NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 2052

TED HEBERT, LLC

VS.

INFINIEDGE SOFTWARE, INC. AND HENRY EYRE, JR., INC. CONSULTING ENGINEERS

Judgment Rendered: SEP 19 2014

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket Number 100,293

The Honorable Thomas J. Kleibert, Jr., Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McClendon, J. concurs and agrees with the result reached by the majority.

WHIPPLE, C.J.

Plaintiff, Ted Hebert, L.L.C. appeals a judgment of the district court, sustaining the objection of *res judicata* and dismissing with prejudice Hebert's claims against defendant, InfiniEdge Software, Inc. For the reasons that follow, we affirm the judgment in part and reverse the judgment in part.

PROCEDURAL HISTORY

On April 21, 2008, InfiniEdge Software, Inc. ("InfiniEdge") entered into a contract with Arkel Constructors, Inc. to develop a piece of property located in Ascension Parish, Louisiana. Arkel then subcontracted with Ted Hebert, L.L.C. ("Hebert") to install, among other things, a sewer lift station, with attached sewer lines and manholes on InfiniEdge's property.

InfiniEdge's contract with Arkel called for the installation of a fifteen hundred (1,500) gallon capacity sewer lift station. However, according to Hebert, the project engineer Henry Eyre, Jr. later determined than an increase in size and capacity of the lift station was necessary and desirable to service future office buildings that may be built on the property. Eyre then instructed Hebert to increase the lift station size to twenty-five hundred (2,500) gallons, and to submit an invoice for the change. Hebert complied and installed the larger lift station. Thus, Hebert invoiced the general contractor, Arkel, for $20,000.00, the additional costs incurred for the larger lift station.

Arkel declined to pay the invoice, stating that there was no approved change-order for a larger sewer lift station. Hebert then asked Arkel to submit the invoice to InfiniEdge for payment. Arkel did so, and InfiniEdge refused to pay the invoice.

On June 14, 2011, Hebert filed the instant lawsuit, seeking payment for the additional costs incurred as a result of the upsized lift station, naming InfiniEdge

and Eyre as defendants.[1] The petition alleged, in pertinent part, that Brad Walker, the president of InfiniEdge, had authorized the project engineer (Eyre) to instruct Hebert to install the upsized sewer lift station, and that Hebert acted in good faith and solely at the direction of the engineer, Eyre, or InfiniEdge's authorized employees, when it installed the larger sewer lift station. Hebert alleged that InfiniEdge was unjustly enriched at Hebert's expense and was thus liable to Hebert, pursuant to LSA-C.C. art. 2055, for the costs of the upsized lift station.[2]

In response to the petition, InfiniEdge filed a peremptory exception raising the objections of no right of action, no cause of action, and peremption, urging that: (1) the rights available to Hebert for the damages alleged in the petition are governed by the Private Works Act, LSA-R.S. 9:4801 *et seq.*; (2) the remedies available to Hebert are set forth in LSA-R.S. 9:4682 *et seq.*, which requires that a lien or claim of privilege must be filed and suit instituted within the year of filing such lien to preserve the claim[3]; and (2) Hebert failed to comply with the same. Following a hearing, the trial court denied InfiniEdge's objections. Thereafter, InfiniEdge filed an application for supervisory writs with this court.

While InfiniEdge's writ application was pending with this court, Hebert filed an amended petition with the trial court. The amended petition again alleged, in pertinent part, that the president of InfiniEdge had authorized the engineer to instruct Hebert to install the upsized sewer lift station, but added that these actions

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[1]A joint motion and order to dismiss all claims against Eyre was signed by the trial court on September 5, 2012.

[2]Louisiana Civil Code article 2055 provides:

> Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.
>
> Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation.

[3]See also LSA-R.S. 9:4822 and 9:4823.

by InfiniEdge created an agency relationship between InfiniEdge and the engineer, and created an independent contract between InfiniEdge and Hebert for the installation of a new, larger, more expensive sewer lift station. The amended petition further alleged that "InfiniEdge and Eyre breached their contract with [Hebert] by refusing to pay the sums due for the sewer lift station. [Hebert] is entitled to recover for this breach of contract."

On June 18, 2012, this court granted supervisory writs and reversed the trial court's denial of InfiniEdge's exceptions of no cause of action, no right of action, and peremption. The action rendered by this court stated:

> WRIT GRANTED. The trial court's judgment of February 1, 2012 denying InfiniEdge's exceptions of No Right of Action, No Cause of Action, and Peremption is hereby reversed. This matter is governed by the Private Works Act and any claim which the subcontractor, Todd Hebert, LLC had for the price of his work has been extinguished by his failure to preserve it under La. R.S. 9:4801 et seq. An action for unjust enrichment is allowed only when the plaintiff has no other remedy at law. Pinegrove Electrical Supply Company, Inc. v. Cat Key Construction, Inc., 11-CA-660 (La. App. 5th Cir. 2/28/12). Since the plaintiff failed to pursue the remedies available to it pursuant to the Private Works Act, it may not now seek recovery based on a theory of unjust enrichment.

Hebert v. InfiniEdge, 2012-0352 (La. App. 1st Cir. 6/18/12) (unpublished writ action).

Following this court's writ action, InfiniEdge filed an answer in the trial court to Hebert's amended petition, raising as an affirmative defense that all of Hebert's claims, including the breach of contract claim, were dismissed by this court's order of June 18, 2012, in docket number 2012-CW-0352, *i.e.*, the writ action. InfiniEdge also sought sanctions pursuant to LSA-C.C.P. art. 863(B) and (D).[4]

[4]Although this pleading was entitled "Answer to Petition," the record reflects that this was InfiniEdge's answer to Hebert's **amended** petition.

A hearing on the motion for sanctions was conducted on September 10, 2012, wherein the trial court expressed concern with the procedural posture of the request for sanctions, commenting that a motion to dismiss or *res judicata* might be more appropriate, and, therefore, resolution of the motion for sanctions would be delayed until the "main claim" was resolved.

Thereafter, InfiniEdge filed a peremptory exception, raising the objection of *res judicata* and re-urging its requests for sanctions. Following a hearing, the trial court signed a judgment on September 13, 2013, sustaining the objection of *res judicata* and dismissing with prejudice all of Hebert's claims against InfiniEdge. The judgment also denied InfiniEdge's requests for sanctions.

Hebert then filed the instant appeal, seeking review of the September 13, 2013 judgment of the trial court. InfiniEdge answered the appeal, contending the trial court judgment should be revised to award it sanctions and requesting penalties for the filing of a frivolous appeal.

DISCUSSION

No Cause of Action

For ease of discussion, we first address InfiniEdge's argument that Hebert's amended petition fails to state a cause of action.[5] In support of the objection of no cause of action, InfiniEdge argues that "Hebert has asserted and readily admitted that it was a subcontractor hired by Arkel in connection with the private construction project owned by InfiniEdge which is the subject of the [a]mended [p]etition. Accordingly, because of a lack of privity and the application of the Private Works Act, the subcontractor has no cause of action against the owner,

[5]Although InfiniEdge did not raise the objection of no cause of action in response to the amended petition at the trial court level, LSA-C.C.P. art. 2163 provides that an appellate court may consider a peremptory exception filed for the first time in the appellate court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record. See also LSA-C.C.P. art. 927(5) (objection of no cause of action is to be raised through a peremptory exception).

InfiniEdge for the price of his work." InfiniEdge then adopts by reference the memorandum it filed with the trial court when it raised the objection of no cause of action as to Hebert's original petition.

In response, Hebert argues that its amended petition alleges a cognizable breach of contract claim and that the Private Works Act's peremption provision does not preclude Hebert's contract claim. We agree.

