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PUBLIC WORKS ACT PROVIDES THE EXCLUSIVE REMEDY

Patriot Construction & Equipment, LLC, pursuant to a contract with Rage Logistics, a sub-subcontractor, provided dirt and other materials for a project for the City of Youngsville. Patriot claimed it was not fully paid, and sued, among others, the City and Trahan Construction, the general contractor, for claims of quantum meruit and unjust enrichment. The City and Trahan filed exceptions of no cause of action.

The court of appeal held Patriot failed to state a cause of action against them. Since they were the owner and general contractor of a public works project, Patriot's only remedy against them was under L.R.S. 38:2241, *et seq.*, the Louisiana Public Works Act, which allows a claimant such as Patriot to file a claim similar to a lien as provided by the Louisiana Private Works Act. If the claim is timely filed and recorded, the City would be required to deduct the amount of the outstanding claim from the final payment due the contractor. If the City failed to do so, it would be liable for the amount of the claim. This, the court of appeal

held, was Patriot's only remedy against the City and Trahan. It would not be able to seek recovery under other theories such as quantum meruit and unjust enrichment. *Patriot Construction & Equipment, LLC v. Rage Logistics, LLC*, 2015-1136 (La.App. 3 Cir. 4/6/16), 215 So.3d 844, *writ denied*, 2016-0864 (La. 9/6/16), 205 So.3d 917.

PEREMPTION

Plaquemines Parish Government contracted with Burk-Kleinpeter, Inc. as the design engineer to rebuild the Burus Fire Station after it was damaged by Hurricane Katrina. It contracted with Lamar Contractors, LLC to perform the work. All South Engineers, LLC was the project manager for Plaquemines Parish.

The contract with Burk-Kleinpeter provided that it, as the engineer, would be the owner's representative during construction. Burk-Kleinpeter issued a certificate of substantial completion stating that the date of substantial completion was April 6, 2010. All South recommended approval of substantial completion to Plaquemines Parish on July 26, 2010. Plaquemines Parish received the certificate on July 28, 2010. In its cover letter to the Parish President, All South stated, "the certificate has been dated April 6, 2010, which is correct." The letter acknowledged that the certificate had been withheld in an attempt to resolve several outstanding change orders on the project. On August 5, 2010, the Parish President executed a notice of acceptance that the work had been completed. On April 15, 2015, Plaquemines Parish sued Burk-Kleinpeter and Lamar seeking damages for alleged design and construction defects.

Lamar filed an exception of peremption relying upon L.R.S. 38:2189. The statute provides that any action against a contractor for a public works project let by the State or any of its agencies, boards or subdivisions shall prescribe in five years from substantial completion or acceptance of the work, whichever occurs first. The trial court concluded substantial completion occurred on April 6, 2010, and sustained Lamar's exception. It is important to note, unlike some other statutes of limitation, L.R.S. 38:2189 does not require that the certificate be recorded in the public records for the limitation period to begin to run.

Plaquemines Parish appealed. The court initially noted that the statute, L.R.S. 38:2189, although it uses the word "prescription," establishes a peremptive time limitation. Plaquemines Parish contended the earliest date the peremptive period started to run was July 26, 2010, the date All South recommended acceptance of the work, or, alternatively, August

5, 2010, the date the acceptance was signed by Plaquemines Parish and recorded in the mortgage and conveyance records. Plaquemines Parish did not contest the assertion its contract with Burk-Kleinpeter gave Burk-Kleinpeter the authority to select the date of substantial completion.

The court of appeal stated its review was limited to whether the trial court erred in finding that April 6, 2010 was the date of substantial completion. It held the contract between Plaquemines Parish and Burk-Kleinpeter gave Burk-Kleinpeter the authority to select the date, and the date the public entity accepted the work did not establish the date when the agreement gave another party the authority to determine it. The court of appeal held there was no error in the trial court's judgment that Plaquemines Parish's action against Lamar was perempted since suit was not filed until April 15, 2015, more than five years beyond the date provided by the statute. *Plaquemines Parish Government v. Burk-Kleinpeter Inc.,* 2015-1152 (La.App. 4 Cir. 3/9/16), 2016 WL 915393.

CLAIM NOT ALLOWED UNDER A PERFORMANCE BOND

F.H. Paschen, S.N. Nielsen & Associates, LLC (Paschen) contracted, as the general contractor, for two school construction projects in New Orleans. Paschen subcontracted part of the projects to J & A Construction Management Resources Company, Inc., and J & A subcontracted its obligations to 84 Lumber Company. Fidelity and Deposit Company of Maryland provided performance bonds with 84 Lumber as the principal and J & A as the obligee. It added riders to the performance bonds naming Paschen as a dual obligee. 84 Lumber sued Paschen and Fidelity alleging it was not paid in full for work performed under its agreement with J & A and for work performed outside of the agreement. Paschen asserted counter claims against Fidelity alleging a breach of contract by 84 Lumber and J & A which, according to Paschen, made Fidelity liable to it for those damages. Fidelity moved for summary judgment.

