

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1019

**J. MICHAEL HOWELL & ASSOCIATES, INC. 4 M AUTO, L.L.C.,
AUTO GAP, INC., AND AUTO GAP INSURANCE COMPANY**

VERSUS

SIERRA W/O WIRES, INC.

Judgment rendered: DEC 22 2010

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
No. 2007-15431; Division "I"**

The Honorable Reginald T. Badeaux, III, Judge Presiding

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4 M Auto, L.L.C., Auto Gap, Inc., and
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Sierra W/O Wires, Inc.**

BEFORE: KUHN, PETTIGREW AND KLINE, JJ.¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

This matter arises from a contract dispute between J. Michael Howell & Associates, Inc., 4M Auto, LLC, Auto Gap, Inc., and Auto Gap Insurance Company (collectively, Howell Group) and Sierra W/O Wires, Inc. (Sierra). After a trial on the merits, the trial court ruled in favor of Howell Group. Judgment was rendered, and Sierra appeals. For the following reasons, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Sierra is an information technology (IT) service company located in Pennsylvania. Bruce Freshwater is Sierra's chief executive officer. The Howell Group, located in Mandeville, Louisiana, primarily sells ancillary automobile insurance products such as "gap" insurance. J. Michael Howell runs the Howell Group businesses.

In late 2006, Howell Group retained Sierra to perform daily IT remote server management services. Mr. Freshwater negotiated on behalf of Sierra, and Robert Magaletta, a friend of Howell's and owner of ShadowTrack, negotiated on behalf of Howell Group.

The provisions of the contract were documented by the execution of a mutual non-disclosure agreement (signed October 23, 2006) and an IT Management Contract (signed November 13, 2006). The IT Management Contract specified the services to be performed by Sierra in two categories: (1) "Scope of Work," and (2) "Out of Scope" work. This proceeding arises out of a dispute regarding the applicability of the "Out of Scope" portion of the agreement. The "Scope of Work" portion of the contract is not at issue.

The IT Management Contract "Out of Scope" provisions cover: (1) 3rd party software integrations, (2) website modifications/redesign, and (3) customized

reporting (SQL,² website, etc. except for reports that are already part of the system).

The IT Management Contract, Section IX, also contained a "Limitation of Liability" provision. This provision provides in pertinent part, that:

Under no circumstances shall [Sierra] be liable for any indirect, incidental, punitive, special or consequential damages, including, without limitation, loss of profits.

The maximum liability of [Sierra] to client for any and all loss, claim, damage or liability of any kind, including due to [Sierra] negligence, shall be limited to the amount paid by client to [Sierra] during the month preceding the claim.

The limitations of liability set forth above shall apply: (i) regardless of the form of action, whether in contract, tort, strict liability or otherwise; and (ii) whether or not damages were foreseeable. This limitations of liability shall survive failure of any exclusive remedies in this agreement.

In early 2007, the parties began discussing changing the software Howell Group was using to keep its records and how it processed the data of its various businesses. Sierra's employee from Pennsylvania, Angela Bennese, was the project's computer programmer/developer who was put to work on this job. She reviewed Howell's operations on March 21-22, 2007 to gauge its database needs. Ms. Bennese testified that she was hired to develop the database into a web-based SQL application. Ms. Bennese testified that the work for the SQL database development was not included in the original IT Management Contract. No terms of this agreement were reduced to writing. Ms. Bennese made recordings in the Incident Management System³ (IMS) about her progress on this software conversion project.

The SQL database development work was to begin in April and was estimated to be completed in two to three months. When the work fell behind

² "SQL" is an acronym for "structured query language," which is a programming language for querying and modifying data and managing databases.

³ The IMS was employed by all of Sierra's customers to track incidents, cases, tickets, etc.

schedule, Mr. Magaletta, on behalf of Howell Group, and Mr. Freshwater, on behalf of Sierra, agreed in writing that Sierra would lower its rates from \$80.00/hour to \$39.75/hour and that Sierra would provide Howell Group with daily progress reports from Ms. Bennese. Sierra also agreed to provide Howell Group with a weekly accounting of time spent and monies due for the SQL database development project.

The database development project was not completed within the projected timeframe. Howell Group expressed concern about this as well as about the cost overruns. Five months and over \$30,000.00 into the project, Howell Group terminated both the IT Management Contract and the agreement for the SQL database development. In August 2007, Howell Group stopped paying Sierra's invoices and demanded the return of its information and documents maintained by Sierra. Sierra informed Howell Group that it needed another 185 hours to complete the SQL database development project.

