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**AFFIRMED**

Appellant, Coalition of Minority Contractors of Louisiana, USA,  
L.L.C. (“COMCOL”), appeals an exception of no cause of action granted to  
Greystar Development and Construction, L.P. (“Greystar”) and summary  
judgments granted to Historic Restoration, Inc. (“HRI”) and Historic  
Construction, Inc. (“HCI”). For the following reasons, this Court affirms the

trial court's judgments.

## **PROCEDURAL HISTORY**

On April 21, 2003, COMCOL brought suit against HRI, HCI, and Greystar relating to a loss of bid on the revitalization of the St. Thomas Housing Development. Greystar filed exceptions of vagueness and no cause of action on June 16, 2003. COMCOL filed a motion to compel responses to discovery from HRI and HCI on August 12, 2003. Shortly after, COMCOL filed a motion to compel Greystar's responses and HRI and HCI filed motions for summary judgment. On October 10, 2003, the trial court granted Greystar's exception of no cause of action and dismissed COMCOL's claims against Greystar. On December 2, 2003, the trial court granted motions for summary judgment filed by HRI and HCI and COMCOL's petition was dismissed in its entirety.

## **FACTS**

In COMCOL's petition for damages, it alleged that HRI, HCI and COMCOL entered into a contract creating a joint venture relationship for the revitalization of the St. Thomas Housing Development in which HRI and/or HCI breached. COMCOL further alleged that Greystar, intentionally and/or negligently interfered with COMCOL's contract with HRI and HCI. Other

allegations such as unfair trade practices, unjust enrichment and abuse of rights were stated in the petition.

The core of COMCOL's contention is that HRI and HCI entered into a joint venture agreement in the form of a Memorandum of Understanding ("MOU"), executed by the parties on November 15, 2001. COMCOL contends that it is entitled, as a joint venture general contractor with HCI under the MOU, to receive an allocation of profits and other revenue generated by the project.

After the execution of the MOU, Housing Authority of New Orleans ("HANO"), Housing and Urban Development ("HUD") and the City of New Orleans ("City") determined that a more competitive price for the construction phase could be obtained if HRI were not permitted to award the construction contract to its own affiliate, HCI. As a result, HANO, HUD, and the City decided to require that the construction contract be put out to competitive bid and that no affiliate of HRI—i.e. HCI, or any joint venture in which HRI and/or HCI were participants—would be permitted to bid on the construction contract. Those decisions were implemented in Ordinance No. 20916 MCS ("Ordinance"), adopted by the New Orleans City Council on September 19, 2002.

Greystar entered the picture when HANO, HUD and the City decided

to prevent HCI from becoming the general contractor on the construction project and to put the project out to public bid. Greystar submitted a bid, which was accepted for the construction of the revitalization of the St. Thomas Housing Development.

## **DISCUSSION**

COMCOL contends that the trial court erred in: (1) dismissing COMCOL's claims against Greystar on Greystar's exception of no cause of action without entertaining COMCOL's pending motion to compel discovery responses from Greystar and without first giving COMCOL an opportunity to amend its petition; (2) granting HRI's and HCI's motion for summary judgment without first entertaining COMCOL's pending motion to compel discovery responses from HRI and HCI; and (3) finding that governmental action is a fortuitous event that will excuse performance of a contract, thereby absolving that party from damages arising from nonperformance.

The first issues to be addressed are whether the trial court erred in dismissing COMCOL's claims against Greystar on Greystar's exception of no cause of action without entertaining COMCOL's pending motion to compel discovery responses from Greystar and without first giving COMCOL an opportunity to amend its petition. In *Rutledge v. Hibernia*

*Corp.*, this Court stated:

The function of the peremptory exception of no cause of action is to determine the legal sufficiency of the petition. It questions whether the petition sufficiently alleges grievances for which the law affords remedy. All well pleaded factual allegations must be accepted as true. The exception of no cause of action is decided upon the face of the petition. *Hoskin v. Plaquemines Parish Gov't*, 98-1825, p. 10 (La.App. 4 Cir. 8/4/99) 743 So.2d 736 [, 742].

*Rutledge v. Hibernia Corp.*, 2000-0674, pp. 1-2 (La.App. 4 Cir. 1/16/02), 808 So.2d 765, 766.

La. C.C.P. art. 931 specifically states “[n]o evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. In other words, any information discovered by COMCOL would have had no bearing on the district court’s decision to sustain Greystar’s exception of no cause of action and the discovery sought by a pending motion to compel is irrelevant to a court’s decision on an exception of no cause of action. Accordingly, this Court finds the trial court did not error in dismissing COMCOL’s claims against Greystar on Greystar’s exception of no clause of action without entertaining COMCOL’s pending motion to compel discovery responses from Greystar.

Secondly, this court stated in *Kosak v. Trestman*, 2003-1056, p.6 (La.App. 4 Cir. 12/3/03), 864 So.2d 214, 218-19, that “[t]he right to amend is not so absolute as to permit an amendment when it would constitute a vain

and useless act.” Moreover, “[f]or an amendment to be allowed there should be some indication that the defective petition can be amended to state a lawful cause of action.” *Fasullo v. Finley*, 2000-2659, p. 11 (La.App. 4 Cir. 2/21/01), 782 So.2d 76, 84.