The court found Fidelity guaranteed 84 Lumber's performance under the subcontracts between J & A and 84 Lumber, and only 84 Lumber's performance. Neither bond made a reference to any contract to which 84 Lumber was not a party. The court held Fidelity could not be held liable for a breach of the subcontract between Paschen and J & A, nor could Fidelity be held liable for any breach committed by J & A. Therefore, Fidelity was entitled to summary judgment as a matter of law. *84 Lumber Company v. F.H. Paschen, S.N. Nielsen & Associates, LLC,* 12-1748 (E.D. La. 2/3/17), 2017 WL 467679.

NOTICE TO A LIEN CLAIMANT'S LAWYER DOES NOT SATISFY THE NOTICE REQUIREMENTS OF L.R.S. 38:2247, AND THE EXISTENCE OF ANOTHER REMEDY PRECLUDES A CLAIM FOR UNJUST ENRICHMENT

F.H. Paschen, S.N. Nielsen & Associates, LLC subcontracted work for two public projects to J & A Construction Management Resources Company, Inc. J & A, in turn, subcontracted a portion of its work to 84 Lumber Company. 84 Lumber filed liens to recover payments due, and sued Paschen and its sureties under the Louisiana Public Works Act (LPWA). It also asserted a claim for unjust enrichment. The lawsuit, additionally, asserted a claim for breach of contract. Paschen and its sureties moved for partial summary judgment on the LPWA and unjust enrichment claims.

84 Lumber did not have a contractual relationship with Paschen. L.R.S. 38:2247 provides that before any claimant having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor, shall have a right of action against the contractor or its surety on the bond furnished by the contractor, he shall, in addition to the notice and recordation requirements of L.R.S. 38:2242, give written notice to the contractor within forty-five days from the recordation of the notice of acceptance by the owner of the work or notice by the contractor of default, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor or service was done or performed. The notice is required to be served by mailing it by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office in Louisiana.

The defendants claimed 84 Lumber failed to comply with the notice requirements, representing there was no evidence of any communication from 84 Lumber mailed to Paschen. 84 Lumber argued Paschen had actual notice of the claims by virtue of the filing of its complaint, as well as emails sent to Paschen's attorney. 84 Lumber asserted that its complaint served as notice under the statute. The court rejected the argument holding the statute requires notice "before" any claimant shall have a right of action. A complaint asserting a right of action cannot, therefore, serve as statutorily required notice if the notice is required before one has the right of action.

The court held 84 Lumber's contention that its emails to Paschen's lawyer provided actual notice, and was, therefore, sufficient under the statute, was contrary to the clear text of the statute. The court noted that neither the Louisiana Supreme Court nor any Louisiana appellate court has held that actual notice is all that the statute requires regardless of the extent of non-compliance with the statute. The court held that the failure to satisfy the requirements of the statute was not excused by emails sent to counsel for the contractor, and, additionally, noted there was no evidence in the record that the lawyer or Paschen received the emails. The court found the defendants were entitled to summary judgment on the LPWA claims as a matter of law.

In addressing the claim for unjust enrichment, the court found that, under Louisiana law, one cannot assert a claim for unjust enrichment if another remedy is available. Since the LPWA provided another remedy, a claim for unjust enrichment was not available, and the defendants were entitled to summary judgment dismissing that claim. *84 Lumber Company v. F.H. Paschen, S.N. Nielsen & Associates, LLC*, 12-1748 (E.D. La. 5/16/17), 2017 WL 2119949.

CONTRACTOR FOUND TO BE STATUTORILY IMMUNE FROM LIABILITY UNDER L.R.S. 9:2771 AND *CONTRA NON VALENTEM* FOUND NOT TO INTERRUPT PRESCRIPTION

LaShip, LLC contracted with Hayward Baker, Incorporated to build a large shipbuilding facility in Houma, Louisiana on land it owned and on land owned by the Terrebonne Port Commission and leased to LaShip. The Port Commission contracted with F. Miller Construction for the bulkhead constructed on the land owned by it. Miller subcontracted the foundation work to Hayward Baker. Lyle Stover Engineering, Inc. designed the foundation system which included drilled soil-mixed columns. Problems were encountered with settlement of the columns. Both LaShip and The Port Commission sued Hayward Baker. LaShip sued for unjust enrichment, breach of contract, negligence and breach of the implied duty of workmanlike performance. All claims of LaShip were previously dismissed, except the claim for implied duty of workmanlike performance which proceeded to trial. The Port Commission sued Hayward Baker in negligence. The district court dismissed all claims against Hayward Baker. LaShip and the Port Commission appealed.

The district court found Hayward Baker complied with the specifications of its contract. LaShip contended the specifications were merely a component of Hayward Baker's overreaching obligation to properly install soil-mixed columns. The court of appeals agreed with the district court and held that because the specifications were met, and LaShip could not identify a specific provision in the contract as a point of breach, the district court did not err in determining that HBI did not breach its contract with LaShip.

