NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0299

KEVIN'S RESTAURANT, L.L.C.

VERSUS

FIRE TECH, INC.

Judgment Rendered: December 28, 2006

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On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Livingston
State of Louisiana
Docket No. 105,175

Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Parro, J., concurs.
Guidry, J. concurs in the result.

McCLENDON, J.

In this redhibition suit, the defendant, Fire Tech, Inc., appeals from the judgment of the trial court awarding damages in favor of the plaintiff, Kevin's Restaurant, L.L.C., for a kitchen hood ventilation system plaintiff had purchased from defendant. Plaintiff filed an answer to the appeal seeking an increase in the amount of damages, lost profits, and attorney fees. For the reasons that follow, we amend in part, vacate in part, and affirm.

FACTS AND PROCEDURAL HISTORY

In early 2004, Henry Ingram, Jr., Inc. agreed to construct a restaurant in Maurepas, Louisiana, for Kevin Delatte, the owner and operator of Kevin's Restaurant. Following completion of the building, plaintiff leased, and later purchased, the building from Ingram.[1] During construction of the restaurant, one of Delatte's restaurant suppliers recommended Fire Tech for the hood ventilation system. Delatte, who was responsible for the kitchen equipment, gave defendant's name to his builder, who submitted a proposal to defendant for the hood ventilation system. Certain specifications were provided to defendant, who submitted the information to the manufacturer, Larkin Industries, Inc. Based on information and pricing supplied from Larkin, defendant quoted a price of $20,879.04, which was accepted by Delatte, and thereafter, the equipment was installed.

It is undisputed that as soon as the restaurant was opened, plaintiff experienced problems with the hood system. Smoke in the kitchen was not being exhausted, and on one occasion, smoke entered the air conditioning system, tripping an automatic cut-off and shutting down the air conditioner. The air conditioner could not be reset for two days resulting in the closing of

[1] Sometime after the purchase, and after the present lawsuit was filed, the restaurant was destroyed by fire. Plaintiff does not allege that the fire was caused by any defect in the hood system.

the restaurant during that period. A number of calls were made to defendant, but the problem was not remedied, and plaintiff ultimately had to hire others to try to repair the problem. According to Delatte, the hood never worked properly.

On August 30, 2004, plaintiff filed suit asserting that defendant negligently installed the hood system. Plaintiff asked for damages, including loss of profits and injury to business reputation. By an amending and supplemental petition, Ingram, as owner of the building, was added as a plaintiff, and a claim in redhibition was made. Thereafter, on September 14, 2005, a bench trial was held, after which the matter was taken under advisement. The trial court issued written reasons for judgment on October 13, 2005, in which it concluded that "the vent hood and exhaust system installed by Fire Tech was not, at least initially, reasonably fit for its ordinary use." The court further stated that after remedial efforts, "the vent hood equipment was not totally useless for its intended purpose, but that its condition diminished its usefulness to the degree that Plaintiff would have only purchased it at a lesser price." The trial court concluded by stating that "given th[e] fact that Kevin's continued to experience some problems with the vent/exhaust, but that these problems were greatly diminished, a reduction of $10,000.00 in the purchase price is an adequate remedy in these proceedings." The court also awarded plaintiff $2,800.00 for the loss of business for the closure of the restaurant for two days, $5,000.00 in attorney fees, and further awarded costs, which included expert witness fees in the amount of $750.00 and $500.00.

Defendant appealed, assigning several errors by the trial court. The issues raised by defendant are as follows:

1) the trial court erred in applying redhibition principles when there was no sale, as this was a construction contract;

2) the trial court erred in finding the hood defective; and

3) the trial court erred in awarding attorney fees to plaintiff.

Plaintiff answered the appeal and asserts:

1) the trial court erred in failing to grant plaintiff a rescission of the sale;

2) the award of lost profits should be increased to the amount that is uncontested in the record; and

3) the award of attorney fees should be increased for work through the trial and for the additional work required for the appeal.

DISCUSSION

Defendant initially contends that the Civil Code articles on redhibition, LSA-C.C. arts. 2520, *et seq.*, do not apply in this matter because this was a construction contract rather than a sale.[2] We need not address this issue, as we cannot consider contentions raised for the first time, which were not pleaded in the court below and which the trial court has not addressed. **Johnson v. State**, 02-2382, p. 3 (La. 5/20/03), 851 So.2d 918, 921. See also Uniform Rules, Courts of Appeal, Rule 1-3. Nonetheless, we note that the contract between plaintiff and defendant was clearly a contract of sale.[3] A sale is defined as "a contract whereby a person transfers ownership of a

[2] Although defendant also alleges that the hood system was not sold to Delatte, the record reflects that Delatte signed to accept the proposal and was in fact the purchaser of the hood system.