In July 2007, Howell Group hired another company to create and develop its new SQL database. On August 31, 2007, Sierra formally demanded payment of outstanding invoices. Howell Group contested the validity of the invoices and refused to pay. Sierra then disconnected Howell Group's access to its server, which thereby cut off the business's access to its databases. Howell Group then paid the invoices, apparently in order to continue operating. Sierra reconnected its access on September 4, 2007.

Howell Group filed suit for breach of contract; Sierra counter-sued for invoices for the work and services it had provided but claimed were still unpaid.

After trial, the trial court found that there was an oral contract for the development services that was separate and apart from the work provided for in the IT Management Contract. It further concluded that the SQL database development work did not fall under the IT Management Contract's "Out of Scope" provisions

and was not subject to its limitation of liability clause. It further concluded that since the IT Management Contract specified that all modifications must be in writing, this oral contract for the SQL development could not be part of the written contract. The trial court ruled in favor of Howell Group and awarded it \$35,736.62, which represented reimbursement of money paid by Howell Group to Sierra for the SQL database development project. Sierra appealed and asserted the following assignments of error:

1. The trial court committed legal error when it erroneously interpreted the IT Management Contract and concluded that the SQL services were not Out of Scope items defined in the IT Management Contract.
2. The trial court committed legal error when it erroneously interpreted the terms of the Limitation of Liability provisions contained in the IT Management Contract.
3. The trial court committed legal error when it admitted evidence of an alleged "new" oral contract between the parties, which has not been previously pled by Howell.
4. The trial court committed legal error by including invoices for Scope of Work services and other services that were unrelated to Howell's claim for SQL services in its award of damages to Howell.
5. The trial court committed legal error when it failed to award Sierra damages for unpaid invoices.

STANDARD OF REVIEW AND APPLICABLE LAW

The proper interpretation of a contract is a question of law and subject to *de novo* review on appeal. **Montz v. Theard**, 01-0768, p. 5 La. App. 1 Cir. 2/27/02), 818 So.2d 181, 185. When considering legal issues, the reviewing court accords no special weight to the trial court, but conduct a *de novo* review and renders judgment on the record. **Id.**

Further, appellate courts also have a constitutional duty to review facts and have every right to determine whether the trial court finding was clearly wrong based on the evidence or clearly without evidentiary support. **Radcliff 10, L.L.C., Inc. v. Zip Tube Systems of Louisiana, Inc.**, 07-1801, 07-1802, p. 17 (La.App. 1

Cir. 8/29/08), 998 So.2d 107, 119. The reviewing court must do more than simply review the record for some evidence with supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's findings were clearly wrong or manifestly erroneous. **Id.** The task of the reviewing court is not to assess whether the trial court's factual findings are right or wrong in an absolute sense, nor to determine whether the court of appeal or another trier of fact might reasonably reach a different conclusion from the same evidence, but solely to ask whether this fact finder's resolution of the conflicting evidence was reasonable in light of the record as a whole. **Id.**

DISCUSSION

Interpretation of the IT Agreement and its Limitation of Liability Clause

Sierra argues in its first and second assignments of error that the SQL database development project comes under the "Out of Scope" provision of the IT Management Contract and is thus subject to the limitations of liability provisions provided for in that agreement. There is no dispute that the database development project at issue does not come within the "Scope of Work" provision of the written contract.

The trial court found that the SQL database development project was separate from the IT Management Contract and thus not subject to the latter's limitations of liability clause. It further held that the IT Management Contract could not be read to negate any other agreement made by the parties; rather, it correctly observed that other agreements that do not meet the requirements of the IT Management Contract are separate agreements.

We begin our *de novo* review of the record in this context. The provision at issue provides as follows:

"Out of Scope" items, these items are listed below and may not be a full and complete list but are put in place **to set the standard on "out of scope" items** and will require customer approval prior to start,

all "out of scope" items will be billed on a pre-negotiated time and materials basis:

- (1) 3rd party software integrations,
 - (2) website modifications/redesign,
 - (3) customizing reporting (SQL, website, etc ...)
- (Except for reports that are already part of the system).