LaShip also argued Hayward Baker was liable in negligence for a failure to warn of alleged defects in the design of the columns. LaShip raised this argument in the district court for the first time in post-trial briefing. The court of appeals held that it did not need to address the merits of the assertion since it found Hayward Baker was statutorily immune from liability under L.R.S. 9:2771. The statute provides that a contractor shall not be liable for the destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed or is constructing the work according to plans and specifications furnished to him which he did not make or cause to be made, and the defects were due to the fault or insufficiency of the plans and specifications. The court of appeals held that, generally, a contractor may rely on the statute to shield it from liability for any defects that may arise as a result of the contractor's adherence to plans and specifications that were provided to it. A contractor cannot escape liability, however, if he has a justifiable reason to believe that adherence to plans and specifications would create a hazardous condition.

The court of appeals found Hayward Baker was given specifications which it did not make or cause to be made, and the settlement stemmed from a design defect in the columns. Thus, the defect was due to the fault or insufficiency of the plans or specifications. LaShip argued that Hayward Baker, because of its geotechnical experience, had justifiable reason to believe that adherence to the plans and specifications would create a hazardous condition, and as a result, it knew or should have known that the design was defective, and it had a duty, therefore, to warn LaShip. The court of appeals declined to broaden the scope of the tort duty of contractors under Louisiana law to the extent urged by LaShip.

The claims of the Port Commission were found to be prescribed under the one-year period for torts. The Port Commission argued prescription was interrupted under the rule of *contra non valentem* where, among other things, the cause of action is neither known nor reasonably known by the plaintiff even though plaintiff's ignorance is not induced by the defendant. The court of appeals held the key inquiry in the analysis is whether knowledge, either actual or constructive, existed to trigger the prescriptive period. To identify constructive knowledge,

the court looks to the reasonableness of the plaintiff's action or inaction in light of its education, intelligence, and the nature of the defendant's conduct. The Port Commission failed to establish the reasonableness of its action with respect to filing a lawsuit within the one-year prescriptive period. The engineer and representatives of the Port Commission continuously monitored the work site and the installation of the soil-mix columns. The ongoing presence of these individuals on-site was sufficient to demonstrate the existence of constructive knowledge on the part of the Port Commission. The Port Commission could not, therefore, rely on *contra non valentem* to shield it from prescription.

Hayward Baker had filed a counterclaim against LaShip representing it was not compensated for many of the soil-mix columns it had installed prior to LaShip's decision to move the footprint of the facility. LaShip argued it did not owe compensation for the columns since they were necessarily abandoned due to their defects and lack of reliability. Hayward Baker argued it disagreed with LaShip's decision to abandon the columns, a decision which was also opposed by Lyle Stover. The district court found in favor of Hayward Baker and awarded costs for the difference between the columns Hayward Baker originally agreed to mix and those which were actually mixed. The court of appeals agreed. *LaShip, LLC v. Hayward Baker, Incorporated*, (U.S. 5th Cir. 3/1/17), 2017 WL 829503.

TIMELINESS OF A LIEN UNDER THE LOUISIANA PRIVATE WORKS ACT

Golden Nugget Lake Charles, LLC contracted with W.G. Yates & Sons Construction Company to construct a hotel and casino in Lake Charles. A dispute developed between Golden Nugget and Yates as to the contract and work. A certificate of substantial completion was signed, but not filed in the public records.

Golden Nugget withheld approximately $18.7 million to protect itself against estimated damages caused by Yates. It filed a complaint in federal district court seeking damages and declaratory relief for breach of contract, breach of warranty and negligence in connection with the project. Yates filed a counterclaim alleging Golden Nugget was wrongfully refusing and delaying payment on the project. It filed a statement of lien and privilege pursuant to the Louisiana Private Works Act to secure payment, and sought recognition of the lien and privilege. Golden Nugget argued Yates did not timely file the statement. The district court held the statement was untimely, and dismissed the claim for the lien. Yates appealed.

Since Yates was a general contractor, the lien was subject to L.R.S. 9:4822B which states that a general contractor to whom a privilege is granted, and whose privilege has been properly preserved, shall file a statement of privilege within sixty days after the filing of the notice of termination or substantial completion of the work. Yates argued a notice of substantial completion was never filed in the public records, and the time period for it to file its lien never started to run. Golden Nugget contended the time period began to run on the date the certificate of substantial completion was signed, although it was never filed in the public records, and the sixty-day period during which Yates could have filed the lien statement had long since expired.

The court of appeal agreed with Yates. The sixty-day period began to run when either a notice of termination or notice of substantial completion was filed. Since no notice was ever filed, the sixty-day period did not begin to run. Yates had a valid lien. The judgment of the district court was reversed. *Golden Nugget Lake Charles, LLC v. W.G. Yates & Sons Construction*, 850 F.3d 231, (5th Cir. 2017).

