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CONSTRUCTION LAW UPDATE
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The ***Construction Law Update*** is published by Pugh Accardo for the benefit of its clients having an interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, and legislative developments concerning construction-related matters. For further information on the decisions and legislative developments covered in this newsletter, please contact **John A. Stewart, Jr.** at *jstewart@pugh-law.com* or (504) 799-4529. Licensed in Louisiana and Texas (inactive in Texas).

CLAIM FOR INDEMNITY AND DEFENSE BEFORE A FINDING OF LIABILITY NOT PREMATURE

The Louisiana Supreme Court held a claim for indemnity raised during the pendency of litigation and before a finding of liability is not premature. The relevant Code of Civil Procedure articles pertaining to third party practice dictate this result. The purpose of those articles is to promote judicial economy and efficiency. The fact the indemnity claim in the matter before the court arose out of a cross-claim rather than a third party claim did not change the analysis. The right to collect on an indemnity agreement is determined upon judgment or a finding of liability or loss, but there is no prohibition on asserting a claim for indemnity in the same proceeding.

The issue has particular relevance with respect to claims for peremption concerning construction issues. L.R.S. 9:2772 provides a peremptive period for claims against contractors, and L.R.S. 9:5607 for claims against designers. To hold a claim for indemnity in those instances is premature before the underlying matter is ultimately resolved, could very well subject the party attempting to claim indemnity to an exception of peremption. A peremptive period is not subject to interruption or suspension.

The trial court in the matter before the court denied the exception of prematurity. The Court of Appeal reversed, and the Louisiana Supreme Court reversed the Court of Appeal. The ruling of the trial court was reinstated. *Bennett v. DEMCO Energy Services, LLC,* 2023-01358 (La. 5/10/24), ___So.3d _____, 2024 WL 2097634.

ARCHITECT NOT LIABLE FOR JOBSITE INJURIES SUSTAINED BY AN EMPLOYEE OF A SUBCONTRACTOR

Gustavo Bonilla, while working for a subcontractor, was standing on the ceiling of a vault which he was demolishing with a jackhammer when the entire vault structure collapsed. Bonilla sustained neck and back injuries and sued the architect. The architect moved for summary judgment which was granted by the trial court. The Court of Appeal reversed finding genuine issues of material fact as to the architect's awareness the vault was being demolished in an unsafe manner and deviations from the relevant contractual provisions/specifications had occurred. The Louisiana Supreme Court granted the architect's application for a writ of review.

The Supreme Court reviewed several provisions of the General Conditions and Design Agreement. Bonilla argued the Design Agreement imposed a duty on the architect to supervise and report any deviations from design specifications to ensure work site safety. Alternatively, he avered there was an extra-contractual duty imposed on the architect to use reasonable care to protect against injury to third parties such as Bonilla. The architect contended the Design Agreement was not intended to make it responsible for the means and methods of construction and site safety. Instead, it argued, the Agreement ensures that, before final acceptance of the work, the owner will have the building for which it contracted. The court agreed with the architect.

The clear and unambiguous language of the General Conditions and Design Agreement dictated the architect owed no duty to Bonilla. The mere fact an architect or engineer was involved in the construction process and had contractual duties to an owner did not create an all-encompassing duty to protect everyone from every risk which could be encountered during the course of the project. The Court declined to establish an extra-contractual duty owed to Bonilla by the architect.

The Supreme Court found the Design Agreement required the architect to make weekly site visits, the purpose of which was to ensure the owner secured the building it had contracted for and the progress and quality of the work was proceeding according to specifications. The primary object of the provision was to impose the duty on the architect to ensure the owner that before final acceptance of the work, the building would be completed in accordance with the plans and specifications; and to ensure this result the architect was to make frequent visits to the work site during the progress of the work. The General Conditions clarified the undertaking of periodic visits and observations by the architect or its associates would not be construed as supervision of actual construction.

Further, the Design Agreement specified the architect would not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work. The General Conditions stated the architect would not be responsible for, nor control, the construction means, methods, safety precautions and programs. The architect was, thus, contractually limited in its authority and duties. Still further, the General Conditions placed responsibility for all construction means and methods on the contractor and clearly placed responsibility for site safety on the contractor. Still further, the General Conditions stated the contractor would erect and maintain all reasonable safeguards for safety and protection. The architect could not, therefore, be held liable for failure to perform duties it had no responsibility or authority to undertake.

The decision of the Court of Appeal was reversed and judgment of the trial court reinstated. *Bonilla v. Verges Rome Architects – A Professional Architectural Corporation*, 2023-00928 (La. 3/22/24), 382 So.3d 62.

