NOT DESIGNATED FOR PUBLICATION

IDA M. PERRY	*	**NO. 2016-CA-0261**
VERSUS	*	
		COURT OF APPEAL
HURRICANE FENCE COMPANY, INC.	*	**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2010-51517, SECTION "C"
Honorable Veronica E Henry, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard, Judge Madeleine M. Landrieu)

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SEPTEMBER 21, 2016

AFFIRMED

Defendant, Hurricane Fence Company, Inc., appeals a trial court judgment that found in favor of plaintiff, Ida M. Perry, and awarded $10,095.00 in damages as a result of a breach in a construction contract. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Ms. Perry is the owner of the property located at 1810-1812 Congress Street, New Orleans, Louisiana. On August 14, 2007, Ms. Perry entered into a written contract with Hurricane Fence Company, Inc. ("Hurricane Fence") to: (1) remove an existing fence; (2) install a six foot high chain link fence; and (3) pave a concrete slab in front of the entry stairs and on both sides of her home. In return for the aforementioned services, Ms. Perry paid Hurricane Fence $9,850.00.

Ms. Perry testified that right after the work was completed, she began having problems with water accumulating underneath her home and in her yard. At that time, Ms. Perry testified that Hurricane Fence removed a section of her fence, and made two trips to her house to resolve the drainage problem. Ms. Perry testified that after her third call to Hurricane Fence, and the fact that the problem was "just left unsolved," she retained attorney Anthony L. Glorioso to discuss her options regarding the condition of the pavement around her house. Mr. Glorioso met with James Vairin of Vairin Construction Company ("Vairin Construction"), who examined the property and provided an estimate to fix the pavement. Mr. Vairin's June 25, 2009 estimate stated, in pertinent part:

> At your (Mr. Glorioso's) request, I have visited the above site and spoke with the owner regarding the in place concrete paving. In my opinion, the present paving cannot be refurbished to meet City Building Codes and/or satisfy the owner. According to the Building Code paving cannot drain on adjacent property. While this paving does not drain on adjacent property it is poured releatively [sic] flat all around the house and therefore drains to the point of least resistance which could be towards adjacent property or under the house, both of which are unacceptable to the owner.
>
> We have worked up a price of $13,200.00 to remove the existing paving and replace with 4"of 3000 psi concrete reinforced with 6x6, 10/10 mesh all sloped to the front sidewalk. Additionally, we have included a 4"w x 2"h curb all around to insure positive drainage to the front and no water going under the house.
>
> Removal of the fence is included. Replacement and repairs are not.

Upon receiving the above estimate, Mr. Glorioso sent a demand letter regarding the pavement defects to Hurricane Fence on July 15, 2009, stating, in pertinent part:

> My investigation reveals that a contract dated August 14, 2007 was entered into by Ms. Perry and Hurricane Fence Co. (Dan Cobb) providing for the installation of a chain link fence and approximately 1200 sq. feet of concrete to the front, sides and rear of Ms. Perry's home. Unfortunately, the concrete was poured in such a way as to allow water to accumulate and drain underneath the house. I have obtained an opinion that the present paving cannot be refurbished to meet City Building Codes. Since part of the concrete drains water directly beneath Ms. Perry's home, the present condition is unacceptable to her. I have received an estimate to remove the existing paving and replace with 4" 3000 psi concrete reinforced with 6x6, 10/10 mesh all sloped to the front sidewalk. A 4"w x 2"h curb all around will ensure positive drainage to the front and no water going beneath the home. The estimated cost is $3,350.00 which will include removal of the present fence but not replacement and repairs of the fence.
>
> Since the original job must be removed, please consider this letter as demand that the original contract in the amount of $9,850.00 be returned to Ms. Perry immediately and the difference in the amount of $3,350.00 also be paid to her since the original contract must be removed and hauled from the premises.

Ms. Perry testified that she eventually entered into a contract with Killeen Group Construction ("Killeen"), on November 16, 2010, to fix the pavement and drainage around the house for $9,475.00. Ms. Perry further testified that after Killeen fixed the pavement and drainage problem, she hired Morgan's Mobile Welding Company ("Morgan's Mobile") to put the portion of the fence, removed initially by Hurricane Fence, back up for $620.00. Ms. Perry stated that following Killeen's work, she has not had any issue with water accumulating in her yard and under her house.

