

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0572

DISCOVERY DEVELOPMENT, INC.

VERSUS

MALISE PRIETO, CLERK OF COURT AND
BBD CONSTRUCTION, L.P.

Judgment Rendered: February 9, 2007

Appealed from the
Twenty-Second District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2005-11583

Honorable Donald M. Fendlason, Judge

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Individually and as Partner of
BBD Construction LP, and
BBD, Inc., d/b/a BBD
Construction LP and BBD
Construction LP

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

This is an appeal by BBD Construction, L.P. (BBD), a Texas limited partnership, of a judgment rendered against it, granting plaintiff, Discovery Development, Inc. (Discovery), by writ of mandamus, the immediate cancellation of a lien previously filed in the mortgage records of St. Tammany Parish based on an Affidavit of Claim and Privilege executed by BBD.¹ After ruling on several exceptions filed by the defendant,² the trial court issued a writ of mandamus ordering the cancellation of the lien, finding that the Affidavit filed by BBD was insufficient to preserve rights pursuant to the Public Works Act, La. R.S. 9:4801 *et seq.* This ruling was based on the trial court's finding that BBD failed to prove the requisite legal connexity with the plaintiff/owner of the project, Discovery, or with the contracting parties, IGC, L.L.C. (contractor) and Better Builders Dallas, Inc. (subcontractor). We affirm.

BACKGROUND FACTS

The facts essential to this dispute include the following: In April of 2003, Discovery, as owner, and IGC, LLC (IGC), as general contractor, entered into an agreement for the construction of an apartment complex. Thereafter, in June of 2003, IGC entered into a subcontracting agreement (American Institute of Architects – AIA Document A401 – 1997 Standard Form of Agreement Between Contractor and Subcontractor) with Better Builders-Dallas, Inc. (Better Builders), where Better Builders contracted to provide rough carpentry framing for the development.

¹ The lien claiming a privilege on Discovery's property was filed in the mortgage records of the Parish of St. Tammany, Instrument #1418469, Registry # 1365993, based on BBD's assertions it was owed in excess of \$600,000 for work performed on and supplies incorporated into Discovery's immovable property.

² The trial court denied BBD's exceptions alleging unauthorized use of summary proceeding; *lis pendens*; failure to join an indispensable party; and no cause and no right of action. The trial court also denied BBD's motion to stay the proceedings in light of a previously filed suit in federal court.

BBD asserts it is a vendor with whom IGC contracted to provide the rough carpentry and framework, both materials and labor, for Phases I and II of the project. BBD submitted monthly invoices to IGC for the work performed and the materials delivered. According to BBD, payment pursuant to the contract was to be made on the 10th of every month; however, IGC did not remit any payments to BBD. Notwithstanding these assertions, *the record contains no documentary evidence to support BBD's claim of contract with IGC.*

ACTION OF THE TRIAL COURT

Discovery asserted two bases for the immediate cancellation of the lien sought by its writ of mandamus: (1) the untimeliness of the lien, based on the fact that it was filed before an acceptance of the work of substantial completion of the work by the owner and the principal contractor, rendering it invalid; and, (2) the invalidity of the lien based on BBD not being a contractual party entitled to claim a privilege or file a lien against it.

The trial court entertained the exceptions filed by BBD prior to and at the same hearing as the writ of mandamus. As noted earlier, (and contrary to BBD's assertions that not all of the exceptions were ruled on), the transcript of the hearing clearly reflects that the trial court expressly "denie[d] *all* of the exceptions." The trial court also found that the lien was not invalidated *per se* on the timeliness issue, based on another statutory provision that prohibits the lien from being filed more than sixty days after the acceptance of an affidavit of substantial completion. Although not expressly stated in the trial court's ruling, it appears the trial court ruled the lien was not invalidated on the basis of untimeliness. However, because we find, as discussed below, that the trial court was correct in ruling the lien invalid on the second asserted basis, the timeliness of the lien is moot, and we preterm discussion on that issue.

