NOT DESIGNATED FOR PUBLICATION

HOTARD GENERAL CONTRACTING, INC.	*	**NO. 2008-CA-0329**
	*	
VERSUS		**COURT OF APPEAL**
	*	
STEPHEN CRANE AND MADELAINE UDDO	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2007-50034, SECTION "B"
Honorable Angelique A. Reed, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Michael E. Kirby)

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AFFIRMED

OCTOBER 29, 2008

The Appellants, Hotard General contracting, Inc ("Hotard") appeal the judgment of the First City Court denying its claim for monies sued upon. This court finds that the First City Court properly ruled in favor of the Appellees, Stephen Crane and Madelaine Uddo, thereby affirming.

The Appellees hired Hotard to repair their flood damaged home. The parties orally agreed on the renovations and a cost of repair in the amount of $217,495. Hotard provided a written estimate on the agreed upon amount. As the work progressed, the Appellees admittedly added additional renovations to the project[1] maintaining that they were under the impression that the job was under budget. The Appellees paid the first nine invoices supplied by Hotard totaling $223,307.14. Hotard supplied three additional invoices totaling $33,800.52 of which the Appellees paid $15,000 of leaving a balance of $18,800.52.

On January 4, 2007, Hotard filed suit in First City Court for the Parish of Orleans praying for the full sum of $18,800.52 with legal interest, attorney fees, and all costs. On January 19, 2007, the Appellees filed an answer and

[1] Including but not limited to a swimming pool.

reconventional demand praying for a judgment in their favor and in reconvention for “all sums that may be due in the premises.” On October 15, 2007, the First City Court granted a partial motion for summary judgment in favor of the Appellees finding that the “facts do not constitute an open account.” In addition, On January 9, 2008, following a bench trial, the First City Court denied Hotard’s claim and the Appellees’ reconventional demand. Hortard timely appeals both judgments.

Hotard presents two assignments of error for this Court’s review: (1) the First City Court erred by concluding that Hotard was not entitled to monies due under a cost plus percentage contract and (2) The First City Court court erred by determining on summary judgment that the contract between the parties was not an “open account” pursuant to La. Rev. Stat. 9:2781. [2]

We find the standard of review as it pertains to the instant matter is best articulated in *Pellittieri's Bayou Homes, Inc. v. Sherbeck* 2005-1286 La. App. 4 Cir. 11/29/06), 947 So.2d 764:

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[2] A. When any person fails to pay an open account within thirty days after the claimant sends written demand therefor correctly setting forth the amount owed, that person shall be liable to the claimant for reasonable attorney fees for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the claimant. Citation and service of a petition shall be deemed written demand for the purpose of this Section. If the claimant and his attorney have expressly agreed that the debtor shall be liable for the claimant's attorney fees in a fixed or determinable amount, the claimant is entitled to that amount when judgment on the claim is rendered in favor of the claimant. Receipt of written demand by the person is not required.

B. If the demand is forwarded to the person by first class mail to his last known address, a copy of the demand shall be introduced as evidence of written demand on the debtor.

C. If the demand is made by citation and service of a petition, the person shall be entitled to pay the account without attorney fees by delivering payment to the claimant or the claimant's attorney within ten days after service of the petition in city courts and fifteen days after service of the petition in all other courts.

D. For the purposes of this Section and Code of Civil Procedure Articles 1702 and 4916, "open account" includes 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. "Open account" shall include debts incurred for professional services, including but not limited to legal and medical services. For the purposes of this Section only, attorney fees shall be paid on open accounts owed to the state.

