

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1720

TYRONE GRIFFIN, DBA, GRIFFIN CONCRETE WORK

VERSUS

DESIGN/BUILD ASSOCIATES, INC., AND
LOUISIANA PARTY CO., LLC

Judgment Rendered: MAY 31 2019

On appeal from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket Number 174520

Honorable George J. Larke, Jr., Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Griffin
AHP
by Griffin

MT

GUIDRY, J.

A subcontractor appeals the summary judgment dismissal of its claims against a project owner in a lawsuit to recover payments that the subcontractor claimed were due and owing for concrete work performed.

FACTS AND PROCEDURAL HISTORY

In September 2012, Louisiana Party Company, LLC ("LPC"), represented by Neal Patel,¹ entered into a contract with Design/Build Associates, Inc. ("DBA"), represented by Joseph Bergeron, III,² to construct a shopping center on Martin Luther King Boulevard in Houma, Louisiana. Tyrone Griffin, doing business as a sole proprietorship under the trade name Griffin Concrete Work, was hired to perform concrete finishing work on the project in 2013. Upon failing to receive payment for \$59,118.75 worth of work itemized on an invoice dated December 20, 2013, which work was billed to DBA, Mr. Griffin filed a "Petition for Breach of Contract, Costs and Attorney Fees" against DBA and LPC on May 5, 2015. In the petition, Mr. Griffin alleged that LPC and DBA had "contracted with petitioner for the performance of cement finishing work for the construction and/or improvement of the immovable property located at 1795 Martin Luther King Boulevard, Houma, Louisiana 70360."

LPC filed an answer to Mr. Griffin's petition denying liability and asserting various affirmative defenses. In that pleading, LPC also asserted a reconventional demand seeking payment for work that Mr. Griffin allegedly did not complete and further seeking reimbursement for costs incurred to repair allegedly defective work performed by Mr. Griffin. On June 16, 2015, LPC filed a motion for summary judgment, requesting that Mr. Griffin's claims be dismissed because there was no contractual privity between it and Mr. Griffin and because any claim Mr. Griffin

¹ Mr. Patel is the sole member of LPC, which is a limited liability company.

² Mr. Bergeron is the president of DBA.

may have had against LPC pursuant to the Louisiana Private Works Act, La. R.S. 9:4801-4855, was extinguished upon his failure to timely institute suit to preserve the privilege.³

A hearing on the motion for summary judgment was initially scheduled for July 31, 2015, but was later continued to September 25, 2015, and then continued without date, as discovery remained ongoing in the case. Roughly a month before the case was scheduled to go to trial,⁴ however, LPC filed a motion to reset the hearing, which the trial court granted.

In addition to the motion to reset the hearing, LPC also filed a "Supplemental and Amending Memorandum" in support of its motion for summary judgment. In the supplemental and amending memorandum, LPC acknowledged having entered into a verbal agreement with Mr. Griffin to perform a small, separate job of pouring concrete for a temporary driveway at an agreed-upon price of \$13,000.00, which LPC claimed it paid in full. However, LPC expressly denied having any other verbal agreement with Mr. Griffin and expressly denied having contracted with Mr. Griffin in any form for the \$59,118.75 worth of cement work claimed. Instead, LPC asserted that the \$59,118.75 worth of work was performed by Mr. Griffin pursuant to his agreement with DBA.

Initially after LPC filed its motion to reset the hearing on its motion for summary judgment and its supplemental and amending memorandum in support of its motion, Mr. Griffin filed a motion to amend his petition to add a claim of unjust

³ On February 18, 2014, Mr. Griffin filed a statement of privilege against LPC with the Terrebonne Parish Clerk of Court for the \$59,118.75 debt claimed. Louisiana Revised Statutes 9:4823(A)(2) provides that a privilege is extinguished if the holder of the privilege does not institute an action for enforcement of the privilege within one year after filing the statement of privilege. Although Mr. Griffin primarily asserts a claim of breach of contract in the May 5, 2015 petition and only vaguely referred to his claim of privilege, to the extent his petition could be construed as an action to enforce the privilege, it would be untimely, having been filed more than one year after the filing of the statement of privilege.

