

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2005 CA 1642**

**MORTON BUILDINGS, INC.**

**VERSUS**

**REDEEMING WORD OF LIFE CHURCH AND DAVID M. DIAMOND**

*consolidated with*

**NUMBER 2005 CA 1643**

**REDEEMING WORD OF LIFE CHURCH, INC.**

**VERSUS**

**MORTON BUILDINGS, INC. AND JOHN B. DUNLAP, III**

**Judgment Rendered: SEP 15 2006**

**Appealed from the  
Nineteenth Judicial District Court  
in and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 415,152 c/w 460,656**

**Honorable William A. Morvant, Judge Presiding**

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**Scott E. Mercer  
Baton Rouge, LA**

**Attorney for Plaintiff/Appellee,  
Morton Buildings, Inc.**

**Richard Creed, Jr.  
Baton Rouge, LA**

**Attorney for Defendant/Appellant,  
Redeeming Word of Life Church, Inc.**

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**BEFORE: CARTER, C. J., WHIPPLE AND HUGHES, JJ.**

**WHIPPLE, J.**

Defendant, Redeeming Word of Life Church, appeals from a judgment of the trial court, granting the motion for summary judgment of plaintiff, Morton Buildings, Inc., awarding plaintiff sums due under a construction contract and dismissing defendant's claims. For the following reasons, we amend and affirm as amended.

**FACTS AND PROCEDURAL HISTORY**

In 1994, Reverend David Diamond, pastor of Redeeming Word of Life Church, Inc. (Redeeming Word), entered into design and construction contracts with Morton Buildings, Inc. (Morton Buildings) for the design and construction of a gymnasium and educational building.

Before construction began, the parties became aware that the proposed elevation for the building as set forth in the plans did not comply with the building code for the City of Baton Rouge/Parish of East Baton Rouge (City/Parish) and that it would be necessary to construct the building at an elevation over two feet higher than that proposed in order to comply with the building code.

Due to cost constraints, Morton Buildings, through its representative, agreed to apply for an elevation variance on behalf of Redeeming Word along with the building permit, requesting that the church be allowed to construct the building at the lower elevation. When a building permit was subsequently issued, Morton Building assumed that the variance had also been granted and, accordingly, began construction of the building at the lower elevation.

However, when construction of the building was approximately 90% complete, the Department of Public Works for the City/Parish denied the application for an elevation variance for construction of the gymnasium. Because the building, as constructed, was not in compliance with the building code and a

variance was not granted, Redeeming Word contended that it was unable to obtain a certificate of permanent occupancy upon completion of construction.

Thus, Reverend Diamond, on behalf of Redeeming Word, refused to make final payment on the construction contract, design services contract and a change order. Morton Buildings then filed suit against Redeeming Word seeking payment on the contracts. Redeeming Word reconvened against Morton Buildings alleging breach of the construction contract and seeking return of the contract price and damages.

Following trial, the trial court found that construction of the building was substantially complete, thus entitling Morton Buildings to payment on the contracts. The court further found that while Morton Buildings had undertaken to help Redeeming Word secure the building permit and elevation variance, it had no duty to guarantee that the variance would be granted. Thus, the trial court found no breach of contract by Morton Buildings and denied Redeeming Word's reconventional demand. Redeeming Word appealed the trial court's judgment to this court.

Meanwhile, while this matter had been pending on appeal, Redeeming Word filed a separate suit against Morton Buildings, contending that Morton Buildings had committed the torts of conversion and abuse of civil process in executing on the original judgment of the trial court in its favor during the pendency of Redeeming Word's devolutive appeal. The suit was assigned docket number 460,656 in the trial court below, and the two suits were then consolidated.

On appeal, this court reversed the trial court's judgment in favor of Morton Buildings in its entirety. Morton Buildings, Inc. v. Redeeming Word of Life Church, Inc., 97-2251, (La. App. 1st Cir. 11/6/98), 744 So. 2d 5, 12, writ denied, 99-0687 (La. 4/30/99), 741 So. 2d 16. With regard to Morton Buildings' demand, this court concluded that, because the building could not serve its intended purpose

at its present elevation, Morton Buildings had not substantially performed the contract. This court noted that Redeeming Word was occupying the building at the time of trial pursuant to a temporary occupancy permit, but that Reverend Diamond had testified that the temporary occupancy permit was granted only for the duration of the litigation. Morton Buildings, Inc., 97-2251, 744 So. 2d at 8 n.3. Thus, this court concluded, because the building was not fit for its intended purpose, Morton Buildings had failed to prove its entitlement to payment on the construction contract. Morton Buildings, Inc., 97-2251, 744 So. 2d at pp. 11-12.