E. As used in this Section, "person" means natural and juridical persons.

> In *Rosell v. ESCO,* 549 So.2d 840 (La.1989), the Louisiana Supreme Court stated that it is well settled that an appellate court may set aside a factual finding of a trial court or a jury only where the finding was based on a "manifest error" or was "clearly wrong". *Id.* at 844. Further, where there is conflict in the testimony, a trial court's or a jury's reasonable evaluations of credibility and reasonable inference of fact should not be disturbed on appeal, even though the appellate court may feel that its own evaluations and inferences are as reasonable as those of the trial court or jury. *Id.* Additionally, where there are two permissible views of the evidence, the trial court's or jury's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*
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> If a trial court or a jury has based findings of fact on a determination regarding the credibility of the witnesses, the manifest error or clearly wrong standard of review requires even greater deference to the findings of the trier of fact. *Id.* This is because only the finder of fact can be aware of the variations in the demeanor and tone of voice of the witnesses that bear so heavily on the listener's understanding of and belief in what is said. *Id.*
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> In *LeBlanc v. Stevenson,* 00-0157, p. 3 (La.10/17/00), 770 So.2d 766, 770, the Louisiana Supreme Court held that a trial court's factual finding may not be reversed unless (1) the record reflects that a reasonable factual basis for the findings does not exist, or (2) the record establishes that the findings are clearly wrong or manifestly erroneous. *Id.* Where a decision of a court is based on an erroneous application of law rather than a valid exercise of discretion, the trial court's decision is not entitled to deference from the reviewing court. *Kem Search, Inc. v. Sheffield,* 434 So.2d 1067, 1071-72 (La.1983).

Id., pp. 4-5, 947 So.2d at 768.

Hotard's main argument is that the parties were operating on a "cost-plus basis" whereby Hotard provided invoices of detailed itemization of the actual costs incurred by Hotard as the renovation project progressed. Hotard also maintains that the invoices were accompanied with receipts of monies spent on products purchased that the Appellees were to reimburse Hotard for.

Hotard argues that the Appellees were consistently adding other renovation projects beyond the scope of the initial agreed upon "flood damage estimate." The Appellees requested that Hotard renovate their mother-in-law suite, replace the roof, change the size of their kitchen and bathrooms, install a chain wall, and elevate the rear yard and modify the underground plumbing system to accommodate a swimming pool. Hotard maintains that the Appellees' additional requests inflated the monthly invoices. Hotard even contends that the Appellees selected expensive materials without discussing the cost with Hotard.

There is no dispute that the Appellees modified renovations throughout the life of the project, however, it is their contention that they were within the original budget. Specifically, the Appellees maintain that after a significant amount of work had been done, Hotard presented a budget in the amount $204,000 in which they based their decision to construct a swimming pool being of the opinion that the project was substantially under budget.

Hotard bases its argument on *Schiro Del-Bianco Enterprises v. NSL, Inc.*, 99-1237 (La. App. 4 Cir. 5/24/00), 765 So.2d 1087, arguing that it met its burden of proof that there was indeed a cost plus contract between the parties and that the First City Court erred in not applying the burden shifting analysis in *Schiro*.

Louisiana jurisprudence recognizes three basic types of construction contracts: lump sum contracts; cost plus percentage of the cost contracts (percentage contracts); and cost plus a fixed fee contract. *M. Carbine Restoration, Ltd. v. Sutherlin,* 544 So.2d 455, 458 (La.App. 4 Cir.1989); *Joe Bonura, Inc. v. Hiern,* 419 So.2d 25, 29 (La.App. 4 Cir.1982); *Standard Oil Co. of Louisiana v. Fontenot,* 198 La. 644, 4 So.2d 634, 671 (1941). In a percentage contract, or cost plus percentage of the cost contract, the owner reimburses the contractor for the

costs of the material and labor while paying the contractor a percentage of the total cost of the project for his profit or gain. *Schiro Del-Bianco Enterprises v. NSL, Inc*., p. 4, 765 So.2d at 1090.

Under a cost plus contract, the contractor is hired in a supervisory capacity and when the owner cancels the contract, the contractor is entitled to reimbursement for labor and materials and the profit thereon at the time of cancellation. Likewise, the owner is not entitled to recover for the cost of completion upon cancellation of the contract. *Kerner v. Gilt*, 296 So.2d 428 (La.App. 4 Cir.1974), *writ denied* 300 So.2d 185 (La. 1974). The rationale for such denial is that the contractor has been paid commensurate with the progress of the work done, therefore, presumably neither the contractor nor the owner has sustained any loss. *Schiro*, 765 So. 2d at 1091.

