

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0294

LYNDA JARRELL

VERSUS

BURYCHKA ENTERPRISES, INC.
D/B/A SERVPRO OF EAST BATON ROUGE

MJ
TMH

Judgment Rendered: DEC 30 2020

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 638613

The Honorable R. Michael Caldwell, Judge Presiding

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Servpro of Baton Rouge

BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

WJ
Wolfe J., concurs with reasons

THERIOT, J.

In this suit involving property damage allegedly caused by a contractor performing remediation work in the plaintiff's home, the plaintiff appeals a partial summary judgment in favor of the defendant, finding that a limitation of liability clause allegedly included in the contract between the parties is applicable to the plaintiff's claim. For the reasons set forth herein, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Lynda Jarrell, filed a petition for damages on April 15, 2015 against Burychka Enterprises, Inc., doing business as Servpro of East Baton Rouge ("Servpro"). Jarrell engaged Servpro to perform remediation work at her home following a water leak. In her petition, Jarrell alleged that the negligent performance of the remediation work by Servpro's employees caused further damage to her property. According to the petition, the removal of a bathroom vanity by Servpro's employees caused a mirror above the vanity to become loose and later fall, striking and rupturing exposed pipes, resulting in extensive water damage to the interior of the dwelling.

The matter was eventually set for jury trial on June 17, 2019. On June 11, 2019, the video deposition of Tom Winnfield, III, Servpro's Production Manager, was taken by Servpro to be used in lieu of live testimony at trial. At the deposition, Servpro's attorney attached the April 15, 2014 contract between Servpro and Jarrell to the deposition as Exhibit A. The contract attached as Exhibit A was a two-sided document. Jarrell's signature was on the front side of the document, immediately below a statement which read:

I HAVE READ THIS AUTHORIZATION TO PERFORM SERVICES AND DIRECTION OF PAYMENT, INCLUDING THE TERMS AND CONDITIONS OF SERVICE ON THE REVERSE SIDE HEREOF, AND AGREE TO SAME.

The back side of the contract contained the terms and conditions referenced in the acknowledgment above the signature line on the front side. There was no signature line on the back side.

After the deposition, Jarrell's attorney emailed counsel for Servpro, asserting that Servpro had not produced the back side of the two-sided contract in response to discovery, despite multiple requests that would have encompassed the document. Jarrell's attorney informed counsel for Servpro that unless Servpro provided proof that both sides of the contract had previously been produced to Jarrell, he would file a motion in limine, motion for sanctions, and rule for contempt. Servpro's counsel replied by email that a copy of the two-sided contract had in fact been provided and that Jarrell cannot claim surprise at the existence of a second side, since the front page contains "very obvious language (boldfaced and ALL CAPS) referring to the terms on the opposite side."

On June 12, 2019, Servpro filed a motion in limine seeking to limit the amount of damages Jarrell may recover, pursuant to the contract's limitation of liability provision.¹ The limitation of liability clause, located on the back of the two-sided contract, states:

4. Limitation of Liability: IN NO EVENT SHALL PROVIDER, ITS OWNERS, ANY OFFICERS, DIRECTORS, EMPLOYEES, OR AGENTS, FRANCHISOR, OR AFFILIATES BE RESPONSIBLE FOR INDIRECT, SPECIAL, NOMINAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL LOSSES OR DAMAGES, OR FOR ANY PENALTIES, REGARDLESS OF THE LEGAL OR EQUITABLE THEORY ASSERTED, INCLUDING CONTRACT, NEGLIGENCE, WARRANTY, STRICT LIABILITY, STATUTE OR OTHERWISE, EVEN IF IT HAD BEEN AWARE OF THE POSSIBILITY OF SUCH DAMAGES OR THEY ARE FORESEEABLE; OR FOR CLAIMS BY A THIRD PARTY. THE MAXIMUM AGGREGATE LIABILITY SHALL NOT EXCEED THREE TIMES THE AMOUNT PAID BY CUSTOMER FOR THE SERVICES OR ACTUAL PROVEN DAMAGES, WHICHEVER IS LESS. IT IS EXPRESSLY AGREED THAT CUSTOMER'S REMEDY EXPRESSED HEREIN IS CUSTOMER'S EXCLUSIVE

¹ According to Servpro, no hearing was held on the motion in limine, and the trial court did not rule on the motion. Instead, Servpro alleges that the trial court suggested that the motion in limine filed by Servpro would be better served in the form of a motion for summary judgment.

