

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 1060

LANDCO CONSTRUCTION, LLC

VERSUS

PRECISION CONSTRUCTION AND MAINTENANCE, LLC,
MAPP CONSTRUCTION, AND KIRSHMAN, LLC

Judgment Rendered: FEB 21 2018

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 652004

Honorable Timothy E. Kelley, Judge

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

WELCH, J.

Landco Construction, LLC (“Landco”) appeals a judgment sustaining the peremptory exception raising the objections of no cause of action and prescription filed by Mapp Construction, LLC (“Mapp”) and dismissing Landco’s claims against Mapp with prejudice. For the reasons that follow, we affirm in part and vacate in part the judgment of the trial court, and we remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On October 10, 2016, Landco filed a petition for damages for breach of contract and unjust enrichment, naming as defendants Mapp; Precision Construction and Maintenance, LLC (“Precision”); and Kirshman, LLC (“Kirshman”). According to the allegations of the petition, Mapp was hired by Kirshman to be the contractor for the Carmax Center on Siegen Lane in Baton Rouge, Louisiana (“the project”) on property that was owned by Kirshman. Mapp subcontracted with Precision to perform and complete certain work on the project, and Precision then contracted with Landco for the performance of lime and soil cement work for the project. Landco alleged that Precision failed to pay Landco for the work it performed pursuant to their contract and that Mapp failed to pay Precision for Precision’s work pursuant to their contract. Landco also alleged, however, that Kirshman had paid Mapp pursuant to their contract. Therefore, Landco maintained that Mapp, Precision, and Kirshman were solidarily liable to Landco for the cost of the work Landco performed, *i.e.* \$40,383.00.

In the petition, Landco also claimed that “Mapp was a party to the contract [between Precision and Landco because] ... Mapp was the contractor hired by Kirshman ... to build [the] Carmax Center,” that “Mapp subcontracted with Precision to perform and complete certain work needed to complete Mapp’s contract with Kirshman,” and that “Mapp consented to Precision contracting with

[Landco] to perform the lime and soil cement work on the Kirshman ... property.” Landco further claimed that “Mapp’s consent to the contract [was] evidenced by its personal supervision of the work performed by [Landco] and the fact that only Mapp employees were present at the time [Landco] performed the work in accordance with the contract.”

According to Landco, Mapp and Precision were put on notice of their default on March 24, 2011 by certified mail, but neither Mapp nor Precision had performed its obligation to pay Landco. Therefore, Landco claimed that the defendants—Mapp, Precision, and Kirshman—were obligated to pay Landco the cost of the work it performed and were liable for all damages that were a direct consequence of their failure to perform. In addition, Landco alleged that since Mapp was paid by Kirshman for the work performed by Landco, yet Landco was never paid for its work, that Mapp was unjustly enriched, and therefore, indebted unto Landco for all amounts in which Mapp was unjustly enriched by its failure to pay Landco.

In response to Landco’s petition, Mapp filed a peremptory exception raising the objections of no cause of action and prescription.¹ Therein, Mapp maintained that Landco had failed to state a cause of action against Mapp for breach of contract because Landco did not have a contract with Mapp; rather, its contract was with Precision. Mapp also maintained that Landco had failed to effectively plead a claim based on unjust enrichment against Mapp, had failed to allege facts establishing that it had a valid statutory lien claim against Mapp pursuant to the Private Works Act (La. R.S. 9:4801, *et seq.*), and failed to allege facts establishing that it had a claim against Mapp for any actionable offense or quasi-offense. Mapp further maintained that to the extent any such claims existed, those claims were

¹ The record before us does not contain any responsive pleadings filed by either Kirshman or Precision.

prescribed because Landco's suit was filed more than one year from Landco's March 24, 2011 notice to Mapp.² Therefore, Mapp sought the dismissal of Landco's claims against it.

After a hearing, the trial court signed a judgment on April 25, 2017, which sustained both the objection of no cause of action and the objection of prescription and dismissed Landco's claims against Mapp with prejudice. From this judgment, Landco has appealed, essentially arguing that the trial court erred in: sustaining the objection of no cause of action, sustaining the objection of prescription, and failing to afford Landco the opportunity to amend its petition to remove the grounds for the objections.

NO CAUSE OF ACTION

The peremptory exception of no cause of action tests the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged. **Naquin v. Bollinger Shipyards, Inc.**, 2013-1638 (La. App. 1st Cir. 5/2/14), 147 So.3d 207, 209, writ denied, 2014-1091 (La. 9/12/14), 148 So.3d 933. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931. Rather, the exception is triable solely on the face of the petition and any attached documents. **Paulsell v. State, Dept. of Transp. and Development**, 2012-0396 (La. App. 1st Cir. 12/28/12), 112 So.3d 856, 864, writ denied, 2013-0274 (La. 3/15/13), 109 So.3d 386. For purposes of resolving the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. **Reynolds v. Bordelon**, 2014-2362 (La. 6/30/15), 172 So.3d 589, 594-595. Therefore, the court reviews the petition and accepts well pleaded allegations of fact as true, and the issue is whether, on the

² See La. R.S. 9:4823(A)(2) (providing that a subcontractor's or privilege holder's claim against the owner and/or contractor for the payment of work performed under a contract is extinguished if the claimant/privilege holder does not institute an action for the enforcement of the claim or privilege within one year after filing the statement of claim or privilege to preserve it) and La. C.C. art. 3492 (providing for a liberative prescriptive period of one year for delictual actions).

face of the petition, the plaintiff is legally entitled to the relief sought. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1235 (La. 1993).

Louisiana retains a system of fact pleading, and mere conclusions of the plaintiff unsupported by facts will not set forth a cause or right of action. **Scheffler v. Adams and Reese, LLP**, 2006-1774 (La. 2/22/07), 950 So.2d 641, 646-647; **Montalvo v. Sondes**, 93-2813 (La. 5/23/94), 637 So.2d 127, 131. In addition, conclusions of law asserted as facts are not considered well pled allegations of fact, and the correctness of those conclusions are not conceded. **Hooks v. Treasurer**, 2006-0541 (La. App. 1st Cir. 5/4/07), 961 So.2d 425, 429, writ denied, 2007-1788 (La. 11/9/07), 967 So.2d 507. Because the objection of no cause of action raises a question of law and the trial court's decision is based solely on the sufficiency of the petition, review of the trial court's ruling on the exception is *de novo*. **Scheffler**, 950 So.2d at 647.

On appeal, Landco contends that the trial court erred in sustaining the objection of no cause of action because its petition set forth, on its face, a claim against a contractor for the enforcement of a claim for the failure to pay a subcontractor under the Private Works Act (La. R.S. 9:5801, *et seq*). However, Mapp contends that Landco's petition was an action for breach of contract and unjust enrichment, that there was no contract between MAPP and Landco, that a claim based on unjust enrichment was not available to Landco since it had another remedy under the law, *i.e.*, a claim for breach of contract against Precision and/or a claim under the Private Works Act, and that Landco failed to plead any facts supporting a claim under the Private Works Act. Therefore, Mapp argues that Landco failed to state a cause of action against Mapp and that Landco's petition was properly dismissed.

First and foremost, we agree with Mapp that Landco's petition was based on breach of contract and unjust enrichment. The essential elements of a breach of

contract claim are: (1) the existence of a contract (the obligor's undertaking of an obligation to perform), (2) the breach of that contract (the obligor failed to perform the obligation), and (3) damages (the failure to perform resulted in damages to the obligee). **Mouton v. Generac Power Systems, Inc.**, 2014-0350 (La. App. 3rd Cir. 11/5/14), 152 So.3d 985, 997; **Denham Homes, L.L.C. v. Teche Fed. Bank**, 2014-1576 (La. App. 1st Cir. 9/18/15), 182 So.3d 108, 119; see La. C.C. art. 1994.

As set forth above, Landco's petition alleged that Kirshman was the owner of the project, that Kirshman contracted with Mapp, that Mapp contracted with Precision, that Precision contracted with Landco, and that Mapp consented to Precision contracting with Landco for the lime and soil cement work. Landco did not, however, allege that it entered into a contract with Mapp. While Landco alleged that Mapp consented to Landco's contract with Precision, Mapp's consent to or knowledge of Landco's contract with Precision does not create a contract between Mapp and Landco, does not make Mapp a party to that contract, and does not create an obligation on behalf of Mapp to pay Landco. Likewise, although Landco claimed that Mapp was a party to Landco's contract with Precision because Mapp was the contractor hired by Kirshman, Mapp's status as the contractor hired by Kirshman neither establishes the existence of a contract between Landco and Mapp nor does it establish that Mapp undertook an obligation to pay Landco.

As to claims based on unjust enrichment, La. C.C. art. 2298 provides that "[a] person who has been enriched without cause at the expense of another person is bound to compensate that person." However, the remedy of unjust enrichment "is subsidiary" in nature, and "shall not be available if the law provides another remedy." *Id.*; see **Carriere v. Bank of Louisiana**, 95-3058 (La. 12/13/96), 702 So.2d 648, 671 (*on rehearing*). Thus, the remedy of unjust enrichment is "only applicable to fill a gap in the law where no express remedy is provided." **Mouton**

v. State, 525 So.2d 1136, 1142 (La. App. 1st Cir.), writ denied, 526 So.2d 1112 (La. 1988).

Landco's petition alleged that Mapp was enriched by receiving payment for work performed by Landco and refusing to pay Landco accordingly, that Mapp had no justification for its failure to pay Landco, and that unjust enrichment resulted. However, Landco also asserted in its petition that Landco entered into a contract with Precision for the performance of the lime and soil cement work on the project, that Precision had breached or not performed its obligation under that contract, *i.e.*, to pay for the work that was performed, and that Landco was damaged by the failure to be paid for the work it performed. Therefore, Landco, having pled facts establishing a cause of action for breach of contract against Precision, has a remedy under the law to obtain payment for the work it performed. Furthermore, Landco, as a subcontractor, is also provided a remedy against Mapp under the Private Works Act, which specifically provides a method for contractors and subcontractors to recover the costs of labor and/or materials from a party with whom there is no contract.³ Accordingly, since Landco has other remedies under the law, it is not entitled to make a claim based on or seek the remedy of unjust enrichment.

Lastly, to the extent that Landco contends that its petition sets forth a cause of action against Mapp under the Private Works Act, we find that Landco's petition fails to fulfill the requirements necessary to state such a cause of action against Mapp, Kirshman, or Precision. The Private Works Act was enacted to facilitate construction of improvements on immovable property, and it does so by granting to subcontractors, among others, the right to recover payment for the work

³ Whether Landco is or can be successful in pursuing that remedy is irrelevant to determining whether Landco has the right to recover under the theory of unjust enrichment. See Pinegrove Elec. Supply Co., Inc. v. Cat Key Const., Inc., 2011-0660 (La. App. 5th Cir. 2/28/12), 88 So.3d 1097, 1101; Jim Walter Homes, Inc. v. Jessen, 98-1685 (La. App. 3rd Cir. 3/31/99), 732 So.2d 699, 706.

they perform from the owner or contractor with whom they lack privity of contract. See **Cosman v. Cabrera**, 2009-0265 (La. App. 1st Cir. 10/23/09), 28 So.3d 1075, 1078 n.1; **Ted Hebert, LLC v. Infiniedge Software, Inc.**, 2013-2052, p.3 (La. App. 1st Cir. 9/19/14) (*unpublished*). More specifically, La. R.S. 9:4802 regulates the rights of persons who supply services or materials to a contractor of an owner and who thus have no direct contractual relationship with the owner. **Perque Floor Covering of New Orleans, Inc. v. L. Cambre Enterprises, Inc.**, 593 So.2d 407, 410 (La. App. 1st Cir. 1991); see Comment (a) to La. R.S. 9:4802. Louisiana Revised Statute 9:4802 imposes personal liability upon the owner and the contractor for claims arising out of the performance of work done on the owner's property by subcontractors, laborers and sellers (as well as other enumerated categories of persons addressed in the statute). **Perque Floor Covering of New Orleans, Inc.**, 593 So.2d at 410; see Comment (a) to La. R.S. 9:4802.

The provisions of La. R.S. 9:4822 set forth the procedure that persons having claims or privileges under the Private Works Act must follow if they wish to preserve those claims and privileges. **Perque Floor Covering of New Orleans, Inc.**, 593 So.2d at 410; see Comment (a) to La. R.S. 9:4822. The timely filing of a statement of claims or privilege pursuant to 9:4822 is essential to preserve the claims or privilege recognized in La. R.S. 9:4802. **Perque Floor Covering of New Orleans, Inc.**, 593 So.2d at 410. The effect of failing to timely file the statement of claims or privilege results in the extinguishment of the claims or privilege given under the act. **Perque Floor Covering of New Orleans, Inc.**, 593 So.2d at 410; La.R.S. 9:4823; see Comment (a) to La. R.S. 9:4823. The jurisprudence clearly establishes that the burden of proving the timeliness of the claim is upon the party who asserts the claim or privilege. **Perque Floor Covering of New Orleans, Inc.**, 593 So.2d at 410. Thus, in order to state a cause of action pursuant to the Private

Works Act, the plaintiff's petition must allege facts which, if proven, would support a finding that the statement of claims or privilege was timely filed. *Id.*

Herein, while Landco's petition alleged that Kirshman was the owner of the project, that Kirshman contracted with Mapp, that Mapp contracted with Precision, that Precision contracted with Landco, and that Landco provided materials and labor to Mapp or Kirshman for the project for which it has not been paid, Landco did not allege facts that would support a finding that Landco timely filed a statement of claims or privilege pursuant to La. R.S. 9:4822 to preserve its claim or privilege under La. R.S. 9:4802.

Therefore, based on our *de novo* review of Landco's petition and accepting all of the well pled allegations of fact contained therein as true, we conclude that Landco has failed to set forth a cause of action against Mapp. Accordingly, that portion of the April 25, 2017 judgment of the trial court sustaining the peremptory exception raising the objection of no cause of action is affirmed.

However, pursuant to La. C.C.P. art. 934, when the grounds of an objection pleaded by the peremptory exception may be removed by amendment of the petition, "the judgment sustaining the exception shall order such amendment within the delay allowed by the court." In this matter, we are unable to determine, as a matter of law, whether the grounds for the objection can (or cannot) be removed by an amendment of the petition so as to state a cause of action against Mapp under the Private Works Act or whether there are other causes of action that may be pled by Landco. Thus, Landco should have been given an opportunity to amend its petition to state a cause of action against Mapp. Therefore, although we affirm the trial court's ruling sustaining the objection of no cause of action, we vacate the trial court's ruling dismissing Mapp from the suit and remand this matter to the trial court with instructions to allow Landco the opportunity to amend its petition within thirty days of the date of this decision to remove the grounds for

the objection of no cause of action. See Carr v. Sanderson Farm, Inc., 2015-0953 (La. App. 1st Cir. 2/17/16), 189 So.3d 457, 458 (when the court is unable to determine whether the grounds for the objection of no cause of action can be removed by amendment of the petition, out of an abundance of caution, the matter should be remanded to allow the plaintiff the opportunity to amend the petition as provided in La. C.C.P. art. 934.⁴

PRESCRIPTION

Lastly, on appeal, Landco has challenged the trial court's ruling sustaining the peremptory exception raising the objection of prescription. We note that at the time the trial court made this ruling, it had already sustained the peremptory exception raising the objection of no cause of action. Therefore, the issue of prescription was moot and should not have been considered by the trial court. See First Nat. Bank of Picayune v. Pearl River Fabricators, Inc., 2006-2195 (La. 11/16/07), 971 So.2d 302, 307–308 (an issue is moot when a judgment on that issue has been deprived of practical significance or made abstract or purely academic.) In addition, we note that the record lacks the appropriate evidence that would allow the trial court or this Court to resolve the issue of prescription. Therefore, we vacate that portion of the April 25, 2017 judgment sustaining the peremptory exception raising the objection of prescription.

⁴ We note that the trial court did not afford Landco the opportunity to amend its petition on the basis that any amended claims that Landco could assert would be prescribed. However, we find the trial court's determination in this regard was error. The objection of prescription must be specifically pleaded by the parties; neither the trial court nor this court can supply the objection of prescription. See La. C.C.P. art. 927(B). Thus, the trial court's refusal to allow Landco the opportunity to amend its petition because the claims that might be asserted therein would be prescribed, was tantamount to supplying the objection of prescription on the court's own motion.

CONCLUSION

For all of the above and foregoing reasons, that portion of the April 25, 2017 judgment of the trial court sustaining the objection of no cause of action is affirmed, that portion of the April 25, 2017 judgment sustaining the objection of prescription and dismissing Landco's claims against Mapp is vacated, and this matter is remanded to the trial court in order to afford Landco the opportunity to amend its petition.

All costs of this appeal are assessed to the plaintiffs/appellants, Landco Construction, LLC.

AFFIRMED IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.