

VECTOR ELECTRIC &
CONTROLS, INC.

STATE OF LOUISIANA

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

JE MERIT CONSTRUCTORS, INC.

NO. 2005 CA 2244

McDONALD, J., DISSENTING:

NOV 15 2006

JMM
I do not find that the contract at issue here meets the criteria established by the supreme court in *Southern States Masonry, Inc. v J. A. Jones Construction c/w Strahan v. Landis Construction*, 507 So.2d 198 (La. 1987) to create a suspensive condition to payment by a general contractor to a subcontractor. While this matter is before us on review of the trial court's granting of an exception of prematurity, the dispositive issue depends on a determination of which of these parties is obligated to incur the risk of the owner's insolvency.

The supreme court addressed this issue in the *Southern States* cases and held that in the normal course of events this risk is one assumed by the general contractor and in order for the risk to be transferred, "the contract between the general contractor and the subcontractor should contain an express condition clearly showing that to be the intention of the parties." *Southern States* notes that obligations subject to a suspensive condition are those dependent on an uncertain event, such that the very existence of the depends upon the occurrence of the event, and instructs that "contractual provisions are construed obligation as *not* to be suspensive conditions whenever possible." (Italics in the original.)

I do not find that the cases containing "condition precedent" language, and relied upon by Merit to establish a suspensive condition here, are persuasive in this matter. With the exception of *Imagine Construction, Inc. v. Centrex Landis Construction* 97-1653 (La. 4th Cir. 2/11/98), 707 So.2d 500, Merit relies on language contained in insurance policies. However, the obligation created in a contract of insurance is subject to a suspensive condition by its very nature.

Therefore, these cases are clearly distinguishable and I do not find them relevant to the matter before us.

The *Imagine* court found that the language in the contract before it did conform to *Southern States*' requirements to establish a suspensive condition. However, in addition to the "condition precedent" language, the contract provided, ... "final payment shall be made within forty days after the completion of the Work, and provided Centrex Landis *has received final payment* from the owner." (Italics in original). The contract further provided "... Subcontractor shall not be entitled to receive any progress payment or final payment prior to Centrex Landis' *actual receipt* of that payment from Owner. Subcontractor agrees that Centrex Landis' actual receipt of full payment from Owner shall be a condition precedent to the bringing of any action by Subcontractor hereof against Centrex Landis or its surety, if any, relating to Contractor's failure to make payment...."

My review of the entire subject contract, in light of the above legal and jurisprudentially established precepts, and considering the nature of this contract and the facts regarding the drafting and signing of it, leads me inescapably to the conclusion that an intention to transfer the risk of owner insolvency from the general contractor to the subcontractor was not sufficiently clear in this contract, drafted by them, to create a suspensive condition to Merit's obligation to pay Vector for the work that it contracted with Vector to perform. Therefore, I respectfully dissent.