NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0937

MEG-A-BUILDERS, L.L.C.

VERSUS

BECKY MAGGIO AND CLENT MAGGIO

DATE OF JUDGMENT: DEC 2 3 2008

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
NUMBER 39,432, DIV. "C," PARISH OF POINTE COUPEE
STATE OF LOUISIANA

HONORABLE ALVIN BATISTE, JR., JUDGE

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BEFORE: KUHN, GUIDRY, AND GAIDRY, J.J.

Disposition: AFFIRMED IN PART; REVERSED IN PART.

Guidry, J. dissents in part and assigns reasons.

KUHN, J.

Defendants-appellants, Becky and Clent Maggio, appeal the trial court's judgment in favor of plaintiff-appellee, Meg-A Builders, L.L.C.[1] (Meg-A Builders), which ordered them to pay $10,195.84, the amount the trial court determined they owed on a costs plus contract for renovation work. We affirm in part and reverse in part.

PROCEDURAL AND FACTUAL BACKGROUND

Donald "Steve" Olinde, a project manager for Meg-A Builders, and Clent Maggio were lifelong friends. In October 2004, the Maggios and Olinde agreed that Meg-A Builders would repair flooring in the Maggios' house in Ventress, Louisiana. No firm estimate was given but Olinde suggested that it could run as much as $40,000 or more. Meg-A Builders began the project and, as the extent of the damage was revealed, the house was elevated and sand was added beneath it for completion of repairs. The Maggios also asked Meg-A Builders to complete additional renovation work on the house, including the installation of insulation under the floors and in the walls, re-plumbing, the addition of ventilation, the replacement of windows, and the installation of vinyl siding and sheetrock, the latter of which subsequently required painting. According to Olinde, he advised the Maggios that in light of the damage the project could run more than $70,000. After contemplating demolition and new construction of the house, the Maggios opted to undertake the renovation project.

Meg-A Builders performed the renovation work and as of February 2005,

[1] Although in the pleadings the plaintiff is referred to "Meg-A-Builders, L.L.C.," documentation submitted in evidence establishes that this entity refers to itself as "Meg-A Builders, L.L.C."

the Maggios had paid a total of $66,837.99. It is undisputed that the invoices that the Maggios paid did not itemize the expenses incurred by Meg-A Builders or set forth the manner in which the total due had been calculated. In April 2005, Meg-A Builders presented the Maggios with an invoice for $12,291.70, representing work completed during March and April. Upon receipt of this invoice, the Maggios sent a letter to Meg-A Builders, requesting for the first time a complete itemization of all costs and related expenses for the project. Meg-A Builders complied, sending the Maggios a list of labor and uninsured subcontractor charges with a fifty-percent markup on those charges, as well as a list of the material and insured subcontractor charges with a ten-percent markup on those charges. The Maggios refused to pay, contending that they had never agreed to pay Meg-A Builders according to the costs plus terms.

On September 14, 2005, Meg-A Builders filed this lawsuit, seeking to enforce the contract. After a bench trial, the trial court issued written reasons for judgment, finding that the parties had entered into a costs plus contract. The trial court concluded that the Maggios were obligated to pay the April 2005 invoice but discounted the labor charges by forty percent based on the evidence submitted by Meg-A Builders. A judgment in favor of Meg-A Builders and Joe Garrett, awarding the sum of $10,195.84 against the Maggios was signed on February 7, 2008.

The Maggios appeal, contending that the trial court erred: (1) in concluding that Meg-A Builders proved the existence and the terms of a costs plus contract between the parties; (2) in determining that Meg-A Builders proved each item of

expense it claimed against the Maggios; and (3) by rendering judgment in favor of Joseph Garrett.

DISCUSSION

A "costs plus" (costs plus percentage of costs) contract, or a "percentage" contract, is a construction contract in which the owner agrees to reimburse the contractor for the costs of material and labor and to pay a percentage of those costs as his profit. ***Burdette v. Drushell***, 2001-2494, p. 5 (La. App. 1st Cir. 12/20/02), 837 So.2d 54, 59, ***writ denied***, 2003-0682 (La. 5/16/03), 843 So.2d 1132.

The trial court's written reasons state, "[Meg-A Builders] was paid every invoice except the last which is the subject of this suit. The uncontradicted evidence submitted at trial corroborates [Mr.] Olinde's testimony that the parties agreed to have the work done on a cost plus basis."

In their challenge of the existence of a cost plus contract, the Maggios urge that the trial court erred by relying on Olinde's testimony and the fact that they paid the invoices submitted to them until the April 2005 invoice as an evidentiary basis to support its conclusion.

