NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0443

CAJUN CONSTRUCTORS, INC.

VERSUS

RODNEY J. STRAIN, SHERIFF
AND EX-OFFICIO TAX COLLECTOR
OF ST. TAMMANY PARISH

DATE OF JUDGMENT: December 28, 2006

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 2001-11852 DIV. "B"), PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE ELAINE W. DIMICELI, JUDGE

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AFFIRMED.

Welch J. concurs in result

KUHN, J.

Plaintiff-appellant, Cajun Constructors, Inc. (Cajun), appeals the trial court's judgment granting summary judgment in favor of defendant-appellant, Rodney J. Strain, Sheriff and ex-officio Tax Collector for the Parish of St. Tammany (the Collector), and dismissing its claim for a refund of taxes paid under protest. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In 1997, Cajun was awarded the Basin 500 Collection System Improvements Contract I (the contract) for the purpose of upgrading sewerage pump stations and constructing an aboveground concrete tank with sewerage headworks (sewerage system) for the City of Slidell (the City). According to the terms of the contract, Cajun was to pay all taxes relating to the contract lawfully assessed against the City or Cajun. In this lawsuit, the parties agree that from January 1997 through December 2000, in fulfillment of its obligations under the terms of the contract, Cajun purchased and used items including submersible aerators, seals, flanged pipes and fittings, flanged gate valves, flanged valve controllers, pipe supports, ladders and handrails, manual and mechanical bar screens, submersible pumps, guide rails, air release valves, and hose guns (the items). After an audit, the Collector determined that Cajun owed sales taxes, penalties, interest, deficiencies, and audit fees in the amount of $78,300.61 for the items purchased and used in constructing and upgrading the sewerage system.[1] Cajun paid the assessment under protest and filed this lawsuit in April 2001, seeking a refund.

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[1] See City of Slidell General Sales and Use Tax Ordinance 2748, St. Tammany Parish Ordinance 98-2803, and St. Tammany Police Jury Ordinance 98-2802.

In February 2005, the Collector filed a motion for summary judgment, averring that the items had become component parts of the sewerage system and, as the contractor of the upgrades and constructions, Cajun was the ultimate consumer who owed the taxes. Thus, the Collector sought dismissal of Cajun's petition for a refund. In April 2005, Cajun filed a cross-motion for summary judgment, claiming that the items purchased and used in fulfillment of its obligations under the contract remained movables of which the City was the ultimate consumer. Accordingly, Cajun claimed entitlement to a refund of the amounts it had paid under protest.

After a hearing on the cross-motions, the trial court granted the Collector's motion, denied Cajun's, and dismissed the taxpayer's lawsuit. This appeal followed.

DISCUSSION

On appeal, summary judgments are reviewed *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. ***Brumfield v. Gafford***, 99-1712, p. 3 (La. App. 1st Cir. 9/22/00), 768 So.2d 223, 225. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. ***Id.*** Whether a thing is correctly classified as a component part of a building or other construction is a legal conclusion that is necessarily drawn from the pertinent facts. 2 A.N. Yiannapoulos, 2 *Louisiana Civil Law Treatise: Property* § 142, at 322 (4th ed. 2001) citing ***White v. Gulf State Utilities Co.***, 525 So.2d 145 (La. App. 3d Cir. 1988).

The general purpose of the sales/use tax is to impose the tax upon the ultimate purchaser or user of the particular product purchased or used. ***Cajun Contractors,***

Inc. v. State of Louisiana, Dep't of Revenue and Taxation, 515 So.2d 625, 627 (La. App. 1st. Cir. 1987). The tax is assessed on tangible personal property, which has been recognized as movable property in Louisiana. ***Cajun Contractors, Inc.***, 515 So.2d at 627. On appeal, the Collector concedes that if the City is determined to be the ultimate consumer of the items, no tax is owed. See La. R.S. 47:301(8)(c) (excluding municipalities from the definition of those against whom a political subdivision may levy the sales and use tax). But in performing a contract to construct an immovable, a contractor is the ultimate purchaser of materials incorporated into the immovable and can be taxed for governmental use. ***Bill Roberts, Inc. v. McNamara***, 539 So.2d 1226, 1229 (La. 1989). Thus, resolution of the issue raised in this case depends upon the classification of the items as immovable property, for which Cajun owes the sales tax, or movable property, for which the City is exempt from paying sales tax.

