

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0139

FOUNDATION MATERIALS, INC.

VERSUS

KRISTY NICHOLS, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES, AS
COMMISSIONER OF THE DIVISION OF ADMINISTRATION;
PAUL RAINWATER, IN HIS INDIVIDUAL CAPACITY, AS FORMER
COMMISSIONER OF THE DIVISION OF ADMINISTRATION;
KEVIN DAVIS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, AS
DIRECTOR OF THE GOVERNOR'S OFFICE OF HOMELAND SECURITY &
EMERGENCY PREPAREDNESS; DIVISION OF ADMINISTRATION; AND
GOVERNOR'S OFFICE OF HOMELAND SECURITY & EMERGENCY
PREPAREDNESS

Judgment rendered SEP 17 2014

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 620900
Honorable Wilson Fields, Judge

J. ARTHUR SMITH, III
ADRIENNE D. RACHEL
BATON ROUGE, LA

LESIA B. WARREN
DAVID W. BOGGS
BATON ROUGE, LA

BERNARD M. PLAIA, JR.
LaSHAUNTE MARTIN
BATON ROUGE, LA

ATTORNEYS FOR
PLAINTIFF-APPELLANT
FOUNDATION MATERIALS, INC.

ATTORNEYS FOR
DEFENDANTS-APPELLEES
KRISTY H. NICHOLS, PAUL W.
RAINWATER & THE DIVISION OF
ADMINISTRATION

ATTORNEYS FOR
DEFENDANT-APPELLEE
THE GOVERNOR'S OFFICE OF
HOMELAND SECURITY & EMERGENCY
PREPAREDNESS

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

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

PETTIGREW, J.

In this public records request litigation, the plaintiff, Foundation Materials, Inc. (Foundation), appeals a judgment denying its requests for preliminary and permanent injunctions and dismissing its claims with prejudice, finding that the names and addresses of persons determined to be eligible to receive funding from the Flood Hazard Mitigation Grant and the Severe Repetitive Loss Program (HMGP) are not subject to disclosure under the Louisiana Public Records Law, because those records implicate the privacy interests of the individuals involved. After a thorough review of the record and applicable law, we amend the judgment of the trial court (to include decretal language as to Foundation's Motion for Declaratory Judgment) and, as amended, affirm.

FACTUAL BACKGROUND

The Requests and Responses

Foundation, licensed to do and doing business in Louisiana, supplies materials to contractors who are selected to renovate the homes of the recipients of hazard mitigation grant monies. In apparent furtherance of its business pursuits, on July 9, 2012, the president of Foundation, Patrick Tassin, made a written public records request, pursuant to La. R.S. 44:1 *et seq.*, by letter to Paul Rainwater, who was the then commissioner and records custodian of the Louisiana Division of Administration (DOA), requesting a list of persons and/or properties within the state "who have applied or are eligible for Flood Hazard Mitigation Grants" and "for Grants under the Severe Repetitive Loss Program."

On March 6, 2013, Foundation, through its counsel, J. Arthur Smith, III, made a second request for the same list of persons and/or properties to Ms. Kristy Nichols, the then commissioner and records custodian for the DOA, referencing and attaching the prior written request and the refusal of the DOA to provide the records requested.

On March 12, 2013, the deputy general counsel for the DOA, Jason A. Bonaventure, responded to Mr. Smith, as counsel for Foundation, first informing him that, contrary to his assertions in the second request letter, the DOA, through Kristen Williams Parnell, deputy counsel of the DOA, in August 2012, had officially responded to

Mr. Tassin's request by letter dated August 15, 2012. That August 15, 2012 letter was attached to Bonaventure's letter; and the response, denying Mr. Tassin's request, read as follows, in pertinent part:

Please be advised that the level of details you have requested regarding the HMGP program administered by the Office of Community Development *is considered to be the homeowner's private information protected by the Louisiana constitution* and therefore not subject to production under the Louisiana Public Records Law.

With regard to applications/eligibility for Grants under the Severe Repetitive Loss Program, the Division of Administration does not administer that program and as such *we do not have the information you have requested.*

(Emphasis added.) In Bonaventure's March 12, 2013 response letter, he supplemented the response by "elaborat[ing] on the position of the Division of Administration as it pertains to Foundation Material's request" as follows, in pertinent part:

Your client's first request can be divided into two parts: (1) persons who have applied for Flood Hazard Mitigation Grants and (2) persons who are eligible for Flood Hazard Mitigation Grants.