Additionally, with regard to Redeeming Word's reconventional demand, this court further concluded that, while Morton Buildings had no duty to guarantee that a flood variance would be granted, Morton Buildings had breached the duty it assumed of applying for the flood variance by simply assuming that the variance had been granted by virtue of the building permit having been granted and beginning construction without verifying that the variance had in fact been granted. Morton Buildings, Inc., 97-2251, 744 So. 2d at 11. Accordingly, this court awarded Redeeming Word a return of all sums paid on the construction contract. Morton Buildings, Inc., 97-2251, 744 So. 2d at 12. The Supreme Court denied Morton Buildings' writ application on April 30, 1999. Morton Buildings, Inc. v. Redeeming Word of Life Church, Inc., 99-0687 (La. 4/30/99), 741 So. 2d 16. Morton then refunded the sums that Redeeming Word had paid on the construction contract.

Thereafter, on June 1, 1999 Morton Buildings filed a petition to nullify this court's previous judgment in favor of Redeeming Word. Morton Buildings alleged that subsequent to the Supreme Court's denial of its writ application and the resulting finality of this court's prior judgment, Redeeming Word had continued to use and occupy the building and had, in fact, obtained a certificate of permanent occupancy on June 16, 1999.

Morton Buildings alleged that during the pendency of the appeal of the original judgment, Redeeming Word had been informed by an attorney for the City/Parish that the City/Parish would grant Redeeming Word a certificate of permanent occupancy upon Redeeming Word's execution of an indemnification agreement in favor of the City/Parish. Additionally, Morton Buildings alleged that Redeeming Word had, in fact, executed the indemnification agreement in August of 1998, prior to rendition of this court's opinion in the original appeal. Thus, Morton Buildings contended, Redeeming Word's silence in this court and the Supreme Court as to its ability to obtain a certificate of permanent occupancy by mere execution of an indemnity agreement and its continued representation that the building was useless constituted fraud and ill practices pursuant to LSA-C.C.P. art. 2004. Accordingly, Morton Buildings claimed that the basis for this court's previous judgment no longer existed.

Following a hearing on cross motions for summary judgment, the trial court denied Redeeming Word's motion for summary judgment, granted Morton Buildings' motion and annulled the November 6, 1998 judgment granted on appeal in favor of Redeeming Word pursuant to LSA-C.C.P. art. 2004, finding that the prior judgment was obtained by ill practices.<sup>1</sup>

On appeal of the judgment nullifying this court's previous judgment, this court noted that Redeeming Word had represented to the trial and appellate courts that it would not be able to legally occupy the building on a permanent basis.

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<sup>1</sup>Under certain circumstances as set forth in LSA-C.C.P. art. 2005, a judgment affirmed, reversed, amended, or otherwise rendered by an appellate court may be annulled through an action for nullity. The action to annul a judgment rendered by an appellate court must be brought in the trial court. LSA-C.C.P. art. 2006.

Morton Buildings, Inc. v. Redeeming Word of Life Church, 2001-1837 (La. App. 1st Cir. 10/16/02), 835 So. 2d 685, 689, writ denied, 2002-2733 (La. 1/24/03), 836 So. 2d 46. This court further concluded that Redeeming Word's failure to inform Morton Buildings or this court of its pending resolution with the City/Parish undoubtedly thwarted the fairness of the prior judgment and that enforcing the original judgment would be unconscionable and inequitable. Morton Buildings, Inc., 2001-1837, 835 So. 2d at 692. Thus, this court affirmed the trial court's judgment nullifying the prior appellate court judgment. This court further concluded that our decision put the parties in the same legal positions they occupied prior to the original trial court judgment, i.e., Morton Buildings had a main demand for specific performance for an alleged unpaid portion of the contract price, and Redeeming Word had a reconventional demand for damages. Morton Buildings, Inc., 2001-1837, 835 So. 2d at 692-693. Redeeming Word's claims of alleged conversion and abuse of process in the consolidated matter were not before this court in the appeal of the judgment of nullity. Morton Buildings, Inc., 2001-1837, 835 So. 2d at 688 n.2.

After the matter was remanded to the trial court, Morton Buildings filed another petition, seeking to recover the total amount due under the construction contract. In response to Morton Buildings' petition filed after remand, Redeeming Word again filed a reconventional demand, in which it contended that because the building was constructed at the lower elevation and no elevation variance had been granted, Redeeming Word was unable to obtain a permanent certificate of occupancy and, accordingly, that Morton Buildings breached the construction contract by failing to construct a building in compliance with applicable codes and regulations.