⁴ On December 27, 2017, Mr. Griffin filed a motion to fix the case for trial, and the trial court ordered that trial be set for July 17-18, 2018.

enrichment pursuant to La. C.C. art. 2298, but the trial court denied his motion. Thereafter, Mr. Griffin filed a memorandum in opposition to LPC's motion for summary judgment on June 20, 2018. In his memorandum, Mr. Griffin asserted that if he "establishes that a verbal agreement existed between him and LPC, the motion [for summary judgment] should be denied, and he will prevail at trial." Based on evidence attached to his memorandum, Mr. Griffin argued that a genuine issue of material fact existed as to "whether a verbal agreement was reached between [him] and LPC to complete the concrete work in question[,]" which would preclude summary judgment. Thereafter, both LPC and Mr. Griffin filed reply memoranda, with LPC submitting additional evidence with its reply memorandum.⁵

The trial court conducted the hearing on LPC's motion for summary judgment on June 29, 2018. After allowing counsel for the parties an opportunity to present their arguments on the motion, the trial court observed that it had "read through everything," and therefore was prepared to render judgment. First, the trial court declared that "the portion of the plaintiff's suit to enforce a lien is time-barred on its face because plaintiff did not file suit within one year after the expiration of the time for filing claims." Then after discussing the evidence submitted, the trial court concluded that Mr. Griffin did not present sufficient evidence to corroborate the existence of an oral contract between him and LPC for the \$59,118.75 worth of cement work and accordingly granted summary judgment in favor of LPC. The trial court signed a judgment on July 18, 2018, to that effect that further dismissed

⁵ This court has previously recognized that "under the language of La. C.C.P. art. 966 both before and after the 2015 amendments, only documents attached to the motion for summary judgment and opposition, not a reply memorandum, are deemed admitted and properly considered by the trial court on a motion for summary judgment." Diversified Marine Services, Inc. v. Jewel Marine, Inc., 16-0617, p. 9 n.5 (La. App. 1st Cir. 6/2/17), 222 So. 3d 1008, 1015 n.5. Accordingly, we will not consider the evidence attached to LPC's reply memorandum in our *de novo* review of the judgment before us.

Mr. Griffin's action with prejudice. Mr. Griffin filed a petition for the instant devolutive appeal on September 19, 2018, which was granted by the trial court.

DISCUSSION

In his sole assignment of error, Mr. Griffin alleges that the trial court erred, as a matter of law, in granting LPC's motion for summary judgment.

After adequate discovery, a motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion, show that 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(B)(2) & (C)(1).⁶ The mover bears the burden of proving that he is entitled to summary judgment. However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. La. C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2). If the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. La. C.C.P. art. 966(C)(2).

In ruling on a motion for summary judgment, the trial 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 triable fact. In determining whether summary judgment is appropriate, appellate courts review evidence *de*

⁶ Louisiana Code of Civil Procedure article 966 was amended and reenacted by 2015 La. Acts, No. 422, § 1, with an effective date of January 1, 2016. The amended version of article 966 does not apply to any motion for summary judgment that was pending adjudication or appeal on the effective date of the Act; therefore, we refer to the former version of the article as applicable in this case. See 2015 La. Acts, No. 422, §§ 2 and 3.

novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Because the applicable substantive law determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Bice v. Home Depot U.S.A., Inc., 16-0447, p. 3 (La. App. 1st Cir. 12/22/16), 210 So. 3d 315, 318.

The only relevant issue is whether the evidence presented by Mr. Griffin was sufficient to create a genuine issue of material fact regarding the existence of an oral contract between Mr. Griffin and LPC for the \$59,118.75 worth of cement work at issue. Hence, the applicable substantive law is La. C.C. art. 1846, which provides that a contract not reduced to writing, for a price or value above \$500.00, must be proved by at least one witness and other corroborating circumstances. Hodson v. Daron Cavaness Builder, Inc., 17-1235, p. 3 (La. App. 1st Cir. 2/27/18), 243 So. 3d 597, 599.

