

**ANN STREIFFER, WIFE
OF/AND RICHARD
STREIFFER**

VERSUS

**DELTATECH
CONSTRUCTION, LLC, AND
SANDRA TOMASETTI**

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NO. 2018-CA-0155

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2013-10916, DIVISION "T"
Honorable Piper D. Griffin, Judge**

Judge Daniel L. Dysart

(Court composed of Judge Daniel L. Dysart, Judge Regina Bartholomew-Woods,
Judge Dale N. Atkins,)

**BARTHOLOMEW-WOODS, J., CONCURS IN PART AND DISSENTS IN
PART, WITH REASONS**

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**JUDMENT AFFIRMED AS TO
DELTATECH; REVERSED AS TO
SANDRA TOMASETTI, INDIVIDUALLY**

OCTOBER 10, 2018

Deltatech Construction, LLC, and Sandra Tomasetti, appeal a judgment against them, in favor of plaintiffs, Anne and Richard Streiffer, for damages in the amount of \$63,785.77, plus costs and attorney fees. For the reasons that follow, we affirm the judgment as to Deltatech Construction, LLC, and reverse the judgment as to Sandra Tomasetti, individually.

BACKGROUND:

Ann and Richard Streiffer (hereinafter “plaintiffs”), contracted with Deltatech Construction, LLC (hereinafter Deltatech), to remodel and renovate their home, located at 1138 Joseph Street in New Orleans. The Petition for Breach of Contract and Damages, alleges that plaintiffs contracted with Deltatech and Sandra Tomasetti (hereinafter “Tomasetti”), individually.

Plaintiffs allege in the petition filed November 20, 2013, that numerous problems arose during the renovation causing them to incur damages in the form of corrective work and materials purchased to fix or replace defective work and materials provided by Deltatech. The petition outlines in great detail the problems

incurred, but does not allege any actions taken by Tomasetti outside of her role as general contractor.

Following service of the petition on both defendants, a motion for additional time to respond was filed on December 26, 2013, on behalf of Tomasetti and Deltatech. The pleading was signed by Tomasetti, in proper person, both individually, and as a member of Deltatech. Additionally, Karl Guilbeau (hereinafter “Guilbeau”), signed in proper person as a member of Deltatech.¹ Guilbeau also listed his Louisiana Bar Roll number with “ineligible” in parentheses. The trial court signed an order granting an additional thirty days to respond.

On January 16, 2014, an Exception of No Cause of Action was filed as to Tomasetti, which was signed by her and Guilbeau, both in proper person. An answer was filed the same date on behalf of Deltatech, and signed by both Tomasetti and Guilbeau, in proper person as members of Deltatech. Guilbeau made no reference to his status as an attorney in either pleading.

Following a telephone conference with all parties, a judgment was signed by the trial court on October 20, 2015, ruling that Guilbeau was not eligible to practice law at that time, and thus could not represent Deltatech. In reasons for judgment, the trial court found that as Deltatech is a fictional legal person, it could only be represented by licensed counsel. The trial court stated that Deltatech “has no right to proceed without counsel and cannot act or appear *pro se*. DeltaTech

¹ Tomasetti and Guilbeau are married.

[sic] may only appear in court through counsel and may not be represented by its sole member Mr. Karl Guilbeau. Accordingly, the Court will not consider Mr. Guilbeau as a proper person to represent DeltaTech [sic] Construction, L.L.C., for purposes of this litigation.” The trial court thereafter ordered Deltatech to obtain counsel to proceed.

Deltatech applied to this Court and the Supreme Court for supervisory review. The notice of intent was signed by Guilbeau as a member of Deltatech. Both Courts denied the writ applications.

Despite the trial court’s ruling disqualifying Guilbeau from representing Deltatech, Guilbeau filed a Motion for Sanctions Pursuant to La. Code Civ. Proc. art. 863, and a Memorandum in Opposition to Plaintiffs Motion to Enforce Judgment rendered on October 20, 2015 (filed on September 21, 2016), and Deltatech Construction’s Witness List (filed on January 15, 2017). The trial court set a hearing on the Motion for Sanctions, after which the trial court granted plaintiffs’ motion and denied Deltatech’s motion.

On February 2, 2017, Tomasetti filed a Petition in Reconvension for Abuse of Process. Although it is unclear from the wording of the document, it appears that the demand is on behalf of her personally and on behalf of Deltatech. Contrary to the title of the pleading, the substance of the pleading answers all of the allegations made in plaintiffs’ petition. Plaintiffs moved to strike the reconventional demand based on its untimely filing.

