

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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2021 CA 0569

CWI HOLDINGS, LLC D/B/A  
BUILDERS INSULATION OF LOUISIANA, LLC

VERSUS

ROBERTSON DEVELOPMENT, L.L.C.

JUDGMENT RENDERED: DEC 22 2021

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Appealed from  
The Seventeenth Judicial District Court  
Parish of Lafourche • State of Louisiana  
Docket Number 138765 • Division B  
The Honorable Steven M. Miller, Presiding Judge

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Insulation of Louisiana, LLC

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**BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.**

*JEW*

*PMC by JEW*

*mt.*

**WELCH, J.**

In this construction contract dispute, the defendant appeals a motion for summary judgment granted in favor of the plaintiff, which ordered the defendant to pay outstanding invoice balances, interest, and attorney's fees. We reverse and remand.

### **FACTS AND PROCEDURAL HISTORY**

The plaintiff/appellee, CWI Holdings, LLC d/b/a Builders Insulation of Louisiana, LLC ("CWI"), entered into verbal construction subcontracts with the defendant/appellant, Robertson Development, L.L.C. ("Robertson"), in which CWI agreed to supply and install insulation in houses that Robertson was constructing in or around Lafourche Parish between August 2014 and March 2016. Each contract was made for a specific construction project at a specific address. As work progressed under each contract, CWI issued separate invoices to Robertson, indicating the address of each project, the original contract amount for the project, an itemization of any accepted options under the contract, the total contract amount, and the details of amounts previously invoiced, paid, and remaining to be invoiced under the contract.

CWI filed suit on July 8, 2019, alleging that Robertson breached several of the contracts by failing to fully pay the balances due thereunder, leaving a combined balance due of \$34,408.46. CWI also sought interest and attorney's fees, as provided for in CWI's invoices. Robertson answered, asserting general denials. Thereafter, CWI filed a motion for summary judgment on July 13, 2020, seeking the unpaid invoice balances of \$34,408.46, plus interest at a rate of 18% per year, plus all costs and attorney's fees incurred in prosecuting its claims against Robertson.

The trial court set the hearing on CWI's motion for August 31, 2020. The morning of that hearing, Robertson filed a motion to continue and argued that

recently engaged counsel needed time to conduct discovery to oppose CWI's motion for summary judgment. The trial court granted the continuance to October 26, 2020.

The morning of the re-set hearing, Robertson filed a "Notice of Illness of Counsel and Motion to Consider Defendant's Opposition to Petitioner's Motion for Summary Judgment"; an opposition to CWI's motion for summary judgment; and a motion for judgment on the pleadings.

The trial court treated Robertson's "Notice" as a motion for a continuance, which it denied. The trial court stated that Robertson's motion for judgment on the pleadings was "essentially an exception of prescription." The trial court stated that the exception of prescription could possibly be set for hearing, but that it would be possibly mooted by the outcome of CWI's motion for summary judgment; accordingly, the trial court did not rule on prescription. The trial court denied Robertson's motion to consider his opposition to CWI's motion for summary judgment, rejecting the untimely filed opposition, which the trial court stated presented no actual evidence in opposition. Although the trial court rejected Robertson's untimely-filed opposition, it discussed the arguments made therein with counsel for CWI, as to whether CWI's claims arose under an open account rather than separate contracts and whether those claims were prescribed.<sup>1</sup> The trial court ultimately reasoned that Robertson's open account arguments were an affirmative defense to CWI's claims, which Robertson failed to properly raise and that would have to be proven at trial. Finding that CWI's motion was properly supported, the trial court granted summary judgment in favor of CWI and against Robertson, ordering Robertson to pay CWI \$34,408.46, interest at 18% per year, and \$4,000.00 in attorney's fees. The trial court signed a judgment in accordance

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<sup>1</sup> Breach of contract claims are personal actions subject to a prescriptive period of ten years under La. C.C. art. 3499, while a suit on an open account is subject to a three-year prescriptive period under La. C.C. art. 3494(4).

with its ruling on November 18, 2020. Robertson now appeals.

### APPELLATE JURISDICTION

This court, *ex proprio motu*, issued a rule to show cause, ordering the parties to show cause why this appeal should not be dismissed as untimely. An appellant's failure to timely file a devolutive appeal is a jurisdictional defect, in that neither the court of appeal nor any other court has the jurisdictional power and authority to reverse, revise, or modify a final judgment after the time for filing a devolutive appeal has elapsed. **Everett v. Baton Rouge Student Housing, L.L.C.**, 2010-0856 (La. App. 1<sup>st</sup> Cir. 5/6/11), 64 So.3d 883, 886, writ denied, 2011-1169 (La. 9/16/11), 69 So.3d 1149.

Louisiana Code of Civil Procedure article 2121 provides, in pertinent part, that “[a]n appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment.” Louisiana Code of Civil Procedure article 2087, providing for devolutive appeals, states, in relevant part:

A. Except as otherwise provided in this Article or by other law, an appeal which does not suspend the effect or the execution of an appealable order or judgment may be taken within sixty days of any of the following:

(1) The expiration of the delay for applying for a new trial or judgment notwithstanding the verdict, as provided by Article 1974 and Article 1811, if no application has been filed timely.

(2) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial or judgment notwithstanding the verdict, as provided under Article 1914.

In the present case, the trial court signed the judgment on November 18, 2020. The Clerk of Court mailed notice of the judgment to the parties on November 20, 2020. Mailing of the notice of judgment commenced the seven-day delay, exclusive of legal holidays, for applying for a new trial. See La. C.C.P. arts. 1913, 1811, 1974, and 5059. Excluding legal holidays (namely, Thanksgiving

Day, Acadian Day, and two weekends<sup>2</sup>), the time period for applying for a new trial expired on Thursday, December 3, 2020. The record shows that Robertson did not seek a new trial during the seven-day delay.

