

**GULF ENTERPRISES,
INC./HERITAGE SUPPLY
DIVISION**

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NO. 2003-CA-0039

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**JAZZLAND, INC.,
BROADMOOR, AND
FIDELITY & DEPOSIT
COMPANY OF MARYLAND**

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-6838, DIVISION "N-8"
HONORABLE ETHEL SIMMS JULIEN, JUDGE

**JAMES F. MCKAY III
JUDGE**

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay III,
Judge David S. Gorbaty)

MURRAY, J., DISSENTS WITH REASONS

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AFFIRMED

The defendants, Jazzland, Inc. (Jazzland), Broadmoor, L.L.C. (Broadmoor) and Fidelity & Deposit Company of Maryland (F&D), appeal the judgment of the trial court granting a partial summary judgment in favor of a subcontractor, Gulf Enterprises, Inc./ Heritage Supply Division (Heritage), and awarding an unpaid balance on a contract for building materials in conjunction with the construction of Jazzland Amusement Park for the amount of \$48,979.00. The trial court also denied Heritage's motion for summary judgment on the issue of \$12,785.00 in lost profits based on a terminated contract, finding that a material fact remained at issue as to whether the contract was properly terminated for cause.

On July 8, 1998, Broadmoor was awarded the general contract to build Jazzland Amusement Park. F&D was the payment and performance surety on the project for Broadmoor. On June 30, 1999, Broadmoor entered into a purchase agreement with Heritage for millwork and other materials for

the project. Broadmoor alleges that because Heritage failed to timely meet with delivery dates it placed Heritage in default and terminated the purchase order by letter dated November 1, 1999, and refused to pay Heritage \$48,979.00 for delivered goods. Broadmoor does not dispute that the materials were delivered and incorporated into the project, but asserts that they are entitled to a set off based on Heritage's tardiness in delivery of the materials. They argue that this tardiness forced them to place orders with other vendors to supply millwork exterior trim thereby incurring additional cost of \$133,034.00, which is the basis of Broadmoor's reconventional demand in this matter. Broadmoor also refused to accept the remainder of the materials on the purchase agreement order. In response to the actions of Broadmoor, Heritage recorded a lien with the recorder of mortgages for the \$48,979.00 in compliance with the Louisiana Private Works Act.

Broadmoor and F&D responded by filing a lien bond in the amount of \$61,223.00 for the removal of the lien. On May 20, 2002, Heritage filed suit to enforce its lien based on its contract, which included Jazzland. On July 17, 2000, Jazzland was voluntarily dismissed without prejudice. On August 20, 2001, Heritage filed a motion for summary judgment, which sought to

recover from Broadmoor the value of the materials delivered by Heritage to Broadmoor at the project site for \$48,979.00 and for wrongful termination of agreement claiming damages for loss profits. Broadmoor and F&D, in this reconventional demand, opposed the summary judgment asserted as a setoff the cost to Broadmoor to complete the work under the Purchase Agreement. The plaintiffs allege that Broadmoor failed to present any evidence on the matter at the hearing.

At the motion for summary judgment hearing, the trial court partially granted the motion for summary judgment against Broadmoor and F&D in the amount of \$48,979.00 (representing the value of the materials that had been delivered to and installed in the Project). The trial court found that Broadmoor and F&D had failed to produce sufficient evidence to support the defense of setoff. The trial court also denied Heritage's motion for summary judgment concerning the wrongful termination. On June 18, 2002, Heritage filed a rule to show cause requesting that the trial court make the partial summary judgment final and appealable. Heritage bases its argument for finality of judgment asserting that the only issues remaining to be tried are the competing claims of Heritage and Broadmoor. Heritage further argued that F&G had no remaining claims in the matter. In response, Broadmoor

and F&G filed a motion to vacate the partial motion for summary judgment. The trial court also denied Broadmoor and F&D's motion to vacate judgment even though they assert that the judgment was interlocutory and not appealable. On October 18, 2002, the trial court signed a judgment making the partial summary judgment against Broadmoor and F&G final.

STANDARD OF REVIEW

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La.2/29/00), 755 So.2d 226, 230. Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. La. C.C. P. art. 966.

The appellants argue that the trial court erred in granting the motion for summary judgment and awarding the appellee \$48,979.00, the sum of invoiced materials, before the appellant's reconvention demand was tried on the merits. Appellants argue Boudreaux v. State, 97-0076 (La. App. 4th Cir. 1/15/97), 687 So.2d 596,599, for the proposition that partial summary judgment should not be granted under circumstances where there are other

issues arising out of the same operative facts that are not being resolved on summary judgment. However, Boudreaux was decided before the effective date of the amendments to La. C.C. Pro. art. 966 (E), which makes it unclear whether a summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case. In the instant case, the trial court in its judgment states that the matter is final and appealable and that there is no just reason for delay.

At the outset, we note that because the instant suit was filed on May 2, 2000, the amended version of La. C.C.P. art 1915 is applicable requiring that partial summary judgments be designated as final and that there be no just reason for delay. Furthermore, this Court is not bound by the trial court's certification. We must review the propriety of the finality certification *de novo*. In the instant matter, the trial court in its judgment designated this partial summary judgment as final and appealable and noted that there was no just reason for delay. Although the trial court's reasons for this certification were not expounded upon we nonetheless, after a thorough review of the record, agree with his designation and certification that this is a final and appealable judgment and that there is no just reason for delay. It was clearly not necessary for the trial court to resolve the reconventional

demand before it could grant partial summary judgment in favor of Heritage, or certify that partial summary judgment was final and appealable.

Furthermore, the trial court found Broadmoor and F&D's defenses to be insufficient to defeat the summary judgment.

Accordingly, based on the foregoing discussion, we affirm the judgment of the trial court.

AFFIRMED