On cross-examination, Ms. Perry testified that although Hurricane Fence attempted to correct its work by putting a curb or a lip on the concrete to keep the water from going under the house, she did not find this solution permissible

because she would fall down when walking on the pavement. Specifically, Ms. Perry testified as follows in regards to the construction of the lip or curb:

> They [Hurricane Fence] put up a lift down the center of the alley. They made something like a gutter down the center of the alley and it came like this (Indicating). And oh, that was not permissible. If I would walk through there, I would fall down. It was - - it was accidental-prone. I never seen a thing put up like that.

She further testified that she never stopped Hurricane Fence from finishing the job; rather, "[t]hey just didn't come back and finish it."

Mr. Vairin, an expert in the area of construction involving placement of ground concrete, testified that he visited Ms. Perry's property after Hurricane Fence completed the concrete pavement and he noticed that she had a drainage problem that caused water to accumulate on her property. He testified that the drainage problem needed to be remedied and opined that the cost to fix the drainage would be approximately $13,200.00.

On cross-examination, Mr. Vairin was asked what he meant when he stated in his June 25, 2009 report "that the present paving [by Hurricane Fence] cannot be refurbished to meet city building codes and/or satisfy the owner." Mr. Vairin responded to the question, as follows:

> The grade in the rear was too low. It had to go over an obstacle which was part of the paving. Water doesn't run uphill, so the paving in the rear was always holding water. It couldn't get to the front. It had to go to the right or to the left to get out of there.

Mr. Vairin testified that it was his opinion that all of the concrete needed to be removed and re-poured to correct the elevation.

Mr. Renemi Alamina, a sub-contractor for Hurricane Fence, testified that he spoke to Ms. Perry about "sloping" the concrete in the backyard in order for water to flow towards the front of the house, but that she did not want to elevate the concrete. Mr. Alamina testified, in regard to his conversation with Ms. Perry and the elevation of the concrete, as follows:

> And I guess, you know, she [Ms. Perry] misunderstood, you know, it don't [sic] matter that we slope the concrete to the neighbor's side. And she [Ms. Perry] didn't want nothing [sic] come [sic] to her house. But at the same time, we have the same grading, you know, the same level from the street to the back, the same level. So I told her, you know, that we was [sic] going to have problems if we slope the water to the neighbor. So I guess she [Ms. Perry] told us, you know just - - I mean my order was to follow her orders. That's what I did.

Thus, according to Mr. Alamina's testimony, he followed Ms. Perry's instructions for the design and elevation of the initial concrete work. Mr. Alamina also testified that after Ms. Perry complained about water accumulating in her yard, Hurricane Fence tried to resolve the drainage problems by creating a concrete lip, installing a French drain, and adding additional concrete to the back of the house.

On April 21, 2010, Ms. Perry filed suit against Hurricane Fence alleging that it "caused the concrete to be poured in such a manner as to allow water to accumulate and drain" under her house and that Hurricane Fence is responsible for all additional costs incurred to correct the substandard work. Hurricane Fence contends that it performed all work under the terms of the contract in a workmanlike manner and that it made every effort to correct the water drainage problem. Further, Hurricane Fence alleges that Ms. Perry did not allow it the opportunity to rectify the problems prior to being terminated.

After a bench trial, the trial judge ruled in favor of Ms. Perry, and against Hurricane Fence, and awarded $10,095.00 in damages. In her well-written reasons for judgment, the trial judge stated, in pertinent part:

> The central focus of plaintiff Perry's claim is the concrete work and the water accumulation problem that resulted after defendant Hurricane Fence completed the job.
>
> Hurricane Fence representative Rene Alamina, foreman, subcontractor, and former president of Hurricane Fence, met with plaintiff Perry at the beginning of the job to assess what work was to be done and submit a proposal. Mr. Alamina proposed raising the rear elevation of the rear concrete to allow water to flow to the street. Raising the rear concrete elevation would have affected an abutting step or other structure. Plaintiff Perry was not inclined to have the concrete work interfere with that structure. Hurricane Fence acquiesced to the plaintiff's wishes and performed the concrete work without elevation.
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> Some months after the work was completed, plaintiff Perry noticed that water was not draining to the street, but was accumulating underneath her home. Hurricane Fence was called and the company proposed to erect a "lip" or small retaining wall on the top edge of the concrete.
>
> The "lip" was erected, but plaintiff could not access the underside of the home because of the height of the retaining wall.
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> Defendant Hurricane Fence was again called and Mr. Alamina recommended that the concrete be elevated (as was originally proposed) along with the construction of a French drain. Work began on the French drain proposal, but plaintiff Perry terminated the services of the defendant before that work was completed.
>
> Plaintiff Perry, through her attorney, hired James Vairin[1] of Vairin Construction Company to inspect her

