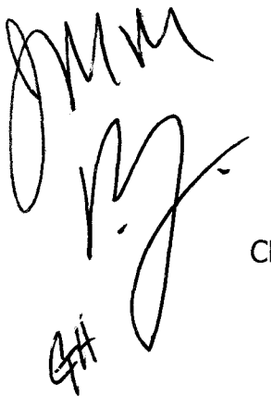
**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT



2014 CA 1749

GASAWAY-GASAWAY-BANKSTON

VERSUS

CP LAND, LLC; DANA R. FENECK; AND WELLS FARGO BANK

Judgment Rendered: JUN 05 2015

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APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LIVINGSTON
STATE OF LOUISIANA
DOCKET NUMBER 127686, DIVISION "C"

HONORABLE ROBERT H. MORRISON, III, JUDGE

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**BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.**

**McDONALD, J.**

In this case, an architectural corporation appeals a judgment dismissing its suit to preserve its statutory lien rights and to enforce a contract against a developer and a former owner of immovable property. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are primarily based on stipulations and evidence agreed upon by the parties. In April 2006, CP Land, LLC, sold immovable property to Dana and Tatjana Feneck for $288,000. The property was part of a development known as Carter Plantation in Springfield, Louisiana, and Mr. Feneck was managing director of Carter Plantation from April 2005 through July 2009. According to Mr. Feneck, the purpose of the sale was to generate cash to pay property taxes on Carter Plantation, and the parties agreed in writing that CP Land would later repurchase the property from the Fenecks for $350,000. The repurchase transaction never occurred.

On January 30, 2007, CP Land entered into a $400,000 contract with Gasaway-Gasaway-Bankston (GGB), a professional architectural corporation, to provide architectural services for the construction of a marina and hotel site, front office, and supporting facility center (the conference center) at Carter Plantation, part of which was to be constructed on the Fenecks' property. Although GGB provided all services pursuant to the contract, CP Land did not pay an outstanding balance of $182,500 owed to GGB. On April 9, 2009, GGB recorded a privilege against immovable property in Carter Plantation, including the immovable property owned by the Fenecks, pursuant to the Louisiana Private Works Act, LSA-R.S. 9:4801, et seq.

In February of 2010, the Fenecks' attorney advised CP Land that it was in default of its agreement to repurchase the immovable property from them and demanded that the conference center be removed from their property. GGB received a copy of the Fenecks' demand letter on the same day, and this was when GGB first became aware that the Fenecks, rather than CP Land, owned the immovable property. In early March of 2010, GGB filed the current suit against CP Land, Mr. Feneck, and Wells Fargo Bank (incorrectly alleged to be the current owner of the immovable property), seeking preservation of its statutory lien rights and to enforce the architectural contract (the GGB suit). GGB additionally alleged that its services enhanced the value of the immovable property and that Mr. Feneck, as the owner of the

property, was liable to GGB for that enhancement. CP Land did not respond to the suit and a preliminary default was entered against it. Wells Fargo was not served with the petition and made no appearance in the suit.

In June of 2010, the Fenecks filed a separate suit against CP Land, seeking a declaratory judgment that they were the owners of all improvements to the immovable property, namely the conference center (the Feneck suit). GGB was not notified of the suit nor made a party to it. Wells Fargo intervened in the Feneck suit, alleging that CP Land's sale of the immovable property to the Fenecks was part of a scheme by which those parties planned to avoid a mortgage held by Wells Fargo on one lot within Carter Plantation by building the conference center on other unencumbered lots, namely the property sold to the Fenecks. Wells Fargo sought a judgment holding that the Fenecks were not the owners of the conference center.

Approximately two years later, while both the GGB and Feneck suits remained pending, a title company filed a request to have GGB's privilege on the immovable property canceled, because GGB had not timely filed a notice of lis pendens as required by LSA-R.S. 9:4833(E).[1] Afterwards, in May of 2012, the Fenecks obtained a judgment in the Feneck suit declaring them owners of the conference center. Ultimately, the Fenecks sold the immovable property and conference center.

The GGB suit was submitted to the trial court for decision based on the stipulations and agreed upon evidence. On July 2, 2014, the trial court signed a judgment in favor of GGB and against CP Land for $182,500 and dismissed GGB's claim, which it characterized as one for unjust enrichment, against Mr. Feneck. GGB appeals, contending the trial court erred in concluding that LSA-R.S. 9:4833 required the filing of a notice of lis pendens for it to preserve its lien against property owned by Mr. Feneck, a party litigant with actual knowledge of the assertion of the lien. GGB also contends the trial court erred in failing to render judgment against Mr. Feneck personally for the outstanding $182,500 owed under GGB's contract with

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[1] GGB's lien was canceled in May 2012. Prior to its amendment by 2012 La. Acts No. 394, §2, effective August 1, 2012, Louisiana Revised Statute 9:4833(E) provided, in pertinent part:

> 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 statement of claim or privilege.

CP Land.

**DISCUSSION**

A licensed architect has a claim against the owner of an immovable for the price of professional services rendered in connection with a work that is undertaken by a contractor or subcontractor. LSA-R.S. 9:4802(A)(5). The claim against the owner shall be secured by a privilege on the immovable on which the work is performed. LSA-R.S. 9:4802(B). The claim against an owner under LSA-R.S. 9:4802 is limited to: (1) the owner(s) who have contracted with the contractor, or (2) to the owner(s) who have agreed in writing to the price and work of the contract of a lessee. LSA-R.S. 9:4806(B). The privilege granted by LSA-R.S. 9:4802 affects only the interest in or on the immovable enjoyed by the owner whose obligation is secured by the privilege. LSA-R.S. 9:4806(C).

We have carefully reviewed the record and determine that the trial court judgment is correct. Although it is undisputed that the Fenecks owned the immovable property upon which GGB filed its lien, there are important limitations on the liability of owners under the Private Works Act. Under LSA-R.S. 9:4806(B) and (C), the claim against an owner granted by LSA-R.S. 9:4802 is "limited to the [owner(s)] who have contracted with the contractor" and "affects only the interest in or on the immovable enjoyed by the owner whose obligation is secured by the privilege." If the owner did not personally contract with a contractor, there is no liability, either personally or for that owner's interest in the property. See Rubin, Michael H., **Ruminations on the Louisiana Private Works Act**, 58 La.L.Rev. 569, 585-86 (1998). Further, we note that lien statutes must be strictly construed against the lienors, and any doubt as to the meaning of a lien statute should be resolved against the party claiming it and in favor of the party resisting the claim. **Circle H. Bldg. Supply, Inc. v. Dickey**, 89-0124 (La. App. 1 Cir. 2/21/90), 558 So.2d 680, 682.

In this case, Mr. Feneck did not contract with GGB or a contractor, and he had no "obligation" with GGB to which GGB's lien attached; so, his ownership interest in the immovable property upon which the conference center was built was not affected by GGB's lien. See **Louisiana Industries v. Bogator, Inc.**, 23,780 (La. App. 2 Cir. 8/19/92), 605 So.2d 213, 219 (Although defendant was a co-owner of property upon which lien work was performed, co-owner could not be held liable personally, because there was no evidence that

the co-owner contracted with lien holder.) Thus, we need not decide the effect on Mr. Feneck of GGB's failure to file a notice of lis pendens under LSA-R.S. 9:4833(E), because the lien did not affect Mr. Feneck's property. And, although the evidence establishes that the Fenecks no longer own the immovable property, we likewise do not address the effect on any current owners of GGB's failure to file the notice of lis pendens, because such owners are not parties to this suit.

Next, we find no error in the trial court's refusal to render a personal judgment against Mr. Feneck under an unjust enrichment theory. Under LSA-C.C. art. 2298, an unjust enrichment remedy is not available if the law provides another remedy for the impoverishment. In this case, GGB received a judgment against CP Land for the full amount owed under the architectural contract. This was the remedy to which GGB was entitled, and the fact that GGB may be unable to collect on the judgment against CP Land does not create an unjust enrichment cause of action against Mr. Feneck. See **Scott v. Wesley**, 589 So.2d 26, 28 (La. App. 1 Cir. 1991) (In cases where a claim has been exercised and a judgment obtained, the availability of a practical remedy is apparent and precludes application of the theory of unjust enrichment.); see also **Walters v. MedSouth Record Management, LLC**, 10-0352 (La. 6/4/10), 38 So.3d 241, 242-43 (per curiam) (The mere fact that a plaintiff does not successfully pursue another available remedy does not give the plaintiff the right to recover under the theory of unjust enrichment.)

**CONCLUSION**

Thus, after a thorough review of the evidence and applicable law, we find the trial court's judgment and his reasons for judgment, both signed on July 2, 2014, are correct. We affirm the judgment and issue this opinion in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.2(A)(5) and (6). In doing so, we adopt the trial court's written reasons as our own, attaching those reasons hereto as Appendix A.

All costs of this appeal are assessed to Gasaway-Gasaway-Bankston.

