

MOSHE SHARGIAN & SCHLOMO  
GREENWALD D/B/A BSD RESTORATION

VERSUS

POWER PLUS CLEANING SOLUTIONS, INC.

NO. 24-CA-131

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 786-862, DIVISION "F"  
HONORABLE MICHAEL P. MENTZ, JUDGE PRESIDING

October 30, 2024

**TIMOTHY S. MARCEL**  
**JUDGE**

Panel composed of Judges Susan M. Chehardy,  
Fredericka Homberg Wicker, and Timothy S. Marcel

**AFFIRMED**

**TSM**

**SMC**

**FHW**

FIFTH CIRCUIT COURT OF APPEAL  
A TRUE COPY OF DOCUMENTS AS  
SAME APPEARS IN OUR RECORDS



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## **MARCEL, J.**

In this breach of contract case arising from a supplier's alleged failure to timely deliver air handling and dehumidifying equipment for Hurricane Harvey disaster mitigation and mediation, plaintiffs Moshe Shargian and Shlomo Greenwald d/b/a BSD Restoration, ("BSD"), appeal judgments of the trial court dismissing BSD's claims against defendant Power Plus Cleaning Solutions, Inc., ("Power Plus"), and denying a motion for a new trial. For the following reasons, we affirm the judgments of the trial court.

### **BACKGROUND**

BSD Restoration is a Louisiana-based enterprise engaged in residential and commercial cleaning and restoration services. Power Plus Cleaning Solutions, Inc. is a professional cleaning equipment supplier incorporated and based in California. On August 26-27, 2017, the metropolitan Houston area experienced a catastrophic flooding event as a result of rainfall from Hurricane Harvey.

Around August 30, 2017, BSD received an order from 24/7 Complete Restoration, a Houston-based firm that specializes in water extraction, remediation, and restoration services for residential and commercial structures, to rent from BSD 125 air movers and 40 dehumidifiers for a minimum of three months. Mr. Yehuda, the president and owner of 24/7 Complete Restoration, emphasized that time was of the essence in getting the equipment in order to extract water and humidity to prevent molding and further damage to homes and buildings.

On August 31, 2017, BSD negotiated the purchase of equipment from Power Plus, to wit: 125 air movers at a unit price of \$125.00 and 40 dehumidifiers at a unit price of \$900.00, for a total purchase price of \$55,755.00. BSD paid a deposit of \$5,500.00. Changes to this original order were proposed. A dispute arose between BSD and Power Plus concerning payment for the equipment and the timeframe for fulfilment of the order. No additional payments were made.

Ultimately, Power Plus never shipped, and BSD never received, any of the invoiced equipment. 24/7 Complete Restoration cancelled its order with BSD because of its inability to supply the requested equipment.

On August 21, 2018, BSD filed a petition for damages against Power Plus seeking return of its initial payment of \$5,500.00, loss of profits, loss of income, business expenses, loss of future profits, and other damages resulting from the alleged negligence and fault of Power Plus, including unjust enrichment, detrimental reliance, breach of contract, unfair and deceptive trade practices, misrepresentation, and failure to perform requirements under the invoice.

The matter proceeded to a bench trial on March 6, 2023. On May 3, 2023, the trial court rendered a judgment in favor of Power Plus, dismissed BSD's claims with prejudice, and assessed all costs against BSD. In written reasons for judgment, the trial court found that plaintiffs were unable to prove that defendants failed to perform an obligation to deliver the equipment in accordance with the terms of the agreement because plaintiffs had not tendered full and final payment prior to defendant shipping the equipment as specified in the parties' original agreement.

Plaintiffs filed a motion for a new trial, which the trial court denied in an October 17, 2023 judgment. This timely appeal follows.

On appeal, BSD raises three assignments of error:

- 1) the trial court erred in finding that no contract existed because the parties did not have a meeting of the minds;
- 2) the trial court erred in finding that BSD breached the agreement to tender full and final payment for an order that Power Plus did not fulfill;
- 3) the trial court erred in assessing all costs to BSD.

We consider these assignments of error in our discussion below.

## DISCUSSION

We begin our discussion by noting that appeals are taken from the judgment, not written reasons for judgment. La. C.C.P. art. 1918. Nevertheless, a court of appeal can use reasons for judgment to gain insight into the district court's judgment. *Wooley v. Lucksinger*, 09-0571 (La. 4/1/11), 61 So.3d 507, 572.

