NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1213

CROSSTEX ENERGY SERVICES, LP; CROSSTEX LIG, LLC;
AND CROSSTEX PROCESSING SERVICES, LLC

VERSUS

TEXAS BRINE COMPANY, LLC; ZURICH AMERICAN INSURANCE COMPANY;
AND AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY

Judgment Rendered: JUL 11 2019

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APPEALED FROM THE 23RD JUDICIAL DISTRICT COURT
ASSUMPTION PARISH, LOUISIANA
DOCKET NUMBER 34,202

HONORABLE THOMAS J. KLIEBERT JR., JUDGE PRESIDING

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BEFORE: McDONALD, HIGGINBOTHAM, and CRAIN, JJ.

McDONALD, J.

This suit is one of many arising from an August 2012 sinkhole that appeared near Bayou Corne in Assumption Parish, Louisiana. In this appeal, Texas Brine Company, LLC,[1] the operator of the Oxy Geismar #3 brine well (OG3 well), challenges the summary judgment dismissal of its third-party contract claims[2] against certain non-operators of the nearby Adams Hooker #1 oil and gas well (AH1 well), including LORCA Corporation, Colorado Crude Company, Sol Kirschner, Reliance Petroleum Corporation, and its insurer, Chicago Insurance Company (Non-Operators). We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1982, Texas Brine operated the OG3 well on land owned by Occidental Chemical Corporation (Oxy). Texas Brine continued as the OG3 operator for over 29 years, until it plugged and abandoned the OG3 well in 2011. In 1983, Oxy leased certain property near the OG3 well to Colorado Crude Company to explore for oil and gas, a lease we reference as the Colorado Crude lease (the CCL). Thereafter, the CCL was assigned to several parties, including at least some Non-Operators. The AH1 well was drilled in 1986, pursuant to the CCL, and was operated by multiple entities (Operators) for several years. The Non-Operators maintained a non-operating interest in the CCL until 2001. The AH1 well was plugged and abandoned in May 2010.

After the sinkhole appeared in 2012, Crosstex,[3] the plaintiff in the underlying litigation, sued Texas Brine claiming Texas Brine's negligent brine mining operation of the OG3 salt cavern caused the sinkhole and the sinkhole damaged Crosstex's pipeline.

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[1] In its original petition, the plaintiffs in this case, multiple Crosstex entities, named Texas Brine Company, LLC, as the defendant who operated the OG3 well. In later pleadings, the Crosstex entities additionally named other parties allegedly related to Texas Brine Company, LLC, as defendants. Here, we refer to the plaintiffs collectively as Crosstex and to the defendants, herein third-party plaintiffs, collectively as Texas Brine.

[2] We decided Texas Brine's challenge to the summary judgment dismissal of its third-party *tort* claims against the non-operators of the AH1 well in *Crosstex Energy Services, LP v. Texas Brine Company, LLC*, 18-0749 (La. App. 1 Cir. 2/27/19), 2019 WL 969564. The summary judgment in that case, among other things, also dismissed Texas Brine's tort claims under pre-1996 law, including indemnity and contribution, and all "post-1996 claims for tort indemnity and contribution" against Occidental Chemical Corporation, Occidental Petroleum Corporation, Oxy USA, Inc., Basic Chemicals Company, LLC, and Occidental VCM, LLC (collectively, Oxy). Although Oxy filed a brief in the instant appeal, that brief pertains to the dismissal of Texas Brine's third-party tort claims, decided on February 27, 2019, not to Texas Brine's third-party contract claims, decided here.

[3] *See* footnote 1.

In response, Texas Brine filed third-party contract claims against the Non-Operators, claiming the CCL was binding on them as assignees, and that the CCL required that they "shall diligently endeavor not to damage any salt formations which may exist on the leased premises and shall pay for any actual damages which may occur from operations upon said leased premises." According to Texas Brine, the AH1 well reservoir shared a common wall with the OG3 well cavern; a pressure differential between the AH1 well reservoir and the OG3 cavern developed; the Non-Operators shared control of the AH1 well with the AH1 well Operators; the Non-Operators took no steps to alleviate the pressure differential; and, this inaction caused damage to the salt formations in violation of the CCL and contributed to the August 2012 sinkhole. Texas Brine further alleged that it was a third-party beneficiary of the CCL and was entitled to damages from the Non-Operators.

