NOT DESIGNATED FOR PUBLICATION

KENNETH M. BORDENAVE	*	**NO. 2006-CA-1428**
VERSUS	*	**COURT OF APPEAL**
DAVID R. M. WILLIAMS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-7311, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay III, Judge David S. Gorbaty, Judge Leon A. Cannizzaro Jr.)

ROY M. BOWES
JOAQUIN SHEPHERD
JOSHUA MATTHEWS
ROY M. BOWES & ASSOCIATES
Gretna, Louisiana 70053
Council for Plaintiff/Appellee

DAVID R. M. WILLIAMS
Metairie, Louisiana 70002
In Proper Person, Defendant/Appellant

AFFIRMED

The appellant, David R. M. Williams ("Williams"), appeals the judgment of the trial court awarding the appellee, Kenneth M. Bordenave ("Bordenave"), a judgment in the amount of $46,003.46 plus interest and cost.

This matter arises from a verbal contractual dispute concerning work done at Williams' residence located at 2701 St. Charles Avenue. The allegations are that sometime in the summer of 2002, both parties entered into a verbal agreement for specific repairs and renovations to the residence which occurred between August of 2002 and February of 2003. One uncontested fact is that Williams, to date, has paid six invoices representing labor and materials dated from August 12, 2002 through January 16, 2003, and totaling $186,799.13. On February 6, 2003, Bordenave presented Williams with a final invoice, which allegedly represented work for materials used and labor performed from January 17, 2003, through February 6, 2003, and included Bordenave's personal labor. In dispute is the final invoice in the amount of $46,003.46, the amount the trial court awarded to Bordenave. The trial court's reasons for judgment specifically address the issue of

the credibility of the parties and the evidence presented. The trial court ruled in favor of Bordenave, finding "Bordenave's version is more credible." The trial court based this judgment on three distinctive issues. Williams is an attorney and "the agreement between Bordenave and Williams was not reduced to writing"; "Mr. Williams entered into the exact same sort of contract with Travis Meinert that he claimed he did and would not enter into with Mr. Bordenave"; and finally that Williams was "a sophisticated home remodeler." Despite finding that both parties were credible the trial court ruled in Bordenave's favor.

Williams argues that the trial court committed legal error by refusing to require Bordenave, the contractor, to sustain his burden of proof in a "cost plus" contract with insufficient itemization of his bills and failing to apply "strong scrutiny" to the contractor's claims for certain expenses.

STANDARD OF REVIEW

Louisiana courts of appeal apply the manifest error standard of review in civil cases. Deltraz v. Lee, 05-1263 (La. 1/17/07), 950 So.2d 557, 561; Hall v. Folger Coffee Co., 03-1734 (La. 4/14/04), 874 So.2d 90. Under the manifest error standard, a factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong. Smith v. Louisiana Dept. of Corrections, 93-1305 (La. 2/28/94), 633 So.2d 129, 132. In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist

for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. Id.

The appellate court must not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. Id.; Pinsonneault v. Merchants & Farmers Bank & Trust Co., 01-2217 (La.4/3/02), 816 So.2d 270, 278-79. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong, even if the reviewing court would have decided the case differently. Id.

The appellant asserts in his sole assignment of error that the trial court committed legal error in failing to require Bordenave to sustain his burden of proof concerning the alleged “cost plus” contract. The Louisiana Supreme Court reiterated the standard of review for legal errors, in Landry v. Bellanger, 02-1443, (La.5/20/03), 851 So.2d 943, 954, and opined that "[w]here one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine which party should prevail by a preponderance of the evidence." Id., citing Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La.2/20/95), 650 So.2d 742, 747; McLean v. Hunter, 495 So.2d 1298, 1304 (La.1986).

While the manifest error standard applies to our review of facts found below, we are required to examine the record as well for legal error. Where an error of law taints the record, we are not bound to affirm the judgment of the lower court.

Rosell v. ESCO, 549 So.2d 840, 844 (La.1989). When a trial court makes one or more prejudicial legal errors which interdict the fact-finding process, the manifest error standard is no longer applicable, and the appellate court is obliged to make its own independent, *de novo* review of the record if such is complete. Evans v. Lungrin, 97-0541, 97-0577, p. 7 (La.2/6/98), 708 So.2d 731, 735; McLean v. Hunter, 495 So.2d 1298, 1303-04 (La.1986). The Supreme Court stated in Evans: "Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights." Evans 708 So.2d at 735. However, under Evans, a *de novo* review should not be undertaken for every evidentiary exclusion error. *De novo* review should be limited to consequential errors, which are those that have prejudiced or tainted the verdict rendered. Wingfield v. State ex. rel. Dept. of Transportation and Development, 01-2668, 01-2669, p. 15 (La.App. 1 Cir. 11/8/02), 835 So.2d 785, 799.

LAW

Pertinent to the case at bar is an oral agreement for repairs and renovations to a residence. Both parties, by their own admissions agree that they proceeded under an oral agreement. This oral agreement has been described as a “cost plus” contract. Neither party disputes this. What is in dispute are the terms of the agreement, to wit, Bordenave’s reimbursement for his personal labor on the project.

The Louisiana Civil Code is very specific in its dictates concerning oral contracts.

Art. 1846. Contract not in excess of five hundred dollars

> When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.
>
> If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances.