[3] Defendant concedes as much in its pretrial memorandum wherein it states:

> The claims of plaintiff are simple[. The] hood ventilation system was the subject of a contract. There was agreement as to the price and the thing. The thing was delivered, the price paid[.] Smoke got in the air conditioning system triggering automatic cut offs and customers left because of hot and humid conditions. The plaintiff was unable to re-activate the air conditioning system and business closed for the next day. This triggered the suit in damages and redhibition.

thing to another for a price in money. The thing, the price, and the consent of the parties are requirements for the perfection of a sale." LSA-C.C. art. 2439.

Defendant also contends that the trial court erred in finding the hood system defective, particularly in light of the fact that the fire marshal approved the building for occupancy. Therefore, according to defendant, the fire marshal must have determined that the hood was not defective. Plaintiff asserts, however, that the hood never worked properly despite attempts to remedy the problem, and that it is entitled to a rescission of the sale rather than a reduction of the purchase price.

Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold which renders the thing either absolutely useless or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. LSA-C.C. art. 2520; **Ross v. Premier Imports**, 96-2577, p. 6 (La.App. 1 Cir. 11/7/97), 704 So.2d 17, 21, writ denied, 97-3035 (La. 2/13/98), 709 So.2d 750. To prevail in a claim for redhibition, a purchaser must prove that: (1) the thing sold is absolutely useless for its intended purpose or its use is so inconvenient that had he known of the defect, he would never have purchased it; (2) the defect existed at the time of the sale, but was not apparent; and (3) the seller was given an opportunity to repair the defect. **Pratt v. Himel Marine, Inc.**, 01-1832, p. 13 (La.App. 1 Cir. 6/21/02), 823 So.2d 394, 403, writs denied, 02-2128 & 02-2025 (La. 11/1/02), 828 So.2d 571 & 572.

If defects exist which merely diminish the value or utility of the thing sold, constituting a partial failure of consideration, a reduction in the purchase price, rather than a rescission of the sale, is the appropriate remedy. See LSA-C.C. art. 2541; **Jackson v. Slidell Nissan**, 96-1017, p. 7 (La.App.

1 Cir. 5/9/97), 693 So.2d 1257, 1262; **Fly v. Allstar Ford Lincoln Mercury, Inc.**, 95-1216, p. 4 (La.App. 1 Cir. 8/21/96), 690 So.2d 759, 761-62. The existence of a redhibitory defect is a question of fact to be determined by the trier of fact. Similarly, the avoidance of a sale or a reduction in the purchase price as a remedy for defects in a product is a factual question, the resolution of which is best left to the trier of fact. **Fly**, 95-1216 at p. 3, 690 So.2d at 761. A court of appeal may not set aside a fact finder's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1987); **Fly**, 95-1216 at p. 3, 690 So.2d at 761. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Ferrell v. Fireman's Fund Ins. Co.**, 94-1252, p. 4 (La. 2/20/95), 650 So.2d 742, 745-46.

To establish its claim in redhibition, plaintiff called several witnesses at trial. One such witness was William J. Holstein, of Tech Test, Inc. of Louisiana, who was qualified as an expert in the field of air balancing. Mr. Holstein testified that he was asked to test the hood ventilation system at Kevin's. The results of his test were included in a Test and Balance Analysis Report, dated July 26, 2004. According to Mr. Holstein, the amount of air exhausted in the hood ventilation system greatly exceeded the amount of air being made up.[4] Further, the duct system was undersized and the workmanship was "less than" shoddy. Mr. Holstein further testified that following his report, defendant tried to repair the problem by adding more ductwork for the make-up air ventilation. Subsequent to the attempted repairs, Mr. Holstein made a follow-up inspection. He testified that while

[4] As the trial court pointed out in its written reasons for judgment, the "make-up air" is roughly similar to the return air flow in a conventional air conditioning system, allowing the recirculation of air through the system.

the additional ductwork greatly improved the hood operation, it was his opinion that the problem was still not completely resolved, and the hood system was still not pulling the smoke out as it should. Mr. Holstein also testified that in his opinion, the air conditioning system was not contributing to the smoke problem.

Mark Quebedeaux, a licensed mechanical engineer, also testified on behalf of the plaintiff. Qualified as an expert in the field of mechanical engineering, Quebedeaux testified that he troubleshoots problems with hood ventilation systems, and that he was contacted to look at the hood system at Kevin's. Quebedeaux testified that, in reviewing materials from the hood manufacturer, the hood system installed at Kevin's was recommended for cooler climates and for light to medium cooking loads. The appliances in use at Kevin's required a hood recommended for heavy cooking loads. Thus, the system installed at Kevin's was simply inadequate for its intended use.

