SHIELDS MOTT LUND L.L.P.
ATTORNEYS AND COUNSELLORS AT LAW

Louisiana Construction Law and News Update

Summer 2006

In this issue:

Construction Law Update

Federal Bankruptcy and the Louisiana Private Works Act: friends or foes?

In *In re Whitaker Construction Company, Inc.*, 439 F.3d 212 (5th Cir. 2006), the U.S. Fifth Circuit Court of Appeals addressed whether the filing of an involuntary bankruptcy petition and related adversary actions by a subcontractor against the general contractor constitutes an assertion of claims or rights by the subcontractor under the Louisiana Private Works Act (the applicable state lien statutes). At issue in the case was the timeliness of assertion of rights under the state's lien laws.

Whitaker Construction Company was general contractor on two large projects in Caddo Parish. Fidelity & Deposit Company of Maryland provided the performance and payment bonds on the projects, and the contracts were recorded. Fitzgerald Contractors, an unpaid subcontractor on both projects, filed an involuntary bankruptcy petition to place Whitaker in Chapter 7 bankruptcy. The case was converted to Chapter 11 on motion of Whitaker. In an effort to get paid by the surety, Fitzgerald filed two adversary complaints in the bankruptcy against the surety, giving rise to motions to dismiss based on a statute of limitations (in Louisiana, for this case, a defense of "peremption").

Louisiana Revised Statute 9:4813(E) of the Private Works Act provides that the surety's liability, except as to the owner, is extinguished as to all persons who fail to institute an "action asserting their claims or rights" – *i.e.*, a lawsuit to enforce their lien - against the owner, contractor and/or surety within one year after the expiration of the time specified in 9:4822 (which specifies the period for filing a lien in the public records). The bankruptcy court held that Fitzgerald's mere filing of an involuntary petition against the debtor constituted a proper suit under 9:4813(E), although, on appeal the district court reversed, finding that the petition did not mention the Private Works Act or specify any claims made under the Act. The United States Fifth Circuit Court of Appeals affirmed.

Also at issue in the case, however, was the matter of the start of the lien filing period: when must a claimant file a statement of claim or privilege in the event that the contract is properly recorded but no notice of termination is ever filed? Louisiana Revised Statute 9:4822(A) provides that if a contract is properly recorded, a claim must be filed within thirty (30) days from the filing of a notice of termination (such as a notice of substantial completion) of the work. A corresponding provision – La. R.S. 9:4822(C) – states that a claim must be filed within sixty days from the filing of a notice of termination, or from actual substantial completion or abandonment of the work if notice of termination is not filed. The bankruptcy court held as to one of the two projects for which no notice of termination was filed that the sixty-day period applied, while the district court on appeal, applying 9:4822(A), ruled that because the contract was properly recorded the thirty-day period never began to run. The Court of Appeals affirmed, in keeping with earlier state law decisions on the subject (noting that the language of La. R.S. 9:4822(A) is clear on its requirements), entailing that Fitzgerald's suit related to the project with no notice of termination of record was not too late.

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Letter From the Partners

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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Surety Decisions and Non-Louisiana Cases

Durham Land Owners Ass'n v. County of Durham, 2006 WL 1526112 (N.C. App. 2006)

In a case decided June 6, 2006, the North Carolina Court of Appeals held that Durham County's impact fees on new home construction are illegal. The impact fees were imposed to require builders of new homes to assist in paying for new infrastructure – including schools – to accommodate the anticipated burden on the system caused by the new housing. Durham was the first North Carolina county to pass an impact fee ordinance without specific authority from the North Carolina legislature. The County contended that despite lacking specific enabling legislation from the General Assembly, it nevertheless had the authority to issue this type of ordinance.

The County cited North Carolina General Statute § 153A-102 as the source of its authority to enact the fee provision. That statute allows the board of county commissioners to "fix the fees and commissions charged by county officers and employees for performing services or duties permitted or required by law." The Court of Appeals rejected that argument, holding that the language of the statute suggests a "fee" more in line with a fixed cost to a recipient for an over-the-counter type service provided by a county officer or employee who is performing that service, processing, or transaction pursuant to law. The court noted, also, that providing certain services – like schools – "is a duty of the County itself, not a duty of the County's 'officers and employees.'" In its decision, the court rejected the reasoning in the seminal impact fee case of *Home Builders and Contractors Assoc. of Palm Beach County v. Board of County Commissioners of Palm Beach County*, 446 So.2d 140 (Fla.Ct.App.1983) (wherein a Florida appellate court determined that a road impact fee imposed by Palm Beach County was a regulation, not a tax, and was supported by the broad regulatory powers given to Florida counties).

El Dorado Irrigation Dist. v. Traylor Bros., Inc., 2006 WL 38953 (E.D. Cal. 2006).

The El Dorado (California) Irrigation District entered a construction contract with the defendant, Traylor Brothers, Inc., out of which grew a series of problems and extensive litigation. The liquidated damages provision in the contract provided that the EID would be entitled to recover $500 per calendar day for each day the project was not substantially complete. Plaintiff claimed millions of dollars in delay damages beyond the LD assessment, to which the defendant contractor objected.

While the court readily allowed some of the non-liquidated damages as falling under the category of a separate and distinct "corrective work" provision of the contract, the liquidated damages provision was held to apply on its face to millions of dollars in additional consequential damage claims related to contractor delay. In response, the EID argued that the liquidated damages clause was unenforceable as being unreasonable, as it allowed only for recovery of $191,000 for delays that ultimately cost millions. California law states that a liquidated damages provision is valid unless "manifestly unreasonable under the circumstances." The EID also urged that certain categories of its losses were not intended to be subsumed in the LD clause because they were easily ascertainable (the LD clause specifically noted that the liquidated damages were agreed to by the parties because "…damages for Contractor delay are expensive to litigate and difficult to ascertain…," and that the contractor "used its lopsided bargaining power to force an inequitable liquidated damages measure." Although the court stated that the wide disparity between actual and liquidated damages gave the plaintiff's argument "a certain appeal," the court ultimately held that the EID did not support its arguments that the parties contemplated exclusion of certain delay damage categories or that the contractor had an unfair advantage in negotiating the contract and the LD clause. The liquidated damages provision was held to be enforceable, severely limiting the recovery of the plaintiff.

Diversified Carting, Inc. v. City of New York, 2006 WL 147584 (S.D.N.Y.)

In a case arising from the aftermath of the terrorist attacks on 9/11, the plaintiff, Diversified Carting, Inc., an excavation and demolition contractor, sued the City of

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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 readers. 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.

Sheeting happens

Plaintiffs in *Millican v. River Road Construction, Inc*., 924 So.2d 255 (La. App. 5 Cir. 2006), sued to recover for damage to their homes they alleged was a result of sheet pile work done on the Suburban Canal Project in Metairie, Louisiana. Made defendants were the designers and contractors of the project, as well as Jefferson Parish. The primary issue was whether the installation of sheeting is considered "pile-driving" under Louisiana law, giving rise to strict liability for damages caused by the activity.

Article 667 of the Louisiana Civil Code provides strict liability (*i.e.*, proof of negligence is not required to trigger liability under the Code article) against anyone causing damage to another through an ultra-hazardous activity, which, by specific reference in the statute, includes pile-driving. The court held that, as a matter of law, driving of sheeting is not pile-driving under article 667, and, therefore, rejected the strict liability claims of the plaintiff. Other claims of the plaintiff based in negligence were also rejected because the plaintiff failed to counter defense experts' affidavits that the sheet pile activity did not cause the damage to the plaintiff's home.

New Home Warranty Act: still an exclusive club

In *Thibodaux v. Arthur Rutenberg Homes, Inc*., 2005 WL 3489527 (La. App. 1 Cir. 2005), plaintiffs-home-owners sued multiple parties under the Louisiana New Home Warranty Act to recover for defective construction of their residence. The trial court awarded several different components of damages to the homeowners against the homebuilder, including "non-pecuniary" damages, or damages for the emotional pain and suffering incurred by the homeowner because of the faulty construction.

The Louisiana NHWA states that, unless the parties agree otherwise in writing, the statute excludes any loss or damage which does not constitute a defect in the construction of the home by the builder. The statute limits recovery to actual damages arising out of the defect. Reading these and other contract provisions together, the court found that the NHWA precludes the recovery of nonpecuniary damages, meaning "damage of a moral nature which does not affect a 'material' or tangible part of a person's patrimony." The Court of Appeal also found that an assignment during the litigation by the homeowners of certain NHWA claims to a party defendant with which the homeowners had settled was not prohibited under the statute.

Actual substantial completion trumps the issuance of the notice in calculation of LDs

In *All Seasons Construction, Inc. v. Mansfield Housing Authority*, 920 So.2d 413 (La. App. 2 Cir. 2006), the general contractor, All Seasons, sued the Mansfield Housing Authority to have restored to it the amount of liquidated damages withheld under a construction contract between the parties for the renovation of twenty-eight (28) buildings.

All Seasons alleged the project was substantially complete on April 28, 2000, the contractually mandated end date of the contract. The project owner claimed that the job was not substantially complete until August 18, 2000, the date the certificate of substantial completion was actually issued along with the final punch list. According to the owner, extensive punch lists prepared by the architect showed substantial work on the project remained.

The court examined the concept of "substantial completion" under the contract and Louisiana law. Substantial completion was defined in the contract as "the stage in the progress of the Work when the Work… is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use." Louisiana Revised Statute 38:2241.1 (part of the Public Works Act) defines "substantial completion" in a similar way: as "the finishing of construction… to the extent that the public entity can use or occupy the public works or use or occupy the specified area of the public works for the use for which it was intended."

The court of appeal determined that the trial court was correct when it found that All Seasons achieved substantial completion by the contract end date. According to the court, at that time the "majority of the work had been performed," and the buildings were, in fact, occupied by tenants during the construction process. The existence of minor defects did not preclude a finding of substantial completion, the court noting that the length of the punch list in this case was magnified because a separate punch list was prepared for each of the 28 buildings – and most items were repetitive. Additionally, many of the punch list items were found to be cosmetic in nature.

News and Notes

Movin' On Up!

The firm is pleased to announce the relocation of its New Orleans offices two floors up – now on the 26th floor of Poydras Center. The new address of the firm is:

Shields Mott Lund L.L.P.
650 Poydras Street
Suite 2600
New Orleans, Louisiana 70130

All firm telephone numbers and email addresses will remain the same. If you are in the neighborhood, please stop by and visit our new digs!

Upcoming Construction Law Seminars

Shields Mott Lund L.L.P. is pleased to announce an upcoming construction law seminar:

Resolving Problems and Disputes on Construction Projects (National Business Institute), July 14, 2006, New Orleans Marriott, 555 Canal Street, New Orleans, Louisiana, 9:00 a.m. – 4:30 p.m.

Our seminars are designed to address the legal issues that the construction industry faces and to zero in on the options that make the best legal advice. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. We sincerely hope you can this seminar. Additional information on the seminar can be obtained by contacting Sonny Shields at Shields Mott Lund (504-581-4445) or National Business Institute at www.nbi-sems.com.

Surety Decisions and Non-Louisiana Cases continued from page 2

New York and the Department of Homeland Security, among others, to recover payment for work performed in cleanup services at the site of the World Trade Center following the attacks.

About a week after the tragedy occurred, FEMA contracted with the state of New York to pay 100% of all "eligible" costs incurred in the clean up. The plaintiff never entered a written agreement with FEMA or any other entity to perform cleanup services, though it did perform the work at the direction of contractors that had a contract with the city or state.

The plaintiffs argued that the President's executive orders following the tragedy constituted a binding contract with plaintiff. The plaintiffs also claimed that a contract was implied based on the defendants' conduct. The court rejected both of these arguments, finding that neither manifested an intent by the government or anyone else to create a binding agreement with the plaintiff. Full summary judgment was granted to the federal government, with others obtaining summary judgments on contract claims and leaving extant for the plaintiff to try a handful of characteristically more-difficult (from a proof and recovery perspective) unjust enrichment/*quantum meruit* claims against certain contractors and the city.

McCoy v. Coker, 620 S.E.2d 691 (N.C. App. 2005)

A homeowner brought suit against the repair contractor, county and building inspector employed by the city to recover damages from toxic mold found in his home. The North Carolina appeals court ruled that the city waived its sovereign immunity (*i.e.*, the right of a governmental entity to be free from liability in tort) to the extent of its insurance coverage under the insurance policy purchased to cover liability for negligent acts of its employees.

Under North Carolina law, a county is immune from suit for the negligence of its employees in the exercise of governmental functions. However, the court ruled that when a county purchases liability insurance, it waives governmental immunity to the extent it is covered by that insurance.

After making that initial determination, the court ruled that the policy covered the actions of the negligent building inspector and that the negligent inspection constituted an "accident" under the policy.

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