

NOT DESIGNATED FOR PUBLICATION

225 BARONNE COMPLEX, LLC	*	NO. 2016-CA-0492
	*	
VERSUS	*	COURT OF APPEAL
	*	
ROY ANDERSON CORP., ET AL	*	FOURTH CIRCUIT
		STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-00358, DIVISION "M"
Honorable Paulette R. Irons, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome,
Judge Joy Cossich Lobrano)

LOBRANO, J., CONCURS IN THE RESULT.

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JUDGMENT REVERSED

DECEMBER 14, 2016

This matter involves the cancellation of a contractor's statement of claim and privilege (Lien) filed pursuant to the Private Works Act, La. R.S. 9:4801, *et seq.* The appellant/contractor, Roy Anderson Corp. (RAC), appeals the trial court's judgment which granted the petition of the owner, 225 Baronne Complex, LLC (225 Baronne), to remove and cancel RAC's Lien. For the reasons that follow, we reverse the judgment and order the Lien's reinstatement.

FACTS/PROCEEDINGS BELOW

On November 8, 2013, 225 Baronne and RAC entered into a \$61,300,000.00 Contract. The Contract required RAC to serve as the design-builder for the Project. The Project involved the construction of 192 apartments, a 188-room hotel, and a parking garage. The Contract terms included Section A. 9.11.1 which provided the following:

So long as the Owner is not in default of its payment obligations, the Design-Builder shall complete the Work free of any laborer's, materialman's, mechanic's or other lien (a "Lien") on any part of the construction Work or the Project and shall not voluntarily permit any Lien to be filed or otherwise imposed on any part of the construction Work or the Project. If any such Lien or claim is filed and the Design-Builder does not, within 10 days following written notice to the Owner, either (i) cause such Lien to be released

and discharged or (ii) furnish an appropriate surety bond in the amount required by applicable state law, including notice to the Owner of any disputed payment obligation by Design-Builder related thereto, if applicable, **the Owner shall have the right to pay all sums necessary to obtain such release and discharge and to deduct the same from the next succeeding Application for Payment until the total amount of same shall be recouped.** The Design-Builder shall be required as a condition to receiving payment under an Application for Payment to furnish Owner with partial waivers of all Liens for portions of the construction Work for which the Owner has previously made payment to the Design-Builder. If such lien remains unsatisfied after payments are made, the Design-Builder shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees. (emphasis added).

On October 23, 2015, 225 Baronne filed a Notice of Termination of the Work ("the Acceptance") in the Mortgage Office for Orleans Parish. The Acceptance stated in part that RAC's work on the referenced Project "is substantially complete."

On December 18, 2015, RAC signed a Confirmation of No Default document and received payment of \$2,941,725.28. That document included the following:

ACKNOWLEDGING 225 Baronne, LLC's ("225 Baronne") dispute of Roy Anderson Corp's ("RAC") previous notice(s) and assertions of payment default by 225 Baronne, including, without limitation, Michael A. Pierle, II's December 9, 2015, letter to Wayne Clement and the assertions therein, and in consideration of and exchange for 225 Baronne's payment of Two Million Nine Hundred Forty-One Thousand Seven Hundred Twenty-Five Dollars and 27/100 (\$2,941,725.27), receipt of which RAC acknowledges, **RAC rescinds its prior notices(s) and assertions of payment default against 225 Baronne's previously billed payment obligations** under the November 8, 2013 prime contract between 225 Baronne and RAC. **Said payment is accepted with the express reservation of the parties' rights and defenses regarding RAC's unsubmitted extra work claims, unbilled amounts and liquidated damages.** (emphasis added).

Thereafter, on December 22, 2015, RAC recorded a notarized affidavit of its Lien on the Project in the amount of \$15,401,300.00. The Lien claimed the balance owed “represents material, labor, equipment, and services provided to Owner in connection with the construction project entitled 225 Baronne Mixed-Use Project, New Orleans, Louisiana (‘the Project’).” The Lien also included an “Out Of Scope PCO Status Summary” attachment which itemized the elements comprising the amounts allegedly owed.

