NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0506

CARL J. KENNEDY

VERSUS

LOUISIANA MAINTENANCE SPECIALTIES, INC.,
LMS CONSTRUCTORS, LARRY KELLY, AND JOHN KELLY

Judgment Rendered: DEC 28 2007

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Appealed from the 19th Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 522,284

Honorable Timothy E. Kelley, Judge

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BEFORE: PARRO, KUHN, AND DOWNING, JJ.

DISPOSITION: Affirmed

Parro, J., dissents and assigns reasons.

KUHN, J.

Plaintiff appeals the involuntary dismissal of his suit following the presentation of his case at trial. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In November 2001, Carl Kennedy wanted to construct a building to house his gift shop and his accounting practice. On January 2, 2002, Mr. Kennedy signed a contract with LMS Constructors for the construction of a metal building on his property located at 11222 North Harrell's Ferry Road in Baton Rouge, Louisiana. LMS Constructors was a trade name employed by an entity known as Louisiana Maintenance Specialties, Inc. (collectively "LMS").

The contract provided that LMS would complete all work "in a workmanlike manner and in compliance with all building codes and other applicable laws." It also provided that LMS would furnish "all of the materials and perform all of the work shown on the drawings and/or described in the quote." Appended to the contract was the quote for the entire job, listing the various components of the proposed construction. Significantly, architectural plans, permit fees, elevation certification, and any site work needed to meet elevation requirements were specifically excluded from the scope of the contract. Hence, responsibility for these items rested with Mr. Kennedy, not LMS.

In January 2002, Carl Jeansonne, Jr., a professional land surveyor, was hired to execute a proposed certificate of elevation for the subject property. Therefore, prior to the beginning of construction, Mr. Jeansonne surveyed the property to determine the required minimum elevation for the proposed building's foundation in accordance with the Unified Development Code (Code) provided by the Planning Commission of the City of Baton

Rouge, Parish of East Baton Rouge. After considering all pertinent factors, Mr. Jeansonne determined that the required minimum elevation for the building's foundation was 46.2 decimal feet above mean sea level. The following day, the architect retained by Mr. Kennedy executed the necessary plans for the construction. The plans neither incorporated Mr. Jeansonne's determination regarding elevation, nor did they contain a particular figure specifying at what elevation the foundation was to be.

Shortly thereafter, LMS employees began to set the forms for the foundation to comply with the required minimum elevation as determined by the surveyor. However, LMS officer and job supervisor, Larry Kelly, subsequently ordered that the forms be re-set to increase the elevation of the foundation at least two more inches.

The day before the concrete was to be poured, Mr. Kennedy and his wife visited the construction site. The lot to their left was vacant; however, the Kennedys noticed that the building situated on the lot to their right had a foundation distinctly higher than the constructed forms for their foundation. When they questioned Mr. Kelly regarding the correctness of their foundation's height, he assured them that it exceeded the Code's requirements by more than two inches and that it should be safe from flooding. Based on this assurance, the Kennedys did not request that LMS further increase the elevation of the foundation.

Once LMS had substantially completed construction, Mr. Jeansonne conducted a final survey to ensure that the finished foundation was actually constructed at the required minimum elevation. The results of his survey indicated that the foundation did, in fact, exceed the required elevation by more than two inches.

Mr. Kennedy accepted the building and began occupying it in April 2002. Despite the occurrence of heavy rains, the building sustained no flooding during Mr. Kennedy's first year of occupancy. Indeed, Mr. Kennedy contacted LMS to request that it construct an addition to the rear of his building at the same elevation as the original structure, and in June 2003, the parties executed a written contract.

While LMS was working on the addition, a strip mall was being constructed simultaneously on the adjacent lot to the left of Mr. Kennedy's property. The elevation of the foundation for the new strip mall was appreciably higher than Mr. Kennedy's foundation. Consequently, during the course of the addition job, Mr. Kelly felt compelled to perform additional grading and drainage work not contemplated by the parties' contract. Accordingly, the cost for this extra work was borne by LMS.

Approximately six months after LMS completed construction of the addition, Mr. Kennedy's building flooded as a result of a heavy rainstorm on May 12, 2004.[1] The building also flooded on five subsequent occasions.

In August 2004, Mr. Kennedy hired civil engineer Phillip Beard to determine and to rectify the cause of the flooding. It was Mr. Beard's opinion that the flooding was due to the fact that Mr. Kennedy's building was situated in a "dish" that funneled rainwater toward it. Mr. Beard's subsequent remediation efforts were only partially successful. Ultimately, he concluded that the only way to ensure the building would not flood again would entail demolishing the building and increasing the elevation of the building's foundation at least six inches prior to rebuilding.

