

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1512

GULF COAST REFRIGERATION, LLC

VERSUS

HOUMA TERREBONNE HOUSING AUTHORITY, AS PRINCIPAL,
COMPANION PROPERTY AND CASUALTY INSURANCE
COMPANY, AS SURETY, AND OLYMPIC COMMERCIAL &
RESIDENTIAL REPAIR, AS AGENT

Judgment Rendered: MAR 24 2014

Appealed from the
32nd Judicial District Court
In and for the Parish Terrebonne
State of Louisiana
Case No. 167,715

The Honorable John R. Walker, Judge Presiding

KUHN, J. CONCURS IN THE RESULT

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The plaintiff-appellant, Gulf Coast Refrigeration, LLC (Gulf Coast), seeks reversal of a judgment of the Thirty-Second Judicial District Court that sustained exceptions of no cause of action and no right of action in favor of the defendants-appellees, Houma Terrebonne Housing Authority (HTHA) and Companion Property Casualty Insurance Company (Companion).¹ For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 15, 2010, HTHA entered into a construction agreement with Olympic Commercial and Residential Repair, LLC (Olympic), a building contractor, to modernize and renovate ten duplex housing units in Houma, Louisiana, owned by HTHA. It is undisputed in the record that the project qualified as a public work and falls under the authority of the Louisiana Public Works Act.² Companion became surety of the project by issuing a performance bond in favor of Olympic on March 30, 2010. The bond was for the full amount of the contract, totaling \$785,530.00.

Gulf Coast was a subcontractor on the project, and, as the work progressed, made several charges on the contract for work and materials. Olympic paid Gulf Coast for those charges, until it went into default on the project on February 2, 2012, and was terminated as contractor by HTHA. HTHA then secured a new contractor and resumed construction on the project, but Gulf Coast was not renewed as a subcontractor.

¹ The third defendant, Olympic Commercial and Residential Repair, LLC, was not served at the time of the trial court's hearing on the exceptions; therefore, the trial court's ruling was not applied to this defendant. As such, this defendant was not made a party to the instant appeal.

² Title 38 of the Louisiana Revised Statutes.

Gulf Coast filed a lien against the Houma work site on July 20, 2012 for the outstanding balance Gulf Coast claimed to be \$130,340.50,³ and recorded the same in the public records of Terrebonne Parish. Gulf Coast filed its petition for sums due against all three defendants on September 13, 2012. Companion and HTHA filed exceptions of no cause of action and no right of action on November 13, 2012, and November 19, 2012, respectively. Gulf Coast filed an amended petition on March 6, 2013, two days before the hearing on the exceptions.⁴

Hearing on the exceptions was held on March 8, 2013. At that time, HTHA and Companion moved to strike Gulf Coast's supplemental memorandum, but the trial court denied their motion. The trial court sustained the exceptions, finding that since Gulf Coast had untimely filed its lien, it had no cause of action against HTHA or Companion, and neither did Gulf Coast have a right of action since it did not fall within a class of plaintiffs that would be entitled to a remedy against HTHA or Companion. The trial court dismissed HTHA and Companion from Gulf Coast's lawsuit with prejudice, awarding them court costs and attorney fees, and ordered the Terrebonne Parish Clerk of Court to cancel the lien filed by Gulf Coast against the Houma property work site. The judgment was signed March 28, 2013. Gulf Coast filed a motion for reconsideration and/or motion to supplement record, challenging the trial court's decision on the exceptions. The trial court denied Gulf Coast's motion on May 30, 2013, awarding additional costs and attorney fees to HTHA and Companion, and designated

³ The date of the lien's filing appears erroneously in Companion's brief as August 20, 2012; however, since the appellees contend that Gulf Coast's lien became untimely as of March 19, 2012, the error is of little significance.

⁴ In the amended petition, Gulf Coast added as defendants Alford Petroleum Equipment, Inc., and North American Specialty Insurance Company, who were the second contractor hired and its surety, respectively.

its rulings from March 28 and May 30 final and appealable. Gulf Coast timely appealed.

ASSIGNMENTS OF ERROR

Gulf Coast assigns error to the trial court's March 28, 2013 judgment only. Gulf Coast's six assignments are as follows:

1. It was error for the trial court to grant the exception of no right of action and no cause of action filed on behalf of both Companion and HTHA;
2. It was error for the trial court to consider matters outside the petition in making its determination on the exceptions of no right of action and no cause of action;
3. It was error for the trial court to allow the supplemental and amending petition of Gulf Coast except as to HTHA and Companion;
4. It was error for the trial court to refuse Gulf Coast's request for leave to amend;
5. It was error for the trial court to order cancellation of Gulf Coast's lien;
6. It was error for the trial court to award fees and costs to HTHA and Companion in connection with the exceptions of no right of action and no cause of action.

