NOT DESIGNATED FOR PUBLICATION

FREDERICK PATTERSON	*	**NO. 2008-CA-1221**
VERSUS	*	
		COURT OF APPEAL
CHARLES K. WILLIAMS	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-8747, DIVISION "K-5"
Honorable Herbert Cade, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Dennis R. Bagneris, Sr. and Judge Edwin A. Lombard)

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APRIL 22, 2009

AFFIRMED

Appellant/defendant, Charles K. Williams, appeals a judgment of the trial court that found in favor of appellee/plaintiff, Frederick Patterson, in the amount of fifty-five thousand three hundred sixty dollars and eighty-eight cents ($55,360.88) plus interest and cost. For the following reasons, we affirm.

FACTS

In October 2003, plaintiff Frederick Patterson ("Plaintiff"), acting through his brother and agent, Alvin Patterson, entered into a verbal contract with defendant Charles Williams for the renovation of his property located at 2515 S. Prieur Street in New Orleans, Louisiana. According to Plaintiff, Mr. Williams promised to reduce their verbal agreement to writing, but he never did.

It is undisputed that the initial price for the work was $55,000.00. By subsequent agreements, the price rose to $72,000.00. It is also undisputed that Plaintiff paid Mr. Williams a total of $72,000.00 by December 2003 for the renovation.

On May 26, 2004, Plaintiff's lawyer sent a letter to Mr. Williams, which ordered him off of the job. Thereafter, on June 15, 2004, Plaintiff filed suit against

Mr. Williams seeking the full return of the $72,000.00 due to Mr. Williams's breach of the renovation contract. The petition states, in pertinent part:

> 4.
>
> The renovations to the house were to include, but were not limited to, electricity, plumbing, fixtures, cabinets, central air and heat, and roof repairs. Williams understood that he was to virtually rebuild the house from the ground up. He promised that the renovations would be "turnkey"[1].
>
> 5.
>
> As work progressed, defendant requested additional money for the work, totaling $17,000.00. Alvin Patterson paid this sum plus the original price of $55,000.00 for a total of $72,000.00 for the project.
>
> 6.
>
> By January 2004, the work was only 10% complete, despite repeated requests on the part of Alvin Patterson to finish it. Defendant did no further work, except to send an occasional worker to do touch-up work. Defendant has abandoned the project, leaving it without air conditioning, heating, electricity, plumbing, and flooring. The actual work defendant did is virtually worthless and must be replaced. For example, defendant put roofing material over rotten and burned wood on the roof; as a consequence, the roof sags.

On June 2, 2005, Plaintiff filed a supplemental petition seeking to recover all expenditures incurred, and future expenditures, in completing the work. Plaintiff also requested that he recover the rental value of the property from January 1, 2004 until completion of the renovation.

Following a one day bench trial, the trial court ruled in favor of Plaintiff in the amount of fifty-five thousand three hundred sixty dollars and eighty-eight cents

[1] Merriam Webster Dictionary defines turnkey as: built, supplied, or installed complete and ready to operate.

($55,360.88) plus interest and cost. In its reasons for judgment, the trial judge stated, in pertinent part:

> Factually, the court finds that the parties entered into a verbal agreement to renovate plaintiff's property. Defendant was to reduce the agreement to writing but did not. Plaintiff timely paid the price initially agreed upon as well as request for additional payments totaling Seventy-Two Thousand Dollars ($72,000.00). Although the parties did not agree to a specific completion date, defendant's performance in no way equaled the timeliness of plaintiff's payments. In other words, defendant was paid in advance for work he did not substantially complete. Pursuant to Louisiana Civil Code Article 1989 and the second sentence thereof, 'Other damages are owed from the time the obligor has failed to perform.' Further a putting in default is not necessary prior to filing suit as defendant contends. Pursuant to C.C. Article 2769, the plaintiff is entitled to recover amounts he paid to complete the renovation and amounts still to be paid for completion as given below. (Footnotes omitted).
>
> The evidence presented at trial is consistent with the amount as given by plaintiff in the post trial memo with one exception. The court finds that there was not a meeting of the minds relative to the installment of gas lines and will only reimburse plaintiff the additional $7,000 he paid to defendant for plumbing.
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> Cost To Finish the Work:
>
> | | |
> |---|---|
> | Carlos Figueroa, contractor | $21,485.00 |
> | David Howard, plumber | 7,000.00 |
> | Herbert Broussard, electrician | 2,500.00 |
> | Ronald Ward, air conditioning/heating | 1,411.64 |
> | Materials | 8,964.24 |
> | Roof completion | 14,000.00 |
> | | $55,360.88 |
>
> The court received no evidence relative to the loss of rents and therefore said claim is denied.

