

**COMMERCIAL CAPITAL  
MANAGEMENT**

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**NO. 2000-CA-2487**

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**COURT OF APPEAL**

**VERSUS**

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**FOURTH CIRCUIT**

**B.F. CARVIN  
CONSTRUCTION COMPANY,  
INC.**

\*

**STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 99-19742, DIVISION "E"  
HONORABLE GERALD P. FEDOROFF, JUDGE

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**JAMES F. MCKAY, III  
JUDGE**

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(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge David S. Gorbaty)

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**AFFIRMED**

The defendants appeal the trial court's granting of the plaintiff's motion for summary judgment wherein the court found in favor of the plaintiff in the amount of \$39,965.52 plus interest and costs. The issue for review is whether sufficient issues of factual dispute remain such that the trial court's granting of summary judgment constituted legal error. For the following reasons, we conclude that the trial court properly granted the motion for summary judgment and we affirm.

**UNDERLYING FACTS AND PROCEDURAL HISTORY**

This case involves a construction contract for renovation of the City Park Casino (the "Project"). The City of New Orleans, acting through the "New Orleans City Park Improvements," contracted with the defendant, B.F. Carvin Construction Company, Inc., ("Carvin") for the renovation. Carvin, as the general contractor, executed three subcontracts on the Project with Voiron Construction, Inc. ("Voiron"). The plaintiff, Commercial Capital Management ("CCM"), is in the "factoring business"; *i.e.*, it makes loans to

customers and secures the loans by taking an assignment of its customer's/borrower's accounts receivables. In this matter, Voiron was one of CCM's customers.

CCM made several loans to Voiron during the Project renovation to pay for labor and materials associated with Voiron's work on the Project. The loans were secured by an assignment by Voiron to CCM of the receivables due to Voiron from Carvin for the subcontracted construction work at City Park.

The amount of any specific loan from CCM to Voiron was based on the amount that Voiron was preparing to submit to the general contractor, Carvin, for payment. Before each advance of funds from CCM to Voiron, however, CCM presented Carvin with a copy of Voiron's invoice to determine whether Carvin would approve and pay the amount billed. CCM thus obtained assurance from Carvin that it would pay the invoice before advancing any funds to Voiron. Additionally, prior to advancing funds to Voiron, CCM had Carvin execute an "Invoice Acknowledgment Agreement" ("IAA") wherein Carvin specifically acknowledged that the invoice referenced in and attached to the IAA would be paid when presented and, moreover, wherein Carvin waived any right of setoff, defense, counterclaim, or recoupment against Voiron in connection with that invoice.

Each IAA was also signed by Voiron acknowledging that payment of the invoice by Carvin must be made to CCM. After thus obtaining Carvin's signature on the IAA, only then did CCM advance money to Voiron and took, in return, an assignment of the receivable due from Carvin to Voiron.

Subsequently, despite the written agreement to pay the invoices to CCM, Carvin refused to pay three invoices in the following amounts: (1) \$6,912.00 (Invoice No. BC 9952 – July 9, 1999); (2) \$4,937.52 (Invoice No. BC 9957 – July 22, 1999); and (3) \$28,116.00 (Invoice No. 9959 – July 28, 1999). Thus, the total due to CCM from Carvin under the above IAAs is \$39,965.52.

CCM filed suit on December 8, 1999. Carvin responded with a declinatory exception of improper venue and partial exception of no cause of action. The trial court found moot the issue of plaintiff's request for attorney's fees pursuant to the Louisiana open account statute because the plaintiff withdrew such request. Additionally, the trial court overruled the exception of improper venue on March 22, 2000.

Two months subsequent to defendant's filing of the answer, CCM filed its motion for summary judgment on July 11, 2000 with support of the three (3) invoices at issue, plus an affidavit of the Chief Financial Officer of CCM, Mark Byouk. On August 9, 2000, Carvin third partied Guy Voiron

and Voiron Construction Company.

In the August 11, 2000 hearing on the motion for summary judgment, the trial court asked counsel to brief the issue of the applicability of the Louisiana Assignment of Accounts Receivable Act (“LAARA”), La. R.S. 9:3051, *et seq.* Both sides submitted supplemental memoranda.

Carvin argued that the LAARA *does* apply and that it requires notice of assignment to be filed in the conveyance records of the parish of assignor’s place of business, which, if the place of business is Orleans Parish, the notice must be filed in the Sale of Movables Book. In this matter, Carvin argued that it was a third party under the Act the LAARA provides that third parties’ rights are not affected by an assignment of accounts receivable unless all the steps outlined in the statute are satisfied. Therefore, because CCM failed to record the assignment in the Sale of Movables Book in Orleans Parish (CCM recorded some notice in East Baton Rouge Parish), and Carvin’s place of business is in Orleans Parish, Carvin cannot be affected by any purported assignment by Voiron.