In addition, the parties added in Mr. Howell's handwritten script, "4. Up to 4 hrs of out of scope work is provided at no cost. Any additional hours will be invoiced at 80.00/hr with prior approval." This provision was initialed by Mr. Howell.

Both parties acknowledge their intent in connection with the database development project at issue was to completely change Howell Group's database into a web-based SQL application. Sierra argues that this project comes under the "Out of Scope" provisions as listed above, particularly number three, which mentions SQL. Howell Group however, asserts that the development of its database was a separate agreement and not encompassed in the "Out of Scope" clause. Howell Group contends that the "SQL" reference in (3) was for SQL reporting and not the development of an SQL database.

Regarding the "Out of Scope" clause, we note that it does not clearly delineate the items covered under the IT Management Contract; rather, the clause states that the three examples are provided to "set the standard on 'out of scope' items." Clearly, the development of the database is not specifically included in the three listed items. Therefore, we conclude that there is some ambiguity as to the meaning of this clause. Moreover, the provision at issue does not appear to contemplate the development of an SQL database.

Sierra's employee hired to perform the work, Ms. Bennese, testified that the (rec. 706) work for the SQL database development was not included in the original IT Management Contract. This testimony was supported by the testimony of the Howell Group representative, Mr. Magaletta. He testified that at the time the IT

Management Contract was signed, Howell Group had an accurate database even though it was not an SQL database. He testified that the new SQL database development application did not have anything to do with the existing "Access" application.

After a careful review of the record, we conclude that there appears to be little relationship between the three items listed in the "Out of Scope" provision used to set the standard for the out of scope work and the development of a web-based SQL application to replace Howell Group's "Access" database. As such, we conclude that the agreement to develop a new database was not contemplated in the IT Management Contract under the "out of scope" items provision. Therefore, we also conclude that the agreement to develop the SQL data-base application is a separate contract, not governed by the overall written IT Management Contract agreement.

We note that the trial court ruled that the oral contract regarding the development of the database could not have come under the IT Management Contract agreement because it was not in writing as mandated by the contract. It is well-settled that in certain instances, written contracts may be modified by oral contracts even when the written contract contains a provision stating otherwise. *See Amitech U.S.A., LTD. V. Nottingham Construction Co.*, 09-2048, p. 17 (La.App. 1 Cir. 10/29/10), ____ So.3d ____, ____ (2010 WL 426277). It is also well-settled that district court's oral or written reasons for judgment form no part of the judgment and that appellate courts review judgments and not reasons for judgment. *Bellard v. American Cent. Ins. Co.*, 07-1335, 07-1399, p. 25 (La. 4/18/08), 980 So.2d 654, 671. Even so, the trial court correctly concluded that the contract was outside of the original IT Management Contract and, therefore, not subject to the written contract's limitations of liability. Accordingly, the first and second assignments of error are without merit.

Evidence of an Oral Contract that Sierra claims was not Originally Plead

Sierra alleges in its third assignment of error that Howell should not have been permitted to introduce parol evidence of a “separate” oral agreement. Sierra argues, citing **James Const. Group, L.L.C. v. State ex rel. Dept. of Transp. and Dev.**, 07-0225, p. 5 (La.App. 1 Cir. 11/2/07), 977 So.2d 989, 993, that this introduction results in reversible legal error because it stands in direct contravention to basic contract principles. Particularly, Sierra argues that parol evidence may not be admitted to explain or contradict the parties’ intent as evidenced by the IT Management Contract agreement.

Conversely, Howell argues that this rule of parol evidence does not apply because the evidence regarding the work entailed in developing the database was not offered as an explanation or contradiction of the written IT Management Contract agreement. Rather, the evidence introduced established that there was an agreement separate and apart from the written agreement.

Moreover, Howell Group argues, that it did not “expand the pleadings” as alleged by Sierra, because its original petition describes, in paragraph 8, the negotiation of a third and separate agreement between Howell Group and Sierra regarding the SQL database development project; and it also asserted a claim for breach of contract in paragraph 20 of the petition.

As discussed hereinabove, we conclude that Howell Group was not seeking to explain or to vary the terms of a written contract, but to utilize the witnesses to establish that the negotiations between it and Sierra were for work on the development of a database pursuant to a new contract. Such use of parol evidence is not prohibited. Moreover, parol evidence may be used to show the true cause or consideration for a contract. **McCarroll v. McCarroll**, 96-2700, (La. 10/21/97), 701 So.2d 1280, 1286. Thus, it follows that in certain instances, parol evidence may be introduced to show the true cause of the oral agreement. Accordingly, the

trial court properly admitted the testimony of various witnesses. This evidence helps to resolve the issues of whether the oral agreement was or was not a modification of the written document and to establish the terms of the oral agreement. This assignment of error is without merit.