On December 28, 2015, 225 Baronne demanded that RAC remove its Lien. RAC refused. Thereafter, on January 12, 2016, 225 Baronne filed its petition to remove the Lien in accordance with La. R.S 9:4833.¹ It argued the Lien was

¹ La. R.S. 9:4833 states, in pertinent part:

A. If a statement of claim or privilege is improperly filed or if the claim or privilege preserved by the filing of a statement of claim or privilege is extinguished, an owner or other interested person may require the person who has filed a statement of the claim or privilege to give a written request for cancellation in the manner provided by law directing the recorder of mortgages to cancel the statement of claim or privilege from his records. The request shall be delivered within ten days after a written request for it is received by the person filing the statement of claim or privilege.

B. One who, without reasonable cause, fails to deliver a written request for cancellation in proper form to cancel the claim or privilege as required by Subsection A of this Section shall be liable for damages suffered by the owner or person requesting the authorization as a consequence of the failure and for reasonable attorney fees incurred in causing the statement to be cancelled.

C. A person who has properly requested a written request for cancellation shall have an action pursuant to R.S. 44:114 against the person required to deliver the written request to obtain a judgment declaring the claim or the privilege extinguished and directing the recorder of mortgages to cancel the statement of claim or privilege if the person required to give the written request fails or refuses to do so within the time required by Subsection A of this Section. The plaintiff may also seek recovery of the damages and attorney fees to which he may be entitled under this Section.

D. The recorder of mortgages shall cancel a statement of a claim or privilege from his records upon the filing with him by any person of a written request for cancellation in proper form or when he is ordered to do so by judgment of the court.

E. The effect of filing for recordation of a statement of claim or privilege and the privilege preserved by it shall cease as to third persons unless a notice of lis pendens identifying the suit required to be filed by R.S. 9:4823 is filed within one year after the date of filing the claim or privilege. In addition to the requirements of Article 3752 of the Code of Civil Procedure, the notice of lis pendens shall contain a reference to the notice of contract, if one is filed, or a reference to the recorded statement of claim or privilege if a notice of contract is not filed.

improper because 1) the Contract terms barred the Lien; and 2) the Lien contained amounts that had not been submitted to 225 Baronne for payment and/or sums for which 225 Baronne disputed payments were owed. The latter argument emphasized that RAC recorded its Lien before RAC had submitted or billed for a significant portion of the claims encompassed by the Lien. The petition prayed that the Clerk order the Recorder of Mortgages to remove the Lien and also requested damages and attorneys' fees.

RAC's opposition maintained that the Lien was proper because it met the statutory guidelines of La. R.S. 9:4822(G).² It also claimed the Lien was timely filed within sixty days of the notice of substantial completion as mandated by La. R.S. 9:4822(B).³

On February 22, 2016, after the matter had been submitted, the trial court granted 225 Baronne's removal petition and ordered the Recorder of Mortgages to cancel the Lien. The trial court deferred ruling on the request for attorneys' fees, pending 225 Baronne's submission of bills to the court for review. In its reasons for judgment, the trial court noted that the purpose of R.S. 9:4833 is to discourage

² La. R.S. 9:4822(G) provides a statement of claim or privilege:

- (1) Shall be in writing.
- (2) Shall be signed by the person asserting the same or his representative.
- (3) Shall reasonably identify the immovable with respect to which the work was performed or movables or services were supplied or rendered and the owner thereof.
- (4) Shall set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, material supplied, or services rendered. The provisions of this Paragraph shall not require a claimant to attach copies of unpaid invoices unless the statement of claim or privilege specifically states that the invoices are attached.

³ La. 9:4822(B). A general contractor to whom a privilege is granted by R.S. 9:4801 of this Part, and whose privilege has been preserved in the manner provided by R.S. 9:4811, shall file a statement of his privilege within sixty days after the filing of the notice of termination or substantial completion of the work.

the filing of a clearly unjustified claim motivated by the contractor's attempt to extract a settlement or a payment from the owner in exchange for the Lien's removal.⁴ It then concluded the lack of prior invoices or claims from RAC to 225 Baronne showed that RAC's Lien was unsupported; and therefore, filed for the express purpose prohibited by the statute, namely, to put undue economic pressure on 225 Baronne to procure an unwarranted pay-out.