CCM argued that the LAARA *does not* apply. The statute provides that the assignee (here, CCM) must file notice of the assignment to protect its interest in the account. However, pursuant to La. R.S. 9:3108 (A): “an account debtor who has received written notice of the assignment will not be

discharged from his debt if he pays any one other than the assignee.” In this matter, Voiron (the assignor) gave written notice to Carvin (the account debtor) of the assignment. If the account debtor is not given notice of the assignment and makes payment to someone other than the assignee, the account debtor is exonerated of liability to pay the correct assignee. La. R.S. 9:3108 (B). CCM noted that there is not issue in this case of Carvin paying someone other than the correct assignee; Carvin has not paid *anyone* on the invoices at issue. Carvin should not be allowed to breach its agreement with CCM that it would pay Voiron’s accounts to CCM. Carvin can seek recovery from Voiron in the third party demand.

Moreover, whether notice of the assignment was filed is irrelevant. Carvin signed a contract (the IAAs) wherein it agreed to pay CCM directly for Voiron’s advances. Under Carvin’s argument that it should not have to pay CCM because the notice was not properly filed, even if all the work had been performed adequately by Voiron, Carvin would not have to pay. Such an outcome makes no sense.

Additionally, CCM pointed out that the LAARA, La. R.S. 9:3112 specifies that: “This part shall apply to assignments of accounts receivable that are entered into prior to the effective date of Chapter 9 of the Louisiana Commercial laws

(R. S. 10:9-101 *et seq.*) . . . .” and that effective date is January 1, 1990. The assignment in question was entered into in 1999. Therefore, the entire LAARA is inapplicable to the instant case. The contractual agreement among Carvin, CCM and Voiron, evidenced by the IAAs, is controlling.

Carvin opposed the motion for summary judgment by contending that several fact issues remained in dispute: (1) the affidavit supporting the motion for summary judgment was allegedly devoid of the statement that the affiant had personal knowledge to which he attested therein; and (2) the amount paid to Voiron by CCM was not supported by documentation such as receipts of payment, check stubs, etc.

The trial court granted summary judgment.

## **ANALYSIS**

Carvin asserts that the trial court erred in finding that CCM had met its burden of proof because significant fact issues remain. Carvin argues that it signed the IAAs with assurance from CCM that Voiron was in compliance with all of its contractual requirements. After signing the IAAs, Carvin then discovered that Voiron had substantially failed to perform on several aspects of the subcontract, thus requiring Carvin to complete the work at greater expense than agreed with Voiron. Pursuant to its rights under the Subcontract, § 20, Carvin refused to pay the invoices of Voiron to CCM,

alleging that it was entitled to offset its costs of completing the work from the amount otherwise owed to Voiron. Additionally, Carvin raised the issue that its purported obligation to CCM was unenforceable for lack of cause or consideration.

Carvin argues the following in support of its instant appeal: (1) by affidavit, B.F. Carvin attested that Carvin had a right, under the subcontract, to offset costs and expenses resulting from Voiron's failure to perform; (2) that Ms. Fulco from CCM, not Mark Byouk whose affidavit CCM attached, had assured Mr. Carvin, prior to his signing the IAA, that Voiron had completed the work and paid its subcontractors; and (3) after signing the IAA, Ms. Fulco represented that Carvin owed amounts different than those that were reflected in the assignment. Thus, the above presents factual issues in dispute and the motion for summary judgment was improperly granted.

Conversely, CCM notes that the issues argued by Carvin (above) in opposition to CCM's motion for summary judgment are not the same ones argued on appeal. Rather, the arguments asserted on appeal (listed in the previous paragraph) *were not raised in the trial court* and, therefore, are not properly raised on appeal. *See* Rule 1-3 of the Uniform Rules – Courts of Appeal (“The Courts of Appeal will 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.”); *see also Shephard v. Allstate Ins. Co.*, 562 So.2d 1099, 1102 (La. App. 4<sup>th</sup> Cir. 1990) (this court refused to consider an issue not raised in the trial court).

The two arguments, therefore, that are properly before this Court are: (1) Carvin’s assertion that Mark Byouk’s affidavit was devoid of a statement that he attested based upon his personal knowledge, and (2) that CCM did not prove, by documentation in the form of check stubs, receipts of payment, etc., how much was paid to Voiron. A second affidavit stating that Mr. Byouk had personal knowledge of the facts to which he attested cured the first problem. Carvin’s second argument is not persuasive because the contractual agreement was evidenced by the IAAs, signed by Carvin, CCM, and Voiron, all three of which were attached to the Motion for Summary Judgment. In the IAAs, Carvin acknowledged:

(i) the goods and/or services described in the invoices approved are acceptable and (ii) the invoices will be paid to us without any setoff, defense, counter claim or recoupment.

It seems that it was incumbent upon *Carvin*, not CCM, to confirm the adequate performance of the subcontracted work prior to signing the IAA, which signing served to bind it to CCM as specified in the agreement. CCM

is a lender, not a general contractor. Common sense dictates that the general contractor would have the responsibility to ensure that the subcontracted work was performed in a satisfactory manner, not merely to confirm whether to pay the lender.

Moreover, Carvin has an adequate remedy through its third party demand against Voiron. Under the subcontract agreement, Carvin should be entitled to reimbursement for any costs and expenses that it has had to bear to complete or fix substandard work by Voiron. There is no basis for Carvin to avoid paying CCM the money owed on the three invoices pursuant to the contract with CCM.

Therefore, we affirm the trial court's granting of CCM's Motion for Summary Judgment.

**AFFIRMED**