Morton then filed a motion for summary judgment, contending that there were no genuine issues of material fact and that it was entitled to judgment in its

favor as a matter of law. Following a hearing on the motion, the trial court rendered judgment, granting Morton Buildings' motion for summary judgment, awarding Morton Buildings \$183,197.00 with contractual interest from the date of default, awarding Morton Buildings \$185,151.01 in attorney's fees and \$19,533.87 in costs, dismissing Redeeming Word's reconventional demand and dismissing Redeeming Word's claims in consolidated suit number 460,656.

From this judgment, Redeeming Word appeals, alleging in its single assignment of error that the trial court committed legal error in granting Morton Buildings' motion for summary judgment.

### **SUMMARY JUDGMENT**

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." LSA-C.C.P. art. 966(B). The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. The procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2).

In determining whether summary judgment is appropriate, appellate courts conduct a *de novo* review of the evidence, employing the same criteria that governed the trial court's determination of whether summary judgment is appropriate. BellSouth Telecommunications, Inc. v. Industrial Enterprises, Inc., 96-0682 (La. App. 1st Cir. 2/14/97), 690 So. 2d 145, 148.

The burden of proof remains with the mover. However, pursuant to LSA-C.C.P. art. 966(C)(2), if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will

be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. Keller v. Case, 99-0424 (La. App. 1st Cir. 3/31/00), 757 So. 2d 920, 922, writ denied, 2000-1874 (La. 9/29/00), 770 So. 2d 354. Moreover, as consistently noted in LSA-C.C.P. art. 967(B), the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence which will establish that material facts are still at issue. Hunter v. Tensas Nursing Home, 32,217 (La. App. 2nd Cir. 10/27/99), 743 So. 2d 839, 841, writ denied, 99-3334 (La. 2/4/00), 754 So. 2d 228.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Spears v. Jones, 2000-2799 (La. App. 1st Cir. 2/15/02), 807 So. 2d 1182, 1185, writs denied, 2002-0663, 2002-0767 (La. 5/3/02), 815 So. 2d 106, 826.

## **DISCUSSION**

As stated above, Morton Buildings, in its petition filed after remand, sought full payment on the construction contract, including the sums it had reimbursed to Redeeming Word pursuant to this court's original opinion, contending that the gymnasium/educational building was constructed pursuant to the contracts between the parties and that Redeeming Word enjoyed unrestricted use of the building Morton Buildings had constructed. Thus, Morton Buildings sought payment of \$185,761.00 with a 1.5% monthly service charge from the date of default. Redeeming Word, through its reconventional demand, contended that Morton Buildings had materially breached its contract with Redeeming Word by failing to design and construct the building in accordance with applicable codes, rules, regulations and laws by constructing the building more than two feet lower than the flood elevation required by the Building Code of the City/Parish. Thus, in

its reconventional demand, Redeeming Word sought specific performance of the design and building contracts including correction of the improperly performed work. Alternatively, Redeeming Word sought damages for the purported diminished value of the building, including, but not limited to, the total cost of replacing the building.

Under Louisiana law, a building contractor is entitled to recover the contract price even though defects and omissions are present when it has substantially performed the building contract. “Substantial performance” means that the construction is fit for the purposes intended despite the deficiencies. Mayeaux v. McInnis, 2000-1540 (La. App. 1st Cir. 9/28/01), 809 So. 2d 310, 313, writ denied, 2001-3286 (La. 3/8/02), 810 So. 2d 1164. The factors to be considered in determining whether there has been substantial performance include the extent of the defect or nonperformance, the degree to which nonperformance has defeated the purpose of the contract, the ease of correction, and the use or benefit to the owner of the work already performed. Mayeaux, 2000-1540, 809 So. 2d at 313.

In support of its motion for summary judgment, Morton Buildings presented evidence to establish that it completed construction of the building in early February of 1995 and that Redeeming Word began occupying and using the building as of February 1995. Additionally, Morton Buildings presented evidence establishing that although the request for an elevation variance was denied, Redeeming Word obtained a temporary occupancy permit in late January or early February 1995 and a certificate of permanent occupancy on June 16, 1999, and that Redeeming Word had used and occupied the building ever since February of 1995. Thus, Morton Buildings contended, because Redeeming Word had always been able to use the building for the purposes intended since the building’s completion, the issue of the denial of the elevation variance was moot, and Morton Buildings was entitled to payment under the construction contract.

