NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1491

RITA RUSHING

VERSUS

NEWTON BUILDERS, L.L.C.

Judgment Rendered: MAR 2 5 2011

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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 573,320, DIVISION "D"

THE HONORABLE JANICE G. CLARK, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

On September 26, 2008, the plaintiff, Rita Rushing, entered into a construction contract with Andre Newton of Newton Builders, LLC (Newton), to repair her home that had been damaged by Hurricane Gustav. After Newton began the repairs and had received the first of four draws for payment, the parties had several disagreements over the workmanship. Ms. Rushing obtained an attorney who had numerous conversations with counsel for Newton attempting to resolve the differences between the parties.

On December 9, 2008, Ms. Rushing filed suit against Newton for breach of contract damages and attorney fees. On February 23, 2009, Newton filed an answer and reconventional demand claiming that Ms. Rushing wrongfully terminated the contract and requesting damages for expenses and anticipated profits and attorney fees. After the termination of Newton's services, Ms. Rushing hired Homecare to finish the project.

On December 11, 2009, Ms. Rushing filed a motion for summary judgment that was heard on February 1, 2010, and granted on February 10, 2010, with a judgment signed on March 2, 2010. The judgment not only granted Ms. Rushing's motion for summary judgment, but also dismissed Newton's reconventional demand and awarded Ms. Rushing $34,775.41 in specific damages, $5,000.00 in nonpecuniary damages, and $29,400.00 in attorney fees. On May 12, 2010, the district court denied Newton's motion for new trial and awarded Ms. Rushing an additional $1,125.00 in attorney fees.

Newton appeals, citing four assignments of error:

> 1. The trial court erred in making credibility determinations in resolving the ultimate issue in dispute, who breached the contract.
>
> 2. The trial court erred in determining the ultimate issue in dispute, who breached the contract, where conflicting evidence is submitted and a genuine issue of material fact exist[sic] which precludes summary judgment.

3. The trial court erred when it determined the amounts of the awards made to plaintiff when there was no evidence supporting such amounts.

4. The trial court erred when it considered an affidavit of the plaintiff prepared three days prior to the hearing of a motion for summary judgment.

5. The trial court erred when it adopted the amount of fees provided in the affidavit of plaintiff's attorney, which was filed twenty three days after the hearing on a motion for summary judgment, in determining that a $29,400.00 fee was reasonable in prosecuting this matter and in awarding an additional $1125.00 in fees for a motion for new trial.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Lewis v. Four Corners Volunteer Fire Department,* 08-0354 (La. App. 1 Cir. 9/26/08), 994 So.2d 696, 699. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B. The initial burden of proof remains with the mover and is not shifted to the non-moving party until the mover has properly supported the motion and carried the initial burden of proof. Only then, and only if the issue is one on which the non-moving party would have the burden of proof at trial, must the non-moving party "submit evidence showing the existence of specific facts establishing a genuine issue of material fact." When the court is presented with a choice of reasonable inferences to be drawn from subsidiary facts contained in affidavits and attached exhibits, these reasonable inferences must be viewed in the light most favorable to the party opposed to the motion. The credibility of a witness or doubt as to whether a party alleging a fact will be able to sustain his burden of proof on the merits are

improper considerations in determining the existence of material fact. *Schindler v. Biggs*, 06-0649, p. 5-6 (La. App. 1 Cir. 6/08/07), 964 So.2d 1049, 1053.

Ms. Rushing's motion for summary judgment was supported by the affidavit of Bob Dencklau, the owner of Homecare, and various documents including correspondence between the attorneys for the parties. In opposition to the motion, Newton filed the affidavits of Hillery G. Johnson and Andre Newton claiming there were numerous issues of material fact including who actually breached the contract.

After conducting a *de novo* review of the evidence in support of and in opposition to the motion for summary judgment, we agree with Newton that there are genuine issues of material fact as to who breached the contract, the resolution of which will depend on the testimony of the various witnesses and the credibility to be given to them. We also find there are numerous other genuine issues of material fact at issue in this case.

For these reasons, the judgment of the district court, dated March 2, 2010, dismissing the reconventional demand of Newton Builders, LLC and granting summary judgment in favor of the plaintiff, Rita Rushing, is reversed. The judgment of the district court, dated May 12, 2010, denying the judgment notwithstanding the verdict, the motion for new trial, the motion to vacate the judgment, and assessing additional attorneys fees and costs, is also reversed. The matter is remanded to the district court for further proceedings consistent with this opinion. We find it is not necessary to address Newton's additional assignments of error. Costs are assessed against the plaintiff-appellee, Rita Rushing.

REVERSED AND REMANDED.