

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2010 CA 1858**

**RAE JEANFREAU**

**VERSUS**

**BAYOU CONTRACTING, L.L.C.**

**Judgment Rendered: DEC 21 2011**

*HMC  
J.P.B.*

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On Appeal from the City Court of Slidell  
In and for the Parish of St. Tammany  
State of Louisiana  
Docket No. 2007 C 1076

Honorable James "Jim" Lamz, Judge Presiding

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Martin L. Morgan  
Covington, Louisiana

Counsel for Defendant/Appellant  
Bayou Contracting, L.L.C.

P. David Carollo  
Slidell, Louisiana

Counsel for Plaintiff/Appellee  
Rae Jeanfreau

\* \* \* \* \*

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

*welch J. concurs in part and dissents in part with reasons assigned.*

**McCLENDON, J.**

A contractor appeals a judgment that awarded a homeowner damages arising from the contractor's alleged defective work and its failure to remedy the defects. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

Rae Jeanfreau and Bayou Contracting, LLC entered into a contract on November 25, 2005, for repair work to Ms. Jeanfreau's home, which had been substantially damaged during Hurricane Katrina. In February 2006, Bayou Contracting, which had been paid the estimated costs for the repair work, declared that it had finished the work. However, the work was not accepted by Ms. Jeanfreau at that time.

Ms. Jeanfreau alleges that some of the work was defective and that she repeatedly contacted Bayou Contracting about correcting the problems. Ms. Jeanfreau indicated that beginning in May 2006, and over a period of the next eight months, Bayou Contracting reassured her that it would address these issues.

After Bayou Contracting failed to address these problems, Ms. Jeanfreau filed suit on March 19, 2007, seeking recovery of those amounts it would cost to remedy the defective work together with contractual damages arising from Bayou Contracting's failure to complete the work. Bayou Contracting did not answer the petition or file any exceptions.

A trial was held on May 14, 2009. The only two witnesses to testify at trial were Ms. Jeanfreau and Gerald J. Marcotte, who provided an estimate of the costs to complete the repairs to Ms. Jeanfreau's home. At the conclusion of trial, the court awarded Ms. Jeanfreau \$460.00 for remedial work and an additional \$21,600.00 to repair the remainder of the deficient work. Ms. Jeanfreau further alleged that she was due an additional \$23,500.00 in delay damages arising from

her contract with Bayou Contracting.<sup>1</sup> However, the trial court, with Ms. Jeanfreau's consent, limited the amount of the delay damages so as not to exceed its jurisdictional limit of \$35,000.00. See LSA-C.C.P. art. 4843(G). On May 15, 2009, the trial court signed a judgment in favor of Ms. Jeanfreau and against Bayou Contracting, awarding Ms. Jeanfreau "\$35,000.00 together with legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings."

Bayou Contracting has appealed, assigning two errors for review: 1) that the trial court erred in allowing Ms. Jeanfreau to recover the estimated cost of repair and damages arising from Bayou Contracting's nonperformance, and 2) that the trial court erred in accepting Mr. Marcotte's cost estimates.

### **DISCUSSION**

A judgment by default may be entered against a defendant who fails to answer within the time prescribed by law. LSA-C.C.P. art. 1701A. Louisiana Code of Civil Procedure article 1702 specifies the procedure and evidence necessary to confirm a default and provides in pertinent part:

A. A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the judgment of default....

B.(1) When a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering judgment.

A prima facie case is established when the plaintiff proves the essential allegations of its petition, with competent evidence, to the same extent as if the allegations had been specifically denied. **Crescent City Const., Inc. v.**

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<sup>1</sup> The parties agreed that if the work was delayed due to the contractor's neglect, the contractor would pay "\$100.00 per day as liquidated damages until the work is completed." Ms. Jeanfreau sought the stipulated damages for 235 days from May 31, 2006, when she was initially instructed that Bayou Contracting would remedy the defects, through January 22, 2007, which she alleges was the date of her last conversation with Bayou Contracting.

**Camper**, 03-1727, p. 5 (La.App. 1 Cir. 12/30/04), 898 So.2d 408, 413. In other words, a plaintiff must present competent evidence that convinces the court that it is more probable than not that he would prevail in a trial on the merits. **Signlite, Inc. v. Northshore Service Center, Inc.**, 05-2444, p. 4 (La.App. 1 Cir. 2/9/07), 959 So.2d 904, 906. There is a presumption that a default judgment has been rendered upon sufficient evidence to establish a prima facie case and is correct, and appellant has the burden of overcoming that presumption. However, this presumption does not apply where testimony is transcribed and contained in the record. **Id.**, 05-2444 at p. 4, 959 So.2d at 906-07. Because there is a transcript of the testimony in the record before us, the presumption of the validity of the confirmation of the default judgment does not apply.

