NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1203

SOD FARM, L.L.C.

VERSUS

LAKEWOOD DEVELOPMENT, L.L.C.

Judgment Rendered: MAR 2 8 2012

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TMH

On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2008-12719

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Parro, J. Concurs. by TMH
Carter C.J. Concurs

HIGGINBOTHAM, J.

The defendant, Lakewood Development, L.L.C. (Lakewood), challenges the trial court judgment in favor of plaintiff, Sod Farm, L.L.C. (Sod Farm). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Sod Farm owned a tract of land near Abita Springs in St. Tammany Parish. Lakewood, a development company in the business of constructing subdivisions, agreed to purchase the tract of land to develop a subdivision to be named Abita Trace Subdivision. On June 30, 2005, Sod Farm and Lakewood entered into a purchase agreement (the agreement) in which Sod Farm agreed to sell and Lakewood agreed to buy the 361.093 acre tract of land (the property) located in St. Tammany Parish. The agreement provided that the property would be divided into sub-parcels and the purchase of the property would occur in stages at multiple closings. The agreement required that the first sub-parcel sold be at least 100 acres, and each sub-parcel sold thereafter be at least 50 acres. The agreement had a timeline after the first closing establishing when the following closings should occur. The second closing was to occur no later than twelve months after the recordation of the final subdivision plat for sub-parcel 1 or twenty-four months after the first closing, whichever date was first. In the event Lakewood failed to comply with its obligations under the agreement, the agreement provided that the "sole and exclusive remedy for [Lakewood's] default shall be the forfeiture of the [d]eposit as stipulated damages." The deposit was $100,000.00.

On January 27, 2006, the parties entered into a "Credit Sale with Subordination" (credit sale) for the first 100 acres (sub-parcel 1) of the property. Pursuant to the credit sale, Sod Farm conveyed a 100-acre sub-parcel to Lakewood for two million dollars. On that day, Lakewood paid to Sod Farm one million dollars. For the remaining balance of the purchase price, Lakewood furnished a

promissory note for the sum of one million dollars made payable to Sod Farm. The credit portion of the purchase price was secured by a mortgage and vendor's lien on sub-parcel 1 in favor of Sod Farm. The credit sale provided that the remaining balance "shall be repaid contemporaneous with each sale by Lakewood of completed homes to third parties in accordance with the terms and conditions of paragraph three of the purchase agreement." Paragraph three of the agreement provides that the purchase price for each property sub-parcel shall be payable in stages based on the sales of completed homes as follows: the amount payable at each closing of a completed home shall be equal to $10,000.00 per acre multiplied by the number of acres in that property, divided by the number of home lots in that property sub-parcel. Neither the agreement, the credit sale, nor the promissory note provided any specific due date for repayment of the credit portion of the sale. The credit sale states that if legal proceedings are instituted for foreclosure, Lakewood agrees to pay reasonable attorney's fees.

Subsequent to the credit sale, Lakewood was to close on the second sub-parcel no later than twenty-four months after January 27, 2006. Lakewood did not close on the second sub-parcel of land as scheduled and was granted an extension by Sod Farm until April 30, 2008. Lakewood did not close on April 30. Further, no houses had been built nor lots sold on sub-parcel 1, and none of the balance of one million dollars had been repaid by that date.

On May 22, 2008, Sod Farm filed a "Petition for Damages and For Enforcement of Mortgage" seeking judgment in the amount of one million, one hundred thousand dollars against Lakewood and enforcement of the mortgage on the immovable property. Sod Farm also filed a "Notice of Pendency of Action (Lis Pendens)" in the St. Tammany Parish mortgage records. In its petition, Sod Farm contended that Lakewood's failure to close on the purchase of the second sub-parcel by April 30, 2008, constituted default of Lakewood's obligation under the

agreement. Further, Sod Farm alleges Lakewood's failure to take any meaningful steps toward development of the first sub-parcel was a breach of Lakewood's obligation to develop the tract, thus the one million dollars remaining on the purchase price should be immediately due and payable. Sod Farm also sought enforcement of its mortgage on the property and attorney's fees.

On May 23, 2008, Lakewood paid to Sod Farm $100,000.00 as provided in the agreement, for defaulting by failing to timely close on the second sub-parcel of land. The remaining matters were heard by the trial court on August 2, 2010.

