

ST. PIERRE ASSOCIATION

*

NO. 2017-CA-0228

VERSUS

*

COURT OF APPEAL

JUDE SMITH

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-10275, DIVISION "L-6"
Honorable Kern A. Reese, Judge

* * * * *

Judge Regina Bartholomew Woods

* * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins,
Judge Regina Bartholomew Woods)

JENKINS, J., CONCURS

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REVERSED
December 6, 2017

Appellant, Jude Smith (“Appellant” or “Smith”) appeals the trial court’s November 18, 2016 judgment wherein the trial court granted summary judgment in favor of Appellee, St. Pierre Association (“Appellee” or “St. Pierre”). For the reasons that follow, we reverse the trial court and remand for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Appellee is a Louisiana condominium association affiliated with the St. Pierre Condominiums located at 1022 St. Peter Street in the French Quarter of New Orleans, Louisiana.¹ Appellant is the owner of Unit 204 (“the unit”) of the St. Pierre Condominiums. On October 23, 2014,² Appellee filed a Petition for Preliminary and Permanent Injunction, and for Delinquent Condominium Fees against Appellant; St. Pierre prayed for \$6,260.19, which represented delinquent fees and late charges owed through October 16, 2014.³ In its petition, St. Pierre

¹This association is subject to the provisions of the Declarations of Condominium Bylaws and Rules of the St. Pierre Association.

²In the appellate briefs, both Appellant and Appellee aver that Appellee’s petition was filed on October 29, 2014. However, the record reflects that the petition was actually filed on October 23, 2014.

³According to Appellee’s petition, Appellant was in arrears of his monthly \$366.80 condominium fee. Further, without identifying a particular monetary amount, Appellee

stated that the condominium association had filed a claim of privilege⁴, which was recorded at Instrument Number 2014-19796. According to St. Pierre, it filed the action against Appellant, because Smith, *inter alia*, was performing construction work on the unit without proper permits and in violation of the City of New Orleans' ordinances, as well as the condominium association's rules and regulations. St. Pierre further asserted that the construction work was potentially rendering the unit structurally unsafe and creating a hazard to other units.

On April 23, 2015, the trial court conducted a hearing on the preliminary injunction. In its April 24, 2015 judgment granting the preliminary injunction in favor of St. Pierre, the trial court ordered Smith to "obey the statutes and ordinances of the City of New Orleans, the rules and regulations of the Vieux Carre' Commission, and the provisions of the Declaration of Condominium, bylaws and rules, and regulations of the St. Pierre Condominium Association, insofar as it applies to construction work performed by or on [Appellant's] behalf." The trial court further ordered Smith to complete specific construction tasks by no later than close of business on May 25, 2015. The trial court reserved other pending issues for further adjudication.

Because Smith failed to comply with the aforesaid judgment, on June 4, 2015, St. Pierre filed a Rule for Contempt. The trial court held an evidentiary

generally prayed for "all sums due under the premises, including, but not limited to condominium association fees, assessments, costs and attorneys['] fees."

⁴ "*Privilege* is a right, which the nature of the debt gives to the creditor, and which entitles him to be preferred before other creditors, even those who have mortgages." La. C.C. art. 3186; *Miller v. Charbonnet*, 2007-0646, p. 4 (La. App. 4 Cir. 12/5/07), 972 So.2d 1237, 1239, n. 1 [Emphasis in original text].

hearing on September 9, 2015. On September 10, 2015, the trial court rendered judgment in favor of Appellee, finding Appellant to be in contempt of its April 24, 2015 judgment. The trial court granted St. Pierre custody and control of the unit to conduct inspections and perform work to stabilize it.

On October 13, 2015, St. Pierre filed an amended claim of privilege in the amount of \$17,360.58. On May 17, 2016, St. Pierre filed a Motion for Summary Judgment concerning delinquent condominium fees and assessments that Smith owed and, for the first time, sought \$17,360.58, as opposed to \$6,260.19, as alleged in its petition. Several months later, on July 20, 2016, St. Pierre filed another amended claim of privilege in the amount of \$85,407.23, which included architectural fees and construction costs.⁵ Subsequently, on October 12, 2016, Appellee filed a supplemental memorandum in support of its motion for summary judgment and sought judgment in the amount of \$85,407.23.