In its reasons for judgment in support of the grant of summary judgment, the trial court noted that it was undisputed that prior to construction of the building at issue, the parties to the contract contemplated that the building would be constructed at the same elevation as the existing building on the site. Moreover, the court found that it was also undisputed that when the elevation problem was discovered, Reverend Diamond, on behalf of Redeeming Word, nonetheless wanted the building constructed at the same elevation as the existing building and sought to obtain (or to receive on its behalf) a variance in the elevation requirement to avoid incurring any additional cost for site preparation. The court concluded that Reverend Diamond's actions in seeking a variance demonstrated that, contrary to its assertions in its reconventional demand, Redeeming Word was not seeking a building constructed according to the building code, but rather sought to have its building constructed at the lower elevation, i.e., a building that varied from the building code requirements.

With regard to the denial of the variance request, the trial court rejected Redeeming Word's position that the denial of the elevation variance somehow relieved it of its obligations under the construction contract and further concluded that the denial of the variance did not create a genuine issue of material fact. Specifically, the trial court noted that Redeeming Word's obtainment of certificates of temporary occupancy and, later, permanent occupancy achieved the same result as if the variance had been granted, i.e., the right to legally use and occupy the building without interruption from the time of its completion in early 1995. Thus, the court concluded that no genuine issues of material fact existed as to the formation, execution and performance of the construction contract and that Morton Buildings was entitled to summary judgment in its favor as a matter of law.

With regard to Redeeming Word's reconventional demand for specific performance and/or damages, the court further found that Morton Buildings was

entitled to summary judgment in its favor dismissing the reconventional demand. The court also dismissed Redeeming Word's consolidated petition alleging conversion and abuse of civil process based on Morton Buildings' execution on the original trial court judgment during the pendency of Redeeming Word's devolutive appeal.

On appeal, Redeeming Word lists only one assignment of error, i.e., that the trial court committed legal error in granting summary judgment. However it outlines in its appellate brief fifteen alleged issues of fact in support of its assignment of error. Thus, we will address these alleged issues of fact individually in our *de novo* determination of whether summary judgment was appropriate.

Redeeming Word first alleges that an issue of fact exists as to whether Redeeming Word agreed to construct the gymnasium/educational building below the required elevation level. However, in support of its motion for summary judgment, Morton Buildings presented the testimony of Reverend Diamond himself, wherein he acknowledged that he initially contemplated that the building would be constructed at "about the same level as the existing building." Additionally, Reverend Diamond's testimony established when he became aware of the elevation problem, Reverend Diamond did not wish to expend the additional \$7,000.00 to \$8,000.00 required to raise the building to the required elevation. Rather, Reverend Diamond hoped to obtain a variance **for the purpose of constructing the building at the lower elevation.** Accordingly, we find no merit to Redeeming Word's contention that an issue of fact existed as to whether Redeeming Word agreed to construction of the building at the lower elevation.

Redeeming Word next contends that an issue of fact exists as to whether dirt work to bring the building's elevation up to the required level was contemplated in the original contract. At the outset, we note that the contract at issue is silent as to the exact quantities of dirt that were to be used in site preparation or as to the exact

elevation at which the building was to be constructed.<sup>2</sup> Nonetheless, the uncontradicted testimony of the parties was that at the time the contract was confected, they contemplated constructing the new building at the same elevation as the existing building. Specifically, Brian Smyda, the sales consultant for Morton Buildings who negotiated the contract at issue with Redeeming Word and Reverend Diamond, testified that when negotiating the contract, he and Reverend Diamond had agreed that the new building would be constructed at the same elevation as the existing building. He further testified that before the contract was confected, Morton Buildings determined that the building site would have to be raised by eight inches in order to construct the new building at the same elevation as the existing building on the property.<sup>3</sup> Smyda testified that he had determined exactly how much fill dirt was needed to construct the building at the agreed-upon elevation, and that the price for site preparation he had computed was reflected in the contract between the parties.

Moreover, as stated above, Reverend Diamond also acknowledged in his testimony that he initially contemplated that the building would be constructed at “about the same level as the existing building.” Thus, when the parties confected the contract, they clearly did not contemplate the expense of dirt work to raise the elevation of the building by over two feet higher than the elevation they had agreed upon.

Accordingly, on *de novo* review, we find no merit to Redeeming Word’s contention that a genuine issue of material fact existed as to whether the original

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<sup>2</sup>With regard to site preparation, the contract provided as follows: “Site prep[a]ration will consist of removing top soil and placing compacted fill to elevation needed for proper drainage.”

<sup>3</sup>Additionally, we note that the subcontract that Morton Buildings entered into with Larry Reeves on September 14, 1994, for the site preparation work provided that Reeves would remove the existing top soil and place eight inches of compacted fill at the site. Redeeming Word offered no countervailing evidence to establish or even suggest that any additional site preparation work was originally contemplated.

contract contemplated dirt work to raise the building's elevation by over two feet.

