

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0357

UBW
TMH

ASCENSION READY MIX, INC.

VS.

GEE CONSTRUCTION, LLC AND ROBYN FOSTER

Judgment Rendered: DEC 23 2014

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number C613889

The Honorable Kay Bates, Judge Presiding

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Defendants/Appellants
Gee Construction, LLC &
Robyn Foster

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Defendants/Appellees
R.L. Hall & Associates, Inc. &
Endurance American Specialty
Insurance Co.

Charles E. Spedale
Baton Rouge, LA

Defendants/Appellees
Elvin C. Simpson, Jr. &
Geaux Tiger Mart, LLC

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

McCleendon, J. concurs.

WHIPPLE, C.J.

This matter is before us on appeal by defendant/third-party plaintiff, Gee Construction, LLC, from a judgment of the district court maintaining the exceptions raising objections of no right of action, no cause of action, and improper cumulation of actions filed by third-party defendants, R.L. Hall & Associates, Inc. and Endurance American Specialty Insurance Company, and dismissing the third-party demand. For the following reasons, we reverse and remand.

PROCEDURAL HISTORY

Gee Construction, LLC (“Gee”) alleges that at some time in 2010, Elvin Simpson and Geaux Tiger Mart, LLC entered into a contract (“the design agreement”) with R.L. Hall & Associates, Inc. (“Hall”) for Hall to design a new service station called “Geaux Tiger Mart” in Baton Rouge. Simpson and Geaux Tiger Mart, LLC subsequently entered into a separate contract (“the construction agreement”) with Hall for Hall to construct the service station. Hall then subcontracted Gee to perform certain work required under the construction agreement.

On July 20, 2012, Ascension Ready Mix (“Ascension”) filed the instant lawsuit, naming Gee and Robyn Foster as defendants and alleging that Gee had failed to pay Ascension for concrete materials and supplies used in the construction of the Geaux Tiger Mart.¹ In response, Gee and Foster filed an answer and lengthy

¹Robyn Foster was named as a defendant as the person who signed Ascension’s “Credit Application and Guaranty” on behalf of Gee and in an individual capacity as guarantor of the debt owed to Ascension.

third-party demand, naming Hall, ABC Insurance Company, Simpson, and Geaux Tiger Mart, LLC as third-party defendants.²

Gee alleged in the third-party demand, among other things, that: (1) Gee's progress on the project was interrupted as a result of errors, omissions, and conflicts on the project plans that Hall certified as being final; (2) Gee's progress on the project was interrupted as a result of Hall's failure to participate in the project as both a designer and supervising contractor; (3) Hall violated its professional duty to avoid conflicts of interests, as it could not act impartially as the architect/engineer on the project due to its financial interests in the outcome of the project as the general contractor; (4) Hall failed to timely process change orders; (5) Hall wrongfully invoked a concursus proceeding after the project was completed, naming subcontractors, including Gee, who did not file a lien as defendants; and (6) the lawsuit filed by Ascension is a direct result of Hall improperly withholding Gee's contract funds, and wrongfully invoking a concursus proceeding.

In response to the third-party demand, Hall filed peremptory and dilatory exceptions, raising the objections of no right of action, no cause of action, improper cumulation of actions and improper joinder of parties, and vagueness and ambiguity. In support of the objections of no right of action and no cause of action, Hall noted that Gee had submitted an application for payment in the amount of \$63,797.00, which stated that site concrete for the job was one hundred percent complete. Hall also noted that it then issued a check to Gee for the full amount requested in the payment application, and Gee had accepted the check. Hall further averred that attached to the payment application was a partial waiver of lien

²Gee subsequently amended its third-party demand to name Endurance American Specialty Insurance Company ("Endurance") and Admiral Insurance Company ("Admiral"), in place of the fictitiously named "ABC Insurance Company." Endurance and Admiral were named as commercial general liability and professional liability insurers of R. L. Hall & Associates, Inc.

and release of claims, wherein Gee waived and released any future claims. Hall contended that this evidence establishes that Hall paid Gee for the concrete provided by Ascension, and that the debt owed to Ascension is a direct result of Gee's own actions, as Gee should have paid its bills with the contract funds it had sought and obtained.

