CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 2009-02688 **DIVISION "I"**

GOLF CLUB OF NEW ORLEANS, L.L.C.
AND EASTOVER REALTY, INC.

VERSUS

HONORABLE DALE N. ATKINS, CLERK OF COURT FOR CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

AND

EARTH SERVICES & EQUIPMENT, INC. AND
MOORE TESTING & INSPECTION, L.L.C.

_____ _____
FILED DEPUTY CLERK

TRIAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S WRIT FOR MANDAMUS

NOW INTO COURT, through undersigned counsel, comes defendant EARTH SERVICES & EQUIPMENT, INC. (hereinafter "Earth" or "Defendant"), a Louisiana corporation doing business in this State and Parish, who submits this Memorandum in opposition to Plaintiff's Writ for Mandamus requesting that this Court order cancelled a Statement of Claim and Privilege filed by Defendant Earth. As Earth is prepared to demonstrate through this memorandum and at trial, it is entitled to avail itself of the privileges within the Louisiana Private Works Act, and therefore, the Writ for Mandamus should be DENIED.

The Matters in Contention

In its Petition for Mandamus, the Plaintiffs allege that the Statement of Claim and Privilege filed by Earth Services & Equipment, Inc. is invalid or improper for primarily two reasons:

1) "The liens inappropriately name both Eastover and Golf Club as owners. As

such, the liens are improper." Plaintiffs Petition ¶ III.

2) "The Statement of Claims and Privileges and corresponding invoices do not consist of 'work' performed within the statutory definition as established by the Louisiana Private Works Act." Plaintiffs Petition ¶ IV.

3) Whether, based on the foregoing two alleged defects, the Plaintiffs are entitled to (a) cancellation of the lien; and (b) costs, attorneys' fees and the award of other legal expense.

General Jurisprudence Re: Mandamus Actions under § 9:4833

Louisiana Revised Statute 9:4833 in pertinent part states as follows:

> A. If a statement of claim or privilege is improperly filed or if the claim or privilege preserved by the filing of a statement of claim or privilege is extinguished, an owner or other interested person may require the person who has filed a statement of the claim or privilege to give a written request for cancellation in the manner provided by law directing the recorder of mortgages to cancel the statement of claim or privilege from his records. The request shall be delivered within ten days after a written request for it is received by the person filing the statement of claim or privilege.

The comments of this statute, referenced by the Petitioner, state as follows:

> (a) This section is new but does not change the law. It adopts the substance of the former R.S. 9:4821 but expands its provisions. Many construction projects contemplate or are dependent upon financing arrangements, leases, or conveyances that are to be consummated shortly after completion of the work. *This section is designed to discourage the filing of a claim that is clearly unjustified, late, or otherwise made without reasonable cause* for believing it is valid in the hope that economic pressure may be placed upon the owner or contractor to extract a settlement or other payment as the price of a release. Thus, the delay for delivering authorization to cancel the lien after request has been reduced from thirty days to ten days. *Emphasis ours.*

Properly filed claims, on the other hand, are afforded great protection by the Private Works Act. This general legal principal is evidenced by La. R.S. 9:4802, et. seq., and particularly Comment (a) to 9:4833, which considers as invalid *only* those liens that are *clearly unjustified*.

The Writ for Mandamus is a Rule to Show Cause and summary proceeding set to

determine whether the lien is "clearly unjustified...or otherwise made without reasonable cause," and is not a trial on the merits of the case. Accordingly, a Defendant in rule is not required to prove up the validity of each item making up his lien. *See Davis Wood Lumber Co. v. Wood,* 224 La. 825, 71 So.2d 125 (Supp 1954) (Defendant in a rule to show cause why a lien should not be erased and cancelled is not called upon to prove up the validity of each item making up his lien as this would be to try the merits of the case by rule. The fact that a person asserting a lien may not, on trial of suit for supplies, materials and labor furnished, be able to prove entire amount of lien claimed is no reason why the lien should be cancelled and erased).

To the contrary, the burden of proof falls upon the Petitioner, who must show by a preponderance of evidence that it is not indebted to the Defendant as claimed in the lien. *See Adams v. Darby,* App. 2 Cir. 1951, 54 So.2d 887. (In proceeding by rule for cancellation of a lien on real property where plaintiff alleged that he was in no way indebted to defendant, he had burden of proving the allegation by clear preponderance of evidence).

