NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CA 2244

VECTOR ELECTRIC & CONTROLS, INC.

VERSUS

JE MERIT CONSTRUCTORS, INC.

Judgment Rendered: NOV - 8 2006

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 503,462

Honorable Kay Bates, Judge Presiding

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David L. Bateman
Baton Rouge, LA

Attorney for Plaintiff-Appellant,
Vector Electric & Controls, Inc.

André G. Bourgeois
Baton Rouge, LA

Attorney for Defendant-Appellee,
JE Merit Constructors, Inc.

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BEFORE: CARTER, C.J., WHIPPLE, AND McDONALD, JJ.

McDonald, J. dissents and will assign reasons.

CARTER, C. J.

Plaintiff, Vector Electric & Controls, Inc. ("Vector Electric"), appeals the trial court's sustaining of a dilatory exception of prematurity brought by defendant, JE Merit Constructors, Inc. ("JE Merit"), dismissing Vector Electric's suit without prejudice. For the following reasons, we affirm.

BACKGROUND

This case concerns a construction contract dispute involving the owner of the project, Kaiser Aluminum & Chemicals Corporation ("Kaiser"), the electrical and instrumentation subcontractor, Vector Electric, and the project's general contractor, JE Merit. Vector Electric brought suit against JE Merit on January 15, 2003, claiming entitlement to payment for electrical and instrumentation work it performed on the project, pursuant to a February 27, 2001 subcontract between Vector Electric and JE Merit. Prior to Vector Electric's suit, Kaiser filed a voluntary petition for bankruptcy and was not a party to the suit.

According to Vector Electric's petition, by March 2002, it had completed all the work and met all the requisites under the subcontract to entitle it to receive payment from JE Merit. JE Merit responded to Vector Electric's suit by filing a dilatory exception of prematurity, arguing that under the provisions of the subcontract's general terms and conditions (contained in Attachment "E"), Vector Electric was entitled to payment from JE Merit only after Kaiser paid JE Merit for the work. A copy of the subcontract signed by representatives for both parties, and including Attachment "E," was attached as an exhibit to JE Merit's memorandum in support of its exception.

The trial court held a hearing on JE Merit's exception of prematurity on May 10, 2004. Argument was had and Vector Electric introduced into evidence a copy of the subcontract signed by its representative, without Attachment "E." Post-hearing memoranda were ordered and filed. The trial court filed oral reasons for judgment sustaining JE Merit's exception of prematurity on July 2, 2004, and signed the judgment sustaining the exception and dismissing Vector Electric's suit without prejudice on June 20, 2005. Vector Electric appeals.

LAW AND ANALYSIS

In concise oral reasons for judgment, the trial court stated:

> This court having read the motions and memoranda filed in this matter and having heard oral argument previously presented by counsel hereby finds the following:
>
> The contract between JE Merit and Vector Electric dated February 27, 2001, clearly states on page 2 under paragraph 1, section C labeled Attachments that Attachment ["E"] is entitled "SUBCONTRACT GENERAL TERMS AND CONDITIONS". On page 3 of the same contract under section 2(A) it states that the subcontract consists of other documents listed in paragraph 1 of this subcontract Agreement. Therefore, the court finds that Attachment "E" was a part of the contract Agreement between JE Merit and Vector Electric.
>
> Attachment "E" to the contract between JE Merit and Vector [Electric] clearly states in subsection F that "receipt of payment by Contractor [JE Merit] from Owner [Kaiser] shall be a condition precedent to the right of Subcontractor [Vector Electric] to receive payment". Condition precedent is an obligation that must be performed before the right depend[e]nt on it will accrue. Therefore, the right is a suspended condition as defined by La. Civil Code Art. 423.[1]

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[1] The correct reference to the Louisiana Civil Code definition for a suspensive condition is LSA-C.C. art. 1767. The trial court inadvertently cited article 423, which is the proper article number in the Louisiana Code of Civil Procedure describing the implied right to enforce an obligation with a suspensive 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 the right has accrued. LSA-C.C.P. art. 423. Prematurity is determined by the facts existing at the time suit is filed. **Sevier v. U. S. Fidelity & Guar. Co.**, 497 So.2d 1380, 1382 (La. 1986).

> [JE Merit's] exception of prematurity is hereby granted for the reasons stated dismissing the instant suit without prejudice. Judgment to be signed accordingly.
> (Footnote added.)

