APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT DATED DECEMBER 7, 2018

910 F.3d 221

United States Court of Appeals,

Fifth Circuit.

In the MATTER OF the Complaint of LOUIS R. KOERNER, JR., Individually and as Assignee of Jean McCurdy Meade, Plaintiff – Appellant,

v.

CMR CONSTRUCTION & ROOFING, L.L.C. Defendant – Appellee.

Docket No. 18-30019
Decided: December 7, 2018

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Opinion

Before JONES, CLEMENT, and SOUTHWICK, Circuit Judges. EDITH BROWN CLEMENT, Circuit Judge:

This case is about a roof. A perpetually leaky roof that Louis Koerner could never seem to get CMR

Construction & Roofing LLC to fix. Koerner challenges the district court's decision setting aside CMR's default, its grant of summary judgment in CMR's favor, and its denial of his Rule 59(e) motions for reconsideration. These three challenges call upon this court to answer a myriad of sub-issues. But in the end, we find no error and affirm.

I.

In the aftermath of Hurricane Katrina, in late 2005 and early 2006, CMR sold a Slate 2.0 roof to Koerner and installed it. CMR periodically returned to perform warranty and repair work in 2006, 2007, 2011, and early 2012. And despite CMR's contention that its workmanship was not to blame, it paid a contractor to conduct additional repairs in November 2012.

In April 2016, Koerner sued his insurer, Vigilant Insurance Company, in state court alleging

that his home required several repairs. The case was removed to federal court. Thereafter, Vigilant denied Koerner's claim for roof repairs by citing the faulty-workmanship exclusion to his policy, which implicated CMR. Koerner moved to join CMR as a defendant, and the district court granted the motion.

Koerner served CMR with a complaint and summons; however, the cover sheet misnamed CMR. When CMR failed to respond to the complaint, Koerner was granted an entry of default and a partial default judgment against CMR for nearly $500,000. Finally roused to action, CMR successfully moved to set aside the default, claiming that (1) it did not willfully ignore the complaint, (2) Koerner would suffer no harm or prejudice if the default were set aside, and (3) it had meritorious defenses. After several months of discovery, CMR filed a motion for summary judgment, which was granted. That same

day, the district court entered final judgment dismissing all of Koerner's claims.

Koerner timely filed two motions under Rule 59(e), one to amend the district court's interlocutory ruling setting aside the entry of default and partial default judgment, and another to amend the summary-judgment order. Koerner's motions introduced new evidence to impeach CMR's denial of willfully failing to respond to the initial complaint and to contest the summary- judgment order. On November 15, 2017, the district court summarily denied Koerner's motion to amend the entry of default and partial default judgment. And on January 4, 2018, the court denied the motion to amend the summary- judgment order. This appeal followed.

II.

Koerner first challenges the district court's decision to set aside the entry of default and vacate the partial default judgment.

Under Rule 55(c), a district court "may set aside an entry of default for good cause." Fed. R. Civ. Pro. 55(c). To decide if good cause exists, courts consider three non-exclusive factors: "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000) (internal quotation mark omitted). "A finding of willful default ends the inquiry, for 'when the court finds an intentional failure of responsive pleadings there need be no other finding.'" *Id*. (quoting *In re Dierschke*, 975 F.2d. 181, 184 (5th Cir. 1992)).

Defaults are "generally disfavored." *Mason & Hanger-Silas Mason Co. v. Metal Trades Council of*

Amarillo, Tex. & Vicinity, AFL-CIO, 726 F.2d 166, 168 (5th Cir. 1984). "Unless it appears that no injustice results from the default, relief should be granted." *In re OCA, Inc.*, 551 F.3d 359, 370–71 (5th Cir. 2008). We review a district court's decision to set aside an entry of default or a default judgment for an abuse of discretion. *Lacy*, 227 F.3d at 291–92. Determining whether a defendant willfully defaulted is a factual finding that we review for clear error. *Wooten v. McDonald Transit Associates, Inc.*, 788 F.3d 490, 495 (5th Cir. 2015).

The district court dutifully applied these good-cause factors. Koerner challenges only the analysis of the willfulness factor, so we too will evaluate only that factor.

The district court held that "CMR was not intentionally failing to respond to litigation or trying to be uncooperative or obstructionist." The court based

this holding on an affidavit from CMR's President, Steven Soulé. According to Soulé, he believed that it was too late for Koerner to sue CMR because the allegations dated from 2005 and 2006. He also believed that CMR was not actually involved in the lawsuit because the only defendant named in the caption was Vigilant and because the cover sheet sent to CMR by its registered agent was incorrectly addressed to "CMR Construction & Roofing of Texas, LLC" instead of "CMR Construction & Roofing, LLC." Upon confirming that the cover sheet misnamed CMR, the district court held, "[a]lthough Soul[é] certainly acted unwisely in failing to contact an attorney upon receiving the summons for this litigation, under the circumstances Soul[é]'s negligence is insufficient to warrant a finding of willfulness."

Koerner objects to the characterization of CMR's conduct as negligent. Specifically, Koerner argues that Soulé was dishonest in his affidavit and that CMR had sufficient notice of the lawsuit to infer that its failure to respond was intentional, notwithstanding the cover sheet. Koerner grounds this claim in a series of communications between himself and Soulé in February 2016. These consisted primarily of one-way demands by Koerner via email, phone, and text in which Koerner told Soulé there was a lawsuit pending against CMR and that CMR would be in default if it failed to respond. Given these repeated contacts, he insists that CMR's "supposedly good faith error" does not justify setting aside the entry of default and partial default judgment.

While we agree that Koerner's proffered evidence could support a willfulness inference, Soulé's affidavit, if believed, supports the contrary inference.

Given the record as a whole, we cannot say the district court clearly erred when it chose to credit Soulé's affidavit over Koerner's evidence. Consequently, the district court did not abuse its discretion in setting aside the entry of default and partial default judgment.

III.

Koerner next challenges the district court's summary denial of his Rule 59(e) motion to reconsider the order setting aside the entry of default and partial default judgment. That motion contained additional evidence impeaching Soulé's affidavit—the only evidence supporting the non-willfulness finding.

"Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). "There is no requirement that reasons be stated for the denial of a motion for

reconsideration under Rule 59(e)," especially if "valid—indeed compelling—reasons for denying the motion are obvious and apparent on the face of the record." *Briddle v. Scott*, 63 F.3d 364, 381 (5th Cir. 1995).

Koerner was not entitled to this extraordinary relief, and there is an obvious reason on the face of the record why this is so. To be granted, a Rule 59(e) motion "'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' that was not available before the judgment issued." *Molina v. Equistar Chemicals LP*, 261 F. App'x 729, 733 (5th Cir. 2008) (quoting *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)). The district court set aside the default in May 2017. The evidence that Koerner attached to his Rule 59(e) motion came to light after Soulé's deposition on August 25, 2017. The court entered final judgment on

October 18, 2017. Thus, because the evidence came to light before final judgment was entered, relief under Rule 59(e) was improper.

Koerner should have instead filed a Rule 54(b) motion while the case was still open. Under that rule, district courts can amend interlocutory orders for any reason they deem sufficient before final judgment is entered. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336–337 (5th Cir. 2017) (describing the differences between Rule 59(e) and Rule 54(b)). But in the interest of finality, Rule 59(e) sets a much higher threshold for relief once judgment is entered. *Id.*

Koerner actually admits that he could have filed a Rule 54(b) motion, but he says that he did not do so because they are disfavored for having the potential to interfere with the underlying case's progress. He cites no cases for this perplexing proposition. We fail to see how sitting on potentially

dispositive evidence until the district court completes more work and enters final judgment on a summary-judgment motion is preferable to correcting error as soon as possible.

Koerner made a poor tactical decision by waiting until after final judgment to bring the new evidence forward. But the fact remains: the evidence was available before final judgment was entered, so he is not entitled to the extraordinary relief that Rule 59(e) provides.

IV.

Finally, Koerner argues that the district court erred in granting summary judgment on (1) the fraud claim stemming from the 2006 purchase of his roof, (2) the claims related to the 2011 repairs, and (3) the negligence, fraud, and detrimental-reliance claims surrounding the 2012 repairs. After reviewing the district court's grants of summary judgment de novo,

we find no error in any of the district court's conclusions.[1]

The question at summary judgment is whether "the record, taken as a whole, could . . . lead a rational trier-of-fact to find for the non-moving party." *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013) (defining a genuine dispute of material fact). "Credibility determinations have no place in summary judgment proceedings" because "non-movants' summary judgment evidence must be taken as true." *Richardson v. Oldham*, 12 F.3d 1373, 1379 (5th Cir. 1994). All facts and inferences must be viewed in the

[1] Koerner also faults the district court for failing to give him adequate notice of the grounds upon which it granted summary judgment. We need not address this argument because after reviewing all the evidence submitted on appeal, we do not believe that there is any dispute of material fact on any of Koerner's claims. *See Ross v. Univ. of Tex. at San Antonio*, 139 F.3d 521, 527 (5th Cir. 1998) ("[F]ailure to provide notice may be harmless error…. if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact." (internal citation and quotation mark omitted)).

light most favorable to the non-movant. *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 770 (5th Cir. 2000). However, "[s]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment," and "a vague or conclusory affidavit [without more] is insufficient to create a genuine issue of material fact in the face of conflicting probative evidence." *Kariuki*, 709 F.3d at 505 (internal quotation marks omitted). Therefore, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of . . . summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). With this familiar standard in mind, we turn to Koerner's claims.

A.

Koerner maintains that in 2006 CMR fraudulently induced him to purchase a roof made of Slate 2.0. His only evidence: his two declarations made under penalty of perjury. In those declarations, he states that Eric Hunter, a CMR representative, told him that Slate 2.0 had all the same attributes as traditional slate but was better in every meaningful way. This representation, Koerner claims, was false. Slate 2.0 actually differs from traditional slate in that it consists of decorative slate facade over a synthetic membrane. Had he known that it was the membrane—not the slate itself, as in traditional slate— that provides most of the protection against the elements, Koerner claims that he would not have purchased the roof from CMR.

To establish fraud involving a contract under Louisiana law, a plaintiff must prove three elements: "(1) a misrepresentation, suppression, or omission of

true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract." *Shelton v. Standard/700 Associates*, 798 So. 2d 60, 64 (La. 2001). Additionally, a contractual fraud claim will not lie if "the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill." La. Civ. Code Ann. art. 1954; *see also Cashman Equip. v. Acadian Shipyard, Inc.*, 66 F. App'x 524 (5th Cir. 2003) (per curiam).

Koerner's claim does not survive summary judgment for two reasons. First, Koerner puts forth no competent evidence of fraudulent intent. He simply asserts in his declaration that Hunter "knew," but concealed, the differences between Slate 2.0 and

traditional slate. But this is a topic about which Koerner could have no possible personal knowledge. His speculative opinion as to what Hunter knew and did not know cannot defeat a summary- judgment motion. And without any other evidence that Hunter intentionally misled Koerner, he cannot prove his fraud claim.

Second and more importantly, Koerner could have easily ascertained the truth about Slate 2.0's qualities. Slate 2.0 differs from traditional slate in two ways. First, the Slate 2.0 tiles sit flush against each other—as opposed to being partially overlaid as in traditional slate. And second, because of this, Slate 2.0 relies more on the synthetic membrane to keep out the elements—whereas traditional slate uses felt and relies primarily on the actual slate for protection. Koerner was aware of both differences. He admitted in his declaration that he knew CMR was going to use

a synthetic membrane. He also knew, based on his own research, that Slate 2.0 is designed so that the individual tiles do not overlay on each other. Koerner could have easily put these facts together to figure out that what he was purchasing was different than a traditional slate roof and that the Slate 2.0 tiles do less work in keeping out the elements than traditional slate tiles.

Summary judgment was proper on this claim.

B.

Turning to the 2011 repairs, Koerner argues that the district court erred in dismissing Koerner's claims as perempted. We disagree.

The district court held that under Louisiana Revised Statute § 9.2772(A), any claims arising from repairs done to Koerner's roof are subject to a five-year peremptive period. Since Koerner first asserted claims against CMR on November 14, 2016, the

district court held that "any claims arising from 'improvement[s]' that Koerner 'occupied'" *prior* to November 14, 2011, would fall outside the required five-year window and be perempted. Koerner does not challenge these premises; he argues only that the 2011 repairs should not have fallen within this five-year period because the 2011 and 2012 repairs were part of the same project. There is no dispute that if the 2011 and 2012 repairs are considered one project, then the 2011 repairs should not have been perempted.

But the only evidence in support of this proposition is one conclusory assertion in Koerner's declaration that "based on [his] understanding," the 2011 repairs were part of a larger remedial project that was not completed until November 2012. But this subjective belief is belied by other more concrete evidence in the record. For example, CMR's job report

documented the 2011 job as closed on November 10, 2011. It then separately agreed to do work three months later, in February 2012. After reviewing the record as a whole, we agree with the district court that the 2011 claims are perempted.

C.

As to the 2012 repairs, Koerner alleges three claims: negligence, fraud, and detrimental reliance. Summary judgment was appropriate on all of them.

i.

Koerner asserts a negligence claim against CMR for the repairs done in November 2012. There is only one problem—CMR did not perform the repairs; a different roofer named Brian Velasquez did. As in the district court, Koerner argues that CMR can be held liable for Velasquez's work because he was CMR's independent contractor. But under Louisiana law, Koerner must point to a valid contract between

Velasquez and CMR before he can successfully argue that they had a principal/independent-contractor relationship. *See Bourquard v. L.O. Ausauma Enter.*, Inc., 52 So. 3d 248, 253 (La. Ct. App. 2010). This, he cannot do.

The summary-judgment evidence shows that Koerner entered into a contract with Velasquez—not CMR—to repair his roof in November 2012. It is true that CMR was involved with the repairs in many ways: it agreed to reimburse Koerner for Velasquez's work, set the scope of the work it would reimburse, had some supervisory power over Velasquez, and later assured Koerner that Velasquez's work was complete and done well. None of this, however, is evidence of a contract between CMR and Velasquez. At best, it is evidence of an independent agreement between Koerner and CMR to pay for, supervise, and inspect Velasquez's work. But the transitive property does not

apply in contract law. The fact that Koerner had a contract with Velasquez and a contract with CMR does not mean that Velasquez and CMR had a contract with each other. And without a contractual relationship, CMR cannot be held responsible for Velasquez's alleged negligence.

ii.

Koerner claims that CMR fraudulently represented to him that the work scope it was proposing for the November 2012 repairs would fix all of his roof's problems, when it knew the work would not. In support, Koerner relies on an email from Gary Klocke, a CMR superintendent, to his colleagues after inspecting Koerner's roof saying, "I did not disclose or offer any info on my findings [to Koerner] and simply left [Koerner] assured we are working on correcting his leak issue, after all he is a lawyer and I know they are sneaky :)."

To prove fraud, Koerner must prove that "(1) a misrepresentation of material fact, (2) made with the intent to deceive, (3) caus[ed] justifiable reliance with resultant injury." *Becnel v. Grodner*, 982 So. 2d 891, 894 (La. Ct. App. 2008). Fraud can be predicated on a promise made with no intention of performing, but a "failure to perform as promised or nonperformance of an agreement to do something at a future time" does not evince fraud. *Taylor v. Dowling Gosslee & Assocs.*, 22 So. 3d 246, 255 (La. Ct. App. 2009). Koerner argues that when all inferences are drawn in his favor, Klocke's email shows an intention not to fix all the roof's problems even though CMR told Koerner that it would.

We think otherwise. The email states that Klocke did not want to tell Koerner about all of his particular findings; it does not say that Klocke did not intend to fix the other problems in addition to the

leak. He just did not want to tell Koerner about them because he thought Koerner was a sneaky lawyer. Moreover, the entire email makes clear that the other problems Klocke found all relate to the mentioned leak. No reasonable jury could read Klocke's email and infer an intent not to fix the identified problems. They could infer, at most, an intent not to tell Koerner about all of the leak's nitty-gritty details. Without any other evidence of fraudulent intent, Koerner cannot prevail on this claim.

iii.

Koerner's detrimental-reliance claim centers around a single representation: CMR assured him that the work done by Velasquez, a third- party contractor, was complete and would fix all of his roof's problems. The key question, then, is whether this type of representation can support Koerner's claim.

Detrimental-reliance claims are based on Louisiana Civil Code Article 1967, which states that "[a] party may be obligated by a *promise* when he knew or should have known that the *promise* would induce the other party to rely on it to his detriment and the other party was reasonable in so relying." (emphasis added).

The statute's focus is on one type of representation—a promise. Despite that focus, Koerner argues that the promise requirement is no longer on sure footing. He cites a single 2018 case for the proposition that a simple assertion can give rise to a detrimental-reliance claim. In *Feingerts v. D'Anna*, a lawyer told his client that he could sell his property without consent. A Louisiana appellate court held that this could support a detrimental-reliance claim, reasoning that "whether or not that assertion is labeled a promise or a legal opinion is

inconsequential." 237 So. 3d 21, 26 (La. App. 4th Cir. 2018).

Feingerts is not convincing. It is out of step with Article 1967's plain text. When interpreting a Louisiana statute, "the words . . . must be given their generally prevailing meaning." La. Civ. Code Ann. art. 11. And when "a law is clear and unambiguous . . . the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. Civ. Code. Ann. art 9. The *Feingerts* court did not follow these principles. It did not even attempt to determine what Article 1967 meant by narrowing its reach to only "promises."

But in *Wooley v. Lucksinger*, another Louisiana court did just that—it attempted to determine the general prevailing meaning of a "promise" because that is the word the statute uses. 961 So. 2d 1228, 1238–39 (La. Ct. App. 2007). The court looked at

Black's Law Dictionary, Merriam–Webster's Collegiate Dictionary, and Louisiana's civil jury instructions. All of them were substantially similar: a promise is a declaration that a person will or will not do something in the future. *Id.* at 1239. Applying this definition, the court found that no promise had been made, so the plaintiff could not prove a detrimental-reliance claim. *Id.*; *see also Saba v. Emerson*, 2016 WL 6427697, at *13 (La. Ct. App. 2016) (rejecting a detrimental-reliance claim by finding no promise in an inspector's construction report that the plaintiffs relied upon to reduce their house's value); *Jones v. Herlin*, 2013 WL 5270547, at *5 (W.D. La. Sept. 17, 2013) (relying on *Wooley*'s definition of promise).

In an unpublished case, this court too has held that the first step in proving a Louisiana detrimental-reliance claim is showing that the defendant made a promise. In *Roxco Ltd. v. Harris Specialty Chemical,*

Inc., we noted that we had sometimes, in the past, described the first element in a detrimental-reliance claim in terms of mere "representations." 85 F. App'x 375, 378 (5th Cir. 2004) (per curiam). But we decided that this description was too general and not consistent with the statute—which, "by its language, requires the representations to be promises." *Id.* We distinguished the old cases by holding that in those cases there was no question that the representation "related to promises or contracts." *Id.*

Since *Roxco,* the Louisiana Supreme Court has been less than precise when listing out the detrimental-reliance elements. It has described the elements as "(1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance." *Suire v. Lafayette City-Par. Consol. Gov't*, 907 So. 2d 37, 59 (La. 2005). But while using this broader language, the

court used narrower promissory language later in the opinion:

> [T]he basis of detrimental reliance is the idea that a person should not harm another person by making *promises* that he will not keep. Thus, the focus of analysis of a detrimental reliance claim is not whether the parties intended to perform, but, instead, whether a representation was made in such a manner that the promisor should have expected the promisee to rely upon it, and whether the promisee so relies to his detriment.

Id. (emphasis added) (internal quotation marks omitted). Importantly, in *Suire* there was no dispute that the representation at issue was the city's promise to pay for damages to a particular property. *Id.*

Post-*Suire*, this court has described the first element inconsistently. We have sometimes described the first element as a representation but described the remaining elements in terms of promises. *See In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319, 334 (5th Cir. 2007) (listing the elements as "(1) a

representation by conduct or word; (2) made in such a manner that the promisor should have expected the promisee to rely upon it; (3) justifiable reliance by the promisee; and (4) a change in position to the promisee's detriment because of the reliance" (citing *Suire*, 907 So. 2d at 59)*; see also Water Craft Mgmt., L.L.C. v. Mercury Marine*, 426 F. App'x 232, 237 (5th Cir. 2011) (per curiam). We have sometimes ignored altogether *Suire*'s formulation of the first element as a representation, relying instead directly on the statute's promissory language. *See Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 565 (5th Cir. 2005). And we have sometimes repeated verbatim all the elements as *Suire* listed them. *See New Orleans City v. Ambac Assur. Corp.*, 815 F.3d 196, 203 (5th Cir. 2016); *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 254 (5th Cir. 2008). But when doing so, we have continued to emphasize in other parts of the opinions that the

representations are normally promises. *See Ambac Assur. Corp.*, 815 F.3d at 203 ("Under Louisiana law, courts have found reliance on promises made outside of an unambiguous, fully-integrated agreement to be unreasonable as a matter of law." (internal quotation marks omitted)); *Audler*, 519 F.3d at 254 (holding that "the focus of analysis of a detrimental reliance claim is . . . whether a representation was made in such a manner that the promisor should have expected the promisee to rely upon it" (internal quotation mark omitted)).

We now resolve any ambiguity in our prior cases and make the following Erie guess. *See Howe ex rel. Howe v. Scottsdale Ins. Co.*, 204 F.3d 624,628 (5th Cir. 2000) ("The role of this court is not to create or modify state law, rather only predict it." (internal quotation marks omitted)). We hold that under Article 1967 the existence of a promise is a necessary element

of a detrimental- reliance claim. We also adopt *Wooley*'s definition of promise—an assurance to do or not do something in the future. This result is faithful to the clear statutory text and the fact that Louisiana does not favor recovery under a detrimental-reliance theory. *See Allbritton v. Lincoln Health Sys., Inc.*, 51 So. 3d 91, 95 (La. Ct. App. 2010). Under this construction, Koerner's claim fails. CMR did not promise to do or not do anything; it simply assured Koerner that the roof work was done well.

V.

For the foregoing reasons, We AFFIRM the district court on all grounds.

APPENDIX B – DENIAL OF REHEARING, REHEARING EN BANC, AND CERTIFICATION TO THE LOUISIANA SUPREME COURT

910 F.3d 221

United States Court of Appeals,

Fifth Circuit.

In the MATTER OF the Complaint of LOUIS R. KOERNER, JR., Individually and as Assignee of Jean McCurdy Meade, Plaintiff – Appellant,

v.

CMR CONSTRUCTION & ROOFING, L.L.C. Defendant – Appellee.

Docket No. 18-30019
Decided: February 12, 2019

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before JONES, CLEMENT, and SOUTHWICK, Circuit Judges.

PERCURIAM:

> (X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R.35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not hacing vote in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith Brown Clement

UNITED STATES CIRCUIT JUDGE

APPENDIX C – CLERK'S ENTRY OF DEFAULT, OPINION SETTING AWARD OF DAMAGES

2017 WL 931341
Only the Westlaw citation is currently available.

United States District Court,
Eastern District Of Louisiana

In the Matter of the Complaint of Louis R. Koerner, Jr., as plaintiff,

VERSUS

Vigilant Insurance Company, Defendant.

CIVIL ACTION No. 16-13319
Signed 01/13/2017
Filed 01/13/2017

CLERK'S ENTRY OF DEFAULT

Judge Africk, Van Meerveld Magistrate

The defendant CMR Construction & Roofing, LLC, having failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure,

LET the default of CMR Construction & Roofing, LLC be and the same is hereby entered.

New Orleans, Louisiana, this 18th day of January, 2017.

CLERK OF COURT
William Blevins

By: _____
Deputy Clerk

2017 WL 931341
Only the Westlaw citation is currently available.

United States District Court,
Eastern District Of Louisiana

In the Matter of the Complaint of Louis R. Koerner, Jr., as plaintiff,

VERSUS

Vigilant Insurance Company, Defendant.

CIVIL ACTION No. 16-13319
Signed 03/08/2017
Filed 03/09/2017

ORDER AND REASONS

Before the Court is Louis Koerner's ("Koerner") motion for entry of a default judgment against defendant CMR Construction & Roofing, LLC. Koerner asks the Court for a judgment that CMR is liable to Koerner in the full sum of $502,545.21[1], plus legal interest from date of judicial demand until paid,

1 This amount includes the expert witness fee the plaintiff paid to Ladd P. Ehlinger in the amount of $5,287.50.

all costs, and reasonable attorney's fees in an amount to be determined after further submissions to the Court. For the following reasons, the motion is granted in part.

I.

Koerner alleges in the second amended complaint that in 2005 he was sold a "Slate 2.0" roof by CMR. He alleges that CMR represented to him that the Slate 2.0 roof was a traditional slate roof which would outlive Koerner, that the roof was backed by a 75-year all risk warranty, and that the roof would be properly installed onto Koerner's home. According to Koerner, CMR further represented to him that it would properly remove his existing and damaged roof. CMR then removed the damaged roof and installed the Slate 2.0 roof on Koerner's home.

In 2006, 2008, 2011, and 2012, Koerner allegedly complained to CMR regarding issues with

his new roof, and CMR performed various remedial work. In 2016, however, Koerner learned that the prior roof had not been removed properly, that the Slate 2.0 roof was not a traditional slate roof as represented to Koerner, and that Koerner's home required a new roof.

Shortly thereafter, Koerner submitted a claim to Vigilant Insurance Company for the cost of the repair work. After Vigilant denied the claim, Koerner sued them in state court. Vigilant removed the claim, and Koerner subsequently amended his complaint to assert allegations against CMR. Since that time, Koerner and Vigilant have filed a joint stipulation dismissing Vigilant without prejudice. CMR, the only remaining defendant, has yet to file responsive pleadings despite being served several months ago.

II.

Under Federal Rule of Civil Procedure 55(b), the Court may enter a default judgment against a party when it fails to plead or otherwise respond to the plaintiff's complaint within the required time period. Fed. R. Civ. P. 55(b). A plaintiff who seeks a default judgment against an unresponsive defendant must proceed through two steps. First, the plaintiff must petition the clerk for an entry of default, which is simply "a notation of the party's default on the clerk's record of the case." *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 335 (2d Cir. 1986); *see also United States v. Hansen*, 795 F.2d 35, 37 (7th Cir. 1986) (describing the entry of default as "an intermediate, ministerial, nonjudicial, virtually meaningless docket entry"). Before the clerk may enter the default, the plaintiff must show "by affidavit or otherwise" that the defendant "has failed to plead or otherwise defend." Fed. R. Civ. P. 55(a). Beyond

that requirement, however, the entry of default is largely mechanical.

After the defendant's default has been entered, the plaintiff may request the entry of judgment on the default. In that context, the court deems the plaintiff's well-pleaded factual allegations admitted. *See Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). At the same time, the court does not hold the defaulting defendant "to [have] admitt[ed] facts that are not well-pleaded or to [have] admitt[ed] conclusions of law." *Id.* The default judgment should not be entered unless the judgment is "supported by well-pleaded allegations and . . . ha[s] a sufficient basis in the pleadings." *Wooten v. McDonald Transit Associates, Inc.*, 788 F.3d 490, 498 (5th Cir. 2015) (internal quotation marks omitted).

If the plaintiff's claim is for a sum certain and the defendant has not made an appearance in court,

the clerk may enter a default judgment. Fed. R. Civ. P. 55(b)(1). In all other cases, "the party must apply to the court for a default judgment." Fed. R. Civ. P. 55(b)(2). No party is entitled to a default judgment as a matter of right. *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001) (per curiam) (internal quotation marks omitted). The disposition of a motion for the entry of default judgment ultimately rests within the sound discretion of the court. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977).

III.

Koerner has already received an entry of default against CMR from the clerk. *See* R. Doc. No. 36. The question is now whether, accepting the well-pled factual allegations in the complaint as true, Koerner is entitled to a judgment against CMR for $502,545.21, plus legal interest from date of judicial demand until paid, all costs, and reasonable

attorney's fees in an amount to be determined after further submissions to the Court. *See* R. Doc. No. 37, at 1.

Koerner alleges that CMR is liable because it (1) breached certain express and implied warranties, (2) breached its contract with Koerner, (3) was negligent, (4) made material misrepresentations on which Koerner reasonably relied to his detriment, and (5) sold a roof containing redhibitory defects. Although Koerner provided summary judgment-type evidence in support of his claims, he did not brief the claims themselves in his motion. The Court ordered Koerner to file a brief outlining the elements of each of the claims and demonstrate that the complaint's well-pleaded factual allegations satisfy those elements. *See* R. Doc. No. 44.

The supplemental brief sets forth the elements of Koerner's claims, and the Court is satisfied that

Koerner is entitled to a default judgment on each of them. Accordingly, the Court will grant the motion as to liability. With respect to damages, the Court cannot enter a default judgment without a hearing "unless the amount is liquidated or easily computable." *See Richardson v. Salvation Army, S. Territory, USA*, 161 F.3d 7 (5th Cir. 1998) (citation omitted). The damages Koerner seeks here are not liquidated damages. But the Fifth Circuit recognizes that in place of an evidentiary hearing, a court "may rely on detailed affidavits or documentary evidence, supplemented by the judge's personal knowledge, to evaluate the proposed sum." *See id.* (citation omitted).

Koerner's requested damages are substantiated by the sworn affidavit and expert report of his construction expert, Louis Relle, as well as by the unsworn declaration and expert report of his architectural expert, Ladd Ehlinger. Mr. Relle

inspected the damage to Koerner's home and estimated the cost of repairing that damage. He provides a fifty-two page expert report in which he explains his findings and breaks down the damage estimate by each particular repair job required. *See* R. Doc. No. 37-4. The report includes numerous photographs of the damage to Koerner's home. Mr. Relle ultimately opines that completion of the entire repair project will cost $497,257.71. *See* R. Doc. No. 37-3. Mr. Ehlinger reviewed Mr. Relle's expert report and conducted his own inspection of Koerner's home, reaching the same conclusions. *See* R. Doc. No. 37-6. When added to Mr. Ehlinger's expert fees of $5,287.50, the total damage estimate calculated by Mr. Relle amounts to $502,545.21.

The Court finds that Koerner has submitted sufficient evidence to support his $497,257.71 damage claim without the need for an evidentiary hearing.

However, the Court remains unconvinced by the briefing that Koerner is entitled to recover the $5,287.50 in expert fees he paid to Mr. Ehlinger. Koerner does not explain why he is entitled to recover expert fees in the first place. Accordingly, a decision as to the attorney's fees issue3 and as to whether Koerner is entitled to recover expert fees will be be deferred until the Court has more information. The Court provides a deadline below by which Koerner should provide the Court with that information if he wishes to proceed as to those elements of damages. A separate final judgment will be issued once the expert fee issue and the attorney's fees issue are decided.

IV.

For the foregoing reasons,

IT IS ORDERED that Koerner's motion is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Louis R. Koerner, Jr., and against defendant, CMR Construction & Roofing, LLC, in the full sum of **$497,257.71**, plus legal interest from date of judicial demand until paid, and costs.

IT IS FURTHER ORDERED that Koerner may file a brief and supporting documentation by **Monday, March 20, 2017** substantiating his claimed attorney's fees and his entitlement to expert witness fees. If no such brief is received, such claims will be waived, final judgment will issue, and the case will be closed.

New Orleans, Louisiana, March 8, 2017.

APPENDIX D – JUDGMENT AND REASONS FOR JUDGMENT SETTING ASIDE DEFAULT

United States District Court,
Eastern District Of Louisiana

In the Matter of the Complaint of Louis R. Koerner, Jr., as plaintiff,

VERSUS

Vigilant Insurance Company, Defendant.

SECTION I

Docket No. 16-13319
May 10, 2017

ORDER AND REASONS

Before the Court is a motion[1] filed by CMR Construction & Roofing, LLC to set aside the entry of default and to reconsider the partial default judgment that has been entered against it. For the following reasons, the Court grants the motion.

I.

Koerner's suit against Vigilant Insurance Company was removed to this Court on July 27, 2016.

On November 14, 2016, Koerner filed a second amended complaint joining CMR as a defendant and alleging claims of breach of warranty, breach of contract, detrimental reliance, redhibition, and negligence.

A summons was issued to CMR's registered agent in Louisiana on December 14, 2016, meaning that CMR's answer was due on January 4, 2017. After CMR failed to appear, Koerner obtained an entry of default from the Clerk on January 18, 2017. On February 21, 2017, Koerner and Vigilant entered a joint stipulation dismissing Koerner's claims against Vigilant without prejudice. On March 9, 2017, this Court granted in part Koerner's motion for entry of a default judgment against CMR. Judgment was entered against CMR for the sum of $497,257.71, although no final judgment was entered.

II.

A.

Rule 55(c) of the Federal Rules of Civil Procedure sets forth the standard for setting aside the Clerk's entry of default. It provides that "[t]he court may set aside an entry of default for good cause." To determine whether good cause exists, courts consider a number of factors including: (1) whether the default was willful, (2) whether setting the default aside would prejudice the adversary, and (3) whether a meritorious defense is presented. *Buckley v. Donohue Indus. Inc.*, 100 F. App'x 275, 278 (5th Cir. 2004). These three factors are not "exclusive" or "talismanic," and the Court can consider other factors including whether the "public interest was implicated," whether "there was a significant financial loss to the defendant," and whether "the defendant acted expeditiously to correct the default." *In re Dierschke*,

975 F.2d 181, 183-84 (5th Cir. 1992).

Federal courts disfavor resolving cases through default judgments and have a strong policy in favor of decisions on the merits. *See Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998). "[E]ntries of default are serious; where there are no intervening equities, any doubt should be resolved in favor of the movant to the end of securing a trial upon the merits." *Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003) (internal quotation marks omitted).

B.

Rule 54(b) of the Federal Rules of Civil Procedure sets forth the standard for reconsideration of interlocutory orders. *See Austin v. Kroger Texas, L.P.*, No. 16- 10502, 2017 WL 1379453, at *8 (5th Cir. Apr. 14, 2017). Because the Court only entered a partial default judgment against CMR, its order was

interlocutory and must be considered under Rule 54(b). *See Halliburton Co. Benefits Comm. v. Graves*, 191 F. App'x 248, 250 (5th Cir. 2006) (partial judgment is an interlocutory order). "Under Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Id.* at 9 (internal quotation marks omitted).

III.

The Court first considers CMR's request to vacate the Clerk's entry of default, examining each factor in turn.

A.

CMR asserts that its failure to timely respond to the complaint was not willful but instead was caused by a number of mistakes. CMR's President,

Steven Soule, explains in an affidavit that he believed it was too late for Koerner to sue CMR, as the allegations date from 2005 and 2006. Soule further believed that CMR was not actually involved in the lawsuit because the only defendant named in the caption was Vigilant and because the cover sheet sent to CMR by its registered agent was incorrectly addressed to "CMR Construction & Roofing of Texas, LLC" instead of "CMR Construction & Roofing, LLC." Soule did not contact an attorney until after he received notice of the Court's order granting the default judgment.

A finding of willful default may be considered dispositive. *See In re Chinese Manufactured Drywall Products Liab. Litig.*, 742 F.3d 576, 594 (5th Cir. 2014). Willfulness has been defined by the Fifth Circuit as "an intentional failure to respond to litigation." *In re OCA*, 551 F.3d 359, 370 n. 32 (5th Cir.

2008). Courts have also framed a finding of willfulness in terms of whether a party is being "uncooperative" or "obstructionist." *Broadwing Commc'ns, Inc. v. Harris*, No. 00-1125, 2000 WL 1059863, at *2 (E.D. La. Aug. 1, 2000) (Vance, J.).

The Court does not find CMR's actions to be willful as defined by the Fifth Circuit. Although Soule certainly acted unwisely in failing to contact an attorney upon receiving the summons for this litigation, under the circumstances Soule's negligence is insufficient to warrant a finding of willfulness. CMR has provided evidence that the cover sheet sent by its registered agent in Louisiana incorrectly named CMR. This information in combination with the affidavit provided by Soule provides sufficient evidence for this Court to conclude that CMR was not intentionally failing to respond to litigation or trying to be uncooperative or obstructionist.

B.

Koerner argues that he will suffer undue prejudice if the motion to set aside the default judgment is granted. He stresses that he has engaged experts to evaluate damages, has already been deposed once, and has "extensively briefed" his claims in support of his motion for default judgment. Koerner also claims in his brief that he will be prejudiced because he stipulated to a dismissal without prejudice of the homeowner's insurer, though Koerner conceded during a telephone conference with the Court that he entered into the stipulation to dismiss Vigilant for strategic reasons and that he has no intention of rejoining Vigilant in this lawsuit.

The Fifth Circuit has held that mere delay "does not alone constitute prejudice." *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir. 2000). Rather, there must be a showing that the delay will result in "the

loss of evidence, increased difficulties in discovery, or greater opportunities for fraud or collusion." *Id*. When the only harm to the plaintiff is having to prove his case, that harm does not constitute prejudice. *Side by Side Redevelopment, Inc. v. City of New Orleans*, No. 09-03861, 2010 WL 375237, at *3 (E.D. La. Jan. 25, 2010) (Africk, J.).

Koerner has not shown prejudice other than delay and the inconvenience that he be required to prove his case on the merits. The work which he has already invested in this litigation will still be useful to him in a contested action. Although Koerner voluntarily dismissed Vigilant, he admitted that the dismissal was not due to CMR's failure to appear. In any event, because Vigilant was dismissed without prejudice, Koerner may seek leave to re-join Vigilant as a party once new dates and deadlines are set—though he admits that he has no intention of doing so.

C.

CMR asserts that it has presented a number of meritorious defenses in its proposed answer. Koerner argues that CMR's defenses have no merit and CMR cannot prevail on them. When analyzing this factor, the "[l]ikelihood of success is not the measure," rather, a defendant's allegations are considered to be meritorious "if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." *Side by Side Redevelopment, Inc.*, 2010 WL 375237 at *3 (internal quotation marks omitted). Because CMR has provided a number of defenses that if proven at trial would constitute a complete defense, the meritorious defense prong is satisfied.

D.

Considering the other relevant factors, this Court notes that when CMR became aware that an entry of default was entered against it and that it was

a proper defendant, CMR "acted expeditiously to correct the default." *In re Dierschke*, 975 F.2d at 184. Additionally, the sum involved in this case is $497,257.71—not an insignificant amount of money. Certainly, a half million dollars is a sum "substantial enough to merit caution before denying defendant a defense on the merits." *See Harris*, 2000 WL 1059863, at *2.

After considering all of the appropriate factors, the Court determines that the motion to vacate the entry of default should be granted.

IV.

With respect to CMR's request for reconsideration of the default judgment, the Court concludes that reconsideration is appropriate. This Court is free to reconsider and reverse its decision for "any reason it deems sufficient." *Austin*, 2017 WL 1379453, at *9. Because the default in this case was

not willful, the amount at issue is a substantial sum, the movant has at least provided a hint or suggestion of a meritorious defense, and in light of the strong federal policy in favor of decisions on the merits, the Court concludes that the motion to reconsider and vacate the default judgment should be granted.

V.

For the foregoing reasons,

IT IS ORDERED that CMR's motion to set aside the Clerk's entry of default and this Court's partial default judgment are **GRANTED** and that the entry of default and default judgment are **VACATED**.

IT IS FURTHER ORDERED that all dates and deadlines in the abovecaptioned matter are continued, and will be reset at a scheduling conference with the Court's case manager on **Tuesday, May 23, 2017 at 10:15am**.

New Orleans, Louisiana, May 10, 2017.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

APPENDIX E – FINAL JUDGMENT GRANTING SUMMARY JUDGMENT IN FAVOR OF CMR AND REASONS FOR JUDGMENT

United States District Court,
Eastern District Of Louisiana

In the Matter of the Complaint of Louis R. Koerner, Jr., as plaintiff,

VERSUS

Vigilant Insurance Company, Defendant.

SECTION 1

Docket No. 16-13319
October 18, 2017

ORDER AND REASONS

Louis R. Koerner, Jr. ("Koerner") owns a house on Jackson Avenue in New Orleans. On November 11, 2005, Koerner contracted with CMR Construction & Roofing, LLC ("CMR") to replace the house's slate roof. The roof installed by CMR— a "Slate 2.0 roof"—is at the center of the present dispute.

Koerner contends that he wanted to purchase what he labels a "traditional slate roof," that CMR

knew the same, and that CMR led him to believe that the Slate 2.0 roof was a "traditional slate roof." According to Koerner, a Slate 2.0 roof is not a "traditional slate roof," because CMR used a synthetic membrane instead of felt underneath the slate tiles. Koerner alleges that he never would have purchased the Slate 2.0 roof had he known that it was not a "traditional slate roof," and had CMR not made other representations to him regarding the quality of the roof and its advantages when compared to other available roofs.

Further, Koerner argues that representations made by CMR when Koerner sought subsequent repair work on the roof caused him additional damage. Koerner also contends that the overall quality of CMR's work—the removal of the old roof and installation of the new one, as well as the remedial work—was shoddy. Based on these

allegations, Koerner asserts numerous Louisiana law claims against CMR, including breach of warranty, breach of contract, rescission of contract, detrimental reliance, redhibition, negligence, and fraud.

CMR has now moved for summary judgment, arguing that most of Koerner's claims are perempted. CMR also contends that it is entitled to summary judgment on Koerner's remaining claims, which relate to repair work performed on his Jackson Avenue house's roof in 2012. Further, CMR argues that Koerner's fraud claims are prescribed.

I.

Summary judgment is proper when, after reviewing the pleadings, the discovery and disclosure materials on file, and any affidavits, the court determines that there is no genuine dispute of material fact. *See* Fed. R. Civ. P. 56. "[A] party seeking summary judgment always bears the initial

responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party seeking summary judgment need not produce evidence negating the existence of material fact, but need only point out the absence of evidence supporting the other party's case. *Id.*; *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986).

Once the party seeking summary judgment carries its initial burden, the nonmoving party must come forward with specific facts showing that there is a genuine dispute of material fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The showing of a genuine issue of material fact is not satisfied by creating "'some metaphysical doubt as to the material facts,' by

'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted). Instead, a genuine issue of material fact exists when the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party responding to the motion for summary judgment may not rest upon the pleadings, but must identify specific facts that establish a genuine issue. *Id.* However, the nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in [the nonmoving party's] favor." *Id.* at 255; *see also Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

Moreover, "[a]lthough the substance or content of the evidence submitted to support or dispute a fact

on summary judgment must be admissible . . . , the material may be presented in a form that would not, in itself, be admissible at trial." *Lee v. Offshore Logistical & Transp., LLC*, 859 F.3d 353, 355 (5th Cir. 2017) (quoting 11 Moore's Federal Practice–Civil ¶ 56.91 (2017)). "This flexibility allows the court to consider the evidence that would likely be admitted at trial . . . without imposing on parties the time and expense it takes to authenticate everything in the record." *Maurer v. Independence Town*, No. 16-30673, 2017 WL 3866561, at *3 (5th Cir. Sept. 5, 2017).

II.

CMR argues that peremption bars most of Koerner's claims. "Peremption is a period of time fixed by law for the existence of a right." La. Civ. C. art. 3458. "Unless timely exercised, the right is extinguished upon the expiration of the peremptive

period." *Id.*; *see also Naghi v. Brener*, 17 So. 3d 919, 926 (La. 2009) (observing that "the cause of action no longer exists after the termination of the peremptive period and any right to assert the claim is destroyed"). "Peremption may not be renounced, interrupted, or suspended." La. Civ. C. art. 3461; *cf. Naghi*, 17 So. 3d at 925-26 ("Because the cause of action no longer exists after the termination of the preemptive period and any right to assert the claim is destroyed, there is nothing to which an amended or supplemental pleading filed after the peremptive period has expired can relate back.").

"Peremption may be pleaded or it may be supplied by a court on its own motion at any time prior to final judgment." La. Civ. C. art. 3460. As a general rule, "the exceptor bears the burden of proof at the trial of the peremptory exception." *Rando v. Anco Insulations, Inc.*, 16 So. 3d 1065, 1082 (La. 2009).

However, where peremption is "evident on the face of the pleadings," the burden shifts to the plaintiff to demonstrate that an action is not perempted. *Id.*

"Peremptive statutes are strictly construed against peremption and in favor of the claim." *Id.* at 1083. "Of the possible constructions, the one that maintains enforcement of the claim or action, rather than the one that bars enforcement should be adopted." *Id.*

When interpreting Louisiana law—including Louisiana's preemptive statutes—a federal court must heed the Louisiana Supreme Court's instructions regarding statutory interpretation. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007). "[T]he starting point in interpreting any statute is the language of the statute itself." *Louisiana v. Johnson*, 884 So. 2d 568, 575 (La. 2004).

The meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and by placing a construction on the law that is consistent with the express terms of the law and with the obvious intent of the legislature in enacting the law. A statute must be applied and interpreted in a manner that is logical and consistent with the presumed purpose and intent of the legislature.

Further, it is presumed that every word, sentence, or provision in a law was intended to serve some useful purpose, that some effect is to be given to each such provision, and that no unnecessary words or provisions were employed. As a result, courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause or word as meaningless and surplusage if a construction giving force to, and preserving, all words can legitimately be found. Finally, it is presumed that the legislature acts with full knowledge of well-settled principles of statutory construction.

Moss v. Louisiana, 925 So. 2d 1185, 1196 (La. 2006) (internal citations omitted). Ultimately, "[t]he fundamental question in all cases of statutory interpretation" involving Louisiana law "is legislative intent." *Id.*

In addition to these jurisprudential principles, the Louisiana legislature has enacted specific rules governing the interpretation of Louisiana's revised statutes. *See generally* La. R.S. § 1. As relevant in this case, the legislature directs that "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the language." *Id.* § 1:3. "Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." *Id.* "The word 'shall' is mandatory and the word 'may' is permissive." *Id.*

Moreover, "[w]hen the wording . . . is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit." *Id.* § 1:4. Finally, "[u]nless it is otherwise clearly indicated, the word 'person' includes a body of persons, whether incorporated or not." *Id.* § 1:10.

With these rules of construction in mind, the Court turns to the preemption issue raised by CMR.

III.

A.

CMR's peremption argument focuses on La. R.S. § 9:2722, which the Louisiana legislature enacted in 1964 "to protect residential building contractors from liability for past construction projects that could extend for an indefinite period of time." *Thrasher Const., Inc. v. Gibbs Residential, L.L.C.*, 197 So. 3d 283, 290 (La. Ct. App. 4th Cir. 2016). The current version of § 9:2722 became effective as of August 15,

2003, and so was in effect well before Koerner contracted with CMR to install a Slate 2.0 roof on his Jackson Avenue house. *Metairie III v. Poche' Const., Inc.*, 49 So. 3d 446, 450 (La. Ct. App. 4th Cir. 2010).

> Section 9:2772 provides, in pertinent part:
>
> Except as otherwise provided in this Subsection, *no action*, whether ex contractu, ex delicto, or otherwise, including but not limited to an action for failure to warn, to recover on a contract, or to recover damages, or otherwise arising out of an engagement of planning, construction, design, or building immovable or movable property which may include, without limitation, consultation, planning, designs, drawings, specification, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, *shall be brought . . . against any person performing or furnishing* the design, planning, supervision, inspection, or observation of construction or *the construction of immovables, or improvement to immovable property*, including but not limited to a residential building contractor as defined in R.S. 37:2150.1:

> (1)(a) More than five years after the date of registry in the mortgage office of acceptance of the work by owner.
>
> (b) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, *more than five years after the improvement has been thus occupied by the owner*.

La. R.S. § 9:2772(A) (emphasis added). In other words, "actions involving deficiencies in surveying, design, supervision, or construction of immovables or improvements thereon" are subject to § 9:2772's five-year peremptive period. *Thrasher Const.*, 197 So. 3d at 290.

The peremptive period's trigger "is not dependent on the discovery of the defect." *Burkart v. Williamson*, 29 So. 3d 635, 639 (La. Ct. App. 1st Cir. 2009). Moreover, "any repairs or promises to repair alleged to have been made" do not interrupt the running of the § 9:2772 peremptive period. *Lasseigne*

v. Schouest & Sons, Builders, 563 So. 2d 371, 373 (La. Ct. App. 1st Cir. 1990).

B.

The parties first dispute whether the § 9:2772 peremptive period applies to claims arising from the underlying contract between the parties. As the Court previously explained, the dispute between CMR and Koerner centers on a 2005 contract in which CMR agreed to remove the Jackson Avenue house's old slate roof and install a new Slate 2.0 roof. Koerner contends that a genuine dispute of material fact exists as to whether this contract was a contract of sale or a construction contract. If the contract was a contract of sale, as opposed to a construction contract, then § 9:2772's peremptive period is inapplicable. *See Swope v. Columbian Chems. Co.*, 281 F.3d 185, 201-02 (5th Cir. 2002) (quoting *KSLA–TV, Inc. v. Radio Corp. of Am.*, 693 F.2d 544, 545 (5th Cir. 1982) (per curiam)).

CMR disagrees, contending that "a roof is an improvement to an immovable, or part of an immovable, as a matter of law"—and therefore the underlying contract obligating CMR to remove the house's old roof and install a new one is a construction contract falling squarely within the purview of § 9:2772. The parties do not dispute the work for which Koerner contracted with CMR: replacement of the roof of Koerner's Jackson Avenue house.

Louisiana law provides that "[t]racts of land, with their component parts, are immovables." La. Civ. C. art. 462. Buildings, such as houses, are "components parts" of the land and therefore are themselves immovables. *Id.* art. 463. "[A] new home construction on a vacant lot is an 'improvement to immovable property,'" and "it is equally the case that once such a home is built it becomes an immovable itself, and *any further construction*, be it a *renovation*

or addition to the home, is likewise an 'improvement to immovable property.'" *Dugas v. Cacioppo*, 583 So. 2d 26, 27 (La. Ct. App. 5th Cir. 1991); *see also Moll v. Brown & Root Inc.*, 218 F.3d 472, 476 (5th Cir. 2000) (discussing *Dugas*). As a renovation to a home, the installation of the Slate 2.0 roof is subject to § 9:2772. *See, e.g.*, *Celebration Church, Inc., v. Church Mutual Ins. Co.*, 216 So. 3d 1059, 1061-63 (La. Ct. App. 5th Cir. 2016) (applying § 9:2772 to claims arising from a contractor's alleged failure to properly repair and replace a roof).

Koerner also alleges that "[h]e was solicited by CMR to purchase a roof, not to purchase installation or repair services," and thus the 2005 contract with CMR was a contract for sale. Despite Koerner's contention, however, the record clearly demonstrates—and Koerner admits—that CMR provided both materials and installation services

pursuant to the 2005 contract. Indeed, many of Koerner's claims against CMR derive from CMR's alleged faulty installation work.

In other words, Koerner did not simply buy slate tiles; he bought the installation of a new roof for his Jackson Avenue house, which is an improvement on an immovable as a matter of law. *Cf. Vicari v. Window World, Inc.*, 171 So. 3d 425, 433 (La. Ct. App. 5th Cir. 2015) ("[T]he object of the Vicari contract was not to simply sell forty-five windows to the Vicaris, but to install those windows in their home. To suggest that the Vicaris' only desire in contracting with Window World was to purchase forty-five custom windows to be delivered and set aside at their home, is illogical. The installation was not incidental to the sale, . . . it was the object of the contract."). The 2005 contract is a construction contract and so § 9:2772 applies to claims arising from it.

In addition to claims arising from the 2005 contract, Koerner also asserts claims against CMR arising from subsequent repair work performed on the roof in 2006, 2007, 2011, and 2012. CMR argues that such claims are also governed by § 9:2772's preemptive period. The Court agrees. *See Celebration Church*, 216 So. 3d at 1061-63 (treating roof repairs as covered by § 9:2772); *cf. Vicari*, 171 So. 3d at 436 (same for claims arising from repairs to previously installed windows); *but cf. Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171, 196 (La. Ct. App. 4th Cir. 2006) (observing that "no Louisiana appellate court" had yet to hold that the particular "type of asbestos repair and maintenance work" at issue fell within the purview of § 9:2772).

C.

Next, the Court must determine which, if any, of Koerner's claims are perempted under § 9:2772(A). Under the "clear and specific" language of § 9:2772, *Celebration Church*, 216 So. 3d at 1062, the five-year peremptive period for claims arising from construction work runs either 1) from "the date of registry of the acceptance in the mortgage office of the work by the owner," or 2) if the owner does not register his acceptance "within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part," from the date that "the improvement has been thus occupied by the owner," La. R.S. § 9:2772(A)(1). In this case, neither party argues that Koerner registered CMR's roof work.

Koerner first asserted claims against CMR arising from CMR's roof work on November 14, 2016.

Under § 9:2772(A), then, any claims arising from "improvement[s]" that Koerner "occupied" *prior* to November 14, 2011, would fall outside the required five-year window and be perempted.

The parties do not dispute that CMR's removal of his old roof and installation of the Slate 2.0 roof, as well as the repair work in 2006 and 2007, all constitute improvements that Koerner occupied well before November 14, 2011. Any claims arising from these jobs are therefore perempted under § 9:2772(A). Likewise, the parties do not dispute that claims arising from repair work performed by CMR in 2012 are not perempted under § 9:2772(A).

The parties do dispute, however, whether claims arising from roof repairs performed by CMR in late 2011 are perempted. CMR contends that these roof repairs were completed by November 10, 2011. On the other hand, Koerner—"based on

[his] understanding"—suggests that those specific repairs were part of a larger remedial project that was not completed until November 2012.

Upon closer examination, the record belies Koerner's belief that the repairs that CMR completed by November 10, 2011, were part of one continuous project that did not come to fruition until November 2012. CMR's job report documenting the 2011 repairs lists the job as "Closed" on November 10, 2011. CMR next agreed to do work for Koerner approximately three months later, in early February 2012, when Koerner entered into an agreement with CMR to do a discrete repair project. CMR performed additional repair work for Koerner between late February and July 2012. Finally, in October 2012, Koerner entered into an agreement with a third party—not CMR—to undertake certain repairs.

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). There is no genuine dispute that the repair work performed in 2011 amounts to an "improvement" distinct from the repair work performed in 2012, and that Koerner "occupied" this "improvement" at the time of its completion. As such, claims arising from CMR's 2011 repair work are perempted under § 9:2772(A).

IV.

A.

While § 9:2772(A) applies to many of Koerner's claims, the Court's analysis is not at an end because Koerner contends that he is able to escape this

preemptive period by way of § 9:2772(H). Under this subsection, "[t]he peremptive period provided by [§ 9:2772(A)] shall not apply to an action to recover on a contract or to recover damages against any person . . . whose fraud has caused the breach of contract or damages sued upon." La. R.S. § 9:2772(H)(1). For § 9:2772(H)(1) to apply, the breach or damages must in fact be *caused* by fraud; where damages are a result of alleged deficient work, for example, then fraud did not *cause* the damages. *See Thrasher Const.*, 197 So. 3d at 293.

The term "fraud" as used in § 9:2772 has "the same meaning as provided in Civil Code Article 1953." La. R.S. § 9:2772(H)(3). Article 1953 defines "fraud" as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." This article further

clarifies that fraud may result from either silence or a failure to act. La. Civ. C. art. 1953.

To establish fraud involving a contract, a plaintiff must show "(1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract." *Shelton v. Standard/700 Associates*, 798 So. 2d 60, 64 (La. 2001). Evidence is "sufficient to support an inference of fraudulent intent if [it] either '(1) show[s] a defendant's motive to commit [ ] fraud or (2) identif[ies] circumstances that indicate conscious behavior on the part of the defendant.'" *Cargill, Inc. v. Degesch Am., Inc.*, 875 F. Supp. 2d 667, 675 (E.D. La. 2012) (quoting *Herrmann Holdings Ltd. v. Lucent*

Techs. Inc., 302 F.3d 552, 565 (5th Cir. 2002)) (alternation in original).

Fraud will not nullify contractual consent "when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill," unless "a relation of confidence has reasonably induced a party to rely on the other's assertions or representations." La. Civ. C. art. 1954; *see also Cashman Equip. Corp. v. Acadian Shipyard, Inc.*, 66 Fed. App'x 524 (5th Cir. 2003) (per curiam) (discussing and applying La. Civ. C. art. 1954). A "relation of confidence has been found to exist where there is a long-standing and close relationship between the parties due to numerous transactions." *Sepulvado v. Procell*, 99 So. 3d 1129, 1137 (La. Ct. App. 3rd Cir. 2012). The required "confidante/trustee relationship is less likely to exist between parties to a

single or limited business transaction." *Id.* At 1137-38.

"[P]laintiffs must state all allegations of fraud with particularity by identifying the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby." *Owens v. Jastrow*, 789 F.3d 529, 535 (5th Cir. 2015) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 9(b); *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) ("We see no principled reason why the state claims of fraud should escape the pleading requirements of the federal rules . . . ."). Further, plaintiffs must state "the specifics of the false representation." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 188-89 (5th Cir. 2009).

"Fraud need only be proven by a preponderance of the evidence and may be established by

circumstantial evidence." *Lomont*, 172 So. 3d at 629. Such evidence may include "highly suspicious facts and circumstances." *Id.*

B.

The Court must first consider if a genuine dispute of material fact exists as to whether fraud caused any of the damages upon which Koerner is suing.

Koerner alleges that CMR misrepresented the nature of the product that he was purchasing, *i.e.*, that a Slate 2.0 roof was a "traditional slate roof," that a Slate 2.0 roof would "outlast" Koerner, and that a Slate 2.0 roof was backed by a 75-year warranty. Koerner also alleges that CMR did not properly remove the old roof from the Jackson Avenue house, that CMR did not properly install the Slate 2.0 roof, and that CMR did not properly repair the Slate 2.0 roof's deficiencies after installation. As a result,

Koerner argues that he did not receive the roof that he wanted and that his house sustained damage from CMR's work.

To the extent that Koerner asserts claims against CMR for physical damage resulting from the removal of his old roof, the installation of the Slate 2.0 roof, and subsequent repair work in 2006, 2007, and 2011—all jobs performed and completed by CMR before November 14, 2011—there is no genuine material dispute that fraud did not *cause* the damages. Rather, the quality of CMR's work—alleged to be deficient—is to blame. *See Thrasher Const.*, 197 So. 3d at 293. Koerner cannot salvage claims arising from the alleged substandard quality of CMR's work by relying on the § 9:2772(H) fraud exception and so such claims are perempted. Thus, all claims arising from CMR's repair work in 2006, 2007, and 2011 are perempted and will be dismissed.

On the other hand, Koerner's claims arising from his *purchase* of the Slate 2.0 roof from CMR *may* qualify for the § 9:2772(H) exception. With respect to the purchase, the "damages sued upon"—purchasing one product under false pretenses— *could* have been caused by fraud. La. R.S. § 9:2772(H)(1).

CMR argues that Koerner cannot prove that his purchase of the Slate 2.0 roof was caused by any fraud on the part of CMR. CMR points out that its agent provided Koerner with product literature, and that the 2005 contract between CMR and Koerner explicitly provided for a Slate 2.0 roof. Further, the 2005 contract does not mention a 75-year warranty and explicitly notes, after listing 10-year workmanship and materials warranties, that "THERE ARE NO OTHER WARRANTIES EXPRESS OR IMPLIED, AND THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY." To CMR,

Koerner's assertion that fraudulent behavior by CMR led to his purchase of the Slate 2.0 roof is "devoid of factual support."

Koerner's only evidence that fraud caused him to purchase the Slate 2.0 roof is his own unsworn declaration under penalty of perjury, in which Koerner details his interactions with the CMR agent with whom he dealt to purchase the roof. According to Koerner, "I made it clear to CMR's salesman that I wanted to purchase a traditional slate roof to maintain the historic character of my home." Koerner goes on to allege that:

> CMR conveyed to me that the Slate 2.0 roof was a new and improved version of a traditional slate roof (which roof still possessed all of the attributes of a traditional slate roof but was better in every meaningful way), was the best slate roof available to be purchased anywhere, that its warranty of 75 years was longer than the life of other slate roofs, and that I was paying a premium over the cost of [ ] other slate roofs in

> order to purchase a Slate 2.0 roof. I believed this, or I would not have purchased it and spend [sic] over $90,000 for an inferior or otherwise second-class roof.
>
> . . .
>
> I did not know that I was buying a roof with a synthetic membrane beneath slate tiles. Had I known this, I would not have bought this roof from CMR. . . . I was not shown physical samples of the Slate 2.0 roofing system, although the salesman may have had samples of the slate which would have appeared . . . to be real slate and apparently is.

In the same unsworn declaration, however, Koerner acknowledges—as CMR points out—that he received product literature from CRM's agent at the time that he purchased the Slate 2.0 roof. Further, Koerner admits that he knew at the time that CMR was not using felt on his roof. Specifically, Koerner alleges that he "understood that instead of felt CMR was installing some kind of advanced underlayment."

Koerner's allegations of fraud do not survive CMR's motion for summary judgment. As the Court previously explained, "plaintiffs must state all allegations of fraud with particularity, including by identifying the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby." *Owens*, 789 F.3d at 535. "[I]n many cases, the failure to state a claim is the 'functional equivalent' of the failure to raise a genuine issue of material fact." *Whalen v. Carter*, 954 F.2d 1087, 1098 (5th Cir. 1992); *see also id.* at 1097-98 (applying the pleading requirements for fraud claims on a motion for summary judgment). Such is the case here.

Nowhere in his unsworn declaration or any other filing, including his complaint, does Koerner identify when or where CMR's agent made the allegedly fraudulent statements. *Cf. Webb v.*

Everhome Mortgage, No. 17-10243, 2017 WL 3121983, at *2 (5th Cir. 2017) (per curiam) (affirming a district court's dismissal of a fraud claim because the amended complaint did not allege, *inter alia*, when or where the allegedly fraudulent statements were made). Koerner's allegations of fraud are legally insufficient on this basis.

Moreover, by Koerner's own account, CMR represented to Koerner that the Slate 2.0 roof shared "all of the attributes of a traditional slate roof"—*not* that it *was* a "traditional slate roof." Koerner also acknowledges that he was aware that CMR was not installing felt underneath the slate tiles. Further, the 2005 contract does not include a 75-year warranty and expressly disclaims all warranties not listed. Without evidence of "a misrepresentation, suppression, or omission of true information" by CMR, Koerner

cannot sustain allegations of fraud. *Shelton*, 798 So. 2d at 64.

The record is likewise devoid of any evidence "that invite[s] an inference of fraudulent intent" on the part of CMR, another shortcoming fatal to Koerner's fraud allegations. *Cargill*, 875 F. Supp. 2d at 675. While evidence of motive can support such an inference, Koerner "do[es] not sufficiently allege[, let alone prove,] motive by making generic allegations that [CMR] had a financial interest in carrying out the alleged fraud"—in this case, selling Koerner a roof. *Id.* at 675-76 (citation and internal quotation marks omitted).

Lastly, the Court observes that Koerner presumably could have "ascertained the truth" about the Slate 2.0 roof that he was purchasing—assuming that he did not know it—"without difficulty, inconvenience, or special skill." La. Civ. C. 1954.

Koerner admits that he believed the representations made by CMR's agent about the Slate 2.0 roof, but no facts presented to the Court suggest that Koerner and the agent had a "relation of confidence" such that Koerner should have unquestionably "rel[ied] on the other's assertions or representations." *Id.*; *see also Sepulvado*, 99 So. 3d at 1137; *cf. Hawes v. Kilpatrick Funeral Homes*, Inc., 887 So. 2d 711, 715 (La. Ct. App. 2d Cir. 2004) ("The mere fact that [the funeral home branch manager] possessed more expertise regarding the funeral home industry did not create a relationship of trust between the parties."); *C.J. Calamia Constr. Co., Inc. v. Ardco/Traverse Lift Co., L.L.C.*, No. 97-2779, 1998 WL 638368, at *2 n.2 (E.D. La. Sept. 15, 1998) (Clement, J.) ("Calamia and ARDCO did not have the type of relationship that would be included under [the La. Civ. C. art. 1954 'relation of confidence'] exception. The

Calamia/ARDCO relationship merely consisted of a *single sales contract*." (emphasis added)).

In the end, Koerner is displeased with the product that he purchased and he is attempting to revive his long-perempted claims against CMR via § 9:2772's fraud exception. Koerner is out of luck. "[E]ven in cases where elusive concepts such as motive or intent are at issue," summary judgment may be appropriate "if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) (internal quotation marks omitted). This is one of those cases. All of Koerner's claims related to the purchase of the Slate 2.0 roof are therefore perempted and will be dismissed.

V.

With respect to CMR's 2012 repairs of his Jackson Avenue house roof, Koerner brings claims for negligence, detrimental reliance, and fraud. CMR challenges all of these claims.

A.

A negligence claim under Louisiana law "is properly examined under the dutyrisk analysis." *Daye v. General Motors Corp.*, 720 So. 2d 654, 660 (La. 1998). This analytical framework requires a plaintiff to show "that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant and the risk of harm was within the scope of protection afforded by the duty breached." *Syrie v. Schilhab*, 693 So. 2d 1173, 1176-77 (La. 1997). "A negative answer to any of the inquiries

of the duty-risk analysis results in a determination of no liability." *Daye*, 720 So. 2d at 660.

CMR argues that there is no genuine dispute that Koerner's damages related to the 2012 repairs do not arise from the repairs at all, but rather from CMR's alleged faulty installation of the Slate 2.0 roof in 2005 and 2006. To support this argument, CMR points to an affidavit by Koerner's construction expert, Louis Relle, Jr. ("Relle"), which Koerner attached to his prior motion for default judgment. CMR reads Relle's allegations in the affidavit as addressing only damage caused by the roof's installation, not additional damage caused by CMR's repair work.

CMR also argues that Relle "wrongly attribute[s] an obligation to CMR to repair any and all issues that may have existed at the time of the repair work, whether or not such issues were even known to

CMR at the time." Finally, CMR argues that "Relle does not attribute any such leaks to repair work by CMR." Instead, CMR contends that an independent third party performed the repair work that Koerner now complains was inadequate.

Koerner attempts to identify a genuine dispute of material fact by pointing not to Relle's affidavit, but instead to Relle's more recent supplemental expert report, in which Relle outlines the damage to the Jackson Avenue house allegedly caused by CMR's roof work. Specifically, Relle links the damage that he identifies to "CMR not following the installation instructions during the original installation" of the Slate 2.0 roof and CMR "failing to correct the known defects [with the Jackson Avenue house roof] when it performed the *last* of its repairs in 2012."

The "last" repairs that Relle attributes to CMR are repairs performed in November 2012. Thus, based

on Relle's report—on which Koerner relies—Koerner's claims related to the 2012 repairs concern only the November 2012 repairs, as Relle points only to those repairs as a cause of damage to Koerner.

Yet CMR argues that the November 2012 repairs were performed by a third party, not itself. Koerner disagrees, insisting in his unsworn declaration that the third party "was CMR's own contractor." Despite Koerner's insistence, however, the record before the Court does not permit such a finding.

Under Louisiana law, a party must prove *all* of the following to establish the existence of a principal/independent contractor relationship:

> 1) there is a valid contract between the parties;
>
> 2) the work being done is of an independent nature such that the contractor may employ non-exclusive means in accomplishing it;

> 3) the contract calls for specific piecework as a unit to be done according to the independent contractor's own methods without being subject to the control and direction of the principal, except as to the result of the services to be rendered;
>
> 4) there is a specific price for the overall undertaking; *and* 5) specific time or duration is agreed upon and not subject to termination at the will of either side without liability for breach.

Bourquard v. L.O. Ausauma Enter., Inc., 52 So. 3d 248, 253 (La. Ct. App. 4th Cir. 2010) (emphasis added). In this case, the agreement covering the November 2012 repairs (the "2012 agreement")—dated October 21, 2012—does state that a CMR employee asked the third party "to inspect and, if appropriate, repair . . . damage to the roof and flashing of the roof" of the Jackson Avenue house. However, the 2012 agreement is directly between Koerner and the third party; CMR is not a party to it. In fact, the

record is devoid of evidence of *any* contract between CMR and the third party.

Further, in an email dated October 16, 2012—sent five days *before* the execution of the 2012 agreement—CMR's president informed Koerner that this third party "does not represent CMR in any way" and that he did not even know the third party. (Koerner directly responded to this email.) In another email to CMR's president sent on the day that the 2012 agreement was executed, Koerner himself acknowledges that he "made a deal" with the third party.

While it appears that CMR paid for a portion of the third party's work on the Jackson Avenue house roof, that payment does not convert the third party into CMR's contractor. *See id.* If anything, the record supports a finding that the third party was *Koerner's* contractor, *not* CMR's. *See id.* ("An independent

contractor relationship exists when," among other things, "there is a valid contract between the parties . . . .").

As the Court previously explained, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. Koerner's assertion that the third party was CMR's contractor is an example of creative lawyering; it is "simply an opinion" and as such "a textbook example of conclusoriness." *Reese v. Anderson*, 926 F.2d 494, 499 (5th Cir. 1991). "What is needed . . . are facts, reasons, observations, and explanations—in a word, *evidence*— not sweeping conclusions." *Id.* (emphasis in original). Based on the record and given

the applicable law, there is no genuine dispute that the third party was not CMR's contractor.

Moreover, even assuming that the Court classified the third party as CMR's contractor, generally "[a]s a matter of [Louisiana] law, a principal is not liable for the negligence of an independent contractor." *Burton v. Conoco Offshore, Inc.*, 631 So. 2d 1374, 1376 (La. Ct. App. 5th Cir. 1994). This rule has two exceptions: "[a] principal may not avoid liability for the acts of an independent contractor when the principal reserves the right to supervise or control the contractor's work or when an ultrahazardous activity is involved." *Id.* Koerner points to no evidence that CMR "reserve[d] the right to supervise or control the contractor's work," or that repairing the Jackson Avenue house roof constituted an "ultrahazardous activity." *Id.*; *see also Sims v. Cefolia*, 890 So. 2d 626, 631-32 (La. Ct. App. 5th Cir.

2004) (defining ultrahazardous activities); *Burton*, 631 So. 2d at 1377 (applying the three-prong test developed by the U.S. Court of Appeals for the Fifth Circuit in *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985), to determine whether a particular activity is ultrahazardous).

Koerner simply alleges in his unsworn declaration that "the work was reviewed and verified as complete by CMR." Yet "[m]ere inspection of the work done by an independent contractor and direction as to the final results of the project is insufficient to support a conclusion that the principal has retained enough control over the project" to be liable for the independent contractor's negligence. *Nippa v. Chevron, USA*, 774 So. 2d 310, 315 (La. Ct. App. 4th Cir. 2000).

In a nutshell, Koerner's claim for negligence concerns only the November 2012 repairs, which was

performed by a third party, not CMR. In this case, CMR cannot be held legally responsible for the alleged negligence of this third party. Koerner's negligence claim related to the November 2012 repairs will be dismissed.

B.

To establish detrimental reliance pursuant to Article 1967 of the Louisiana Civil Code, "a party must prove the following by a preponderance of the evidence: (1) a representation by conduct or word; (2) made in such a manner that the promisor should have expected the promisee to rely upon it; (3) justifiable reliance by the promisee; and (4) a change in position to the promisee's detriment because of the reliance." *In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319, 334 (5th Cir. 2007) (citing *Suire v. Lafayette City-Parish Consolidated Gov't*, 907 So. 2d 37, 59 (La. 2005)). "Louisiana law does not require proof of a formal,

valid, and enforceable contract" between parties to assert a detrimental reliance claim. *Suire*, 907 So. 2d at 59. However, the party asserting the claim must show that the representation that is the basis for the claim amounted to a *promise*. *See Roxco Ltd. v. Harris Specialty Chem., Inc.*, 85 Fed. App'x 375, 378 (5th Cir. 2004) (noting that Article 1967 "requires the representations to be promises"); *Wooley v. Lucksinger*, 961 So. 2d 1228, 1238 (La. Ct. App. 1st Cir. 2007) ("The first element of proof of the Article 1967 detrimental reliance cause of action is that a promise was given by the defendant to the plaintiff."). "Recovery under detrimental reliance is difficult, because estoppel is not favored in [Louisiana] law." *Allbritton v. Lincoln Health Sys., Inc.*, 51 So. 3d 91, 95 (La. Ct. App. 2d Cir. 2010).

With respect to Koerner's detrimental reliance claim related to the November 2012 repairs to the

Jackson Avenue house roof, CMR argues that a third party performed those repairs pursuant to an agreement directly between Koerner and that third party. As such, "no merit lies in any contention that CMR allegedly misled Koerner about the scope or effect of repairs," because CMR did not provide the repairs.

To support his detrimental reliance claim, Koerner argues that CMR made a representation to him regarding "the completeness of [the November 2012] repairs." More specifically, Koerner contends that CMR "reviewed and verified as complete" the repairs provided by the third party, and made "assurances that this work would address the remaining issues with his roof." Based on this representation, Koerner contends that he "believed that all issues with [the] roof"—in particular, those issues identified in a January 2011 roof inspection

report by Guaranty Sheet Metal and Roofing ("2011 inspection report")—"had been addressed," but in fact "all issues" were not.

Like his negligence claim, Koerner's claim for detrimental reliance fails. In order to state a detrimental reliance claim, Koerner must first allege that CMR made a promise to him. *See Roxco*, 85 Fed. App'x at 378. In this context, a promise is "[t]he manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made." *Wooley*, 961 So. 2d at 1239 (quoting *Promise*, Black's Law Dictionary 1228-29 (7th ed. 1999)) (internal quotation marks omitted); *see In re Katrina Canal Breaches Litig.*, 495 F.3d at 210 (noting that dictionaries "are helpful resources in ascertaining a term's generally prevailing meaning"); *Gregor v. Argenot Great Cent. Ins. Co.*, 851 So. 2d 959,

964 (La. 2003) ("Dictionaries are a valuable source for determining the 'common and approved usage" of words.'"). In other words, a promise amounts to "a person's *assurance* that the person will or will not do something." *Id.* (citation and internal quotation marks omitted) (emphasis in original).

The alleged representation by CMR at the heart of Koerner's detrimental reliance claim is that CMR reviewed the third party's remedial work on the Jackson Avenue house roof, verified the work as complete, and assured Koerner that this work would fix the problems with the roof. Yet this representation is not a promise: it does not constitute an assurance by CMR to do any particular thing, or not do any particular thing, for Koerner. With a promise given to him by CMR, Koerner has not stated a detrimental reliance claim against CMR.

Moreover, even if CMR's representation constituted a promise, "reliance on the representation must be reasonable," meaning the representation "must not be vague and plaintiff's reliance cannot simply be based on assumption." *Bernard v. Scott Liti. Grp.*, No. 16-1314, 2017 WL 819036, at *4 (E.D. La. Mar. 2, 2017) (Morgan, J.) (citation and internal quotation marks omitted); *see also Bensco One, LLC v. Volkswagen of Am., Inc.*, No. 06-1591, 2008 WL 907521, at *11 (E.D. La. Mar. 31, 2008) (Porteous, J.) ("Assumptions based merely upon vague promises are insufficient to support a [detrimental reliance] claim."). Koerner alleges that CMR attested to the "completeness" of the third party's repair work: that CMR "reviewed and verified [the third party's work] as complete," and assured him "that this work would address the remaining issues with his roof." Koerner appears to assume that CMR's representation that

the third party had completed its work amounted to a guarantee as to the *quality* of the work. Yet there is substantial difference between a verification that work is *complete* and a pledge that work is *correct*. Koerner's assumption—which appears wholly unjustified by the representation, as characterized by Koerner—precludes the inference that Koerner's alleged reliance on the representation was reasonable.

Further, as previously discussed and despite Koerner's insistence to the contrary, the record demonstrates that CMR did not perform the November 2012 repairs. The 2012 agreement was directly between Koerner and the third party; CMR was not a party to the 2012 agreement, did not provide the work, and was not legally responsible for the finished product. *See Nippa*, 774 So. 2d at 315. As such, the record precludes the inference that CMR would have expected Koerner to rely on any

representation concerning the correctness or comprehensiveness of the third party's repairs, and any reliance on Koerner's part was unreasonable.

What Koerner is attempting to do is hold CMR liable for the third party's alleged negligent repairs. The Court has already explained that CMR is not liable for the third party's negligence, and the Court will not allow Koerner to escape this conclusion by transforming his negligence claim into a claim for detrimental reliance. The Court will therefore dismiss the detrimental reliance claim.

C.

Lastly, Koerner asserts a fraud claim related to the 2012 repair work performed on the Jackson Avenue house roof. "To recover under a cause of action in delictual fraud, a plaintiff must prove three elements: (1) a misrepresentation of material fact, (2) made with the intent to deceive, (3) causing justifiable

reliance with resultant injury." *Becnel v. Grodner*, 982 So. 2d 891, 894 (La. Ct. App. 4th Cir. 2008) (citing *Newport Ltd. v. Sears Roebuck & Co.*, 6 F.3d 1058, 1068 (5th Cir. 1993)). CMR contends this fraud claim is too vague to survive summary judgment.

Koerner alleges in his complaint that "CMR did perform extensive repairs to his roof in late November 2012"—the Court has concluded that CMR did not—and that "CMR intentionally misrepresented to [him] that these repairs would address the issues that he was having with his roof." In his unsworn declaration, Koerner further contends that a CMR employee allegedly assured him that the 2012 repairs would "correct all defects in the roof that had been identified" in the 2011 inspection report and that this assurance proved false.

Koerner also points to a September 10, 2011, email that a CMR superintendent sent to his

colleagues after inspecting the Jackson Avenue house roof. In the email, the CMR superintendent states that "I did not disclose or offer any info on my findings [to Koerner] and simply left [Koerner] assured we were working on correcting his leak issue, after all he is a lawyer and I know they are sneaky :)." Koerner argues that the email "confirms" that "CMR was well aware of the defects in his home, kept that information from him, assured him that it would correct the problems, and deliberately failed to do so."

To the extent that Koerner bases his fraud claim on an alleged representation by CMR to address all of the issues with the Jackson Avenue house roof identified in the 2011 inspection report, the claim suffers from the same lack of specificity that doomed his allegations of fraud related to his purchase of the Slate 2.0 roof. Koerner does not identify the CMR employee who made this specific representation to

him, nor does he identify when or where the representation was made. *See Owens*, 789 F.3d at 535. Insofar as the September 10, 2011, email mentions the 2011 inspection report at all, it simply notes that Koerner "stated [to the CMR superintendent] that last January he had another roofing company quote these repairs and said he sent to us what they suggested." The email does not indicate that the CMR superintendent even saw the 2011 inspection report, let alone that he made any assurances to Koerner related to the report. Thus, the email does nothing to cure Koerner's particularity problem.

Further, to the extent that Koerner bases his fraud claim on the representation by the CMR superintendent that CMR would "correct[ ]" the "leak issue," the claim likewise fails. First, CMR addressed this "leak issue" with discrete repairs that CMR performed on the roof in fall 2011. The Court has

already concluded that this repair work is separate and independent from repairs performed in 2012, and that claims arising from this repair work are perempted under La. R.S. § 9:2772(A).

Second, while fraud can be predicated "on promises made with the intention not to perform at the time the promise is made," the "[f]ailure to perform as promised, or nonperformance of an agreement to do something at a future time . . . is alone not evidence of fraud" under Louisiana law. *Peaker Energy Grp., LLC v. Cargill, Inc.*, No. 14-2106, 2015 WL 4879415, at *11 (E.D. La. Aug. 14, 2015) (Engelhardt, J.) (quoting *Benton v. Clay*, 123 So.3d 212, 219 (La. Ct. App. 2d Cir. 2013)). The email does not indicate that CMR did not intend to honor its assurances to Koerner that it would address the Jackson Avenue house roof's leak problem. To the contrary, and as just mentioned, CMR *did* conduct

repairs on the roof soon after the CMR employee's inspection.

Koerner's emphasis on the CMR superintendent's admitted decision not to disclose the results of his inspection to Koerner is ultimately misplaced. The email only shows that the CMR superintendent did not disclose those results because lawyers are "sneaky," not because the CMR superintendent never intended that CMR would address the "leak issue." The former is not equivalent to the latter. Koerner's fraud claim related to the 2012 repairs will be dismissed.

VI.

As the Court has already dismissed Koerner's fraud claims on other grounds, the Court need not address the issue of prescription.

Accordingly,

IT IS ORDERED that the motion for summary judgment is **GRANTED** and that all of Koerner's claims against CMR are **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, October 18, 2017.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

United States District Court,
Eastern District Of Louisiana

In the Matter of the Complaint of Louis R. Koerner, Jr., as plaintiff,

VERSUS

Vigilant Insurance Company, Defendant.

No: 2:16-cv-13319(I)(1)
Signed: October 18, 2017

FINAL JUDGMENT

IT IS ORDERED that **FINAL JUDGMENT** is **ENTERED** in favor of the CMR Construction & Roofing, LLC ("CMR") and against Louis R. Koerner, Jr. ("Koerner"). All of Koerner's claims against CMR are **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, October 18, 2017.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

APPENDIX F – ORDER DENYING RULE 59(e) RELIEF FROM THE SETTING ASIDE OF THE DEFAULT JUDGMENT

United States District Court,
Eastern District Of Louisiana

In the Matter of the Complaint of Louis R. Koerner, Jr., as plaintiff,

VERSUS

Vigilant Insurance Company, Defendant.

No: 2:16-cv-13319(I)(1)
Signed: January 4, 2018

ORDER AND REASONS

Before the Court is a motion filed by Louis Koerner ("Koerner") pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Koerner asks the Court to reconsider its Order and Reasons granting summary judgment on all of Koerner's claims in favor of CMR Construction and Roofing, LLC ("CMR"). CMR opposes Koerner's motion.

I.

Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." According to the Fifth Circuit, a Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). "[S]uch a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5th Cir. 2004). Instead, "Rule 59(e) serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (internal quotation marks omitted) (alteration in original); *see also In re Transtexas*, 303 F.3d at 581 (same). "Reconsideration of a judgment after its entry

is an extraordinary remedy that should be used sparingly." *Templet*, 367 F.3d at 478.

"[W]hile a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless." *Id.* The Fifth Circuit "has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts." *Id.* "The task for the district court is to strike the proper balance between these competing interests." *Id.*

II.

Koerner alleges that the Court "granted summary judgment to CMR on grounds not raised by CMR without giving Koerner notice and an opportunity to respond." Koerner contends that this purported action by the Court was error warranting

rescission of the grant of summary judgment in CMR's favor.

A.

While "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*," *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), the Fifth Circuit has cautioned that "[a] district court cannot grant summary judgment *sua sponte* unless it gives ten days notice to the adverse party. *Loughman v. Sw. Bell Tel. Co.*, No. 96-11546, 1997 WL 759294, at *3 (5th Cir. 1997) (per curiam). "A court enters a summary judgment *sua sponte* when it grants the motion on grounds other than those urged by the movant." *Id.*; *cf. John Deere Co. v. Am. Nat. Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987) ("Since the district court relied on grounds not advanced by the moving party as a basis for granting summary judgment, and did not give proper notice to

the Bank before granting judgment on such grounds, its judgment cannot be upheld on appeal.").

"If a party has reason to believe that only some of its claims are being adjudicated, it is not on notice that it must bring forth all of its evidence supporting each and every claim." *Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, LLC*, 255 Fed. App'x 775, 788 (5th Cir. 2007). Further, "[n]otice that a particular element of a cause of action is being challenged with summary judgment does not put a party on notice that every element is being challenged." *Id.* However,

> [a]bsent formal notice, the nonmoving party may nevertheless be deemed to be on notice—enabling a court to enter summary judgment *sua sponte*—if the basis on which the motion is granted is otherwise raised in a manner sufficient to make the nonmoving party aware that failure to present evidence on the issue could be grounds for summary judgment.

Loughman, 1997 WL 759294, at *3.

B.

After reviewing the parties' filings in connection with both the previous motion for summary judgment and the present motion for reconsideration, the Court concludes that Koerner was on notice of grounds on which the Court dismissed all of Koerner's claims.

In its memorandum in support of summary judgment, CMR argued that Koerner's allegation of fraud related to his 2005 purchase of the Slate 2.0 roofing system was "devoid of factual support." CMR contended that it had provided Koerner with product literature, as well as with samples of the slate to be installed. Koerner did not dispute this contention. CMR also pointed out that Koerner had entered into a contract with CMR that explicitly called for the installation of a Slate 2.0 roofing system. (The

contract also explicitly defined the warranties provided to Koerner and disclaimed all other warranties.)

Further, and in response to the Court's inquiry, Koerner "confirmed that a basis of his fraud allegations related to his 2005 roofing contract with CMR is CMR's use of a synthetic membrane—rather than felt—under the slate tiles, which does not constitute a 'traditional slate roof.'" Yet Koerner admitted in his unsworn declaration under penalty of perjury, filed in connection with his opposition to CMR's motion for summary judgment, that he knew at the time of the Slate 2.0 roof's installation that CMR was not using felt on the new roof, but was instead using "some kind of advanced underlayment." The Court thus determined that the record lacked evidence of "a misrepresentation, suppression, or omission of true information" by CMR.

In addition, CMR argued in its memorandum in support of summary judgment that Koerner's suggestion that CMR intended to defraud him with the purchase of the Slate 2.0 roof amounted to nothing more than mere "speculation" with no evidentiary basis. The Court agreed, concluding that CMR's financial interest in selling a roof to Koerner—the only motive to commit fraud that Koerner appeared to suggest—could not alone support "an inference of fraudulent intent" on CMR's part. *Cf. Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 213 (5th Cir. 2009) (noting that the Fifth Circuit "has held that certain motives alleged, especially those universal to corporations and their officers, do not suffice to establish an inference of fraud under Rule 9(b)" of the Federal Rules of Civil Procedure and holding that "the motive attributed to Appellees by Appellants—the desire to complete a

financially successful tender offer—is insufficient to establish an inference of fraud under Rule 9(b)").

Koerner was also on notice as to additional particularity problems with respect to the fraud allegations related to his purchase of the Slate 2.0 roof—namely, his lack of specificity as to the time and place of any alleged misrepresentations by CMR. In a previous motion, CMR had argued that "Koerner has not specified a date on which any alleged misrepresentations were made—not even a month or a year." CMR had further argued that "Koerner has not specified where any allegedly false statements were made to him." The Court dismissed this motion without prejudice. The Court therefore concludes that, although CMR did not again raise this particular issue in its motion for summary judgment, Koerner "may nevertheless be deemed to be on notice" as to the issue. *Loughman*, 1997 WL 759294, at *3.

With respect to Koerner's fraud and detrimental reliance claims related to the 2012 repairs on his Slate 2.0 roof, CMR argued in its memorandum in support of summary judgment that "Koerner does not, and cannot, allege that CMR agreed to perform work . . . with an intent not to perform the work." CMR went on: "Instead, Koerner seeks to skirt the issue by alleging that CMR somehow told him, through an unidentified representative, at an unstated time, in an unidentified place, that 'everything will be OK.'" In CMR's view, "[s]uch an allegation of 'failure to live up to vague, alleged assurances' does not state any cause of action at all, much less a cause of action for fraud."

The Court concluded that the particularity problem identified by CMR doomed any non-perempted fraud claim asserted by Koerner. The Court also concluded that Koerner had not put

forward any evidence of fraud, observing that a "[f]ailure to perform as promised . . . is alone not evidence of fraud." As for Koerner's detrimental reliance claim, the Court concluded that the alleged representation at the heart of the claim, as described by Koerner in his unsworn declaration under penalty of perjury, was vague and thus Koerner's reliance on it—or more specifically, Koerner's reliance on his own assumption about the alleged representation—was unreasonable as a matter of law.

Finally, with respect to Koerner's negligence claim related to the 2012 repairs on his roof, CMR argued that "Koerner has not identified any alleged problems that he claims resulted from the repair work or additional work that CMR performed in early 2012, which was the last time that CMR worked on Koerner's house." CMR then elaborated on this point, noting that "[s]ubsequent repair work was performed

by an independent contractor whom Koerner dealt with directly, Brian Vela."

The Court concluded that Koerner had failed to offer any evidence that the third party who performed the repairs on his roof in November 2012 was CMR's contractor. Thus, the Court determined that CMR could not be held legally responsible for any alleged negligence associated with those repairs. (The Court also concluded that the absence of a principal-independent contractor relationship bore on the viability of Koerner's detrimental reliance claim: because CMR was not legally responsible for those repairs, CMR would not have expected that Koerner would "rely on any representations concerning the correctness or comprehensiveness of the third party's repairs, and any reliance on Koerner's part was unreasonable.")

In short, even if the Court identified some deficiencies with respect to Koerner's claims that CMR did not itself identify, grounds on which the Court dismissed Koerner's claims were adequately identified by CMR in its memorandum in support of summary judgment. As such, the Court will not vacate its dismissal of Koerner's claims.

C.

Further, and in the alternative, the Court concludes that dismissal of Koerner's claims is appropriate even in light of the additional evidence that Koerner has submitted along with his motion for reconsideration.

Given Koerner's representations to the Court during the course of this litigation, the Court remains unable to discern a misrepresentation by CMR that could support a claim of fraud. Koerner continues to focus on the material used underneath the slate tiles.

Yet as the Court has already pointed out, Koerner previously admitted under penalty of perjury that he knew that CMR did not use felt underneath the slate tiles on the Slate 2.0 roof. Koerner also previously represented to the Court that the absence of felt was why a Slate 2.0 roof was not a "traditional slate roof."

Moreover, the Court remains unable to discern any reason why Koerner—who has presented no evidence that he and CMR's representative had a "relation of confidence"—would not have been able to "ascertain[ ] the truth" about the design of the Slate 2.0 roof "without difficulty, inconvenience, or special skill." La. Civ. C. art. 1954; *cf. Hawes v. Kilpatrick Funeral Homes*, Inc., 887 So. 2d 711, 715 (La. Ct. App. 2d Cir. 2004); *C.J. Calamia Constr. Co., Inc. v. Ardco/Traverse Lift Co., L.L.C.*, No. 97-2779, 1998 WL 638368, at *2 n.2 (E.D. La. Sept. 15, 1998) (Clement, J.). Indeed, evidence that Koerner now

submits to the Court for the first time shows that he conducted his own research into the Slate 2.0 roof. This research appears to explain the Slate 2.0 roofing system.

The Court also notes that this evidence appears to contradict previous representations that Koerner made to the Court regarding what he was told about the cost of a Slate 2.0 roof compared to alternatives. Throughout this litigation, and under penalty of perjury, Koerner has alleged that he "was never told that the Slate 2.0 [sic] was not the best and therefore most expensive roof replacement that [he] could buy to put a slate roof back on" his house, and that "[c]ost was not a factor in his decision-making process with respect to [his] new roof." Evidence that Koerner has now made available to the Court raises significant questions as to the veracity of these statements.

In addition, Koerner has still not established that the third party who worked on his roof in late 2012 was CMR's contractor. *See Bourquard v. L.O. Ausauma Enter., Inc.*, 52 So. 3d 248, 253 (La. Ct. App. 4th Cir. 2010) (articulating the requirements under Louisiana law to establish the existence of a principalindependent contractor relationship). Further, the emails on which Koerner relies to support his detrimental reliance claim do not alter the fact that the evidence in the record demonstrates that CMR did not perform the repairs that are the subject of the claim and that the third party who performed the repairs was hired by Koerner, not CMR. Simply put, CMR was not legally responsible for those repairs.

Moreover, Koerner has still not identified any specific promise made and broken by CMR that could support a detrimental reliance claim. *See Wooley v.*

Lucksinger, 961 So. 2d 1228, 1238 (La. Ct. App. 1st Cir. 2007) (explaining the definition of "promise" for purposes of a detrimental reliance claim). For example, Koerner does not contend that CMR did not pay "up to $3,000" for the third party's repair work in late 2012, as CMR appears to have represented to Koerner that it would do. Instead, Koerner appears to fuse his allegations regarding what CMR allegedly "assured" him regarding the result of the third party repairs—which is not a promise by CMR to do any particular thing for Koerner—with what he "understood" about CMR's role vis-à-vis the November 2012 repairs and what he "believed" about the quality of those repairs—which do not involve any representations by CMR. For reliance on a particular representation to be reasonable for purposes of a detrimental reliance claim, however, the representation must not only constitute a promise as

defined under Louisiana law, but it must also "not be vague and plaintiff's reliance cannot simply be based on assumption." *Bernard v. Scott Liti. Grp.*, No. 16-1314, 2017 WL 819036, at *4 (E.D. La. Mar. 2, 2017) (Morgan, J.).

Finally, with respect to Koerner's fraud claim connected to the 2012 repair work—and to the extent that the claim is not perempted—"[f]ailure to perform as promised, or nonperformance of an agreement to do something at a future time . . . is alone not evidence of fraud" under Louisiana law. *Peaker Energy Grp.*, 2015 WL 4879415, at *11. The crux of Koerner's fraud claim concerns CMR's alleged representation regarding the expected effectiveness of the repairs to be performed by the third party. The failure of this representation to hold up over time, however, does not alone support a claim for fraud, as Koerner appears to continue to believe.

III.

For the foregoing reasons,

IT IS ORDERED that Koerner's motion is **DENIED**.

New Orleans, Louisiana, January 4, 2018.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE