JOHN BEGNAUD ELECTRIC MOTORS, INC.	*	NO. 2017-CA-0548
	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
ALTERNATIVE WELL INTERVENTION, LLC	*	STATE OF LOUISIANA
	*	
	*	

* * * * * * *

LOBRANO, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent. I find that by awarding damages as if the contract for the construction of rig 4 were complete,[1] the district court incorrectly classified the contract between John Begnaud Electric Motors, Inc. ("JBEM") and Alternative Well Intervention, LLC ("AWI") as a contract of sale rather than a contract to build, which caused the district court to incorrectly calculate damages in its award. Accordingly, the district court's judgment awarding damages to JBEM in the amount of $262,500.00 for the expense and labor needed to complete rig 4 and for sales tax is contrary to law. As I find that the district court committed legal error by failing to classify the contract between JBEM and AWI as a contract to build, I would conduct my own independent *de novo* review of the record,[2] find that the

[1] The majority opinion results in a total payment of $342,149.75 plus $17,107.50 in sales tax from AWI to JBEM as follows: the district court's award of $250,000.00 plus $12,500.00 sales tax against AWI plus the down payment of $92,149.75 plus $4,607.50 sales tax. This amount constitutes, for all practical purposes, the full amount of the cost of rig 4, which is undisputedly not complete and in no way usable for its intended purpose. Although, as discussed *infra*, the contract at issue is a contract to build, it is important to note that the concept of "substantial performance" should not be applied to this case. Substantial performance is a concept applied when a construction may be fit for the purposes intended. *See Airco Refrigeration Service, Inc. v. Fink,* 134 So.2d 880 (La. 1961). If a contractor has substantially performed such that the construction is fit for its intended use, he is entitled to recover the full contract price. *Id.* In the case *sub judice*, the testimony absolutely forecloses the application of substantial performance, as Mr. Begnaud testified that rig 4 was only "better than halfway finished" and the entirety of the record discloses no testimony or evidence indicating that rig 4 was fit for its intended purpose.

[2] A trier of fact's factual conclusions regarding breach of contract claims are typically governed by the manifest error standard of review. *See Brenner v. Zaleski,* 2014-1323, p. 3 (La. App. 4 Cir. 6/3/15), 174 So.3d 76, 79. However, where an error of law taints the fact finding process, the appellate court must conduct its own *de novo* review. *MST Enterprises Co. v. City of New Orleans,* 2015-0112, pp. 5-6 (La. App. 4 Cir. 7/29/15), 174 So.3d 195, 198.

parties entered into a contract to build, and award damages to JBEM for the "expense and labor already incurred" on the contract as set forth in La. C.C. art. 2765. I would therefore reverse the district court's judgment and award damages to JBEM in the amount of $90,215.75.

AWI agreed to a contract[3] with JBEM for JBEM's construction of rig 4. The contract price was for $368,599.00 plus sales tax of $18,430.00. AWI paid a twenty-five percent (25%) down payment in the amount of $96,757.25 as provided by the contract. The contract listed thirteen (13 or XIII) items to be constructed relative to rig 4, along with the price of each item. In particular, Item I, an electrical transformer, had a corresponding price of $174,551.00. In addition, JBEM included a line item for sales tax payable to the City of Scott of $18,430.00.

There is no dispute in the record testimony that following JBEM's initiation of work on the contract, the parties agreed that JBEM would stop work and bill AWI for the work performed to date. It is also undisputed that JBEM built Items II through IX[4] of the contract, and those items remained in JBEM's possession.

John Begnaud ("Mr. Begnaud") testified that JBEM "special ordered" Item I, the transformer, from a third party supplier, Bayou Buff Electric. There was no testimony that the transformer was completed. There was no contract, invoice, purchase order, demand letter, or any other evidence admitted into evidence establishing JBEM had incurred an expense for the purchase of the transformer.

In its judgment, the district court awarded damages in the amount of

[3] The record in this matter establishes that the contract consisted of nothing more than a one-page contract to build dated February 19, 2014 with the attached February 12, 2014 quote of construction costs and a purchase order dated February 19, 2014.
[4] Items II through IX are as follows:

II	Telescopic light stands with sling	$38,685
III	Receptacle lighting panel with slings	$ 9,300
IV	BOP closing unit (labor and material electrical hook)	$ 6,694
V	20x8x4 Basket/fab/paint/stress test/slings	$26,620
VI	8x8x4 Basket/fab/paint/stress test/slings	$18,360
VII	4x4x4 Basket/fab/paint/stress test/slings	$23,120
VIII	Electrical Transformer Skid/fab/paint/stress test/slings	$21,311
IX	Air Compressor Skid/fab/paint/stress test/slings	$42,883

$262,500.00 on the basis of a subsequent invoice submitted by JBEM to AWI dated September 9, 2014. However, the testimony reflects that the $262,500.00 was a revised price agreed to by the parties to complete rig 4 after consideration of the $96,757.25 down payment made by AWI to JBEM. Mr. Begnaud testified that he calculated the amount of the September 9, 2014 invoice by determining the cost of "the work left to be done and the material left to buy" and deducting that amount, as well as the 25% down payment, from the original contract price. Nothing in the record established that the parties entered into a binding settlement agreement establishing the $262,500.00 as an agreed upon amount that AWI would pay JBEM for early termination of the contract.