In support of the objection of improper cumulation of actions and improper joinder of parties, Hall averred that there was no "community of interest" between the third-party demand and Ascension's primary demand, as Hall paid Gee for the concrete, but Gee then failed to pay Ascension from the contract funds it received. Thus, Hall contended, Gee's failure to pay Ascension broke any connection between Hall's actions and Ascension's payment. Last, in regard to the objection of vagueness, Hall averred that Gee failed to allege any specific facts as to how, when, and to what extent Hall violated its professional duties and obligations and, moreover, how the purported violation of professional duties and obligations led to Gee's inability to repay the debt owed to Ascension.

A hearing on Hall's objections to Gee's third-party demand was conducted on March 4, 2013, after which the trial court sustained the objection of no right of action, and granted Gee fifteen days to amend its third-party demand to assert a valid claim. In so ruling, the trial court found that all other objections raised by Hall were moot. A written judgment reflecting the trial court's ruling was signed on March 26, 2013.

On April 11, 2013, Gee filed an amended and supplemental third-party demand. Gee's amended petition adopted all prior allegations and further added that Hall had refused to pay Gee the \$99,440.98 retainage amount due, and that ten percent of this amount belongs to Ascension and is a direct part of Ascension's claims against Gee in the underlying lawsuit. The amended petition further alleged

that due to Hall's incomplete construction plan drawings, a change order was required to complete the construction of the car wash at the service station, and Hall had refused to pay the costs associated with this change order. Gee alleged that the costs incurred from this change order totaled \$7,509.05, approximately \$3,415.06 of which is owed to Ascension for concrete and is part of Ascension's principal demand against Gee.

In response to the amended and supplemental petition, Hall and its insurer, Endurance, re-urged the objections of no right of action, no cause of action, improper cumulation of actions, and vagueness and ambiguity, contending that Gee's amended thirty-party demand failed to amend the allegations of the original demand to properly assert a valid claim or right of action against Hall.

Following a hearing on Hall and Endurance's re-urged objections, the trial court signed a judgment on December 9, 2013, sustaining the exceptions raising objections of no right of action, no cause of action, and improper cumulation of actions and dismissing Gee's third-party demand.

Gee then filed the instant appeal, seeking review of the December 9, 2013 judgment of the trial court.

DISCUSSION

Evidentiary Issue

In sustaining the exceptions of no right of action and no cause of action, the trial court commented that Hall clearly paid Gee for what was owed and Gee clearly released Hall from liability. In reaching this conclusion, the trial court discussed: (1) "pay application eight" for \$63,797.00, wherein Gee stated that the concrete for the job was one hundred percent complete; (2) the subsequent check issued by Hall to Gee for \$63,797.00; and (3) the alleged waiver of claims signed by Gee.

Generally, no evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action. LSA-C.C.P. art. 931. However, an exception to this rule has been recognized by the jurisprudence, and a court may consider evidence admitted without objection to enlarge the pleadings. Maw Enterprises, L.L.C. v. City of Marksville, 2014-0090 (La. 9/3/14) 149 So. 3d 210, 215, citing City of New Orleans v. Board of Directors of Louisiana State Museum, 98-1170 (La. 3/2/99), 739 So. 2d 748, 756. Moreover, evidence supporting or controverting an objection of no right of action is admissible. Niemann v. Crosby Development Co., L.L.C., 2011-1337 (La. App. 1st Cir. 5/3/12), 92 So. 3d 1039, 1046. Here, the trial court did not separately address the objections of no cause of action and no right of action. Thus, we are unable to determine whether the trial court considered the above-mentioned evidence in relation to both objections, or only as to the objection of no right of action.

Moreover, regardless of whether the evidence was considered in relation to both objections or only considered as to the objection of no right of action, the evidence was required to be properly offered and introduced into the record before it could be considered. Here, the evidence that the trial court discusses in its reasons for judgment was attached to Hall's memorandum in support of the objections. However, it is well-established that documents attached to memorandums do not constitute evidence for purposes of an exception and cannot be considered on appeal. Quinn v. Louisiana Citizens Property Ins. Corp., 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1017, n. 5, citing Denoux v. Vessel Management Services, Inc., 2007-2143 (La. 5/21/08), 983 So. 2d 84, 88.