**AFFIRMED.**

# APPENDIX A

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| GASAWAY-GASAWAY-BANKSTON | : | NUMBER 127,686, DIVISION "C" |
| | : | 21ST JUDICIAL DISTRICT COURT |
| VERSUS | : | PARISH OF LIVINGSTON |
| CP LAND, LLC, DANA R. FENECK AND WELLS FARGO BANK | : | STATE OF LOUISIANA |
| FILED:_____ | : | DY. CLERK:_____ |

## REASONS FOR JUDGMENT

This is a suit for the recovery of architectural fees incurred in the construction of a conference center at the Carter Plantation development near Springfield, Louisiana. The applicable facts are not in dispute, and are mostly contained in a stipulation entered into between the architects, Gasaway-Gasaway-Bankston ("GGB") and Dana R. Feneck ("Feneck"). CP Land, LLC, ("CP") never answered the suit, and a preliminary default was entered against that entity. Wells Fargo Bank was a named defendant, but was never served and has made no appearance in this lawsuit.

Essentially, CP transferred ownership of a tract of immovable property to Fenick. Fenick at the time was managing director for CP at the Carter Plantation facility. Apparently, this transfer was to help CP with cash flow problems, and there was an agreement, later extended, whereby CP would repurchase the land from Fenick at a later date.

Thereafter, CP entered into an agreement with GGB to provide architectural services in connection with the construction of a conference center at Carter Plantation. This construction took place on the property CP had previously transferred to Fenick, which fact was unknown at the time either by GGB or by Wells Fargo, which was trustee under a bond issue that was utilized to furnish funding for development at Carter Plantation. GGB's fees amounted to $182,500.00, and have never been paid.

Ultimately, GGB filed a lien against the property, but, when the present suit was filed, had failed to file a notice of lis pendens as to the claim within one year of filing of the lien as required by R.S. 9:4833.

Thereafter, Fenick made demand on CP to remove the improvements (conference center) from his property within 90 days, and then filed suit to be determined the owner of the improvements under Civil Code Article 493. GGB was not named as a party to that litigation. Interestingly, Wells



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Fargo became aware of the suit and intervened. While not a stipulated fact in the present lawsuit, based upon the deposition testimony of Fenick, apparently what transpired was that a third party corporate entity became interested in purchasing the conference center, made arrangements to cover the indebtedness held by Wells Fargo, which then dismissed its intervention, Fenick proceeded to obtain judgment against CP that he was the owner of the conference center building on his property, and then sold the property and the conference center to the third party. Also, according to his deposition testimony, Fenick did not reap any windfall for the added value of the building, but basically was paid roughly the amount originally agreed to by CP to repurchase the property from Fenick. CP did not contest this lawsuit either, and, one must assume, is presently insolvent.

Initially, the Court has no difficulty in granting judgment in favor of GGB and against CP for the architectural fees incurred. The lawsuit, as filed, further contends that the property was owned at the time of filing by Wells Fargo, and prays that its lien rights remain enforceable as against the conference center property. However, as stated Wells Fargo, though named as a defendant, was never served and is therefore not a viable party to this action, nor is there any stipulation contending that title to the property ever vested in Wells Fargo.

The lawsuit further makes a claim against Fenick, under a theory of unjust enrichment. Had there been any proof that Fenick did receive some windfall in his ultimate sale of the property, based upon the enhanced value to the property due to the construction of the conference center, the Court might have been able to consider this claim, but, as stated, the only evidence presented was the deposition testimony of Fenick, that he apparently received approximately the same amount of money he had invested in the property at the time it was sold.

In post trial memoranda, GGB asserts that since it was never given any notice of Fenick's subsequent lawsuit to claim ownership of the structures built on his immovable property, that judgment should be annulled, citing Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L. Ed.2d 180 (1983) and CJ Contractors v. American Bank & Trust Co., 559 So. 2d 810 (La. App. 1st Cir. 2/21/90). This Court actually agrees with this contention, but there are procedural impediments to ruling on this claim. First of all, Plaintiff did not pray for this type of relief in its petition. Secondly, the same argument would conversely apply in this case, in that Wells Fargo was never brought into this lawsuit, and may have a potential interest in the outcome of an

annulment of the prior judgment, as would whoever the present owner of the conference center property, who is likewise not made a party to these proceedings. However, since this claim has not been made, it would not be a matter of *res judicata*, and, if the prior judgment actually constitutes an absolute nullity, that claim could still be asserted in another proceeding. But, under the circumstances, this Court is powerless to rule on this contention.

Livingston, Louisiana, this 2nd day of July, 2014.

Robert H. Morrison, III
Judge, Division "C"

Please send copies and notice to:

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