The third issue of fact that Redeeming Word contends still exists is whether Morton Buildings chose to request a variance rather than incurring the \$7,000.00 to \$8,000.00 expense necessary to raise the building. However, the uncontradicted evidence presented establishes that Smyda discussed the possibility of Redeeming Word obtaining an elevation variance with Reverend Diamond as an alternative solution to Redeeming Word incurring any additional expense to conform to the code requirements. At that point, Reverend Diamond, not Morton Buildings or its representative, chose to pursue the variance request so that the building could be constructed at the originally agreed-upon lower elevation at the originally agreed-upon contract price. Accordingly, we also find no merit to the contention that a genuine issue of material fact exists as to who chose to request the elevation variance.

Redeeming Word further contends that a fourth issue of fact remains as to whether Morton Buildings had the responsibility to perform all work in compliance with the City/Parish codes. However, we note that, as discussed above, Redeeming Word desired to have the building constructed at the originally contemplated elevation for the originally agreed-upon price. Even when Redeeming Word became aware of the higher elevation required to bring the building within code requirements, it nonetheless sought to have the building constructed at the lower elevation by requesting an elevation variance. While the elevation variance was not ultimately granted, the variance request is relevant in that it demonstrates the intent of Redeeming Word to have the building constructed at the lower elevation, which varied from the code requirements. Moreover, the fact that the variance was not ultimately granted is of no moment inasmuch as a certificate of permanent occupancy was granted to Redeeming Word, thereby achieving the same result, *i.e.*, allowing Redeeming Word to legally use and

occupy the building as constructed for its intended purpose. Thus, we also find no merit to the contention that this issue raises a genuine issue of material fact.

Next, Redeeming Word contends that a genuine issue of material fact exists as to whether Morton Buildings began work at its own peril by assuming that an elevation variance had been granted when the building permit was issued. However, we note that not every potential fact issue constitutes a **material** issue of fact. See Spears, 2000-2799, 807 So. 2d at 1185. In the instant case, whether Morton Buildings proceeded with construction at its own peril by merely assuming that the elevation variance had been granted is irrelevant given that a certificate of permanent occupancy was ultimately granted. Upon completion of the building, Redeeming Word was issued a temporary occupancy permit, and Redeeming Word was immediately able to occupy and use the building for its intended purpose as constructed. Redeeming Word has always enjoyed unrestricted use and occupancy of its building. More importantly, with the issuance of the certificate of permanent occupancy, any remaining issue as to whether it could continue, on a permanent basis, to legally use and enjoy its building at the elevation upon which it was constructed was resolved. Accordingly, the issue of whether or not Morton proceeded with construction at its own peril is simply no longer a material issue of fact in this case.

Redeeming Word lists as its sixth unresolved issue of fact the issue of whether Morton Buildings agreed to perform duties on behalf of Redeeming Word that were not called for in the contract. In its brief to this court, Redeeming Word avers that Smyda, on behalf of Morton Buildings, agreed to assume the responsibility for applying for the variance for Redeeming Word and that, by obligating itself to handle the variance application procedure, Morton Buildings assumed the duty to ascertain the status of the variance application prior to beginning construction.

However, we conclude that any issue regarding whether Morton Buildings assumed any additional duties other than those listed in the contract is also no longer a material issue in this case. As stated above, the issuance of the certificate of permanent occupancy achieved the same result as if the variance had been granted: it allowed Redeeming Word to continue to legally use and occupy the building as constructed for its intended purpose. With the issuance of the certificate of permanent occupancy, any remaining issue as to whether Redeeming Word could continue to legally use and enjoy its building on a permanent basis at the elevation constructed was resolved. Accordingly, we conclude that the issue of whether Morton Buildings assumed any additional duties with regard to the variance application procedure has been mooted by the issuance of the certificate of permanent occupancy.

Redeeming Word next contends that a seventh unresolved material issue of fact is whether Redeeming Word accepted the site preparation work and foundation work, but only with objections. Redeeming Word argues that in a February 10, 1995 letter from Redeeming Word's attorney to Morton Buildings, Redeeming Word placed Morton Buildings in default of the construction contract on the basis of "numerous" alleged defects, including a cracked slab, that allegedly rendered the building unfit for its intended purpose. Based upon this letter, Redeeming Word contends that a material issue of fact exists as to whether it accepted the site preparation and foundation work without objection, and was thereby estopped from defending the suit, and pursuing its reconventional demand, on the basis of an improper elevation, or whether its February 10, 1995 written

rejection of the work, prior to occupancy of the building, overcame any “constructive acceptance” of the work.<sup>4</sup>

In the trial court’s oral reasons in support of the granting of summary judgment, the court found as follows:

Redeeming Word had knowledge of the elevation difference before the slab was even poured. It didn’t object. And to the contrary, based on the submissions with the motion for summary judgment, it accepted the site preparation and the foundation reports and made payments, knowing that it was below code, that it didn’t rise to the necessary level the City-Parish had set. And I don’t think it can now come before the Court and argue that it contracted for a building in compliance with code when the records reflect that that is never what it contemplated even before it found out the elevation problem.