On November 18, 2016, the trial court granted the motion for summary judgment in favor of St. Pierre and against Smith in the amount of \$85,407.23. It is from this judgment that Smith now appeals.

DISCUSSION

Appellant raises as an assignment of error that the trial court erred in granting the motion for summary judgment in favor of St. Pierre. Specifically, Appellant argues that the trial court erred in granting summary judgment on three different bases: it erred in granting summary judgment in St. Pierre's favor in an

⁵Recorded at Instrument Number 2016-31459.

amount higher than what St. Pierre pled in its petition; it erred in granting summary judgment when St. Pierre failed to properly preserve its claim of privilege; and it erred in granting summary judgment when Appellant was unable to conduct adequate discovery.

Standard of Review

In *Alexander v. Hancock Bank*, this Court articulated the standard for reviewing a trial court's decision regarding a motion for summary judgment, in light of the 2016 amendment to La. C.C.P. art. 966, as follows:

An appellate court conducts a *de novo* review, applying the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Brown v. Amar Oil Co.*, 2011-1631, p. 2 (La. App. 1 Cir. 11/8/12), 110 So.3d 1089, 1090 (citing *Sanders v. Ashland Oil, Inc.*, 96-1751, p. 6 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1035). A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. *Collins v. Randall*, 2002-0209, p. 3 (La. App. 1 Cir. 12/20/02), 836 So.2d 352, 354. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. *King v. Allen Court Apartments II*, 2015-0858, p. 3 (La. App. 1 Cir. 12/23/15), 185 So. 3d 835, 837, *writ denied*, 2016-0148 (La. 3/14/16), 189 So.3d 1069. This procedure is favored and shall be construed to accomplish these ends. *Id.*; *see also* La. C.C.P. art. 966 A(2).

The initial burden of proof rests on the moving party. La. C.C.P. art. 966 D(1). However, if the mover will not bear the burden of proof at trial on the matter 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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. *King*, 2015-0858 at p. 3, 185

So.3d at 838. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. *Id.* It is only after the motion has been made and properly supported that the burden shifts to the non-moving party. *Brown*, 2011-1631 at p. 3, 110 So.3d at 1090-91; *Pugh v. St. Tammany Parish School Bd.*, 2007-1856, p. 3 (La. App. 1 Cir. 8/21/08), 994 So.2d 95, 98.

A genuine issue is a triable issue. *Brown*, 2011-1631, p. 3, 110 So.3d at 1090-91. *Jones v. Stewart*, 2016-0329, p. 7 (La. App. 4 Cir. 10/5/16), 203 So.3d 384, 389, *writs denied*, 2016-1962, 2016-1967 (La. 12/16/16) ___ So.3d. ___, ___, 2016 WL 763845, 2016 WL 7638388. More precisely, an issue is genuine if reasonable persons could disagree. *Id.* If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. *Id.* A fact is material when its existence or non-existence may be essential to the plaintiff's cause of action under the applicable theory of recovery. *Id.* Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Id.*; *King v. Illinois Nat. Ins. Co.*, 08-149, p. 6 (La. 4/3/09), 9 So.3d 780, 784. 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 substantive law applicable to the case. *Brown*, 2011-1631 at p. 3, 110 So. 3d at 1091; *Hall v. Our Lady of the Lake R.M.C.*, 2006-1425, p. 9 (La. App. 1 Cir. 6/20/07), 968 So.2d 179, 185. In order to determine whether the trial court's grant of summary judgment was proper, this court must look to the applicable substantive law.

Alexander v. Hancock Bank, 2016-0662, 2-4 (La. App. 4 Cir. 2/8/17), 212 So.3d 713, 715-16.

Appellant asserts that in its petition, St. Pierre, sought damages solely in the amount of \$6,260.19, which represented, *inter alia*, delinquent condominium fees and late charges; and never amended the petition to allege any other amounts of money owed by Appellant. Notwithstanding the aforementioned, on October 13,

2015, Appellee filed an amended privilege in the amount of \$17,360.58.⁶ In connection with the amount set forth in the amended privilege, on May 17, 2016, Appellee filed a motion for summary judgment, in which it sought a monetary judgment in the amount of \$17,360.58. On August 3, 2016, Appellee filed another amended claim of privilege in the amount of \$85,407.23. In connection with this amended claim of privilege, on October 12, 2016, Appellee filed a supplemental memorandum in support of its motion for summary judgment, and sought damages in the amount of \$85,407.23. On November 18, 2016, the trial court granted Appellee's motion for summary judgment in the amount of \$85,407.23.

Special damages, (such as condominium assessments, architectural fees, and construction costs), are damages “which can be fixed to pecuniary certitude.” *Hollenbeck v. Oceaneering Int’l, Inc.*, 1996-0377 (La. App. 1 Cir. 11/8/96), 685 So.2d 163, 175; *Stevens v. Winn-Dixie of Louisiana*, 1995-0435, p. 9 (La. App. 1st Cir. 11/9/95); 664 So.2d 1207, 1213. “[W]hen special damages are claimed, they must be specifically alleged.” La. C.C.P. art. 861. “[A] trial court may not award special damages which have not been specifically plead. The purpose of the specificity requirement is to avoid the imposition of surprise upon the defendant.” *Watts v. Scottsdale Ins. Co.*, 45,397, pp. 7-8 (La. App. 2 Cir. 6/30/10), 43 So.3d 266, 271. In its petition, St. Pierre solely pled for \$6,260.19 and failed to amend its petition to reflect any other amount. However, when it filed its motion for summary for judgment, as well as the two amended claims of privilege, it alleged,

⁶ Recorded at Instrument No. 2015-43729

among other costs, architectural fees, contractor fees, and other fees that could have been “fixed to pecuniary certitude” in its petition, but were not. To impose a judgment against Appellant in the amount of \$85,407.23 when the petition only pled \$6,260.19, and did not include the other finite sums of money allegedly due and owing is clearly an “imposition of surprise on the defendant.” *Id.* For this reason, we find that the granting of summary judgment by the trial court to be improper; and we thus, reverse the trial court’s granting of summary judgment on this basis.

Perfecting Privilege

Alternatively, Appellant asserts that St. Pierre failed to comply with provisions of its condominium by-laws regarding the preservation and assessment of its claim for privilege as a consequence of delinquent condominium fees, assessments, costs, and attorney’s fees, which creates a genuine issue of material fact precluding the grant of summary judgment. In particular, Appellant argues that St. Pierre has not produced evidence proving that Appellant was properly served with the original or amended claims of privilege.

The Louisiana Condominium Act (La. R.S. 9:1121.101, *et seq.*) provides the procedure by which a condominium association, such as St. Pierre, may assert a claim of privilege on a condominium for unpaid association fees and assessments. In particular, La. R.S. 9:1123.115 (A)(3)⁷ provides that the condominium

⁷ La. R.S. 9:1123.115 states:

A (1) The association shall have a privilege on a condominium parcel for all unpaid or accelerated sums assessed by the association, any fines or late fees in excess of two hundred fifty dollars, and interest thereon at the rate provided in the condominium declaration or, in the absence thereof, at the legal interest rate. This privilege shall also

association “shall, at least seven (7) days prior to the filing for registry of the privilege, serve upon the delinquent unit owner a sworn detailed statement of its claim for the delinquent or accelerated assessment that includes the date said

secure reasonable attorney fees incurred by the association incident to the collection of the assessment or enforcement of the privilege. Further, if the unit owner fails to timely pay the assessments for common elements for a period of three months or more during any eight-month period and notice to the delinquent unit owner is provided as set forth in Paragraph (3) of this Subsection, the association may accelerate the assessment on the common elements for a twelve-month period and file a privilege for the accelerated sums. Assessments for common elements are those assessments that are collected on a regular basis by the association for routine expenditures associated with the property.

(2) To be preserved, the privilege shall be evidenced by a claim of privilege, signed and verified by affidavit of an officer or agent of the association, and shall be filed for registry in the mortgage records in the parish in which the condominium is located. The claim of privilege shall include a description of the condominium parcel, the name of its record owner, the amount of delinquent or accelerated assessment, the date on which the assessment became delinquent, and any fines or late fees assessed in excess of two hundred fifty dollars.

(3) The association shall, at least seven days prior to the filing for registry of the privilege, serve upon the delinquent unit owner a sworn detailed statement of its claim for the delinquent or accelerated assessment that includes the date said assessment became delinquent or accelerated, which service shall be effected by personal service, or registered or certified mail.

