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ATTORNEYS AND COUNSELLORS AT LAW

Louisiana Construction Law and News Update

SPRING 2016

Where It's At (With Apologies to Our English Teachers)

One recent decision, *Ryan Gootee General Contractors, L.L.C. v. Plaquemines Parish School Board*, 2015-0678 (La. App. 4 Cir. 11/18/15), 2015 WL 7356420, is a good reminder that where you file suit can just as easily doom your case as bad facts. In *Gootee*, the Plaquemines Parish School Board ("School Board") issued an advertisement for bids for construction of a new field house at one of its high schools. At bid opening, One Construction, L.L.C. ("One Construction") was deemed the low bidder; Ryan Gootee Construction Contractors, L.L.C. ("Gootee") was the second lowest.

Gootee discovered One Construction's bid may not have included a certified copy of the corporate resolution authorizing execution of the project's contract, a violation of La. R.S. 38:2212(B)(5) of the Louisiana Public Bid Law. Gootee notified the School Board's architect about the alleged deficiency. Nevertheless, the School Board sent notice of an upcoming meeting where it intended to award the project, and at that meeting the project was awarded to One Construction.

As a result, Gootee filed a petition for temporary restraining order, preliminary and permanent injunction, declaratory judgment, and mandamus against the School Board and One Construction in Jefferson - - not Plaquemines - - Parish. The petition maintained venue was proper in Jefferson Parish under La. R.S. 38:2181(A), which allows a suit to annul a public contract on the grounds of illegality to be filed in the parish or the domicile of the contractor.

The School Board filed a litany of exceptions, including a declinatory exception of improper venue, contending that as a political subdivision, the mandatory venue requirements of La. R.S. 13:5104(B) dictated that venue for a suit against the School Board was only proper in Plaquemines Parish. The trial court granted the School Board's venue exception, and Gootee's claims against the School Board were transferred to the 25th Judicial District Court in Plaquemines Parish. Despite the

transfer of the claims against the School Board, those against One Construction remained in Jefferson Parish. Importantly, One Construction consented to a permanent injunction in favor of Gootee after the transfer of the claims against the School Board but before those transferred claims resumed activity. One Construction consented to expedite the appeal in the remaining case between it and Gootee.

Once Gootee's claims against the School Board were comfortably in Plaquemines Parish, Gootee filed a motion for writ of mandamus. Specifically, Gootee argued that because the low bidder had been permanently enjoined from working on the project, Gootee should be awarded the project's contract. The School Board opposed Gootee's motion, contending that the permanent injunction Gootee obtained had no legal effect upon the School Board because the School Board was not a party to the Jefferson Parish proceedings once the claims against it were transferred. The trial court nevertheless granted Gootee's exceptions, and the School Board appealed that ruling, and others.

On appeal, the School Board highlighted that Gootee elected not to make the School Board a part to the injunction or any of the relief sought in Jefferson Parish. Instead, Gootee proceeded only against One Construction in Jefferson Parish rather than have all of the issues against both parties litigated in Plaquemines Parish. Based on La. R.S. 13:4231, the School Board argued it was not bound by the permanent injunction.

The Louisiana Fourth Circuit found that the trial court erred in granting Gootee's mandamus. First, it recognized that the permanent injunction was only against One Construction. However, the court also acknowledged that while this prevented One Construction's performance, there was no specific judgment - - against the School Board or otherwise - - invalidating the contract for the project. Second, the Fourth Circuit recognized that the grant of the permanent injunction to which One Construction consented was for appeal purposes. Because the judgment was not executory, its effects were

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Letter From the Firm

We are pleased to deliver to you the latest edition of "Louisiana Construction Law and News Update." This newsletter is provided to keep you and your company current on legal topics that affect the construction industry. The firm hopes you find this information insightful and relevant to your work.

The newsletter is published on a quarterly basis by the firm and is distributed to the construction industry. We encourage suggestions and ideas for articles from our readers so that this publication can be as current and useful as possible.

We appreciate the opportunity to provide this newsletter to you. If you know of others in the industry whom you think might enjoy receiving the publication, please let us know so that we can add them to our industry list.

Lloyd N. Shields

Norman A. Mott

Elizabeth L. Gordon

Andrew G. Vicknair

Adrian A. D'Arcy

Jeff K. Prattini

Ashley B. Robinson

Jessica R. Derenbecker

Michael S. Blackwell

Adrienne C. May

Eric A. Mund

The lawyers of
Shields | Mott L.L.P.

"Surety Decisions and Non-Louisiana Cases,"

Miller Act Surety Slip

Subcontractors should take note when proceeding against a general contractor on a federal project: a judgment against the contractor isn't always binding on the surety. In *Thomas v. Burkhardt*, --- Fed. Appx. ---, 2016 WL 143351, Alvin Thomas ("Thomas") was hired by Thorington Electrical Construction Company ("TECC") as a subcontractor to perform drainage work on a federal project at Maxwell Air Force Base in Montgomery, Alabama ("the Project"). Travelers Casualty and Surety Company of America ("Travelers") issued Miller Act bonds to TECC for the Project.

Thomas completed his work on the Project in March 2006, but was only paid approximately half of his subcontract value. Eventually, in January 2008, Thomas filed suit against TECC in Alabama state court to collect the remaining amounts owed. In October 2008, the state court entered a judgment in Thomas's favor and ordered TECC to pay the remaining amounts.

In September 2008, eight months after filing suit, Thomas notified Travelers that he intended to file a claim on the payment bonds Travelers issued to TECC for the Project. After some negotiation, Travelers denied Thomas's claim, arguing that it was untimely under the Miller Act's one-year statute of limitations. Believing his claim was improperly denied, Thomas filed suit against Travelers in the United States District Court for the Middle District of Alabama in December 2012. Travelers immediately filed a motion for summary judgment, arguing that Thomas's claim was time-barred under the Miller Act's one-year statute of limitations. The district court agreed, and granted Travelers's motion. Thomas appealed.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Thomas did not dispute that the claim was untimely, but instead argued that the Full Faith and Credit Clause of the United States Constitution required the district court to recognize his state-court judgment against TECC. To its full end, Thomas argued that because the state-court judgment bound TECC, Travelers was also bound. However, the Eleventh Circuit stated that "only federal courts may determine a surety's liability on a Miller Act bond[.]" The appellate court stated that the basis for this rule is that the Miller Act vests exclusive jurisdiction with federal courts, and to recognize any state-court influence would thwart congressional intent. Thus, the Eleventh Circuit stated that the district court was not required to recognize Thomas's judgment against TECC as binding on Travelers. The Eleventh Circuit found that to be true even if Travelers had notice of the state-court lawsuit and could have raised its objection of timeliness in it. Overall, the Eleventh Circuit found that Thomas's suit was time-barred, and that Thomas's judgment against TECC did not implicate Travelers. Thus, the Eleventh Circuit affirmed the trial court's grant of summary judgment. This case and its predecessors stand as an exception to the general rule that sureties are typically bound to the extent of their principals.

Other Noteworthy Decisions

Curtiss-Manes-Schulte, Inc. v. Safeco Ins. Co. of America, --- Fed. Appx. ---, 2016 WL 497523 (8th Cir. 2016)(per curiam): holding that where the record showed that an owner failed to invoke the default declaration requirement in the performance bond, the surety's obligations under the bond had not been triggered.

This newsletter covers recent case law and other developments of significance to the construction industry. However, the information contained in this newsletter should not be considered legal advice and does not create an attorney-client relationship with the reader. ADDITIONALLY, PURSUANT TO THE APPLICABLE RULES GOVERNING ATTORNEY CONDUCT, THIS NEWSLETTER MAY BE CONSIDERED LEGAL ADVERTISING. Readers should always seek the advice of competent legal counsel for any matters on which they need legal advice.

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suspended. Third, the Louisiana Fourth Circuit noted that Gootee had not been named the lowest responsible bidder. As a result, the Louisiana Fourth Circuit found that the School Board retained the discretion - - the linchpin question for mandamus - - to award the project's contract, and the trial court's grant of Gootee's writ of mandamus was improper.

It is worth noting that this issue represented only a portion of those that the Louisiana Fourth Circuit addressed. Nevertheless, the interesting part is that it was Gootee's decision to drive two separate lawsuits in two venues that led to the writ of mandamus being overturned. The takeaway is to file suit against everyone in the jurisdiction where the public entity is located.

Beware of Owner

Typically, ownership of property is relatively clear when identifying the party against whom to enforce a lien under the Louisiana Private Works Act

("the Act"). However, one recent decision thwarted the efforts of subcontractors because of a badly-timed sale. In *Solid Rock Technologies, L.L.C. v. Joseph*, 2015-1290 (La. App. 1 Cir. 2/24/16), --- So. 3d ---, 2016 WL 743304, Solid Rock Technologies, L.L.C. and Heavenly Home Consulting, L.L.C. ("Plaintiffs") performed work on the construction of a private residence. Ultimately, the Plaintiffs were allegedly unpaid and jointly filed a lien ("the Lien") on the property. The Lien stated that the Plaintiffs contracted with the Alan Joseph and Laurel Lane Investments, L.L.C. ("Developers"). However, before Plaintiffs filed the Lien, the Developers had sold the property to Jacob and Amanda Hester ("Owners"). The Lien did not name the Owners.

The Plaintiffs filed suit against the Owners, the Developers, and the general contractor for enforcement of the Lien. At some point thereafter, the Owners tried to sell the property, but realized that the Lien

prevented clear title. The Owners obtained a lien bond from International Fidelity Insurance Company ("International") to cancel the Lien, secure clear title, and allow them to sell the property. The Plaintiffs then amended their lawsuit to add International as a defendant.

