NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1935

GEORGE BAYHI

VERSUS

SUSAN DIANE STARKS ROSS MCKEY

Judgment Rendered: May 2, 2008

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Appealed from the
Nineteenth Judicial District Court in and for the
Parish of East Baton Rouge, State of Louisiana
Docket Number 545,676

Honorable Wilson Fields, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Guidry, J. concurs.

WHIPPLE, J.

Plaintiff, George Bayhi, a Louisiana attorney, appeals a trial court judgment dismissing his claims against defendant, a former client, at his costs. For the reasons that follow, we affirm in part, reverse in part, and remand the matter to the trial court for further proceedings.

BACKGROUND

Mr. Bayhi filed a suit on open account in accordance with LSA-R.S. 9:2781 against Susan Diane Starks Ross McKey to recover amounts allegedly due for legal services he provided to Ms. McKey. According to the petition, Mr. Bayhi entered into an attorney-client relationship with Ms. McKey in June 1995, pursuant to which Mr. Bayhi was to represent Ms. McKey (then Ross) in a divorce proceeding and community property partition. Mr. Bayhi alleged that he and Ms. McKey had a verbal agreement that he would be paid for his services at the rate of $165.00 per hour, plus expenses and court costs.

According to Mr. Bayhi, the community property partition was extremely complex and required him to conduct substantial discovery, as well as the first part of a bifurcated trial. Mr. Bayhi further asserted that after the trial court ruled against Ms. McKey, he had to appeal the matter to both the first circuit and the supreme court before ultimately obtaining a favorable result for Ms. McKey. Mr. Bayhi alleged that because of the complexity of the case, he worked a "minimum" of 648.25 hours over the course of his nine-year representation of Ms. McKey in this matter. Therefore, Mr. Bayhi contended, he was owed legal fees totaling $106,961.25 based on the hourly rate to which the parties allegedly had agreed, plus unreimbursed expenses totaling $8,812.17, which he had allegedly incurred on behalf of Ms. McKey. Mr. Bayhi acknowledged that he had received payments from Ms. McKey totaling $39,550.00, the last of which was received in August 2004.

On May 15, 2006, Mr. Bayhi sent a letter to Ms. McKey indicating that almost two years had passed since the successful completion of her case and advising her that she still owed him for his legal fees. In the letter, Mr. Bayhi asserted that the balance due, "after the reductions and the adjustments that [he] made for [Ms. McKey]," remained at $45,000.00. He further requested that she pay this balance by the end of the month.

Thereafter, Mr. Bayhi hired an attorney to send a demand letter to Ms. McKey via certified mail. This letter, dated June 23, 2006, stated that after "[a]pplying all discounts and payments, a balance of $75,000.00 is past due...." The letter further stated that Mr. Bayhi had agreed to reduce the amount due to $45,000.00, provided payment was made within thirty days. On July 6, 2006, Mr. Bayhi's attorney sent Ms. McKey a "recapitulation of statements and expenses" for her review. This statement, dated June 27, 2006, suggested that the remaining balance due was actually $76,223.42. When Ms. McKey still failed to pay the amount sought, Mr. Bayhi filed suit in accordance with LSA-R.S. 9:2781, seeking the principal sum of $76,223.42, plus attorney's fees, interest from the date of judicial demand, and all costs of court. After a trial, the trial court dismissed the suit, finding that Mr. Bayhi had failed to prove his case. Mr. Bayhi then filed the instant appeal.

DISCUSSION

As noted above, Mr. Bayhi filed this suit under LSA-R.S. 9:2781, which provides a cause of action to recover for debts incurred on open account for professional services rendered. Pursuant to LSA-R.S. 9:2781(D), an "open account" includes debts incurred for legal services. In proving an open account, the creditor must first prove the account by showing that the record of the account was kept in the course of business and by introducing supporting testimony regarding its accuracy. Once a *prima facie* case has been established by the creditor, the

burden shifts to the debtor to prove the inaccuracy of the account or to prove that the debtor is entitled to certain credits. The amount of an account is a question of fact that may not be disturbed absent manifest error. Deutsch, Kerrigan & Stiles v. Fagan, 95-0811, p. 5 (La. App. 1st Cir. 12/15/95), 665 So. 2d 1316, 1320, writ denied, 96-0194 (La. 3/15/96), 669 So. 2d 418.

In this case, Mr. Bayhi relied primarily on his own testimony in an attempt to prove the existence of an open account. Mr. Bayhi testified that he and Ms. McKey had an oral agreement that his fee would be $165.00 per hour, and that he kept his fee at that amount throughout the litigation, despite the fact that his regular hourly fee increased over the years. However, he acknowledged that he never reduced the agreement to writing, but claimed he did not do so because he and Ms. McKey were friends. He further testified that because of this friendship and because he knew she did not have any available money, he agreed to represent her and to allow her to pay him at the end of the community property settlement.