FORUM SELECTION CLAUSE

The Louisiana Fifth Circuit Court of Appeal held in a matter involving the enforcement of a forum selection clause that while an ordinary act under private signature must be signed by the parties, a jurisprudential exception to the statutory requirement exists when one party has signed an agreement and the non-signing party has availed himself of the agreement or has taken actions evidencing his acceptance. Here, the work involved several contracts, only two of which were signed by both parties.

The court found forum selection clause in each of the agreements should be enforced unless the resisting party could clearly show enforcement would be unreasonable and unjust, or the clause was invalid for such reasons as fraud or overreaching or enforcement would contravene a strong public policy of the forum in which the suit is brought. Here, the agreements provided the venue for all legal actions associated with litigation to resolve the dispute would be Orange County, Florida. The Court of Appeal reversed the decision of the trial court and upheld the enforcement of the forum selection clause. *Global Disasters Services, LLC v. Whitestone Construction Group, LLC*, 24-25 (La.App. 5 Cir. 4/30/27), 2024 WL 1868598.

ABANDONMENT

The Louisiana Private Works Act provides a prescriptive period for filing lawsuits against a surety, L.R.S. 9:4813(E). The Louisiana Third Circuit Court of Appeal held the requirement does not contradict or supersede the three year period for abandonment of C.C.P. art. 561. Thus, although a claim against a surety might not be prescribed, it can be abandoned.

Further, the court held although the subcontractor obtained a default judgment against the landowner, that had no effect as to its claims against the general contractor and its surety on the payment bond. Each claim represented a separate action that was cumulated in a single lawsuit. A judgment against one defendant does not suspend the abandonment period in the actions against the remaining defendants. *Pinnacle Construction Group, LLC v. Devere Swepco JV, LLC*, 2023-551 (La.App. 3 Cir. 2/28/24), 380 So.3d 878.

CLAIM BY A SUBCONTRACTOR AGAINST A GENERAL CONTRACTOR FOR INDEMNITY IN RESPONSE TO A CLAIM BY A SURETY FOR INDEMNITY PURUSANT TO PERFORMANCE AND PAYMENT BONDS

DonahueFavret Contractors, Inc. subcontracted with Lott Construction, LLC for a project in Bossier City, Louisiana. DonahueFavret notified Western Surety which provided performance and payment bonds that Lott Construction was in default of its subcontract in failing to perform work timely and to pay workers and vendors. DonahueFavret also gave notice to the surety Lott Construction breached its subcontract by walking off of the job. Western Surety sued Mr. Lott under the indemnity agreement provided with the bonds for more than $400,000.00 which it was required to pay. Mr. Lott filed a third-party complaint for indemnity against DonahueFavret alleging its actions contributed to the dispute between Mr. Lott and Western Surety.

A Magistrate Judge held the issue was whether Mr. Lott could assert claims against DonahueFavret which was not a party to the indemnity agreement. The answer was “no” because the indemnity agreement provided that upon default by Lott Construction, Mr. Lott assigned to Western Surety all of his rights under the related contracts and subcontracts, including all actions, causes of action, claims and demands whatsoever relating to the contracts. The indemnity agreement signed by Mr. Lott provided any such rights he may have had were vested in Western Surety in the event of default by Lott Construction.

Mr. Lott also invoked a claim for unjust enrichment. The Magistrate Judge held the rights regarding these events were governed by the indemnity agreement and if he believed he had been wronged he could assert a breach of contract defense against Western Surety as to the surety's obligation not to engage in intentional wrongdoing in the payment of claims. The existence of that potential remedy precluded Mr. Lott from seeking to recover under unjust enrichment.

These findings were the recommendations for judgment of the Magistrate Judge to the district court. Western Surety Co. v. Larry W. Lott Jr, 22-6054, (WD.La 3/27/24), 2024 WL 1957322, Report and Recommendations adopted by District Cout, (MD.La 4/24/24), 2024 WL 1957320.

BID BONDS FOR PUBLIC WORKS

Virginia Wrecking Company, Inc. was the low bidder for a Jefferson Parish School Board project. Concrete Busters of Louisiana, LLC was the second low bidder. Virginia Wrecking's bid was rejected as non-responsive and the contract for the project was awarded to Concrete Busters. Virginia Wrecking sought a permanent injunction prohibiting the School Board from proceeding with the project or contract with any bidder other than Virginia Wrecking, declaring the prior award of the contract to Concrete Busters a nullity. The trial court granted the injunction. Concrete Busters sought appellate review.

Virginia Wrecking submitted its bid electronically and uploaded with the electronic bid as proof of its bid security a cashier's check labeled "official check." This check was provided to the School Board in physical form the day after bids were received. Concrete Busters claimed the trial court was manifestly erroneous in failing to recognize that an electronic copy of the front of a check does not meet the requirements for bid security under the Louisiana Public Bid Law, and, as a result, Virginia Wrecking's bid was unsecured and non-responsive. Virginia Wrecking argued that disallowing its submission of an electronic copy of its cashier's check would be in violation of the provisions of the Public Bid Law allowing electronic delivery as a means of bid submission.

The Court of Appeal disagreed with Concrete Busters. Under the interpretation of the bid requirements proposed by Concrete Busters, if a bidder chooses, at its option, to submit a bid electronically, then its only option is to submit an electronic bid bond. If a bidder chooses, at its option, to submit a cashier's check, then it cannot submit an electronic bid, it must submit a physical bid with a cashier's check. This interpretation would create a requirement for electronic bid submissions that they may only be submitted with a bid bond which is contrary to the applicable statute, L.R.S. 38:2212(E). The check submitted by Virginia Wrecking with its bid was a cashier's check. It was submitted both electronically as part of Virginia Wrecking's bid and physically delivered to the School Board.

Under these facts, the Court of Appeal held an acceptance of Virginia Wrecking's bid did not constitute an impermissible waiver of the mandatory requirements of the Public Bid Law or the specifications stated in the bidding documents. The Court of Appeal rejected the proposed interpretation of Concrete Busters. The writ sought by Concrete Busters was denied. *Virginia Wrecking Company, Inc. v. Jefferson Parish School Board*, 24-183 (La.App. 5 Cir. 5/1/24), _____ So.3d _____, 2024 WL 1901125.

AN ARBITRATOR EXCEEDED HIS AUTHORITY

An arbitration award was entered against Briggs Enterprises Corporation. The party in whose favor the award was entered filed a motion to confirm the award naming Briggs of Texas as a defendant. Briggs of Texas filed a motion to vacate the arbitration award, representing because it was not a party to the subcontract at issue and was not a party to the agreement to arbitrate, and argued the arbitrator

exceeded his powers by rendering an award against an entity not a party to any relevant contract. The District Court denied the motion to confirm the award and granted the motion to vacate.

The Court of Appeal found Briggs of Pennsylvania and Briggs of Texas are two separate legal entities. The arbitration award was sought and rendered against Briggs of Texas. Briggs of Texas was not a party to the subcontract agreement containing the arbitration clause and did not otherwise consent to participate in the arbitration proceeding. The court concluded the arbitrator exceeded his power in rendering an award against Briggs of Texas. *Mobile Enterprises, Inc. v. Briggs Brothers Enterprises Corporation*, 2023-1114 (La.App. 1 Cir. 4/17/24), ___ So.3d _____, 2024 WL 1645729.

STAY OF ARBITRATION

The United States Supreme Court held that when a district court finds a lawsuit involves an arbitrable dispute, and a party requests a stay pending arbitration, the Federal Arbitration Act compels the court to stay the proceeding rather than dismiss it. *Smith v. Spizzirri*, 144 S.Ct. 1173 (2024).

INDEPENDENT CONTRACTOR

River Rental Tools, Inc. leased property and contracted with Southern Heritage for renovations. Southern Heritage subcontracted a portion of the work to A-1 Steel Erectors. The contract was not written. A written estimate submitted by Southern Heritage provided that all electrical work was to be done by others.

Thomassie was employed by A-1, and volunteered to move a junction box. The foreman, a licensed electrician, announced he had turned off the electrical switch controlling the junction box and told Thomassie he had been pulling wires in preparation for moving other electrical equipment that was in the path of the construction. Thomassie was injured when he cut a wire at a junction box. He was knocked off a ladder and fell to the concrete floor. Thomassie sued Southern Heritage, the foreman and River Rental, the lessee. River Rental moved for summary judgment. It argued Southern Heritage was an independent contractor and solely responsible for the means and methods of performance of his contract.

The Court of Appeal held it was a generally accepted rule of law that an owner who has hired an independent contractor has no duty to a contractor's employees. Acknowledged exceptions to the general rule are when the undertaking is ultra-hazardous or when the owner retains operation control of the work. The court found River Rental retained operational control of all electrical work by virtue of the statement in the written estimate of Southern Heritage that all electrical work was to be done by others. River Rental imposed upon itself a duty to retain an electrical contractor to supervise all electrical work or to provide its own personnel to do so. The jurisprudence makes clear that retaining operational control is the key, not the exercise of the retained control. *Thomassie v. Southern Heritage Construction, LLC*, 2023-0749 (La.App. 4. Cir. 5/15/24), _____ So. 3d _____, 2024 WL 2178482.

INSURERS OF A JOINT VENTURE DESIGN TEAM NOT REQUIRED TO ARBITRATE CLAIMS BY THE OWNER

The New Orleans Aviation Board contracted with Crescent City Aviation Team for the engineering and architectural design of a terminal facility at the Louis Armstrong New Orleans International Airport. The contract contained an arbitration clause. The New Orleans Aviation Board filed an arbitration demand against Crescent City Aviation and the two members of the joint venture and their insurers demanding over $51,000,000.00 in damages for errors and omissions in the work for the project and extra contractual penalties. The insurers filed suit in the United States District Court for the Eastern District of Louisiana seeking a declaratory judgment the New Orleans Aviation Board

had no right to demand they arbitrate since they did not agree to arbitration, and for preliminary and permanent injunctions enjoining the prosecution of the arbitration against them.

An applicant for preliminary injunctive relief must show: 1) a substantial likelihood he will prevail on the merits, 2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, 3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and 4) granting the preliminary injunction will not disserve the public interest. The party seeking a preliminary injunction has the burden of persuasion of all four elements. The court found the insurers met their burden of proof as to items 2, 3 and 4 and turned to the question of the likelihood the insurers would prevail on the merits.

There are six theories under which an arbitration agreement may be enforced against a non-signatory: a) incorporation by reference, b) assumption, c) agency, d) veil-piercing/alter-ego, e) estopple, and f) third-party beneficiary. The court found the New Orleans Aviation Board failed to show any of the six theories were applicable.

Finally, the court considered whether the dispute was subject to the Louisiana Direct Action Statute. It found the statute inapplicable.

The New Orleans Aviation Board, nevertheless, contended the court should compel arbitration of its claims against the insurers. The court found a two-step analysis governs whether parties should be compelled to arbitrate a dispute. The determination involves two separate inquiries: 1) whether there is a valid arbitration agreement to arbitrate between the parties, and if so, 2) whether the dispute in question falls within the scope of the agreement. The court found the first requirement of a valid agreement to arbitrate was not met. The insurers would likely prevail on the merits. Their motion for a preliminary injunction was granted and defendant's motion to compel arbitration was denied. *Chubb Captial I Limited, et al v. New Orleans City*, 23-5806 (ED.La 5/6/24), 2024 WL 1991492.

MOTION TO INTERVENE DENIED

Lemoine Company, LLC was the general contractor for the Cohen High School project in New Orleans, LA. Berkshire Hathaway Specialty Insurance Company issued payment and performance bonds on behalf of Lemoine. Lemoine subcontracted the masonry work to Small Construction Group, LLC. A dispute developed as to who was responsible, Lemoine or Small, with respect to the color of bricks used for the project. Small sued Berkshire Hathaway for amounts owed under the payment bond. Masonry Products Sales, Inc. sought to intervene. Masonry Products alleged Small purchased the new bricks and related goods and materials from it, but failed to pay for them.

The court found when a third party claiming an interest in the proceeds of a primary lawsuit is allowed to intervene, that third party typically has some legal or contractual interest in the proceeds of the lawsuit. The court held Masonry Products had no legally cognizable interest in the proceeds of the lawsuit. Small had no obligation to use the proceeds to pay Masonry Products even if it appeared undisputed Small owed Masonry Products for the bricks and materials. Nor did Masonry Products have any contractual or legal right against Berkshire or Lemoine. Because it had no direct substantial and legally protected interest in the lawsuit, it was not entitled to intervene as of right.

Nor, according to the court, was permissive intervention appropriate. The court found denying Masonry Product's motion would not impair or impede its interests. It remained able to pursue its claims against Small in a separate lawsuit just as it was pursuing Torance Small, the owner of Small Construction who personally guaranteed any debt owed by Small to Masonry Products, in a state court action. Injecting the Masonry Products/Small dispute into the present lawsuit would raise new issues related to the contractual relationship between them. The presence of Masonry Products in the lawsuit was unlikely to contribute significantly to the development of the underlying factual issues. Further,

whether bricks were provided and at what cost did not appear to be the issue in the underlying lawsuit. Instead, the parties disputed who was responsible for the error in the color.

The motion to intervene was denied. *Small Construction Group, LLC v. Berkshire Hathaway Specialty Insurance Company*, 23-6866 (ED.La 5/6/24), 2024 WL 1991585.

ARBITRATION

The Louisiana Third Circuit Court of Appeal held arbitration is a matter of contract, and a party cannot be required to submit to arbitration of any dispute to which he has not so agreed. Before a party can be compelled to arbitrate, there must be two preliminary determinations: 1) there must be a valid arbitration agreement between the parties; and 2) it must be decided whether the dispute at issue falls within the scope of the agreement. The application of arbitration law presupposes the existence of a valid contract as a basis for invoking arbitration.

The trial court held the representative of the party against whom arbitration was sought acted with apparent authority to bind it to the contract. The Court of Appeal found the ruling was in error. For the doctrine of apparent authority to apply, the principal must first act to manifest the alleged agent's authority to an innocent third party. Second, the third party must reasonably relay on the manifested authority of the agent. The principal will be bound for the agent's actions if it has given an innocent third party a reasonable belief the agent has authority to act for the principal. A third-party seeking to benefit from the doctrine of apparent authority may not blindly rely upon the assertions of an agent. He has a duty to inquire into the nature and extent of the agent's power.

It was uncontroverted at trial the principal's representative who allegedly ratified the contract did not have the authority to bind that party to a contract. At no point did it ever hold the representative out as someone who could act with authority to bind the company. The representative was known by the other party only as an estimator. The decision of the trial court compelling arbitration was reversed. *Patriot Construction & Industrial, LLC v. Buquet & LeBlanc, Inc.,* 2023-557 (La.App. 3 Cir. 4/24/24), _____ So.3d_____, 2024 WL 1750143.

FORUM SELECTION CLAUSE HELD NOT TO BE A CONTRACT OF ADHESION

In contesting a forum selection clause in its contract with a roofer, an owner contended the contract was a prohibited contract of adhesion. A contract of adhesion is a standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party. The main issue with respect to a contract of adhesion, is not the standard form of the contract, but rather whether a party truly consented to all of the printed terms. The party seeking to invalidate the contract as adhesionary must then demonstrate he either did not consent to the terms in dispute or his consent was vitiated by error, which in turn renders the contract or provision unenforceable. Simply because the language is in small font, and does not differ from any other print or font in the contract does not render a clause unenforceable.

The jurisprudence has held a contract which was only a two-page document, and the provision was contained in a single sentence and not concealed and the complaining party could have attempted to negotiate the terms was enforceable. A party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending he did not read it, or did not understand it, or the other party failed to explain it to him.

The Court of Appeal held the complaining party failed to show enforcement of the forum selection clause would be unreasonable or unjust or that enforcement would contravene a public policy or law of Louisiana. The contract at issue was not a contract of adhesion. *D'Aquin v. Garcia Roofing*

Replacement, LLC, 23-604 (La.App 5 Cir. 1/31/24), _____ So.3d _____, 2024 WL 374584, writ denied, 2024-00269 (La. 4/23/24), 383 So.3d 606.

CLAIM FOR COMPENSATION

TKTMJ sued the New Orleans Sewerage and Water Board with respect to the replacement of two sewerage pumping stations. The S&WB filed a reconventional demand against TKTMJ for service charges. The trial court rendered a judgment in favor of TKTMJ and against the S&WB awarding TKTMJ $1,719,808.00. It also dismissed the S&WB's reconventional demand. The Louisiana Fourth Circuit Court of Appeal earlier reversed the trial court and awarded the S&WB $92,000.00 for its reconventional demand. It also reduced TKTMJ's damage award to $1,555,064.00.

TKTMJ filed a motion for post-judgment relief seeking an order from the court that would have the effect of preventing any interruption in service to TKTMJ by the S&WB for failure to timely pay an invoice for water and sewer service contending the obligation was extinguished by operation of law through compensation. The trial court denied the motion. TKTMJ appealed.

The Court of Appeal held the object of TKTMJ's obligation to the S&WB was to pay for water and sewer service provided by the S&WB to TKTMJ, and the object of the S&WB's obligation was the judgment TKTMJ sought to enforce through compensation. Considering the S&WB is a political subdivision of the State of Louisiana, the object of TKTMJ's obligation to the S&WB, for providing water and sewer services, was constitutionally exempt from seizure under the provision of the Louisiana Constitution which provides no judgment against the state, a state agency, or a political subdivision shall be exigible, payable or paid except from funds appropriated therefore by the legislature or the political subdivision against which the judgment is rendered. La. Const. art. 12 § 10C. No funds had been appropriated for payment. According to the article of the Constitution and L.R.S. 13:5109(B)(2), TKTMJ could not, by operation of law, obtain payment through compensation. The Court of Appeal affirmed the judgment of the trial court denying TKTMJ's motion for post-judgment relief. *TKTMJ, Inc. v. The Sewerage & Water Board of New Orleans*, 2023-0787 (La.App. 4 Cir. 4/25/24), ___ So.3d _____, 2024 WL 1793198.

CONTRACTOR PERFORMING DEWATERING/WATER MITIGATION WORK NOT REQUIRED TO BE LICENSED

The United States District Court for the Western District of Louisiana held a contractor was not required to be licensed in Louisiana for a dewatering/water mitigation project. The court noted the website for the Louisiana State Licensing Board for Contractors does not require a license be issued to lawfully contract for and perform dewatering/water mitigation work. The owner argued because the contractor was to perform demolition and tear down services by tearing out all of the sheetrock, cabinetry and flooring and installing its equipment (air movers and dehumidifiers) to remove moisture, the work fell within the requirements for licensing.

The court noted every water/mitigation service will inherently include tearing down drywall and some type of demolition which would make every water/mitigation contract subject to the Louisiana law requiring such contractors to be licensed. That would directly contravene Louisiana's law that exempts water/mitigation services from the licensing requirements. *RACMLLC v. Glad Tidings Assembly of God Church of Lake Charles*, 2:21-03580 (WD.La 4/12/14), 2024 WL 1607491.

REVERSAL OF A DEFAULT JUDGMENT

A plaintiff obtained a default judgment against the defendants. The defendants filed a petition for nullity of the judgment and sought damages against the plaintiff. A trial was held. The plaintiff was absent and not represented. The trial court signed a judgment on behalf of the defendants. The plaintiff

moved for a new trial on the basis the notice of trial was only provided to a former counsel who was ineligible to practice law. There was no indication in the record notice of trial was issued directly to the plaintiff.

The court of appeal found plaintiff's procedural due process rights were violated as related to notice of the trial. The court of appeal also found the trial court abused its discretion in denying the plaintiffs motion for a new trial. *George Kellett & Sons, Inc. v. Lucas & Sons Builders*, 23-0186 (La.App. 4 Cir. 11/28/23), 377 So.3d 1247, writ denied, 2023-01705 (La. 2/27/24), 379 So.3d 668.

OBLIGATIONS UNDER A PERFORMANCE BOND

A performance bond issued on behalf of a subcontractor expired. The general contractor, the obligee of the bond, sued the surety. The surety moved for dismissal of all claims related to performance outside of the term of the bond and dismissal of any claims for damages in excess of penal sum of the bond. The claims were well in excess of the penal sum.

The United States District Court for the Eastern District of Louisiana found neither party alleged the bond was extended and the surety notified the general contractor the bond would not be renewed. The bond did not include language triggering obligations for the surety for the entirety of the contract or for any costs incurred, or anticipated to be incurred, in connection with the principal's obligation to perform after the expiration of the bond.

The court also found the bond was clear and explicit: the surety could be liable under the bond only for costs up to the penal sum. The court stated it need not look to extrinsic evidence beyond the four corners of the instrument to determine the parties agreed the surety would not be liable for contractual damages in excess of the penal amount of the bond.

The general contractor argued the penal sum did not apply to its claims for statutory bad faith and penalties under L.R.S. 22:1982 and 22:1973. The court found, however, only the breach of contract claim was at issue in the instant motion, not a statutory bad faith penalty claim. Therefore, the court, at the time, need not decide whether the statutory bad faith penalties are subject to the limitation of the surety's liability to the penal sum. *Plenary Infrastructure Belle Chasse, LLC v. Aspen American Insurance Company*, 22-2666 (ED.La 2/23/24), 2024 WL 758390.

INTERPRETATION OF A JOINT VENTURE AGREEMENT

The McDonnel Group, LLC (TMG) and Archer Western Contractors, LLC (AWC) entered into a Joint Venture Agreement for the construction of the Orleans Parish Sheriff's Office Inmate Processing Center/Templeman III & IV Replacement Administration building. AWC held a 70% share of the Joint Venture while TMG held the other 30%. The Agreement established an Executive Committee. AWC largely controlled the Executive Committee; the representatives of each party held a vote equal to their proportionate share. AWC, as the Managing Party, determined the need for capital contributions and the date on which the capital was to be furnished to the Joint Venture. Upon unanimous approval of the Executive Committee, each such determination was binding and conclusive on the parties.

In the event of a default by a party in making its proportionate share contributions, the voting strength of the Executive Committee representatives of the non-defaulting party was increased to the proportion that its actual contributions to working capital, including loans therefore to the defaulting party, beared to the total contribution made to working capital by the parties while the strength of the defaulting party was decreased proportionately. If the non-defaulting party paid all or part of the defaulting parties' contribution, such payments were deemed to be demand loans made by the non-defaulting party to the defaulting party. Such loans were to be immediately repayable by the defaulting party, without notice, including interest. The defaulting party was required to pay any legal expenses

of the non-defaulting party to protect its interest or defend any action arising out of the defaulting party's breach.

The parties agreed the owner's failure to properly compensate the Joint Venture created critical cash flow issues for the Joint Venture which required the Joint Venture to obtain additional contributions from its constituent parties. AWC, as the Managing Party, made numerous determinations for working capital contributions from the parties; TMG failed to make any such contributions. AWC paid TMG's share of capital contributions and deemed such payments to be demand loans made by AWC to TMG. AWC sued TMG to recover, among other things, the amounts of the demand loans. TMG moved to dismiss the claims to recover the amount of the loans which exceeded $6,000,000. TMG contended AWC's capital contribution determinations were never binding because they were never properly authorized and approved by the Executive Committee. It was undisputed the Executive Committee did not vote or approve any of AWC's working capital contributions either because TMG voted against the determinations or because TMG failed to attend the Executive Committee meetings.

The narrow issue before the Court was whether the Joint Venture Agreement required the approval by the Executive Committee of the Managing Party's determination of the need for capital contributions in order to bind the Joint Venture members or did the Managing Party's determination alone bind the members. The court found the plain language of the Agreement supported the former contention and not the latter.

The court held the Joint Venture Agreement provided, upon unanimous approval, of the Executive Committee, the determination by the Managing Party would be binding and conclusive among the parties. Thus, the determination of when working capital was required involved an initial determination by the Managing Party and then a subsequent approval by the Executive Committee. The Managing Party's determination itself, absent Executive Committee approval, did not bind the parties. The Executive Committee did not approve AWC's working capital determinations. The AWC determinations themselves were not binding on TMG. Without any underlying obligation to make the working capital contributions, TMG could be said to have been in default. The court granted TMG's motion for partial summary judgment to the extent it sought dismissal of any and all claims related to TMG's purported failure to make working capital contributions. *Archer Western Contractors, LLC v. The McDonnel Group, LLC*, 22-5323 (ED.La. 2/16/24), 2024 WL 663648.

CERTIFICATE OF OCCUPANCY AND SUBSTANTIAL COMPLETION

The Louisiana First Circuit Court of Appeal held a contractor was not a proper witness to authenticate a copy of a certificate of occupancy. He did not create the email chain with respect to the certificate or the certificate itself. The court found the fact a certificate was issued was not in dispute. Both parties testified to the fact that it was issued. It is not, however, equivalent to a finding of substantial performance. Here, the certificate was relevant because it was an agreed upon benchmark for payment under the contract, but did not prove substantial performance.

The court found, however, there was a reasonable factual basis to conclude, as did the trial court, the project was substantially performed. *Wolfe Washauer Construction, LLC v. Dart*, 2022-1241 (La.App. 1 Cir. 12/4/23), 383 So.3d 193.

EXCLUSION OF EXPERT REPORT AND SUMMARY JUDGMENT

Plaintiff's hired architects to design an apartment complex and sued them for professional negligence and breach of contract. It was alleged the design was faulty and caused defects in the project. Damages were sought to offset the alleged cost of repairs and to mitigate the alleged deficiencies.

Plaintiffs did not produce expert information or reports by the court's mandated deadline, but later emailed to defendants what they described as a preliminary expert report noting an amended report was being prepared. The report which was produced was effectively a re-styling of the expert's field report that plaintiffs had previously produced in discovery and advised an amended expert report would be forthcoming. In the same e-mail, counsel for plaintiff asked, while they were in the process of discussing the extension of expert deadlines, that the architect defendants advise, at their earliest convenience, but not beyond a specific date, whether a motion to extend expert deadlines would be opposed. Counsel for plaintiffs in a subsequent e-mail advised, after discussions and further review of the schedule, he did not have authority and would not be able to join in a motion to continue any dates or deadlines. Finally, counsel for plaintiffs sent to defendant's an amended and supplemental expert report. The architect defendants filed a motion in limine to strike plaintiffs expert report as untimely and to prohibit him from testifying at trial. They also moved for summary judgment arguing plaintiffs would not be able to show the applicable standard of care or that the architect defendants breached such standard if the district court struck plaintiff's expert reports and testimony. The district court granted both motions. Plaintiffs appealed.

The United States Fifth Circuit Court of Appeals, after considering several factors relating to the motions, concluded plaintiffs demonstrated a lack of respect for the courts scheduling order by producing an untimely and deficient expert report and then supplementing its content over the course of two months in an apparent attempt to stretch the courts deadline, while, at the same time, declining to agree to a continuance. The court concluded the district court did not abuse its discretion by deciding a continuance would not be appropriate. According to the court, this was not one of the unusual and exceptional cases in which the district court's discretion to exclude an expert's report and testimony was manifestly erroneous. Plaintiffs argued the district court abused its discretion by refusing to consider their expert's affidavit in opposition to the motion for summary judgment which plaintiffs produced for the first time with their opposition and which they contended provided evidence of the applicable standard of care.

The court of appeals held the district court did not abuse its discretion by excluding the amending and supplemental report and did not err by granting the motion for summary judgment by the architects. The judgments of the district court were affirmed. *Glenn R. Stewart v. Morton M. Gruber*, 23-30129 (5th Cir. 12/14/23), 2023 WL 8643633.

OPEN ACCOUNT

The United States District Court for the Western District of Louisiana considered whether a claim by a contractor against an owner arising from the owner's failure to make full payment to the contractor was a claim under the Louisiana Open Account Statute, L.R.S. 9:2781. If the contractor was successful, the owner could be liable for attorneys' fees for the prosecution and collection of the claim. The owner contended the agreement was a contract and there was no open account relationship between the parties.

The court relied upon United States Fifth Circuit Court of Appeal jurisprudence which holds Louisiana courts use four factors to determine whether a course of dealings qualifies as an open account: 1) whether there were other business transactions between the parties; 2) whether a line of credit was extended by one party to the other; 3) whether there are running or current dealings; and 4) whether there are expectations of other dealings. According to the court, Louisiana law, for purposes of an open account, requires an ongoing relationship with an extension of credit to the debtor.

The contract between the owner and the contractor indicated the price of the performance of the subject work was a sum certain subject to modification by subsequent work orders. As each payment milestone was reached, a certain percentage of the contract was to be remitted by the owner for work

performed. The contractor argued the invoices for percentages of the work performed resulted in its expenses in performing its contractual obligations having the practical effect of a generous line of credit in favor of the owner.

In focusing on the factor concerning a line of credit, the court held the evidence did not establish a line of credit, which would weigh in favor of a contract and not an open account. The court found the contract at issue did not contemplate future or prospective business dealings beyond those which were specified in the contract. *Precision Cooling Towers, Inc. v. Indorama Ventures Olefins, LLC*, 21-03708 (W.D.La. 9/28/23), _____ F.Supp.3d _____ (2023), 2023 WL 6340510.

CONSEQUENCES OF FAILURE TO PARTICIPATE IN A WRAP-UP LIABILITY POLICY

Woodward Design + Build, LLC was the general contractor for a project. Eagle Access, LLC/Division Management, LLC was a subcontractor. Woodward obtained a Contractor Controlled Insurance Program (CCIP or Wrap-Up) policy from Houston Casualty Company. Eagle failed to participate in the Wrap-Up policy. A personal injury lawsuit was filed involving an accident at the jobsite. Eagle, together with its own CGL insurer (TBIC), was sued. The Louisiana Supreme Court found Eagle was not insured under the Wrap-Up policy. Eagle's liability insurer, TBIC, moved for summary judgment seeking dismissal of all claims against it contending the Wrap-Up Exclusion contained in its policy clearly and unambiguously precluded coverage for Eagle's work on the project. The trial court granted summary judgment in favor of TBIC. Plaintiffs appealed.

The court of appeal held the plain language of the Wrap-Up Exclusion contained in the TBIC policy stated coverage for Eagle was excluded in all locations where it performed or had performed work that is or was to be insured under a wrap-up insurance program. The court affirmed the judgment of the trial court. The end result: Eagle was without liability insurance for the accident. *Soule v. Woodward Design + Build, LLC*, 2022-0352 (La.App. 4 Cir. 12/21/23), 382 So.3d 1052, writ denied, 2024-00121 (La. 4/3/24), 382 So.3d 113.

ASSIGNMENT OF BAD FAITH CLAIMS

In considering the assignment at issue, the United States District Court for the Western District of Louisiana held although the assignment covered all contractual claims, bad faith claims must be expressly provided for in the act of assignment. The assignment before the court made no reference to extra-contractual bad faith claims. *Roofing & Construction Contractors of America v. Church Mutual Insurance Co.*, 21-03551 (W.D.La. 12/20/23), 2023 WL 8814596.

CONSIDERATION OF EXCEPTIONS OF PEREMPTION AND NO CAUSE OF ACTION

The Louisiana Supreme Court considered the decision of the court of appeal on exceptions of peremption and no cause of action with respect to claims under the Louisiana Uniform Trade Practices Act (LUTPA). The court of appeal considered the exception of peremption first finding the claims were perempted. It held the prescriptive period under the LUTPA was perempted. The Louisiana Supreme Court held the lower court should have ruled on the exception of no cause of action before disposing of the exception of peremption. The ruling of the appellate court finding the statute sets forth a peremptive period rather than a liberative prescription period was reversed. The Court also found the exception of no cause of action should have been sustained.

Without deciding the issue, the Louisiana Supreme Court, in a footnote, cast doubt on the holding of the court of appeal the prescriptive period of the LUTPA was peremptive rather than prescriptive. The Court noted the decisions of Louisiana courts holding it was peremptive relied on jurisprudence prior to the amendment of the time bar in 2018. The 2018 amendment stated the time for filing a private action under the LUTPA was subject to a liberative prescription of one-year rather

than simply a prescriptive period. This seemed to be evidence the legislature intended the time period to be prescriptive rather than peremptive. *Law Industries, LLC v. State of Louisiana, Department of Education*, 2023-00794 (La. 1/26/24), 378 So.3d 3.