UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4828
Summary Calendar

JAMES CORPORATION OF OPELOUSAS,

Plaintiff-Appellee,

VERSUS

TANGIE CONSTRUCTION COMPANY, INC.,

Defendant-Appellant,

TRAVELERS INDEMNITY CO., ET AL.,

Defendants.

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TANGIE CONSTRUCTION COMPANY, INC.,

Third Party Plaintiff-Appellant,

VERSUS

TRAVELERS INDEMNITY CO. and
PLAQUEMINE CONSTRUCTION CO.,

Third Party Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(89-CV-1073)

(October 12, 1993)

Before HIGGINBOTHAM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Raising six issues, Tangi Construction Company, Inc., appeals from a judgment entered against it following a bench trial. Finding no reversible error, we **AFFIRM**.

I.

In 1986, the Corps of Engineers awarded Plaquemine Contracting Company a construction contract for Ft. Polk, Louisiana. Plaquemine contracted with Ragusa Brothers to administer the project, in exchange for 2.5% of the gross proceeds. When Ragusa Brothers went bankrupt in 1987, Plaquemine again took control of the project, and hired some of Ragusa's employees. One of these employees, Mike Ragusa, also worked for Tangi Construction Co., and was a longtime friend of Lucile Bellavia, who owned Tangi with her husband.

Mike Ragusa suggested to Tangi and to Plaquemine's owner, Allen Thomason, that Tangi administer the remainder of the project. Thomason, Bellavia, and Ragusa met in October 1987, to discuss Tangi's involvement in the project. They reached a verbal agreement concerning Tangi's involvement in the Plaquemine contract; however, at trial, the parties presented very different opinions about the nature of their agreement.

Tangi contends that the agreement was an agency contract, under which it would manage the project in exchange for a fixed fee. It was to pay all bills, and be reimbursed monthly by Plaquemine. Plaquemine contends, on the other hand, that Tangi agreed to take over the entire contract as a subcontractor, absorbing the resulting profit or loss.

Tangi took over the project in November 1987. Mike Ragusa, Tangi's employee, was project manager; and Tangi arranged for workmen and materials as needed. Among the subcontractors who dealt with Tangi on the job was James Corporation (James). In May 1988, Tangi employees contacted James to deliver asphalt for the job; and James was supplied with Tangi's credit references. James was not paid for the asphalt deliveries. Tangi contends that James was told that the Ft. Polk contract was Plaquemine's. James claimed that it discovered Tangi's claim of agency status only after Tangi defaulted.

In June 1988, Tangi began to worry about losing money on the project. Accordingly, it required that Plaquemine fund the job "up front", rather than reimbursing Tangi after Tangi had paid bills. After some negotiation, the job was completed with Plaquemine paying all expenses directly.

James sued Tangi and Travelers Indemnity Co., the surety for the job, under the Miller Act, 40 U.S.C. 270. Tangi asserted that it had acted only as Plaquemine's agent in incurring the asphalt bills, and filed a third party claim against Plaquemine. Plaquemine counterclaimed against Tangi maintaining that Tangi, as an independent contractor, was solely liable to James. James amended its complaint to make Plaquemine a primary defendant. A bench trial was held in November 1991. Plaquemine attempted to introduce exhibits, to which Tangi objected. The district court heard James' case-in-chief, and continued the balance of the trial so that Tangi could examine Plaquemine's exhibits and conduct additional discovery if needed.

The bench trial resumed in September 1992; and in March 1993, the court granted judgment in favor of James and Plaquemine against Tangi; dismissed Tangi's third-party claim against Plaquemine; and found in favor of Plaquemine on its counterclaim. Judgment was entered in March 1993. Tangi filed a motion for a new trial, which was denied. The court entered an amended judgment in April 1993.

II.

Although Tangi raises six issues, one is moot.[2] We address the remaining five.

A.

Tangi's first two issues concern the district court's interpretation and application of Louisiana law, and its findings of fact in applying it. Tangi also contends that the district court's opinion, contains "certain factual statements ... which do not properly represent the evidence."

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[2] In its fourth assignment of error, Tangi contends that the district court erred in granting to Plaquemine attorney's and court reporter's fees (totalling $8,077.87). This issue is moot, because the judgment appealed from is the judgment of March 16, 1993, *as amended and corrected by* the judgment of April 21, 1993. The latter reduces the amount of the judgment by $8,077.87, in accord with Tangi's motion for a new trial and Plaquemine's concession that such fees were not recoverable.