1. List of All Persons Who Have APPLIED for Flood Hazard Mitigation Grants

For the first part of your first request, *it is our long standing opinion that any lists or records derived from applicants used to create such a list are exempt as private* under the Louisiana Constitution Art. 1, § 5 and the U.S. Constitution. When a record is *considered protected as private because of an expectation of privacy*, it is exempt from disclosure under the Public Records Law. R.S. 44:4.1 (A). The expectation of privacy and the State's agreement to keep the homeowner's information confidential is stated in writing to all applicants. Furthermore, the State of Louisiana is duty bound under the United States Code of Federal Regulations to protect such information in the same manner that the Privacy Act requires FEMA to protect it. See 44CFR 206.110 (j)(2)(i).

2. List of All Persons and/or Properties within the State of Louisiana Who are Eligible to Apply for Flood Hazard Mitigation Grants

As to the second part of your first request, the Division of Administration *has no such list of all persons and property.* The parish where the property is located determines eligibility for the grants. If you wish to obtain such a list, contact the parish's government directly.

3. A List of All Persons and/or Properties within the State of Louisiana Who Have Applied for or Are Eligible for Grants under the Severe Repetitive Loss Program

Lastly, as stated in the attached correspondence to your client, the Division of Administration does not administer the Severe Repetitive Loss Program. Therefore, *we do not have any such public records.* (Emphasis in original.)

On March 25, 2013, Mr. Smith, again, as counsel and on behalf of Foundation, sent a public records request seeking the same information sought in the aforementioned letter to Director Kevin Davis, of the Governor's Office of Homeland Security & Emergency Preparedness (GOHSEP). (An identical request letter, also dated March 25, 2013, was sent to Kristy Nichols, as commissioner of the DOA.) This request from Foundation, in addition to seeking a list of all persons eligible to receive benefits from those two programs, also sought all existing information and documents related to those programs, including all internal notes, memoranda, investigative files, charts, etc. The letter furthermore offered to pay reasonable charges incurred with searching for and copying the materials sought, and requested a detailed statement for the reasons withholding the records sought, if production of such was to be denied.

On April 1, 2013, the GOHSEP, through its legal counsel for the disaster recovery division, Bernard M. Plaia, Jr., responded to Mr. Smith's request by letter, stating as follows:

Response to Request #1:

FEMA does not have a non-disaster grant program (or any other such program to the best of my knowledge) named the Flood Hazard Mitigation Grant. As such, there can be no response to this request. In addition to the Severe Repetitive Loss Program, the other FEMA non-disaster grant programs are: Flood Mitigation Assistance, Pre-Disaster Mitigation and Repetitive Flood Claims. You are invited to make a request for public records regarding the above programs. However, be advised that the three programs are subject to the same exception discussed below addressing the Severe Repetitive Loss program.

Response to Request #2:

The names of persons within the State who have been determined to be eligible for Severe Repetitive Loss Program are available for release under the Louisiana Public Records Act, with the *exception* of those persons and the addresses of

their properties whose projects are not completed. GOHSEP relies upon Louisiana Constitution Article 1, Section 5 and the Louisiana Attorney General's Opinion 07-0251 to justify this position.

Properties that are determined eligible for the program are bundled into grants. Each grant will contain properties that have completed its project, properties that have yet to commence its project and properties at different phases of the project. It is necessary for the GOHSEP staff to review each grant and identify those properties with a completed project. It is estimated that this information will be available to you by COB, Wednesday, April 3, 2013.

As stated in the foregoing letter, on April 3, 2013, Mr. Plaia, on behalf of GOHSEP, sent Mr. Smith a five-page list of the names and addresses of all recipients of the Severe Repetitive Loss program whose projects were completed at that time.

PROCEDURAL HISTORY

On April 19, 2013, Foundation filed a petition for declaratory and injunctive relief, naming as defendants, Ms. Nichols, in her individual and official capacities as commissioner of the DOA and custodian of records; Paul Rainwater, in his former individual and official capacities of same; Kevin Davis, in his individual and official capacities as the same for the GOHSEP; the GOHSEP; and the DOA. Foundation listed the chronology and substance of the requests and responses, and asserted that there are no exceptions or exemptions in the public records law prohibiting the defendants from releasing the requested information. Foundation maintained that the list of persons who have already been approved to receive public funding is a matter of public record. Plus, the defendants' failures to comply with its requests constituted an arbitrary and capricious violation of the public records law, entitling Foundation to statutory damages in the amount of \$100.00 per day of violation, pursuant to La. R.S. 44:35(E), and also entitling them to recover all attorney's fees and legal expenses incurred in attempting to receive the requested information, pursuant to La. R.S. 44:35(D). Foundation also sought injunctive and declaratory relief pursuant to La. R.S. 44:35(A) and (D).

