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

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-06233, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS
JENKINS, J., CONCURS IN THE RESULT

Stephen D. Marx
CHEHARDY, SHERMAN, WILLIAMS, MURRAY,
RECILE, STAKELUM & HAYES, LLP
One Galleria Boulevard, Suite 1100
Metairie, LA 70001

COUNSEL FOR PLAINTIFF/APPELLEE, JOHN BEGNAUD ELECTRIC MOTORS, INC.

Robert G. Harvey, Sr.
600 North Carrollton Avenue
New Orleans, LA 70119

COUNSEL FOR DEFENDANT/APPELLANT, ALTERNATIVE WELL INTERVENTION, LLC

AFFIRMED
December 20, 2017

This appeal arises from a contract for the construction and sale of a rig that plaintiff was building for defendant. Defendant instructed plaintiff to cease work on the rig after the rig was over halfway completed. Plaintiff requested payment for work completed and presented an invoice signed by the president of defendant. The trial court awarded plaintiff $262,500.00, plus interest from the date of judicial demand, as well as all costs. Defendant appealed contending that the trial court awarded a windfall amount considering the original contract price of the rig and electrical equipment that was never delivered to plaintiff.

We find that the evidence demonstrates that the rig was over halfway completed. Additionally, plaintiff remains obligated to pay for the electrical equipment that had yet to be delivered. Further, the former president for defendant signed no less than two documents acknowledging the $262,500.00 debt. As such, we find that the trial court did not commit manifest error by finding for plaintiff for $262,500.00. The judgment of the trial court is affirmed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Alternative Well Intervention, LLC ("AWI") provided "workover services to oil and gas companies in the Gulf of Mexico." John Begnaud Electric Motors, Inc. ("JBEM") previously constructed three rigs for AWI and was awaiting the final payment on rig 3 when AWI contracted with JBEM for the construction of rig 4 for $387,029.00. Once JBEM received the final payment on rig 3 and received the initial payment of $96,757.25 for rig 4, construction began. After the oil and gas market suffered a downturn, AWI ordered JBEM to halt construction on rig 4. AWI asked JBEM to submit an invoice for the amount of work completed on rig 4. The invoice reflected that AWI owed JBEM $262,500.00 for rig 4.

JBEM then needed cash and assigned the invoice to Crestmark Capital ("Crestmark"). John Stansbury, the former president of AWI, signed the invoice as an acknowledgment. Further, Mr. Stansbury accepted and agreed to the assignment by signing an "Invoice Acknowledgment Agreement" ("IAA") from Crestmark acknowledging the assignment and his ability to bind AWI. AWI never paid Crestmark on the invoice. JBEM repaid Crestmark for all of the monies Crestmark extended for the invoice. Crestmark then reassigned the invoice back to JBEM. AWI never paid JBEM.

JBEM filed a petition seeking the $262,500.00 payment from AWI. AWI filed Exceptions of No Right of Action and No Cause of Action. The Exception of No Right of Action was based on the premise that JBEM no longer possessed rights regarding the invoice. The trial court granted the Exception of No Right of Action with the right to amend. The Exception of No Cause of Action urged that JBEM was not entitled to attorney's fees. The trial court granted the Exception of No Cause of Action. JBEM then filed its First Supplemental and Amended Petition, which included the documentation concerning the assignment and reassignment of the invoice. The matter then proceeded to a bench trial.

The trial court found for JBEM and awarded $262,500.00, plus interest from the date of judicial demand, and all costs. AWI's Motion for Devolutive Appeal followed.

AWI contends that the trial court erred when computing the amount owed to JBEM. Specifically, AWI maintains that it should not be required to pay for a transformer JBEM did not accept delivery on and should not be held responsible for almost the entire agreed upon contract price for a finished rig 4.

STANDARD OF REVIEW

"Louisiana courts of appeal apply the manifest error standard of review in civil cases." *Detraz v. Lee*, 05-1263, p. 7 (La. 1/17/07), 950 So. 2d 557, 561. "[A] factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong." *Id*. To reverse a fact finder's factual determinations, "an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous." *Id*. "Thus, the issue before the court of appeal is not whether the trier of fact was right or wrong, but whether the fact-finder's conclusion was a reasonable one." *Snider v. Louisiana Med. Mut. Ins. Co.*, 14-1964, p. 5 (La. 5/5/15), 169 So. 3d 319, 323. "The appellate court must not reweigh the evidence or substitute its own factual findings because it would have decided the case differently." *Id*. Furthermore, "[w]here the factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous." *Id*.