However, the reason the trial court found that Redeeming Word was, in essence, estopped from complaining about the elevation at which the building was constructed was not based on a finding that Redeeming Word had somehow constructively accepted the work by failing to object to the elevation prior to occupying the building.

Rather, as noted by the trial court in its reasons, Reverend Diamond actively desired that the building be constructed at the lower elevation, as long as it could be legally occupied and could be insured. Redeeming Word’s contention was that the denial of the elevation variance prevented it from obtaining a certificate of permanent occupancy. If, in fact, Redeeming Word had been unable to obtain a

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<sup>4</sup> In support of its motion for summary judgment, Morton Buildings presented an Acceptance of Subcontract Work signed by Reverend Diamond on November 17, 1994, through which Reverend Diamond accepted the concrete foundation and slab work as having “been satisfactorily completed to plans and specifications agreed upon.” Moreover, Howard Graham, a member of Redeeming Word who performed some of the interior work on the building, also signed an Acceptance of Subcontract Work on behalf of Redeeming Word for the site preparation on December 29, 1994, certifying that the site preparation had “been satisfactorily completed to plans and specifications agreed upon.” When questioned about whether Graham was authorized to sign documents in connection with construction of the building, Reverend Diamond acknowledged, “[a]pparently, so I guess.” Upon further questioning, Reverend Diamond stated that Graham would not have acted without approval or authorization to do so. Notably, neither of these documents lists any objections to the site preparation and foundation work or limitations as to the acceptance of that work. Of course, at that point in time, neither of the parties was yet aware that the elevation variance had not been granted.

certificate of permanent occupancy (and thus had been deprived of the ability to legally use and occupy the building), Redeeming Word could validly argue that the denial of the variance application prevented it from obtaining a certificate of permanent occupancy, rendering the building useless for its intended purpose, and, thus, that Redeeming Word had not gotten what it bargained for.

However, where, as here, the undisputed facts demonstrate that Redeeming Word sought to have the building constructed at the lower elevation and that Redeeming Word was subsequently granted a certificate of permanent occupancy, which allows it to legally use and occupy the building for its intended purpose at the elevation **agreed to by the parties**, and where the cost of insurance was not affected by the elevation of the building, Redeeming Word cannot now complain that it did not get what it bargained for. Rather, the undisputed facts demonstrate that Redeeming Word got exactly what it bargained for, i.e., a building constructed at the lower elevation it requested that it is able to legally occupy and use for its intended purpose. Accordingly, we find no merit to Redeeming Word's argument that a material issue of fact remains as to whether it accepted the site preparation and foundation work.

In its eighth alleged issue of fact, Redeeming Word contends that a material issue of fact remains as to whether Morton Buildings breached the construction contract by failing to obtain the elevation variance. At the outset, we note that the undisputed facts now demonstrate that Morton Buildings never obligated itself to **obtain** an elevation variance. Rather, it agreed to fill out the application for the variance on behalf of Redeeming Word. Moreover, as stated above, the fact that the variance was not ultimately granted is of no moment in that a certificate of permanent occupancy was granted to Redeeming Word, thereby achieving the same result, i.e., allowing Redeeming Word to legally use and occupy the building, as constructed, for its intended purpose. Redeeming Word's complaint that the

denial of the elevation variance prevented it from obtaining a certificate of permanent occupancy no longer has merit. Thus, we also find no merit to Redeeming Word's contention that a genuine issue of material fact remains as to whether Morton Buildings' failure to obtain the variance constituted a breach of contract.

Redeeming Word further alleges that a ninth issue of material fact exists as to whether Morton Buildings completed the building. As stated above, a building contractor is entitled to recover the contract price even though defects and omissions are present when it has substantially performed the building contract, meaning that the construction is fit for the purposes intended despite the deficiencies. Mayeaux, 2000-1540, 809 So. 2d at 313. The evidence offered in support of the motion for summary judgment demonstrates that the building was completed in early February 1995 and that Redeeming Word began occupying the building shortly thereafter and has continued to occupy the building since its completion. Redeeming Word did not point to any evidence to dispute that the building had been substantially completed. Indeed, Reverend Diamond testified that Morton Buildings had constructed a "good building" that was structurally sound. Thus, we find no merit to its contention that an issue of fact remains as to the completion of the building.