When reviewing a confirmation of default judgment, an appellate court is restricted to determining whether the record contains sufficient evidence to prove a prima facie case. **Arias v. Stolthaven New Orleans, L.L.C.**, 08-1111, p. 5 (La. 5/5/09), 9 So.3d 815, 818. This determination is a factual one governed by the manifest error standard. **Id.**

Confirmation of the default judgment is similar to a trial at which the defendant is absent. **Crescent City Const., Inc.**, 03-1727 at pp. 5-6, 898 So.2d at 413 (citing Frank L. Maraist & Harry T. Lemmon, Civil Procedure § 12.3, at 326, in 1 Louisiana Civil Law Treatise (1999)). At the hearing on the confirmation of default, the rules of evidence generally apply. **Id.** (citing Maraist and Lemmon, Civil Procedure § 12.3, at 327). "Because at a default confirmation there is no objecting party, to prevent reversal on appeal, both plaintiff and the trial judge should be vigilant to assure that the judgment rests on admissible evidence" that establishes a prima facie case. **Arias**, 08-1111 at p. 8, 9 So.3d at 820 (citing George W. Pugh, Robert Force, Gerald A. Rault, Jr., & Kerry Triche, Handbook on Louisiana Evidence Law 677 (2007)). Thus, inadmissible evidence, except as specifically provided by law, may not support a default judgment even

though it was not objected to because the defendant was not present. **Arias**, 08-1111 at p. 8, 9 So.3d at 820 (citing 19 Frank L. Maraist, Civil Law Treatise: Evidence and Proof § 1.1, at 5 (2d ed.2007)).

Bayou Contracting argues that the court awarded damages for both the costs of repair in the amount of \$21,600.00 and stipulated damages arising from Bayou Contracting's nonperformance. Bayou Contracting avers that this "double judgment" is expressly prohibited by LSA-C.C. art. 2007, which provides:

An obligee may demand either the stipulated damages or performance of the principal obligation, but he may not demand both unless damages have been stipulated for mere delay.

Bayou Contracting concludes that the trial court committed legal error in awarding damages for both the cost of repair and the stipulated damages provided for by the contract.

We disagree. We note that the contract between the parties provided that "[i]n the event the work is delayed due to neglect of the Contractor, the Contractor agrees to pay the Owner the sum of \$100 per day as liquidated damages until such time as the work is completed." In accordance with the clear terms of the parties' agreement, the stipulated damages are solely for delay. As such, these damages are expressly excluded from Article 2007's prohibition. Therefore, the trial court's award of both the costs for repair and the stipulated contractual damages for delay are not prohibited by Article 2007. Assignment of error number one is without merit.

In its second assignment of error, Bayou Contracting asserts that the trial court erred in awarding repair costs based on Mr. Marcotte's estimates. Although Mr. Marcotte had "expertise" in the area of home repair, Bayou Contracting notes that Mr. Marcotte was never qualified as an expert by the court.

Generally, a witness not testifying as an expert may not give testimony in the form of opinion or inferences. This rule is subject to the limited exception of LSA-C.E. art. 701, which provides that a lay witness may provide testimony in

the form of opinions or inferences where those opinions or inferences are: (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact at issue. See Louisiana Land and Exploration Co. v. Verdin, 95-2579, p. 5 (La.App. 1 Cir. 9/27/96), 681 So.2d 63, 66, writ denied, 96-2629 (La. 12/13/96), 692 So.2d 1067.

In this case, Mr. Marcotte testified that he has owned investment properties for roughly thirty-five years and he has "worked in and around them...all this time." Following Hurricane Katrina, he indicated that he renovated seventeen houses similar to Ms. Jeanfreau's home. Through his experience, he has learned "how to repair and how to especially work on flooring and tile and things of this nature."<sup>2</sup>

Finding that both elements of Article 701 are present in this case, we cannot conclude that the trial court was manifestly erroneous. First, Mr. Marcotte's opinions were rationally based on his perceptions. Second, his testimony, based on his experience and background, was helpful to the trial court in determination of the factual issues in this case. As such, we cannot conclude that the trial court erred in crediting Mr. Marcotte's testimony. See Verdin, 95-2579 at pp. 5-6, 681 So.2d at 66 and **St. Martinville, L.L.C. v. Louisiana Tax Comm'n**, 05-0457, pp. 5-7 (La.App. 1 Cir. 6/10/05), 917 So.2d 38, 42-43. Accordingly, Bayou Contracting's second assignment of error is without merit.

For the foregoing reasons, we affirm the May 15, 2009 judgment of the trial court. Costs of this appeal are assessed against appellant, Bayou Contracting, LLC.

**AFFIRMED.**

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<sup>2</sup> We note that the flooring was the main concern, and the estimate to repair the defective work in this regard was \$16,000.00.

**RAE JEANFREAU**

**NUMBER 2010 CA 1858**

**VERSUS**


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**COURT OF APPEAL**

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WELCH, J., concurring in part and dissenting in part.

 I respectfully concur in part and dissent in part with the majority opinion in this matter. While I agree with the majority's conclusion that both the costs of repair and the stipulated contractual damages could be awarded, I disagree with the majority's decision to affirm the trial court's award of the estimated repair costs. The evidence in the record regarding the estimated costs of repair was insufficient to establish a *prima facie* case warranting an award of such damages in the amount of \$21,600.00. The award for the estimated costs of repairs was based solely on the opinion testimony of Gerald Marcotte, the plaintiff's neighbor. Mr. Marcotte is not a licensed or qualified residential contractor in Louisiana and has not performed any work that has been the subject of a building permit or an inspection by a building official. To allow an individual with Marcotte's qualifications (or lack thereof) to render an opinion—lay or otherwise—on the estimated cost of repairs, not only violates the spirit of the licensing process for residential contractors, but sets a dangerous legal precedent. Therefore I would amend the trial court's judgment to reflect an award of \$23,500.00 in damages for delay and \$460.00 in damages for the remedial work already performed.