CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 08-7729 DIV: H-12

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

VS

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

FILED DEPUTY CLERK

MEMORANDUM IN OPPOSITION TO EXCEPTIONS FILED BY EVENSTAR, INC.

NOW INTO COURT, through the undersigned counsel, comes Earth Services & Equipment, Inc. (Earth) who submit this Memorandum in Opposition to the Exceptions filed by Evenstar, Inc. (Evenstar).

The Exceptions were filed by Evenstar on or around November 5, 2008, and are scheduled for hearing before this Honorable Court on the morning of March 20, 2009.

The Plaintiff, Earth, avers that the Exceptions lack merit and should be DENIED.

I. Exception of Prematurity

Evenstar's entire support for its Exception of Prematury is based on its unilateral assertion that Earth understood that it would not get paid until Evenstar was paid on the project. Since this was "understood" between the parties, the Defendant excepts to the action as premature.

The dilatory exception of prematurity provided in La. Code Civ. Proc. art. 926 questions whether the cause of action has matured to the point where it is ripe for judicial determination. *Spradlin v. Acadia-St. Landry Medical Foundation*, 98-1977 (La. 2/29/00), 758 So. 2d 116; see also Frank L. Maraist and Thomas C. Galligan, Jr., *Louisiana Tort Law § 21-3(f)* (1996). An action is premature when it is brought before the right to enforce it has accrued. *La. Code. Civ. Proc. art. 423.*

The question here is, of course, whether Earth's action against Evenstar is ripe for judicial determination.

Evenstar argues that the parties "understood" that payment to Earth would only be due after Evenstar received payment from the owner. Evenstar does not point to any written contract or contract language to support its position that this was the understanding of the parties, and in fact, the Plaintiff disputes this understanding. A cursory review of the Petition for Damages filed by Earth Services on July 25, 2008, will demonstrate that the Earth performed work under the understanding that payment was due on a "Net 30 Days" basis. *See* Petition ¶ 3, 4, 5, 6, 7.

When a contractor and subcontractor agree that a subordinate party will be paid after the dominant party is paid from a funding source, this is commonly referred to in the construction industry as a "Pay When Paid" contract. *See Louisiana Construction Law*, James Holiday and H. Bruce Shreves, 2008, § 4.4, p.81.

In the instant matter, the "pay when paid" provision was presumably an oral understanding, according to Evenstar. To underscore the ripeness of this action, even assuming that this was the understanding, Louisiana case law would still consider payment possibly due to the subcontractor at a time before the dominant party received payment. In other words, when Louisiana courts are presented with clear "pay when paid" provisions in a contract, they still will require payment to the subcontractor by the general contractor within a reasonable period of time. *Southern States Masonry, Inc. v. J.A. Jones Contr. Co.*, 507 So.2d 198 (La. 1987).

In the instant matter, there is no clear "pay when paid" provision, and the Plaintiff disputes that one exists. For this reason, the exception of prematurity should be denied. However, even assuming that the parties had such an "understanding," a reasonable time has passed sincce work was performed in or around the spring of 2007, and the Plaintiff's claims would still be ripe for judicial determination.

II. Improper Cumulation

The Plaintiff also has a pithy analsys related to its exception of improper cumulation, asserting that since some projects were performed in Orleans parish and some were performed outside of Orleans parish, that it is not proper to "cumulate these separate projects and agreements." Within the improper cumulation discussion, the Plaintiff mentions his exception to jurisdiction and venue, but without any analysis whatsoever.

If the grounds for the objection of improper venue do not appear on the face of the plaintiff's petition, the burden is on the defendant to offer evidence in support of his position. *Nitro Gaming, Inc. v. D.I. Foods, Inc.*, 34,301 (La. App. 2d Cir. 2000).

It is clear that the defendant has not offered the court any evidence whatsoever in support of its position, and therefore, this Court should determine whether the grounds for objecting to improper venue appear on the face of the Plaintiff's petition.

In its memorandum in support of the exceptions, the Defendant plainly states that the locations of projects Riverbirch, Willswood, Pomez Pit, and Myrtle Grove are outside of Orleans Parish, and that the Eastover project is within Orleans Parish.

The services in controversy that were performed by Earth are described in ¶ 3, 4, 5, and 6 of its Petition. As compensation for rendering all services, the Plaintiff avers that it is owed approximately $89,200.49. The amount related to Eastover – which is in New Orleans – is $38,463.49, or 43% of the total. There is no dispute that venue is proper with respect to the work performed at Eastover.