Under the general rule of contracts, a contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. *LSA C-C art. 1906.* Four elements are necessary for formation of a contract in Louisiana: (1) capacity; (2) consent; (3) certain object; and (4) lawful cause. *McPherson v. Cingular Wireless, LLC*, 2007-0462, p.4 (La.App. 3 Cir. 10/3/07), 967 So.2d 573, 577, *writ not considered*, 2007-2147 (La. 1/7/08) 972 So.2d 1150; *LSA-C.C. Art. 1906*. Where there is no "meeting of the minds" between the parties, there is no consent, thus no enforceable contract. La. C.C. art. 1927; *Howell v. Rhoades,* 547 So.2d 1087, 1089 (La.App. 1 Cir.1989); *Ricky's Diesel Service, Inc. v. Pinell*, 2004-0202, p. 4 (La.App. 1 Cir.2005), 906 So.2d 536, 538.

We find in the instant case, that there was never a meeting of the minds between the parties. At the onset of the project, the Appellees believed that they had a bottom line price; on the other hand, Hotard believed that the contract was on

a “cost-plus” basis. Hotard cannot rely on *Schiro* because in *Schiro*, although the parties never entered into a written agreement, they did actually discuss performance on a cost-plus basis. Unlike the case at bar, the owners were never under the impression that they received a bottom line price from the contractors. Here Hotard provided a written estimate that appeared to be a contract price for total performance. It was not until after the Appellees inquired about the cost of the job, did they add additional renovations thinking that the job was coming in under budget.

The testimony of the parties proved credible and reliable, it is unfortunate that the parties failed to produce evidence on either side to support their claims as to the contractual relationship that existed between them. There is no doubt from the review of the testimony that Hotard believed that the nature of the job was going to be one way and the Appelles were under the impression that it was going to be another way. The confusion obviously came in when at the onset of the project there was no written agreement; and in this case we have to go back to the simple laws of contracts. The First City Court reasoned, and we agree that:

> The problem is that we never had a meeting of the minds. The Cranes though[sic] that the estimate was their contract and relied on Mr. Hotard’s estimate…
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> We just had a failure to communicate. And I’m not sure in this case that if we would have had a formal contract instead of the proposal, that the outcome would have been any different because once you start making changes, it just changes the whole dynamics of everything because the parties would have gone outside the scope of the contract anyway…
>
> I think that is it incumbent upon the contractor to make the customer aware that they have chosen a product over budget allowance…
>
> What we have is a total failure to communicate.

Where there is no meeting of the minds, there is no contract. The First City Court did not err in failing to apply the standards in *Schiro* since no contract existed between the parties. There was no error by he First City Court.

Further, the First City Court did not err in finding that this was not a suit on open account. For it to be classified as such Hotard would have to show that he performed long term work for the Appellees over a period of time in which they paid him for his continuous services. Hotard provided a steady stream of work with a predicted beginning and end. Further, for Hotard to argue that this matter is a suit on open account negates his theory that he entered into a cost plus contract with the Appellees. The law is clear: A contract is significantly different from an open account; a "contract" is an agreement by two or more parties whereby obligations are created, modified, or extinguished and a concurrence in understanding is established, while an "open account" is an account in which a line of credit is running and is open to future modification because of expectations of prospective business dealings, and services are recurrently granted over a period of time. *Shreveport Elec. Co., Inc. v. Oasis Pool Service, Inc.*, 38,776, p.8 (La. App. 2 Cir. 2004), 889 So.2d 274, 279, *rehearing denied, writ denied* 2005-0340 (La. 4/1/05). "Open account" is an account in which a line of credit is running and is open to future modification because of expectations of prospective business dealings and services are recurrently granted over a period of time; however, a "contract" is an agreement between two or more parties in which an offer is made by one of the parties and acceptance is made by the other party, thereby establishing a concurrence in understanding the terms. *Tyler v. Haynes*, 1999-1921, pp. 5-6 (La.App. 3 Cir. 5/3/00), 760 So.2d 559, 562-563.

Decree

For the reasons stated above, we affirm the judgments of the First City Court finding that this case does not constitute a case on open account and denying Hotard General contracting, Inc.'s claim for monies sued upon.

AFFIRMED