To determine whether property is movable or immovable for purposes of sales tax, it is appropriate to turn to the relevant provisions of the Civil Code. ***Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales and Use Tax Comm'n,*** 04-0473, pp. 9-10 (La. 4/1/05), 903 So.2d 1071, 1078. Whether items which are otherwise movable property have become component parts of an immovable, subject to the laws governing immovable property, is determined by application of La. C.C. art. 466.

At the time Cajun filed its petition for a refund, La. C.C. art. 466 provided:

> Things permanently attached to a building or other construction, such as plumbing, heating, cooling, electrical or other installations, are its component parts.

> Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.

Article 466 sets forth two ways in which a thing becomes a component part. First, under the first paragraph of the article, a thing that fits within a listed category (plumbing, heating, cooling, electrical, or other installation) is a component part as a matter of law, regardless of its degree of attachment. Second, under the second paragraph of the article, a thing is a component part if its removal would cause "substantial damage" to itself or to the immovable to which it is attached. ***Equibank v. United States Internal Revenue Service***, 749 F.2d 1176, 1178 (5th Cir. 1985).

Through the deposition testimony of Stanley Polivick, the City Engineer, Cajun established as a matter of fact that the items could be removed from the sewerage system without substantial damage to either the items or the immovable structure of the system. Thus, they are not component parts under the second paragraph of Article 466.

Turning our focus to the first paragraph of Article 466, the Collector has categorized the items as plumbing installations, and Cajun has not challenged this description. Thus, under Article 466, the items are component parts as a matter of law.

Moreover, according to the societal expectations theory, lines of demarcation between movables and immovables are ordinarily drawn in accordance with prevailing ideas in society. In contemporary civil law, the distinction rests, in principle, on physical notions of mobility and on inherent characteristics of things. Thus, the views of the public on which items are

ordinarily regarded as part of a construction must be considered in defining those items that the legislature meant to include within the term plumbing installation. ***See Equibank***, 749 F.2d at 1179 (relying on The Expose des Motifs and 2 A.N. Yiannapoulos, *Louisiana Civil Law Treatise: Property* § 22 (1st ed. 1980) in finding that chandeliers were electrical installations and, therefore, component parts of a mansion); ***see also American Bank & Trust Co. v. Shel-Boze, Inc.***, 527 So.2d 1052 (La. App. 1st Cir.), ***writ denied***, 532 So.2d 155 (La. 1988) (concluding that under the societal expectations theory light fixtures are electrical installations and carpeting is an "other installation"; therefore, both are component parts of a residence).

The Collector established through City Engineer Polivick's affidavit that all the items are an integral part of the sewerage system upgraded and constructed by Cajun pursuant to the contract, and that the system could not work or function without these items. Because a reasonable purchaser or owner of a sewerage system would ordinarily expect that the system would function, the items -- which are necessary for the system to work -- are clearly plumbing installations under the societal expectations theory.

Based on the facts established in this case, the lack of challenge of the characterization of the items as plumbing installations, and an application of the societal expectations theory, we readily conclude that the submersible aerators, seals, flanged pipes and fittings, flanged gate valves, flanged valve controllers, pipe supports, ladders and handrails, manual and mechanical bar screens, submersible pumps, guide rails, air release valves, and hose guns are items ordinarily regarded as plumbing installations and, therefore, component parts of the sewerage system that

Cajun upgraded and constructed. The trial court correctly granted summary judgment, concluding that as the contractor of the sewerage system, Cajun was the ultimate consumer of the component parts of the immovable it constructed and liable to the Collector for the sales taxes on the items.