Ultimately, the Owners and International filed a peremptory exception of no cause of action, arguing that they were not named in the Liens and that under the Act, the Plaintiffs did not have a valid claim against them. Thus, the Liens were improperly filed. The trial court denied the exception. Thereafter, the Plaintiffs filed a motion for summary judgment against the Owners and International for the full amount of the Liens, which the trial court granted. The Owners and International appealed the trial court's grant of summary judgment.

On appeal, the Owners argued that under the Act, they could not be "owners," as the Plaintiffs contended on summary

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Intellectual Property Corner

Building by Design: Copyrighted Architectural Works and the Implications on the Construction Industry

Marking an important change in U.S. intellectual property law and the construction industry, on December 1, 1990, President George H. W. Bush signed into law the Architectural Works Copyright Protection Act ("AWCPA"), extending federal copyright protection to architectural works. Specifically, the AWCPA protects the nonfunctional, artistic features of original architectural designs represented in virtually any form, including plans, drawings, and buildings themselves. In the twenty-five years since its enactment, courts have sought to interpret and construction and design professionals have grappled with the AWCPA's broad subject matter, most notably on the consequences of copyright ownership of an architectural design.

This may be a shock to many owner-developers, but paying for architectural plans and/or owning the building embodying the design conveys no automatic ownership right to the copyright in the design documents or even the design of the building owed. If the contract does not state otherwise or no written agreement to the contrary is executed, the original architect or designer retains ownership of the copyrights and the purchaser merely obtains a non-exclusive license to use the plans for that particular construction project. The copyright owner and the project owner are not synonymous terms.

With a handful of exceptions, this result carries with it a number of lasting implications as to an owner's and even general contractor's right to use, and potential infringement of the copyright in a project or building's design. Additionally, it is

crucial for architects, engineers, and other design professionals to understand the scope of copyright protection when filing copyright applications, deciding whether to incorporate a feature from another design, or litigating a lawsuit for infringement.

To provide a more thorough examination of these issues, future newsletters and circulated articles will address the host of considerations that copyright protection of architectural works generates. Over the next several months, look for publications on the following topics:

- The design elements and types protected by copyright and the breadth of copyright protection for any particular design.
- How the major AIA forms of owner-architect agreements address the use and ownership of copyright to design documents.
- Practical suggestions for negotiating contract terms and conditions pertaining to the copyright to design work.
- The copyright implications of regenerating building plans for the purposes of a building addition or renovation, particularly when Building Information Modeling (BIM) programs are used.
- What courts consider in determining if a building design is an infringement of another and tips to help construction professionals protect themselves from architectural copyright disputes.
- Vicarious copyright infringement as it pertains to various third parties, such as project lenders and financiers.



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ATTORNEYS AND COUNSELLORS AT LAW

650 Poydras Street • Suite 2600 • New Orleans, Louisiana 70130

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judgment. Specifically, the Owners argued that although they purchased the property before the Act's lien period expired, they were not the owners who contracted with the Plaintiffs (which is a specific requirement of the Act in order to impose liability).

The Louisiana First Circuit agreed. Specifically, the Court stated that there was "no evidence whatsoever admitted" to prove that the Owners contracted with the Plaintiffs, or agreed to the Plaintiffs' price. Considering the lack of evidence, the First Circuit held that "no legal basis exists to assess personal liability against the [Owners] under the [Act.]" As a result, the Louisiana First Circuit reversed the trial court's grant of the Plaintiffs' motion for summary judgment.

From an owner's perspective, this is a dangerous decision because it leaves some uncertainty about whether - - despite not agreeing to the work or the contract for it - - you can still be held responsible even after the owner who was involved has sold the property. From the subcontractor's perspective, it prevents full use of the hammer that is the lien the Act authorizes. Although the timing of the sale is what makes this case unique, it is a reminder to file your lien (at least under the Private Works Act, but not necessarily the Louisiana Public Works Act) quickly.

News and Notes

Construction Seminars

Shields | Mott, L.L.P. is consistently engaged in construction law seminars throughout the state of Louisiana, and is pleased to announce the following upcoming seminars:

10 Things Every Construction Professional Needs to Know . . . Legally Speaking
Associated Builders and Contractors – Bayou Chapter
Legal Edge Speaking Series
May 24, 2016

Bad Plans and Specifications: A Contractor's Perspective
(Lorman Education Services Webinar)
<http://www.lorman.com/training/contractor-s-dilemma-of-dealing-with-bad-plans-and-specs>
July 21, 2016

Our seminars are designed to address the legal issues that the construction industry faces and to hone in on the options that provide the best legal advice. Understanding these issues are the best ways to avoid potential problems. Additional information about our seminars can be obtained by contacting Andrew G. Vicknair at Shields | Mott, L.L.P. at (504) 581-4445.