Louisiana Code of Civil Procedure article 76.1 provides that:

> an action on a contract may be brought in the parish where the contract was executed or the parish where any work or service was performed or was to be performed under the terms of the contract.

In Plaintiff's Petition for Damages, the Plaintiff avers that a construction contract existed between the parties and that the Earth was unpaid subcontractor. The Plaintiff will be amended its Petition to argue that an open account may have existed between the parties, and plead the open account statute, and the statute regarding payment under a

construction contract (9:2784), in the alternative.

In either event, the Plaintiff is alleging that it has a contract with Evenstar, Inc., and not necessarily that it has 4, 5 or 6 separate agreements with Evenstar. It seems clear that the parties were operating from location to location under the same terms and conditions, and were not establishing new contracts and new conditions on a location-by-location basis.

In this event, under La. C.C.P. art 76.1, the Plaintiff would urge that some of the work performed under this over-arching contract or open account was in the parish of Orleans, and therefore, that venue for work performed at all of the locations is proper in Orleans Parish.

Notwithstanding what will be shown factually as to the terms and conditions of the contract, *it is not clear from the face of Plaintiff's Petition* that this was not the arrangement. Accordingly, the defendant has the burden o offer evidence in support of its position. *Nitro Gaming, Inc.*

It has not done so, and accordingly, its exceptions should be DENIED.

III. Declinatory Exceptions

The argument of Defendant related to its declinatory exceptions of improper venue, lack of subject matter jurisdiction and lack of "jurisdiction," mirror its dilatory exception of improper cumulation, not only in the exceptions' theories, but also in the lack of making any effort to substantiate its argument to this court.

Essentially, the Defendant is arguing that this Court should not be hearing this matter since some of the work in controversy was performed in Orleans Parish, while other work was performed in other parishes. While the Defendant's argument is necessarily centered around this court's lack of venue, Evenstar also suggests that this court does not have jurisdiction and/or personal jurisdiction against it.

Jurisdiction (Personal and Subject Matter)

With regard to this court's subject matter jurisdiction, La C.C.P. art. 2 states:

> Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted.

Evenstar's Memorandum in Support of its Exceptions fail to indicate to this court why it is without subject matter jurisdiction, or specifically, that (a) the object of the demand; (b) the amount in dispute; or (c) the value of the right asserted is not within the purview of this court.

Louisiana jurisprudence is clear that determination of subject matter jurisdiction is limited to the requirements of La. C.C.P. art 2. *See generally Support Enforcement Servs. v. Beasley,* 801 So.2d 515 (2001 La. 3 Cir).

Evenstar also avers that this court is without personal jurisdiction over it, and again, for no particular reason except as it may relate to its exception of improper venue.

With regard to personal jurisdiction, La. Civil Code Art. 6 states in pertinent part,

> "A. Jurisdiction over the person is the legal power and authority of a court to render a personal judgment against a party to an action or proceeding. The exercise of this jurisdiction requires:(1) The service of process on the defendant, or on his agent for the service of process…"

Clearly, Evenstar was served in this matter, and this Court has personal jurisdiction over it.

Improper Venue

The authentic exception urged by Evenstar in this matter relates to whether this Court is the proper venue for this action.

As above-quoted, if the grounds for the objection of improper venue do not appear on the face of the plaintiff's petition, the burden is on the defendant to offer evidence in support of his position. *Nitro Gaming, Inc. v. D.I. Foods, Inc.*, 34,301 (La. App. 2d Cir. 2000).

As argued by Plaintiff in this Opposition Memorandum under the title "II. Improper Cumulation," the face of Plaintiff's Petition does not present a clear circumstance where this court would not be a proper venue for the action. According to

La. C.C.P. art. 76.1, "an action on a contract may be brought in the parish where the contract was executed or the parish where any work or service was performed or was to be performed under the terms of the contract." Emphasis added.

Presuming that this matter is based on a "contract" between the Plaintiff and Defendant, according to art. 76.1 proper venue would be in either the (a) parish where the contract was executed; or (b) the parish where *any work or service* was performed.