Calculation of Damages

Sierra argues in its fourth assignment of error, that the trial court incorrectly included invoices in the damage award that were unrelated to Howell Group's claim for the SQL database development project. It asserts that this alleged miscalculation resulted in awarding damages to the Howell Group that had been billed for "Scope of Work" and other services that were not subject to the contested claims of this proceeding. These include invoice #537, allegedly for time billed prior to the SQL database project - \$3,068.00. And, also includes five other invoices not introduced into evidence. (#14168 - \$300.00, #14325 - \$300.00, #14581 - \$300.00, #14729 - \$628.68, and #14785 - \$300.00.)

Conversely, the Howell Group contends that its Chief Financial Officer, Heather Heburn, testified to the amount of the money it paid to Sierra for the SQL database development project as approximately \$35,736.52. Howell Group further argues that Sierra did not object to this testimony at trial. Thus, Howell Group contends that Sierra's complaints in this regard do not matter since this testimony was introduced without objection to the amount Sierra was paid for the services.

Sierra bases its claim on a document it filed on September 30, 2007, entitled "Court Ordered Memorandum Addressing Damages and Monetary Value of Source Code." Despite this title, we can find no court order in the record reserving or holding open the issue of damages pending memoranda from the parties. In fact, the memorandum submitted pursuant to the trial court's preliminary judgment, signed July 1, 2009 orders the parties to submit memoranda only on the subject of source code. This July 1, 2009, judgment awarded Howell Group

\$35,736.52, which was made final by the judgment on appeal now before us. Accordingly, Sierra's arguments contained in its memorandum filed September 30, 2007, entitled "Court Ordered Memorandum, etc." cannot constitute admissible evidence since they were only attached to its memorandum and were never offered or admitted into evidence. As Howell Group points out, therefore, there is no evidence in the record to contradict the testimony on the amount of damages offered by Heather Heborn. Accordingly, this assignment of error is without merit.

Failure to Award Payment for Unpaid Invoices

In Sierra's final assignment of error, it alleges that the trial court erred in failing to award damages that it prayed for in its reconventional demand for Howell Group's alleged unpaid invoices. It argues that the written contract clearly provides the following:

At any time during the term, should Client have a bona fide quality of service problem caused by [Sierra], that remains unresolved for more than thirty (30) days following written notice to [Sierra], the Client may cancel this Agreement at no charge to [Sierra]. Client agrees that all outstanding [Sierra] invoices must be satisfied prior to cancellation.

These alleged unpaid invoices, #652, #672, #676, and #1110, totaling \$2,316.17, Sierra contends, were introduced into the evidence at trial and remain unpaid.

Howell Group counters that there is no evidence that these invoices fall under the IT Management Contract agreement. The remote services invoices, Howell Group claims, were always described as "Managed Services." Howell Group observes that the trial court found as a fact, as stated in its reasons, that there is "no indication that these invoices represent work and goods used in anything other than the SQL Project and associated work."

In order for Sierra to be paid for these invoices pursuant to its reconventional demand, it must prove its entitlement to the funds. A plaintiff in

reconvention bears the burden of establishing its claim in the same manner as a plaintiff in the main demand. **Miller v. Leonard**, 588 So.2d 79, 81 (La. 1991). Although invoices #652, #672, and #676, were specifically plead in Sierra's reconventional demand, we find no evidence showing that they, or invoice #1110, are unpaid or that they are related to a project other than the database development project. Nor does Sierra direct us to any such evidence in its briefs.⁴ In its factual findings, the trial court implicitly concluded that Sierra failed to meet its burden of proof on the reconventional demand. We conclude that the trial court was not manifestly erroneous in reaching its implicit conclusion that Sierra failed to meet its burden on its reconventional demand. Accordingly, this assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. The cost of this appeal is assessed to Sierra W/O Wires, Inc.

AFFIRMED

⁴ Accordingly to Uniform Rules Courts of Appeal, Rule 2-12.4, which provides that unless the argument includes a suitable reference place in the record, the court may disregard the argument on that error.