"Where one or more legal errors interdict the trial court's fact-finding process, however, the manifest error standard becomes inapplicable, and the appellate court must conduct its own *de novo* review of the record." *Hamp's Const., L.L.C. v. Hous. Auth. of New Orleans*, 10-0816, p. 3 (La. App. 4 Cir. 12/1/10), 52 So. 3d 970, 973. "A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial." *Id*. "Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights." *Id*.

"'The manifest error standard of review also applies to mixed questions of law and fact.'" *State Farm Fire & Cas. Co. v. Hotel Mgmt. of New Orleans,*

L.L.C., 16-0822, p. 3 (La. App. 4 Cir. 5/3/17), 219 So. 3d 435, 438, *quoting A.S. v. D.S.*, 14-1098, p. 10 (La. App. 4 Cir. 4/8/15), 165 So. 3d 247, 254. "Conversely, purely legal issues 'are reviewed with the de novo standard of review.'" *State Farm*, 16-0822, p. 3, 219 So. 3d at 438, *quoting Gordon v. Gordon*, 16-0008, p. 3 (La. App. 4 Cir. 6/8/16), 195 So. 3d 687, 689.

VALUATION OF COMPLETED WORK

AWI asserts that the trial court committed manifest error by including the price of an undelivered transformer in the award to JBEM.

"Although a plaintiff can establish damages through evidence consisting only of his or her testimony, such testimony is subject to the trier of fact's evaluation of credibility." *Doucette v. Guient*, 15-1346, p. 11 (La. App. 4 Cir. 12/29/16), 208 So. 3d 444, 452.

JBEM presented the live testimony of John Begnaud, the president and owner of JBEM; the deposition testimony of Mr. Stansbury, the former president of AWI; the contract for rig 4; the final invoice to AWI; and several Crestmark documents, including the IAA, regarding the assignment of the final invoice.

Mr. Begnaud testified that AWI previously contracted with JBEM for the construction and sale[1] of three rigs prior to contracting for rig 4. As reflected by

[1] The dissent relies upon a distinction between a contract of sale and a contract to build in order to conduct a *de novo* review of the record. We find that distinction to be without a difference under the facts and circumstances of this case. Traditionally, courts examine whether the contract at issue was one for sale or build when the classification determines substantial rights of the parties and primarily concern the construction or sale of a building/home. *See Conmaco, Inc. v. S. Ocean Corp.*, 581 So. 2d 365 (La. App. 4th Cir. 1991) (determining whether redhibition applied). *See also Martinez v. Reno*, 99-114 (La. App. 5 Cir. 9/15/99), 742 So. 2d 1014 (determining right to damages for mental anguish); *Morris & Dickson Co., Inc. v. Jones Bros. Co., Inc.*, 29,379 (La. App. 2 Cir. 4/11/97), 691 So. 2d 882 (determining prescription); *Mayerhofer v. Three R's Inc.*, 597 So. 2d 151 (La. App. 3rd Cir. 1992) (right to nonpecuniary damages depends upon classification); *Degeneres v. Burgess*, 486 So. 2d 769 (La. App. 1st Cir. 1986) (classification governed prescriptive period and plaintiffs' recourse).

The present case only concerns damages for the breach of contract wherein the president of AWI signed the invoice containing the amount owed for the work completed and further acknowledged this exact amount owed to JBEM in correspondence with Crestmark. The amount

the invoice/contract entered into evidence, the price of rig 4 was $387,029.00. JBEM and AWI agreed upon three payments for rig 4: 25% as a down payment, 50% when halfway completed, and 25% when completed.

Mr. Begnaud testified that when AWI halted construction of rig 4, JBEM was "better than half way finished." AWI also requested that JBEM calculate the price of the work completed. Mr. Begnaud stated that he deducted the 25% already paid and the labor and materials remaining from the project price of $387,029.00 to calculate the amount owed. JBEM's final invoice to AWI was for $262,500.00. Mr. Begnaud stated that no deviations or alterations were made from the contract. Further, Mr. Begnaud testified that JBEM never accepted delivery of the "specially ordered" $174,500.00 transformer needed for rig 4 because JBEM was waiting to get paid for it.

Mr. Begnaud testified that when Mr. Stansbury was presented with the invoice, he did not express concerns regarding the amount. AWI had "a hard time coming up with the money to pay" JBEM, so Mr. Begnaud stated that JBEM decided to assign the invoice to Crestmark. Mr. Stansbury signed and dated the invoice, September 9, 2014. Mr. Begnaud testified that this signified AWI would pay Crestmark directly. Not having received any payments from AWI, Crestmark demanded that JBEM buy the invoice back. Crestmark then reassigned the invoice back to JBEM. Mr. Begnaud stated that AWI never paid the invoice.