Reliance filed a motion for partial summary judgment seeking dismissal of Texas Brine's third-party contract claim against it. Reliance's insurer, Chicago Insurance Company, and Sol Kirschner joined in Reliance's motion. LORCA and Browning Oil Company, an Operator, filed a separate but similar motion.[4] Colorado Crude, identified as a Non-Operator in this litigation, did not file a similar motion. We refer to those who filed the motions as Non-Operator Movants. Texas Brine opposed all of the motions.

In July 2017, the trial court held a hearing, at which it considered numerous motions filed by numerous parties in this Crosstex litigation, as well as similar motions in a related suit filed by Florida Gas Transmission Company, LLC, against Texas Brine, under 23rd Judicial District Court Docket Number 34,316. On September 27, 2017, the trial court signed a summary judgment in favor of the Non-Operators, dismissing Texas Brine's third-party contract claims against them with prejudice, stating that the Non-Operators "did not perform any acts with respect to the [AH1 well;] had no control, no direction, and no active involvement with respect to the [AH1 well;] [were] not liable to

[4] On November 30, 2018, this court granted: (1) LORCA's motion to cite to the records in our Docket Numbers 2018 CA 0749 and 2018 CA 0900, and (2) Reliance's motion to cite to the records in our Docket Numbers 2018 CA 0749 and 2018 CA 1189. Thus, our review of this appeal includes appropriate documents in those records as well.

Also on November 30, 2018, this court referred Texas Brine's motion to supplement the record to this panel. In the motion, Texas Brine seeks to supplement the appellate record with a motion for new trial and the trial court's order denying the motion. We deny Texas Brine's motion to supplement because the subject documents are already part of the appellate record.

Texas Brine for the acts or omissions of others, if any, with respect to the [AH1 well;] and therefore[,] did not breach the terms of the [CCL]."[5]

Texas Brine appeals, claiming the trial court erred in granting summary judgment to the Non-Operators and dismissing its contract claims against them. According to Texas Brine, the trial court made an impermissible factual finding that the Non-Operators had no active involvement in the AH1 well. Further, Texas Brine claims the CCL was binding on all assignees, and the Non-Operators are solidarily bound with the Operators "for their contractual liability for the depressurization of the AH1 reservoir that damaged the salt formations, contributing to the sinkhole."

SUMMARY JUDGMENT

A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966A(3). The burden of proof rests on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to then produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. LSA-C.C.P. art. 966D(1). Appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Crosstex Energy Services, LP v. Texas Brine Company, LLC*, 17-0895 (La. App. 1 Cir. 12/21/17), 240 So.3d 932, 936, *writ denied*, 18-0145 (La. 3/23/18), 238 So.3d 963. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Id.*

[5] The September 27, 2017 judgment denied the motions for partial summary judgment as to Browning Oil Company.

CONTRACTUAL LIABILITY

The party claiming rights under a contract has the burden of proving the existence of the contract, its terms, and a breach of the contract. *See* LSA-C.C. art. 1831; *Hornbeck Offshore Operators, LLC v. Cross Group, Inc.*, 16-0174 (La. App. 1 Cir. 10/31/16), 207 So.3d 1141, 1146. Thus, as the party asserting contract claims against the Non-Operator Movants, Texas Brine has the burden of proving a contractual relationship with the Non-Operator Movants, the contract terms imposing a duty on the Non-Operator Movants in favor of Texas Brine, and that the Non-Operator Movants breached that duty. In this case, Texas Brine claims that it is a third party beneficiary of the CCL and is entitled to collect damages from the Non-Operators.

In support of their motions for summary judgment, the Non-Operator Movants denied that they were contractually bound to Texas Brine; further, they argued that, even if they were bound, there is no evidence showing that they breached any contractual duty to Texas Brine. Texas Brine points to the CCL, which obligated Colorado Crude, the original CCL lessee, to "diligently endeavor not to damage any salt formations which may exist upon the leased premises and shall pay for any actual damages which may occur from operations upon said leased premises." The CCL also stated that all of its provisions were binding on the successors and assigns of both Oxy and Colorado Crude. As explained below, even if we accept Texas Brine's position that the Non-Operator Movants were bound to Texas Brine as a CCL third party beneficiary, the summary judgment evidence shows no action or inaction by the Non-Operators with respect to the AH1 well that would constitute a breach of the CCL duty not to damage any salt formations on the leased premises.

Before the AH1 well was drilled in 1986, the Non-Operators executed a Joint Operating Agreement (JOA), naming Adams Resources Exploration Corporation as the operator of the contract area, and stating that Adams "shall conduct and direct and have full control of all operations on the Contract Area ... ." As acknowledged by Texas Brine, the JOA empowered Adams with decision-making authority with regard to the drilling of the AH1 well. From 1986 to 2001, Adams and later Operators operated the

AH1 well, and the Non-Operators remained passive working interest owners, as contemplated by the JOA.

Texas Brine argues the Non-Operators jointly exercised control over the operation of the AH1 well by: selecting the well site prior to drilling, attending meetings to discuss matters related to the AH1 well, and retaining authority under the JOA to replace or remove the operator of record. However, the summary judgment evidence upon which Texas Brine relies is speculative at best and does not support its position that the Non-Operators were involved in any decision making that could be considered a breach of the CCL duty not to damage salt formations. The December 16, 1985 assignment does not show that the Non-Operators selected the AH1 well site. The April 4, 1986 letter inviting "Joint Interest Owners" to attend a meeting at which the AH1 well would be discussed does not show which, if any, Non-Operators attended. An attendance sheet at that meeting, showing that one Non-Operator was present, does not show that the Non-Operators had any decision-making authority regarding the AH1 well operations. The Non-Operators' authority under the JOA to remove the AH1 well operator of record does not show the Non-Operators had sufficient information at any time during their tenure to warrant such removal. And, finally, Texas Brine's expert evidence as to the possible causal relationship between the depressurization of the AH1 reservoir and damage to the salt formations sets forth no act or omission by the Non-Operators. *Accord Pontchartrain Natural Gas System v. Texas Brine Company,* 18-0606 (La. App. 1 Cir. 12/21/18), 268 So.3d 1058, 1063, *writ denied,* 19-0526 (La. 6/17/19), 2019 WL 2591169 (finding Texas Brine's experts' opinions "wholly irrelevant as to any actions or omissions by the non-operators of the AH1 oil well")

Thus, after a de novo review, we conclude the Non-Operator Movants pointed to an absence of factual support for Texas Brine's contract claims, and Texas Brine failed to produce factual proof sufficient to establish a genuine issue of material fact that the Non-Operator Movant's breached the CCL. *See* LSA-C.C.P. art. 966D(1). The trial court correctly granted summary judgment to the Non-Operator Movants on this issue.

SOLIDARY LIABILITY

Next, Texas Brine argues that even if the Non-Operator Movants did not breach the lease, they are solidarily liable with the other assignees (i.e., the Operators) who *did* breach the CCL by allowing the depressurization of the AH1 well cavern that damaged the salt formations, contributing to the sinkhole.

Texas Brine relies on LSA-C.C. art. 1821 as the source of solidary liability among the Operators and Non-Operator Movants and claims the benefit of LSA-C.C. art. 1821 as an alleged third-party beneficiary of the CCL. For purposes of this appeal, we need not decide whether Texas Brine is indeed a third-party beneficiary of the CCL, nor need we decide whether a third-party beneficiary to a contract may avail itself of LSA-C.C. art. 1821's imposition of a solidary relationship between an obligor and third persons who assume the obligor's contractual obligations. As explained below, even if the above two premises were established, the summary judgment evidence does not show that the Non-Operator Movants assumed Colorado Crude's CCL obligation to pay for damage to salt formations.

Louisiana Civil Code article 1821 pertinently provides that an obligor and a third person may agree to an assumption by the latter of an obligation of the former, and unless released, the obligor remains solidarily bound with the third person. Here, under LSA-C.C. art. 1821, Colorado Crude (the obligor) and the Non-Operator Movants (third persons) could be solidarily bound for any CCL obligation the Non-Operator Movants agreed to assume, but only to the extent of their assumption. *See* LSA-C.C. art. 1822; *J.D. Fields & Co., Inc. v. Nottingham Const. Co., LLC*, 15-0723 (La. App. 1 Cir. 11/9/15), 184 So.3d 99, 102.