Mr. Bayhi sent Ms. McKey two demand letters seeking payment; however, neither of these letters contained a statement of account or other documentation establishing the account. Mr. Bayhi ultimately generated a statement of account on June 27, 2006, approximately two years after the conclusion of the underlying litigation. Although the statement contained a monthly recapitulation of the amount of time Mr. Bayhi allegedly spent on the case, the statement did not set forth any specific breakdown by date or task.[1] Mr. Bayhi testified that the information set forth in this statement of account was gathered from the

[1]For example, the entry for October 1996 merely stated:
PREPARE PETITION FOR DIVORCE; PREPARE LETTER TO D. MARTIN; TELECOMS WITH DORSEY MARTIN AND CLIENT; PREPARE AFFIDAVIT OF EXPENSES; PREPARE LETTER TO D. MARTIN; TELECOM WITH D. MARTIN; TELECOM WITH CLIENT; RECEIPT AND REVIEW OF NOTICE OF ASSIGNMENT; TELECOM WITH CLIENT; PREPARE ANSWER TO PETITION AND RECONVENTIONAL DEMAND. 4.75 HRS.

handwritten time sheets he had kept throughout the litigation, but Mr. Bayhi did not introduce these time sheets into evidence at trial.

Mr. Bayhi further testified that his normal practice was to give these time sheets to his secretary at the end of each month. His secretary would then type billing statements to send to his clients. However, Mr. Bayhi acknowledged that he had deviated from his normal practice in dealing with Ms. McKey, because he knew she did not have the money to pay him and receiving the billing statements upset her. According to Mr. Bayhi, aside from one or two statements he sent to her at the start of the litigation, he did not send any monthly or periodic billing statements to Ms. McKey during the entire course of the nine-year litigation. He insisted, however, that he kept Ms. McKey apprised of the status of the bill, although she never asked for copies of the billing statements.

Ms. McKey corroborated Mr. Bayhi's testimony that the parties had agreed that Mr. Bayhi's fee would come out of the cash portion of the settlement obtained at the end of the case. However, she denied that they had ever discussed an hourly fee at any point in the proceedings, even though she asked.[2] According to Ms. McKey, every time she asked about a bill, Mr. Bayhi simply told her that his fee would come out of the cash settlement. Ms. McKey further testified that she had advised Mr. Bayhi that he needed to "get enough money [in the settlement] to cover [his] fee." When the matter was ultimately settled, Ms. McKey received the marital home, which was valued at approximately $209,000.00, and a cash

[2]At oral argument before this court, counsel for Ms. McKey purported to "stipulate" that the parties had agreed that Mr. Bayhi's fee would be on an hourly basis. We note, however, that pursuant to LSA-C.C.P. art. 2164, an appellate court must render its judgment upon the record on appeal. An appellate court cannot review evidence that is not in the record and cannot receive new evidence. Brown v. Associated Insurance Consultants, Inc., 97-1396, p. 5 n.2 (La. App. 1st Cir. 6/29/98), 714 So. 2d 939, 942 n.2. Because there is no such stipulation in the record of the trial court proceedings, we are unable to consider the purported stipulation. Furthermore, we note that such a "stipulation" at the appellate level would appear to be at odds with her position in the proceedings below, and contrary to Ms. McKey's testimony and the conclusion of the trial court that Mr. Bayhi failed to let Ms. McKey know whether her bill was to be based on an hourly fee or a lump sum payment.

settlement of $91,000.00. Mr. Bayhi received approximately $38,000.00[3] from this settlement, and Ms. McKey received $25,000.00.[4] Ms. McKey testified that it was her understanding after the settlement funds had been disbursed that everything had been settled between her and Mr. Bayhi, because that had been their agreement all along.

After hearing all of this testimony and considering the documentary evidence introduced by Mr. Bayhi, the trial court ultimately determined that Mr. Bayhi had failed to prove his case. In its oral reasons, the trial court noted that an attorney has an obligation to inform his client of what his fee is going to be and how that fee is to be paid, if some arrangement must be made. The court stated that the only documentary evidence supporting the amount owed on the account was Exhibit P-3, which was generated almost two years after the final settlement in this matter. The court found that the exhibit was not reliable, presumably because of its late generation and because it was not supported by billing statements or time sheets generated contemporaneously with the time the charges were allegedly incurred. The court also stated that the exhibit did not provide sufficiently detailed information concerning the time Mr. Bayhi spent on each task. Although the court found that an hourly fee of $165.00 was not unreasonable, the court indicated that it did not believe that the parties had agreed to such a fee. Specifically, the court stated:

> What I do have is testimony from the plaintiff stating that he was familiar with the defendant and was going to allow her to accrue a bill until the conclusion. But plaintiff should have gone a step further and let her know whether or not it was going to be an hourly fee or whether or not it was going to be a lump sum payment for representing her in this matter. And listening to the defendant's testimony of not being informed even of ... filing an appeal with the First Circuit, draws some concern to me of whether or not the defendant actually knew what was going on in this litigation and

[3]Mr. Bayhi also acknowledged receiving payments totaling $1,500.00 from Ms. McKey.