RAC filed its petition for a devolutive appeal on March 15, 2016.

LAW/ARGUMENT

RAC's assignments of error contend 1) the trial court erred in granting the Owner's petition for removal because the trial court did not apply La. R.S. 9:4822 as the standard to determine the Lien's validity; and 2) the trial court erred in failing to recognize that because the Lien met the requirements of La. R.S. 9:4822, it was therefore proper under La. R.S.9:4883.

In opposition, 225 Baronne maintains this Court should dismiss RAC's devolutive appeal as moot as the appeal did not suspend the effect of the judgment, referencing the Recorder of Mortgages' actual cancellation of the Lien.⁵ Alternatively, it asks that we uphold the judgment because the Lien was improperly filed.

⁴ La. R.S. 9:4833, Comment (a) explains in part that the purpose of the Act is "to discourage the filing of a claim that is clearly unjustified, late, or otherwise made without reasonable cause for believing it is valid in the hope that economic pressure may be placed upon the owner or contractor to extract a settlement or other payment as the price of a release."

⁵ The Lien was removed on April 21, 2016.

Before we review the merits of the judgment, we shall first consider the merits of 225 Baronne's Motion to Dismiss.

Motion To Dismiss

225 Baronne claims the devolutive appeal is moot because RAC effectively waived its right to object to the Lien's removal upon appeal when it allowed the judgment to become executory. 225 Baronne asserts that "Louisiana courts of appeal have held that when, as here, an appellant fails to protect its interest through a suspensive appeal of a judgment ordering removal of a public record filing, the appellant waives its objections to the removal." In support, it relies on *Maryland Cas. Co. v. Rausch*, 401 So.2d 374 (La. App. 1 Cir. 1981) and *Rathborne Lumber & Supply Co. v. Harding*, 56 So.2d 164, 166 (La. App. Orleans Cir. 1954), decisions in which the appellate courts dismissed devolutive appeals as moot.

Rausch involved the same parties who had also filed another action in a different venue that had also resulted in the cancellation and erasure of a notice of lis pendens judgment. *Id.*, 401 So.2d at 375. The *Rausch* court granted its appellee's motion to dismiss the suspensive appeal as moot. *Id.* The opinion explained that the notice of lis pendens had already been erased in the other pending appeal in which the same appellants had only devolutively appealed the judgment. *Id.*

In *Rathborne*, the appellant took a devolutive appeal of a judgment that had ordered the recorder of mortgages to cancel a property lien and had also ordered the civil sheriff to disburse proceeds from the judicial sale of the property. The *Rathborne* court concluded that upon cancellation of the lien and disbursement of the proceeds from the sale, it could not render any judgment which would reinstate appellant's lien or allow appellant to participate in proceeds of the judicial sale;

therefore, the court dismissed the appellant's devolutive appeal as moot. *Rathborne*, 56 So.2d at 166.

Upon review, we find the present appeal distinguishable from the results reached in *Rausch* and *Rathborne*. In those matters, the appellate courts were unable to offer any relief to the appellant. Here, this Court can still afford RAC a remedy by reinstating its lien. An appellate court's authority to reinstate a lien was recognized in *Davis-Wood Lumber Co. v. DeBrueys*, 200 So.2d 916 (La. App. 1 Cir. 1967). In that matter, the First Circuit opined that "a mortgage or lien cancelled through error, as well as fraud, must be reinstated." *Id.*, 200 So.2d at 920.

In *Pettingill v. Hills, Inc.*, 6 So.2d 660, 662 (La. 1942), the Supreme Court reasoned: "It is the function of appellate courts to render judgments that can be made effective and not to give opinions on moot questions or abstract propositions from which no practical results can follow. So where it is impossible for the appellate court to undo what has already been done, the court will not determine the questions litigated in the court below, but will dismiss the appeal." When we apply these precepts to the facts of the case at bar, this Court can render a meaningful judgment. We can still decide whether the Lien is properly cancelled or if it warrants reinstatement. In contrast, 225 Baronne cites no case law or statutory authority that expressly deprives a contractor of its right to appeal a lien removal from the public records solely because an appeal was taken devolutively, rather than suspensively.⁶

⁶ We also note Louisiana statutory authority gives appellants the choice to file a devolutive appeal, which by their very nature does not suspend the execution of a judgment, or a suspensive appeal. *See* La. C.C.P. art 2087; La. C.C.P. art. 2123.

The record shows RAC met the prerequisites to file a devolutive appeal. This Court has the authority to offer relief to the appellant. Accordingly, we deny 225 Baronne's Motion to Dismiss Appeal based on mootness.

ASSIGNMENTS OF ERROR.

RAC's assignments of error essentially contend the trial court erred because it did not apply La. R.S. 9:4822 to determine the Lien's validity. In opposition, 225 Baronne claims the trial court properly cancelled the Lien pursuant to La. R.S. 9:4833. This Court shall first consider whether RAC filed a valid Lien; and thereafter, whether 225 Baronne presented sufficient evidence to cancel the Lien.

Validity of the Lien- La. R.S. 9:4822

As outlined in La. R.S. 9:4822(G), a valid lien must be in writing, signed by an authorized representative, reasonably identify the immovable, and set forth the amount and reasonably itemize the elements that comprise the lien. Additionally, La. R.S. 9:4822(B) requires the lien to be filed within sixty days after the filing of the notice of termination or substantial completion of the work.

In the matter before us, the parties do not contest the Lien's timeliness. The record shows the Notice of Substantial Completion was filed on October 23, 2015 and the Lien was recorded on December 22, 2015. Hence, the Lien was timely filed within sixty days of substantial completion in accordance with La. R.S. 9:4822(B).

The parties also do not contest that the Lien met the first, second, and third requirements of La. R.S.9:4822(G). The Lien was in writing, signed by a duly authorized representative, and reasonably identified the property subject to the Lien. However, the parties do dispute whether RAC met the requirement of La.

R.S. 94822(G)(4) to “set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, material supplied, or services rendered.”

RAC avers the Lien provided an itemized breakdown of the costs it incurred in the Project’s completion. It maintains the Lien describes the nature of the obligation giving rise to the Lien and specifies that the past due balance owed of \$15,401,300.00 represents “certain work performed and materials and services delivered for use in and were in fact incorporated into or consumed during the repair, construction, and/or improvement of the aforementioned immovable property, owned by Owner, in connection with the Project.” Moreover, RAC points to the “Out of Scope PCO Status Summary” attached to the Lien which itemizes the amounts that comprise the \$15,401,300.00 Lien.

225 Baronne counters RAC’s Lien is procedurally invalid because it only categorized the types of claims for which RAC alleged 225 Baronne owed payment. In support, it cites *Jefferson Door Co., Inc. v. Cragmar Const. L.L.C.*, 2011-1122, p. 7 (La. App. 4 Cir. 1/25/12), 81 So.3d 1001, 1006. In *Jefferson Door*, this Court found the contractor had not reasonably itemized the elements that comprised its lien where the lien stated that “various materials” would be “more particularly itemized on the attached invoices;” however, the referenced invoices were not attached. *Id.*

225 Baronne also relies on *Tee It up Golf, Inc. v. Bayou State Construction, L.L.C.*, 2009-855, pp.4-5 (La. App. 3 Cir. 2/10/10), 30 So.3d 1159, 1162 and *Bradley Elec. Services, Inc. v. 2601, L.L.C.*, 2011-0627, pp. 4-5 (La. App. 4 Cir.

12/14/11), 82 So.3d 1242, 1243, other cases in which appellate courts found contractors had failed to perfect their liens. In *Tee It Up Golf*, the appellate court found the lien was not perfected when it listed only lump sum amounts owed, did not identify the elements which comprised the amounts owed, and failed to attach invoices the lien statement referenced. *Id.*, 2009-855, pp.4-5, 30 So.3d at 1162. Similarly, in *Bradley Elec.*, the appellate court found the contractor's lien invalid because the lien included only a lump sum statement of the amount owed and did not itemize the elements comprising the lien. *Id.*, 2011-0627, pp. 4-5, 82 So.3d at 1243.

