

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1202

COASTAL DEVELOPMENT GROUP, L.L.C.

VERSUS

INTERNATIONAL EQUIPMENT DISTRIBUTORS, INC.,  
ABC INSURANCE COMPANY, AND THE PARISH OF  
LIVINGSTON

Judgment Rendered: February 11, 2011

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On Appeal from the  
21st Judicial District Court,  
In and for the Parish of Livingston,  
State of Louisiana  
Trial Court No. 125255

Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

*JTB* *PETTIGREW, J. CONCURS*

## **HIGGINBOTHAM, J.**

Plaintiff, Coastal Development Group, LLC (hereafter referred to as “Coastal”) appeals a judgment sustaining the exception of prematurity brought by defendants International Equipment Distributors Inc. (hereafter referred to as “IED”), and the Parish of Livingston (hereafter referred to as “the Parish”) and dismissing Coastal’s suit without prejudice. For the following reasons, we affirm.

### **BACKGROUND**

On August 31, 2008, defendant, the Parish contracted with defendant, IED, for debris management and removal services in anticipation of Hurricane Gustav. Hurricane Gustav struck the Parish the next day. Hurricane Gustav was declared by President Bush as a federal disaster making the Parish eligible to receive money from the Federal Emergency Management Agency (hereafter referred to as “FEMA”).

Subsequently, on February 4, 2009, IED subcontracted a portion of the debris removal work for the Parish to plaintiff, Coastal, in a “Debris Reduction and Reclamation Agreement.” (Hereafter referred to as the “subcontract”).<sup>1</sup> In February 2009, Coastal began removing debris from ditches and canals on public and private property throughout Livingston Parish in accordance with the subcontract. Coastal continued this work until May 2009, when the work was suspended by the Parish to allow FEMA time to review the work and determine if it was eligible for federal reimbursement. IED initially paid Coastal on a weekly basis, paying ninety percent of the price for the work they performed. IED retained the ten percent that was provided for in the subcontract. IED was not being paid by the Parish; therefore, in March IED reduced the percentage of payments it made to Coastal to twenty percent. The Parish at the time of the hearing had not paid IED for the work performed by Coastal. It was undisputed that Coastal was not paid in full for the

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<sup>1</sup> Neither the contract between the Parish and IED nor the subcontract between IED and Coastal were procured using public bid law.

work they completed and that over four-hundred thousand dollars remained unpaid.

Coastal filed suit against IED and the Parish for damages under the Louisiana Public Works Act (hereafter referred to as "LPWA"). IED filed a dilatory exception raising the objection of prematurity and a peremptory exception raising the objection of no cause of action.<sup>2</sup> The Parish joined in the exceptions. IED and the Parish contend that because money was not yet due under the subcontract, Coastal's suit was premature. The trial court sustained the objection of prematurity and dismissed plaintiff's suit,<sup>3</sup> without prejudice.

### LAW AND ANALYSIS

A suit is premature if it is brought before the right to enforce it accrues. LSA-C.C.P. art. 423. Prematurity is determined by the facts existing at the time the suit is filed. **Metro Riverboat Associates, Inc. v. Louisiana Gaming Control Bd.**, 99-2241 (La. App. 1st Cir. 3/7/01), 798 So.2d 143, 147, writ denied, 01-0818 (La. 1/4/02), 805 So.2d 1188. Prematurity raises the issue of whether a cause of action has not yet come into existence because some prerequisite condition is unfulfilled. **Id.** The standard of review of a judgment sustaining a dilatory exception raising the objection of prematurity is that of manifest error. **Pinegar v. Harris**, 08-1112 (La. App. 1st Cir. 6/12/09), 20 So.3d 1081, 1088.

IED and the Parish base their denial of payments on the provisions of the subcontract, which provide in pertinent part:

5.4 [Coastal] shall only be entitled to receive payments for "Eligible" work... [T]he term "Eligible" refers to work involving debris and/or

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<sup>2</sup> The trial court sustained the defendant's objection of no cause of action prior to the prematurity exception being heard and gave Coastal thirty days to amend its petition. Coastal filed a motion for leave to amend its petition; however, that motion was denied because the case had been dismissed on the prematurity exception. Once the case was dismissed as premature, the issue of no cause of action became moot. Therefore, the sustaining of the dilatory exception raising the objection of prematurity is the only matter properly before this court.

<sup>3</sup> A judgment sustaining the dilatory exception of prematurity is a final appealable judgment. **Pinegar v. Harris**, 08-1112 (La. App. 1st Cir. 6/12/09), 20 So.3d 1081, 1087-1088.

services, tasks or materials that are eligible for reimbursement by [FEMA]....

5.5 In the event that payments, or total payment owed under the prime contract between [IED] and [the Parish], shall be withheld or reduced for any reason, including but not limited to any adverse determination with respect to whether the Work constitutes Eligible work ... then [IED] shall have the right to proportionately (by percentage) reduce the amount of its payment to Subcontractor for the Work or line item reduced or withheld by [the Parish]....

5.7 All payments from [IED] to [Coastal] are advances, subject to the availability of funds from [the Parish] and the State of Louisiana....[IED] shall not be bound to make any payments to [Coastal] until [IED] has received payments from [the Parish] for services.