Olinde, Becky, and Clent Maggio all testified that there was an oral agreement for Meg-A Builders to undertake the renovation work at the Maggios' home. While Olinde testified that he told Clent that the work would be performed on a costs plus basis, Clent denied having been so advised. It is well established that even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. ***Stobart v. State***, 617 So.2d 880, 882 (La. 1993). The trial

court's decision to credit Olinde's testimony over Clent's is not manifestly erroneous.

In his testimony, Olinde candidly admitted that he did not recall whether the exact percentages of fifty percent over the cost of labor and uninsured subcontractors and ten percent over the cost of materials and insured subcontractors had been discussed when he and Clent agreed that Meg-A Builders would undertake the renovation project. And it is undisputed that there were no others present when Olinde and Clent made the agreement. Thus, the Maggios contend that the trial court erred in finding a costs plus agreement of fifty percent above labor expenses and ten percent over material and subcontractor expenses existed.

Where an account rendered is not objected to within a reasonable time, failure to object is regarded as an admission of its correctness by the party charged. ***Peterson Sales Co., Inc. v. C-Moore Glass, Inc.***, 296 So.2d 397 (La. App. 2d Cir. 1974). See also La. R.S. 9:2781D (providing that an "open account" includes any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions).

The evidence established that the Maggios timely paid the four invoices Meg-A Builders presented to them from December 2004 through February 2005. After Clent objected to the amount of the invoice dated December 30, 2004, Meg-A Builders adjusted the amount from $14,223.72 to $8,431.72, which the Maggios paid. Clent testified that the reason he knew the total amount Meg-A Builders claimed the Maggios owed was wrong was because workers had not been at the

house for the entire week, i.e., based on the time Meg-A Builders workers were on the premises. But nothing in the record otherwise shows that the Maggios at any time prior to the final invoice questioned the manner in which Meg-A Builders calculated the total due. Indeed, they paid the adjusted December 30, 2004 invoice without demanding an itemization or explanation of how the total due of $8,431.72 had been calculated. Additionally, Olinde's testimony was that each of the invoices presented to the Maggios had been calculated on a costs plus basis, utilizing a fifty percent markup for labor and a ten percent mark up for materials and subcontractors. Thus, the record establishes that the invoices paid by the Maggios were calculated on a costs plus basis, utilizing a fifty-percent ten-percent markup on materials and subcontractors.

Based on the evidence contained in this record, we cannot say the trial court was manifestly erroneous in concluding that the parties agreed to enter into a costs plus contract. And since the Maggios paid the invoices, which reflected total payment on the basis of a fifty-percent markup for labor and a ten-percent markup for materials and insured subcontractors, an evidentiary basis exists to support the conclusion that the parties agreed to the terms of the costs plus contract. Accordingly, the trial court was not manifestly erroneous in finding a costs plus contract existed and that the parties agreed to its terms.

When a contractor asserts a claim on a "costs plus" contract and the owner denies being indebted to the contractor, the contractor has the burden of proving each item of expense in connection with the job and he must itemize each expenditure made by him. ***Burdette***, 2001-2494 at p. 5, 837 So.2d at 59.

In its written reasons, the trial court stated:

> The only invoice sued upon in the instant case and the only invoice objected to by [the Maggios] in their answer to the lawsuit was the last invoice in the amount of $12,291.70. [Meg-A Builders] offered the testimony of [Olinde] and the itemized invoice that it submitted to [the Maggios] for payment to meet its burden of properly itemizing the costs making up the price of its work. The [Maggios] offered into evidence the "Job Actual Cost Detail" which showed the itemization of the costs [Meg-A Builders] incurred in performing the work on [the Maggios'] home. No evidence was presented by [the Maggios] to contradict the actual costs associated with the work performed.
>
> With one exception the court finds that [Meg-A Builders] has met its burden of properly itemizing the costs making up the price of its work. The exception is the forty percent ... markup charged for labor. Specifically, the charges for workers comp-19%, FICA-7.65%, FUTA-.8%, SUTA-6.2%, and general overhead (liability insurance, auto insurance, etc)-6.35%. Although [Meg-A Builders] offered into evidence this breakdown (see letter dated April 28, 2005 to Clent Maggio, which is marked P-3) there was no admissible proof elicited at trial that [Meg-A Builders] actually was charged or paid these costs associated with subcontractor labor. No subcontractor was called to testify nor does the "Job Actual Cost Detail" show that the cost cited above for contract labor was either charged to or paid by [Meg-A Builders].
>
> ... [Meg-A Builders] in this [instance] is not entitled to payment of the 40% markup for labor for which [it] did not properly prove payment.

