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ATTORNEYS AND COUNSELLORS AT LAW

Louisiana Construction Law and News Update

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In this issue:

Performance Bond Pleading Pitfalls… and Surety Defenses

In the recent decision of *84 Lumber Company v. F.H. Paschen, S.N. Nielsen & Assocs., LLC*, No. 12-1748, 2017 WL 467679 (E.D. La. Feb. 3, 2017), the United States District Court for the Eastern District of Louisiana dismissed a general contractor's claims against a project surety, holding that the contractor had not adequately pled satisfaction of the performance bond's "conditions precedent." The case arose out of two school construction projects in New Orleans area, the Mildred Osborne Project and the South Plaquemines Project. F.H. Paschen, S.N. Nielsen & Associates, LLC ("Paschen") served as the general contractor on both projects. Paschen subcontracted part of its work to J & A Construction Management Resources Company, Inc. ("J & A") and J & A in turn subcontracted with plaintiff 84 Lumber Company ("84 Lumber"). Fidelity and Deposit Company of Maryland ("Fidelity") issued performance bonds for each of the sub-subcontracts between J & A and 84 Lumber. Both bonds identified 84 Lumber as the Principal, J & A as the Obligee, and Fidelity as the Surety. Fidelity added riders to both bonds, which amended the bonds by naming Paschen as a dual obligee.

On July 5, 2012, 84 Lumber sued Paschen, Fidelity, and other defendants in the Eastern District of Louisiana, alleging that it was not paid in full for work performed under its sub-subcontract with J & A. Paschen answered 84 Lumber's complaint, adding J & A as a third-party defendant and crossclaiming against Fidelity. As against Fidelity, Paschen asserted two claims. First, Paschen sought damages for the failure of both J & A and 84 Lumber to perform under Paschen's subcontract with J & A. Second, Paschen sought to recover damages as a dual obligee on the performance bonds issued by Fidelity.

After a multiyear stay pending arbitration, in 2016, Fidelity moved for summary judgment and judgment on the pleadings, respectively, on Paschen's claims. On the first claim, Fidelity argued that it could not be held liable for 84 Lumber's alleged breach of the J & A subcontract - - as 84 Lumber was not a party to that subcontract and Fidelity did not bond that subcontract. Fidelity opposed Paschen's second claim by noting that the performance bonds clearly set out certain conditions precedent to Fidelity's obligations, and that Paschen's third-party complaint did not adequately plead the satisfaction of the conditions precedent as required under Rule 9(c) of the Federal Rules of Civil Procedure.

The Eastern District ruled in favor of Fidelity on both motions and dismissed all of Paschen's claims against the surety. The grant of summary judgment was straightforward. Paschen's claims arising out of J & A's breach of its subcontract with Paschen were dismissed because Paschen submitted no evidence indicating that the performance bonds applied to a contract other than the sub-subcontract between J & A and 84 Lumber or that the bonds guaranteed the performance of any party besides 84 Lumber.

More interestingly, the Court also granted judgment on the pleadings, approving of Fidelity's "conditions precedent" pleading argument. Interpreting the bond language, the court isolated two conditions precedent to trigger Fidelity's obligations under the performance bond. First, the Court found that the bond required that 84 Lumber be in default of the bonded sub-subcontract between 84 Lumber and J & A. Second, the Court read the bond to mandate that 84 Lumber be declared in default by one of the obligees. The Court then turned to the requirements of Federal Rule of Civil Procedure 9(c), which instructs that "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed." The Court determined that, while Paschen pleaded the satisfaction of the first condition, satisfaction of the second condition precedent was not pleaded anywhere on the face of Paschen's complaint. Paschen's failure to allege that it had declared 84 Lumber in default resulted in dismissal of its claims against the surety.

This case sounds a warning to obligees suing performance bond sureties in federal court: Plead satisfaction of applicable conditions precedent, or have your claims thrown out. On the other hand, the decision of the Eastern District of Louisiana in *Paschen* provides sureties with more ammunition to seek speedy dismissals of claims made against them. The technicalities of pleading do matter.

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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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Shields | Mott L.L.P Wins Reinstatement of $15.4 Million Louisiana Private Works Act Lien

In a recent appellate decision obtained by Shields | Mott L.L.P., the Louisiana Fourth Circuit Court of Appeal held that cancellation of a Louisiana Private Works Act lien was manifestly erroneous where a contractor met all proper lien requirements, particularly the requirement of reasonably itemizing the elements comprising its claim. In *225 Baronne Complex, LLC v. Roy Anderson Corp.*, 2016-0492 (La. App. 4 Cir. 12/14/16), --- So. 3d ---, 2016 WL 7238975, *writ denied*, No. 2017-C-0326 (La. 4/7/17), 2017 WL 1375165, Roy Anderson Corporation ("RAC") entered into a $61.3 million design-build contract with 225 Baronne Complex, LLC ("the Owner") for the construction of 192 apartments, a 188-room hotel, and parking garage ("the Project"). On October 23, 2015, the Owner filed its acceptance of the work. But as so often occurs, Project payment disputes lingered. RAC subsequently recorded a $15.4 million lien ("the Lien") under the Louisiana Private Works Act (La. R.S. 9:4801 *et seq.*) for unpaid material, labor, equipment, and services rendered to the Project.

On January 12, 2016, the Owner filed suit to remove RAC's Lien, claiming that it was improper for two main reasons. First, the Owner contended that the parties' design-build contract did not authorize the Lien. Second, the Owner opined that the Lien contained amounts that had not been submitted to the Owner for payment and disputed amounts. The Owner not only sought removal of the Lien, but also damages and attorney's fees. Concluding that a lack of prior invoices from RAC to the Owner showed that RAC's Lien was "unsupported," the trial court granted the Owner's removal petition and cancelled the Lien. RAC devolutively appealed on March 15, 2016.

On appeal, the Louisiana Fourth Circuit reversed the trial court's ruling and ordered reinstatement of the Lien. The Fourth Circuit found that RAC had timely filed the Lien within 60 days of substantial completion and had complied with all formal requirements of the Private Works Act. The Fourth Circuit's decision stressed the purpose of Private Works Act liens: to adequately place the Owner and third persons on notice that a privilege is claimed on the property. Although the Owner here claimed that RAC had not "reasonably itemize[d]" the amounts claimed in the Lien per La. R.S. 9:94822(G) or submitted all requests for payment prior to its filing, the Fourth Circuit held that "La. R.S. 9:4822 does not require the sums encompassing the Lien be invoiced or submitted beforehand in order to perfect a valid lien." The Fourth Circuit further held that RAC had described the nature of the obligation giving rise to the Lien by providing an itemized breakdown of all the costs incurred in the Project's completion. The court found that while the parties' design-build contract did give the Owner a remedy for a lien filed when the Owner was not in default based on submitted invoices, it did not explicitly bar the filing of a general contractor lien. Thus, the Owner's contract-based arguments failed. On April 7, 2017, the Louisiana Supreme Court declined to review the Fourth Circuit's reversal.

This decision imparts some valuable reminders to contractors and owners alike. For contractors or other lien claimants, this case reaffirms the importance of following the letter of the law with respect to lien-filing formalities. While those seeking liens under La. R.S. 9:4822 need not attach invoices to their sworn statements of claim, courts may require highly particularized descriptions of the nature of the outstanding obligations and sums owed. Meeting the procedural requirements of the La. R.S. 9:4822 remains half the battle. For project owners, too, this decision is instructive. Here, the Owner did not offer sworn testimony or evidence at the lien removal hearing to dispute the sums claimed by RAC. In order to get rid of a meritless Private Works Act lien, a project owner must shoulder the burden and prove that the lien was filed without reasonable cause. As the Fourth Circuit determined in *225 Baronne*, the fact that the exact amount owed may be in dispute will not be sufficient to invalidate a lien outright.

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Call to Action

The case of *Golden Nugget Lake Charles, L.L.C. v. W.G. Yates & Sons Construction Company*, No. 16-30496, --- F.3d --- (5th Cir. 2017), 2017 WL 892407, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") held that, where a project owner never took affirmative action to file a notice of substantial completion, a general contractor's statutory lien under the Louisiana Private Works Act ("LPWA") was timely even though recorded a year after substantial completion had actually been achieved.

In 2011, project owner Golden Nugget Lake Charles, L.L.C. ("Golden Nugget") engaged W.G. Yates & Sons Construction Company ("Yates") to serve as the general contractor for the construction of a casino, hotel, and spa ("the Project"). On December 1, 2014, Golden Nugget and Yates signed a certificate of substantial completion, indicating that the Project was fit for occupancy, but did not record it at the courthouse. The Project has been in use ever since. However, Golden Nugget acknowledged it had withheld approximately $18.7 million to protect itself against "estimated damages" caused by alleged contractual breaches by Yates.

On November 25, 2015, Golden Nugget filed a complaint in federal district court based on those alleged contractual breaches. Yates filed a counterclaim on the basis of the $18.7 million withheld by Golden Nugget. In its counterclaim, Yates indicated it would be "filing a statement of lien and privilege pursuant to [the Louisiana Private Works Act]" and would seek judicial enforcement of this lien. When Yates followed through and actually filed its lien statement on December 23, 2015, Golden Nugget sought partial dismissal on the grounds that Yates had not filed its lien within sixty days of substantial completion as required by the Private Works Act. The district court agreed with Golden Nugget's interpretation of La. R.S. 9:4822, and dismissed Yates' claim for a statutory lien with prejudice. Yates filed a notice of appeal thereafter.

On appeal, the Fifth Circuit addressed the question of whether the phrase "substantial completion of the work" in La. R.S. 9:4822(B) refers to the occurrence of an event or the recordation of a document. Yates contended that the term requires Golden Nugget, as the Project owner, to take affirmative action by filing either a notice of termination or a notice of substantial completion of the work in the local property records. Because such a document was never actually *filed* by Golden Nugget, Yates claimed its lien statement - - filed over a year after the parties signed the certificate of substantial completion - - was nonetheless timely. By contrast, Golden Nugget argued that the sixty-day period during which Yates could have filed its lien statement had long expired. Golden Nugget drew support for its argument from the language of La. R.S. 9:4822(H), which defines substantial completion as an event; Yates drew support from language of La. R.S. 9:4822(F), clearly referencing the filing of a document.

The Fifth Circuit found the text of the Private Works Act ambiguous, so it looked to Louisiana courts' interpretations. While noting that Louisiana courts have not addressed the precise question at hand - - whether La. R.S. 9:4822(B), which applies to general contractors, considers "substantial completion" to be an event or a document - - cases involving subcontractors indicate that an owner must affirmatively *file* a notice to trigger the lien-filing clock. Thus, the Fifth Circuit held that because Golden Nugget never actually filed a notice of substantial completion (or termination), Yates's lien was timely:

> The LPWA places the burden on an owner to take affirmative action to cut off potential claims when a contract has been recorded, whether it is a general contractor or a subcontractor. The weight of Louisiana case law, in combination with the nearly identical language in subsections (B) and (F), suggest that the sixty-day period in 9:4822(B) begins to run when either a notice of termination or a notice of substantial completion is filed. 2017 WL 892407, at *5.

Construction project owners beware: Affirmative action is not controversial; it is required in the federal Fifth Circuit.

The Latest Installment in the *Pierce-Gootee* Saga

The Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court have been engaged in an extended "conversation" about what it takes to perfect a statement of claim ("lien") under the Louisiana Public Works Act, a conversation which is turning lien law as practiced for 30 years by Louisiana construction lawyers on its head.

In May 2016, the Louisiana Supreme Court held in *Pierce Foundations, Inc. v. JaRoy Construction, Inc.*, 2015-0785 (La. 5/3/16); 190 So. 3d 298, that a subcontractor in contractual privity with a general contractor did not have to file a lien on a public works contract in order to pursue a lawsuit against the project surety. The decision in that matter should be held to the facts in that case. There, a first-tier subcontractor filed suit against the project contractor and its surety long before the filing of the notice of acceptance or default - - and without filing a sworn statement of claim in the mortgage records. The Supreme Court found that La. R.S 38:2242 and La. R.S. 38:2247, concerning filing a public works lien, use "confusing - - even conflicting - - language," because the first provision uses the permissive "may" when talking generally about filing a lien and the second the restrictive term "requirements" when describing whether a lien must be filed to have a "right of action" on the Public Works Act bond. In other words, while section 2242 provides that a claimant "may" file a sworn statement of the amount claimed, section 2247 suggests that a claimant is required to comply with 2242's notice and recordation "requirements" in order to proceed against the bond. As what a scathing dissent called "nothing more than legislating from the bench," the Pierce majority ultimately held that the first-tier subcontractor's failure to file a lien resulted in the loss of its privilege against the public owner, but did not affect a subcontractor's right to proceed directly against the contractor and its surety. This holding was important because, under this specific set of facts, it preserved a first-tier subcontractor's right to pursue the surety, even absent a filed Public Works Act lien.

In *Gootee Construction, Inc. v. Dale N. Atkins*, 15-0376 (La. App. 4 Cir. 11/4/15); 178 So. 3d 629 ("*Gootee I*"), the Louisiana Fourth Circuit Court of Appeal found a public works act lien was premature under La. R.S. 38:2242 because it was filed prior to the recordation of acceptance by the project's owner and not "within" the forty-five day window running from recordation of acceptance. The *Gootee I* opinion did not expressly consider the subcontractor's rights against the surety bond. Last year, the state Supreme Court granted writs and ordered the Fourth Circuit Court of Appeal to reconsider its ruling "in light of" *Pierce*. The Fourth Circuit was thus presented with a golden opportunity to revise its decision in *Gootee I* - - or expand or contract the reach of the Supreme Court's ruling in *Pierce*.

On reconsideration, the Louisiana Fourth Circuit held that "the *Pierce* Court holding is limited to a subcontractor's rights to proceed directly against a surety despite his failure to comply with notice and recordation as provided by La. R.S. 38:2242." The Fourth Circuit did not revise its holding in *Gootee I*, distinguished *Pierce*, and held tight to its view that the lien-filing period does not begin to run until notice of acceptance or default is filed. The Supreme Court recently denied writs, so this saga is complete - - at least for now.

Thus, for better or worse, a ready rule is that a first-tier subcontractor can only file a public works lien strictly within the forty-five days following the recordation of the notice of acceptance by the owner or notice of default, and not beforehand. Depending on the facts, filing a statement of claim prematurely may not affect the subcontractor's rights to sue the contractor or surety, but it also may not preserve its privilege against the public owner.

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Louisiana Construction Law and News Update

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News and Notes

Construction Seminars

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

The Rules of Evidence: A Practical Toolkit
National Business Institute
New Orleans, Louisiana
May 25, 2017

The Potential Price of Ethics and Liability
Annual Gulf States Engineering Conference
Sandestin Golf & Beach Resort
June 18-20, 2017

Dealing with Regulators and the Unfair Claim Settlement Practices Act, State and Federal
Surety Claims Institute Meeting
Nemacolin Woodlands Resort
Farmington, Pennsylvania
June 23, 2017

Contractor's Dilemma of Dealing with Bad Plans and Specs
Lorman Education Services – Webinar
July 12, 2017

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.