The trial court found the lien invalid based on the lack of proof of BBD's contractual capacity, which is a prerequisite for claiming a privilege under the Private Works Act. Specifically, the trial court noted that the AIA standard form agreement contained in the record notes that the contractor was IGC, and the subcontractor was Better Builders. The trial court noted a complete lack of proof of documentary or testimonial evidence to support BBD's assertions that it was one and the same entity as the contracting party, Better Builders. The trial court further noted the documentary evidence before it to the contrary, i.e., that "they appear to be two separate entities." The court finally questioned counsel for BBD and noted there was no proof presented of any assignment of rights or interests otherwise entitling BBD to claim a privilege under the act.

Based on the absolute lack of proof establishing a legal connexity between BBD and any of the contracting parties, the trial court granted Discovery's request, making the Rule of Mandamus absolute, and authorizing the immediate cancellation of the lien.

DISCUSSION

Our review of the record and applicable law establishes that the trial court's ruling, based on the utter lack of proof in the records, was absolutely correct. The evidence presented consisted only of the testimony of the owner of Discovery; no witness testified on behalf of BBD, or of Better Builders. *No* documentary evidence was presented by BBD, other than the lien affidavit itself, to support BBD's purported relationship with Better Builders, the contracting party entitled to the privilege granted by La. R.S. 9:4801 *et seq.*

The Private Works Act, La. R.S. 9:4801-4842, provides methods for and governs the securing and preserving of privileges in favor of contractors, laborers, and suppliers of materials, against the owner, the property or the general contractor's surety in certain circumstances.

In pertinent part, subsection 4802 expressly accords the privilege to *subcontractors, laborers or employees of the contractor or a subcontractor, and sellers of movables to the contractor or the subcontractor* that become component parts of the immovable. It is well settled that this statute, creating privileges in derogation of common rights, requires strict construction. **Lumber Products, Inc. v. Crochet**, 156 So.2d 438 (La. 1963). The evidence in the record simply fails to establish that BBD was a claimant (contractor, subcontractor, etc.) within the meaning of the law granting the privilege it seeks to enforce. Indeed, the documentary evidence establishes otherwise.

We also reject BBD's assertions that the only issue before the trial court was the timeliness of the lien and that, therefore, the trial court erred "in exploring the connexity" issue. Both issues were clearly raised and addressed by the trial court. In addition to being clearly raised, the invalidity of the lien on any basis renders the timeliness of its filing moot. Because the lien in this matter was invalid on a substantive basis, the trial court's discussion of that issue was indeed superfluous.

Finally, we also find no merit in BBD's contention that the trial court erred in denying BBD the opportunity to file an answer to the Petition of Mandamus or grant it additional time in which to provide documentary evidence regarding connexity after hearing and denying its exceptions. At the inception of the hearing set for the mandamus proceeding, the trial court indicated that it may require more time to prepare to rule on BBD's exceptions. The transcript clearly reflects that the parties agreed to a recess, met with the trial judge in chambers, and unanimously agreed to move forward with the trial of both the exceptions and the merits of the mandamus. Specifically, the transcript provides: "Let the Record reflect that we had a pretrial conference. The Court indicated it was willing to consider the exceptions *and the entire matter at this time.*" (Emphasis added). BBD did not object to, nor move for a continuance of, the trial of the exceptions and the merits;

indeed, it proceeded with the trial on both; it was not until after the trial court's ruling on the merits of the mandamus that BBD raised complaints of not being given sufficient opportunity to present the necessary evidence. Moreover, considering the subject matter of the exceptions presented, certainly BBD had ample opportunity to gather and present evidence of the legal connexity required to claim the privilege underlying this litigation.

CONCLUSION

For all of the foregoing reasons, the trial court was correct as a matter of law in finding BBD's lien invalid, and in ordering the immediate cancellation thereof. Accordingly, that judgment is affirmed. All costs of this appeal are assessed to BBD.

AFFIRMED.