NOT DESIGNATED FOR PUBLICATION

NATIONAL RESTORATION OF NEW ORLEANS, INC	*	**NO. 2015-CA-0703**
	*	
VERSUS		**COURT OF APPEAL**
	*	
LANCE M. ELLIS		**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-04826, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Daniel L. Dysart, Judge Sandra Cabrina Jenkins)

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MOTION TO SUPPLEMENT RECORD DENIED;
JUDGMENT AFFIRMED

FEBRUARY 17, 2016

Plaintiff-Appellee, National Restoration of New Orleans, Inc., "National" filed suit against Defendant-Appellant, Lance M. Ellis, seeking $55,294.51 for construction services performed in 2005-2006 following Hurricane Katrina. The trial court rendered judgment in favor of National and against Mr. Ellis in the amount of $55,294.51, plus all costs and judicial interest. For reasons that follow, we affirm.

PROCEDURAL HISTORY AND FACTS

On May 5, 2008, National filed a "Suit on Materialmen's Lien and Privilege and on Open Account" against Mr. Ellis. National alleged that it supplied labor and materials for the repair and/or construction of property owned by Mr. Ellis on 926 North Salcedo Street in New Orleans, Louisiana. National further alleged that Mr. Ellis is liable to it in the amount of $34,224.12, together with interest thereon, and for all costs of the suit and for the filing of a statement of claim and privilege. National timely filed the statement of claim and privilege in Orleans Parish on April 2, 2008, after amounts owed by Mr. Ellis went unpaid. National notified Mr. Ellis of the filing of the statement of claim and privilege by certified mail, and

attached the statement to the mailing along with an itemized bill for services rendered.

At trial, Mr. Ellis conceded that he hired National to repair the roof of his home but testified that he never agreed to the restoration services that National alleges were performed. Rather, Mr. Ellis argues on appeal that he gutted the property himself and that, at most, National brought in blowers to dry the walls.

After a one day bench trial, the trial court rendered judgment on March 2, 2015, finding in favor of National and against Mr. Ellis in the amount of $55,294.51, plus all costs and judicial interest. The judgment also dismissed with prejudice Mr. Ellis's exception of no right of action. On March 17, 2015, Mr. Ellis filed a motion for new trial, which the trial court denied. On March 23, 2015, the trial court issued reasons for its March 2, 2015 judgment. Specifically, the trial court stated as follows:

> Basically, the Court's Judgment boils down to this: The defendant, Mr. Ellis, was unworthy of belief.
>
> Mr. Ellis contracted with National Restoration, the plaintiff, to repair a property following hurricane Katrina. Although Mr. Ellis owned several properties that were uninsured, he did have insurance for the property at issue in this case. The plaintiff began the work according to the estimate given by the insurance company. Unfortunately, Mr. Ellis chose to use the money he received for other purposes; he did not pay the plaintiff for the work the plaintiff performed. Mr. Ellis had all sorts of excuses for non-payment, but he failed to prove any of them. Most telling was his comment that he had paid for the insurance so the proceeds were his to do as he pleased. WRONG! He had a legal obligation to pay for the work for which he contracted, and he failed to do so.

On appeal, Mr. Ellis alleges the following six assignments of error: (1) whether the trial court erred in rendering judgment in favor of National under the provisions of the Louisiana Private Works Act and an open account where there is

nothing in the record to show a contract existed; (2) whether the trial court erred in rendering judgment for National where there is no evidence that an open account existed; (3) whether the trial court erred in granting judgment in favor of National where even if a presumption is made of a contract it was a "costs plus" contract on its face and the record shows that National failed to meet its burden of proof that each item of its purported contract was performed; (4) whether the trial court erred in rendering judgment in favor or National where it failed to itemize the specific amounts of the award as required by law and failed to state whether the judgment was rendered for or against Jeffrey Underwood, one of the named plaintiffs in the litigation; (5) whether the trial court erred when it failed to hold a contradictory hearing on his motion to strike National's motion to admit the request for admissions where the hearing was requested; and (6) whether the trial court erred when it failed to hold a contradictory hearing on his motion for new trial. We note that assignments of errors three (3), four (4) and five (5) were not briefed by Mr. Ellis; thus, they are deemed abandoned under Uniform Rules – Courts of Appeal, Rule 2-12.4. See *Burnett v. Lewis*, 02-0020, p.6 (La. App. 4 Cir. 7/9/03), 852 So.2d 519, 525.