In support of its motion for summary judgment, LPC initially offered the affidavit of Mr. Patel,⁷ copies of the liens filed by Mr. Griffin against Mr. Patel and LPC, and a copy of the petition filed by Mr. Griffin in the instant matter. Prior to Mr. Griffin filing any opposition to the motion for summary judgment, LPC filed a "supplemental and amending memorandum" in support of its motion for summary judgment based on recent discovery, wherein LPC learned that Mr. Griffin was claiming that an oral contract existed between him and LPC. LPC attached the following documents to the supplemental and amending memorandum: an amended affidavit of Mr. Patel,⁸ copies of interrogatories and a request for

⁷ Attached to Mr. Patel's affidavit and referenced therein are the following documents: a copy of a page from the Louisiana Secretary of State's website displaying information regarding LPC, a copy of the contract between LPC and DBA, and a copy of a "Notice of Termination of Building Contract" that was filed by LPC with the Terrebonne Parish Clerk of Court.

⁸ Attached to Mr. Patel's amended affidavit and referenced therein were a copy of two checks issued by LPC to Mr. Griffin and/or his business totaling \$13,000 and copies of several pages titled "Application for Payment," which Mr. Patel stated in his affidavit were sent to LPC by DBA.

production propounded to Mr. Griffin by LPC with the responses thereto (including several documents that appear to be responsive to the request for production), and a copy of a portion of a hearing transcript from the arbitration proceedings that DBA initiated against LPC.

In opposition to LPC's motion for summary judgment, Mr. Griffin offered the following documents: the affidavit of Mr. Bergeron,⁹ his own affidavit, a copy of an arbitration award signed March 3, 2015, a copy of an arbitration ruling signed May 23, 2018, a copy of a portion of the written contract between LPC and DBA, a copy of answers to interrogatories and requests for production propounded to LPC by Mr. Griffin, including two documents that appear to be responsive to the request for production.

As the plaintiff asserting breach of contract in the underlying suit, Mr. Griffin would bear the burden of proving the existence of an oral contract at trial. See La. C.C. art. 1831. When claiming the existence of an oral contract for the payment of money above \$500.00 in value, the party must prove the existence and terms of the contract by at least one credible witness and other corroborating circumstances. Steve Owens Construction, Inc. v. Bordelon, 17-1320, p. 5 (La. App. 1st Cir. 2/27/18), 243 So. 3d 601, 605; see also La. C.C. art. 1846. On appeal, Mr. Griffin argues that the trial court improperly weighed the evidence submitted by the parties and made credibility determinations in order to render summary judgment in favor of LPC.

Affidavits offered in support of or in opposition to a motion for summary judgment must be made on personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated therein. See La. C.C.P. art. 967(A); Schexnaildre v. State Farm Mutual Automobile Insurance Company, 15-

⁹ The actual affidavit states that it is the affidavit of DBA, represented by its president, Mr. Bergeron.

0272, pp. 14-15 (La. App. 1st Cir. 11/9/15), 184 So. 3d 108, 116. Personal knowledge encompasses only those facts that the affiant saw, heard, or perceived with his own senses; however, a witness is permitted to draw reasonable inferences from his personal observations. Schexnaildre, 15-0272 at p. 15, 184 So. 3d at 116. Portions of affidavits not based on the personal knowledge of the affiant should not be considered by the trial court in deciding a motion for summary judgment. Indulge Island Grill, L.L.C. v. Island Grill, L.L.C., 16-1133, p. 12 (La. App. 4th Cir. 5/10/17), 220 So. 3d 154, 162.

Considering the foregoing evidence, it must first be observed that while Mr. Patel acknowledged that LPC had a verbal agreement with Mr. Griffin for some separate work, he expressly denied any oral contract for the work at issue. On the other hand, Mr. Bergeron, as president of DBA, testified in his affidavit regarding the scope of DBA's agreement with Mr. Griffin, of which he was competent to testify.¹⁰ But while Mr. Bergeron's statements regarding DBA leaving the job and the reasonable inference of his understanding that Mr. Griffin completed the cement work on the project can be construed as corroborating circumstances of an oral contract for the work at issue, his affidavit is not witness proof of an oral contract, as Mr. Bergeron's affidavit indicates that he did not personally hear Mr. Patel ask Mr. Griffin to perform the work or agree to compensate Mr. Griffin for the same.