Upon review, we find RAC's Lien distinguishable from the invalid liens filed in *Jefferson Door*, *Tee It Up Golf*, and *Bradley Elec.* In *Jefferson Door*, the contractor failed to attach invoices it claimed would itemize the lien. Here, RAC did not represent that it would attach invoices to itemize its Lien; and moreover, was not required to do so under La. R.S.4822(G)(4). Notwithstanding, RAC described the nature of the obligation giving rise to the Lien and provided an itemized breakdown of all the costs it incurred in the Project's completion.

The invalidated liens in *Tee It Up Golf* and *Bradley Elec.* provided only a general lump sum designation of the amounts allegedly owed to the contractors. Here, RAC's Lien contrasts with those invalidated liens in that RAC attached the PCO summary document which identified the elements or sums which comprised its \$15,401,300.00 Lien.

As noted in the comments following La. R.S. 9:4822(G), the purpose of the lien is to give notice to the owner of the existence of a claim and to give notice to third persons that a privilege is claimed on the property. *Hibernia Nat. Bank v.*

Belleville Historic Development, L.L.C., 2001-0657, p. 8 (La. App. 4 Cir. 3/27/02), 815 So.2d 301, 306. In *Hibernia*, this Court determined that a lien was valid where it was filed with the contract and set forth the amount the contractor maintained was owed with the following statement: “...to furnish labor material to construct twenty-one (21) condominium units, a project of Belleville Historic Development, L.L.C. Said work was performed as per the aforementioned contract.” *Id.*

When we compare RAC’s Lien with the *Hibernia* lien, we conclude RAC’s Lien adequately placed the owner and third persons on notice, sufficiently specified the work and services rendered, and itemized the amounts owed that comprised the Lien. *See also Simms Hardin Co., LLC v. 3901 Ridgelake Drive, L.L.C.*, 2012-469, pp. 16-17 (La. App. 5 Cir. 5/16/13), 119 So.3d 58, 68 (where the subcontractor’s lien which contained an adequate property description and a sufficient description of the work performed that gave rise to the lien was deemed valid). As discussed further herein, 225 Baronne apparently accepts the adequacy of the Lien’s notice and itemization based on its specific contest of various components of the Lien. Therefore, we find RAC’s Lien met all the procedural requirements to constitute a valid lien pursuant to La. R.S. 9:4822.

RAC maintains that because the Lien met all procedural requirements, this Court is compelled to conclude the trial court erred in granting the petition for removal. However, the procedural validity of RAC’s Lien does not end our inquiry as to whether the trial court properly cancelled the Lien. To do so would overlook that the Private Works Act also gives owners the right to remove or cancel liens if they lack any substantive validity. Indeed, in *LaMoyne-Clegg*

Development Corp. v. Bonfanti-Fackrell, Ltd., 509 So.2d 43, 46 (La. App. 1 Cir. 1987), the First Circuit invalidated a lien where the evidence showed the contractor knew that the amount of the lien was not due and owing. Accordingly, we now turn to whether 225 Baronne presented sufficient evidence to justify the Lien's cancellation as provided for by La. R.S.9:4833.

La. R.S. 9:4833-Lien Cancellation

225 Baronne makes a two-fold argument in support of the Lien's cancellation. First, it alleges the Contract barred the Lien because 225 Baronne had paid all of RAC's billings at the time of the Lien's filing. In support, it cites the "Confirmation of No Default" document in which RAC attested that all billed expenditures had been paid. Next, it disputes the Lien amount, based in part on RAC's failure to submit underlying invoices. It suggests the Lien is unsupported because it contains un-billed and duplicate claims. Specifically, the removal petition contends the Lien comprises \$8.4 million of un-submitted claims, \$545,000.00 of duplicate claims, and a disputed unpaid balance of \$1,969,575.00. Based on these arguments, 225 Baronne avers the trial court properly concluded RAC lacked just cause to file its Lien. We disagree.