On December 1, 2015, Mr. Ellis filed a motion to supplement the appeal record with evidence that he corrected the defects in the bond on September 17, 2015, and requests that this appeal remain a suspensive appeal. However, because we find that the notice of suspensive appeal was untimely, as will be discussed more fully below, we hereby deny the motion to supplement the appeal as moot.

DISCUSSION

We first note two problems with the appeal. First, Mr. Ellis filed an untimely motion for a new trial under La. C.C.P. art. 1974. As stated in La. C.C.P.

art. 1974, "[t]he delay for applying for a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913." La. C.C.P. art 1913(A) provides, in pertinent part, that: "notice of the signing of a final judgment ... is required in all contested cases, and shall be mailed by the clerk of court to the counsel of record for each party, and to each party not represented by counsel." La. C.C.P. art 1913(D) provides that: "[t]he clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed." According to the record, the written judgment was signed on March 2, 2015, and the notice of the signing of the judgment was mailed on March 5, 2015. Mr. Ellis filed his motion for new trial on March 17, 2015, which is the eighth day after the clerk mailed the notice of judgment.

Second, Mr. Ellis filed a notice of suspensive appeal on April 20, 2015, which was more than thirty days from the expiration of the delay for applying for a new trial, which was March 16, 2015. La. C.C.P. art 2123 provides, in pertinent part:

> A. Except as otherwise provided by law, an appeal that suspends the effect or the execution of an appealable order or judgment may be taken, and the security therefor furnished, **only within thirty days of any of the following**:
>
> (1) **The expiration of the delay for applying for a new trial** or judgment notwithstanding the verdict, as provided by Article 1974 and Article 1811, if no application has been filed timely.
>
> (2) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial or judgment notwithstanding the verdict, as provided under Article 1914.

In order to have suspensive appeal, Mr. Ellis had to file a petition for appeal and furnish the security within the thirty day delay allowed in La. C.C.P. art. 2123. See also *Wright v. Jefferson Roofing, Inc*., 93-1217 (La. 1/14/94), 630 So.2d 773. Although Mr. Ellis filed a motion to supplement the appeal record on December 1, 2015, with evidence that he met the requirements for posting a security bond on September 17, 2015, and requested that his appeal remain suspensive, we find that the initial notice of suspensive appeal was untimely under La. C.C.P. art. 2123. Nevertheless, since Mr. Ellis filed a motion for appeal within sixty days from the expiration of the seven day delay for applying for a new trial, we hereby convert the appeal to a devolutive appeal and address the merits of the case.

The issue before us is whether the trial court properly found that National and Mr. Ellis entered into a contract for renovations to Mr. Ellis's home at 926 North Salcedo Street in New Orleans, Louisiana, and whether Mr. Ellis paid for the professional services rendered by National. It is worth noting at this time that the trial court judgment does not award attorney fees that are provided under an open account nor does it assert a privilege under the Private Works Act; rather the judgment merely awards money damages in the amount of $55,294.51. Further, because the December 14, 2015, signed arrangement between Mr. Ellis and National defines the scope of the services to be performed by National and delineates the obligation of Mr. Ellis to pay National for those services, we find that the agreement between the two parties constitutes an ordinary contract for services, for which a claim for attorney's fees may not be had under the open account statute.

"A contract is the law between the parties, and the parties will be held to full performance in good faith of the obligations flowing from the contract." *Henderson v. Ayo*, 11-1605, p.5 (La. App. 4 Cir. 6/13/12), 96 So.3d 641, 645 (citing La. Civ. Code art. 1983). The existence or nonexistence of a contract is a question of fact and, accordingly, the determination of the existence of a contract is a finding of fact, not to be disturbed unless clearly wrong. *Price v. Law Firm of Alex O. Lewis, III & Associates*, 04-0806, p.3 (La. App. 4 Cir. 3/2/05), 898 So.2d 608, 610-11. A trial court's interpretation of a contract is also a finding of fact subject to the manifest error rule. *Paz v. BG Real Estate Services, Inc*., 05-0115, p.3 (La. App. 4 Cir. 12/14/05), 921 So.2d 186, 188. The Supreme Court has announced a two-part test for the reversal of a factfinder's determinations: 1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and 2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). *Stobart v. State through DOTD*, 617 So.2d 880, 881 (La. 1993). The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Id.*

In this case, National submitted evidence of a contract, signed by Mr. Ellis on December 14, 2005, which states in pertinent part:

> I (we) hereby authorize National Restoration of New Orleans, Inc. … to perform restoration service at my (our) property…and with respect to items that need to be restored at a remote location, to remove and restore such items….
>
> I (we) understand that National is working for me (us) and not the insurance company or adjuster.
>
> I (we) agree to pay National directly for any amounts not covered by insurance.