Mr. Williams now appeals this final judgment alleging the following assignments of error: (1) the trial court committed an error of law when it awarded

Plaintiff damages for work not finished despite the fact that Plaintiff never gave him notice to perform pursuant to Louisiana Civil Code article 2015[2], and despite the fact that Plaintiff did not seek a judicial dissolution of the contract; (2) the trial court committed an error of law when it awarded Plaintiff damages for work which had already been performed by defendant in accordance with the terms of the contract, which work was allegedly demolished and redone by Plaintiff's new contractor at considerable expense; and (3) the trial court's award of $14,000.00 in damages for an entire new roof was manifestly erroneous, as there was no competent evidence in the record to support a finding that replacement of the entire roof was warranted.

STANDARD OF REVIEW

An appellate court may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong, and where there is conflict in the testimony, reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). Further, where there are two permissible views of the evidence, the factfinder's choice between them *cannot* be manifestly erroneous or clearly wrong. *Id.* (our

[2] Louisiana Civil Code art. 2015. Dissolution after notice to perform.

Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances.

The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

emphasis). Thus, disagreements with the findings of the trial court, alone, are not grounds for substituting the appellate court's judgment for that of the trier of fact.

APPLICABLE LAW

Louisiana Civil Code art. 2016. Dissolution without notice to perform.

> When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor.

Louisiana Civil Code art. 1989. Damages for delay.

> Damages for delay in the performance of an obligation are owed from the time the obligor is put in default.
>
> Other damages are owed from the time the obligor has failed to perform.

Louisiana Civil Code art. 2769. Contractor's liability for non-compliance with contract.

> If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

DISCUSSION

In his first assignment of error, Mr. Williams argues that he was not given the requisite notice to perform pursuant to Louisiana Civil Code art. 2015, despite the fact that Plaintiff did not seek a judicial dissolution of the contract. We find no merit in this assignment of error.

As stated under Louisiana Civil Code art. 2016, the obligee may regard the contract as dissolved without any notice to the obligor when (1) the delayed performance was no longer of value to Plaintiff or (2) when it is evident that the

obligor will not perform. In this case, Alvin Patterson[3], introduced into evidence his handwritten narrative, which read in pertinent part:

> When Mr. Williams was told his services were no longer needed…, I didn't have any running water, electricity, central air/heat or anything close to what Mr. Williams and I agreed on when we discussed the job. Not only were these things unavailable after seven months of being on the job, but there wasn't anybody showing up to work on the job.

Mr. Patterson also testified that he started showing up to the jobsite on a regular basis after Thanksgiving, and that from Thanksgiving until the end of the year, no one was on the job site. This evidence supports the trial court's finding that "defendant's performance in no way equaled the timeliness of plaintiff's payments" and that "defendant was paid in advance for work he did not substantially complete." We find that under these facts, Louisiana Civil Code art. 2016 does not require Plaintiff to give notice to Mr. Williams in order to dissolve the verbal agreement. Therefore, we find the cases cited by Mr. Williams in support of the requirement of notice to perform, (i.e. *Myer v. Foster*, 610 So.2d 192 (La. App. 3rd Cir. 1992); *Mennella v. Kurt E. Schon E.A.I. Ltd*., 979 F.2d 357 (5th Cir. 1992), and *Delta Paving Company v. Woolridge*, 209 So.2d 581 (La. App. 4th Cir.1967)) are not on point with the instant case and thus not dispositive.

Further, we agree with Plaintiff that it is not necessary to put Mr. Williams in default prior to filing his suit. Specifically, the revision comment (d) to Louisiana Civil Code art. 1989[4] states, in pertinent part:

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[3] Alvin Patterson was Plaintiff's brother who, on behalf of Plaintiff, entered into the verbal agreement with Mr. Williams, and oversaw the project.

[4] Although revision comments are not law, they are used to express the commentator's interpretation of how the codal provisions and/or statutes are to be applied, and are meant to be used as guiding tools for the court.

