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ATTORNEYS AND COUNSELLORS AT LAW

Louisiana Construction Law and News Update

SUMMER 2016

Work of the 2016 Legislature

While this year was a busy one for the Louisiana legislature, few direct changes to the laws impacting general contractors, subcontractors, or sureties were made. Most proposed legislation relating to the construction industry was referred to committees for further review, further revision, or rejection. One noteworthy change is an amendment to La. R.S. 38:2290. Specifically, La. R.S. 38:2290 prohibits the use of closed specifications (specifications requiring that a sole source supplier be used) in projects governed by the Louisiana Public Works Act. However, Act No. 373 of the 2016 Regular Session amended La. R.S. 38:2290 to allow for closed specifications if it “is required as part of an integrated coastal protection project as defined in R.S. 49:214.2(11), for the evaluation of new and improved integrated coastal protection technologies.”

La. R.S. 9:2772 and Partial Substantial Completion

In a recent appellate decision obtained by Shields | Mott L.L.P., the Louisiana Fourth Circuit Court of Appeal ruled that the five-year preemptive period to file suit against a contractor under La. R.S. 9:2772 can be triggered by partial substantial completion. In *Thrasher Construction, Inc. v. Gibbs Residential, L.L.C.*, 2015-0607 (La. App. 4 Cir. 6/29/16), --- So. 3d ---, 2016 WL 3557110, Gibbs entered into a contract with Canal Condominium Development, L.L.C. (“the Owner”) for a \$36,128,641 renovation and redevelopment of the Krauss Building, located at 1201 Canal Street in New Orleans, Louisiana (“the Project”). The Project was separated into two buildings. The “Canal Building” was for commercial and residential leasing, where the “Iberville Building” contained residential parking and residential condominiums. Gibbs’s contract with the Owner required renovation of both the Canal Building and the Iberville Building. On May 11, 2007, Gibbs entered into a subcontract with Thrasher Waterproofing Corporation (“Waterproofing”) in the amount of \$351,000.00. All of Waterproofing’s work occurred on the exterior of the Project. Indeed, Waterproofing’s largest work scope on the Project was to apply waterproofing and sealants to the new exterior façade of the Iberville Building.

On September 29, 2008, the Project’s architect issued a certificate of partial substantial completion (“the Certificate”) for part of the Project. The Certificate accepted the entirety of the Iberville Building, and the first and sixth floors of the Canal Building, as complete. The Certificate’s acceptance included all of Waterproofing’s work on the Iberville Building.

In December 2009, approximately one year after the Certificate, the Iberville Building began experienced water intrusion issues from sources other than what had been covered by Waterproofing’s earlier work. Thereafter, Gibbs and Thrasher Construction, Inc. (“Thrasher”) entered into a new subcontract to remedy the water intrusion issues in the Iberville Building. The Thrasher Contract’s primary purpose was to properly seal the Iberville Building’s window jambs to the waterproofed stucco exterior. Thrasher performed the entirety of its subcontract, but Gibbs refused to make the \$40,532.66 final payment.

On January 22, 2013, Thrasher filed suit against Gibbs to recover the \$40,532.66 balance owed by Gibbs. On January 14, 2014, Gibbs filed its third-party demand against Waterproofing. Gibbs’s third-party demand against Waterproofing attempted to collect “in excess of five hundred thousand dollars” in damages for the Iberville Building’s water intrusion issues that Gibbs alleged Waterproofing caused while performing its work on the Project. Gibbs also filed a counterclaim against Thrasher, and a third-party demand against Waterproofing’s president, Mr. Thrasher, alleging that both were liable with Waterproofing for the alleged damage caused by it. Gibbs did not allege any defects in Thrasher’s work, and lodged fraud allegations against Mr. Thrasher.

On December 12, 2014, Waterproofing, Thrasher, and Mr. Thrasher filed an exception of preemption, contending that: (i) Gibbs’s claim against Waterproofing for defective work was foreclosed by La. R.S. 9:2272’s five-year preemptive period; and (ii) the fraud exception found under La. R.S. 9:2772(H)(1) was unavailable to salvage Gibbs’s claims against Waterproofing or Mr. Thrasher. On February 27, 2015, the trial court agreed and granted the exception. Gibbs appealed.

On appeal, the Louisiana Fourth Circuit upheld the trial court’s ruling. Specifically, the Fourth Circuit found that although La. R.S. 9:2772 does not require a specific form of recorded acceptance by the owner, both parties in this case rely upon the Certificate as proof of the owner’s acceptance of the work performed by TWC on the Project. Based upon that, the appellate court found that the trial court’s reliance upon the Certificate was satisfying La. R.S. 9:2772(A)(1)’s requirement was correct. More importantly, however, the Louisiana Fourth Circuit found no error in the trial court’s interpretation and application of La. R.S. 9:2772(A)(1)(a) to find that acceptance of only portions of an entire project can commence the five-year preemptive period for those accepted portions. Finally, the Fourth Circuit rejected Gibbs’s attempt to use the fraud exception found in La.

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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.

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R.S. 9:2772(H) to salvage its claims, simply finding that "Gibbs's allegations do not constitute fraud."

This decision is a win for general contractors and subcontractors by upholding La. R.S. 9:2772. However, it is important to remember that now even partial substantial completion can trigger La. R.S. 9:2772's five-year preemptive period for work included within the purview of a partial substantial completion certificate.

Beware the Technical Distinction

In the recent decision in *Apex Building Technologies Group, Inc. v. Catco General Contractors, L.L.C.*, 15-729 (La. App. 5 Cir. 3/30/16), 189 So. 3d 1209, the Louisiana Fifth Circuit drew a fine line on what constitutes final payment for triggering a claimant's right against a public entity under the Louisiana Public Works Act. On September 22, 2009, Jefferson Parish ("the Parish") contracted with Catco General Contractors, L.L.C. ("Catco") to construct the "New East Bank Maintenance Facility" in Jefferson, Louisiana ("the Project"). Hanover Insurance Company ("Hanover") issued the payment and performance bonds for the Project.

Catco subcontracted the Project's electrical work to Apex Building Technologies Group, Inc. ("Apex"). Following completion of its work on the Project, Apex claimed that a balance of \$39,186.19 remained unpaid. Thus, on April 8, 2011, Apex filed a claim and privilege (*i.e.*, a "lien") on the Project in the Jefferson Parish mortgage records.

On January 25, 2012, the Jefferson Parish Council adopted a resolution granting acceptance of the Project. The resolution was recorded on March 15, 2012. Importantly, the Parish evidently issued final payment for the Project to Hanover, not Catco.

On April 12, 2013, Apex filed suit against Catco and Hanover to recover the unpaid balance. Hanover filed a peremptory exception of prescription, contending that Apex's petition fell outside of the one-year time period found in La. R.S. 38:2247. Between the time the trial court ruled on Hanover's exception, Apex amended its petition to add Jefferson Parish as a direct defendant. Afterward, on July 16, 2013, the trial court granted Hanover's peremptory exception, dismissed Hanover, and also ordered cancellation of Apex's previously-filed privilege. Apex did not immediately appeal this decision.

After being added to the lawsuit by Apex, Jefferson Parish filed several exceptions that were granted, but the trial court gave Apex the right to amend its lawsuit again. In that subsequent amendment, Apex added a concursus claim under La. R.S. 38:2243 against Jefferson Parish. A concursus proceeding requires the Parish to place all remaining contract funds in the court registry, among other things. Thereafter, Jefferson Parish filed a motion for summary judgment, contending that the Public Works Act did not afford Apex a remedy against the Parish. Specifically, the Parish argued that it had not made final payment to the contractor, which was a prerequisite for its liability under La. R.S. 38:2242(D), and that Apex could not maintain a concursus under La. R.S. 38:2243 against the Parish. The trial court agreed with both arguments and granted summary judgment for the Parish, which Apex appealed.

On appeal, the Louisiana Fifth Circuit affirmed the trial court's decision. First, the Fifth Circuit pointed out that as the trial court's order cancelling Apex's privilege was a final judgment that Apex failed to timely appeal. As a result, Apex could not challenge the removal of its privilege. The removal of Apex's privilege became an important fact in the rest of the decision.

Additionally, the Fifth Circuit agreed that the Parish could not be liable under La. R.S. 38:2242(D). Specifically, the appellate court pointed out that a prerequisite to being liable under La. R.S. 38:2242(D)(1) or (D)(2), the Parish would have had to make final payment to Catco. Instead, the Parish made final payment to the Project's surety, Hanover. Without payment being made to Catco, La. R.S. 38:2242(D)'s conditions were not satisfied. Further, the court pointed out that

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Other Noteworthy Decisions

Louisiana's Public Bid Law does not provide any authority for establishing a local hiring preference. La. Atty. Gen. Op. No. 16-0020 (March 3, 2016).

Jury finding of general contractor's bad faith in breach of contract action for failure to pay does not require trial court to impose statutory penalties and award attorney's fees under prompt payment provisions. *A. Scott Enterprises, Inc. v. City of Allentown*, --- A.3d ---, 2016 WL 3908965 (Pa. July 19, 2016).

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.

because Apex failed to appeal the removal of its privilege, it did not qualify as a claimant, which was required to invoke La. R.S. 38:2242(D)'s protections.

With regard to Apex's concursus proceeding under La. R.S. 38:2243, the Fifth Circuit recognized that there was no penalty against the Parish for failing to invoke the concursus proceeding, only that La. R.S. 38:2243 states that "any claimant may do so." Again, however, Apex's failure to appeal the removal of its privilege barred it from being a claimant under the Public Works Act. Thus, the concursus proceeding was improper, and the Fifth Circuit upheld the trial court's dismissal of it.

This decision does not explore whether payment to a contractor's surety is for all intents and purposes the same thing as a payment to the general contractor. In many cases, in absence of a separate lien bond protecting claimants, payments made directly by an owner to the surety generally reduce any liability a contractor may have to the surety, indirectly providing the contractor with a benefit at the expense of claimants. Still, this decision reemphasizes the hard reminder that the Louisiana Public Works Act is *stricti juris*, meaning that its protections must be met with precision.

The Danger of Subcontractor Bonds

There has been a growing trend in the construction industry to require subcontractors on both public and private projects to provide bonds to secure performance of their work or payment of their suppliers. However, one recent decision by the Louisiana Fifth Circuit Court of Appeal emphasizes that a general contractor must be vigilant in invoking those bonds, or run the risk of losing any rights it has under them. In *Law Enforcement Dist. of Jefferson Parish v. MAPP Const., L.L.C.*, 16-220 (La. App. 5 Cir.

6/30/16), --- So. 3d ---, 2016 WL 3556548, the Fifth Circuit addressed whether a bond provided by a subcontractor was a statutory bond, subject to the five-year preemptive period under La. R.S. 38:2198, or a conventional bond, whose prescriptive period could be shortened by the language of the bond.

On February 3, 2009, MAPP Construction, L.L.C. ("MAPP") entered into a public works contract with the Law Enforcement District of Jefferson Parish ("the District") for construction of a new forensic crime lab in Gretna, Louisiana ("the Project"). MAPP subcontracted a portion of its work to Casey Civil, L.L.C. ("Casey"). As part of its subcontract, MAPP required Casey to obtain a surety bond, which it obtained from Travelers Casualty and Surety Company ("Travelers"). The bond Travelers issued ("the Bond") stated that any lawsuit by MAPP to enforce it must be made either at "the expiration of one year from the date of substantial completion," or "one year after" Casey ceased working on the Project.

Ultimately, the Project reached substantial completion on September 24, 2010. Subsequently, the District filed suit against MAPP for various damages arising out of the Project. On June 9, 2015, MAPP answered the District's lawsuit and filed a third party demand against Casey and Travelers, as the Bond's issuer. On July 14, 2015, Travelers filed an answer to MAPP's third party demand, as well as a preemptory exception of prescription and a motion for partial summary judgment. In both the exception and the motion, Travelers argued that MAPP's claims against Travelers were procedurally time-barred under the terms of the Bond. MAPP opposed Travelers's arguments, contending that all claims arising out of public construction are subject to the five-year preemptive period under La. R.S. 38:2189. The trial court denied Travelers's exception and its motion for partial summary judgment. Travelers

filed an application for supervisory writ to the Louisiana Fifth Circuit Court of Appeal, which it granted.

In reviewing the trial court's judgment, the Fifth Circuit highlighted that the Louisiana Public Works Act only requires that "the contractor" obtain "a bond" in connection with a public contract. The appellate court acknowledged that "La. R.S. 38:2189 provides the preemptive period for any action against 'the contractor' or 'the surety' on 'the bond' in connection with a public works project." However, the Fifth Circuit stated that based upon the requirement that the Public Works Act be strictly construed, the definition of a "contractor" is a legal entity that is awarded a contract by the public entity, not necessarily a "general contractor."