On September 9, 2010, judgment was signed reforming[1] the repayment provision of the promissory note between Lakewood and Sod Farm, requiring Lakewood to pay to Sod Farm twenty-thousand dollars per month until the principal amount of one million dollars was paid in full. The judgment also granted reasonable attorney's fees in favor of Sod Farm. The trial court specifically found that Lakewood was required to perform its obligations under the credit sale within a reasonable time and that a reasonable time had passed for the initiation of repayment of the debt. Lakewood appeals, alleging three assignments of error: (1) the trial court erred in finding that the term for performance of Lakewood's payment obligation under the credit sale agreement was not determinable and thus not valid and enforceable as written; (2) the trial court manifestly erred in failing to find that any delay in performance of Lakewood's payment obligation under the credit sale agreement was reasonable and justified under the facts and circumstances of this case; and (3) the trial court erred as a matter of law in finding Sod Farm was entitled to recover attorney's fees.

[1] We do not determine the appropriateness of the court's decision to reform the contract as that issue was not before us. However, we note the Louisiana Civil Law Treatise, Law of Obligations § 6.4 (2d ed.) states the following regarding an uncertain term that must be performed within a reasonable time:

> Some foreign codes expressly allow parties to seek the aid of the court for the fixing of a specific deadline in such cases. Though not expressly contemplated, such recourse has not been excluded by the Louisiana Civil Code and may be had in situations that warrant it.

STANDARD OF REVIEW

It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. **Stobart v. State, DOTD**, 617 So.2d 880, 882 (La. 1993). If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. **Hulsey v. Sears, Roebuck & Co.**, 96-2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-1177.

With regard to questions of law, appellate review is simply a review of whether the trial court was legally correct or legally incorrect. **In re Mashburn Marital Trust**, 04-1678 (La. App. 1st Cir. 12/29/05), 924 So.2d 242, 246, writ denied, 06-1034 (La. 9/22/06), 937 So.2d 384. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. **Id.**

DISCUSSION

Initially, we note that the payment provisions in the agreement and credit sale constituted a term of payment rather than a condition.[2] The agreement provides that "[t]he sum of [t]en [t]housand and NO/100 Dollars ($10,000.00) per acre ... **shall be** payable at the [c]losing of the sale of that property sub-parcel, in [c]ash." (Emphasis added.) The agreement relative to payment by Lakewood is

[2] Contractual provisions are construed as *not* to be suspensive conditions whenever possible. **Southern States Masonry, Inc. v. J.A. Construction**, 507 So.2d 198, 201 (La. 1987).

not conditional on the sale of the homes, the sale of the homes merely dictates when payment should occur. The agreement and credit sale are couched in mandatory terms. The parties clearly contemplated that the agreement that Sod Farm be "repaid contemporaneous with each sale by [Lakewood] of completed homes" did not form a condition of the contract, but rather constituted a term given for payment. See **River Ridge Co. v. Hill Heights Country Club, Inc.**, 300 So.2d 537, 539 (La. App. 4th Cir. 1974).

The first issue presented by Lakewood for review by this court is whether the agreement is valid and enforceable as written. Lakewood maintains that the term in the contract is not fixed, but determinable, and therefore the contract is enforceable as written. Thus, according to Lakewood, because the term for payment (the sale of homes) has not yet occurred, the money is not yet due under the contract. In support of its position, Lakewood relies on **Schultz v. Hill**, 02-0835 (La. App 1st Cir. 2/14/03), 840 So.2d 641. In **Schultz**, the issue was termination of a real estate commission contract. In that case, the court found the contract at issue contained an uncertain, but determinable term and, thus, could not be terminated at will under La. C.C. art. 2024. (A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.) In the case *sub judice*, the issue is when payment is due, not whether the contract can be terminated at will. Therefore, we do not find the rationale of **Schultz** applicable.

Louisiana Civil Code article 1778 identifies different terms for performance. It provides:

> A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future and certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time.

The payment provisions in the agreement and the credit sale only delayed Lakewood's payment until the sale of homes to third parties, an event contemplated by the parties to take place in the anticipated normal course of events. The parties did not anticipate that Lakewood would not make substantial progress on the subdivision for several years after the credit sale was signed. Lakewood's failure to begin development of the subdivision changed the premise on which the parties were relying. Therefore, we find that the unanticipated non-occurrence of a future certain event made the time for performing the payment obligation not determinable and uncertain requiring that the obligation be performed within a reasonable time. See **Southern States Masonry, Inc.**, 507 So.2d at 204; La. C.C. art. 1778.

Further, where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time. **Morvant v. Russell & Clemmons, Inc.**, 11 So.2d 45, 48 (La. App. 1st Cir. 1942). Lakewood's obligation to repay the debt depended on its sale of homes to third parties. Whether the homes were built and sold was within the control of Lakewood. We do not find that the parties intended Lakewood to have an unlimited time for performance. The foregoing analysis leads us to conclude that the trial court was legally correct in its finding that Lakewood had to fulfill its obligation within a reasonable time.

In its second assignment of error, Lakewood argues in the alternative that even if the trial court's finding that Lakewood was required to perform its obligation within a reasonable time was correct, any delay in performance of Lakewood's payment obligation under the credit sale agreement was reasonable and justified under the facts and circumstances of this case.