Of course, we apply a clear error standard for the district court's findings of fact. *See* Fed. R. Civ. P. 52(a). A finding of fact "`is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" ***Anderson v. City of Bessemer City***, 470 U.S. 564, 573 (1985) (quoting ***United States v. United States Gypsum Co.***, 333 U.S. 364, 395 (1948)). Legal conclusions, on the other hand, are reviewed *de novo*. ***Salve Regina College v. Russell***, 499 U.S. 225 (1991).

1.

Tangi asserts that the district court improperly interpreted and applied LSA-C.C. art. 1846 in evaluating the evidence of the terms of the contract between Tangi and Plaquemine.[3] Pursuant to that article, and because that contract had a value of more than $500, the district court properly required that it be proved by one credible witness and other corroborating circumstances. Under Louisiana law, the party attempting to prove the existence of the contract may serve as his or her own witness; the other corroborating circumstances may be general, and need not prove every detail of the plaintiff's case. ***Wisinger v. Casten***, 550 So.2d 685 (La. App. 2d Cir. 1989); ***Hilliard v. Yarbrough***, 488 So.2d 1038, 1041-42 (La. App. 2d Cir. 1986). As the district judge properly pointed out in his opinion, however, the corroborating circumstances must come from a source other than the "credible witness" that the statute also requires. ***Hilliard***, 488 So.2d at 1041-42.

After hearing the evidence presented by Tangi, the district court found that "Tangi's proof [was] inadequate to carry its burden" of proving the terms of the contract. On the other hand, it found that Plaquemine's version of the contract was supported by sufficient evidence to satisfy the

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[3] LSA-C.C. art. 1846 reads:

> When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.
>
> If the price or value is in excess of five hundred dollars, the contract must be proved by at least *one witness and other corroborating circumstances.*

(Emphasis added).

statute. The district court's finding of corroborating circumstances under LSA-C.C. art. 1846 is entitled to great weight. ***Miller v. Harvey***, 408 So.2d 946 (La. App. 2d Cir. 1981). We find no reversible error in either the court's interpretation of Louisiana law on this issue or its findings of fact regarding the terms of the contract.

2.

Tangi next contends that the district court misinterpreted Louisiana law on the subject of proof of obligations, under LSA-C.C. art. 1831.[4] Tangi's contention is that, in order to prove the measure of damages owed by Tangi to Plaquemine, Plaquemine should have been required to prove each item of damages with one credible witness and corroborating evidence (the same standard required to prove the terms of the contract under LSA-C.C. art. 1846). Plaquemine counters that its burden is only to prove the amount at issue by a preponderance of the evidence. We concur with this interpretation. There is no reversible error.

3.

Tangi's next contention, that the district court's opinion made statements of fact that "do not properly represent the evidence", is without merit. Tangi's brief on appeal lists several instances in which, it contends, the district court misstated the facts of the controversy. As stated, we defer to findings of fact made by the district judge unless we are, "on the entire evidence ... left with the definite and firm conviction that a mistake has been committed." ***Anderson v. City of Bessemer City***, 470 U.S. at 573. Based on our review of the record, we are left with no such conviction.

B.

Tangi next challenges evidentiary rulings. We review such rulings for abuse of discretion. *See, e.g.*, ***Southern Pacific Transp. Co. v. Chabert***, 973 F.2d 441, 448 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1585 (1993); *see also* Fed. R. Evid. 103(a), Fed. R. Civ. P. 61. And, in a bench trial, the district judge is entitled to greater latitude in evidentiary rulings. In any event, we will

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[4] LSA-C.C. art. 1831 provides in relevant part: "A party who demands performance of an obligation must prove the existence of the obligation."

reverse such rulings only where they affect a substantial right of the complaining party. ***Chabert***, 973 F.2d at 448; *see also* ***Polythane Sys., Inc. v. Marina Ventures Int'l Ltd.***, 993 F.2d 1201 (5th Cir. 1993).