Thus, upon recognizing this potential evidentiary problem, which could affect our review of this case, we issued an order for the record in this appeal to be

supplemented by a certain date with the transcript of the hearing on the objections, so that a determination could be made as to whether the relied-upon evidence was properly introduced into the record and if so, whether an objection was made to the introduction of this evidence. The time delays set forth in this order have expired and the record has not been supplemented with the requested transcript.³ Accordingly, to avoid further judicial delay, we will consider the issues raised on appeal based on the record now before us.

No Cause of Action and No Right of Action

The exceptions of no cause of action and no right of action are two separate and distinct objections, each serving a particular purpose, with different procedural rules. Franks v. Royal Oldsmobile Co., Inc., 605 So. 2d 633, 634 (La. App. 5th Cir. 1992). In Badeaux v. Southwest Computer Bureau, Inc., 2005-0612 (La. 3/17/06), 929 So. 2d 1211, 1216-17, the Supreme Court explained the difference between these two objections, stating:

[O]ne of the primary differences between the exception of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant.

When the facts alleged in the petition provide a remedy under the law to someone, but the plaintiff who seeks the relief 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. Howard v. Administrators of Tulane Educational Fund, 2007-2244 (La. 7/1/08), 986 So. 2d 47, 59. In contrast, an exception of no

³The transcript of the second hearing on Hall and Endurance's re-urged exceptions is included in the record, and no exhibits were introduced during this hearing. However, the record does not contain the transcript of the first hearing, wherein the trial court sustained the objection of no right of action and gave Gee fifteen days to amend the third-party demand. Thus, we still cannot determine if the evidence cited by the trial court was actually introduced into the record at this first hearing.

cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. Badeaux, 929 So. 2d at 1217.

Here, Hall's argument in support of its objections of no cause of action and no right of action focuses on whether or not all amounts due to Gee have been paid and whether Gee signed a release of all claims against Hall. Hall's argument does not question whether the law extends a remedy to anyone in Gee's position. Moreover, no argument has been made by Hall questioning whether Gee is the proper party to assert the claims made in the third-party demand.

Accepting the allegations of Gee's third-party demand and amended and supplemental third-party demand as true, we find that Gee has stated a cause of action against Hall. Specifically, Gee has alleged that it had a contractual relationship with Hall for the construction of the Geaux Tiger Mart service station, and has further alleged that Gee's progress on the project was delayed due to various alleged instances of inaction by Hall and misappropriate actions on the construction project. We further find that Gee has a right of action, as a plaintiff who has a real interest in the institution of this suit and in whose favor the law extends a remedy. Specifically, Gee alleges that Hall failed to pay the retainage amount due to Gee, and that Hall's failure to provide complete and buildable plans caused Gee to incur additional costs.⁴

⁴As recognized in the jurisprudence, a design professional may be subject to an action in tort brought by [a subcontractor] even in the absence of any privity of contract. Such an action arises when there is a breach of a duty owed independently of the contract between the owner and architect. An architect is deemed to know that his services are for the protection of the owner's interest, as well as the protection of other third parties who have no supervisory power whatsoever and must rely on the architect's expertise in providing adequate supervision, plans, and specifications. Greater Lafourche Port Com'n v. James Const. Group, L.L.C., 2011-1548 (La. App. 1st Cir. 9/21/12), 104 So. 3d 84, 90, citing Standard Roofing Co. of New Orleans v. Elliot Construction Company, Inc., 535 So. 2d 870, 880 (La. App. 1st Cir. 1988), writs denied, 537 So. 2d 1166, 1167 (La. 1989).