Further, the Louisiana Fifth Circuit cited that the United States Court of Appeals for the Fifth Circuit squarely addressed the same issue, and found that only a general contractor was required to provide a bond to the public entity, and therefore any other bond was not a statutory bond under the Public Works Act. Thus, the Louisiana Fifth Circuit found that the Bond was not a statutory bond to which La. R.S. 38:2189 applied, but was instead a conventional bond. Because the Bond's limitation of filing suit to enforce it was one year, and more than one year had passed, MAPP's claims against Travelers under the Bond were prescribed. Thus, the Louisiana Fifth Circuit reversed the trial court's decision, and granted summary judgment in favor of Travelers.

This decision heavily underscores the need for general contractors to carefully read the language contained in the bonds provided to it by subcontractors, and to be vigilant about recognizing its claims at or immediately after substantial completion.

Intellectual Property Corner

A common industry misconception is that a building design must be Frank Lloyd Wright-innovative to be copyrightable. Under the law, the level of detail and creativity required to be worthy of copyright protection is a relatively low bar; the standard benchmark is a mere dash of originality. That said, the sheer copyrightability of a building's design does not mean every element is protected. In terms of copyright infringement two regularly recurring issues arise: (1) what design mediums and features are protectable and (2) what is the extent of protection in the context of a copyright infringement claim.

What is and isn't copyrightable?

Technical Drawings and the Design of a Physical Building Are Protected

Architectural and engineering plans and drawings have long been protected under the Copyright Act of 1976 as "technical drawings," but this protection did not prevent others from replicating a building constructed from copyrighted drawings. More to the point, there was no copyright protection for the physical building,

just the structure's technical drawings. The Architectural Works Copyright Protection Act ("AWCPA") changed all that. Now "humanly habitable" buildings, as well as the underlying plans and drawings, are protected, creating two separate copyrights in a building's design: one in the technical drawings and another in the architectural work.

Standard, Functional Design Features and Commonplace Notions of their Arrangement are Unprotected Ideas

The breadth of copyright protection available for any particular design is primarily dictated by how many original, nonfunctional, and purely aesthetic features are expressed. Staple building components, such as windows and doors, and aspects that are required by design are not protected; nor are the generalized notions of where to place these functional elements. Likewise, certain market expectations for homes or commercial buildings and design parameters imposed by client demands, building codes, topography, pre-existing structures, or engineering necessity do not receive copyright protection.

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Additionally, features that are hallmarks of a given architectural style are not protected by copyright. For example, the tall columns of neoclassical buildings, the symmetrical front façade and accented doorway of colonial houses, and the steel framework of modern, high-rise office buildings are all recognized as standard design characteristics from which all architects are allowed to draw.

How much protection does a copyright provide?

While a copyright owner need not clear a high bar in order for an architectural work to qualify as original, the level of protection afforded a particular work is determined on a sliding scale as to the variety of ways to express the design. If there's a wide range of possible choices, then copyright protection is "broad," and only substantial similarities to the protectable aspects constitute an unlawful appropriation. Conversely, if the means of expression are limited, then copyright protection is "thin," and a work must be virtually identical to infringe.

The unfortunate truth is that an architectural work's interwoven mix of aesthetic elements and utilitarian aspects precludes any bright-line standard for discerning the scope of copyright protection afforded. As the United States Court of Appeals for the Second Circuit aptly described the dilemma "some architectural designs, like that of a single-room log cabin, will consist solely of standard features arranged in standard ways; others, like the Guggenheim, will include standard features, but also present something entirely new." *Zaleski v. Cicero Builder Development, Inc.*, 754 F.3d 95, 103-104 (2nd Cir. 2014)

News and Notes

Construction Seminars

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

***The Potential Price of Ethics and Liability
2016 Louisiana Civil Engineering Conference and Show
Pontchartrain Center – Kenner, Louisiana
September 28 – 29, 2016***

***Applying the Rules of Civil Procedure
National Business Institute
New Orleans, Louisiana
November 17, 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 Michael S. Blackwell at Shields | Mott, L.L.P. at (504) 581-4445.