Issue 1: Naming Eastover & Golf as Owners

The Statement of Claim and Privilege states as follows within its first paragraph, identifying the parties to the lien:

> …THE GOLF CLUB OF NEW ORLEANS, L.L.C., a Louisiana limited liability company with its offices at 5690 Eastover Drive, New Orleans, Louisiana, 70128-3600, upon information and belief the occupant or owner of the premises, and EASTOVER REALTY, INC., a Louisiana corporation with its principal office at 5690 Eastover Drive, New Orleans, Louisiana, 70128, upon information and belief the occupant or owner of the premises (hereinafter collectively referred to as "Owner")…[1]

La. R.S. 9:4822(G) [emphasis ours] sets forth those items that must be contained

[1] It is now represented that Golf Club of New Orleans, LLC is the owner of the property at controversy, but it is important to note that Eastover Realty, Inc. is added to the lien by the Plaintiff "upon information and belief" that the company is an owner *or occupant* of the premises. The Plaintiff submits that it was reasonable for it to believe that the Plaintiff was an owner or occupant…and while the Plaintiff has denied that Eastover Realty, Inc. is an owner of the property, it has not set forth that the company is not an occupant of the property.

within a Statement of Claim and Privilege for it to be considered proper, providing:

> A statement of a claim or privilege:
> (1) Shall be in writing;
> (2) Shall be signed by the person asserting the same or his representative;
> (3) Shall reasonably identify the immovable with respect to which the work was performed or movables or services were supplied or rendered and the owner thereof;
> (4) Shall set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, materials supplied, or services rendered.

It is undisputed that the Plaintiff Earth's Statement of Claim and Privilege has properly and reasonably identified the owner of the property (Golf Club). The only question for this Court to decide, therefore, is whether the Defendant's inclusion of Eastover Realty, Inc. renders the claim invalid.

The Advisory Committee comments to La. R.S. 9:4822 make the purpose of the "construction lien" evident when it provides in part (g) that "The purpose of a statement of claim or privilege is to give notice to the owner (and contractor) of the existence of the claim and to give notice to persons who may deal with the owner that a privilege is claimed on the property." 1981 Commentary, part (g), *citing Mercantile Nat. Bank of Dallas v. J. Thos. Driscoll, Inc.*, 195 So. 497 (La. 1940).

Comment (g) goes on to state "technical defects in the notice should not defeat the claim as long as the notice is adequate to serve the purposes intended."

These comments and proposed purpose of the Private Works Act is consistent with Louisiana jurisprudence on the subject. In a case with facts similar to the instant matter, the Louisiana 3rd Circuit held that a mere error in designating a lien claimant as a corporation rather than as a sole proprietorship is not fatal to an otherwise properly and timely filed lien. *Cole's Constr. Co. v. Knotts*, 619 So.2d 876 (La. App. 3d Cir. 1993).

The facts in this matter are more favorable to the Defendant than in *Cole's*, since under these circumstances, the Defendant's lien *exactly* names the property owner. The

only discrepancy here is that the lien names an additional party.

There is no indication within La. R.S. 9:4822(G) that mistakenly including a non-involved party is fatal to a construction lien, and the Plaintiffs' have not proposed any legislative or jurisprudential language to support such a conclusion. In fact, the comments to La. R.S. 9:4822 seem to indicate that parties other than the contractor and owner may be included in a Statement of Claim and Privilege, as it provides that a claimant may "give notices to persons who may deal with the owner that a privilege is claimed on the property."

Eastover Realty, Inc. is not a random party to these lien in controversy. To the contrary, the work at controversy was performed at the Eastover Country Club in New Orleans East, and research as to the legal property description and owner of the property yielded the Golf Club of New Orleans, L.L.C. and Eastover Realty, Inc. If Eastover Realty, Inc. does in fact have no ownership interest in the property at controversy, it at least has a relationship to its co-plaintiff, such to justify including it in the lien as "person(s) who may deal with the owner."[2]

Issue 2: Defendant Earth did perform "Work" as per the Private Works Act

In its Writ for Mandamus, the Plaintiffs submit that the Defendant's lien is improper because it did not perform "work" as established by the Private Works Act.

The Louisiana Private Works Act (La. R.S. 9:4801 *et seq.*) authorizes a subcontractor like Earth to lien property whereupon it performed work to secure payment for the obligations arising out of the associated contract. The "lien" right is made available to subcontractors like the Defendant, and against a contractor *and* owner through La. R.S. 9:4802.

[2] Information concerning Eastover Realty, Inc.'s non-ownership of the property was only provided to Plaintiff Earth on the afternoon of March 11, 2009. On March 12, 2009, based on the provided information, the Plaintiff agreed to dismiss Eastover Realty, Inc. from the proceedings without prejudice.

To demonstrate the variety of "work" types or contractors types protected under the Private Works Act, La. R.S. 9:4802 sets forth that the following persons have claims thereunder: (1) subcontractors; (2) laborers or employees of the contractor or subcontractor; (3) sellers of movables; (4) lessors of movables; (5) prime consultants; (6) surveyors or engineers; (7) professional sub-consultants; and (8) licensed architects.

These parties may all avail themselves of the privilege under 9:4802 when they perform services in connection with a "work."