[1] The Court qualified James R. Vairin as an expert witness in the area of construction specializing in concrete. Mr. Vairin is a licensed general contractor under license number 23239 by the

home. Mr. Vairin testified that, upon inspection, there was, indeed, water accumulating underneath plaintiffs home.[2] He opined that the concrete structure was not elevated properly so that the water would be directed to the street. He recommended that the existing concrete be dug up, re-poured and constructed to the proper elevation.

Mr. Vairin's proposal to perform the concrete work was $13,200. That sum included fencing which would have to be reinstalled. Plaintiff Perry, however, ultimately contracted with Killeen Group Construction (hereinafter referred to as "Killeen Group").The Killeen Group proposed to remove the existing concrete on the right, left, and rear of the home, pave concrete on those areas, and install new fence posts on the property, if needed, at a contract price of $9,475.00. The plaintiff also contracted with Morgan's Mobile Welding & Fab to install the fence into the fence post at the contract price of $620.00.

1. The Court finds that plaintiff Ida M. Perry's termination of Hurricane Fence was on just grounds.

At the time of termination, defendant Hurricane Fence was on its third attempt at modifying the concrete installation. The defendant certainly stood by its work in that the company returned each time the plaintiff called. Martina Scheuermann, manager of defendant Hurricane Fence, testified that the company responded to all of plaintiff's complaints and made every attempt to satisfy the plaintiff. However, the court believes that there is a difference between standing by the work and having to make minor adjustments post construction versus having to make repeated design changes that should have been addressed at the very beginning of the job. The cost of that type of warranty is a shaken confidence in the competency of the company and the workmanship of the job being performed. It was clear to the court that plaintiff Perry became frustrated and concerned with the defendant's job performance and the quality of the work.

State of Louisiana. He also received a certification from CSI (Construction Specification Institute).

[2] Mr. Vairin testified at the time of his examination he did not observe a "lip" or small retaining wall. The Court believes that Mr. Vairin examined the property before the defendant installed the retaining wall.

Mr. Alamina testified that his very first recommendation to the plaintiff was to elevate the rear portion of the concrete to allow water to flow to the street. To Hurricane Fence's detriment, Mr. Alamina allowed the homeowner to dictate the concrete design. Whether plaintiff Perry's reasons for objecting to elevation were for aesthetics or not, elevation of the concrete was such an essential design element that, perhaps, the concrete portion of the job should have been declined if it was not going to be performed correctly the first time.

At the time of defendant Hurricane Fence's termination, the defendant was in the process of making its third modification. Under these facts, the court finds that plaintiff Perry terminated Hurricane Fence on just grounds.

2. The Court finds that defendant Hurricane Fence is liable in damages to plaintiff Ida M. Perry pursuant to La. Civ. Code art. 2769.[3]

To establish the contractor's liability for defective workmanship under article 2769, the owner must establish; (1) the existence and nature of the defect, (2) the defect was caused by faulty workmanship or materials, and (3) the defect resulted in damages to the plaintiff. *New Zion Baptist Church v. MECCO, Inc.,* 478 So. 2d 1364, 1365 (La. Ct. App. 1985) [La. App. 4 Cir. 1985], citing *Goudeau v. Hill,* 410 So. 2d 338, 339 (La. Ct. App. 1982) [La. App. 4th Cir. 1982]. The owner of the construction project bears the burden of proving each element of the claim by a preponderance of the evidence. *Lewis v. La Adrienne, Inc.,* 44,602, p. 5 (La. App. 2 Cir. 08/19/09); 17 So. 3d 1007, 1010, *reh'g denied* (09/17/09).