While the above-discussed evidence (if properly introduced) may ultimately demonstrate that all amounts due Gee have been paid and/or extinguished because of a signed waiver of claims, these are not appropriate considerations in the context of determining the merits of the exception raising an objection of no right of action or no cause of action. A peremptory exception is not the procedural equivalent of a motion for summary judgment, even though either procedural vehicle may be used to determine certain issues. Kirby v. Field, 2004-1898 (La. App. 1st Cir. 9/23/05), 923 So. 2d 131, 137, n. 8, writ denied, 2005-2467 (La. 3/24/06), 925 So. 2d 1230; See also Curry v. Iberville Parish Sheriff's Office, 378 So. 2d 159, 161 (La. App. 1st Cir. 1979) (Exceptions based on exclusionary clauses in insurance policies, which are affirmative defenses, are improper and insufficient to maintain an exception of no right of action.); Comet Drilling Co. v. Tri-State Oil Tool Industries, Inc., 337 So. 2d 567, 569 (La. App. 2d Cir. 1976) (Whether or not plaintiff is barred from asserting its claim against defendant by reason of a contractual exculpatory clause is a matter of an affirmative defense, which cannot be decided on an exception of no right of action.)

Taking the allegations of Gee's third-party demand and amended and supplemental third-party demand as true, we find that Gee has stated a cause of action against Hall and that Gee has a right of action. While the evidence relied on by Hall and the trial court may be relevant and worthy of consideration in determining the merits of Gee's claims, it is inappropriate in determining the merits of an objection of no cause of action or no right of action. Thus, even if this evidence was properly introduced into the record, it would not affect our ultimate finding herein that the trial court erred in sustaining the objections of no cause of action and no right of action.

Improper Cumulation of Actions

Louisiana Code of Civil Procedure article 1111 addresses third-party actions, stating, in pertinent part, that a defendant in a principal action may by petition bring in any person, including a codefendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand. Here, the amended and supplemental third-party demand specifically alleges that Hall is liable to Gee for all or part of the principal demand and further alleges the exact amounts for which Hall may be responsible. Specifically, paragraph sixty-six of the amended and supplemental third-party demand states:

Of the \$99,440.98 retainage improperly withheld by Hall, \$14,138.00 (10% of the estimated \$141,375.00 for concrete materials) belonged to Ascension and is a direct part of Ascension's claims against G[ee] in this lawsuit.

Paragraphs seventy-four through seventy-six of the amended and supplemental third-party demand allege that Gee billed Hall \$7,509.05 for work done pursuant to a change order and that Hall has not paid this amount. Moreover, approximately \$3,415.06 out of the \$7,509.05 owed for this change order is for concrete supplied by Ascension and is included in Ascension's principal demand. A review of these paragraphs demonstrates that Gee has sufficiently alleged that Hall may be liable to him for all or part of the principal demand, as required by LSA-C.C.P. art. 1111 and, thus, Gee properly filed its claims as a third-party demand in response to the principal demand.

Last, we note that the trial court's judgment states, in pertinent part, that the "[e]xception of [i]mproper [c]umulation of [a]ctions is hereby granted and Gee's **professional liability claims** against R.L. Hall and Endurance are hereby dismissed without prejudice." [Emphasis added.] However, the judgment does not specify what claims constitute the "professional liability claims." Gee's third-party

demand is twelve pages long and contains sixty paragraphs; the amended and supplemental third-party demand adds an additional twenty-one paragraphs. None of the allegations in these lengthy pleadings are labeled as “professional liability claims,” and throughout the proceedings, Hall and Endurance do not identify what allegations encompass the alleged “professional liability claims.” Accordingly, after reviewing the record, we are unable to determine what claims constitute “Gee’s professional liability claims,” as dismissed by the trial court as a result of sustaining the objection of improper cumulation of actions.

As we are unable to determine what claims constitute the “professional liability claims,” and further finding that the amended and supplemental third-party demand sufficiently alleges that Hall may be liable to Gee for all or part of the principal demand, we likewise conclude that the trial court erred in sustaining the objection of improper cumulation of actions.

CONCLUSION

For the above and foregoing reasons, the December 9, 2013 judgment of the trial court, sustaining the objections of no right of action, no cause of action, and improper cumulation of actions, and dismissing Gee’s third-party demand, is hereby reversed. The case is remanded to the trial court for proceedings consistent with this opinion. Costs of this appeal are assessed to third-party defendants, R.L. Hall & Associates, L.L.C. and Endurance American Specialty Insurance Company.

REVERSED AND REMANDED.