We find no error by the trial court. By paying Meg-A Builders' invoices from December 2004 through February 2005, the Maggios admitted the correctness of those totals due. Thus, the trial court correctly focused on the final invoice. Meg-A Builders responded to the Maggios' letter requesting an itemization of the expenses with an invoice that detailed labor and materials. The trial court evaluated each item of expense and deducted the markup of forty percent on labor for which Meg-A Builders failed to offer evidence to support. While the Maggios complain that the itemization provided to them by Meg-A Builders and introduced into evidence does not set forth the actual material lists,

receipts, check stubs showing payment, labor time records, invoices of subcontractors, or other records as proof to substantiate the charges billed to them, they neither demanded such through discovery nor presented evidence challenging Meg-A Builders' testimony and itemization of the expenses.[2] At trial, the primary issue was whether the parties had entered into a costs plus contract. In light of the evidence contained in this record, we cannot say the trial court was manifestly erroneous in concluding that the Maggios owed $10,195.84 on the April 2005 invoice.

Meg-A Builders does not dispute that the trial court erred in awarding judgment in favor of Joseph Garrett, a member manager of Meg-A Builders. Our review of the record confirms that Garrett was not a party to the proceeding and, therefore, was not entitled to judgment in his favor. Accordingly, we reverse that portion of the judgment awarding judgment to him.

DECREE

For these reasons, the trial court's judgment is affirmed insofar as it awards Meg-A Builders the sum of $10,195.84, court costs, and interests from date of judicial demand; and reversed insofar as it orders an award in favor of Joe Garrett. Appeal costs are assessed to defendants-appellants, Clent and Becky Maggio.

REVERSED IN PART; AFFIRMED IN PART.

[2] Although the Maggios urge that the "Job Actual Cost Detail" they entered into evidence does not itemize every expense included in the invoice itemizing expenses Meg-A Builders supplied to them, Meg-A Builders member manager, Joseph Garrett, testified that the exhibit was not a reflection of the actual costs expended on the Maggios' renovation project, indicating that it was a computer generated document that had not been reviewed for accuracy. The trial court was within its purview to discount the reliability of the "Job Actual Cost Detail" based on Garrett's testimony. ***See Stobart***, 617 So.2d 882.

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GUIDRY, J., dissents in part and assigns reasons.

GUIDRY, J., dissenting in part.

While I agree with the majority's finding that the costs-plus contract at issue was subject to the terms of a 50 percent markup for labor and uninsured subcontractors costs and a 10 percent markup for materials and insured subcontractors costs, I disagree with the reasoning used by the majority in reaching this conclusion. Instead, I believe that based on the evidence presented, particularly Donald "Steve" Olinde's testimony that he could not remember whether he discussed the specific percentages to be assessed when the oral contract was confected with Clent Maggio, there was no showing of "a meeting of minds" as to the percentages that would be assessed. As such, the La. C.C. arts. 2053 and 2055 would apply to determine this doubtful provision of the contract, and based on the uncontradicted evidence (affidavit of Billy Ward, exhibit P-14) of equity and usage presented by Meg-A Builders that markups of 50 percent and 10 percent respectively are customary in the residential remodeling trade, I believed the claimed percentages were reasonable and proper. See East

Contract Supply, Inc. v. Petite Paree Fashions, Inc., 250 So. 2d 839, 840 (La. App. 4th Cir. 1971).

Nevertheless, I disagree with the majority's determination that the money judgment should be affirmed because Meg-A Builders failed to present any evidence proving that it paid the costs listed in the fifth invoice sued upon. As this court held in Burdette v. Drushell, 01-2494, p. 15 (La. App. 1st cir. 12/20/02), 837 So. 2d 54, 66, writ denied, 03-0682 (La. 5/16/03), 843 So. 2d 1132, a contractor cannot recover for subcontractor's charges for which there is no proof of payment presented. It was further held in M. Carbine Restoration, LTD v. Sutherlin, 544 So. 2d 455, 458-59 (La. App. 4th Cir.), writ denied, 547 So. 2d 355 (La. 1989), which was cited in Burdette:

> Once the existence of a cost-plus contract has been established, the contractor also has a duty to submit an itemization of each and every expenditure made during the course of the project because there is an implicit agreement between the parties that the costs will be reasonable. Presentation of invoices and statements of accounts, *accompanied by proof of payment*, is the proper method of proving the cost of improvements. Proof of payment can be established by presentation of invoices marked "paid." [Emphasis added.]

Thus, based on the foregoing jurisprudence, it is clear that the burden of proof rested with Meg-A Builders to not only itemize the costs incurred, but prove payment of the same. Absent such proof, I believe the trial court erred in rendering judgment in favor of Meg-A Builders, and therefore, I respectfully dissent.