The term "Work" is defined by the statute in La. R.S. 9:4808, whereby it provides where relevant:

> A. A work is a single continuous project for the improvement, construction, erection, reconstruction, modification, repair, demolition, or other physical change of an immovable or its component parts.

A. Distinguishing "**w**ork" (little w) from "**W**ork" (capital W)

In the instant matter, the Plaintiffs attempt to persuade this Court that the Defendant is not entitled to file its privilege under the Private Works Act because the "work performed was soil testing and consultation"…and this is "not work under the Act." Plaintiffs' Petition ¶ IV.[3]

The Plaintiffs pithy argument, however, seems to misunderstand the role of the defined term "Work" in the Private Works Act.

As above-discussed, it is clear from La. R.S. 9:4802 that a subcontractor (like the Defendant) is entitled to lien a property under the Private Works Act "for the price of their work." *See La. R.S. 9:4802(A)(1).* The Louisiana Private Works Act does not concern itself with the type of services provided by the lien claimant. In fact, the matter is clarified a bit in La. R.S. 9:4803, which provides that the privilege granted by § 9:4802

[3] Aside from the language within the Petitions ¶ 4, no other explanation, argument or evidence is presented to demonstrate to this Court that the Defendant cannot avail itself of the privilege under the Private Works Act.

secures payment of "the principal amounts of the obligations described in R.S. 9:4802, interest due thereon and fees paid for filing the statement…"

So long as the claimant is claiming an amount due to it, the claimant should have the right to make its claim under the Act.

The question the Plaintiff is attempting to argue relates to the Act's definition of "Work" within La. R.S. 9:4808, which relates not to the services performed by the claimant, but instead to the project as a whole (the "Work" of the "Private Works Act," if you will). In other words, the definition of "Work" in the Act serves to qualify what type of projects fall under the purview of the legislation, and which do not.

With regard to its argument in this regard, the Plaintiffs in paragraph IV of its Petition as follows:

> The purported liens, referred to in paragraph II above, are not proper liens under La. R.S. 9:4801, et al. The Statement of Claims and Privileges and corresponding invoices do not consist of "work" performed within the statutory definition as established by the Louisiana Private Works Act. As clearly illustrated in the invoices attached to the Statement of Claims and Privileges, the work allegedly performed was soil testing and consultation at the direction of a third-party. This is not "work" under the Act. Thus the liens are improper.

As argued *supra*, a claimant may assert its privilege under the Private Works Act with regard to *any type* of work it performs – including "soil testing and consultation at the direction of a third party." The Act's definition of "Work" has no relationship to the work actually performed by the claimant, and the subject of the construction lien.

To the contrary, the statutory definition of "Work" relates to the project itself. If the project is of the type that qualifies as "Work," any and all subcontractors, architects, consultants, engineers, lessors of equipment and sellers of movables are entitled to lien under the statute.

The Plaintiffs have not offered anything to this Court to demonstrate that the character of the project at controversy does not entitle laborers, subcontractors and others

working the project to avail itself of the privileges under the Private Works Act. More specifically, the Plaintiff fails to demonstrate why the project at Eastover was not "a single continuous project for the improper, construction, erection, reconstruction, modification, repair, demolition, or other physical change" of the property.[4]

Defendant Earth submits that this Court should find that the project at Eastover does fall within the Private Works Act.

While jurisprudence on this particular issue is thin, a case with very similar facts was decided in 1985 in the Louisiana Fourth Circuit, captioned *Lake Forest, Inc. v. Crilot Co., et al.*, 466 So.2d 61. In that matter, subcontractors filed liens against a property for excavation work related to the operation of a sand pit thereupon.

The plaintiff in *Lake Forest* argued that the work did not create a lien right because there had been no improvement to an immovable. The plaintiff attempted to draw a parallel between the Private and Public Works Acts, the latter act specifically applying to only a "building or structure upon the land." *Id.* at 63.

Affirming a trial court determination that the work on the sand pit did fall under the Private Works Act, the Fourth Circuit stated as follows:

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[4] The Plaintiff may argue that La. R.S. 9:4808(C) is applicable to the instant matter. This portion of the statute defining the term "Work" states that "the clearing, leveling, grading, test piling, cutting or removal of trees and debris, placing of fill dirt, leveling of the land surface, or performance of other work on land for or by an owner, in preparation for the construction or erection of a building or other construction thereon to be substantially or entirely built or erected by a contractor, shall be deemed a separate work to the extent the preparatory work is not a part of the contractor's work. The privileges granted by this Part for the work described in this Subsection shall have no effect as to third persons acquiring rights in, to, or on the immovable before the statement of claim or privilege is filed." The Plaintiff quoted this section of §9:4808 in its Exception of No Cause of Action filed in No. 08-7729, before Section H of this Court, which is an ordinary proceeding between the parties related to the lien and work in controversy in this Mandamus.