On March 24, 2017, the trial court granted plaintiffs' motion in limine to exclude all witnesses and exhibits by Deltatech, and denied Tomasetti's motion to determine sufficiency of responses by plaintiffs. Counsel for plaintiffs stated that Deltatech had filed an answer, but that Tomasetti had not. The court explained that because issue had not been joined as to Tomasetti, the trial could not go forward against her, and suggested that the trial be bifurcated. Thereafter, Tomasetti informed the court that she had filed an amended witness list, indicating that she was appearing for trial, and plaintiffs' counsel moved for the trial court to enter a general denial on her behalf. The motion was granted and the matter proceeded to trial on April 4, 2017.

Following a three day trial, the trial court found in favor of plaintiffs and against Deltatech and Tomasetti, in her personal capacity. It awarded plaintiffs \$63,785.77, plus costs and attorney fees. This appeal follows.²

DISCUSSION:

In its first assignment of error, Deltatech asserts that proceeding to trial against it was tantamount to granting a default judgment. However, they argue that as no preliminary default was taken by plaintiffs, the judgment is null. We disagree.

As this issue presents a legal question, our review is *de novo*. *Gootee Const., Inc. v. Dale N. Atkins*, 15-376, pp. 4-5 (La.App. 4 Cir. 11/4/15), 178 So.3d 629, 632.

² Guilbeau filed a motion to enroll as counsel into the trial court record on November 30, 2017.

The record indicates that an answer was filed on behalf of Deltatech, and was signed by Tomasetti and Guilbeau, as members of the limited liability company. Subsequent to the filing of the answer, the trial court determined, after contradictory hearing, that the limited liability company must be represented by legal counsel, not by its members. However, the record confirms that Deltatech was properly served, attempted to answer, and its members were present at the three day trial.

“Louisiana courts have consistently held that failure to join issue, either by filing answer or by entering a preliminary default, is waived where parties who have been served go to trial on the merits without objection.” *Micelli v. Moore*, 499 So.2d 1298, 1299 (La.App. 4th Cir. 1986)(citations omitted).” A defendant is not required to answer when a plaintiff foregoes his right to a default judgment and proceeds to trial on the merits.” *Id.*

In *Citadel Builders, LLC v. Dirt Worx of La., LLC*, 14-2700 (La. 5/1/15), 165 So.3d 908, the Supreme Court held that the proper vehicle for striking an insufficient answer, even when it is filed by a non-attorney, is by a contradictory hearing as required by La. Code Civ. Proc. art. 964.³ “Had the trial court conducted the mandatory contradictory hearing in this matter, plaintiff would have had the opportunity to offer supporting proof for its motion and defendant would have had the opportunity to cure any deficiencies in its pleadings, either by

³ Article 964 provides: “The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter.”

controverting the plaintiff's proof or by engaging an attorney to appear on its behalf." *Citadel*, 14-2700, p. 4, 165 So.3d at 911. In *Citadel*, there was a question of whether there was supporting proof for the contention that the party filing an answer was an attorney or not, which is not an issue here. Nevertheless, in the present case, it is entirely possible that confronted with the potential for default in a contradictory hearing on the motion to strike, Deltatech may well have elected to retain counsel.

We also rely on *Seelig v. Kit World Super Store, Inc.*, in which this Court reversed a default judgment that was based on the trial court's finding that the defendant's answer was insufficient, in part because it was filed by a non-attorney. *Seelig*, 97-1592 (La.App. 4 Cir. 1/21/98), 705 So.2d 806. The *Seelig* court determined that "plaintiff should have moved to strike the answer and after a hearing, the court could have required that the deficiencies be cured. Failure to comply timely would result in the answer being stricken and then, default judgment would be a proper remedy." *Seelig*, 97-1592, 705 So.2d at 808-09.

Accordingly, we find that Deltatech was properly served, attempted to answer the suit against it, and its members were present for trial. They did not object to proceeding with the case against Deltatech. Therefore, this assignment of error is without merit.

As to the merits of the judgment against Deltatech, we note that Deltatech does not assign as error nor does it brief the basis for the judgment against it.

Accordingly, we consider these issues abandoned. *Uniform Rules- Courts of Appeal* 2-12.4 B (3) and (4).

In the second assignment of error, defendant Tomasetti argues that the district court erred in piercing the corporate veil to find Tomasetti personally liable. We agree.

Plaintiffs sued Tomasetti individually, asserting that she acted personally in her attempts to correct problems in the renovation of their property. On appeal, plaintiffs do not brief the jurisprudence addressing this issue; rather, they outline the instances that Tomasetti personally assumed responsibility for the problems that arose.