Taken as a whole, these clauses in the subcontract condition payment to Coastal on FEMA's approval of the work and payment to IED from the Parish. Coastal incurred the risk that FEMA might not determine the work eligible and the Parish would not pay IED. Because the words of the subcontract between IED and Coastal are clear and explicit, there is no need for further interpretation. See LSA-C.C. arts. 2045 and 2046.

The trial court in its reasons for judgment stated:

Both the primary contract between the Parish and IED, and the subcontract between IED and [Coastal] provide that no sums are due unless and until reimbursement payments for debris removal are approved and paid to the parish by FEMA. The evidence was conclusive that no such amounts had been approved or paid for the work which included those actions taken by [Coastal] under the subcontract, although negotiations for these payments were ongoing.

While these contract provisions are certainly not common, they were the agreement of the parties. Accordingly, the court further sustained the exceptions of prematurity.

Mr. Smith L. Day, regulatory counsel for IED, testified about the contract between IED and Coastal. He indicated that the Parish has not paid IED for the work done by Coastal. He stated "as for the canal work, there has been zero paid by the Parish or anyone for that work." The money FEMA reimbursed the Parish was for work performed prior to the subcontract between Coastal and IED.

A suspensive condition is one that depends on the occurrence of an uncertain event. See LSA-C.C. art. 1767. In this case the uncertain events are whether FEMA determines the work done by Coastal to be eligible and whether the Parish pays IED for the work. Thus, this type of pay **if** paid clause creates a suspensive condition.<sup>4</sup>

Louisiana Code of Civil Procedure article 423 provides in pertinent part:

If the obligation depends upon a suspensive condition, the right to enforce it does not accrue until the occurrence or performance of the condition.

When an action is brought on an obligation before the right to enforce it has accrued, the action shall be dismissed as premature, but it may be brought again after this right has accrued.

The trial court found the work had not been approved by FEMA and IED had not been paid for the work. We find no manifest error in these factual determinations. Coastal's right to enforce the obligation of IED to make payments to them has not yet accrued as IED has not received payments from the Parish, or the Parish from FEMA. The subcontract unambiguously suspends payment until payment is received from the owner.

While this court is sympathetic to the plight of Coastal because they performed the work and should be paid for it, according to the unambiguous language of the subcontract, until the work is deemed eligible by FEMA and actual receipt of payment from the Parish to IED, the right of the subcontractor to demand payment is premature. The trial court found that Coastal's work had not been

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<sup>4</sup> This is a "pay if paid" clause as opposed to a "pay when paid" clause as distinguished by this Court in **Vector Elec & Controls, Inc. v. JE Merit Constructors, Inc.**, 05-2244 (La. App. 1st Cir. 11/8/06) (unpublished), writ denied, 06-2913 (La. 2/2/07), 948 So.2d 1089. See also **Imagine Const., Inc. v. Centex Landis Const. Co. Inc.**, 97-1653 (La. App. 4th Cir. 2/11/98), 707 So.2d 500, 501-502. This type of "pay if paid" clause has been approved by this court in **Vector**. In **Southern States Masonry, Inc. v. J.A. Jones Const. Co.**, 507 So.2d 198, 200-201 (La.1987), the Louisiana Supreme Court found that the contract was pay **when** paid and therefore a contract with a term and not a contract subject to a suspensive condition. The language in that contract is distinguishable as it stated "contractor shall pay upon receipt of payment." Further, the court relied on the fact that the company's possible insolvency was not given consideration by the parties and to consider it a suspensive condition would in effect make the subcontractor an insurer of the owner's solvency. In the case *sub judice*, the possibility that FEMA would not find the work eligible was clearly contemplated by the parties.

approved by FEMA and that IED had not received payments from the Parish, and we have concluded these findings are supported by the evidence.<sup>5</sup> Therefore, we find no error in the trial court's sustaining of the dilatory exception raising the objection of prematurity.

### CONCLUSION

Accordingly, the judgment of the trial court sustaining the dilatory exception raising the objection of prematurity and dismissing Coastal's suit without prejudice is affirmed at Coastal's cost.

**AFFIRMED.**

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<sup>5</sup> Coastal argues that the trial court erred in sustaining the prematurity exception because the subcontract was for a "public work," and they had taken all prerequisite steps required for a claim pursuant to the LPWA. LSA-R.S. 38:2241 et. seq. This case does not require us to determine if the LPWA applies because the LPWA defines a "claimant" "as any person **to whom money is due** pursuant to a contract." (Emphasis added.) LSA-R.S. 38:2242(A). We determined Coastal is not yet due money under the subcontract; therefore, Coastal was not a proper claimant under the LPWA. Also, Coastal contends that LSA-R.S. 38:2248 prohibits the type of payment provisions contained in the subcontract. Louisiana Revised Statutes 38:2248 does contain limitations on payment withholding provisions; however, it applies only to the State or any of its agencies, boards, or subdivisions or any other public entity. The subcontract is not with any of the listed persons. Therefore, LSA-R.S. 38:2248 is not applicable.