However, the reliance on 9:4808(C) is misplaced by Plaintiffs. This portion of the statute does not set forth any "exception" to 9:4808(A), or qualify part A of the statute in any way. In other words, it does not provide that this type of work ("dirt work") is only subject to the Private Works Act when done *in preparation* for the erection of some type of building. To the contrary, 9:4808(C) is directed towards the issue of timeliness as it relates to liens, and only that. *See C.J. Contractors v. American Bank & Trust Co.*, 559 So.2d 810 (La. 1 Cir. 1990);

> Although "improvement" language is used in this general statement, La. R.S. 9:4808 contains a broader wording. The definition of "work" as "a single continuous project for the improvement…or other physical change of an immovable…" appears to apply to this unique sand pit operation…
>
> We conclude that this sand pit…was designed to improve Lake Forest's property. At the very least the operation was for the "modification…or other physical change of an immovable."
>
> *Id.* at 64.

The broad definition of Work under La. R.S. 9:4808(A) clearly applies to the current situation, whereby materials and labor were provided to the property by the Defendant Earth to remove soil from the property and conduct soil tests *in anticipation* of later removing larger amounts of soil to sell to the Army Corps of Engineers. The single, continuous project would at least substantially modify the property or provide other physical changes to the property.[5]

B. The Claimants **w**ork

The Statement of Claim and Privilege itself defines the Defendant's services as follows: "ATV rentals, truck rentals, Geoprobe rentals, soil samples and preparation, environmental consulting, equipment, labor and related materials delivered."

Furthermore, many of the invoices from Defendant Earth relate to interest charges, which is a lienable amount as per La. R.S. 9:4803.

Issue 3: Plaintiff Not Entitled to Attorneys Fees and Costs, or Cancellation of Lien

As discussed in the Defendant's Exception for No Cause of Action, damages based on claims of wrongfully recording mechanic's liens are not allowed unless wrongful lien recordation is made in bad faith or with malice. *See* Defendant's Exceptions, Answers and Affirmative Defenses; *see also Dickson v. Moran*, 344 So.2d 102 (App 2 Cir 1977).

[5] See the contract between Evenstar, Inc. (general contractor) and Golf Club of New Orleans, LLC, attached as Exhibit A to the Memorandum for more information about the scope of work.

To award costs and/or attorneys fees under La. R.S. 9:4833, Louisiana Courts have consistently required that the filer act in bad faith, with ill will, in malice and/or without any probable cause. *See Dickson; see also Patterson v. Lumberman's Supply Co*., App.1936, 167 So. 471 (Damages are not recoverable for materialman's unlawful inscription of lien on mortgage records of parish, unless actuated by malice or ill will); *Flournoy v. Robinson-Slagle Lumber Co.*, Sup.1932, 173 La. 989, 139 So. 321 (Materialman furnishing contractor with supplies was not liable to owner for filing asserted lien after expiration of time limit, there being no evidence to show malice); *Norman H. Voelkel Const., Inc. v. Recorder of Mortgages for East Baton Rouge Parish*, App. 1 Cir.2003, 859 So.2d 9, 2002-1153 (La.App. 1 Cir. 6/27/03), writ denied 857 So.2d 486, 2003-1962 (La. 10/31/03), writ denied 857 So.2d 488, 2003-2133 (La. 10/31/03) (Subcontractor had probable cause to refuse to voluntarily erase its lien, therefore, an award of attorney fees was not warranted*). Mayeaux v. McInnis, App. 1 Cir.2001, 809 So.2d 310, 2000-1540 (La.App. 1 Cir. 9/28/01)* (Contractor's refusal to remove lien was reasonable, and thus homeowners were not entitled to attorney fees and damages due to contractor's refusal to remove lien on home for unpaid work, even though trial court found that lien was not properly perfected, where finding was made only after hearing and after contractor had presented considerable although not persuasive evidence in contractor's favor, considerable sum of money was due to contractor, and homeowners had suddenly and without explanation distanced themselves and project from contractor).

A party is in bad faith if it records a lien arbitrary, capriciously and unreasonably. *Linzay Downs, Inc. v. R.E. Heidt Const. Co., Inc.*, 397 So.2d 5 (App 3 Cir. 1981).

The Petitioner has failed to allege, must less prove, that the Defendant acted in bad faith or with actual malice. The Defendant requests that this Court, after careful consideration of this Memorandum in Opposition to this Mandamus, deny the Petitioner's request for cost and attorneys fees since the Defendant has reasonable cause for filing the

Statement of Claim and Privilege at dispute.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all counsel of record to this proceeding through facsimile transmission or US First Class Mail, postage prepaid, this 19th of March 2009.

SCOTT G. WOLFE