(4) If the condominium association files a lien pursuant to this Section and the lien is for an amount of the assessment or dues secured by the privilege allowed pursuant hereto that is not owed, in whole or in part, and any owner or interest holder of the condominium unit affected by the privilege files suit to obtain a complete or partial release of such lien or privilege, then in such event the condominium association filing the lien shall be liable to the owner or interest holder in the condominium for the expenses of obtaining the release, in whole or in part, including reasonable attorney fees and all costs associated therewith.

B. A claim of privilege recorded, as set forth in Subsection A of this Section, shall preserve the privilege against the condominium parcel for a period of five years from the date of recordation. The effect of recordation shall cease and the privilege preserved by this recordation shall preempt unless a notice of filing of suit, giving the name of the court, the title and number of the proceedings and date of filing, a description of the condominium parcel and the name of the unit owner, on the claim is recorded within five years from the date of the recordation of the inscription of the claim. Such notice of filing suit shall preserve the privilege until the court in which the suit is filed shall order the cancellation of the inscription of the claim and the notice of filing of suit on the claim or until the claimant authorizes the clerk of court or recorder of mortgages to cancel the inscriptions.

C. A privilege under this Section is superior to all other liens and encumbrances on a unit except (1) privileges, mortgages, and encumbrances recorded before the recordation of the declaration, (2) privileges, mortgages, and encumbrances on the unit recorded before the recordation of the privilege as provided in Subsection B of this Section, (3) immovable property taxes, and (4) governmental assessments in which the unit is specifically described.

assessment became delinquent or accelerated, which service shall be effected by personal service, or registered or certified mail.” In addition to La. R.S. 9:1123.115, St. Pierre is bound by its condominium declaration, in which Section 6 mandates that a claim of privilege shall be filed for registry “not more than ninety (90) days after the date on which the assessment becomes delinquent.”

In *Miller v. Charbonnet*, 2007-0646, p.4 (La. App. 4 Cir. 12/5/07), 972 So.2d 1237, 1240, this Court affirmed a trial court’s judgment granting mandamus relief against a condominium association that failed to comply with the statutorily prescribed notice requirements of La. R.S. 9:1123.115A(3). Like the condominium association in *Miller*, St. Pierre “does not dispute its failure to comply with the provision of the relevant statute which clearly requires service upon a delinquent unit owner of the association’s claim prior to filing a claim of privilege with the recorder of mortgages.” *Id.* at 1240. This Court opined that “the lack of any written notice to the property owner prior to an action that could result in a deprivation of his property rights must raise a due process concern.” *Id.* at 1240.

The record in this appeal is devoid of any evidence that St. Pierre properly served Smith with the original claim of privilege, which initially gave the legal basis upon which the instant matter was filed. St. Pierre argues that an amended claim of privilege that was sent via certified mail to Smith’s attorney of record at the time cured the deficiencies of the original privilege. However, this is not what is contemplated by La. R.S. 9:1123.115 for the perfection of a claim of privilege. Further, St. Pierre also failed to comply with Section 6 of its Declaration because

the improperly served claim of privilege does not include the date on which Smith's assessments became delinquent; therefore, making it impossible to determine whether St. Pierre's privilege against Smith was timely filed within the ninety (90) day window contemplated by Section 6. Moreover, condominium "[l]iens and privileges are to be strictly construed against claimants and liberally construed in favor of owners as they are in derogation of the common rights of owners." *Norman H. Voelkel Const., Inc. v. Recorder of Mortgages for E. Baton Rouge Par.*, 2002-1153, p. 5 (La. App. 1 Cir. 6/27/03), 859 So.2d 9, 12.

Based on the aforementioned, we find that there exists a genuine issue of material fact regarding whether the liens were ever properly served upon the Appellant and/or timely filed as contemplated within Section 6 of the Declaration.

Adequate Discovery

Appellant finally avers that St. Pierre significantly increased the amount and type of special damages sought in its supplemental memorandum in support of summary judgment just weeks before the hearing on the motion for summary judgment. Appellant further asserts that he was not afforded meaningful and adequate discovery on the expanded damages, despite the fact that he requested both additional discovery and a continuance of the hearing on the motion for summary.