A hearing on Foundation's request for preliminary injunction was held on July 1, 2013; a partial transcript containing the testimony presented is in the record before us as an exhibit. Of significance to this appeal, that transcript contains the testimony of Kristen

Parnell, the attorney for the DOA who responded to Mr. Tassin's letter, denying the requested list of information on the basis that the DOA considers it to be the "homeowner's private information protected by the Louisiana [C]onstitution" and not subject to the Louisiana Public Records Law. She also testified that her response to Mr. Tassin also denied the request for the list of applicants for funds through the Severe Repetitive Loss Program on the basis that the DOA does not administer that program. Regarding the privacy interest stance taken by the DOA, Ms. Parnell testified, "[i]t has always been our practice that homeowners' private information is indeed private and we don't release that information." She further testified that the DOA's refusal to release such information was also partially based on an attorney general's opinion, ruling such information to be protected by the homeowners' privacy interests. Ms. Parnell's testimony also revealed that as part of the application process for these funds, the homeowners receive and sign a "privacy act notice," informing them that the information given will not be used outside the agency "except as required or permitted by law or with [the homeowners'] written consent."

By judgment dated September 4, 2013, the trial court denied Foundation's request for preliminary injunction. However, after the hearing, but before the judgment on the preliminary injunction, on August 14, 2013, GOHSEP and Kevin Davis filed a motion for summary judgment. The DOA, Ms. Nichols, and Mr. Rainwater also filed a motion for summary judgment on October 22, 2013.

In both motions, defendants assert that under the Louisiana Constitution, and as found in Attorney General Opinion 07-0251, and as supported by federal jurisprudence, the records sought by plaintiff and not produced are exempt from production as private until the applicants' projects are completed. They also rely on the testimony presented at the hearing on the preliminary injunction, explaining how these federal grants and funds are administered, such that the applicants/homeowners do not actually receive the federal funds until they make a request for reimbursement, backed by invoices and other documentary evidence, after their projects have been completed. Defendants also noted the trial court's prior denial of the plaintiff's preliminary injunction request and urged that

no new evidence had been presented that would support the plaintiff's request as a valid public records request. In addition, GOHSEP asserted that it did not outright deny Foundation's requests; it actually provided the names and addresses of the homeowners who received funds from the Severe Repetitive Loss Program, and whose projects had been completed. It also had represented to Foundation that it would release additional names and addresses when those projects were complete and the homeowners had actual receipt of the federal funds.

On October 29, 2013, the trial court held a hearing on the plaintiff's petition for permanent injunction as well as the defendants' motions for summary judgment. The trial court rendered judgment in open court on that date, and signed a judgment on November 20, 2013, granting the defendants' motions for summary judgment, denying plaintiff's petition for permanent injunction, and dismissing plaintiff's claims with prejudice. This appeal by Foundation followed.

Exception of No Right for Action (Filed on Appeal)

During the pendency of this appeal, on March 21, 2014, GOHSEP and the DOA, on behalf of itself, Ms. Nichols, and Mr. Rainwater, filed with this court a peremptory exception of no right of action. The basis of this exception is the defendants' contentions that Foundation has at all times throughout these proceedings been the plaintiff/appellant who has made the requests and has attempted to enforce those requests under the Louisiana Public Records Law. They claim that Foundation, as a corporation, has no right of action to bring these proceedings, pursuant to La. R.S. 44:35, which designates the proper party plaintiff to seek enforcement of the provisions thereof to be the "*person* aggrieved." They further contend that a corporation is not a "person" within the meaning of La. R.S. 44:35. Therefore, defendants maintain that the corporation, which is not a person, has no legal right to support this action to enforce its request for alleged public records. They further note that neither Patrick Tassin nor J. Arthur Smith, III, counsel for Foundation, who made the requests on behalf of Foundation, have been named as party plaintiffs in this suit; therefore, all claims should be dismissed.

Foundation strongly opposes the exception, urging that at this late stage in the proceedings, this court should decline to consider the exception, particularly since the facts upon which the exception is based have existed since the inception of this litigation and the issue has not been raised. They maintain that consideration of the exception at this juncture in the litigation would run contrary to the interests of justice, judicial efficiency, and the discretionary purpose of La. C.C.P. art. 2163. Moreover, they maintain that Foundation has a real and substantial interest in judicially enforcing the rights being asserted in the matter and that it is a juridical person that is entitled to invoke proceedings. It also cites several cases that have held that there is no provision in the Louisiana Public Records Law that excludes corporations from the right to inspect public records. Finally, in the alternative, Foundation urges that, if this court should exercise its discretion and consider the exception, the matter should be remanded to allow Foundation to amend its petition (presumably to add Mr. Tassin and/or Mr. Smith as party plaintiffs) “*after resolving the disputed issue of whether the requested records are in fact, public records.*” (Emphasis added.)

APPLICABLE LAW

SUMMARY JUDGMENT

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2); **George S. May Int'l Co. v. Arrowpoint Capital Corp.**, 2011-1865 (La. App. 1 Cir. 8/10/12), 97 So.3d 1167, 1171. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in the light of the substantive law applicable to the case.

Gaspard v. Graves, 05-1042 (La. App. 1 Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 06-0882 and 0958 (La. 6/16/06), 929 So.2d 1286 and 1289.

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2). A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case. LSA-C.C.P. art. 966(E). A summary judgment shall be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. LSA-C.C.P. art. 966(F)(1).

PUBLIC RECORDS LAW

In **Johnson v. Broussard**, 2012-1982 (La. App. 1 Cir. 6/7/13), 118 So.3d 1249, this court recently reiterated the essentials of the public records law as follows:

Louisiana Constitution, Article XII, Section 3, provides: "*No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.*" (Emphasis added.) The provision of the constitution must be construed liberally and in favor of free and unrestricted access to the records, and that access can be denied only when a law specifically and unequivocally provides otherwise. Whenever there is doubt as to whether the public has a right of access to certain records, the doubt must be resolved in favor of the public's right to see. To allow otherwise would be an improper and arbitrary restriction on the public's constitutional rights. ***Title Research Corp. v. Rausch***, 450 So.2d 933, 936 (La.1984); *see also, Capital City Press v. East Baton Rouge Parish Metropolitan Council*, 96-1979, p. 5 (La. 7/1/97), 696 So.2d 562, 564.

The foregoing constitutional provision has been codified in the Louisiana Public Records Act, La. R.S. 44:1 *et seq.*, which includes in its definition of "public records," all documentary materials, *including information contained in electronic data processing equipment*, having been used, being in use, or prepared, possessed, or retained for use in the performance of any function under the authority of the constitution or laws of this state. La. R.S. 44:1A(2)(a),

Any person of the age of majority may inspect, copy or reproduce, or obtain a reproduction of a public record except as otherwise provided in this Chapter or as otherwise specifically provided by law. La. R.S. 44:31A and B(1) and (2). The *burden of proving* that a public record is not subject to inspection, copying, or reproduction *shall rest with the custodian*. La. R.S. 44:31B(3). (Emphasis added.)

Id. at pp. 1255-56.

NO RIGHT OF ACTION

In **OXY USA Inc. v. Quintana Production Co.**, 2011-0047, p. 12 (La. App. 1 Cir. 10/19/11), 79 So.3d 366, 376, writ denied, 2012-0024 (La. 3/2/12), 84 So.3d 536, this court summarized the law governing exceptions of no right of action as follows:

Generally an action can only be brought by a person having a real and actual interest that he asserts. La. Code Civ. P. art. 681. The peremptory exception pleading the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. *See* La. Code Civ. P. art. 927(A)(6). Simply stated, the objection of no right of action tests whether this particular plaintiff, as a matter of law, has an interest in the claim sued on. **Louisiana State Bar Association v. Carr and Associates, Inc.**, 2008-2114, p. 8 (La.App. 1 Cir. 5/8/09), 15 So.3d 158, 165; writ denied, 2009-1627 (La.10/30/09), 21 So.3d 292. The exception does not raise the question of the plaintiff's ability to prevail on the merits nor the question of whether the defendant may have a valid defense. **Falcon v. Town of Berwick**, 2003-1861, p. 3 (La.App. 1 Cir. 6/25/04), 885 So.2d 1222, 1224. Unlike the objection of no cause of action, evidence supporting or controverting an objection of no right of action is admissible for the purpose of showing that the plaintiff does not possess the right he claims or that the right does not exist. **Robertson v. Sun Life Financial**, 2009-2275, p. 6 (La.App. 1 Cir. 6/11/10), 40 So.3d 507, 511; **Thomas v. Ardenwood Properties**, 2010-0026, p. 6 (La.App. 1 Cir. 6/11/10), 43 So.3d 213, 218, writ denied. 2010-1629 (La.10/8/10), 46 So.3d 1271, *quoting Falcon*, 2003-1861 at p. 3, 885 So.2d at 1224. The party raising a peremptory exception bears the burden of proof. **Falcon**, 2003-1861 at p. 3, 885 So.2d at 1224. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the

suit. *Id.* Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed *de novo* on appeal. **Torbert Land Co., L.L.C. v. Montgomery**, 2009–1955, p. 4 (La.App. 1 Cir. 7/9/10), 42 So.3d 1132, 1135, *writ denied*, 2010–2009 (La.12/17/10), 51 So.3d 16.

Filing a peremptory exception for the first time on appeal is permitted by La. C.C.P. art. 2163. However, that article makes consideration of such an exception discretionary with the appellate court. **Southern States Masonry, Inc. v. J.A. Jones Construction Company**, 507 So.2d 198, 207 (La. 1987); **Capital Loans, Inc. v. Stassi**, 195 So.2d 670, 672 (La. App. 1 Cir. 1967), *writ refused*, 250 La. 889, 199 So.2d 912 (La. 1967).

APPLICATION OF LAW/DISCUSSION/ANALYSIS

Summary Judgment/Permanent Injunction

At the hearing on the defendants' motions for summary judgment and the plaintiff's motion for permanent injunction, the procedures by which the federal funds are dispersed under the programs for which the names and addresses of eligible homeowners are requested were established. It was firmly established that after a disaster, such as hurricanes, etc., homeowners apply to receive the funds through the Parish; the Parish then requests funds from FEMA. Once FEMA grants the request of a Parish, the Parish then contacts the eligible homeowners, who then have the option of hiring a contractor, and submitting invoices after the completion of the projects. It is at that time that the homeowners receive the public funds. However, the applying homeowners also have the option of accepting or rejecting FEMA's offer.

We agree with the trial court and defendants that the information sought by Foundation in this matter (i.e., the names and addresses of all eligible applicants/homeowners) simply does not become "public" record if and until the funds are actually dispersed by FEMA through the parish and received by the applicants/homeowners. At all times prior to the actual receipt of public funds, the homeowners' identities are private and constitutionally protected. We find no reading of the Louisiana Public Records Law that would require an "exception" stated, because the names and addresses are simply not public record at the time of application or eligibility.

Accordingly, there are no genuine issues of material fact, and the defendants have sufficiently met their burden for denying the requests for the names and addresses of mere applicants. The record reveals that the defendants have properly responded to the requests for records that are public by releasing those names and addresses of homeowners whose projects have been completed and who have received public funds for reimbursement of those projects. Thus, the motions for summary judgment were properly granted, and the plaintiff's motion for permanent injunction was properly denied.

No Right of Action

We decline to exercise our discretionary authority to consider the exception of no right of action filed for the first time on appeal. The facts underlying the exception have existed since the inception of the litigation, but inexplicably, were not complained of until after the matter was on appeal. Moreover, given that, on the merits of the appeal, we are ruling in favor of the defendants, the exception is essentially moot, and we find it would not be in the interest of justice or judicial efficiency to address and decide that exception at this juncture. Accordingly, we decline to do so.

PENDING MOTION FOR DECLARATORY JUDGMENT

The trial court's judgment in this matter granted the defendants' motions for summary judgment, and denied the plaintiff's request for permanent injunction, and dismissed the plaintiff's claims. We note the trial court erred in dismissing the plaintiff's claims without addressing the pending, yet not ruled on, motion for declaratory judgment.¹ We also note that the trial court's finding in this regard is implicit in its other rulings and the record before us is complete such that we do not find a remand is warranted. Instead, we hereby amend the judgment of the trial court to read as follows:

¹ Louisiana Code of Civil Procedure Article 1871 provides for declaratory judgments as follows:

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree.

IT IS ORDERED, ADJUDGED, AND DECREED that the names and addresses of all persons *eligible* for the Flood Hazard Mitigation Grant and the Severe Repetitive Loss program requested by Foundation Materials, Inc. are not public record unless and until the public funds are dispersed to those persons; therefore, the Motions for Summary Judgment brought on behalf of the defendants, Division of Administration, Kristy Nichols, Paul Rainwater, Kevin Davis, and the Governor's Office of Homeland Security & Emergency Preparedness be and are hereby GRANTED, and as such, IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff's Petition for Permanent Injunction is DENIED and the Plaintiff's claims are dismissed with prejudice at the Plaintiff's costs.

CONCLUSION

For the foregoing reasons, we amend the judgment of the trial court to include decretal language as to Foundation's Motion for Declaratory Judgment, and as amended, affirm the granting of the defendants' motions for summary judgment, the denial of plaintiff's request for a permanent injunction, and the dismissal of plaintiff's suit with prejudice. All costs of this appeal are assessed to Foundation Materials, Inc.

AMENDED, AND AS AMENDED, AFFIRMED.