In the instant case, the concrete installation caused water to flow to the underside of the home. The concrete should have been elevated. Mr. Vairin and Mr. Alamina testified that elevation was the only way to direct the water to the street. Mr. Alamina would have added a

[3] The Louisiana Court of Appeal Fourth Circuit in *Henderson v. Ayo, Vazquez v. Gairens,* and *Brenner v. Zaleski,* hold that La. Civ. Code art. 2769 applies where the cancellation of a contract is founded on just grounds.

French drain. Further, the reason the concrete was not elevated when it was originally constructed was because Hurricane Fence knowingly chose not to elevate the concrete.

The Court finds that plaintiff Perry established by preponderance of the evidence that the work performed by defendant Hurricane Fence was defective and plaintiff Perry had a right to terminate Hurricane Fence and hire another company to perform the work. Plaintiff Perry suffered monetary damages as a consequence.

3. The Court awards plaintiff Ida M. Perry $10,095 in damages.

The appropriate measure of damages as a result of a breach of contract to build under article 2769 is "the cost of repairs necessary to convert the unsound structure to a sound one or the amount paid to remedy the defect." *Nicholson & Loup, Inc. v. Carl E. Woodward, Inc.,* 596 So. 2d 374, 392 (La. Ct. App.) [La. App. 4 Cir. 1992] *writ denied,* 605 So. 2d 1098 (La. 1992). Thus, the owner is entitled to the cost of repairing the defects or completing the work. *Scheppegrell v. Barth,* 117 So. 2d 903, 906 (1960).[4] The owner of the construction project should be placed in the position he deserved to be in when the project was completed. *Henderson,* 11-1605 p. 7, 96 So. 3d at 645 [*Henderson v. Ayo*, 11-1605 (La. App. 4 Cir. 06/13/12); 96 So.3d 641, 645].

In the instant case, the work as performed by Hurricane Fence was worthless. As such, plaintiff Perry is entitled to the amount that was paid to remedy the defect. Plaintiff paid the Killeen Group $9,475.00 for the concrete work and paid Morgan's Mobile $620.00 for fence work - - total $10,095.

Accordingly, the court finds for plaintiff Ida M. Perry and against defendant Hurricane Fence Company, Inc. The court awards the plaintiff the full and true sum of Ten Thousand Ninety-Five and 00/100 ($10,095.00) Dollars, legal interest from the date of judicial demand, and all costs of these proceedings.

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[4] In *Scheppegrell,* the Court held that the appropriate measure of damages for breach of a building contract is usually the cost of repairing defective work where the owner has derived some benefit from defective construction, but if the work is completely worthless and has to be redone, the owner is entitled to recover the cost for redoing the construction project. 117 So. 2d at 906.

STANDARD OF REVIEW

In *Rosell v. ESCO*, 549 So.2d 840 (La.1989), the Louisiana Supreme Court discussed the well settled rule that an appellate court may only set aside a factual finding of a trial court where the finding was based on a "manifest error" or was "clearly wrong." Where there is conflict in the testimony, a trial court's reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on appeal. *Id.* at 844. Thus, where there are two permissible views of the evidence, the trial court's choice between them cannot be manifestly erroneous or clearly wrong. *Id.* Further, if a trial court has based its findings of fact on a determination regarding the credibility of the witnesses, the manifest error standard of review requires even more deference to the findings of the trier of fact, due to the fact finder's unique position to discern variations in the witnesses' demeanor and tone of voice. However, where the decision of the trial 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). In this situation, reviewing courts should apply a *de novo* standard of review. *Kevin Associates, L.L.C. v. Crawford*, 03-0211, p. 15 (La.1/30/04), 865 So.2d 34, 43.

We review damage awards for breach of contract under an abuse of discretion standard. *See NovelAire Technologies, L.L.C. v. Harrison*, 09-1372, p. 6 (La. App. 4 Cir. 10/13/10), 50 So.3d 913, 918. As this Court stated in *Audubon Orthopedic and Sports Medicine, APMC v. Lafayette Ins. Co.*, 09-0007, p. 25 (La. App. 4 Cir. 4/21/10), 38 So.3d 963, 980, "the question is not whether a different award might be more appropriate, but whether the award of the trial court can be

reasonably supported by the evidence and justifiable inferences from that evidence; the fact that the evidence might also support a greater or smaller award does not justify a change in amount by the appellate court." (citing *Bitoun v. Landry*, 302 So.2d 278, 279 (La. 1974)).