Contrary to the argument stated in appellants' first assignment of error, we do not read the statement that "there was no meeting of the minds between the parties" to mean that there was no underlying original contractual agreement. In the same reasons, the judge also states, "[t]he parties had an agreement in which the defendant, Power Plus Cleaning Solutions, Inc., would supply plaintiffs, Moshe Shargian and Shlomo Greenwald d/b/a BSD Restoration, with equipment in connection with disaster mitigation and clean-up efforts." The trial court then explains that, (contrary to plaintiffs' argument at trial that the original agreement had been replaced or novated by subsequent negotiations,) there was no express, clear and unequivocal intention to terminate the original agreement and to substitute new terms creating a new agreement. In other words, the trial court found as a matter of fact that an agreement existed between the parties and also as a matter of fact that the original agreement was never replaced or superseded by a new agreement.

In civil cases, the appropriate standard of review of factual determinations is the manifest-error clearly wrong standard, which precludes the setting aside of a trial court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. *Gucci 1 Field Servs., LLC v. Reeves*, 23-73 (La. App. 5 Cir. 11/8/23), 377 So.3d 354, 359. A written contract is the law between the parties, and the parties will be held to full performance of the obligations flowing from their contract. *Id.* at 360. The party asserting that an obligation has been modified must prove by a preponderance of the evidence facts or acts giving rise to

the modification. *Id.*; La. C.C. art. 1831. Novation is the extinguishment of an existing obligation by the substitution of a new one. La. C.C. art. 1879. The intention to extinguish the original obligation must be clear and unequivocal; novation may not be presumed. La. C.C. art. 1880.

Upon our review of the record, we find no manifest error in the trial court's finding of fact that there existed an original agreement between the parties and that this agreement was never extinguished or superseded by subsequent negotiations. The terms of the original agreement between BSD and Power Plus are stated in the signed invoice dated August 31, 2017. Stated on that invoice in bold capital letters is the following, "WE WILL REQUIRE FULL AND FINAL PAYMENT BY BANK WIRE PRIOR TO SHIPPING." Other invoices introduced into evidence, also dated August 31, 2017, repeated this language and also stated the following payment terms, "BREAK THE REMAINING BALANCE DUE IN 2 PAYMENTS ... FIRST PAYMENT NOW AND BALANCE DUE BEFORE PRODUCT IS SHIPPED." While there appears to have been some factual dispute as to the number of units of equipment Power Plus was willing or able to supply that arose after the original invoice was signed, as indicated by the email exchanges introduced into evidence, the evidence is also clear that, both in the original invoice and in all subsequent negotiations, full payment to Power Plus was required before the equipment would be shipped.

Turning to appellants' second assignment of error, we disagree with appellants' contention that the trial court found that BSD breached the agreement to tender full and final payment for an order Power Plus could not or would not fulfill. The trial court made no explicit finding that BSD breached the agreement; rather, it correctly found that the obligation of Power Plus to ship the equipment was conditioned upon full and final payment being sent by BSD. It is undisputed that BSD made no additional payments, full and final or otherwise, to Power Plus,

and therefore plaintiffs were unable to prove that Power Plus failed to perform its obligation to deliver the equipment in accordance with the terms of the agreement. This argument is without merit.

Finally, appellants argue that, in the event that this court finds the judgment of the lower court should not be disturbed as to the first two assignments of error, they maintain that the trial court still abused its discretion in casting all costs of the lower court proceedings onto the appellants.

Except as provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable. La. C.C.P. art. 1920. The trial court has great discretion in assessing court costs. *Aucoin v. S. Quality Homes, LLC*, 07-1014 (La. 2/26/08), 984 So.2d 685, 697. BSD argues that it prevailed in part on its suit because, after three years of litigation, on November 12, 2021, more than a year prior to trial, Power Plus eventually returned the \$5,500.00 deposit. In light of the record before us on appeal, including evidence that Power Plus offered to return the \$5,500.00 deposit back in 2017, we find no abuse of the trial court's broad discretion in deciding to cast all costs on BSD.

For the aforementioned reasons, we affirm the judgment of the trial court.

**AFFIRMED**

SUSAN M. CHEARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
STEPHEN J. WINDHORST  
JOHN J. MOLAISSON, JR.  
SCOTT U. SCHLEGEL  
TIMOTHY S. MARCEL

JUDGES



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**NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **OCTOBER 30, 2024** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

**CURTIS B. PURSELL**  
CLERK OF COURT

**24-CA-131**

**E-NOTIFIED**

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE MICHAEL P. MENTZ (DISTRICT JUDGE)

JOSEPH S. PIACUN (APPELLANT)

JENNIFER E. FREDERICKSON (APPELLEE)

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