In its tenth through thirteenth alleged issues of fact, Redeeming Word contends that issues of fact remain with regard to the reconventional demand in which it sought specific performance of the construction contract, including "raising the building elevation to comply with all rules, regulations and applicable building codes," or, alternatively, damages for the diminished value of the

building, including the total cost of replacing the building.<sup>5</sup> Specifically, Redeeming Word contends that issues of fact remain as to whether Redeeming Word is entitled to specific performance, whether the building has a diminished value given that the elevation is below that legally required, whether Redeeming Word received the product it bargained for, and the amount owed as the cost of repair.

Redeeming Word would bear the burden of proof at trial with regard to its reconventional demand for specific performance or, alternatively, damages. Thus, pursuant to LSA-C.C.P. art. 966(C)(2), Morton Buildings merely had to point out that there is an absence of factual support for one or more elements essential to the Redeeming Word's claim. As stated above, the basis of Redeeming Word's reconventional demand was that Morton Buildings had breached the construction contract by constructing the building at the lower elevation without an elevation variance having been granted, thus preventing Redeeming Word from obtaining a certificate of permanent occupancy. In support of its motion for summary judgment, Morton Buildings presented evidence to establish that Redeeming Word had, in fact, obtained a certificate of permanent occupancy, thereby entitling it to continue to occupy the building permanently as constructed at the agreed-upon elevation.

In an effort to obtain a certificate of permanent occupancy, Redeeming Word, by letter dated August 7, 1998, requested that the City/Parish "grant the Redeeming Word of Life Church a flood variance so that we can obtain a final inspection on our building which was erroneously constructed below the required

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<sup>5</sup>In its fifteen alleged issues of fact, Redeeming Word does not specifically argue that any issues of fact remain as to the granting of summary judgment dismissing its consolidated petition, wherein it alleged that Morton Buildings committed the torts of conversion and abuse of civil process in executing on the original judgment during the pendency of Redeeming Word's devolutive appeal. Accordingly, we do not address the dismissal of the consolidated suit herein.

flood elevation.” In that letter, Redeeming Word agreed to hold the City/Parish harmless from any liability for granting the variance. Thereafter, on June 16, 1999, the City/Parish granted Redeeming Word a certificate of permanent occupancy which certified that the “building conforms to the provisions of the City-Parish Building Code and all laws regulating health, zoning and fire protection.”

Accordingly, Morton Buildings demonstrated an absence of factual support for Redeeming Word’s reconventional demand, in which it contended that it was unable to obtain a certificate of permanent occupancy due to the elevation at which the building was constructed and, thus, that Morton Buildings had breached the construction contract. Additionally, the evidence presented further established that Redeeming Word got what it bargained for, in that Redeeming Word contracted for a building that varied from the elevation requirements of the City/Parish, so long as it could be legally occupied.

At that point, the burden shifted to Redeeming Word to produce factual support sufficient to establish that it would be able to satisfy its evidentiary burden of proof at trial with regard to its reconventional demand. Keller, 99-0424, 757 So. 2d at 922. Redeeming Word failed to produce evidence sufficient to establish a breach of the construction contract. Accordingly, we find no merit to Redeeming Word’s contention that an issue of fact remained as to whether it received the product it bargained for. Moreover, the alleged issues of fact of whether Redeeming Word is entitled to specific performance, whether the building has a diminished value given that the elevation is below that legally required, and what amount represents the cost of repair are not material herein given Redeeming Word’s failure to produce factual support to establish a breach of the construction contract. Accordingly, we find no merit to these arguments.

In its final two alleged issues of fact, Redeeming Word contends that factual issues remain as to attorney’s fees and costs awarded to Morton Buildings,

specifically whether the attorney's fees and costs were reasonable and whether they were incurred as a result of defending an action by Redeeming Word as opposed to pursuing an action on behalf of Morton Buildings. With regard to Redeeming Word's contention that an issue of fact remains as to whether the attorney's fees and costs were incurred by Morton Buildings in pursuing its own claim or in defending against Redeeming Word's claim, we note that the parties entered into the following stipulation:

As of December 17, 2004, Morton had incurred attorney's fees in the amount of \$185,151.01 and costs in the amount of \$19,533.87 in Morton's suit. These attorney fees and costs do not include the fees and costs incurred by Morton in defending against [Redeeming Word's] suit.

Considering this stipulation, we find no merit to Redeeming Word's contention that an issue of fact remains as to whether the attorney's fees and costs awarded were incurred by Morton Buildings in pursuing its own claim. Thus, the remaining issue before us is the reasonableness of that award.