[4]A forensic C.P.A., who worked on the case on behalf of Ms. McKey, also received approximately $28,000.00 from this cash settlement.

> whether or not this litigation was being pursued because of the implication of it being a first ruling by the Supreme Court or some type of landmark case, and that was self-gratification for counsel to have this matter pursued all the way up to the [Supreme Court]. ... So the court feels that the ... $39,550 that was paid to counsel satisfied counsel's attorney's fees. Therefore, the court is dismissing the suit against Ms. McKey with the judgment that attorney fees has [sic] been satisfied. Plaintiff's counsel did not prove their case in terms of additional attorney fees owed.

Appellate courts may not disturb a trier of fact's factual findings unless: (1) the appellate court finds from the record that a reasonable factual basis for the finding of the trial court does not exist; and (2) the appellate court determines that the record establishes that the finding is clearly wrong (manifestly erroneous). Stobart v. State, Through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Furthermore, when factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). Thus, when there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel its own evaluations and inferences are as reasonable. Rosell, 549 So. 2d at 844. Credibility determinations may be clearly wrong when documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story. Rosell, 549 So. 2d at 844-45. However, absent contradictory evidence or inconsistent or implausible statements, it is "virtually never" clearly wrong for the fact finder to accept one witness's version of the facts over another. Rosell, 549 So. 2d at 845.

After a thorough review of the record, we find no manifest error in the trial court's finding that Mr. Bayhi failed to meet his initial burden of proof on his claim for sums allegedly due on open account. The trial court's decision was clearly based on its assessment of the credibility of the parties, who provided

contradictory testimony on almost every important issue.[5] Accordingly, we affirm the judgment of the trial court to the extent that it dismissed Mr. Bayhi's claim for recovery on an open account pursuant to LSA-R.S. 9:2781.

However, on review, we are unable to determine whether or not the trial court considered Mr. Bayhi's right to recovery on the alternative basis of *quantum meruit*. Although not entirely clear from the record, the trial court seemingly did not consider whether Mr. Bayhi could recover under this alternative theory. The equitable doctrine of *quantum meruit* is based on the concept that one who benefits by the labor and materials of another should not be unjustly enriched thereby.[6] Under such circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor. LSA-C.C. art. 2298; Ricky's Diesel Service, Inc. v. Pinell, 2004-0202, p. 5 (La. App. 1 Cir. 2/11/05), 906 So. 2d 536, 539. The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less. The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered. LSA-C.C. art. 2298.

Here, the trial court stated that it believed that Mr. Bayhi's claim for attorney's fees was satisfied by the payment he received from the cash settlement. However, we are unable to determine whether the trial court considered Mr. Bayhi's claims under the theory of *quantum meruit* or whether the trial court

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[5]Aside from the parties, two other witnesses testified. However, the trial court clearly focused on the testimony of the parties, as they provided the most relevant testimony regarding what the agreement between them had been.

[6]Although Mr. Bayhi's petition is captioned "Petition on Open Account," we recognize that Louisiana is a fact-pleading state, and that no technical forms of pleading are required. See LSA-C.C.P. art. 854; Smith v. Albrecht, 2006-2072, p. 5 (La. App. 1 Cir. 6/8/07), 965 So. 2d 879, 882. Thus, the threshold inquiry is whether Mr. Bayhi has pled or raised, without objection, a cognizable claim for his fees. Smith, 2006-2072 at p. 5, 965 So. 2d at 882. Mr. Bayhi's petition requested that he be paid for his services, and he specifically alleged in the petition the reasonableness of his fees under the circumstances. Furthermore, the testimony of the witnesses and the evidence introduced at trial continually raised issues relevant to a claim for *quantum meruit*, including the reasonableness of Mr. Bayhi's fee and the value of Mr. Bayhi's services to Ms. McKey. Accordingly, Mr. Bayhi has stated a cognizable claim for recovery of his fees under the doctrine of *quantum meruit*.

denied Mr. Bayhi's claim specifically because it believed that Mr. Bayhi had failed to prove the claim as an open account, pursuant to LSA-R.S. 9:2781. On the record before us, we are unable to analyze Mr. Bayhi's claim under the doctrine of *quantum meruit,* as the appellate record is incomplete. Specifically, the transcript of the trial indicates that Mr. Bayhi introduced the family court record of the divorce proceeding and community property settlement into the record of this matter. However, for reasons that are unclear in the record, the family court record has not been included in the exhibits sent to this court.[7] Accordingly, in the interest of fairness, we must remand this matter to the trial court for further proceedings.

CONCLUSION

For the foregoing reasons, we affirm the dismissal of plaintiff's claims for recovery on open account pursuant to LSA-R.S. 9:2781. However, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion, i.e., to allow the trial court to consider plaintiff's claims for recovery under the doctrine of *quantum meruit.* Each party shall bear his or her own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[7]Attempts to obtain the family court record from the trial court have been unsuccessful.