The corroborating circumstances must appear *aliunde*, and not from the witness' testimony. Robbins v. Lambeth, 1842, 2 Rob. 304; Cormier v. Le Blanc, 1830, 8 Mart. (N.S.) 457. Consequently outside corroboration must be presented. With respect to the requirement that an oral contract over $500 be proved by at least one credible witness, which may be the plaintiff or claimant, and other corroborating circumstances, proof of such circumstances need only be general in nature, without independent proof of every detail of the agreement, yet it may not result from plaintiff's own actions but must come from a source other than the person urging existence of the contract. Biedenharn v. Culp, 39,680 (La.App. 2 Cir. 8/26/05), 911 So.2d 313, 319. A party may offer his own testimony in support of a claim of an oral contract in excess of $500.00, but must show other circumstances which corroborate his claim. Although corroboration is required, only general corroboration must be shown, not independent proof of every detail of his testimony. The question of whether evidence offered by the plaintiff corroborates his claim under an oral contract is a finding to be made by the trier of fact, and is therefore not subject to reversal unless clearly wrong. Lee Eyster Associates, Inc. v. Favor, 504 So.2d 580, 582 (La.App. 4 Cir.1987); Taylor v. Dowden, 563 So.2d 1294, 1297 (La.App. 3d Cir. 1990). Whether there were corroborating circumstances sufficient to establish an oral contract is a question of

fact, and the Court of Appeal's review of the factual conclusions is limited to a review of the entire record to determine if those conclusions are clearly wrong. Imperial Chemicals Ltd. v. PKB Scania (USA), Inc., 04-2742 (La.App. 1 Cir. 2/22/06), 929 So.2d 84, writ denied, 2006-0665 (La. 5/26/06), 930 So.2d 31.

ASSIGNMENT OF ERROR

As noted above, the appellant raises one assignment of error asserting that the trial court committed legal error by failing to require Bordenave to sustain his burden of proof in a "cost plus" contract with insufficient itemization of his bills and failing to apply "strong scrutiny" to Bordenave's claim for certain expenses.

It must first be noted that the appellant's use of the term "strong scrutiny" stems from specific language in Foster v. Soule, 310 So.2d 170, 172 (La. App 4 Cir. 1975). Foster deals directly with a "cost plus" contract. In this case the district court ruled in favor of the contractor and the owner appealed, finding that the contractor failed to support the claim for his own labor.

> Although a contractor working on a 'cost-plus' basis can perform labor on one of his 'cost-plus' jobs, any claim for such must be subjected to strong scrutiny. Such a claim runs contra to the usual and ordinary concept of the supervisory type service rendered by a 'cost-plus' contractor. A claim for his own 'labor' should be supported by an agreement between the parties that he will perform some labor on the job and make separate charge for same, absent which , we will presume the contrary. Thus, we find that there is insufficient support in this record for Foster's claim for his own 'labor.'

Id. at 172.

At first blush, this holding would appear on point with the case *sub judice*. However, we are confronted with the daunting issue of trying from a cold record to ascertain what these two parties agreed to in an oral agreement. It is this Court's

view that the matter boils down to the trial court's review of the entire body of evidence and testimony before making a determination. The record does not indicate that the trial court did not apply "strong scrutiny" in its analysis. This "strong scrutiny" standard to this Court's knowledge has never been a commonly used term nor applied widely and appears to be a very subjective standard which can only be obviated in a review of the trial court's actions. In this Court's review of the record we must acknowledge and give considerable weight to the opinion of the trial court being in a more advantageous position of viewing the evidence first hand. As noted above, in its reasons for judgment, the trial court specifically asserted that it weighed the credibility of the witnesses and ruled in favor of Bordenave. The argument that the trial court failed to use "strong scrutiny" is simply not deduced from the record before us.

What we can point to is the deposition of Bordenave. In his deposition, he indicated that he performed carpentry labor and supervisory work concurrently. The nature of the job necessitated his working along side of subcontractors and other workers in which he supervised while expending his own carpentry labor. This is clearly documented in the first six invoices which Williams paid without question.

Williams asserts that Bordenave failed to provide any supporting documentation on how Bordenave calculated his figures for payment of his own labor and supervision. We disagree.

All of the invoices state an amount due for supervision; labor or carpentry labor; profit; overhead; materials; and a description of services provided by other subcontractors. Therefore, Williams was informed and aware of all charges and knew that he was paying Bordenave for his actual labor, as well as profit for his

personal and actual labor, as well as profit, overhead, and the cost of materials and service provided by other workers and subcontractors. Bordenave corroborated this with his own testimony comporting with La.C.Civ. art. 1846 and applicable jurisprudence. While Williams disputed this corroborating testimony it boiled down to a credibility issue which culminated in the trial court favoring Bordenave.

After reviewing the record it is apparent that based upon the nature of the contract and the work involved, it is a virtual impossibility to differentiate or separate the concurrent work performed. Further impacting the situation is the fact that Williams paid without objection or contest six prior invoices. The failure to object or refute these six invoices is in a sense an acquiesce as to the method of billing/invoicing. The trial court reviewed this fact scenario and made a factual determination based on a credibility call.

While we do not have a problem with the trial court's credibility finding, we do take pause in the trial court's finding relevance in another contract with a different contractor, namely Travis Meinert who had worked on the same site. The trial court's reasons for judgment states, "However, in viewing the actions of the parties and the exhibits, particularly Exhibit 21, it is clear that Mr. Williams entered into the exact same sort of contract with Travis Meinert that he claimed he did not and would not enter into with Mr. Bordenave." Despite the trial courts' comparison of the "Meinert" contract, we find that a more accurate indicator of the agreement between Williams and Bordenave would be the actions of the parties involved in this lawsuit throughout the term of this agreement and not the interjection of an outside contract uninvolved in the instant matter. However, this recognition of the "Meinert" contract does not affect the outcome of this matter, it merely gives insight into the depth of analysis that the trial court used in its

evaluation of all of the extrinsic evidence in making its final determination in favor of Bordenave.

Accordingly, we find no error in the judgment of the trial court and affirm the judgment.

AFFIRMED