Generally, attorney's fees are not recoverable unless expressly provided for by statute or contract. Pelican Point Operations, L.L.C. v. Carroll Childers Company, 2000-2770 (La. App. 1st Cir. 2/15/02), 807 So. 2d 1171, 1177, writ denied, 2002-0782 (La. 5/10/02), 816 So. 2d 293. Parties to a contract may lawfully obligate themselves for the payment of an attorney fee, but the amount of attorney's fees are subject to review and control by the courts. Although a written agreement may provide for a specified attorney's fee, the court may inquire into the reasonableness of the fee. Crawford v. Blue Cross Blue Shield of Louisiana, 99-2503 (La. App. 1st Cir. 11/3/00), 770 So. 2d 507, 518, writ denied, 2000-3267 (La. 2/16/01), 786 So. 2d 98.

In the instant case, the construction contract provided as follows with regard to attorney's fees: "In the event of default by the Buyer, Morton Buildings, Inc. shall be entitled to ... attorney's fees expended to enforce the terms of this

contract.” In support of its motion for summary judgment, Morton Buildings submitted affidavits and bills from its attorneys throughout the duration of this litigation to demonstrate the amount of attorney’s fees it has incurred “to enforce the terms of [the construction] contract.” Additionally, the parties entered into a stipulation as to the amount of attorney’s fees and costs incurred. The evidence and stipulation establishes that Morton Buildings has paid \$185,151.01 in attorney’s fees and \$19,533.87 in costs in its attempts to collect under the contract.

Based upon our review of the invoices submitted in support of summary judgment, we find no issue of fact as to the reasonableness of the hourly rates charged. We further note that this litigation has been pending for many years, having been appealed to this court on two prior occasions, thus explaining the amount of attorney’s fees and costs incurred.

However, we note that prior to Redeeming Word obtaining a certificate of permanent occupancy on June 16, 1999, there was a genuine dispute as to whether it would ever be able to permanently occupy the building at the elevation it was constructed. Thus, prior to that date, there was no active breach or “default” on behalf of Redeeming Word for refusing to make the final payment for a building that was not fit for its intended purpose. Thus, Redeeming Word’s actions at that point in refusing to make the final payment would not have subjected it to payment of attorney’s fees and costs.<sup>6</sup>

However, once the certificate of permanent occupancy was granted to Redeeming Word on June 16, 1999, Redeeming Word still refused to pay the sums due under the construction contract, including the sums subsequently refunded to it

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<sup>6</sup>While Redeeming Word may have had some knowledge prior to that date that the City/Parish was likely to grant a certificate of permanent occupancy, knowledge which it should have shared with Morton Buildings and this court, we conclude that the issue of whether Redeeming Word would be able to permanently occupy the building at its current elevation was not finally resolved until the issuance of the certificate of permanent occupancy.

by Morton Buildings. At that point, the construction contract was substantially complete in that the building was fit for its intended purpose and Redeeming Word had received what it bargained for, *i.e.*, a building constructed at the originally agreed-upon elevation that it was able to legally use and occupy on a permanent basis. Thus, Morton Buildings was entitled to payment. Mayeaux, 2000-1540, 809 So. 2d at 313. Redeeming Word's continued failure to pay for the building as provided in the construction contract at that point constituted default within the meaning of the contract and, thus, subjected it to the payment of costs and attorney's fees.

Nonetheless, the judgment on appeal awarded Morton Buildings attorney's fees and costs incurred since the inception of this litigation, rather than from the date that Redeeming Word could truly be found to be in default. We conclude that such an award was unreasonable. Thus, we amend the attorney's fees and costs awards to include only those expenses which are owed under the established facts, *i.e.*, those incurred on or after June 16, 1999. Accordingly, the judgment will be amended to reduce the award of attorney's fees by \$80,487.00, representing the attorney's fees incurred prior to June 16, 1999, and to reduce the award of costs by \$11,371.40, representing costs incurred prior to June 16, 1999.<sup>7</sup>

### CONCLUSION

For the above and foregoing reasons, we amend the January 26, 2005 judgment to reduce the award of attorney's fees to Morton Buildings, Inc. to the

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<sup>7</sup>We note that the trial court also awarded interest on the sums due pursuant to contract at a rate of 1.5% per month (18% annually) from "the date of default, February 15, 1995," the date that Redeeming Word began occupying the building. While this court has determined that the date of default is actually much later, we have not amended the interest herein because Redeeming Word did not specifically challenge the interest award.

sum of \$104,664.01, and to reduce the award of costs to \$8,162.47. In all other respects, the judgment is affirmed. Costs of this appeal are assessed equally against Redeeming Word of Life Church and Morton Buildings, Inc.

**AMENDED AND, AS AMENDED, AFFIRMED.**