On July 15, 2004, Mr. Kennedy filed suit against LMS claiming that it constructed his foundation at an elevation that was too low, and as a

[1] According to the record, Mr. Kennedy began occupying the addition in November 2003.

consequence of this error, the land surrounding the building could not be properly graded.[2] In its answer, LMS denied Mr. Kennedy's allegations regarding the foundation's elevations and further asserted that it had constructed the building in accordance with the plans and specifications it was provided. LMS maintained that it had fully complied with its contract with Mr. Kennedy because the building, and more specifically, the elevation of the foundation, was in compliance with the Code.

A trial on the merits began on October 31, 2006. LMS was allowed to question two of its witnesses during the presentation of Mr. Kennedy's case in chief. Moreover, counsel for Mr. Kennedy stipulated to the admission of Mr. Jeansonne's deposition, so that he would not have to call him to the witness stand. According to Mr. Jeansonne's deposition testimony, the Code requirements are intended "obviously for flood prevention." The Code provisions regarding the minimum height of a structure take into account four basic factors: 1) the 100-year flood zone elevation; 2) the highest recorded flood level in that specific area; 3) the elevation of the center line of the road in front of the proposed building; and 4) the elevation of the nearest upstream or downstream sewer manhole. After the professional surveyor has determined each of these four elevations, he takes the highest one, adds an additional foot to it, and the resulting sum establishes the required minimum elevation for the proposed building. In this matter, the minimum elevation was 46.2 decimal feet, and the actual final elevation was 46.4 decimal feet, more than two inches higher than mandated by the Code.

Mr. Jeansonne opined that when the architect or engineer does not include a particular elevation on the plans, then contractors and owners

[2] Also named as defendants were John Kelly and Larry Kelly, the officers and owners of LMS. However, for the purposes of this opinion, we refer to LMS as though it were the sole defendant.

typically build to the required minimum elevation.[3] According to Mr. Jeansonne, the plans for the original building and for the addition did not indicate a specific elevation.

Finally, Mr. Jeansonne stated that when he is requested to perform topographical surveys, he provides his results to an architect so that the building can be designed in light of the various sight elevations of the property. He further opined that issues regarding drainage were within the expertise of architects and engineers.

Following the presentation of Mr. Kennedy's case, LMS made a motion for an involuntary dismissal, contending that Mr. Kennedy had failed to demonstrate LMS's liability. When asked for a response by the trial court, counsel for Mr. Kennedy essentially argued that the evidence adduced by the plaintiff was sufficient to sustain his burden of proof. Ruling in favor of LMS, the trial court granted the motion and involuntarily dismissed Mr. Kennedy's suit at his costs. This appeal followed.

APPLICABLE LAW

Louisiana Code of Civil Procedure article 1672(B) provides that in an action tried by the court without a jury, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for involuntary dismissal at the close of the plaintiff's case on the ground that upon the facts and law, the plaintiff has shown no right to relief. In deciding whether to grant a motion for involuntary dismissal, the trial court must weigh and evaluate the evidence up to that point and ascertain whether the plaintiff has presented sufficient evidence in his case in chief to establish his claim by a preponderance of the evidence. See **Taylor v. Tommie's**

[3] The exception to this is when the calculated required minimum elevation is exactly even with or is actually below the ground's surface. Obviously, in such a case, to construct the top of the foundation so as to be at the required minimum elevation would require excavation work; accordingly, in that circumstance, the top of the foundation would exceed the minimum elevation requirement.

Gaming, 2004-2254, p. 6 (La. 5/24/05), 902 So.2d 380, 384; **Jackson v. Capitol City Family Health Center**, 2004-2671, pp. 3-4 (La.App. 1 Cir. 12/22/05), 928 So.2d 129, 131.

When considering a motion for involuntary dismissal, the trial court is not required to review the evidence in a light most favorable to the plaintiff nor is the plaintiff entitled to any other special inferences in his favor. However, absent circumstances in the record casting suspicion on the reliability of the testimony and sound reasons for its rejection, uncontroverted evidence should be taken as true to establish a fact for which it is offered. **Jackson**, 2004-2671 at p. 4, 928 So.2d at 131.

A trial court's decision to grant a motion for involuntary dismissal pursuant to LSA-C.C.P. art. 1672(B) should not be reversed unless it is manifestly erroneous or clearly wrong. **Id.** Therefore, with the foregoing legal precepts in mind, we now address Mr. Kennedy's assignments of error to determine whether the trial court was clearly wrong in concluding that under the facts and law, Mr. Kennedy failed to show by a preponderance of the evidence his right to relief under Louisiana law.