PRIVATE WORKS ACT LIEN DISALLOWED

Lacy Doyle Rogers hired Deloach Construction, LLC to construct a home in Rapides Parish. Deloach filed a labor and materialman's lien in the amount of $65,553.82. Rogers filed a petition for mandamus to cancel the inscription of the privilege urging that Deloach failed to timely file his construction contract with the clerk of court, and therefore failed to preserve his contractor's privilege pursuant to L.R.S. 9:4801. The trial court granted Rogers' petition, finding the lien failed to reasonably itemize the amount owed and cancelled the lien. Deloach appealed.

The court of appeal first noted Deloach as a general contractor does not have a lien pursuant to L.R.S. 9:4801 unless, as required by L.R.S. 9:4811, a notice of contract is filed before the contractor begins work. Although Deloach did not dispute the contention the contract or notice thereof was not properly filed, the court of appeal found a contractor may still have a labor and materialman's lien pursuant to L.R.S. 9:4822(G). That holding is curious. Subsection G only sets forth the requirements for the content of a lien which is otherwise allowed by Section 4822.

The court of appeal then examined the lien. The lien stated $65,553.82 was due, but the affidavit of Michael Deloach which was made a part of the record stated that the amount of

the funds owed by Rogers was $45,119.00. The court of appeal stated it was unable to determine from the record how Deloach arrived at the lesser amount, and affirmed the trial court's decision that the lien failed to reasonably itemize the amount owed. The judgment of the trial court cancelling the lien was affirmed. *Rogers v. Hooter*, 2016-969 (La.App. 3 Cir. 4/5/17), 215 So.3d 979.

REQUEST FOR EQUITABLE ADJUSTMENT TO THE CORPS OF ENGINEERS

Fisk Electric Company contracted with DQSI, LLC, as the prime contractor, to perform electrical work on a project for the United States Army Corps of Engineers. Western Surety issued a Miller Act payment bond for the project on behalf of DQSI. Fisk alleged it incurred significant additional expenses as a result of delays for which it was not paid. It filed suit against DQSI and Western. The matter was mediated, and a Memorandum of Agreement was entered into between Fisk and DQSI which was enforced by the court. In addition to other conditions, the Agreement provided that DQSI would submit a request for equitable adjustment (REA) to the Corps of Engineers for the delay damages. Fisk, as a subcontractor, was not permitted to submit its claims directly.

Fisk alleged it confronted DQSI prior to filing the lawsuit, and again at mediation, regarding concerns that DQSI may have waived its rights to seek additional compensation from the Corps of Engineers for delays, but relied on DQSI's representations that it had not. Fisk prepared its REA which was submitted by DQSI to the Corps of Engineers. Fisk received correspondence from the Corps of Engineers via DQSI suggesting that, contrary to the alleged assurances from DQSI that it had not already received delay payment that would involve Fisk's delay claims, all claims for the delays had been paid, and the rights of DQSI's subcontractors had been waived. Fisk alleged that at the time of mediation and settlement, DQSI knew it had waived Fisk's rights, but assured Fisk it had not.

Fisk sued DQSI seeking rescission of the release resulting from the mediation on the basis of fraud and damages for breach of contract, and additionally adopted all of the claims of its original lawsuit. DQSI and Western filed a motion to dismiss, a motion to enforce the settlement, and a motion for summary judgment. All three of the motions were denied. Fisk filed an amending complaint, and DQSI and Western filed a motion for summary judgment.

DQSI and Western argued they were entitled to summary judgment because Fisk could not demonstrate that its consent to the Agreement was vitiated by fraud. In order to prove fraud, a plaintiff must prove: (1) a misrepresentation of a material fact; (2) made with intent to deceive; and (3) causing justifiable reliance with resulting injury. The court found Fisk could not demonstrate there was justifiable reliance on DQSI's representations that formed the basis of the amended complaint. The court found that a letter from Fisk's vice president prior to the release was evidence that Fisk was aware of the waiver of the delay claims and therefore could not have justifiably relied on any representations of DQSI. Further, contract modifications and amendments should have informed Fisk that the delay claims were waived before they entered into the Agreement. Additionally, the Agreement expressly stated that it contained the entire agreement between the parties and the parties agreed that no promise, inducement or agreement not expressed therein had been made to any of the parties. The court found that reliance by Fisk on representations not included in the Agreement did not constitute grounds for fraud based on this provision.

Still further, the court found summary judgment was appropriate where the alleged misrepresentation related to facts which could have been discovered upon investigation or inspection, and where the party alleging fraud had been granted the opportunity to conduct such an investigation or inspection before entering into the contract, that party cannot subsequently complain that its consent was vitiated by fraud. Fisk was a sophisticated party with legal counsel and should have been able to promptly raise and investigate concerns it purportedly had concerning the release of its delay claim. If there was any doubt regarding the terms of the Settlement Agreement, Fisk should have continued litigating its lawsuit. The motion for summary judgment was granted. *Fisk Electric Company v. DQSI, LLC*, 15-2315 (E.D. La. 1/10/17), 2017 WL 86144. [Appeal filed 2/8/17].