On appeal, the parties do not dispute that Hebert did not comply with the procedural requirements of LSA-R.S. 9:4822, and, therefore, any claims under the Private Works Act are perempted.[6] However, the Private Works Act states that any claims against the owner and the contractor granted by the Act are in addition to other contractual or legal rights the claimants may have for the payments of amounts owed them. LSA-R.S. 9:4802(D). Louisiana Revised Statute 9:4823(C) of the Private Works Act states, "The extinguishment of a claim or privilege shall not affect other rights the claimant or privilege holder may have against the owner, the contractor, or the surety." Moreover, as set forth in the jurisprudence, the Louisiana Private Works Act, LSA-R.S. 9:4801 *et seq.*, was enacted to facilitate construction of improvements on immovable property and does so by granting to subcontractors, among others, two rights to facilitate recovery of the costs of their work from the owner **with whom they lack privity of contract**. Jefferson Door Co., Inc. v. Cragmar Const., L.L.C., 2011-1122 (La. App. 4th Cir. 1/25/12), 81 So. 3d 1001, 1004, writ denied, 2012-0454 (La. 4/13/12), 85 So. 3d 1250; Byron Montz, Inc. v. Conco Const., Inc., 2002–0195 (La. App. 4 Cir. 7/24/02), 824 So.

[6]Louisiana Revised Statute 9:4802(A)(1) of the Private Works Act provides subcontractors with a claim against the owner and the contractor to secure payment of obligations arising out of the performance of work under the contract. Louisiana Revised Statute 9:4802(B) provides that subcontractors can also obtain a privilege on the immovable on which the work was performed to secure their claim. However, a subcontractor's claim and privilege under the Private Works Act is extinguished if the claimant or holder of the privilege does not preserve it as required by LSA-R.S. 9:4822 or file suit within one year after the expiration of time provided by R.S. 9:4822 for filing a statement of claim or privilege. See LSA-R.S. 9:4823(A).

2d 498, 502; see also Cosman v. Cabrera, 2009-0265 (La. App. 1st Cir. 10/23/09), 28 So. 3d 1075, 1078, fn.1 ("The Louisiana Private Works Act, found at LSA–R.S. 9:4801, *et seq.,* grants subcontractors the right to make a claim for payment on work performed against a homeowner and contractor, even though there is **no privity of contract** between the homeowner and subcontractor.") (Emphasis added).

Accordingly, although Hebert's claims under the Private Works Act are perempted, there may still be a viable cause of action for breach of contract. In considering an exception raising the objection of no cause of action, we must look only at the face of the pleadings, accept the well-pleaded facts as true, and determine whether the petition alleges sufficient facts to establish a contractual relationship between Hebert and InfiniEdge and breach of the same. See Ourso v. Wal–Mart Stores, Inc., 2008–0780 (La. App. 1st Cir. 11/14/08), 998 So. 2d 295, 298, writ denied, 2008–2885 (La. 2/6/09), 999 So. 2d 785.

In the amended petition, Hebert alleges that InfiniEdge authorized the engineer, not the general contractor, to instruct Hebert to install the upsized sewer lift station, thus creating an agency relationship between InfiniEdge and the engineer. The amended petition further alleges that Hebert then installed the larger lift station as per the instructions of the engineer, *i.e.*, InfiniEdge's agent, and that an independent contract between InfiniEdge and Hebert for the installation of a larger, more expensive sewer lift station was thereby created. Accepting these alleged facts as true, we find that Hebert's petition alleges a sufficient factual basis to establish a contractual relationship between Hebert and InfiniEdge, and states a cause of action for breach of said contract. Accordingly, the exception raising the objection of no cause of action, as raised by InfiniEdge on appeal, is hereby overruled.

Res Judicata

With regard to the peremptory exception raising the objection of *res judicata*, Hebert contends that the trial court erred in sustaining the objection because: (1) the breach of contract claim was not before this court when the June 18, 2012 writ action was rendered; and, (2) the prior writ action of this court is not a final judgment for purposes of *res judicata*.

The doctrine of *res judicata* is codified in LSA-R.S. 13:4231, which provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The chief inquiry is whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. However, the Louisiana Supreme Court has also emphasized that all of the following elements must be satisfied in order for *res judicata* to preclude a second action: (1) the first judgment is valid and final; (2) the parties are the same; (3) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (4) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of

the first litigation. Burguieres v. Pollingue, 2002–1385 (La. 2/25/03), 843 So. 2d 1049, 1053.

The burden of proving the facts essential to support the objection of *res judicata* is on the party pleading the objection. If any doubt exists as to the application of *res judicata,* the objection must be overruled and the lawsuit maintained. Landry v. Town of Livingston Police Dept., 2010–0673 (La. App. 1st Cir. 12/22/10), 54 So. 3d 772, 776.

Applying these legal precepts, the crucial issue herein is whether there was a valid and final judgment previously rendered in this case. Specifically, we must determine whether the June 18, 2012 writ action of this court constitutes a final judgment.[7]

Citing LSA-C.C.P. art. 1841, InfiniEdge contends that the prior writ action rendered in this matter constitutes a final judgment for *res judicata* purposes because it determined the merits of the case in whole or in part.[8] Specifically, InfiniEdge contends that the "judgment," *i.e.,* the writ action, sets forth decretal language which clearly states that Hebert's action for the price of its work was extinguished for failure to preserve the claim under LSA-R.S. 9:4801. Moreover, InfiniEdge contends that the "judgment" became final when Hebert took no further

[7]While *res judicata* is ordinarily premised on a final judgment on the merits, it has also been applied where there is a transaction or settlement of a disputed or compromised matter that has been entered into by the parties. Ortego v. State, Department of Transportation and Development, 96–1322 (La. 2/25/97), 689 So. 2d 1358, 1363. However, the existence or terms of a settlement or compromise is not an issue in the present matter.

[8]Louisiana Civil Code of Procedure article 1841 provides:

> A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.
> A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.
> A judgment that determines the merits in whole or in part is a final judgment.

action on the judgment within thirty days of its mailing, citing Rule 10, Section 5 of the Rules of the Supreme Court of Louisiana.[9]

We find that InfiniEdge's arguments lack merit.[10] Neither the trial court's "order," which this court reviewed on writs, nor the writ action rendered by this court contained decretal language dismissing any or all of Hebert's claims. A final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. These determinations must be evident from the language of the judgment without reference to other documents in the record. Landry v. Williamson, 2013-0928 (La. App. 1st Cir. 4/25/14) (unpublished opinion).

While we disagree with InfiniEdge's contention that the writ action should be treated as a final judgment for purposes of *res judicata,* we recognize that the writ action may constitute the "law of the case." Generally, when an appellate court reviews and considers arguments made in supervisory writ applications or

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[9]Rule 10, Section 5 of the Rules of the Supreme Court of Louisiana provides, in pertinent part:

> (a) An application seeking to review a judgment of the court of appeal either after an appeal to that court, or after that court has granted relief on an application for supervisory writs (but not when the court has merely granted an application for purposes of further consideration), or after a denial of an application, shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal; however, if a timely application for rehearing has been filed in the court of appeal in those instances where a rehearing is allowed, the application shall be made within thirty days of the mailing of the notice of denial of rehearing or the judgment on rehearing. No extension of time therefor will be granted.

[10]In Cantrell v. BASF Wyandotte Corp., 489 So. 2d 1062 (La. App. 1st Cir. 1986), a similar argument was made and rejected. The plaintiff filed a suit for personal injuries and the defendant filed a motion for summary judgment, asserting that the plaintiff was its statutory employee and consequently, it was immune from his tort action. The trial court denied summary judgment and this court granted the writ action, ordering the trial court to vacate the judgment denying the motion for summary judgment and enter judgment granting the same. The trial court then vacated its earlier judgment and rendered summary judgment in favor of BASF. The plaintiff appealed. The defendant filed a motion to dismiss the appeal and/or peremptory exception raising the objection of res judicata. This court maintained the appeal, finding that the writ action was not a final judgment, and, thus, it could not support an objection of *res judicata.* Cantrell, 489 So. 2d at 1063-64.

responses to such applications, the court's disposition on the issue considered becomes the "law of the case," foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. Diamond B Const. Co., Inc. v. Department of Trans. and Development, 2002-0573 (La. App. 1st Cir. 2/14/03), 845 So. 2d 429, 434. However, application of the "law of the case" principle to decisions made on applications for supervisory writs is discretionary. Id. Further, where a prior disposition is clearly erroneous and will create a grave injustice, it should be reconsidered. Id. Therefore, a prior "determination" in a pre-trial writ application is not necessarily binding on a subsequent appeal. Id.

In the instant matter, there is no indication that this court considered Hebert's breach of contract claim when considering the writ application and rendering an action in response thereto. Notably, Hebert filed the amended petition after the trial court denied InfiniEdge's objections to the original petition. Thus, the allegations and causes of action asserted in the amended petition were not submitted to the trial court when it issued the ruling denying InfiniEdge's objections to the original petition. Although Hebert attached the amended petition to his opposition to the writ application, there is no indication that this court considered the claims raised in the amended petition, as the writ action does not reference the amended petition or Hebert's cause of action for breach of contract. Moreover, it would have been error for this court to consider therein the amended petition. As set forth in Uniform Rules - Court of Appeal, Rule 1-3, courts of appeal should review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise. Furthermore, as previously discussed, a breach of contract claim is separate and apart from any claims arising under the Private Works Act, and, thus, the peremption provision of the Private Works Act would

not preclude a claim arising out of privity of contract. Accordingly, if the writ action did encompass and dismiss Hebert's breach of contract claim, as InfiniEdge contends, such a ruling would be clearly erroneous and subject to reconsideration. Diamond B, 845 So. 2d at 434.

In sum, we conclude that the trial court erred as a matter of law in sustaining the objection of *res judicata* as there was no "final judgment" previously rendered in this case. Moreover, Hebert's claim for breach of contract should not be dismissed under the "law of the case" doctrine.

Answer to Appeal and Sanctions

Having found merit to Hebert's appeal and having reversed the trial court's grant of the objection of *res judicata*, we deny InfiniEdge's answer to appeal, which seeks damages for frivolous appeal. Moreover, we find no merit to InfiniEdge's argument that the trial court erred in refusing to award sanctions, pursuant to LSA-C.C.P. art. 863(D).

CONCLUSION

For the above and foregoing reasons, we hereby reverse the September 13, 2013 judgment in part to the extent it sustained the exception of *res judicata* and dismissed Ted Hebert LLC's claim for breach of contract against InfiniEdge Software. We affirm the judgment of the trial court insofar as it dismissed Hebert's claim for unjust enrichment against InfiniEdge Software, and we remand the matter for further proceedings.[11] We further deny the relief sought in InfiniEdge's

[11] Hebert's amended petition reasserts the cause of action for unjust enrichment, which was raised in the original petition. The prior writ decision rendered by this court specifically addressed Hebert's cause of action for unjust enrichment, stating, in pertinent part:

> An action for unjust enrichment is allowed only when the plaintiff has no other remedy at law. Pinegrove Electrical Supply Company, Inc. v. Cat Key Construction, Inc., 11-CA-660 (La. App. 5th Cir. 2/28/12). Since the plaintiff failed to pursue the remedies available to it pursuant to the Private Works Act, it may not now seek recovery based on a theory of unjust enrichment.

Hebert v. InfiniEdge, 2012-0352 (La. App. 1st Cir. 6/18/12) (unpublished writ action).

answer to appeal. All costs of this appeal are assessed to InfiniEdge Software, Inc.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED; ANSWER TO APPEAL DENIED.

We maintain our prior ruling on Hebert's application for writs as to the unjust enrichment claim and, thus, conclude that the trial court did not err insofar as it dismissed Hebert's unjust enrichment claim.