

CARLO DITTA, INC.

NO. 14-CA-116

VERSUS

FIFTH CIRCUIT

J. CALDARERA & COMPANY, INC.

COURT OF APPEAL

STATE OF LOUISIANA

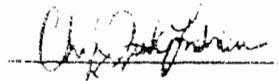
ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 702-202, DIVISION "A"  
HONORABLE RAYMOND S. STEIB, JR., JUDGE PRESIDING

APRIL 9, 2014

COURT OF APPEAL  
FIFTH CIRCUIT

FILED APR - 9 2014

**ROBERT M. MURPHY**  
JUDGE

  
CLERK  
Cheryl Quirk Landrieu

Panel composed of Judges Susan M. Chehardy, Fredericka Homberg Wicker, and  
Robert M. Murphy

JOHN W. WATERS, JR.  
KRISTIN G. MOSELY JONES  
ATTORNEYS AT LAW  
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COUNSEL FOR DEFENDANT/APPELLANT

**APPEAL DISMISSED**

RMM  
SME  
FW

On appeal, appellant challenges the trial court's grant of appellee's motion for summary judgment. For the following reasons, we dismiss this appeal for lack of jurisdiction.

Appellant, J. Caldarera & Co., Inc. ("Caldarera"), contracted with appellee, Carlo Ditta, Inc. ("Ditta"), to provide concrete for placement of a foundation's "shear-wall." During the delivery of concrete, one of Ditta's concrete plants was struck by lightning, interrupting the supply and delivery of the concrete and causing a cold joint in the concrete that had to be demolished and replaced. Caldarera refused to pay for the materials that were defective, and Ditta filed suit on open account on June 6, 2011.

On June 14, 2011, Caldarera reconvened against Ditta for breach of contract to recover damages for replacing the wall. Ditta filed an exception of prescription

and, in the alternative, a motion for summary judgment on Caldarera's reconventional demand.

On December 19, 2013, the trial court granted Ditta's motion for summary judgment dismissing Caldarera's reconventional demand for breach of contract, without reaching the exception of prescription. The trial court judgment included reasons that the defendant failed to indicate what written contractual provision required an uninterrupted supply of concrete and failed to demonstrate any material issue of fact that there was an oral agreement for same; that there was an adequate opportunity for discovery; and that the lightning strike of Ditta's plant would qualify as an Act of God.

Defendant now seeks an appeal of the summary judgment ruling when plaintiff's suit on open account remains. Under La. C.C.P. art. 1915(A), a final judgment may be rendered and signed by the court, even though it may not grant the successful party all of the relief prayed for, or may not adjudicate all of the issues in the case. La. C.C.P. art. 1915(B) states that when a court renders a partial summary judgment as to less than all of the claims, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court. Although a grant of a summary judgment *may* be a final judgment, a summary judgment pursuant to La. C.C.P. art. 966(E) does not fall under La. C.C.P. art. 1915(A) but rather La. C.C.P. art. 1915(B). A summary judgment under La. C.C.P. art. 966(E) does not dispose of the entire case as to the parties though it may dispose of a particular issue or theory of recovery.

The judgment granting plaintiff's motion for summary judgment falls under La. C.C.P. art. 1915(B)<sup>1</sup> in that it is a partial summary judgment not

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<sup>1</sup> La. C.C.P. art. 1915(B) provides:

(1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in

immediately appealable to this Court. The judgment did not dismiss plaintiff or defendant as a party but merely dismissed the defendant's reconventional demand. In order to make this partial judgment final and, thus, appealable, the trial court must have designated it as a final judgment. Since this did not occur, we lack jurisdiction over this appeal.

Accordingly, we dismiss the appeal.

**APPEAL DISMISSED**

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an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

- (2) In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
ROBERT M. MURPHY  
STEPHEN J. WINDHORST  
HANS J. LILJEBERG

JUDGES



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CHERYL Q. LANDRIEU  
CLERK OF COURT

MARY E. LEGNON  
CHIEF DEPUTY CLERK


SUSAN BUCHHOLZ  
FIRST DEPUTY CLERK

MELISSA C. LEDET  
DIRECTOR OF CENTRAL STAFF

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**NOTICE OF JUDGMENT AND  
CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **APRIL 9, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
\_\_\_\_\_  
CHERYL Q. LANDRIEU  
CLERK OF COURT

**14-CA-116**

**E-NOTIFIED**

THOMAS J. EPPLING  
SARA P. SCURLOCK

**MAILED**

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