WRIT OF MANDAMUS TO COMPEL PAYMENT ON A PUBLIC WORKS PROJECT

St. Bernard Port, Harbor and Terminal District contracted with Guy Hopkins Construction Co., Inc. for Phase I of a major public works renovation. The Port sued Hopkins raising claims for breach of contract and damages as a result of Hopkins' alleged faulty performance, abandonment, and incomplete work. Hopkins filed a reconvenational demand for monies it asserted it was owed pursuant to the contract. The trial court rendered judgment offsetting damages due the Port against Hopkins' claim, resulting in a judgment of $101,306.47 in favor of Hopkins.

The Port did not pay the judgment. Hopkins filed a petition for a writ of mandamus to compel payment under L.R.S. 38:2191. The statute provides for the prompt payment of obligations under public works contracts when they become due and payable, and a public entity failing to timely make progressive stage payments arbitrarily or without reasonable cause, and any final payment when due, shall be subject to mandamus to compel payment up to the amount of the appropriation made for the award and execution of the contract, including any authorized change orders. The district court issued a judgment granting the writ of mandamus. The Port appealed.

The Port claimed the provision of the statute authorizing a writ of mandamus was not in effect at the time the contract was executed, nor at the time the underlying lawsuit was filed, and could not be applied retroactively. The court of appeal disagreed, finding that section of the statute was an interpretive and procedural amendment, and could be applied retroactively.

The Port also argued the statute did not authorize mandamus relief after a judgment has been rendered judicially determining the amount due. Again, the court of appeal disagreed. It found the fact the amount due was adjudicated is irrelevant to the Legislature's purpose of insuring that private entities contracting with public entities receive monies due, if other statutory requirements are met.

Additionally, The Port contended the statute was only applicable with respect to final payments when there was a final acceptance. The court of appeal disagreed. It found the unpaid balance due Hopkins became payable after the replacement contractor hired by the Port completed the job. Formal final acceptance, under the statute, is required only when the aggrieved party seeks attorney fees, and is not required to seek mandamus relief.

Finally, the Port argued there was no specific appropriation made for the contract as required by the statute for mandamus relief. According to the Port, there was an appropriation for the whole project, but not for the contract with Hopkins. Again, the court of appeal disagreed. While the Port equivocated that the appropriated money was for the whole project, not for Hopkins' contract, an appropriation was made, thereby separating the disputed funds from the public fisc, to pay Hopkins for Phase I of the project. The court recognized the Port had to retain another contractor to complete Phase I; however, payments that may have been tendered to a replacement contractor for the same scope of work could not change the fact that there was initially an appropriation to pay Hopkins. Although the Port might have spent

the remaining funds appropriated to pay Hopkins, that did not bar Hopkins from recovery. The judgment of the district court was affirmed. *St. Bernard Port, Harbor and Terminal District v. Guy Hopkins Construction Co., Inc.*, 2016-0907 (La.App. 4 Cir. 4/5/17), 2017 WL 1251087.

CLAIMS BY AN OWNER AGAINST THE SUPPLIER OF A METAL BUILDING

ETI, Inc. contracted with Buck Steel, Inc. with respect to a metal building. ETI ultimately terminated the contract with Buck and sought reimbursement of the funds paid. ETI claimed Buck was an unlicensed contractor, and not entitled to retain payments. The court found Buck contracted only to prepare engineered drawings, and supply materials, and not as a contractor to build the structure.

ETI argued alternatively that because Buck breached its contract as a vendor, ETI was entitled to dissolution of the sale of the steel building and return of the purchase price and damages. The court found that ETI unilaterally cancelled the contract, and under the terms of the contract, it forfeited the sums paid to Buck as of the time the contract was cancelled.

ETI also claimed Buck breached its contract in failing to provide drawings which were acceptable, and Buck was not, therefore, entitled to retain the sums paid. The court initially noted that the contract did not separate charges for the materials for the metal building and the drawings, nor was there any testimony indicating a breakdown of these costs. The court held that since Buck did prepare drawings, despite their lack of approval, Buck was entitled to be paid for the work it performed. The court found the circumstances were analogous to the rule with respect to a general breach of a construction contract which provides that if a contractor has substantially performed its contract, he is entitled to be paid. If his work under the contract is faulty or defective, he is still entitled to be paid under the terms of the contract, and the owner's right if the work has not been completed is to finish it, or if it is faulty or defective to make the necessary correction and charge the costs thereof to the contractor. Based on that rule, the court held Buck was entitled to be paid for the work it performed. *ETI, Inc. v. Buck Steel, Inc.*, 2016-0602 (La.App. 4 Cir. 2/1/17), 211 So.3d 439, *writ denied*, 2017-0396 (La. 4/13/17), 2017 WL 1533825.