Plaintiff also called Tony Austin, an expert in air conditioning systems. Based on his expertise, Austin testified that the location of the air conditioning vents in the kitchen did not prevent the smoke from venting.

In an attempt to rebut plaintiff's evidence, the owner of Fire Tech, Inc., Mike David, testified that the type of hood system installed at Kevin's was adequate and that the real problem was with the air conditioning system. According to David, the return air for the air conditioner was too close to the hood, so that it was fighting with the hood exhaust system. Earl Babin, the installer of the hood system, also testified for the defendant, and stated that if the exhaust fans were not turned on prior to heating the cooking equipment, the fuse link in the return air would heat and melt, closing the damper and shutting off fresh air.

The trial court determined that the vent hood and exhaust system, at least initially, was not reasonably fit for its intended use. However, after remedial work, the court concluded that it was not totally useless, "but that its condition diminished its usefulness to the degree that Plaintiff would have only purchased it at a lesser price." The trial court further determined that a reduction of $10,000.00 in the purchase price was an adequate remedy. Following a thorough review of the record, we find no manifest error in these factual findings of the trial court.[5]

Plaintiff has answered the appeal, contending that the trial court erred in awarding $2,800.00 for lost profits, when the uncontroverted evidence in the record is that plaintiff suffered a loss of $3,600.00 to $4,000.00 due to the air conditioners shutting down. Delatte testified that on July 25, 2004, a busy Saturday, the restaurant was at full capacity with customers waiting to be seated. Delatte testified that because the smoke was not being vented through the hood, it went into the return air for the air conditioner, shutting them all down. Angry customers left and it took until Monday to reset the air conditioner system, resulting in a loss of business for two busy days. He testified that his sales were between $10,000.00 and $12,000.00 a day, and that his profit usually was about 18%; therefore, he lost approximately $3,600.00 to $4,000.00. No evidence was presented to dispute or contradict this testimony.

A trial court is accorded broad discretion in assessing awards for lost profits, but there must be a factual basis in the record for the award. A plaintiff bears the burden of proving his claim for lost profits. For purposes of determining damages, the amount of lost profits need not be proved with

[5] We reject defendant's argument that approval for occupancy of the building by the fire marshal is the same as a finding that the hood system is free of any defects. Additionally, we reject defendant's contention that the fire marshal had exclusive jurisdiction to determine the existence of any defects in the hood system.

mathematical certainty, but by such proof as reasonably establishes the claim, and such proof may consist only of the plaintiff's own testimony. Reasonable certainty is the standard. See **Driscoll v. Stucker**, 04-0589, p. 29 (La. 1/19/05), 893 So.2d 32, 53.

In this matter, we conclude that plaintiff proved with reasonable certainty lost profits in the amount of $3,600.00 to $4,000.00. This evidence is not contradicted, and the trial court abused its discretion in failing to award such amount. Accordingly, we increase plaintiff's award of lost profits to $3,600.00.

Lastly, defendant asserts that the amount awarded for attorney fees was set in an arbitrary and capricious manner. Plaintiff answered the appeal seeking an increase in the award of attorney fees. We determine that the trial court incorrectly assessed attorney fees in this matter.

Under the redhibition articles, a good faith seller is only bound to repair, remedy, or correct the defect. If unable to do so, a good faith seller is then bound to return the price to the buyer with interest from the time it was paid, and to reimburse him for the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, less the credit to which a seller is entitled if the use made of the thing, or the fruits it has yielded, were of some value to the buyer. See LSA-C.C. art. 2531; **Pratt**, 01-1832 at p. 20, 823 So.2d at 407. Pursuant to LSA-C.C. art. 2545, a seller in bad faith is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees.

In this matter, there has been no allegation, nor was any evidence presented, that defendant was a bad faith seller, and therefore, pursuant to

LSA-C.C. art. 2531, defendant was only bound to repair, remedy, or correct the defect. Thus, plaintiff had no statutory authority to recover attorney fees from defendant. Accordingly, we amend the judgment to vacate the trial court's award of attorney fees against defendant. See **Pratt**, 01-1832 at p. 21, 823 So.2d at 407-08.

CONCLUSION

For the foregoing reasons, we amend the judgment of the trial court to increase the award to plaintiff of lost profits from $2,800.00 to $3,600.00. We also vacate the judgment insofar as it awards the plaintiff attorney fees from the defendant. In all other respects, the judgment is affirmed, including the award of expert fees in the amount of $750.00 and $500.00. Costs of this appeal are assessed equally between the plaintiff and the defendant.

AMENDED IN PART; VACATED IN PART; AND AFFIRMED.