To meet the burden of proof on an oral contract by a witness and other corroborating circumstances, a party may serve as his own witness. Diversified Marine Services, Inc. v. Jewel Marine, Inc., 16-0617, p. 7 (La. App. 1st Cir. 6/2/17), 222 So. 3d 1008, 1014. Hence, Mr. Griffin's affidavit is witness proof of the alleged oral contract, as he gives a detailed factual account of his conversation

¹⁰ An affiant's status as an executive of a company has been held to demonstrate competency to testify about basic information concerning the company, particularly where that information is not contradicted by any other evidence. Schexnaildre, 15-0272 at p. 16, 184 So. 3d at 117,

with Mr. Patel in which they negotiated a price for Mr. Griffin to perform the cement work at issue. However, observing that Mr. Griffin's affidavit conflicted with his prior "deposition" testimony, the trial court disregarded Mr. Griffin's affidavit and thus found that Mr. Griffin failed to present sufficient evidence to prove the existence of an oral contract.

The earlier, conflicting testimony to which the trial court referred was not in a deposition, but comes from the transcript of a hearing in the arbitration proceedings between DBA and LPC. LPC submitted a copy of Mr. Griffin's testimony from a May 10, 2018 arbitration hearing with its supplemental and amending memorandum in support of its motion for summary judgment.¹¹

Jurisprudence has uniformly treated trial transcripts as testimony that cannot be received on a motion for summary judgment when the parties at trial were not the same as those involved in the motion for summary judgment and when the party against whom the evidence is offered had no opportunity to cross examine the trial witnesses. Hampton v. Cappaert Manufactured Housing, Inc., 36,773, p. 5 (La. App. 2d Cir. 1/29/03), 839 So. 2d 363, 366. However, testimony taken at an earlier judicial proceeding can be admissible as evidence in a subsequent proceeding if there is identity of parties, identity of issues, and an opportunity for full cross-examination. Wattigny v. Lambert, 453 So. 2d 1272, 1277 (La. App. 3d Cir. 1984).

In the instant matter, while Mr. Griffin was not a named party in the arbitration proceedings between LPC and DBA, as revealed in the evidence that Mr. Griffin offered in opposition to the motion for summary judgment, he nonetheless was a participant in the proceedings and initially was allocated a

¹¹ Mr. Griffin's affidavit is dated June 20, 2018.

portion of the recovery awarded to DBA in those proceedings.¹² Moreover, the witness whose testimony is being offered is that of Mr. Griffin himself, and as revealed in Mr. Griffin's testimony, the issue regarding performance of the cement work on the project presented in the arbitration proceedings is the same as in the instant matter. Accordingly, we find the arbitration transcript was properly considered by the trial court in deciding the motion for summary judgment and is properly before us for consideration in reviewing the ensuing judgment.

The arbitration transcript submitted by LPC includes the entirety of Mr. Griffin's testimony from the May 10, 2018 arbitration hearing,¹³ and the transcript reveals that Mr. Griffin was sworn before testifying and was accompanied by counsel at the hearing. In his testimony, Mr. Griffin stated the following on being questioned by LPC's counsel regarding the instant lawsuit:

Q. The amount that's in the lien, \$59,118.75, I'll represent to you is the same amount that's being claimed in this suit [the underlying lawsuit filed by Mr. Griffin against DBA and LPC]. Is that amount – let me step back. At some point you had a separate agreement with – did you have a separate agreement with Mr. Patel or with Louisiana Party Company to do separate work on the project?

A. I worked for both of them.

¹² In the initial ruling signed on March 3, 2015, the arbitrator awarded DBA \$394,693.09, of which amount the arbitrator decreed that "payment of the award is to be placed into the trust account of [DBA's] attorney in order to pay valid and enforceable liens" filed by ten different companies, one of which was Mr. Griffin's sole proprietorship, Griffin Concrete Work. The arbitrator then decreed that "[o]nce all of the above liens have been cancelled, any balance in the trust account will be released to [DBA]."