ABILITY OF AN UNLICENSED CONTRACTOR TO FILE A VALID LIEN

Remijio Leija entered into an oral contract to construct a home in West Monroe, Louisiana. Leija's contractor's license was inactive at the time of the agreement and at all times during construction. Leija filed a lien to collect funds due under the contract. The court found since Leija did not have an active license, he was not licensed and his oral contract was void and unenforceable. Since he was not licensed, he was precluded from filing a lien and privilege. *Leija v. Gathright*, 51,049 (La.App. 2 Cir. 12/21/16), 211 So.3d 592, *writ denied,* 2017-0144 (La. 3/13/17), 216 So.3d 806.

REDHIBITION

The Colemans entered into a contract with Sears Home Improvement Products, Inc. (SHIP) for the installation of an Owens-Corning 3-tab 25-year shingle roof. SHIP hired an independent contractor, Magnolia Roofing & Exteriors, Inc., to install the roof, and contracted with Crawford & Company, d/b/a Strategic Warranty Services, to inspect the installation. The Colemans alleged the roof was not completed or improperly installed, and sued SHIP.

Among other things, the Colemans alleged a claim for redhibition. Under the Louisiana law of redhibition, the seller warrants the buyer against redhibitory defects or vices in the thing sold. It is a warranty against hidden defects. The underlying transaction must be a sale for a redhibitory defect to exist. In analyzing whether a transaction is one of sale or to build, the courts have considered three factors: (1) in a contract to build, the purchaser has some control over the specifications for the project; (2) the negotiations in a contract to build take place before the object is constructed; and (3) a building contract contemplates not only that the builder will furnish the materials, but that he will also furnish his skill and labor in order to build the desired project. Additionally, the courts have used the "value test" by looking to whether the labor extended in constructing the item, or the materials incorporated therein, constitute the principal value of the contract.

The Colemans failed to allege sufficient facts to demonstrate that plaintiffs' contract with SHIP was a contract of sale to which the law of redhbition would apply. The court held the Colemans could, however, plausibly allege facts that would allow it to draw a reasonable inference that SHIP was liable in redhibition, and SHIP had not pointed to any authority to the contrary. The court granted the Colemans leave to amend their complaint to address these issues.

The Colemans also alleged SHIP was liable for fraud and misrepresentations made by it and its employees. Louisiana law 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. To state a claim for fraud or intentional misrepresentation, a plaintiff must allege: (1) a misrepresentation of a material fact; (2) made with intent to deceive; and (3) causing justifiable reliance with resultant injury. To assert a claim for negligent misrepresentation, the plaintiff must demonstrate: (1) the defendant had a legal duty to supply correct information; (2) there was a breach of that duty, which can occur by omission as well as by affirmative misrepresentation; and (3) the breach caused damages to the plaintiff based on the plaintiff's reasonable reliance on the misrepresentation.

The court found the complaint did not meet the particularity requirements of the Federal Rules of Civil Procedure. Plaintiffs failed to make sufficient factual allegations regarding the time, place and contents of any alleged misrepresentations or fraudulent statements by SHIP. The court granted leave for plaintiffs to amend their petition.

Civil Code article 2545 provides for the recovery of attorney fees for redhibition claims. Additionally, Civil Code article 1958 allows for the recovery of attorney fees in instances where a contract is rescinded because of fraud. The court found it was not clear whether the Colemans were asserting such a claim for attorney fees, and, based on its decision with respect to other issues, granted plaintiffs leave to amend the complaint to sufficiently allege grounds for which attorney fees may be awarded. *Coleman v. Sears Home Improvement Products, Inc.*, 16-2537 (E.D. La. 3/21/17), 2017 WL 1089580.

ARBITRATION

The United States District Court for the Eastern District of Louisiana considered the question of whether claims for indemnification and breach of contract were subject to arbitration, and who should decide the issue, an arbitrator or the court. The arbitration provision stated that all claims and other matters in controversy or in question between the parties arising out of or relating to the contract, including allegations of breach and claims of tort as well as contract, would be decided by arbitration.

The court first reviewed the issue of whether the Federal Arbitration Act (FAA) applied to the dispute. The FAA applies to maritime transactions and contracts evidencing a transaction involving commerce. The Act defines "commerce" as meaning commerce among the several

States or with foreign nations. Here, the two parties were citizens of different states. The court held the transaction involved interstate commerce, and the FAA applied.

The court noted both the U.S. Supreme Court and Fifth Circuit have explicitly held that disputes over the arbitrability of a claim, i.e., the question of what issues a party can be compelled to arbitrate, is an issue for the court, rather than an arbitrator, to decide, unless the parties clearly and unmistakably provide otherwise. Neither party pointed to language in the contracts indicating that they clearly and unmistakably intended for an arbitrator to decide questions of arbitrability rather than the court. Accordingly, the court held it, and not an arbitrator, must resolve the dispute over the arbitrability of the claims. Further, the court held that to overcome the presumption in favor of arbitrability, there must be clear evidence the parties did not intend the claim to be arbitrated. The party opposing arbitration, the court found, had not met its burden of proof the disputes fell outside the scope of the arbitration agreement. *Murillo v. Coryell County Tradesmen, LLC*, 15-3641 (E.D. La. 3/28/17), 2017 WL 1155166.

