether the total cost or price is left open or determined, whether other business transactions between the parties existed, whether one party extended a line of credit to another, whether there are running or current dealings, and whether there are expectations of future dealings. However, La. R.S. 9:2781(D) defines an open account as simply "any account for which all or part 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 expect future transactions." In *Frey Plumbing Company, Inc. v. Foster*, 2007-1091 (La. 2/26/08), 996 So.2d 969 (per curiam), the Louisiana Supreme Court held that the language of La. R.S. 9:2781(D) must be applied as written and that *any account* which fits the statutory definition of an open account fits within the ambit of the statute. The *Frey* court noted that "there is no requirement that there must be one or more transactions between the parties, nor is

there any requirement that the parties must anticipate future transactions,” and went on to explain that “[t]o the extent the prior case law has imposed any requirements which are inconsistent with the clear language of La. R.S. 9:2781(D), those cases are overruled.” *Frey*, 2007-1091 at p. 6, 996 So.2d at 972. Following *Frey*, this court held that “any account,” as used in La. R.S. 9:2781, means literally any account, *including those based on construction accounts or contracts*. See *R.L. Drywall, Inc. v. B & C Electric, Inc.*, 2013-1592 (La.App. 1 Cir. 5/2/14), 2014WL3559390 at *6 (unpublished opinion). Based on the evidence before us on appeal, I cannot say that the trial court was clearly wrong in finding that Shamrock had an account with GOM for which all or part of the balance was past due, i.e., an open account.

Furthermore, I disagree with the majority’s holding that GOM could plead a contract remedy as an alternative to the open account claim for Shamrock’s failure to pay the past due balance under the contract. The ten-year prescriptive period set forth in La. C.C. art. 3499 is applicable to personal actions *unless otherwise provided by legislation*. One such exception to the ten-year prescriptive period for personal actions is found in La. C.C. art. 3494(4), which establishes a shorter, three-year prescriptive period for actions on open account. All of the actions subjected to a three-year prescriptive period by the provisions of Article 3494 essentially arise from contractual relationships, e.g., actions for the recovery of compensation for services rendered, actions for arrearages of rent and annuities, actions on money lent, actions on open account, and actions to recover underpayments or overpayments of royalties. Article 3494 does not present a choice between a contract remedy and some other remedy; it merely provides exceptions to the general rule stated in Article 3499 that a personal action prescribes in ten years. Thus, an action on open account, while arising from a contractual relationship, is an exception to the ten-year prescriptive period for personal actions. *Dear v. Mabile*, 93-1188 (La.App. 1 Cir.

5/20/94), 637 So.2d 745, 747, citing *Starns v. Emmons*, 538 So.2d 275, 278 (La. 1989) (holding that an action to recover rent, late charges, and attorney fees under the terms of a lease was subject to the three-year prescriptive period of Article 3494, rather than the ten-year prescriptive period applicable to personal actions, despite the fact that the action arose from a breach of a contract of lease, because application of the ten-year prescriptive period to the action would render Article 3494 useless).

For the foregoing reasons, I would affirm the judgment of the trial court.