Tangi contends that the district court erred in admitting certain documents (included in Exhibits 10, 11A, and 11B) over its hearsay objection. Exhibit 10 is a compilation of expenses paid by Plaquemine for the Ft. Polk job, prepared by its president, Steve Compher. Compher testified that the items listed in Exhibit 10 represented such expenses. Exhibits 11A and 11B consist of the invoices and checks by Plaquemine to pay for the Ft. Polk job.[5] Tangi objected to the admission of the compilation and the checks and invoices on the ground that the checks offered without supporting documentation, other than the compilation, were hearsay. The parties recessed to collate as many of the checks as possible with supporting invoices; these checks were admitted as Exhibit 11A, under the business records exception to the hearsay rule. The compilation was admitted as Exhibit 10. Tangi's counsel stated, "I have no objection to [the checks'] being admitted at this time as business records. I would request that they be admitted for no other purpose until after I've had an opportunity to cross-examine on the invoice attached to the checks." The remaining checks, designated as Exhibit 11B, were also admitted, without objection. Tangi's counsel cross-examined Compher regarding the invoices and checks, and made no subsequent objection to the evidence.

Tangi's initial objection to Exhibit 10 stated no specific grounds for objection to that exhibit; rather, Tangi's counsel objected to Exhibit 10 on the grounds that the *checks* to which Exhibit 10 referred (*i.e.*, the checks in Exhibits 11A and 11B), were not properly documented. Nor did Tangi object to the admission of Exhibit 10 when it was admitted into evidence the following day. The objection to the checks apparently was conditioned on their being admitted as business records, and on Tangi's ability to cross-examine Compher regarding them. Tangi did not object to the admission of the invoices, nor to the admission of the checks without documentation (Exhibit 11B).

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[5] The checks originally were offered as Exhibit 11; supporting invoices for some of the checks, as Exhibit 12. Exhibits 11 and 12 were combined to comprise Exhibits 11A and 11B.

By failing to state the grounds for its objection to the admission of Exhibit 10, and by failing to renew that objection when the Exhibit actually was admitted, Tangi waived its objection to Exhibit 10.[6] *See, e.g.*, ***Calcasieu Marine Nat'l Bank v. Grant***, 943 F.2d 1453 (5th Cir. 1991). By failing entirely to object to the admission of the invoices and the remaining undocumented checks (Exhibit 11B), Tangi also waived its objection to Exhibit 11B and the invoice portion of Exhibit 11A. *See, e.g.*, ***Calcasieu***, 943 F.2d 1453. Finally, by specifically agreeing to the admission of Exhibit 11A (and perhaps also Exhibit 11B) as "business records" subject to cross-examination, Tangi waived its objection to the admission of the checks. Fed. R. Evid. 103(a). Nor do we find plain error. Fed. R. Evid. 103(d). In sum, Tangi's challenge to the district court's admission of the documents is without merit.

C.

Finally, Tangi contends that the district court erred in refusing its request for sanctions against Plaquemine for not complying with discovery procedures. We will reverse a ruling on sanctions for violations of discovery procedures only on a showing of clear abuse of discretion. *See*, *e.g.*, ***Shipes v. Trinity Indus.***, 987 F.2d 311, 323 (5th Cir. 1993); ***Frame v. S-H, Inc.***, 967 F.2d 194, 202 (5th Cir. 1992); ***Britt v. Corporacion Peruana de Vapores***, 506 F.2d 927 (5th Cir. 1975); *see also* Fed. R. Civ. P. 37 (giving trial court authority, in its discretion, to impose sanctions against a party who fails to cooperate in discovery).

In December 1991, Tangi filed a motion *in limine*, to prevent introduction of Plaquemine's exhibits; a motion for additional discovery; and a request for production. Plaquemine did not respond to the request for production, and Tangi filed several motions to compel, which were granted.

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[6] *See* Fed. R. Evid. 103(a), stating in relevant part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless ...
>
> (1) ... a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Finally, Tangi filed a motion for sanctions on September 4, 1992, requesting that all documentation requested by Tangi be excluded from evidence. The district judge stated that he declined to impose such sanctions because Tangi's request came "mighty late" (as noted, the motion was not filed until September 4, and trial began, after the Labor Day weekend, on September 14). The court stated that it saw no reason to delay the trial any longer. Further, Tangi's request -- that the documents Plaquemine had failed to produce be excluded from evidence -- would have served little purpose. Tangi had had access to some of the documents and, judging by the terms of its requests for production, knew the contents and particulars of the requested documents with some specificity already. We find no abuse of discretion.

III.

For the foregoing reasons, the judgment is

AFFIRMED.