On appeal of the district court judgment confirming the arbitration award, this court vacated the portion of the district court's judgment that ordered payment of the arbitration award, less any valid and enforceable liens, because the district court's judgment, in line with the arbitrator's ruling, did not state the precise amount of the liens that were to be deducted from the total award. Bergeron v. Patel, 16-0600, p. 14 (La. App. 1st Cir. 5/17/17), 2017 WL 2170142, at *8, writ denied, 17-1270 (La. 10/27/17), 228 So. 3d 1226 (unpublished opinion). This court then remanded the matter to the district court for further proceedings. Bergeron, 16-0600 at p. 15, 2017 WL 2170142, at *9. The district court, in turn, remanded the matter to the arbitrator to render a ruling consistent with this court's opinion. On remand, the arbitrator ruled that because suit was not timely filed to enforce the lien, Griffin Concrete Work's lien was not "valid and enforceable." Hence, the arbitrator did not allocate any portion of the amount awarded to DBA to Mr. Griffin, doing business as Griffin Concrete Work, in his ruling on remand, signed May 23, 2018.

¹³ Based on the date of the hearing, it appears this proceeding was in response to the remands by this court and the district court.

Q. Okay. And the work that you did separately for the owner, have you been paid for that by the owner?

A. Mr. Bergeron paid me some and Neal Patel paid me some.

Q. The work that you had a contract with directly with the owner, did the owner pay you what he owed you?

A. Yes.

Q. And the \$59,000 that is set forth in this lawsuit and in the lien, is that money that is related to your contract with Design/Build?

A. That money related to the contract on the project.

Q. That you had with the general contractor?

A. Yeah.

As previously stated, the foregoing testimony was offered by Mr. Griffin at the arbitration hearing that was held on May 10, 2018. In his subsequent June 20, 2018 affidavit, Mr. Griffin indicated that he negotiated with LPC, through Mr. Patel, to perform the \$59,118.75 worth of work at issue, which conflicts with his earlier arbitration hearing testimony, wherein he acknowledged that he contracted with DBA for the work.

It has been held that an inconsistent affidavit offered only after the motion for summary judgment was filed is not sufficient to create a genuine issue of material fact where no justification for the inconsistency is offered. Hudson v. Progressive Security Insurance Company, 05-2648, p. 3 n.1 (La. App. 1st Cir. 11/3/06), 950 So. 2d 817, 819 n.1. Mr. Griffin has offered no explanation for the inconsistency in his statements, and as his testimony in his affidavit is inconsistent with his earlier testimony at the May 10, 2018 arbitration hearing, his affidavit cannot be considered for the purpose of establishing a genuine issue of material fact as to the witness element of his claim of an oral contract.

Disregarding Mr. Griffin's affidavit, none of the other factual support produced by him addresses the element of witness proof of an oral contract. The

only persons identified as witnesses to the alleged oral contract between LPC and Mr. Griffin were Mr. Patel and Mr. Griffin himself. While the other evidence produced by Mr. Griffin is sufficient to establish corroborating circumstances of an oral contract, absent his affidavit, Mr. Griffin failed to produce factual support sufficient to establish that he will be able to satisfy his burden of producing a witness to the alleged oral contract for the \$59,118.75 in cement work, particularly in light of Mr. Patel's express denial of the same. We therefore find that summary judgment was properly granted.

CONCLUSION

Based on our *de novo* review of the record before us, we find that Mr. Griffin failed to produce factual support sufficient to establish that he will be able to satisfy his burden of proving an oral contract between him and LPC for the \$59,118.75 in cement work at issue in the underlying suit. Accordingly, we affirm the July 18, 2018 summary judgment rendered in favor of Louisiana Party Company, LLC and dismissing Mr. Griffin's action with prejudice. All costs of this appeal are cast to the appellant, Tyrone Griffin.

AFFIRMED.