Vector Electric first argues that the trial court erred in finding that Attachment "E" was a part of the subcontract. We initially note that the trial court's ruling involves a question of law, in that the trial court found, as a matter of law, that the subcontract contained Attachment "E." When appellate review is not premised upon any factual findings made at the trial level, but is, instead, based upon an independent review and examination of the contract on its face, the manifest error rule does not apply. In such cases, appellate review of questions of law is simply whether the trial court was legally correct or legally incorrect. **L & A Contracting Co., Inc. v. Ram Indus. Coatings, Inc.**, 99-0354 (La. App. 1 Cir. 6/23/00), 762 So.2d 1223, 1234, writ denied, 00-2232 (La. 11/13/00), 775 So.2d 438.

Although the copy of the subcontract introduced into evidence at the hearing by Vector Electric did not contain a copy of Attachment "E," the trial court correctly found that the subcontract language clearly and unambiguously referred to Attachment "E," entitled, "SUBCONTRACT GENERAL TERMS AND CONDITIONS." We note that the subcontract also clearly specifies on page 3, under section 2(B) that "[Vector Electric] acknowledges that it has read the Subcontract Documents and is familiar with such documents and agrees not to violate the terms of same." The subcontract further states on page 3, under section 2(E) that "[t]he Subcontract Documents are available for examination by [Vector Electric] at all reasonable times at the office of [JE Merit]."

We also note that on page 5 of the subcontract, at paragraph 6, section A covering terms of payment, it is clearly stated in boldface type that "**No amount of the Subcontract Lump Sum shall be considered due and payable until all conditions of the Subcontract Documents, including but not limited to . . . Article 1 of the Subcontract General Terms and Conditions, are satisfied.**" This statement in the subcontract clearly and unambiguously makes reference to Attachment "E" by title, "Subcontract General Terms and Conditions." As a general rule of contract law, separate documents may be incorporated into a contract by attachment *or reference* thereto. **L & A Contracting Co., Inc.**, 762 So.2d at 1234.

Without question, the subcontract at issue explicitly incorporates Attachment "E," entitled Subcontract General Terms and Conditions, by reference. Therefore, the trial court was legally correct in finding that the subcontract included Attachment "E." Vector Electric does not dispute the substance of the actual language contained in Attachment "E," as quoted by the trial court in its oral reasons.[2] Rather, Vector Electric simply maintains that Attachment "E" was not included with the subcontract documents

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[2] JE Merit attached a copy of the subcontract with Attachment "E" as an exhibit to its memorandum in support of its exception of prematurity. However, the record and minute entry for the hearing on the exception do not reveal that the exhibit was introduced into evidence at the hearing, nor was any testimony or stipulation presented. We may not consider exhibits attached to memoranda in determining issues on appeal, as they are not evidence and therefore not properly part of the record on appeal. **McKnight v. D & W Health Services, Inc.**, 02-2552 (La. App. 1 Cir. 11/7/03), 873 So.2d 18, 24 n.3. We note, however, that both parties reference the pertinent language from Attachment "E" in their appellate briefs and the trial court quoted the pertinent language in its reasons for judgment, after noting that it had considered the memoranda filed in the matter and oral argument. Furthermore, the transcript of the hearing on the exception provides a quote of the pertinent language by JE Merit's counsel. Moreover, the trial court's reasons for judgment were filed into the record on July 2, 2004. On appeal, neither JE Merit or Vector Electric dispute the accuracy of the quoted language; therefore, we presume it to be correct as it appears in the trial court's reasons for judgment. See **Kirby v. Field**, 04-1898 (La. App. 1 Cir. 9/23/05), 923 So.2d 131,133 n.2, writ denied, 05-2467 (La. 3/24/06), 925 So.2d 1230; **Willis v. Letulle**, 597 So.2d 456, 475 (La. App. 1 Cir. 1992); **Weldon v. Republic Bank**, 414 So.2d 1361, 1362-1363 (La. App. 2 Cir. 1982).

signed by its representative, and therefore, Attachment "E" was not a part of the subcontract. We find no merit to this argument. At the very least, because the subcontract clearly makes reference to general terms and conditions that must be satisfied before payment is made, Vector Electric should have inquired as to the nature of the general terms and conditions referred to in the subcontract that its representative signed on March 1, 2001, especially if all the attachments referred to in the subcontract were not affixed to the copy. See **AWC, Inc. v. CSF Const., Inc.**, 05-0865 (La. App. 4 Cir. 4/26/06), 931 So.2d 382, 386-387. Louisiana law presumes that parties are aware of the contents of writings to which they have affixed their signatures, and the parties will be held to the consequences of their signatures. **Tweedel v. Brasseaux**, 433 So.2d 133, 137-138 (La. 1983).

Vector Electric next contends that the subcontract documents do not clearly reflect the parties' intention to create a suspensive condition. We also find no merit to this argument. The undisputed language contained in Attachment "E" clearly and unambiguously creates a suspensive condition with the use of the term "condition precedent," to wit:

> [R]eceipt of payment by [JE Merit] from [Kaiser] **shall be a condition precedent** to the right of [Vector Electric] to receive payment. (Emphasis added.)