Even though La. C.C.P. art. 934 may allow a plaintiff to amend its petition to state a cause of action; this is not the situation in this case. COMCOL has failed to indicate the defective petition can be amended to state a lawful cause of action. To allow COMCOL to amend its petition against Greystar would constitute a vain and useless act. Accordingly, the district court did not error in not allowing COMCOL an opportunity to amend its petition.

The next issue is whether the trial court erred in granting HRI’s and HCI’s motion for summary judgment without first entertaining COMCOL’s pending motion to compel discovery responses from HRI and HCI. In *Simoneaux v. E.I. du Pont de Nemours & Co.*, the Louisiana Supreme Court stated:

Summary judgment is an appropriate method for disposing of a case wherein **intent** is a critical question. *Mayer v. Valentine Sugars, Inc.*, 444 So.2d 618, 620 (La.1984); see also *Mashburn v. Collin*, 355 So.2d 879, 890 (La.1977).

A summary judgment should be granted when it is clear there exists no genuine issue of material fact and that the mover is entitled to the judgment as a matter of law. C.C.P. 966. **A motion for summary judgment may be made at any time and can be based on the**

**pleadings, affidavits, depositions, answers to interrogatories and admissions then on file.** Id. Affidavits must be made on personal knowledge and set forth only facts admissible in evidence, and must show that the affiant is competent to testify to the matters contained within the affidavit. C.C.P. 967.

**There is no absolute right to delay action on a motion for summary judgment until discovery is completed. Under C.C.P. 967, a trial judge clearly has the discretion to issue a summary judgment after the filing of affidavits, or the judge *may* allow further affidavits or discovery to take place.**

**"Supporting and opposing affidavits shall be made on personal knowledge,** shall set forth such facts as would be admissible in evidence, **and shall show affirmatively that the affiant is competent to testify to the matters stated therein.** Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits. When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.  
..." C.C.P. 967.

The only requirement is that the parties be given a fair opportunity to present their claim. **Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact.**



*Simoneaux v. E.I. du Pont de Nemours & Co.*, 483 So.2d 908, 912-13 (La. 1986) (emphasis added).

Additionally, La. C.C.P. art. 966 does not “grant a party an absolute right to delay a decision on a Motion for Summary Judgment until all discovery is complete...” *Doe v. ABC Corp.*, 2000-1906, pp. 10-11 (La.App. 4 Cir. 6/27/04), 790 So.2d 136, 143. COMCOL received responses to interrogatories. Moreover, the motions for summary judgment filed by HRI and HCI were properly supported by the affidavits of M. Pres Kabacoff, A. Thomas Lenhard, Jr., Paul Lambert and Sherry Landry. All of which were based on their personal knowledge and all of who were competent to testify to the matters set forth in their affidavits. Those affidavits demonstrated that there are no material facts in dispute as to the issue of whether or not the MOU created a joint venture. The MOU itself evidenced intent to establish intent to establish a joint venture and did not establish a joint venture between HRI or HCI and COMCOL. The MOU did not of itself create a joint venture, but contemplated the future creation of a joint venture. In addition, COMCOL did not show a probable injustice for this suit to be delayed pending discovery.

Accordingly, this Court finds that the trial court did not error in granting HRI’s and HCI’s motion for summary judgment without first

entertaining COMCOL's pending motion to compel discovery responses from HRI and HCI.

The remaining issue is whether the trial court erred in finding that governmental action is a fortuitous event that will excuse performance of a contract, thereby absolving that party from damages arising from nonperformance. La. C.C. art. 1873 provides that "[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." A fortuitous event, under La. C.C. art 1875, "...is one that, at the time the contract was made, could reasonably have been foreseen."

In *WBR Corporation v. State, through DOTD*, 97-0621, p.4 (La.App. 1 Cir. 4/8/98), 711 So.2d 337, p. 340 the court stated:

At the time these contracts were executed by the parties, it is safe to assume that no one believed that there would be any reason why the Chotin property could not be used for its intended purpose, i.e., the construction of a fleet landing facility on the Intracoastal waterway. The conditions subsequently imposed upon DOTD by the Corps of Engineers made construction of such a facility at this location unfeasible, and, in the opinion of this court, constituted an unforeseen "fortuitous event" which hindered DOTD from proceeding further with the project.

Thus, the court found that the DOTD was relieved of its obligation to construct a road over the plaintiff's property because conditions subsequently imposed on the project by the U.S. Army Corps of Engineers

made the project unfeasible.

Similarly, when HANO, HUD and the City imposed the requirement that the construction contract be let out for competitive bid and prevented HCI from participating in the bid process which were not, and could not have been, foreseen. This Court finds that the trial court did not error in finding that governmental action is a fortuitous event that will excuse performance of a contract, thereby absolving that party from damages arising from nonperformance.

For the forgoing reasons, this Court affirms the trial court's judgments.

**AFFIRMED**