DISCUSSION

In his first three assignments of error, Mr. Kennedy argues that in deciding to grant the defendant's motion for involuntary dismissal, the trial court failed to utilize the proper standard. Specifically, he argues that the trial court erred: in failing to require the defendant to show that the evidence strongly and overwhelmingly favored it; in failing to consider the evidence presented with all reasonable inferences in the plaintiff's favor; and in failing to consider that a reasonable and fair-minded person in the exercise of impartial judgment might reach a different conclusion. Given these arguments, it is obvious that the standard being urged by Mr. Kennedy is

that governing a directed verdict in a jury trial.[4] However, the instant case involves a motion for involuntary dismissal in a bench trial, which, as noted above, is governed by a different standard. Accordingly, his arguments are inapplicable in the case *sub judice*.

Mr. Kennedy's next assignment of error is directed at the trial court's procedure. After inquiry by the trial court, and for the convenience of the witnesses, the defendant was allowed to question two of its witnesses during the plaintiff's case in chief. On appeal, Mr. Kennedy asserts that the trial court erred in granting the motion for involuntary dismissal after he rested his case given that the defendant was able to present some of its witnesses' testimony during his case in chief, depriving him of an opportunity to present rebuttal evidence.

As noted by our supreme court in **Taylor**, 2004-2254 at p. 5, 902 So.2d at 383, the "clear wording of La. C.C.P. art. 1672(B) indicates that a plaintiff must have completed the presentation of his evidence prior to the granting of an involuntary dismissal." The jurisprudence generally holds that the motion for involuntary dismissal may be made at the close of the plaintiff's case or at the close of all the evidence, but not at points in between. Accordingly, once a defense witness is taken out of turn, a motion for involuntary dismissal can only be entertained at the close of all evidence. **Gagliano v. Amax Metals Recovery, Inc.**, 96-1751, p. 2 (La.App. 4 Cir. 5/7/97), 693 So.2d 889, 890, writ denied, 97-1738 (La. 10/13/97), 703 So.2d 619.

[4] The motion for directed verdict is a procedural device available in jury trials. The motion is appropriately made at the close of the evidence offered by the opposing party and should be granted when, after considering all evidentiary inferences in the light most favorable to the movant's opponent, it is clear that the facts and inferences so overwhelmingly favor a verdict for the movant, that reasonable jurors could not have arrived at a contrary conclusion. **Tanner v. Cooksey**, 42,010, pp. 5-6 (La.App. 2 Cir. 4/4/07), 954 So.2d 335, 339, writ denied, 2007-0961 (La. 6/22/07), 959 So.2d 508.

However, in **Gagliano**, the defendant was allowed to put on two witnesses during the presentation of the plaintiff's case in chief and was granted an involuntary dismissal at the conclusion of the plaintiff's case. On appeal, the plaintiff contended that due to the fact that the defendant had already presented two of its witnesses, the motion for involuntary dismissal could only be addressed after the defendant had put on all of its evidence. The defendant countered that the plaintiff's acquiescence to the trial procedure constituted a waiver to object to this irregularity on appeal. Based upon the plaintiff's failure to object to the procedural irregularity, the appellate court affirmed the trial court's judgment.

In **Gould v. Gould**, 28,996, pp. 7-8 (La.App. 2 Cir. 1/24/97), 687 So.2d 685, 687-88, the plaintiff allowed a defense witness to testify out of order, during his case in chief. After the plaintiff rested his case, the defendant moved for involuntary dismissal, which the court granted. On appeal, Mr. Gould contended that the court must evaluate the motion on "the plaintiff's evidence, undiluted by the defendant's evidence." The second circuit rejected this argument and held that it was not error to grant the involuntary dismissal, because no additional evidence presented by the defendant was likely to alter the trial court's decision. **Id.** The supreme court later cited the circumstances and judgment in **Gould** to distinguish that case from **Taylor**. See **Taylor**, 2004-2454 at p. 7, 902 So.2d at 384.

Finally, in **Heath v. McCarthy**, 41,853, p. 6 (La.App. 2 Cir. 1/24/07), 948 So.2d 363, 367, writ denied, 2007-0358 (La. 3/30/07), 953 So.2d 69, the plaintiff specifically argued that by granting the motion for an involuntary dismissal after hearing only two of the defendants' 24 listed witnesses, the court breached its duty to hear *all* the evidence, including any rebuttal. After

discussing all of the aforementioned cases, the second circuit affirmed the judgment granting the involuntary dismissal. The court noted:

> In light of these considerations, we find no error in the district court's grant of involuntary dismissal. [The plaintiff] had completed the presentation of his case in chief, as required by Art. 1672 B. He did not timely object when the defendants reiterated their motion before they had presented their entire case, as is normally required to correct a trial error. *Gagliano v. Amax Metals Recovery, supra.* Finally, he has not shown how the presentation of additional defense evidence would in any way contribute to his own case in chief. *Gould v. Gould, supra.*

Heath, 41,853 at p. 8, 948 So.2d at 368.