DISCUSSION

On appeal, Hurricane Fence raises the following assignments of error: (1) the trial judge erred in admitting into evidence the estimate of Killeen Group Construction and any testimony related thereto as it was hearsay; (2) the trial judge erred in admitting into evidence the estimate of Morgan's Mobile and any testimony related thereto as it was hearsay; (3) the trial judge erred in assessing damages against it as Ms. Perry failed to prove her damages by competent and admissible evidence; her proof of damages was based on inadmissible hearsay; (4) the trial judge erred in holding that the work done by Hurricane Fence was in any way negligent or defective and that Ms. Perry was entitled to damages; and (5) the trial judge erred in not finding that Ms. Perry failed to mitigate her damages, particularly by failing to allow Hurricane Fence to complete work which had been started and was near completion.

The contract involved in this case is a building contract as defined in La. Civil Code art. 2756. As stated by this Court in *Brenner v. Zaleski*, 14-1323, p.3 (La. App. 4 Cir. 6/3/15), 174 So.3d 76, 79 "[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. It is implicit in every building contract that the contractor's work be performed in a good, workmanlike manner, and free from defects in materials or work." [Citations omitted.] When a party fails to do the work he has contracted to perform, or does not execute it in the manner and at the

time agreed, he shall be liable in damages for the losses that ensue from noncompliance with the contract. La. Civil Code art. 2769. In order to recover damages from a contractor for defective workmanship, the landowner must establish: 1) that defects exist; 2) that faulty materials or workmanship caused the defects; and 3) the cost of repairing the defects. *Larkins v. Cage Contractors, Inc.*, 580 So.2d 1068, 1069 (La. App. 4 Cir. 1991). The owner should be placed in the position he deserved to be in when the construction project was completed. *Henderson v. Ayo*, 11-1605, p.6 (La. App. 4 Cir. 06/13/12), 96 So.3d 641, 645.

In its first three assignments of error, Hurricane Fence contends that the estimates/invoices prepared by Killeen and Morgan's Mobile were hearsay and should not have been admitted as evidence because the people who prepared the estimates neither testified nor appeared for trial. We find no merit to these arguments. Ms. Perry offered direct testimony verifying that she signed a contract with Killeen to fix her concrete pavement, and that she paid Killeen $9,475.00 for the repair work. Ms. Perry also testified regarding the invoice she received from Morgan's Mobile to repair her chain link fence, and that she paid Morgan's Mobile the $620.00 for its repair work. We find no error in the trial court's ruling to admit Killeen's estimate and Morgan's Mobile invoice into evidence as Ms. Perry testified that she hired Killeen and Morgan's Mobile to do the necessary repair work and she also had first-hand knowledge of the amount of money she spent to repair her concrete pavement as well as her chain link fence. *See Burdette v. Drushell*, 01-2494, p.8 (La. App. 1 Cir. 12/20/02), 837 So.2d 54, 61, n. 4 (whereby the trial court found that a "plaintiff was a party to the transactions represented by the invoices and receipts, and initiated the purchases and other transactions personally" and that plaintiff "indisputably had firsthand personal knowledge of

the factual basis for the third parties' preparation of the documents."[5] Therefore, we find no abuse of discretion in the trial court's $10,095.00 award for damages as we find this amount is properly supported by the evidence and testimony.

We also find no merit in Hurricane Fence's remaining assignments of error that allege the trial court erred in finding its work negligent, and that the trial court should have allowed it the opportunity to complete the work. After reviewing the record, we find the trial court's factual conclusions that (1) Ms. Perry's termination of Hurricane Fence was on just grounds, and (2) Hurricane Fence's workmanship created drainage issues on Ms. Perry's property, were reasonable and not manifestly erroneous. Accordingly, we hereby affirm the judgment of the trial court in favor of Ida M. Perry, and against Hurricane Fence Co., Inc., in the amount of $10,095.00.

AFFIRMED

[5]The Court in *Burdette* found "that the element of payment set forth in the paid invoices, cash receipts, and plaintiff's checks, supported by his testimony, fulfilled the necessary elements of reliance and verification, justifying their admission." *Burdette*, 01-2494 at p.12, 837 So.2d 64.