If no time for performance is stated in a contract, a reasonable time is to be determined from the circumstances surrounding the formation of the contract and how the parties themselves looked upon the time element. See **Perrin v. Hellback**, 296 So.2d 342, 344 (La. App. 4th Cir.) writ denied, 300 So.2d 184(La. 1974); La C.C. art. 2050. A reasonable amount of time is such time that is necessary and convenient to fulfill the contract's requirement. **Morvant**, 11 So.2d at 48.

The trial court in its written reasons for judgment determined "a reasonable time has passed for the initiation of repayment of the debt." Lakewood contended that, considering the circumstances they were met with when preparing to develop the subdivision, any delay in starting to build was reasonable. According to Lakewood, several unusual problems and extraordinary difficulties delayed the process of developing the subdivision. They included: Hurricane Katrina; the indictment of Councilman Impastato; the revision of the parish-wide zoning; the crash of the housing market; the proposed construction of a new highway interchange, and the lis pendens placed on the property by Sod Farm.

Prior to trial, the parties stipulated that Lakewood never obtained approved plans from St. Tammany Parish to develop sub-parcel 1, the property had not been subdivided, no infrastructure had been built, and no traffic study or water well plan had been completed. Lakewood presented evidence of the work they had done to develop the property. In 2005, they hired Tom Walsh to provide a plan for development of the subdivision. They also paid for a topographic survey, landscape design, and for engineering design and consulting. However, most of Lakewood's time and money spent to develop the subdivision occurred prior to August 2007.

The trial court relied on the testimony of Toby Lowe, a member of Sod Farm. Lowe testified about his course of prior dealings with Larry Kornman, a principal of Lakewood. Lowe had previously worked with Kornman on five or six

subdivisions. Lowe testified that he thought it was going to take Lakewood about two years to build out the first 100 acres.

According to Sod Farm, approximately eighteen months after the credit sale, Lakewood placed the development on hold. In support of its position, Sod Farm presented a letter dated August 2007 that Lakewood sent to Kyle and Associates, who was in charge of the traffic study, telling the company that it was placing a temporary hold on the proposed Abita Trace Subdivision. Lakewood also sent a similar letter to Krebs, LaSalle, LeMieux Consultants, Inc., who was in charge of the water well and sewer plant plans, telling it the development of Abita Trace Subdivision was on hold until the end of the year. Also, Lowe stated that around January 2008, Kornman requested that Sod Farm buy back the property and indicated to him that Lakewood did not intend to go forward with developing the 100 acres. Sidney Fontenot, who works in the Department of Planning in St. Tammany Parish, testified that Lakewood never filed an application for land use with the department.

The trial court determined that Lakewood had not made a substantial effort to perform and develop the subdivision in accordance with its obligation. Further, the trial court found that the parties had anticipated and intended that the repayment of the credit portion of the price would begin within two to four years after the credit sale. Therefore, a reasonable time had passed for the initiating of repayment of the debt.

Considering the circumstances surrounding the formation of the agreement and the credit sale, the extenuating circumstances discussed by Lakewood, and how the parties themselves looked upon the time element, we find the trial court did not err in finding that Lakewood had not made a substantial effort to develop the subdivision and that a reasonable time had passed for initiation of repayment of the debt.

In its final assignment of error, Lakewood contends that the trial court erred as a matter of law in finding Sod Farm was entitled to recover attorney's fees. It is well settled that attorney fees are not recoverable unless expressly authorized by statute or by a contract between the parties. See **Huddleston v. Bossier Bank and Trust Co.**, 475 So.2d 1082, 1085 (La. 1985); **Tassin v. Golden Rule Ins. Co.**, 94-0362 (La. App. 1st Cir. 12/22/94), 649 So.2d 1050, 1058. The contracts signed between Sod Farm and Lakewood contain two provisions regarding attorney's fees. The credit sale provides in pertinent part "that if legal proceedings are instituted for foreclosure, [Lakewood] agrees to pay reasonable and customary attorney fees."

In its petition, Sod Farm sought "enforcement of its mortgage on the First Subparcel through the seizure and sale of the First Subparcel" and prayed that the "Court issue a Writ of Seizure and Sale directing the Sherriff of St. Tammany Parish to seize the First Subparcel and sell it ... in enforcement of Sod Farm's mortgage." A foreclosure proceeding can be instituted via ordinary process. See La. C.C.P. art. 3722. Therefore, because Sod Farm "instituted" a proceeding for foreclosure, the trial court did not err in finding reasonable attorney's fees were due under the credit sale.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of the appeal are assessed to Lakewood Development, L.L.C.

AFFIRMED.