This Court, in *Roadrunner Transp. Sys. v. Brown*, 2017-0040 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, concluded that summary judgment had been granted

prematurely when the plaintiff had not been given the opportunity of adequate discovery. This Court stated,

“the standard for obtaining a summary judgment is set forth in La. C.C.P. art. 966 A(3). The 2015 Comments to La. C.C.P. art. 966 provide that subparagraph A(3) does not change the law and that this subparagraph ‘makes clear that a motion for summary judgment should be heard and granted only after there has been an opportunity for adequate discovery.’ 2015 Comments to La. C.C.P. art. 966.¹¹ Continuing, the 2015 Comments state that ‘[a] continuance should be granted to a party who has not had adequate time to conduct discovery relating to the issues in the motion.’ *Id.*

When discovery is alleged to be incomplete, a trial court has the discretion either to hear the summary judgment motion or to grant a continuance to allow further discovery. *Simoneaux v. E.I. du Pont de Nemours and Co.*, 483 So.2d 908, 912 (La. 1986); *Eason v. Finch*, 32,157, p. 7 (La. App. 2 Cir. 8/18/99), 738 So.2d 1205, 1210. In this procedural context, a trial court’s choice to hear a motion for summary judgment or to grant a continuance is reviewed under an abuse of discretion standard. *Rivarde v. City of New Orleans*, 15-0655, p. 5 (La. App. 4 Cir. 3/9/16), 190 So.3d 400, 403, *writ denied*, 16-0670 (La. 5/27/16), 192 So.3d 744.

Construing Article 966, this court has held that ‘[a]lthough the language of article 966 does not grant a party the absolute right to delay a decision on a motion for summary judgment until all discovery is complete, the law does require that the parties be given a fair opportunity to present their case.’ *Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Grp.), Ltd.*, 03-1600, pp. 3-4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969. Similarly, the Louisiana Supreme Court, construing that Article 966, has held that ‘[u]nless 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*, 483 So.2d at 913.

Addressing an adequate discovery claim, the jurisprudence has identified the following four relevant factors for the court to consider:

- (i) whether the party was ready to go to trial,
- (ii) whether the party indicated what additional discovery was needed,

- (iii) whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it, and
- (iv) whether the discovery issue was raised in the trial court before the entry of the summary judgment.

Bass Partnership v. Fortmayer, 04-1438, p. 10 (La. App. 4 Cir. 3/9/05), 899 So.2d 68, 75 (citing *Greenhouse v. C.F. Kenner Associates Ltd. Partnership*, 98-0496, p. 3 (La. App. 4 Cir. 11/10/98), 723 So.2d 1004, 1006). Applying those factors to the instant case supports our finding that adequate discovery has not been allowed here.

Roadrunner Transp. Sys. v. Brown, 2017-0040, pp.10-12 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1272-73.

For purposes of our discussion, we consider the second and third factors set forth in *Roadrunner Transp. Sys.* simultaneously. In the present case, St. Pierre sought relief in the amount of \$85,407.23, for the first time, in its supplemental memorandum in support of motion for summary judgment, which was filed on October 12, 2016. Also, on October 12, 2016, Appellant's counsel withdrew from representation, and Appellant proceeded as a *pro se* litigant. As a *pro se* litigant, Appellant propounded discovery on November 15, 2016. St. Pierre argues that because summary judgment was granted nearly two (2) years after its original petition was filed, Appellant became aware of the amount owed. However, St. Pierre's original petition sought relief in the amount of only \$6,260.19, but summary judgment was sought and granted in favor of St. Pierre in the amount of \$85,407.23, which included architectural fees and construction costs, neither of which were identified nor articulated with specificity in the petition. Thus, Appellant should have been afforded the opportunity to conduct adequate discovery relating to the expanded relief sought; without such discovery, Smith

was denied a “fair opportunity to present [his] case.” The final factor in *Roadrunner Transp. Sys.* evaluates “whether the discovery issue was raised in the trial court before the entry of the summary judgment.” A review of the record reveals that Smith propounded discovery on November 15, 2016, three (3) days before the trial court held a hearing on and issued a judgment granting summary judgment in favor of St. Pierre.

For these reasons, we find that the trial court abused its discretion in granting summary judgment in favor of St. Pierre before affording Appellant the opportunity of conducting adequate discovery on the increased amount of monetary damages, and also deprived Appellant a fair opportunity to present his case.

DECREE

For the aforementioned reasons, we reverse the trial court’s granting of the motion for summary judgment in favor of Appellee and remand the matter for further proceedings not inconsistent with this opinion.

REVERSED