

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0676

AMERICAN ECONOMY INSURANCE COMPANY AS  
SUBROGEE OF LOUISIANA INVESTMENT CORPORATION  
AND LOUISIANA INVESTMENT CORPORATION

VERSUS

*JEW*  
*RHP by JEW*  
*WFK*

MBD CONSTRUCTION COMPANY, INC., ALL STEEL BUILDING  
SYSTEMS, LLC F/K/A ALL STEEL SYSTEMS, LLC AND  
METAL BUILDING SOLUTIONS, L.L.C.

Judgment Rendered: MAR 27 2013

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Appealed from the  
19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 585,441

Honorable Janice Clark, Judge

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BEFORE: PARRO, WELCH, AND KLINE<sup>1</sup>, JJ.

<sup>1</sup> Hon. William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

## **WELCH, J.**

The plaintiffs, American Economy Insurance Company (“American Economy”), as subrogee of Louisiana Investment Corporation, and Louisiana Investment Corporation (“Louisiana Investment”), appeal a summary judgment granted in favor of defendant, MBD Construction Company, Inc. (“MBD”), dismissing the plaintiffs’ claims against that defendant. For reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

### **FACTUAL AND PROCEDURAL HISTORY**

On March 24, 2005, DG Partnership #1, L.L.C. (“DG”) contracted with MBD to construct a commercial building (a Dollar General store) at 9399 Highway 67 in Clinton, Louisiana.<sup>2</sup> The construction contract was the standard form agreement prepared by the American Institute of Architects (“AIA”) and contained a section pertaining to a waiver of subrogation for damages caused by losses covered by property insurance. A certificate of substantial completion was issued for the construction project on July 5, 2005, and on January 13, 2006, a contractor’s certification and warranty was issued by MBD to DG.

On January 17, 2006, DG sold the property and building by act of cash sale to Louisiana Investment. The act of cash sale provided: “Seller [DG] hereby sells and delivers with full warranty of title and with full substitution and subrogation to all rights and actions of warranty Seller may have unto” Louisiana Investment.

Around December 11, 2008, it snowed in the area of Clinton. As a result of the snowfall, the roof of the Dollar General store collapsed; snow entered the building and caused property damage to the store. The damages sustained by Louisiana Investment were covered by a policy of insurance issued by American

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<sup>2</sup> MBD subcontracted with All Steel Building Systems, L.L.C. (“All Steel”) to provide metal building supply materials and framing for the building’s construction. All Steel contracted with Metal Building Solutions (“MBS”) to assist All Steel with providing the metal building supply materials and framing. Although All Steel and MBS are parties to this suit, the issues raised in this appeal do not pertain to either of those parties.

Economy. Louisiana Investment made a claim under the policy, and American Economy paid the claim, less a \$1,000 deductible.

Thereafter, American Economy and Louisiana Investment commenced these proceedings, seeking damages from several defendants alleged to be responsible for the collapse of the roof. Specifically, American Economy sought reimbursement for the monies it had paid to Louisiana Investment pursuant to its insurance policy, and Louisiana Investment sought reimbursement for the \$1,000 deductible relating to the claim.

Based on the waiver of the subrogation clause set forth in the construction contract between DG and MBD, MBD filed a motion for summary judgment seeking the dismissal of the plaintiffs' claims, arguing that since DG sold the property to Louisiana Investment subject only to the rights that DG had, and since DG waived its subrogation rights prior to the sale, no subrogation rights were conveyed to Louisiana Investment. Thus, MBD contended that plaintiffs' claims against MBD were barred by the waiver of subrogation. After a hearing, the trial court granted the motion for summary judgment and dismissed the plaintiffs' claims against MBD with prejudice. A judgment in accordance with the trial court's ruling was signed on August 18, 2011, and it is from this judgment that the plaintiffs have appealed.

On appeal, American Economy and Louisiana Investment contend that the trial court erred in granting the motion for summary judgment and in dismissing their claims against MBD, because the construction contract between DG and MBD was not binding on Louisiana Investment, as Louisiana Investment was not a party to the contract, and there is no language in the construction contract or any other enforceable contract or agreement that assigns or otherwise binds any subsequent purchaser of the property (such as Louisiana Investment) to the terms, conditions, rights, and responsibilities of the construction contract.

## LAW AND DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. The summary judgment procedure is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); **Power Marketing Direct, Inc. v. Foster**, 2005-2023 (La. 9/6/06), 938 So.2d 662, 668. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. *Id.*; La. C.C.P. art. 966(B).

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, that is, whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Power Marketing Direct, Inc.**, 938 So.2d at 669. In this case, since the material facts are not in dispute, we look solely to the legal question presented by MBD's motion for summary judgment, *i.e.*, whether, as a matter of law, the waiver of subrogation in the construction contract between MDB and DG was binding on Louisiana Investment, a subsequent purchaser of the property, who was not a party to the construction contract.<sup>3</sup> We find that it was not.

It is well settled that only a party to a contract can be bound by its provisions. **Farmers State Bank and Trust Company v. Leger**, 503 So.2d 1141, 1143 (La. App. 3<sup>rd</sup> Cir. 1987), citing La. C.C. art. 1983 (which provides that “[c]ontracts have the effect of law for the parties”). In this case, there is no dispute

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<sup>3</sup> See **Diamond B Construction Company, Inc. v. City of Plaquemine**, 95-1979 (La. App. 1<sup>st</sup> Cir. 4/30/96), 673 So.2d 636, 640 (when a contract is to be interpreted by the court as a matter of law, a motion for summary judgment is a proper procedural vehicle to present the question to the court).

that Louisiana Investment was not a party to the construction contract between DG and MBD, and thus, should not be bound by its terms. However, MBD contends that Louisiana Investment is bound by the waiver of subrogation by DG, because Louisiana Investment, as the purchaser of the property and building from DG, could not acquire greater rights than those possessed by DG.

In determining whether Louisiana Investment is bound by the waiver of subrogation set forth in the contract between DG and MBD, we are guided by the general rules of contract interpretation set forth in La. C.C. arts. 2045, *et seq.* The interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. The words of a contract must be given their generally prevailing meaning. La. C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. La. C.C. art. 2048. Each provision in a contract must be interpreted in light of the other provisions, so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050.

The construction contract entered into between DG and MBD provides, in pertinent part, as follows:

## **ARTICLE 11 INSURANCE AND BONDS**

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### **§ 11.4 PROPERTY INSURANCE**

§11.4.1 Unless otherwise provided, *[DG] shall purchase and maintain ... property insurance* written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. *Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section*

9.10 or until no person or entity other than [DG] has an insurable interest in the property required by this Section 11.4 to be covered, whichever is later.

\* \* \*

**§ 11.4.7 Waivers of Subrogation.** [DG] and [MBD] waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect ... *for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.4 or other property insurance applicable to the Work*<sup>4</sup>, except such rights as they have to proceeds of such insurance held by [DG] as fiduciary. (Emphasis added.)

By its terms, this waiver of subrogation applies to damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to the contract or other property insurance applicable to the work. Additionally, the waiver of subrogation clause only applies to any property damage covered by insurance that was in effect during the time period required by §11.4.1. See Gray Insurance Company v. Old Tyme Builders, Inc., 2003-1136 (La. App. 1<sup>st</sup> Cir. 4/2/04), 878 So.2d 603, 608, writ denied, 2004-1067 (La. 6/18/04), 876 So.2d 814. See also Travelers Ins. Co. v. Impastato, 607 So.2d 722, 724 (La. App. 4<sup>th</sup> Cir. 1992); State v. U.S. Fidelity & Guar. Co., 577 So.2d 1037, 1039 (La. App. 4<sup>th</sup> Cir.), writ denied, 581 So.2d 684 (La. 1991) (addressing the effects of a similar waiver of subrogation provisions and finding that such waivers of subrogation reflect a clear intention to shift the risk of loss *during construction* to an insurer in order to avoid disputes which might cause delays in the completion of the construction.) Section 11.4.1 required property insurance to be maintained until at least final payment or until no one other than the owner had an insurable interest in the building.

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<sup>4</sup> The term "Work" was defined by § 1.1.3 of the contract as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by [MBD] to fulfill [MBD's] obligations."

According to the January 13, 2006 contractor's certification and warranty issued by MBD to DG, "Owner [(DG)] ha[d] paid the Contractor [(MBD)] in full under the [c]onstruction [c]ontract between the parties," "[c]onstruction ...ha[d] been fully and properly completed in accordance with [the contract]" and "[a]ll subcontractors, suppliers and laborers have been paid in full for their work." Thus, as of January 13, 2006, construction was complete, final payment had been made, and no other person or entity, other than DG, had an insurable interest in the building. Because the waiver of subrogation clause only applied to any property damage covered by insurance that was in effect during the time period required by §11.4.1, and since that time period had lapsed before Louisiana Investment became the owner of the property, the waiver of subrogation is not binding on Louisiana Investment or otherwise applicable to any of its claims for property damage after the time period required by §11.4.1.

MBD also argues that the waiver of subrogation is effective as to Louisiana Investment based on this court's decision in **Gray**, 878 So.2d 603. In **Gray**, another panel of this court examined whether, based on a virtually identical waiver of subrogation in a construction contract between the owner and the contractor, a contractor's liability insurer was prohibited from seeking reimbursement from the contractor's subcontractor for damages paid due to the subcontractor's faulty workmanship or negligence. *Id.* The trial court determined that the waiver of subrogation precluded recovery by the contractor's liability insurer, and this court affirmed the trial court's ruling. *Id.* at 608. However, in **Gray**, the party against whom the waiver of subrogation was applicable (the contractor) was a party to the contract containing the waiver, and further, the faulty workmanship at issue caused damage to the building *before final payment* had been made. In other words, the property damage occurred during the time period that the construction contract required the property insurance to be in effect, thus, the waiver of subrogation was

applicable. Accordingly, we find **Gray** is factually distinguishable, and therefore, not applicable to the case before us.

### **CONCLUSION**

Since Louisiana Investment was not a party to the construction contract between DG and MBD and since the waiver of subrogation is not otherwise enforceable against Louisiana Investment, we must conclude that the trial court erred in granting MBD's motion for summary judgment and dismissing the claims of Louisiana Investment and American Economy against MBD. The August 18, 2011 judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings. All costs of this appeal are assessed to the defendant/appellee, MBD Construction Company, Inc.

**REVERSED AND REMANDED.**