

**NOT DESIGNATED FOR PUBLICATION**

<b>PLAQUEMINES PARISH</b>	*	<b>NO. 2015-CA-1152</b>
<b>GOVERNMENT</b>		
	*	
<b>VERSUS</b>		<b>COURT OF APPEAL</b>
	*	
<b>BURK-KLEINPETER INC., ET</b>		<b>FOURTH CIRCUIT</b>
<b>AL.</b>	*	
		<b>STATE OF LOUISIANA</b>

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APPEAL FROM  
 25TH JDC, PARISH OF PLAQUEMINES  
 NO. 62-129, DIVISION "A"  
 Honorable Kevin D. Conner, Judge

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**Judge Dennis R. Bagneris, Sr.**  
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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome,  
 Judge Sandra Cabrina Jenkins)

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**JUDGMENT AFFIRMED**

**MARCH 9, 2016**

This appeal arises out of the award of a public works contract and whether the Plaquemines Parish Government timely brought an action against the contractor. Plaquemines Parish Government appeals the trial court's judgment which granted the exception of peremption filed on behalf of the general contractor/appellee, Lamar Contractors, LLC. For the reasons that follow, this Court affirms the judgment.

#### **FACTS/PROCEEDINGS BELOW**

Plaquemines Parish Government (PPG) awarded a public works contract to re-build the Buras Fire Station (the "Project") after it was damaged by Hurricane Katrina. Burk-Kleinpeter, Inc. (BKI) was the design engineer and Lamar Contractors, LLC (Lamar) was the general contractor. All South Engineers, LLC (ASCE) was the Project manager.

The Contract contained the following provisions:

##### 1.01 Defined Terms

45. Substantial Completion- The time at which the Work (or a specified part thereof) has progressed to the point **where, in the opinion of Engineer**, the Work (or a specified part thereof) is sufficiently complete, in

accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms “substantially completed” as applied to all or part of the Work refer to Substantial Completion thereof.

(Emphasis Added).

#### 9.01 Owner’s Representative

- A. **Engineer will be Owner’s representative during the construction period.** The duties and responsibilities and the limitations of authority of Engineer as Owner’s representative during construction are set forth in the Contract Documents and will not be changed without written consent of Owner and Engineer.

(Emphasis Added).

BKI issued the certificate of substantial completion (hereinafter, the “Certificate”) on the Project on April 6, 2010. The Certificate provided in part that:

The work performed under this Contract has been reviewed and found to be substantially complete. **The date of Substantial Completion of the Project or portion thereof is hereby established as April 6, 2010** which is also the date of commencement of applicable warranties by the Contract documents.

(Emphasis added).

ASCE, the Project manager, reviewed the Certificate; and thereafter, recommended it for approval to PPG’s president on July 26, 2010. PPG received the Certificate on July 28, 2010. In the cover letter to the Parish President, ASCE wrote that “the certificate has been dated April 6, 2010, which is correct.” The letter acknowledged that the Certificate had been withheld in an attempt to resolve several outstanding change orders on the Project. On August 5, 2010, the Parish President executed a notice of “Acceptance” that work had been completed on the Project.

On April 15, 2015, PPG filed suit against BKI and Lamar seeking damages for alleged design and construction defects. As to Lamar, PPG contended that it failed to perform its construction tasks in a competent and workman like manner; failed to deliver a finished build-out in accordance with applicable professional standards; and failed to deliver a building suitable for use as a fire station.

In response to the complaint, Lamar filed a peremptory exception of peremption. Lamar relied on La. R.S. 38:2189<sup>1</sup> which provides a five year period for owners to file claims against a contractor arising out of a public construction project. Lamar cited *State Through Div. of Admin. v. McInnis Bros. Const.*,<sup>2</sup> wherein the Louisiana Supreme Court concluded “La. R.S. 38:2189 erects a preemptive time limitation on the State’s ability to bring suits against the contractor or the surety on a public works contract.” As such, Lamar maintained that PPG’s action against it was preempted because the date of substantial completion was April 6, 2010 and PPG waited until April 15, 2015 to file suit.

PPG’s opposition to Lamar’s peremptory exception contested the date of substantial completion. PPG asserted that the earliest date to start the running of the prescriptive or preemptive date to file suit would have been July 26, 2010, the date the ASCE Project manager recommended the acceptance of the work.