REMEDY. THE LIMITATIONS SET FORTH HEREIN SHALL APPLY EVEN IF ANY OTHER REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. Some states/countries do not allow the exclusion or limitation of incidental or consequential damages, so the above may not apply to you.

Pursuant to this provision, Servpro's liability to Jarrell would be limited to the lesser of the actual proven damages or \$3,606.33, three times the amount paid for the services.

Also on June 12, 2019, Jarrell fax-filed a motion in limine/motion for contempt/motion to compel/motion for discovery sanctions regarding the late production of the second page of the contract. In support of its motion, Jarrell filed Servpro's December 16, 2015 discovery responses, wherein Servpro provided only the front page of the two-sided contract.

The June 17, 2019 trial date was continued by the trial court. On July 15, 2019, Servpro fax-filed a motion for partial summary judgment on the issue of the contract's limitation of liability provision. In support of its motion, Servpro filed: Winnfield's May 30, 2019 and July 12, 2019 affidavits and the attachments thereto; Jarrell's deposition and petition for damages; the deposition of Cheryl Stubbs, the insurance adjuster assigned to Jarrell's claim; and a May 17, 2017 letter from Jarrell's prior counsel offering to settle Jarrell's claims for \$850,000.00. Jarrell filed an opposition to Servpro's motion for partial summary judgment on September 20, 2019, alleging that an issue of fact remained as to whether the contract executed by Jarrell and Winnfield was a one-page document with no limitation of liability clause or a two-sided document containing a limitation of liability clause. Jarrell's opposition also disputed the authenticity of the two-sided contract filed by Servpro in support of its motion for summary judgment and contended that the second page of the document was not properly authenticated as required by the Louisiana Codes of Evidence and Civil Procedure. In support of

her opposition, Jarrell filed her own affidavit and the affidavit of her counsel of record, Joseph F. Lahatte, III, as well as Winnfield's June 11, 2019 deposition.

In both his May 30, 2019 affidavit and his June 11, 2019 video deposition, Winnfield identified the two-sided contract as the contract he and Jarrell executed on April 15, 2014 at her home. The contract identified by Winnfield contains both Winnfield's and Jarrell's signatures on the front immediately below the acknowledgment of the terms of conditions "on the reverse side hereof," as well as the limitation of liability clause on the reverse. According to Winnfield's deposition testimony, the contract he and Jarrell executed was a standard form used for all Servpro jobs and was a carbon copy document, with a white "original" for Servpro's files, a yellow "carbon copy" for the customer, and another carbon copy for the insurance company. Winnfield testified that Jarrell received the yellow carbon copy and that Servpro's copy would have been kept in their files at a warehouse. Winnfield's July 12, 2019 affidavit identified the \$1,202.11 Servpro invoice as corresponding to the April 15, 2014 contract executed by Jarrell.

Jarrell's September 20, 2019 affidavit states that Winnfield visited her home and presented a one-page contract for her signature. Jarrell further attested that Winnfield did not discuss the terms of the contract with her, nor did he tell her that the contract was two-sided.

Lahatte, Jarrell's counsel of record, executed a September 20, 2019 affidavit, stating that Servpro had produced only the first page of the April 15, 2014 contract during discovery. Lahatte attested that a copy of the purported back side of the contract first appeared at Winnfield's deposition taken days before trial, and the original executed document had never been produced. Lahatte identified the attached Bates-numbered documents produced by Servpro, which included only the first page of the April 15, 2014 contract.