Mr. Stansbury, the former president of AWI, testified that the investor group of AWI decided to halt construction on rig 4. Mr. Stansbury stated that "we signed" the invoice "so he could factor it." Further, Mr. Stansbury testified that he signed the IAA from Crestmark that indicated AWI would pay Crestmark.

on the invoice includes the "expense and labor already incurred." La. C.C. art. 2765.

However, Mr. Stansbury stated that AWI agreed to pay Mr. Begnaud and Mr. Begnaud would then pay Crestmark. Mr. Stansbury stated that he was "helping John out so he could factor the invoice." Mr. Stansbury had no reason to believe that rig 4 would not have been completed by JBEM if AWI had not halted construction.

In regards to the transformer JBEM ordered from Bayou Buff Electric ("Bayou Buff"), Mr. Stansbury testified that Bayou Buff was closed. Mr. Stansbury was unaware if Bayou Buff demanded payment for the transformer from JBEM. Mr. Begnaud stated that the transformer "was special ordered" with "no returns" and that Bayou Buff telephoned JBEM about the rig numerous times. Bayou Buff had not pursued legal action against JBEM "yet."

After reviewing the testimony and evidence presented, the trial court held in favor of JBEM and awarded $262,500.00. The trial court found that the alleged "fact that Bayou Buff is out of business does not mean it is not legally entitled to collect for the custom electrical equipment that [JBEM] ordered. It is true that [JBEM] has not been sued by Bayou Buff – yet." Further, the trial court stated that, "regarding the amount that AWI should be obligated to pay," the final invoice and the IAA from Crestmark were signed by Mr. Stansbury and acknowledged AWI's debt.

The contract provided that twenty-five percent of the contract price was due initially, fifty-percent at the halfway mark ("second draw"), and the last twenty-five percent due upon completion. It is undisputed that JBEM completed over fifty percent of rig 4 before AWI halted construction. Halting construction after JBEM completed over fifty-percent of rig 4 connotes that a larger monetary amount would be due to JBEM instead of the second draw amount asserted by AWI.

Additionally, AWI contends that it should not be responsible for the cost of the transformer. However, it is undisputed that JBEM specially ordered the transformer from Bayou Buff. While AWI asserts that Bayou Buff closed, thereby erasing JBEM's obligation for the transformer, no proof was presented.

Also, upon our review, it is clear from the record that Mr. Stansbury signed and dated the final invoice for work completed from JBEM.[2] Further, he signed the IAA, wherein he confirmed that he had the authority to issue checks to pay the invoice assigned to Crestmark and to approve the invoice for payment.[3] Mr. Begnaud testified that JBEM was over halfway completed with the construction of rig 4. Although AWI contends that Bayou Buff will never seek payment for the specially ordered transformer valued at $174,500.00,[4] AWI did not present evidentiary proof that JBEM would not be obligated to Bayou Buff. Accordingly, we do not find that the trial court committed manifest error by finding for JBEM or for ordering payment for $262,500.00, which exceeded the $193,514.50 second draw amount,[5] and affirm.

DECREE

[2] The dissent states that "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." We disagree. Mr. Begnaud testified that the $262,500.00 invoice "was the invoice to them when they told us to shut it down. Right there, we had invoiced them to that point." Counsel then asked: "does this . . . represent all of the labor costs and the material costs incurred by Rig Electric, you know, over and above the first payment that you had received?" Mr. Begnaud responded, "Yes, sir." Further, Mr. Begnaud stated that the $262,500.00 invoice was calculated by deducting the first 25% payment, deducting the work remaining, and deducting the materials left to purchase. Nothing in the record contradicts this testimony.

[3] The dissent further states that "[n]othing 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." While the final invoice from JBEM may not met the requirements of La. C.C. art. 3072 (formal requirements of a compromise), the record evidence demonstrates that Mr. Stansbury acknowledged that AWI owed JBEM $262,500.00 for the work completed on rig 4. Not only did Mr. Stansbury sign the invoice, he signed Crestmark's irrevocable acknowledgment that the invoice was assigned to Crestmark and that AWI would pay Crestmark $262,500.00 pursuant to the invoice.

[4] The trial court erroneously referenced $80,000.00 as the price of the transformer.

[5] Again, we note that the final invoice amount was justified because JBEM was over halfway completed with rig 4 when AWI halted construction.

For the above-mentioned reasons, we find that the record documented that JBEM ordered the transformer from Bayou Buff and continues to be obligated to pay for same. Considering this and that rig 4 was over halfway completed when AWI halted construction, we find that the trial court did not commit manifest error by awarding JBEM $262,500.00. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED