

22<sup>nd</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY

STATE OF LOUISIANA

NUMBER: 2008-16267

DIVISION: " E "

SKYLINE CONSTRUCTION, LLC

VERSUS

CHARLENE GERACI

FILED: \_\_\_\_\_ DEPUTY CLERK: \_\_\_\_\_

**MOTION FOR LEAVE AND INCORPORATED MEMORANDUM TO FILE**  
**INCORPORATED SUPPLEMENTAL MEMORANDUM IN SUPPORT**  
**OF MOTION FOR SUMMARY JUDGMENT**

MAY IT PLEASE THE COURT:

**I. Background to Supplemental Memorandum**

On Thursday, April 2, 2009, this Court heard argument from Plaintiff and Defendant with respect to Defendant's Motion for Summary Judgment. There was some question as to the applicability of *Frey Plumbing Co., Inc. v. Foster*, as recently decided by the Louisiana Supreme Court.

This Court provided both Plaintiff and Defendant with 10 days to supplement the record with a memorandum on the *Frey* decision as it applies to Defendant's Motion for Summary Judgment. Not including April 2<sup>nd</sup>, the memorandum would have been due on April 13<sup>th</sup>.

Unfortunately, due to a calendar oversight, this memorandum was not filed on that date. Therefore, the Defendant respectfully requests leave of court (*ex parte*) to file the enclosed Memorandum related to the applicability of *Frey*.

**II. The Frey Supreme Court Decision**

Plaintiff's opposition memorandum has but a pithy analysis of the *Frey* decision. According to our understanding of the argument, the Plaintiff contends that Charlene

Geraci is here relying on a “line of cases” that impose factors to be considered to determine whether a contract were on an open account....said line of cases allegedly being directly overruled by *Frey*.

The Defendant seeks to persuade this Court that the analysis of this issue is not so simple, and that the Plaintiff is misplacing its reliance on the recent *Frey* decision.

In *Frey*, the Louisiana Supreme Court certainly made a point to overrule all decisions that “impose any requirements” in determining whether a contract is an open account that is “inconsistent with the clear language of La. R.S. 9:2781 (D).” However, this is the extent of the *Frey* holding.

The *Frey* court does not, to the contrary, rule that contracts and open accounts are indistinguishable, or set forth that all contracts – or even all construction contracts – are open accounts. The court overruled the 4<sup>th</sup> Circuit on a limited issue: That there is no requirement under the open account statute that the parties must engage in multiple transactions or anticipate future transactions for the statute to apply.

A determination, however, must still be made by a court whether the statute does or does not apply. The court is simply bound to apply La. R.S. 9:2781(D) “as written.” *Id.* at 972.

La. R.S. 9:2781(D) sets forth as follows:

‘Open account’ includes any account forth which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions. ‘Open account’ shall include debts incurred for professional services, including but not limited to legal and medical services. For the purposes of this Section only, attorneys fees shall be paid on open accounts owed to the state.

In *Frey*, the Louisiana Supreme Court found that “applying La. R.S. 9:2781(D) to the facts of this case” there were genuine issues of material facts as to whether the agreement between plaintiff and defendant constituted an “open account” or a contract.

The facts of this case are easily distinguishable, to wit:

- (1) In *Frey*, the agreement between the plumber and the property owner was an oral contract, and there appears to be no facts setting forth that the parties agreed to a specific sum for the work. In this action, it is *undisputed* that the parties have a written agreement to perform work at a stipulated sum;

- (2) In this matter, the Defendant has submitted an uncontroverted affidavit setting forth that:
- a. She never agreed or authorized for Plaintiff to create an account;
  - b. She never purchased, ordered, or demanded any item on an account or on a credit;
  - c. She was billed based on percentages of completion;
  - d. She entered into a contract with Plaintiff;
  - e. She engaged Plaintiff as a general contractor.

The undisputed facts of this case are at severe odds with the facts in *Frey*, wherein there was factual question as to exactly how the services were provided to the property owner.

To apply *Frey* as the Plaintiff requests herein would be an ambitious decision by this Court, as it would essentially render every construction contract (and every contract) subject to the open account statute. Moreover, Defendant contends that the application of *Frey* in this matter would also be in error.

Whether §2781 should be so broad in scope was a matter brought up in the parties' briefs to the *Frey* court.

On the subject, Defendant Foster stated as follows:

Frey reads out the repeated references to 'open account' and 'account' and would have this Court hold that all unpaid debts fall within the purview of the statute. Frey's interpretation of the statute is contrary to well established principals of statutory construction and leads to absurd results clearly unintended by the Legislature. *Frey Plumbing Co. v. Foster*, 2007 LA S. Ct. Briefs 771139 (La. Dec. 11, 2007), at 9.

In response to this argument, Plaintiff Frey states:

It is anticipated that FOSTER shall likely argue that FREY'S position regarding an 'open account' shall convert every unpaid debt into an open account and shall lead to absurd results. However, FOSTER makes no attempt to explain or establish how that this is not what the legislature mandated Pursuant to the express provisions of the open account statute...  
*Frey Plumbing Co. v. Foster*, 2007 LA S. Ct. Briefs 771139 (La. Nov. 27, 2007), at 10-11.

Despite the issue being brought to the Courts attention and seemingly squarely I front of the tribunal, the Louisiana Supreme Court did not even comment on the issue, and proceeded to only overrule those line of cases that "are inconsistent with the clear language of La. R.S. 9:2781(D)." *Frey* at 972.

### III. Conclusion

The Defendant asserts to this Court that:

1. The *Frey* decision is not so broad as to render every construction contractor or contract subject to the open account statute;
2. The *Frey* decision requires this Court to read the language of 9:2781(D) and apply that language as written when determining whether an agreement is *or is not* an open account;
3. The facts of *Frey* are clearly distinguishable from the facts before the Court in this matter; and
4. Applying the facts of this matter to the language of 9:2781(D), it is undisputed and uncontroverted that an open account was not established between the parties.

Accordingly, the Petition of the Plaintiff should be DISMISSED with prejudice, and this Summary Judgment motion granted.

#### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been mailed via regular U.S. Mail, postage prepaid, or via facsimile transmission to all counsel of record in these proceedings on this 15th day of April 2009.

\_\_\_\_\_  
Scott G. Wolfe, Jr.

Respectfully submitted,

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**Attorney For Charlene Geraci, Defendant**

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**ORDER**

CONSIDERING THE FOREGOING MOTION FOR LEAVE to file a Supplemental Memorandum with regard to the *Frey* decision (said memorandum incorporated into the Motion), it is

ORDERED ADJUDGED AND DECREED that the motion is hereby GRANTED, and that the memorandum is entered into the record.

Signed in St. Tammany Parish on this \_\_\_\_ day of \_\_\_\_\_ 2009.

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JUDGE