Contracts to build are differentiated from contracts of sale by the obligations they create. 24 La. Civ. L. Treatise, Sales § 1:10 (2017). Contracts to build create obligations to "do," whereas contracts of sale create obligations to "give." *See id.; FMC Corp. v. Continental Grain Co*., 355 So.2d 953 (La. App. 4th Cir. 9/8/1977). In the case *sub judice,* the contract at issue created both an obligation to do something and an obligation to give something. When contracts create both types of obligations, one of those obligations is "fundamental," and governs the classification of the contract. 24 La. Civ. L. Treatise, Sales § 1:10 (2017); *Conmaco, Inc. v. S. Ocean Corp*., 581 So.2d 365, 369 (La. App. 4th Cir. 5/30/1991). As the contract was negotiated prior to construction of rig 4, and the primary purpose of the contract was for JBEM to provide its labor and skill to construct rig 4, the contract is properly characterized as a contract to build. *See, e.g., Conmaco, Inc. v. Southern Ocean Corp.,* 581 So.2d 365 (La. App. 4th Cir. 1991); *Ortego v. Dupont*, 611 So.2d 792 (La. App. 3d Cir. 1992); *Henson v. Gonzalez,* 326 So.2d 396 (La. App. 1st Cir. 1976).The district court's ruling demonstrates that the contract in this case was improperly viewed as a contract of sale as opposed to a contract to build.

Given that the contract is a contract to build, La. C.C. art. 2765 is applicable to the facts of this case. Article 2765, provides that the "proprietor has a right to cancel at pleasure the bargain he has made, even in case the work as already been commenced, by paying the undertaker **for the expense and labor already incurred, and such damages as the nature of the case may require**" (emphasis added). Pursuant to La. C.C. art. 2765, it was JBEM's burden of proof at trial to establish the "expense and labor already incurred, and such damages as the nature of the case may require." Mr. Begnaud testified based on his personal knowledge that JBEM successfully completed Items II through IX[5] of the quote issued February 12, 2014 to AWI. AWI offered no rebuttal, and in fact the record indicates there was no dispute as to those items. However, I find that JBEM failed to carry its burden with respect to the electrical transformer with a corresponding price of $174,551.00 (Item I of the quote), Items X through XIII[6] of the quote, and the sales tax. With respect to the electrical transformer, Mr. Begnaud testified that he special ordered it from Bayou Buff Electric, but offered no proof that JBEM actually incurred the expense of the transformer.

It is well-settled law that "[s]peculative damage awards without a basis of detail or specificity are not permitted." *Overton v. Shell Oil Co.*, 2005-1001, p. 19 (La. App. 4 Cir. 7/19/06), 937 So.2d 404, 416. As this Court recently explained in *Caruso v. Chalmette Ref., LLC*, 2016-1117, pp. 12-13 (La. App. 4 Cir. 6/28/17), 222 So.3d 859, 867, *reh'g denied* (7/12/17):

> [A] plaintiff's burden must be borne by competent evidence showing the extent of the damages and a plaintiff's own uncorroborated personal estimate of loss alone is insufficient to carry his burden. *See Tudor Chateau Creole Apartments P'ship v. D.A. Exterminating Co.,*

[5] *See* fn. 4, *supra.*

[6] Items X through XIII of the quote are as follows:

X	Spare Parts for Rig	$3,575
XI	125' Feeder Wire for Tool Hose	$1,000
XII	125' feeder wire for mud pump	$1,000
XIII	Price Increase on Metal – 2% (1/1/14)	$1,500

> *Inc.*, 96-0951, p. 8 (La. App. 1 Cir. 2/14/97), 691 So.2d 1259, 1264. It is true that when a party has suffered damages but cannot establish them with legal certainty, the courts have discretion to fix the amounts thereof. The latter rule has no application when the damages sought are easily proven, but such proof is not forthcoming. *See Banner Chevrolet, Inc. v. Kelt*, 402 So.2d 747, 752 (La. App. 4 Cir. 1981).

In *Transier v. Barnes Bldg., LLC*, 2014-1256, pp. 19-20 (La. App. 3 Cir. 6/10/15), 166 So.3d 1249, 1263-64, the appellate court held that the lower court abused its discretion in awarding damages to a contractor under La. C.C. art. 2765 when the contractor failed to "provide a single receipt or invoice" to prove his claim for damages; *i.e.*, the expenses incurred. With respect to the transformer, no witness testified to any personal knowledge that the transformer was completed, and the record lacks any evidence corroborating JBEM's claim of any expense incurred or obligation to Bayou Buff Electric for the cost of the transformer.

Similarly, there was no offer of any proof that JBEM actually incurred the expense of the sales tax and the record provides no basis for the district court's award of $12,500.00 in sales tax.[7] In fact, no sales tax would be due since the record is clear there was no sale of tangible personal property.

Thus, I find that JBEM carried its burden of establishing that it incurred the expense and furnished material with respect to Items II-IX as set forth in the quote of February 12, 2014. I further find that JBEM failed to carry its burden of proof with respect to Item I (the electrical transformer), Items X through XIII, and City of Scott sales tax. Under La. C.C. art. 2765, I calculate the amount to be awarded to JBEM as the sum of the values of Items II through IX of the February 12, 2014 quote totaling $186,973.00, less the down payment of $96,757.25.

For these reasons, I would reverse the district court's judgment and award damages to JBEM in the amount of $90,215.75.

[7] Under La. R.S. 47:302(A), the sales tax is imposed upon the "sale at retail" of tangible personal property. Under La. R.S. 47:301(10)(a)(ii), a "sale at retail" for purposes of the imposition of the sales and use tax levied by a political subdivision is defined as a "sale to a consumer or to any other person for any purpose other than for resale in the form of tangible personal property…"