

<b>SHORE MATERIALS, LLC</b>	*	<b>NO. 2013-CA-1047</b>
<b>VERSUS</b>	*	
<b>ENVIRONMENTAL AND</b>	*	<b>COURT OF APPEAL</b>
<b>INSTALLATION SERVICES,</b>	*	<b>FOURTH CIRCUIT</b>
<b>LLC AND FIRST</b>	*	
<b>MILLENNIUM</b>		<b>STATE OF LOUISIANA</b>
<b>CONSTRUCTION</b>	<b>* * * * *</b>	

APPEAL FROM  
ST. BERNARD 34TH JUDICIAL DISTRICT COURT  
NO. 118-704, DIVISION "E"  
Honorable Jacques A. Sanborn, Judge  
\* \* \* \* \*

**Judge Roland L. Belsome**  
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(Court composed of Judge Max N. Tobias, Jr., Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

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**REVERSED AND REMANDED**

**JANUARY 22, 2014**

First Millennium Construction, LLC (FMC) seeks review of the trial court's grant of Shore Material, LLC's (Shore) motion for summary judgment on an open account. For the reasons that follow, we reverse the trial court's ruling and remand for further proceedings.

Shore initiated this lawsuit seeking payment on an open account from FMC. FMC executed a contract with Environmental and Insulation Services, LLC (EIS) to perform subcontract work on a FMC project in St. Bernard Parish. Subsequently, EIS entered into a contract with Shore to remove concrete and have it hauled to a recycle facility. Later, according to FMC, EIS was terminated.

Shore alleges that during a three day period in April of 2010, it performed the work EIS outlined in their agreement and submitted Load and Hall Tickets to FMC totaling \$12,285.00. Shore maintains that even though their original agreement was with EIS,<sup>1</sup> representatives of FMC on the project acknowledged and approved Shore's hauling activities on the job. However, FMC failed to pay

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<sup>1</sup> EIS was named in the petition on open account but service was never perfected.

the Load and Haul Tickets submitted by Shore and Shore filed a petition on open account pursuant to La. R.S. 9:2781.<sup>2</sup>

After the filing of the petition, Shore moved for summary judgment. The matter came for hearing on March 12, 2013, and judgment was rendered in favor of Shore on March 22, 2013.<sup>3</sup> This appeal followed.

Appellate courts' review of a motion for summary judgment is de novo. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257, p. 7 (La. 2/29/00), 755 So.2d 226, 230. This Court will uphold the granting of a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B). A genuine issue is one on which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. A fact is considered material if it potentially insures or precludes recovery, affects a litigant's success, or determines the outcome of the case. *Hardy v. Bowie*, 98-2821, p. 6 (La. 9/8/99), 744 So.2d 606, 610.

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<sup>2</sup> According to La. R.S. 9:2781, "'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."

<sup>3</sup> The trial court awarded Shore \$12,285.00 plus 25% attorney's fees, all court costs and interest from date of judicial demand.

It is well settled that for there to be an action on an open account, there must be a contract or agreement which gives rise to the debt. *See Montgomery Stire & Partners, Inc. v. London Livery, Ltd.*, 99-3145, p. 4 (La. App. 4 Cir. 9/20/00), 769 So.2d 703, 706, citing *Metrospec Computers & Supply, Inc. v. R.A. Roldan & Co., Inc.*, 94-0102, p. 3 (La. App. 4 Cir. 9/29/94), 643 So.2d 833, 835.

In this case, there is no evidence of a written contract between Shore and FMC. To the contrary, Shore admits that the written contract was between it and EIS. However, Shore filed the affidavit of its managing partner, Chad Denton, which maintains that FMC's project manager, Richard Walsh, and other superintendents on the project requested that Shore continue to haul and that FMC would pay for its services. Furthermore, Mr. Denton's affidavit claims that FMC and EIS represented that they were acting as a joint venture on the project, suggesting that an agreement with one of the entities would bind both.

FMC contradicts Mr. Denton's assertions through the affidavit of project manager, Richard Walsh, which asserts that:

At no time did I ask, communicate, direct, or otherwise instruct Chad Denton or Shore Materials, LLC that they could act, or were acting for, or engaged by First Millennium Construction, and those representations made in that affidavit signed by Chad Denton with respect to his communication and contact with me are false and fabricated.

Additionally, the affidavit of FMC's manager and sole member, Nathian Hossley, refuted Mr. Denton's assertion that there was a joint venture between FMC and EIS. Also, Mr. Hossley maintained that FMC did not enter into any agreement with Shore.

Here, the competing affidavits clearly create contradictory representations of the existence of an agreement for service and payment.<sup>4</sup> Therefore, this Court finds that a genuine issue of material fact exists, and the matter was not appropriate for summary judgment. Accordingly, the trial court's granting of summary judgment is reversed and the matter is remanded for further proceedings.

**REVERSED AND REMANDED**

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<sup>4</sup> “In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence.” *Coto v. J. Ray McDermott, S.A.*, 99-1866, p. 4 (La. App. 4 Cir. 10/25/00), 772 So.2d 828, 830; *Independent Fire Insurance Co*, 99-2181, 99-2257, p. 16, 755 So.2d at 236.