ABILITY OF AN UNLICENSED CONTRACTOR TO COLLECT PAYMENT

Crescent City Cabinets & Flooring, LLC contracted with Grace Tama Development Company, LLC and Wade T. Verges for the purchase and installation of cabinets and countertops. The total price of the agreement was $114,971.44. Crescent City was not paid the balance on its contract in the amount of $42,602.86, and sued Grace Tama and Verges for payment. Grace Tama and Verges contended that payment to Crescent City was withheld since it was unlicensed, and corrective work and repairs to damage to the property caused by Crescent City were required. The trial court awarded Crescent City $22,641.46, the cost of materials and labor less the amount previously paid, on the basis of quantum meruit, finding the contract between Crescent City and Tama and Verges was null and void since Crescent City was unlicensed. Grace Tama and Verges appealed.

The court of appeal held quantum meruit was an equitable remedy based on the doctrine of unjust enrichment, i.e., a person should not enrich himself at the expense of another. The law implies a promise to pay a reasonable amount for labor and materials furnished in such an instance. The jurisprudence has allowed contractors to recover the value of the actual cost of materials and labor, including general overhead, and a reasonable or fair profit in the absence of a contract under the doctrine of quantum meruit. There is no specific test to determine the

amount awarded under the doctrine. It is a matter of equity depending on the circumstances of each case. Trial courts are vested with great discretion when awarding damages.

The court of appeal held it could not conclude the trial court abused its discretion in awarding Crescent City $22,641.46, and affirmed the award. It also held legal interest on a quantum meruit award ran from the date of judgment, and awarded interest accordingly. *Crescent City Cabinets & Flooring, LLC. v. Grace Tama Development Company, LLC.*, 2016-0359 (La.App. 4 Cir. 10/19/16), 203 So.3d 408.

NEW HOME WARRANTY ACT

Wayne and Beverly Papania contracted with Pyrenees Investments, LLC for the construction of a new home in Covington, Louisiana. A subcontractor filed suit on an open account against the Papanias and Pyrenees. The Papanias asserted a third party demand against Pyrenees representing it was liable to them for any amounts they were required to pay. The Papanias amended the third party demand alleging Pyrenees was liable to them for faulty and defective work. They again amended the third party demand to assert claims against Samuel C. LeBlanc, Jr. as the owner and sole member of Pyrenees, alleging Pyrenees was the alter ego of LeBlanc, LeBlanc misrepresented to the Papanias that Pyrenees had a valid contractor's license, and that it carried insurance which would cover the sort of claims filed in the third party demand, thereby inducing them to enter into the construction contract. Further, Pyrenees and LeBlanc were liable to them for all damages they incurred.

Pyrenees and LeBlanc filed a peremptory exception of no cause of action contending the New Home Warranty Act (NHWA) was the exclusive remedy available to the Papanias. They also filed an exception of peremption as to the claims against LeBlanc in his individual capacity representing the claims against him were time barred under the NHWA. Pyrenees and LeBlanc, additionally, moved for summary judgment contending the Papanias failed to establish the requisite notice necessary to support a claim under the NHWA.

The trial court sustained the exception of no cause of action and dismissed all claims not cognizable under the NHWA, sustained the exception of peremption and dismissed all claims against LeBlanc. Finally, it granted summary judgment dismissing the remaining NHWA claims against Pyrenees and LeBlanc. The Papanias appealed.

The court of appeal noted that the NHWA was not the exclusive remedy available to new home owners in an action against a builder based on the builder's failure to complete construction as opposed to defective construction. The Papanias alleged that Pyrenees failed to perform in accordance with the contract, and they subsequently terminated the contract. The court found the Papanias averred facts, which, if proven, would result in damages for increased costs and unmet expectations, i.e., amounts they would have incurred in connection with securing completion of the construction after termination of the construction contract. The court held the factual allegations were sufficient to state a cause of action for breach of contract based on the failure of Pyrenees to complete construction, and it was improper for the trial court to sustain an exception of no cause of action to dismiss the Papanias' breach of contract claim.

As to the fraud claim, the court of appeal found it arose out of a separate and distinct transaction or occurrence, i.e., formation of the contract, as distinguished from that of performance of the contract. The Papanias, in addition to other claims, contended they were entitled to reasonable damages for the fraudulent inducement of the contract. The court of appeal concluded the Papanias stated a cause of action in fraud against LeBlanc and Pyrenees. The NHWA was the exclusive remedy applicable for home construction, but only insofar as claims relative to warranties and redhibitory defects and vices.

With respect to the claims of misrepresentation, the court of appeal noted tort law encompasses an action for negligent misrepresentation. It was error for the trial court to sustain the exception of no cause of action to dismiss the claims of the Papanias for alleged misrepresentation and statutory violation against LeBlanc and Pyrenees. The claim for a statutory violation was related to the fact Pyrenees was not a licensed contractor. Because the Papanias averred facts sufficient to support claims against Pyrenees and LeBlanc for breach of contract, fraud, negligent representation and liability for statutory violations, the trial court erred in sustaining the partial exception of no cause of action to dismiss all claims not cognizable under the NHWA. The portion of the judgment that sustained the exception of no cause of action and dismissed all of the claims outside of the ambit of NHWA was reversed.