After reviewing the terms of the CCL and the various assignments by which the Non-Operator Movants acquired their CCL interests, we reject Texas Brine's argument that the Non-Operator Movants expressly assumed Colorado Crude's obligation to "pay for any actual damages which may occur from [its] operations upon said leased premises." We note that the CCL did state that all of its provisions were binding on the successors and assigns of both Oxy and Colorado Crude. However, we also note that the Non-Operator Movants agreed to the CCL assignment "subject to" the applicable

terms and provisions of the CCL, language which does not automatically amount to an assumption under LSA-C.C. art. 1821. There is a distinction between "subject to" language and "assumption" language as they pertain to contracts. *See, e.g., First State Bank & Trust Co. of EBRP v. Seven Gables, Inc.,* 501 So.2d 280, 290 (La. App. 1 Cir. 1986); *also see, Pinnacle Operating Company v. Ettco Enterprises, Inc.*, 40,367 (La. App. 2 Cir. 10/26/05), 914 So.2d 1144, 1149; *Dart v. Kitchens Brothers Mfg. Co.*, (M.D. La. 4/28/06) 2006 WL 8432367 *3. An assumption of obligations must be clearly expressed on the face of the document assuming the obligation. *Textron Financial Corp. v. Retif Oil & Fuel LLC,* 342 Fed. Appx. 29, 36 (5th Cir. 2009), *citing Davis Oil Co. v. TS, Inc.*, 145 F.3d 305, 311 (5th Cir. 1998). Here, the Non-Operator Movants are only bound to "applicable" CCL terms and only "to the extent of [their] assumption." *See* LSA-C.C. art. 1822. The assumption of a personal obligation, such as the obligation to pay damages, requires an express stipulation to that effect. *See* LSA-C.C. art. 1764; *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/11), 79 So.3d 246, 262 n.52, 281-82; *Global Marketing Solutions, LLC v. Blue Mill Farms, Inc.*, 13-2132 (La. App. 1 Cir. 9/19/14), 153 So.3d 1209, 1214-15; *Wagoner v. Chevron USA, Inc.*, 45,507 (La. App. 2 Cir. 8/18/10), 55 So.3d 12, 23.

We have found no summary judgment evidence showing the Non-Operator Movants expressly assumed Colorado Crude's obligation to pay actual damages for salt formation damages occurring from operations upon the leased premises. Thus, absent an express assumption of this obligation, there is no solidary liability for such between the Operators and Non-Operator Movants under LSA-C.C. art. 1821. Texas Brine has failed to produce factual support sufficient to establish a genuine issue of material fact of a solidary obligation between the Operators and Non-Operators. The trial court correctly granted summary judgment to the Non-Operator Movants on this issue.

SUMMARY JUDGMENT DISMISSAL OF COLORADO CRUDE

We note that the September 27, 2017 judgment dismisses Texas Brine's contract claims against Colorado Crude as a Non-Operator. However, we are unable to find a motion for summary judgment filed by Colorado Crude in any appellate records before

us here seeking dismissal of Texas Brine's contract claims against it.[6] Louisiana Code of Civil Procedure article 966 plainly contemplates that a summary judgment shall only be granted in favor of a party who has moved for such. *Stell v. Louisiana Dept. of Public Safety*, 499 So.2d 1211, 1212 (La. App. 5 Cir. 1986). A trial court does not have authority to grant a motion for summary judgment for a non-moving party. *Burrows v. Executive Property Management Co.*, 13-0914 (La. App. 4 Cir. 3/12/14), 137 So.3d 698, 707. Thus, because the appellate records before us do not show that Colorado Crude moved for summary judgment on Texas Brine's breach of contract claims, the trial court was without authority to dismiss the contract claims against Colorado Crude, and we reverse the judgment in that regard.

CONCLUSION

Our de novo review of the summary judgment evidence leads to the same conclusion reached by the trial court – the Non-Operators did not perform any acts with respect to the AH1 well; had no control, no direction, and no active involvement with respect to the AH1 well; were not liable to Texas Brine for the acts or omissions of others, if any, with respect to the AH1 well; and, therefore, did not breach the terms of the CCL. Further, the CCL and later assignments did not solidarily bind the Operators and Non-Operator Movants to an obligation to pay for salt formation damages.

The September 27, 2017 judgment dismissing Texas Brine's contract claims against Sol Kirschner, LORCA Corporation, Reliance Petroleum Corporation, and Chicago Insurance Company is affirmed. The judgment dismissing Texas Brine's contract claims against Colorado Crude Company is reversed. Texas Brine's motion to supplement the record is denied. We assess all costs of this appeal to Texas Brine Company, LLC.

MOTION TO SUPPLEMENT DENIED; JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

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[6] On June 21, 2019, we granted Colorado Crude's motion to file a post argument brief on this issue. Colorado Crude attached a copy of its purported joinder in Browning/LORCA's motion for summary judgment to its brief. Although the document bears a July 24, 2017 date-filed stamp, the document does not sufficiently indicate that such filing was made in any of the records before us on appellate review of this case. Thus, we do not consider it.