Cajun urges that the conclusion that the items became component parts of the immovable is faulty based on ***Willis-Knighton Medical Center***, 04-0473 at pp. 33-34, 903 So.2d at 1091-92. There, the supreme court held that the determination of whether a thing is a component part of an immovable is not to include an application of the societal expectations theory and that the two paragraphs are Article 466 are to be read conjunctively. Under that holding the items would be movables because, reading the two paragraphs of Article 466 conjunctively, the plumbing installations are component parts of the sewerage system only if they cannot be removed without substantial damage to the immovable structure of the system or to the items. But in the *per curiam* opinion issued by the supreme court on rehearing, the court's original determination is to be given prospective effect only. ***Willis-Knighton***, 04-0473 at p. 1, 903 So.2d at 1107 (on rehearing). And since Cajun filed its lawsuit seeking a refund on April 23, 2001, well before the supreme court opinion, it is inapplicable to the facts of this case. Thus, the trial court applied the correct version of Article 466.

Cajun contends that under this court's jurisprudence, interpretation of Article 466 was set forth in ***Cajun Constructors, Inc.***, 515 So.2d at 626-28, which requires that we conclude the items are movables for which no tax may be levied. We disagree.

In ***Cajun Constructors***, Cajun Constructors entered into several contracts with the State to perform heavy construction, including contracts to construct a

water treatment facility and increase the generating capacity at Louisiana Tech at Ruston. In conjunction with the Louisiana Tech contracts, the Louisiana Department of Revenue (the Department) sought to assess sales and use taxes against Cajun on things that the court characterized as "equipment." According to the ***Cajun Constructors*** court, "[l]awn mowers, lab equipment, generators and a portable generator are a few of the items assessed." Thus, in ***Cajun Constructors***, this court examined things that were notably different in character from the items at issue in this appeal. Emphasizing the things the Department sought to tax were "equipment" rather then "materials," and noting that the trial court had found as a matter of fact that the equipment "was not intended to be permanently attached nor was it so attached," the ***Cajun Constructors*** court closely scrutinized the provisions of the contract between Cajun Constructors and the State. The State had specified use of the assessed things as part of the contract and, after they had been delivered to the job site, had been billed and paid for the things as partial performance. In concluding that the equipment supplied by Cajun Constructors to the State consisted of movables, the court simply examined the parties' agreement and, based on their intent, determined the status of the things that were attached to the construction. In this case, nothing in the contract permits us to draw the conclusion the parties intended to classify the items as movables. Thus, Cajun's reliance on ***Cajun Constructors*** is misplaced.

We find no merit in Cajun's contentions that the trial court's failure to apply ***Willis-Knighton*** or ***Cajun Constructors*** to the facts of this case constituted reversible legal error. Because the trial court applied the correct version of Article 466 and properly interpreted its meaning to conclude that the items were component

parts of the sewerage system upgraded and constructed by Cajun, we find no error in the grant of summary judgment in favor of the Collector.[2]

DECREE

We find no error in the grant of summary judgment in favor of the Collector and its denial of that filed by Cajun. Accordingly, we affirm the trial court's judgment. Appeal costs are assessed against Cajun Constructors, Inc.

AFFIRMED.

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[2] Cajun maintains that an application of the version of La. C.C. art. 466 enacted by La. Acts 2005, No. 301, § 1 in response to the supreme court's determination in ***Willis-Knighton*** "could create constitutional problems" ostensibly because it may increase Cajun's tax burden, which could be construed as a governmental "taking" in violation of the Fifth Amendment to the United States Constitution and in that it also may violate La. Const. Art. III, § 16(B) as an act that raises revenue, which originated in the Senate. Since we have resolved this dispute through an application of the version of Article 466 in effect before the modifications created by Act 301, we find it unnecessary to address these contentions by Cajun.