At the October 7, 2019 hearing on the motion for summary judgment, Jarrell did not mention her objections to the filing of the contract by Servpro in support of its motion, and the trial court did not rule on any objection to documents filed in support of or opposition to the motion. Counsel for Servpro informed the court that although it filed a copy of the two-sided contract in support of its motion, he had the original two-sided document in court for review by the trial court and opposing counsel. Following the hearing, the trial court granted Servpro's motion for partial summary judgment with respect to the contractual damages provision and ordered that Jarrell's recovery against Servpro would be limited thereby to the lesser of Jarrell's actual proven damages or three times the amount paid to Servpro for the services. The trial court declared this portion of its judgment immediately appealable under La. C.C.P. art. 1915(B)(2), stating that its judgment "address[es] the most crucial issue or one of the more crucial issues in the case and will preclude a great deal of the evidence that would be presented at trial."

Jarrell appealed devolutively, arguing that the trial court erred in considering the two-sided contract because it was unauthenticated and inadmissible and because there is a genuine issue of material fact as to whether or not Jarrell signed a two-sided agreement. Jarrell also argues that the trial court erred in granting summary judgment because Servpro did not establish the essential elements of a waiver under Louisiana law and because the contract is adhesionary.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. *M/V Resources LLC v. Louisiana Hardwood Products LLC*, 16-0758, p. 8 (La.App. 1 Cir. 7/26/17), 225 So.3d 1104, 1109, *writ denied*, 17-1748 (La. 12/5/17), 231 So.3d 624. A motion for summary judgment is properly granted if the motion, memorandum, and supporting documents 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(A)(3). Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing a motion for summary judgment, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050 (per curiam).

In determining whether summary judgment is appropriate, appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *M/V Resources LLC*, 16-0758 at p. 9, 225 So.3d at 1109. A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. La. C.C.P. art. 966(F).

On a motion for summary judgment, the burden of proof is on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

In support of its motion for partial summary judgment, Servpro filed Winnfield's affidavit, identifying the two-sided contract containing the limitation of liability provision as the document executed by Jarrell. Thus, in order to survive summary judgment, Jarrell had to produce factual support sufficient to establish a genuine issue of material fact for trial. In opposition to the motion, Jarrell filed her own affidavit, in which she stated that "Winnfield presented her with a one-page

contract” and “She was not given a two-sided contract, the contract she signed and was given contained print on one side only.”

Ruling on whether the contract executed by Jarrell contained one side or two requires the trier of fact to make a credibility call. Credibility is not determined at the summary judgment stage. 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. *Clark v. J-H-J Inc.*, 13-0432, pp. 3-4 (La.App. 1 Cir. 11/1/13), 136 So.3d 815, 817, *writ denied*, 13-2780 (La. 2/14/14), 132 So.3d 964. Whether the contract in question contained print on one side or two is a question of fact to be decided by the trier of fact. The trial court erred in crediting one party’s summary judgment evidence over the other’s in order to grant summary judgment.

Because we have found that the trial court erred in granting summary judgment, Jarrell’s second argument concerning the validity of the limitation of liability clause is moot.

CONCLUSION

The October 24, 2019 judgment of the trial court granting Servpro’s motion for partial summary judgment on the limitation of liability clause is reversed, and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to Burychka Enterprises, Inc., doing business as Servpro of East Baton Rouge.

REVERSED AND REMANDED.

LYNDA JARRELL

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

**BURYCHKA ENTERPRISES,
INC., D/B/A SERVPRO OF
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WOLFE, J., concurring.

I concur that summary judgment is not proper in this case and further note that the record also supports a properly raised objection by Lynda Jarrell pursuant to La. Code Civ. P. art. 966(D)(2), which was not ruled upon by the trial court, and thus creates grounds to vacate and remand the trial court's judgment.