Alternatively, it suggested August 5, 2010, the date the Acceptance notice was signed and filed in the local mortgage and conveyance records. PPG contended that the Project was not “substantially completed” by April 6, 2010 because the building

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<sup>1</sup> La. R.S. 38:2189 provides: “Any action against the contractor on the contract or on the bond, or against the contractor or the surety or both on the bond furnished by the contractor, all in connection with the construction, alteration, or repair of any public works let by the state or any of its agencies, boards or subdivisions shall prescribe 5 years from the substantial completion, as defined in R.S. 38:2241.1, or acceptance of such work, whichever occurs first, or of notice of default of the contractor unless otherwise limited in this Chapter.”

<sup>2</sup> 97-0742, p. 15 (La. 10/21/97), 701 So.2d 937, 948.

was not fit for its intended purpose and there were ongoing issues with the Project's completeness at that time.

The trial court concluded that the evidence introduced at the hearing on the exception established April 6, 2010 as the date of substantial completion. In particular, it noted that BKI, the party to whom PPG gave the authority to designate the date of substantial completion, listed April 6, 2010 as the date of substantial completion and ASCE, PPG's Project manager, also agreed to that date. Accordingly, the trial court granted Lamar's exception of peremption.

This appeal followed.

#### **LAW/DISCUSSION**

In this appeal, PPG argues the trial court erred in granting Lamar's Exception of Peremption because it should not have accepted April 6, 2010 as the date of substantial completion. PPG raises two arguments in support of this position. First, it represents that the date of substantial completion should have been August 5, 2010, the date PPG's President signed off on the Certificate or at minimum, in late July 2010 when PPG was mailed and received notice of the Certificate. Next, PPG maintains that the trial court's acceptance of April 6, 2010 as the date of substantial completion based on BKI's unilateral contractual authority to select the date made the date's selection a "potestative" condition as outlined in La. C.C. art. 1770.<sup>3</sup> Therefore, PPG suggests that the trial court should not have accepted April 6, 2010

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<sup>3</sup> Art. 1770. Condition that depends on the whim or the will of the obligor

A suspensive condition that depends solely on the whim of the obligor makes the obligation null.

A resolutive condition that depends solely on the will of the obligor must be fulfilled in good faith.

as the substantial completion date because BKI and/or Lamar may have acted in bad faith; hence, their bad faith would nullify their selection of that date. We first discuss whether the trial court erred in finding that April 6, 2010 was the date of substantial completion.

### ***Date of Substantial Completion***

La. R.S. 38:2241.1 defines substantial completion as follows:

B. “Substantial completion” is defined for the purpose of this Chapter, as the finishing of construction, in accordance with the contract documents as modified by any change orders agreed to by the parties, to the extent that the public entity can use or occupy the public works or use or occupy the specified area of the public works for the use for which it was intended. The recordation of an acceptance in accordance with the provisions of this Section upon substantial completion shall be effective as an acceptance for all purposes under this Chapter.

“A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.” *See* La. C.C. art. 1906. “When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent.” *See* La. C.C. art. 2046.

In the matter before us, PPG does not contest that the Project Contract gave BKI, as the engineer, the authority to select the date of substantial completion. It presents no evidence that it was unduly coerced into ceding that authority to BKI. Instead, PPG merely objects to April 6, 2010 as the date of substantial completion. Accordingly, our review is limited to whether the trial court erred in finding that April 6, 2010 was indeed the substantial completion date for purposes of granting Lamar’s exception of peremption.

PPG represents the Project could not have been substantially completed until at least July 26, 2010, and possibly August 5, 2010, because of PPG’s on-going

concerns regarding the quality of Lamar's work. It reiterates that it was never satisfied with Lamar's work. PPG suggests that it only "reluctantly" accepted completion to comply with federal government demands that compelled occupancy by a certain date.

This Court accepts PPG's general tenet that the public owner should have some input into the selection of the date of substantial completion. However, as referenced herein, PPG voluntarily ceded its input to BKI. Therefore, PPG's claims as to the "true" date of substantial completion are of no effect because the clear, explicit terms of the Contract gave BKI the authority to select the date. Moreover, the date the public entity accepts the work does not necessarily establish the date of substantial completion where the agreement, as in the present case, gives another party the authority to determine the substantial completion date. *See Diamond B. Const. Co., Inc. v. City of Plaquemine*, 95-1979, p. 7 (La. App. 1 Cir. 4/30/96), 673 So.2d 636, 640.

La. R.S. 38:2189 provides in part that any action against a contractor shall prescribe five years from the date or substantial completion or acceptance of the work, whichever comes first.<sup>4</sup> In this instance, the undisputable facts show that BKI selected April 6, 2010 as the date of substantial completion; Lamar agreed with that date; and the Project Manager advised PPG that April 6, 2010 was the correct date of substantial completion. Thus, April 6, 2010, the designated date of substantial completion, obviously precedes PPG's alleged July/August 2010 dates of acceptance of the work.

We also note that notwithstanding any issues PPG had with the quality of Lamar's work which allegedly caused PPG to withhold acceptance until August 5,

2010, PPG knew that BKI, the entity it empowered to designate the substantial completion date, had selected April 6, 2010 as that date. PPG presents no legal impediments as to why it could not have filed suit within five years of April 6, 2010, especially in light of its contention that “PPG was never happy with the work done on the project.” Therefore, this Court finds no error in the trial court’s judgment that PPG’s action against Lamar was perempted because suit was not filed until April 15, 2015, more than five years beyond the statutory date provided by La. R.S. 38:2189.

***POTESTATIVE CONDITION***

PPG also contends the trial court’s interpretation that the Contract gave BKI the unilateral right to select the substantial completion date created a “potestative” condition, in that the existence of the obligation depended on the whim or the will of the obligor as outlined in La. C.C. art. 1770. PPG specifically asserts that “an element of bad faith can be inferred on the part of one or more parties to dispute about completeness, unilaterally deciding that the dispute is resolved and the contract completed.” We disagree.

First, we note that the clear and explicit words of the Contract gave BKI the right to select the substantial completion date. In Louisiana, parties are free to contract for any object that is lawful, possible, and determined or determinable. La. C.C. art. 1971. Freedom of parties to contract signifies that parties to an agreement have the right and power to construct their own bargains. *See South East Auto Dea. Ren. v. EZ Rent To Own.*<sup>5</sup> In this matter, where there was no apparent disparity in the parties’ bargaining power and the authority to designate

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<sup>4</sup> See fn. 1.

<sup>5</sup> 07-0599, p. 10 (La. App. 4 Cir. 2/27/08), 980 So.2d 89, 97.



the date of substantial completion did not inherently violate public policy, PPG's claim of a potestative condition does not state a legal basis to nullify April 6, 2010 as the substantial completion date.

Next, La. C.C. art. 1770, the article upon which PPG relies to allege the creation of a potestative condition, provides no claim against Lamar. The Contract establishes BKI, not Lamar, as the "obligor" who allegedly created the potestative condition in its selection of the substantial completion date. Even so, we conclude BKI's selection of the substantial completion date did not create a "potestative" condition. The record reveals that the selection of the substantial completion date did not terminate or complete all existing obligations owed amongst the parties, in particular, between PPG and Lamar. PPG admits that Lamar continued to work on change orders and other items on the "punch list" even after the date's selection. PPG also has not offered evidence of bad faith between Lamar and BKI to invalidate April 6, 2010 as the date of substantial completion.

We also reject PPG's claim that BKI's selection of the substantial completion date runs afoul of La. R.S. 38:2241.1 or places the taxpayer at the whim of the contractors. PPG, on its own accord, gave BKI the right to select the substantial completion date. As referenced, that decision is not inherently unlawful and does not violate public policy. Indeed, the decision to give BKI, the engineer, the authority to select the date may have been reasonably calculated to minimize potential conflicts between PPG and Lamar as to the substantial completion date.

In any event, the right to select the substantial completion date does not deprive PPG or any public entity of the right to file suit against the contractor for any perceived failure to perform the contract terms. The date's selection simply limits the right to file suit against the contractor to within five years of the date of

substantial completion. Accordingly, PPG's claim that BKI's selection of the substantial completion date created a potestative condition lacks merit.

### **CONCLUSION**

The record supports the trial court's finding that April 6, 2010 was the date of substantial completion. PPG's disagreement with the selection of the date of substantial completion created no legal impediment that prevented it from timely filing suit against Lamar within five years of that date as provided by La. R.S. 38:2189. PPG waited until April 15, 2015 to file suit; thus, its petition was perempted.

Wherefore, based on the foregoing reasons, the judgment of the trial court is affirmed.

**JUDGMENT AFFIRMED**