First, we note the Contract does not explicitly bar the filing of all liens. Instead, closer scrutiny of the Contract's terms reveals the Contract merely gives the owner a remedy for a lien filed when the owner was not in default based on submitted invoices. That remedy was to deduct all the sums paid to remove the lien from the Application for Payment until the owner recouped the total sum paid for the lien's removal.

We also cannot say the “Confirmation of No Default” document, executed approximately four days before the Lien’s filing, conclusively rebuts that all sums claimed in the Lien were not owed. Although the “no default” document attests that 225 Baronne was not in default for any previously billed statements, it also expressly reserves RAC’s rights and defenses regarding RAC’s un-submitted extra work claims, unbilled amounts, and liquidated damages. For example, the record shows RAC introduced into evidence correspondence which reflected that some of these un-submitted/extra-work claims involved additional costs owed for an asbestos abatement plan.

The other prong of 225 Baronne’s opposition is that the Lien is improper because it was recorded before certain expenditures had been billed or proven. The trial court apparently agreed with this position when it reasoned that “by definition, 225 Baronne cannot owe payment on claims Roy Anderson Corporation has not presented or invoiced.” This reasoning is flawed.

By the trial court’s own acknowledgment, La. R.S. 9:4822 does not require the sums encompassing the Lien be invoiced or submitted beforehand in order to perfect a valid lien.⁷ Moreover, we find no legal support for the proposition that the validity of a lien results from whether the lien amounts have been billed or invoiced. Instead, the validity and enforceability of the Lien emanates from the obligations imposed by the Contract’s terms and conditions. 225 Baronne’s claim that the Lien fails because of un-submitted bill also ignores the fact that the

⁷ This Court also takes judicial notice that the notice of substantial completion was done on October 23, 2015. Therefore, RAC may have been compelled to file its Lien on December 22, 2015, prior to the submission of invoices, to comply with the time delays required by La. R.S. 9:4822(B) to perfect an enforceable lien.

Confirmation of No Default document placed 225 Baronne on notice that RAC might make a claim for expenditures not already billed or submitted.

In seeking cancellation of a subcontractor's lien, the owner is required only to prove that it was filed without reasonable cause. *Urban's Ceramic Tile, Inc. v. McLain*, 47,955, p. 6 (La. App. 2 Cir. 410/13), 113 So.3d 477, 481. As noted, 225 Baronne disputes that it owes \$545,000.00 in alleged duplicate claims and \$1,969,575.00 for an unpaid balance. This dispute as to payments owed, however, is merely argument and is not supported by sworn testimony or evidence. Unlike the owner in *LaMoyné-Clegg*, the record shows 225 Baronne did not offer sworn testimony or evidence at the removal hearing to dispute the sums claimed in the Lien. Indeed, neither party has substantiated the amount, if any, that may be owed to RAC. However, the fact that the exact amount owed may be in dispute is not sufficient to invalidate the lien *per se*. *Hibernia*, 2001-0657, p. 7, 815 So.2d at 306.

Factual findings of a trial court will not be overturned on appeal unless manifestly wrong. *Stobart v. State Through Department of Transportation & Development*, 617 So.2d 880, 882 (La. 1993). In the record before us, we do not see any reasonable factual support for the trial court's conclusion that RAC's failure to submit invoices demonstrates the Lien was filed without reasonable cause or proves the Lien lacks all substantive merit. Accordingly, because the record is devoid of evidence that verifies no amount is due RAC, the trial court committed manifest error in cancelling the Lien, where a sum of money may be owed to the lienholder. *Pipes v. Dyna Ten Corp.*, 389 F.3d 488, 490 (5th Cir. 2004).

CONCLUSION

Upon review, RAC's Lien met the procedural requirements of a valid lien as required by La. 9:4822; whereas, 225 Baronne presented insufficient evidence to warrant the Lien's cancellation pursuant to La. R.S. 9:4833. Based on the foregoing, the trial court erred in granting 225 Baronne's petition for removal. Accordingly, we reverse the trial court's judgment and hereby order the Lien's reinstatement.⁸

JUDGMENT REVERSED

⁸ This opinion offers no position on the amounts, if any, that may be owed under the Lien. That determination must be made at a trial to enforce the Lien.