In the present case, it was only after Mr. Kennedy had completed the presentation of his case in chief that the defendant moved for an involuntary dismissal. Although Mr. Kennedy responded to the purported merits of the defendant's motion, he made no objection regarding the timeliness of the motion or his lack of ability to present rebuttal evidence. Moreover, on appeal, he does not specify any particular rebuttal evidence he would have provided, much less claim how such evidence would have altered the trial court's opinion. See **Taylor**, 2004-2454 at p. 7, 902 So.2d at 384; see also **Gould**, 28,996 at p. 8, 687 So.2d at 688. Thus, we find no merit in this assignment.[5]

Alternatively, Mr. Kennedy argues that based on the sufficiency of the evidence he presented, the trial court erred in granting the defendant's motion for involuntary dismissal. Ultimately, in deciding the motion, the trial court was required to determine whether, based on all the evidence presented, Mr. Kennedy had proven his case by a preponderance of the evidence. Accordingly, we must determine whether the trial court was

[5] Pursuant to LSA-Code of Evid. art. 611(E), a plaintiff has the right to rebut evidence adduced by his opponents; however, as noted above, the standard for the motion for an involuntary dismissal generally involves the sufficiency of the evidence presented by the plaintiff.

manifestly erroneous in concluding that Mr. Kennedy had failed to meet his burden of proof.

Herein, the contract between Mr. Kennedy and LMS expressly provided that the construction would meet all codal requirements and be completed in a workmanlike manner. Indeed, implicit in every construction contract is the requirement that the work of a builder be performed in a good, workmanlike manner, free from defects in materials or workmanship. **City of Plaquemine v. North American Constructors, Inc.**, 2000-2810, p. 23 (La.App. 1 Cir. 11/8/02), 832 So.2d 447, 464, writs denied, 2003-0329, 2003-0345 (La. 4/21/03), 841 So.2d 796, 798.

It is uncontested that Mr. Kennedy's building meets codal requirements; thus, the basis of Mr. Kennedy's claim against LMS is its alleged failure to complete the construction in a workmanlike manner. A contractor's liability is not strict or absolute, nor is it to be presumed from the mere fact that a building develops structural problems after construction is completed. **Harris v. Williams**, 28,512, p. 5 (La.App. 2 Cir. 8/23/96), 679 So.2d 990, 994. To impose liability on a contractor, a plaintiff must prove, by a preponderance of the evidence, the existence and nature of construction defects, and that the defects were caused by the builder's use of materials, equipment, or work methods that the builder knew or should have known were faulty, defective, or unsuitable for a particular construction job. Thus, a plaintiff bears the burden of proving that the builder either lacked or failed to exercise expertise reasonably expected of one in his or her trade in performing work. **Id**.

After reviewing the record, we cannot say the trial court was manifestly erroneous in concluding that Mr. Kennedy's evidence failed to establish, by a preponderance of the evidence, that LMS breached the

foregoing duties. While we agree with Mr. Kennedy's argument that uncontroverted testimony should be taken as true absent circumstances in the record casting suspicion on the reliability of the testimony and sound reasons for its rejection, we point out that much of the evidence that Mr. Kennedy relies upon is controverted. There was testimony that the elevation was not provided for by the plans, and that most contractors build in accordance with the Code's required minimum elevation. Even Mr. Kennedy's expert, who was not accepted as an expert in contracting, opined that the building codes were created, in part, for the purpose of protecting from local flooding. The record contains further testimony that drainage and hydraulics were within the expertise of architects or engineers, not contractors.

Moreover, other evidence and circumstances are reflected in the record that conceivably cast doubt on Mr. Kennedy's claims, such as the admission of the actual architectural plans as well as the original contract that expressly excluded site work for elevation purposes. If LMS knew or should have known that additional site work was necessary to raise the foundation even higher, it undoubtedly would have done so since such site work would have entitled it to receive additional money from Mr. Kennedy. Furthermore, it must be noted that the building did not flood until several months after the addition was completed. Finally, Mr. Kennedy's expert conceded that his opinions were based on the grade and drainage as he found them to exist in August 2004. He was unaware of the grade of the land when the original building was completed, he denied any knowledge regarding the grading or the drainage of Mr. Kennedy's property prior to construction on the adjacent lots, and he admitted he had no access to topographical surveys reflecting the grade of the land at the time the original

building was constructed. Accordingly, the trial court was not clearly wrong in determining, without any consideration of the evidence presented by LMS, that Mr. Kennedy had failed to provide sufficient proof in his case in chief that LMS breached its duty to construct the foundation in a workmanlike manner.