The court of appeal addressed the motion for summary judgment directed to the claim of Pyrenees and LeBlanc that the Papanias failed to establish the requisite notice necessary to support a claim under the NHWA. The NHWA requires that the owner give written notice by registered or certified mail to the builder within one year after knowledge of the defect, advising him of all defects and giving him a reasonable opportunity to comply with the

provisions of the statute. The court of appeal held the Papanias were able to produce factual evidence, which if believed by the trier of fact, would allow for an inference the Papanias had complied with the requirements. The court concluded there were outstanding material issues of fact which precluded summary judgment.

The court held peremption had accrued as to the claims against LeBlanc under the NHWA. The trial court correctly sustained that exception. *Robinson v. Papania*, 2015-1354 (La. App. 1 Cir. 10/31/16), 207 So.3d 566, *writ denied*, 2016-2113 (La. 3/13/17), 216 So.3d 808.

PETITION TO VACATE AN ARBITRATION AWARD NOT GRANTED

Favalora Constructors, Inc. subcontracted the electrical work for a project to Grillot Electric Company. A dispute arose between the owner and Favalora as to payment of Favalora's final invoice. The owner contended the finished project exceeded the original estimate by $230,000.00. That dispute was arbitrated between the owner and Favalora. The arbitrator found Favalora failed to submit timely control estimates as required by its contract, and declined to award the disputed amount to Favalora.

Because Favalora did not receive the amount in dispute from the owner, it did not pay Grillot in full. Grillot claimed it was owed $16,484.88. That dispute was arbitrated. The arbitrator rendered an award in favor of Grillot. Favalora filed a petition to vacate the arbitration award. The district court denied the petition, and confirmed the award in favor of Grillot. Favalora appealed.

The contract between Favalora and Grillot contained a "pay if paid" provision. Favalora contended, in failing to enforce that clause, the arbitrator ignored a clearly governing legal principle, and manifestly disregarded the law relative to such clauses. The arbitrator's award referenced a stipulation by the parties that the legal issue in the arbitration matter pertained to the "paid if paid" clause, and mentioned the contract documents were submitted to the arbitrator.

The arbitrator stated in his award it was difficult to understand how an electrical subcontractor would know he is bound to assume the risk of payment as a result of failure of the prime contractor to submit control estimates. At the very minimum, it was an ambiguity, and is not what the parties could have contemplated when entering into the contract. Further, even if the argument that the "pay if paid" clause was accepted as a bar to Grillot's recovery,

Grillot was not a party to the proceeding between Favalora and the owner, and based on the schedule of values submitted, both the owner and Favalora were on notice of the amounts scheduled for Grillot. Finally, it appeared that the "pay if paid" provision, in the context of this case, was a harsh and unconscionable defense where the prime contractor's breach of the contract is imputed to the subcontractor who had fully performed its scope of work.

The court of appeal noted that the record before it did not contain a copy of the contract at issue which contained the "pay if paid" clause, nor did it appear Favalora submitted a copy of the contract to the district court. The court of appeal held, even accepting the argument that a reference in the arbitration award to the contract was adequate evidence of the existence of the clause, the arbitrator based his conclusions and findings on the entire record before him. Favalora did not meet its burden of establishing the arbitrator made an obvious legal error or ignored a governing legal principle. The judgment of the district court declining to vacate the arbitration award was affirmed. *Favalora Constructors, Inc. v. Grillot Electric Company, Inc.*, 2016-0550, (La.App. 4 Cir. 11/30/16), 204 So.3d 1064.

LIABILITY OF A MEMBER OF AN LLC FOR FRAUD

Winthrop was the managing member of an LLC, Icehouse, which was itself a member of another LLC, ARC. It was alleged Icehouse, through Winthrop, was liable for the fraudulent acts of other members of ARC.

The claimants relied upon a decision applicable to shareholders of corporations who knew of the fraudulent acts of other shareholders, equally participated in the management and decision-making of the company, and profited as a result. The court of appeal agreed with the district court in finding that the facts of the decision relied upon were distinguishable from the matter before it. The district court heard conflicting testimony as to whether the managing member of Icehouse, Winthrop, was involved in the day-to-day management of ARC, and resolved that he was not, and was not physically present at ARC to have been involved in its daily management. Additionally, it found that neither the testimony at trial nor the stipulations indicated that fraud perpetuated against the claimants by other members of ARC was communicated to Winthrop, or that he directly acted to defraud the claimants. Still further, it found that Winthrop did not profit from the fraud. The district court's judgment dismissing the claim against Icehouse was affirmed. *Provosty v. ARC Construction, LLC*, 2015-1219 (La.App. 4 Cir. 11/2/16), 204 So.3d 623, *writ denied*, 2017-0028 (La. 2/10/17), 216 So.3d 49.

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