STANDARD OF REVIEW

When the facts alleged in the petition provide a remedy under the law to someone, but the plaintiff who seeks the relief for himself or herself is not the person in whose favor the law extends the remedy, the proper objection is no right of action or want of interest in the plaintiff to institute the suit. The proper objection is no cause of action when the law does not provide a

remedy to anyone under the facts alleged in the petition. 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure* § 6:7 (2d ed. 2012).

The function of the peremptory exception of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. The standard of review for sustaining or denying a peremptory exception of no cause of action is de novo because it raises a question of law. *Kinchen v. Livingston Parish Council*, 2007-0478, p. 2 (La. 10/16/07), 967 So.2d 1137, 1138. The burden of demonstrating that a petition fails to state a cause of action is upon the mover. *Ramey v. DeCaire*, 2003-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 119. A peremptory exception of no right of action is subject to de novo review. *Parker v. State*, 2011-1475, p. 1 (La. App. 4 Cir. 3/7/12), 86 So.3d 791, 793, writ denied, 2012-0957 (La. 6/15/12), 90 So.3d 1067.

DISCUSSION

Louisiana Revised Statutes, 38:2242(B), provides that any claimant may after the maturity of his claim and within forty-five days after the recordation of acceptance of the work by the governing authority or of notice of default of the contractor or subcontractor, file a sworn statement of the amount due him with the governing authority having the work done and record it in the office of the recorder of mortgages for the parish in which the work is done. It is obvious from the record that Gulf Coast filed and recorded its lien well beyond the forty-five days after which Olympic went into default. In order to proceed on the bond, the claimant must comply with the notice and recordation requirements of La. R.S. 38:2242(B). La. R.S. 38:2247; *John F. Sanchez Plumbing Co., Inc. v. Aetna Cas. & Sur. Co.*, 564 So.2d 1302, 1303 (La. App. 1 Cir. 1990), writ denied, 567 So.2d 1128 (La.

1990). Based on the law and jurisprudence, it is clear that for statutory reasons Gulf Coast does not have a right of action against either HTHA or Companion.

However, the standard of review for the exception of no cause of action confines us to the four corners of the petition itself, with the presumption that all facts contained in the petition are true. See Ford Motor Credit Co. v. Louisiana Tax Commission, 251 So.2d 392, 396 (La. App. 1 Cir. 1971); See also Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So.2d 1234, 1235 (La. 1993); See also Wells v. Flitter, 2005-2525, p. 4 (La. App. 1 Cir. 9/27/06), 950 So.2d 679, 681, writ denied, 2007-0312 (La. 11/2/07), 966 So.2d 598. In its petition, Gulf Coast alleges that it filed a lien pursuant to the Louisiana Public Works Act with the recorder of mortgages in Terrebonne Parish. The petition itself does not contain the date on which the lien was filed, but attached to the petition as an exhibit is the lien affidavit with the recording information. The recordation date is shown as July 20, 2012. Where the petition is silent as to the lien's filing date, we can rely on the attached exhibit to see that Gulf Coast's lien was untimely filed. See Donnaud's Inc. v. Gulf Coast Bank and Trust Co., 2003-0427, p. 5 (La. App. 5 Cir. 9/16/03), 858 So.2d 4, 5, writ denied, 2003-2862 (La. 1/9/04), 862 So.2d 985.

Gulf Coast has failed to state a right of action for the same deficiencies in the petition, as it fails to allege specific facts to show a right of action against any defendant. See Wells, at 681. Because Gulf Coast did not timely file and record its lien, it cannot be afforded the right of action provided in La. R.S. 38:2247 against Companion and/or HTHA.⁵ Gulf

⁵ Louisiana Revised Statutes 38:2247 states, in pertinent part:

Coast cannot avail itself of the one-year prescriptive period provided in La. R.S. 38:2247 because it did not secure its right of action by filing the lien within forty-five days of Olympic's default.