A limited liability company is a business entity separate from its members and its members' liability is governed solely and exclusively by the law of limited liability companies. *Ogea v. Merritt*, 13-1085, pp. 26-27 (La. 12/10/13), 130 So.3d 888, 906 (citing La. R.S. 12:1320⁴). "The fact that a person is the managing

⁴ La. R.S. 12:1320 provides:

- A. The liability of members, managers, employees, or agents, as such, of a limited liability company organized and existing under this Chapter shall at all times be determined solely and exclusively by the provisions of this Chapter.
- B. Except as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.
- C. A member, manager, employee, or agent of a limited liability company is not a proper party to a proceeding by or against a limited liability company, except when the object is to enforce such a person's rights against or liability to the limited liability company.
- D. Nothing in this Chapter shall be construed as being in derogation of any rights which any person may by law have against a member, manager, employee, or agent of a limited liability company because of any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against any such person because of any fraud practiced upon it by him.

member of a limited liability company and/or has a significant ownership interest therein does not in itself make that person liable for its debts.” *Charming Charlie, Inc. v. Perkins Rowe Assoc., LLC*, 11-2254, pp. 7-8 (La.App. 1 Cir. 7/10/12), 97 So.3d 595, 599. It is self-evident that a person must address the issues relative to the contract, and not the juridical entity.

The Louisiana Supreme Court has set forth four factors to be utilized when determining whether a member of a limited liability company should be found personally liable for negligence or wrongful acts: “1) whether a member’s conduct could be fairly characterized as a traditionally recognized tort; 2) whether a member’s conduct could be fairly characterized as a crime, for which a natural person, not a juridical person could be held culpable; 3) whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC; and 4) whether the conduct at issue was done outside the member’s capacity as a member.” *Ogea*, 13-1085, p. 16, 130 So.3d at 900-01. The specific question to be asked is: “whether a member of an LLC can be held personally liable for conduct undertaken in furtherance of the LLC’s contract[?]” *Id.*, 13-1085, p. 18, 130 So.3d at 901-02.

As there are no allegations of fraud raised, nor is there any proof that Tomasetti is a member of professions subject to a breach of professional duty claim, we examine whether plaintiffs have carried their burden to prove that Tomasetti committed some “other negligent or wrongful act.”

Ogea instructs as to factor No. 1, that the member's statutory duty must be "something more than the duty inherent in the LLC's contract not to engage in poor workmanship; otherwise, the general statutory rule of limited liability [La. R.S. 12:1320] would be negated in any case where an LLC had a contractual duty to the claimant not to engage in poor workmanship." *Id.*, 13-1085, p. 18, 103 So.3d at 902.

Factor No. 2 is applicable to a violation of La. R.S. 37:2160, which is engaging in the business of contracting without authority, i.e., not possessing a valid contractor's license. There are no allegations that Deltatech was operating without a valid contractor's license.

Factor No. 3, perhaps the most important factor to be applied to the facts of this case, is whether the member's conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC. If these factors are present, the member may be held personally liable.

The fourth factor does not apply in this matter as there are no allegations that Tomasetti assumed any personal duties on behalf of Deltatech. As previously noted, the testimony indicates that she addressed the issues raised by plaintiffs in her capacity as a member of the LLC.

The contract, which was signed by Tomasetti "For Contractor: Deltatech Construction LLC," clearly shows that Tomasetti was not acting in any personal capacity when she signed the contract with the plaintiffs. Further, there is no evidence that Tomasetti ever acted outside the scope of the contract in her efforts

to rectify problems with the renovation. It is clear that Tomasetti's actions were required by the contract, and her contacts with the plaintiffs were in furtherance of the performance of the contract. As all of the testimony and evidence adduced at trial indicates that Tomasetti was acting on behalf of the LLC to address plaintiffs' complaints of poor workmanship, we find that plaintiffs have not carried their burden of proof to find Tomasetti personally liable.

Accordingly, we reverse that portion of the judgment finding Tomasetti personally liable for damages allegedly incurred by the plaintiffs.

In their third assignment of error, defendants seek attorney fees for their successful maintenance of an action in nullity. As we hereinabove find that the judgment rendered against Deltatech is not null, this assignment of error lacks merit.

Last, defendants seek sanctions for references in post-trial memorandum relative to subject matter jurisdiction. Specifically, plaintiffs cited to La. Code Civ. Proc. art. 4921 that applies to cases in justice of the peace court. Again, defendants argue that the trial court granted a default judgment against it. The judgment against Deltatech was rendered after a three day bench trial; the judgment is not a default judgment. Therefore, this argument has no merit.

For the reasons set forth above, the portion of the judgment finding Deltatech liable is affirmed. The portion of the judgment finding liability on the part of Sandra Tomasetti, individually, is reversed.

**JUDGMENT AFFIRMED AS TO
DELTATECH; REVERSED AS TO
SANDRA TOMASETTI, INDIVIDUALLY**