> Putting the obligor in default is not a prerequisite to filing suit. It is not necessary prior to filing suit for specific performance because in such a case the judicial demand itself amounts to a putting in default….Nor is it necessary prior to filing a suit for compensatory damages, as the judicial demand, in such a case, implies a demand for dissolution. …Putting in default is not even a prerequisite to filing suit for delay damages. An obligee who has not put his obligor in default before filing suit is deemed to do so at the moment of filing. See revised C.C. Art. 1991 (Rev.1984), infra. In such a case, moratory damages are calculated against the debtor from the moment of filing.

Accordingly, under the facts before us, we find no merit in Mr. Williams's argument that Plaintiff was required to give him notice and an opportunity to perform prior to unilaterally dissolving the verbal agreement.

Mr. Williams alleges in his second assignment of error that the trial court's award of damages was excessive and that the work done by the new contractor, Mr. Figueroa, went beyond the scope of what was necessary simply to correct or complete the defective performance. Specifically, Mr. Williams argues that Mr. Figueroa "took license to substantially demolish and redo work already completed by Mr. Williams, particularly with regard to the floor, walls, ceilings, and doors."

We first note that a trial court's determination of damages is a factual finding and shall not be set aside absent an abuse of discretion. *Rosell v. ESCO, supra.* In this case, Mr. Figueroa, who was tendered as an expert in carpentry and restoration, testified to, and submitted into evidence, a list of necessary renovations he performed to complete the house, as follows:

- Removed and reinstalled floors on both floors, including the 2x12's
- Removed all doors through out the house
- Repaired walls in both floors
- Reinforced balcony
- Remodeled kitchen
- Repaired ceiling through out the house
- Painted interior of house

- Poured cement in front of house
- Made and installed columns (4) for the front of house
- Installed face board and overhang around whole house
- Installed ceramic in 1st floor living, dining room, kitchen and bathroom
- Made and installed kitchen cabinets
- Made and installed countertop and bar top
- Installed ceramic in 2ne floor laundry room, hallway and bathroom
- Painted the face board and front of house
- Repaired siding
- Installed base boards and molding through out the house.

Mr. Figueroa repeatedly testified that the house was not leveled and that he had to level the first floor as well as the second floor because "everything looked crooked." He further testified that while doing work throughout the house, he noticed that somebody had previously attached burned wood to good wood as well as used rotten wood for the floor. Plaintiff also submitted into evidence photographs taken of the house at the time Mr. Williams was ordered off the job.

After careful review of the testimony and documentary evidence, we cannot say that the trial court abused its discretion in awarding Plaintiff the $21,485.00 paid to Mr. Figueroa for the renovations that completed the house.

Mr. Williams alleges in his third assignment of error that the trial court erred when it awarded $14,000.00 for a new roof. We find no merit in this assignment of error.

Three witnesses, Mr. Patterson, Mr. Charles Haley [the licensed roofer employed by Mr. Williams], and Mr. Figueroa, testified at trial that: (1) at the time Mr. Williams left the job, the roof "sagged" and/or "sloped", and (2) the decking on the roof contained good wood that was attached to burned wood. Mr. Figueroa also testified that he told Mr. Patterson to replace the roof because the old one was not straight. Specifically, Mr. Figueroa testified as follows:

> Q. Did you do any work on the roof?
>
> A. The roof, I tell Alvin [Patterson] for me, it's better to take it down because the roof is no [sic] good. The house, it looks like it's bending. It's not straight. It looked the house [sic], it got fire before [sic]. People not [sic] fix nothing [sic], only put shingle. Only I tell Mr. Alvin [Patterson], I don't want to fix the roof because I want to take it down and build a new one.
>
> * * *
>
> Q. Okay. What is your estimate of the cost of restoring that roof?
>
> A. The roof, I asked 14 -- $14,000 because I need to take it down, the whole thing soft [sic]. It's the whole thing.
>
> Q. When you were doing work throughout the house, did you observe that somebody before you did your work had actually – was using some of the burned wood attached to good wood? Was it anything like that?
>
> A. Yea. I see [sic] couple of burnt wood in the roof….

Considering this evidence, we do not find that the trial court manifestly erred when it awarded Plaintiff $14,000.00 to fix the roof.

For these reasons, we hereby affirm the judgment of the trial court that found in favor of plaintiff, Mr. Frederick Patterson, and against defendant, Charles Williams, in the amount of fifty-five thousand three hundred sixty dollars and eight-eight cents ($55,360.88) plus judicial interest and costs.

AFFIRMED