> I (we) understand a scope or [sic] repairs will be furnished by National or our Insurance company, if there are any deviations in scope or changes in scope, I (we) will notify National in writing of those changes. If I (we) choose not to have any of the work done per the scope of repairs, those monies will be returned to the Insurance company via certified mail. National agrees to work with Insurance company pricing as long as scopes [sic] agree.
>
> It is fully understood that the CUSTOMER is personally responsible for any and all deductibles, depreciation or any other charges or costs not covered by insurance. The liability of National is expressly limited to the total amount of the services authorized herein and in no event shall National, its agents or assigns, be liable for consequential damages of any kind…In the event that legal proceedings must be instituted to recover any due amount, National shall be entitled to recover the cost of collection including reasonable attorney's fees. (Emphasis in original)

National also submitted the following evidence at trial: (1) a 21 page estimate completed on January 1, 2006, detailing the scope of the work for repairs and renovations to the subject property in the amount of $90,645.01 that was negotiated by National and Mr. Ellis's insurance company, Safeco Insurance; (2) a March 28, 2008, certified letter to Mr. Ellis giving notice of a lien for $34,224.12 that was allegedly due for services rendered; (3) a statement of claim and privilege on the property for improvements made in the amount of $34,224.12; (4) pictures of the property during the gutting phases of renovation in 2006; (5) pictures of the property on January 21, 2015; (6) its contractor license; (7) its certificate of resident contractor status; (8) its Secretary of State of Louisiana certificate of incorporation; (9) its occupational license; (10) its general commercial liability policy declaration page; (11) its State Farm automobile insurance company insurance policy; (12) its worker compensation and employers liability insurance

policy; (13) its suit on materialman's lien and privilege and on open account; and (14) its accounting of work actually performed.

After reviewing this record, we cannot say the trial court was clearly wrong in finding that National was entitled to $55,294.51 for the renovation work to Mr. Ellis's property. During the trial, Jeffrey Underwood, a licensed general contractor for National, testified that he negotiated the scope of work with Mr. Ellis's insurance company, SafeCo, and that Mr. Ellis refused to pay the $55, 294.00 for the scope of work that was contracted for and completed by National. Specifically, Mr. Underwood testified as follows:

> We began work on Mr. Ellis' personal you [sic] unit. We completed the work in his unit and began work on the unit next door. Mr. Ellis moved back into the unit. Within a couple of weeks, I had not received any payment from Mr. Ellis. At that time, we asked him for payment. I'd informed him that we would be unable to continue doing any additional work until some payment was made. He agreed to meet with me one day to get me a check. When I showed up to meet with him, he refused to make any payment. He threw me off of the job. He called the police saying that I was threatening him.

Mr. Ellis testified that although he signed a contract with National to repair a roof, he did not agree to the subject renovations. Mr. Ellis testified that he gutted the house himself and that he also did the mold remediation work. Specifically, Mr. Ellis testified "there was nothing negotiated with me about that because I stated I didn't want to deal with that entity. I didn't want them to get my money because I've been paying insurance all my days."

The record evidences the fact that the parties entered into a contract in December 2005, to perform renovations on Mr. Ellis's property. National adequately proved that it provided the services contracted for and that Mr. Ellis refused to pay the amount owed. As the trial court properly stated in its reasons for

judgment, "Mr. Ellis had all sorts of excuses for non-payment, but he failed to prove any of them." We agree. We too find that the record supports a legal obligation for Mr. Ellis to pay for the work for which he contracted with National to perform. For these reasons, we hereby affirm the judgment of the trial court.

MOTION TO SUPPLEMENT RECORD DENIED;
JUDGMENT AFFIRMED