Gulf Coast attempts to circumvent the requirement of La. R.S. 38:2242(B) by arguing that La. R.S. 38:2242(D)⁶ allowed more time to file and record the lien since HTHA was still holding onto money that had to be paid to the contractor and subcontractors. This is a misreading of the statute and it ignores what is clearly required by La. R.S. 38:2242(B). After HTHA terminated its contract with Olympic, a notice of contractor default was recorded in Terrebonne Parish which acknowledged all valid and outstanding liens, privileges, and encumbrances against Olympic and HTHA, of which Gulf Coast was not included. HTHA as awarding authority was therefore liable for those claims under La. R.S. 38:2242(D) and was not holding any secured funds for Gulf Coast. Once HTHA obtained a new contractor, it no longer had privity of contract with Olympic or Gulf Coast. HTHA then incurred the obligations to pay funds to the new contractor and subcontractors. There were no longer, nor were there ever, any funds reserved, secured, or earmarked for Gulf Coast that HTHA had retained. La. R.S. 38:2242(D) is therefore inapplicable to Gulf Coast, and Gulf Coast's interpretation of the statute would essentially render La. R.S.

Nothing in this part shall be construed to deprive any claimant... who has complied with the notice and recordation requirements of R.S. 38:2242(B), of his right of action on the bond pursuant to this Part, provided that said action must be brought against the surety or the contractor or both within one year from the registry of acceptance of the work or of notice of default of the contractor;...

⁶ Louisiana Revised Statutes 38:2242(D) states:

When an awarding authority makes final payment to the contractor without deducting the total amount of all outstanding claims so served on it or without obtaining a bond from the contractor to cover the total amount of all outstanding claims, the awarding authority shall become liable for the amount of these claims.

38:2242(B) pointless if it meant that a subcontractor could secure funds with an untimely filed lien.

Appellate courts have concluded that La. C.C.P. art. 934 does not require a court to give leave to amend a petition if doing so would be futile, meaning if it is apparent that the defect could not be corrected by amendment. *Magill v. Lowery*, 43,261, p. 4, n. 2 (La. App. 2 Cir. 5/7/08), 990 So.2d 18, 20, n. 2 writ denied, 2008-1237 (La. 10/10/08), 993 So.2d 1283. Gulf Coast's defect in its petition is the date on which it filed and recorded the lien, and that is an unchangeable fact. Allowing Gulf Coast to further amend its petition would be futile.

HTHA and Companion successfully requested attorney fees from the trial court, claiming that both Gulf Coast's original petition and motion to reconsider and/or supplement the record were without any reasonable basis. If the trial court finds that an action brought under the Louisiana Public Works Act was brought by any claimant without just cause or in bad faith, the trial judge shall award the principal or surety a reasonable amount as attorney fees for defending such an action. La. R.S. 38:2246(B). The purpose of the attorney fee provision of the Public Works Act is to encourage and promote amicable settlement of claims from public works contracts to the end that persons furnishing materials, supplies, and labor on such projects will be paid promptly, thus avoiding inconvenience, delay and expense occasioned by litigation. Because it is penal in nature, the attorney fee provision is subject to the rule of strict construction. *Glencoe Educ. Foundation, Inc. v. Clerk of Court and Recorder of Mortgages for Parish of St. Mary*, 2010-1872, p. 16 (La. App. 1 Cir. 5/6/11), 65 So.3d 225, 234, writ denied, 2011-1142 (La. 10/21/11), 73 So.3d 383.

We find that it was obvious to all parties involved that Gulf Coast was untimely with its lien and as a result had no right of action or cause of action against Companion and HTHA; nevertheless, Gulf Coast proceeded with an action it either knew or should have reasonably known could not have been successful. Furthermore, Gulf Coast went forward with the motion to reconsider and/or supplement the record when there had been no new evidence or law presented that could have changed the substance of the trial court's ruling. Gulf Coast's actions against Companion and HTHA were brought without just cause, and the trial court did not abuse its discretion under La. R.S. 38:2246 to award costs and reasonable attorney fees to the defendants.

Lastly, we find that the trial court was correct to cancel Gulf Coast's lien on HTHA's property, since the lien was untimely filed and Gulf Coast had no right or cause of action against HTHA or Companion. The lien unnecessarily encumbered the property, and it was proper for the trial court to cancel the lien following its ruling on the exceptions.

CONCLUSION

Regardless of any amendment or legal argument on the part of Gulf Coast, it is an inescapable fact that Gulf Coast did not abide by the clear requirements of La. R.S. 38:2422(B). By not filing a lien within forty-five days of Olympic's default, Gulf Coast lost its privilege to recover its expenses from the bond and could not be included in the class of plaintiffs who could recover from the bond. As such, Gulf Coast had an incurable defect in its petition, and the trial court was correct to dismiss HTHA and Companion from the suit and cancel the lien.

DECREE

The trial court's judgment in favor of the Houma-Terrebonne Housing Authority and Companion Casualty Insurance Company and against Gulf Coast Refrigeration, LLC is affirmed. All costs of this appeal are assessed to the appellant.

AFFIRMED.