See the relevant discussion of 76.1 in *Jumonville v. White,* 992 So.2d 1044, 1049 (La. 1 Cir. 2008):

> The statute clearly provides alternative venues either in the situs where the contract was executed or where the work or services were performed. In this case, although the contract was executed at Jumonville's former law office in Jefferson Parish, the vast majority, if not all, of the legal services in conjunction with the federal litigation were rendered in St. Tammany following relocation of Jumonville's office on or before May 2003. The Whites were clearly aware of Jumonville's relocation and even met with Jumonville at her St. Tammany Parish office on several occasions during the pendency of the federal litigation. It is disingenuous for the Whites to now argue that St. Tammany Parish is an improper or even unexpected venue, given that they continued to elicit Jumonville's services following her relocation to that parish.

The Defendant here admits that *work or service* was to be performed in Orleans Parish as it relates to the Eastover pit. And since the Plaintiff's petition does not, on its face, assert the each location was a separate executed contract, there could be proper venue in Orleans Parish if this were the case. The Defendant, according to *Nitro Gaming, Inc.*, has the burden of demonstrating otherwise in its exception of improper venue, which it does not do.

Moreover, nearly 50% of the amount in dispute in this litigation relates to the portion of the contract performed in Orleans Parish, and a lien filed here. Like in *Jumonville*, it is disingenous for the Defendant to argue that Orleans is an unexpected venue...and they have not properly set forth that it is an improper venue, which it is not.

As per the 2007 amendment adding art. 74.4, an action on an open account may be brought in venues similiar to that of a ordinary contract (art. 76.1). As above-mentioned, the Plaintiff will amend to assert that it has an open account with the

Defendant, at least alternatively, and therefore, would have proper venue in Orleans Parish according to La. C.C.P. art. 74.4.

III. Peremptory Exception of No Cause of Action

Finally, the Defendant Evenstar asserts that the Plaintiff has failed to state a cause of action with its Petition for Damages. The extent of Defendants No Cause of Action exception is as follows:

1) Plaintiff "prematurly" asks for money not due;[1]
2) Re-stating the Exceptions filed by Golf Club of New Orleans, LLC and Eastover Realty, LLC.

With regard to the first item, as this court is aware, in deciding an exception of no cause of action all of the facts alleged in the Petition must be taken as true. *Campbell v. Continental-Emsco Co. 445 So.2d 70 (App 2 Cir 1984).*

Plaintiff clearly states in its Petition that the amounts in dispute are due to it. *See* Plaintiff's Petition for Damages, ¶ 3-7. Taken this statement as true, which the court must, the Plaitniff is not praying for money "not due."

With regard to the second item, the Plaintiff repeats its argument presented to this Court in our Memorandum in Opposition to the No Cause of Action filed by Eastover Realty and Golf Club.

However, it's curious that Evenstar excepts to Plaintiff's petition based on the exceptions of no cause of action filed by Eastover. Clearly, the exception is not applicable to Evenstar under these circumstances.

In Eastover's Exception of No Cause of Action, it urges that Plaintiff did not properly obtain a privilege on its property, and accordingly, does not have a cause of action against it under the Private Works Act.

---

[1] Essentially, this component of Evenstar's exception is a throwback to its exception of prematurity, which his above-discussed.

The cause of action between Plaintiff and Evenstar in this matter, however, has very little to do with the Private Works Act. In fact, assuming for argument that this Court would grant Eastover's / Golf's exceptions, this would have no effect whatsoever on the asserted causes of action against Evenstar.

Evenstar and Plaintiff are parties to a contract or open account that creates obligations and duties between them. The Plaintiff has brought this litigation arguing that Evenstar is in breach of those duties.

If Eastover convinces this that Plaintiff has no cause of action against it, it would not erase the cause of action between Plaintiff and Evenstar.

Accordingly, Evenstar's reliance on Eastover's no cause of action exception is misplaced. The only other component of its peremptory exception is a reguritation of its prematurity exception. Accordingly, it should be DENIED.

Respectfully Submitted,
WOLFE LAW GROUP, L.L.C.

Scott G. Wolfe, Jr. (Bar Roll 30122)
4821 Prytania Street
New Orleans, LA 70115
P: 866-529-9653 * F: 866-761-8934
Attorney for **Plaintiff, Earth Services & Equipment, LLC**

CERTIFICATE OF SERVICE

I, Scott G. Wolfe, Jr, hereby certify that a copy of the foregoing pleading has been served on all counsel of record via facsimile or U.S. Regular Mail, postage prepaid, on this 12th day of March 2009

Scott G. Wolfe, Jr.