Black's Law Dictionary, 312 (8th ed. 2004), defines "condition precedent" as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." The Louisiana Supreme Court recognized in **Southern States Masonry, Inc. v. J.A. Jones Const. Co.**, 507 So.2d 198, 204 n.15 (La. 1987), that the common law term "condition precedent" is analogous to the civilian term "suspensive condition." Louisiana Civil Code art. 1767 notes that an obligation subject

to a suspensive condition depends upon the occurrence of an uncertain event. See **Southern States**, 507 So.2d at 203, quoting LSA-C.C. art. 1767, and **Cahn Elec. Co. v. Robert E. McKee, Inc.**, 490 So.2d 647, 652 (La. App. 2 Cir. 1986).

A remarkably analogous case to the case *sub judice* is **Imagine Const., Inc. v. Centex Landis Const. Co., Inc.**, 97-1653 (La. App. 4 Cir. 2/11/98), 707 So.2d 500, 502. **Imagine Const.** involved a construction contract dispute with an insolvent owner wherein the subcontractor was demanding payment from the general contractor. The contract language in **Imagine Const.** provided that "actual receipt of full payment from Owner *shall be a condition precedent* to the bringing of any action by Subcontractor . . . relating to Contractor's failure to make payment." See **Imagine Const.**, 707 So.2d at 502. (Emphasis added.) The contract language was upheld as a valid suspensive condition, and the plaintiff's action was dismissed as premature.

We are in agreement with the reasoning set forth in the **Imagine Const.** case and find that in this instance, the trial court correctly found a suspensive condition in the subcontract. We specifically note and agree with the distinction brought out by the court's analysis in **Imagine Const.**, 707 So.2d at 501-502, discussing the difference between a "pay *when* paid" clause and a "pay *if* paid" clause. In **Southern States**, 507 So.2d at 200-201, the supreme court reviewed contract language in two consolidated cases, determining that the clauses were "pay when paid" clauses

constituting terms of payment that merely dictated when the contractors' payments should occur.[3]

The supreme court held in **Southern States** that the "pay when paid" clauses were not suspensive conditions, but rather the provisions created terms for payment that related "to the time when [the] contractor must pay, and not the fact or certainty of such payment." **Id.** at 204. In **Imagine Const.**, 707 So.2d at 501-502, the Fourth Circuit recognized the distinction between clauses that dictate the timing of *when* payments should occur and clauses that dictate events that must occur *if* payments are to be made. In **Imagine Const.** and the case *sub judice*, the subcontractors were to be paid only *if* the owners made payments to the contractors. The clear and unambiguous "condition precedent" language in the subcontract before us mandates that until actual receipt of payment by the contractor from the owner occurs, the right of the subcontractor to receive payment from the contractor is premature. The "condition precedent" language is clearly

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[3] The consolidated cases were **Southern States Masonry, Inc. v. J.A. Jones Const. Co.**, 507 So.2d 198 (La. 1987), consolidated with **Strahan v. Landis Const. Co., Inc.**, 507 So.2d 198 (La. 1987). In the **Southern States** case, the pertinent language read as follows:

> "Contractor shall pay to Subcontractor, *upon receipt of payment from the Owner*, an amount equal to the value of Subcontractor's completed work ..."
>
> "... A final payment consisting of the unpaid balance of the Price shall be made within forty-five (45) days after the last of the following to occur: ... (c) *final payment by Owner to Contractor* under the Contract." (Emphasis added.)

The operative language in the other consolidated case, **Strahan**, read as follows:

> "Contractor agrees that he will pay to the said Sub-Contractor ... ninety percent (90%) of the value of the work completed and accepted each month *for which payment has been made by said Owner to said Contractor*, ... except that *final payment will be made ...immediately following* final completion and acceptance of such materials and work by the Architect and *final payment received by said Contractor.*" (Emphasis added.)

See **Imagine Const.**, 707 So.2d at 501.

distinguishable from the terms of payment language found in the **Southern States** case.

According to every legal definition of "condition precedent," the trial court correctly found a suspensive condition in the subject subcontract. The subcontract clearly provided that Vector Electric could not receive payment if JE Merit had not received payment from Kaiser. Since Kaiser has filed a voluntary petition for bankruptcy and has not paid JE Merit the outstanding amount invoiced by Vector Electric to JE Merit, Vector Electric's right to receive payment has not accrued. Therefore, the trial court correctly held that Vector Electric's suit was premature. See LSA-C.C.P. art. 423.

CONCLUSION

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

AFFIRMED.