Finally, Mr. Kennedy argues that the trial court erred in failing to place the burden of proof on the defendant to show that it had complied with the architect's plans in building the foundation before finding it was entitled to immunity under LSA-R.S. 9:2771.

We find this argument unpersuasive. To reiterate, the standard governing a motion for involuntary dismissal entails determining whether the plaintiff has presented sufficient evidence to prove his claim by a preponderance of the evidence. Hence, plaintiff had the burden of proving by a preponderance of the evidence that the defendant breached its contract to perform in a workmanlike manner. The trial court concluded that he had not.

It is only when a plaintiff has satisfied this burden that a contractor need resort to the contractor's immunity defense under LSA-R.S. 9:2771 in an effort to escape liability that otherwise would be imposed. In granting the motion for involuntary dismissal, the trial court determined that the plaintiff had failed to meet his burden of proof on his claim, thereby rendering the defendant's entitlement to immunity pursuant to LSA-R.S. 9:2771 irrelevant. Moreover, although the defendant would bear the burden of proof in such circumstances, there is no authority for the proposition that a plaintiff's evidence cannot provide a sufficient basis to support this conclusion. Accordingly, we find no error in the trial court judgment.

CONCLUSION

For all of the foregoing reasons, the trial court judgment sustaining LMS's motion for involuntary dismissal and dismissing Mr. Kennedy's petition with prejudice at his cost hereby is affirmed. All costs of this appeal are assessed to Mr. Kennedy.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

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LOUISIANA MAINTENANCE SPECIALTIES, INC., LMS CONSTRUCTORS, LARRY KELLY, AND JOHN KELLY

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

PARRO, J., dissenting.

The procedure for requesting an involuntary dismissal in an action tried by the court without a jury is governed by LSA-C.C.P. art. 1672(B), which provides:

> In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

As the majority has noted, the jurisprudence has generally held that a motion for involuntary dismissal may be made either at the close of the plaintiff's case or at the close of all of the evidence, but not at points in between. See **Taylor v. Tommie's Gaming**, 04-2254 (La. 5/24/05), 902 So.2d 380, 383; **Melady v. Wendy's of New Orleans, Inc.**, 95-913 (La. App. 5th Cir. 4/16/96), 673 So.2d 1094, 1097, writ denied, 96-1249 (La. 6/21/96), 675 So.2d 1088; **Gagliano v. Amax Metals Recovery, Inc.**, 96-1751 (La. App. 4th Cir. 5/7/97), 693 So.2d 889, 890. Nevertheless, in the matter before this court, LMS moved for, and was granted, an involuntary dismissal at the

close of Mr. Kennedy's case in chief, but after LMS had been allowed to put on some of its evidence during the presentation of Mr. Kennedy's case.

In the context of a motion for involuntary dismissal, I believe the fact-finding process in this matter was interdicted by the trial court's decision to entertain the motion after allowing LMS to put on some of its evidence during Mr. Kennedy's case in chief. Having allowed LMS to put on this evidence, the trial court was then unable to confine its analysis of whether Mr. Kennedy had demonstrated a right to relief solely based on the evidence presented by Mr. Kennedy, undiluted by the evidence presented by LMS. In my view, once a defendant is allowed to put on any of his evidence during the plaintiff's case in chief, the plaintiff must then be allowed to put on his rebuttal evidence before the court can entertain a motion for involuntary dismissal. Such an approach is not only in line with LSA-C.C.P. 1672(B) and the relevant jurisprudence, but it also complies with the normal order of trial as set forth in LSA-C.C.P. art. 1632,[1] and it serves to preserve the plaintiff's constitutional right of access to the courts guaranteed by Article I, section 22 of the Louisiana Constitution of 1974. Accordingly, I respectfully dissent.

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[1] Louisiana Code of Civil Procedure article 1632 provides, in pertinent part:

> The normal order of trial shall be as follows:
> (1) The opening statements by the plaintiff and that defendant, in that order;
> (2) The presentation of the evidence of the plaintiff and of the defendant, in that order;
> (3) The presentation of the evidence of the plaintiff in rebuttal; and
> (4) The argument of the plaintiff, of the defendant, and of the plaintiff in rebuttal, in that order.