Expiration of the new trial delay commenced the sixty-day delay for obtaining an order of devolutive appeal. See La. C.C.P. art. 2087(A)(1). Thus, the time period for obtaining an order of devolutive appeal expired on Monday, February 1, 2021. Robertson filed a motion for a devolutive appeal on Monday, February 1, 2021. The trial court signed the order of devolutive appeal on February 3, 2021.

Recognizing that appeals are favored in the law and should be maintained, the Louisiana Supreme Court has stated that an appeal should not be dismissed when the motion for appeal is timely filed, but the order of appeal is not signed until after the delay has run. See Traigle v. Gulf Coast Aluminum Corporation, 399 So.2d 183 (La. 1981). Accordingly, because Robertson filed a motion for a devolutive appeal on the last day of the sixty-day period set forth in La. C.C.P. art. 2087(A)(1) for obtaining an order of devolutive appeal, his appeal is timely.

## LAW AND DISCUSSION

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). In reviewing a trial court's ruling on a motion for summary judgment, appellate courts review evidence *de novo* using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Georgia-Pacific Consumer Operations, LLC v. City of Baton Rouge**, 2017-1553, 2017-1554 (La. App. 1<sup>st</sup> Cir. 7/18/18), 255 So.3d 16, 22, writ denied, 2018-1397 (La. 12/3/18), 257 So.3d

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<sup>2</sup> See La. R.S. 1:55(A)(1), (A)(2), and (B)(3); see also Louisiana State Executive Department Proclamation Number 162 JBE 2020.

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The Code of Civil Procedure places the initial burden of proof on the party filing the motion for summary judgment, here CWI. See La. C.C.P. art. 966(D)(1). Once the motion for summary judgment has been made and properly supported,<sup>3</sup> the burden shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its opposition, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1). If the non-moving party fails to produce sufficient factual support in its opposition which proves the existence of a genuine issue of material fact, La. C.C.P. art. 966(D)(1) mandates the granting of the motion for summary judgment. See **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078 (La. 6/30/00), 764 So.2d 37, 40 (*per curiam*); **Jenkins v. Hernandez**, 2019-0874 (La. App. 1<sup>st</sup> Cir. 6/3/20), 305 So.3d 365, 371, writ denied, 2020-00835 (La. 10/20/20), 303 So.3d 315.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. **Janney v. Pearce**, 2009-2103 (La. App. 1<sup>st</sup> Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078.<sup>4</sup> Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can

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<sup>3</sup> Generally, if the moving party will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover must only point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(D)(1); see also La. C.C.P. art. 966, Comments—2015, Comment (j). Here, however, CWI bears the burden of proof at trial on its breach of contract claims.

<sup>4</sup> Simply showing the presence of disputed facts is insufficient if there is no legal issue presented by those contested facts. See **Franklin Credit Mgmt. Corp. v. Gray**, 2007-1433 (La. App. 4<sup>th</sup> Cir. 1/14/09), 2 So.3d 598, 603, writ denied, 2009-0476 (La. 4/17/09), 6 So.3d 795. A "genuine" issue is a triable issue, which means that an issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. A fact is "material" when its existence or nonexistence may be essential to a plaintiff's cause of action under the applicable theory of recovery. **Kasem v. State Farm Fire & Cas. Co.**, 2016-0217 (La. App. 1<sup>st</sup> Cir. 2/10/17), 212 So.3d 6, 13.

be seen only in light of the substantive law applicable to the case. **Georgia-Pacific Consumer Operations, LLC**, 255 So.3d at 22.

On appeal, Robertson argues that the trial court erred in granting summary judgment in CWI's favor by finding that the alleged debt arose from contracts as opposed to under an open account. Robertson also argues that the trial court erred in failing to rule on his exception of prescription raised in his motion for judgment on the pleadings.

It is the substance, not the caption, of a pleading that determines its content. See Pembo v. Pembo, 2017-1153 (La. App. 1<sup>st</sup> Cir. 6/28/19), 280 So.3d 656, 659. While Robertson filed a pleading titled "Motion for Judgment on the Pleadings and Incorporated Memorandum in Support," the substance of that pleading demonstrates that Robertson sought to raise a peremptory exception raising the objection of prescription. Therein, Robertson argued that "[CWI's] pleadings in its petition and in its motion for summary judgment reveal that [CWI] has filed claims on an open account which on their face have prescribed." The trial court understood the motion for judgment on the pleadings to substantively constitute an exception of prescription, and we agree. During the October 26, 2020 hearing, the trial court stated that the exception of prescription could possibly be set for hearing, but that it would be possibly mooted by the outcome of CWI's motion for summary judgment; accordingly, the trial court did not rule on prescription.

Prescription is a peremptory plea under Louisiana law. La. C.C.P. art. 927. It "may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision...." La. C.C.P. art. 928; see also Louisiana State Bar Ass'n v. Carr & Assocs., Inc., 2008-2114 (La. App. 1<sup>st</sup> Cir. 5/8/09), 15 So.3d 158, 164, writ denied, 2009-1627 (La. 10/30/09), 21 So.3d 292. We find that the trial court erred by failing to hold a trial, receive evidence, and rule on the exception of prescription raised by Robertson. Accordingly, we reverse the trial

court's November 18, 2020 judgment and remand this matter to the trial court for further proceedings consistent with this opinion.

**DECREE**

We reverse the trial court's November 18, 2020 judgment. We remand this matter to the trial court for further proceedings consistent with this opinion. All costs of this appeal are assessed to CWI Holdings, LLC d/b/a Builders Insulation of Louisiana, LLC.

**REVERSED AND REMANDED.**