

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 THE NO CAUSE OF ACTION
EXCEPTION FILED BY THE GOLF CLUB OF NEW ORLEANS, L.L.C. AND
EASTOVER REALTY, INC.**

NOW INTO COURT, through the undersigned counsel, comes Earth Services & Equipment, Inc. and Moore Testing & Inspection, L.L.C. (Plaintiffs) who submit this Memorandum in Opposition to the Exception of No Cause of Action filed by The Golf Club of New Orleans, L.L.C. and Eastover Realty, Inc. (Defendants). The Plaintiffs aver that they do state a cause of action within its Petition, and accordingly, the Exception should be DENIED and the Defendants should be ordered to compose and file an Answer to the Petition of Plaintiffs within the time prescribed by the Louisiana Code of Civil Procedure.

I. Application of Louisiana Code of Civil Procedure Article 927 (4) and Standard of Review.

Generally, for purposes of a peremptory exception for failure to state a cause of action, a complaint should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The “exception of no cause of action is designed to test legal sufficiency of petition by determining whether plaintiff is afforded remedy in law based on facts alleged in petition.” See *Ackel v Ackel*, 696 So.2d 140 (5 Cir App 1997), *Daly v. Reed*,

669 So.2d 1293 (4 Cir App 1996). In considering whether a petition discloses a cause of action all factual allegations of the petition must be taken as true. *Campbell v.*

Continental-Emsco Co. 445 So.2d 70 (App 2 Cir 1984).

To define clearly, a “‘cause of action.’ as used in context of peremptory exception which questions whether law extends remedy to anyone under factual allegations of the petition, means operative facts which give rise to plaintiff’s right to judicially assert action against defendant.” *Bourgeois v. A.P. Green Industries, App. 5 Cir.2003, 841 So.2d 902, 02-713 (La.App. 5 Cir. 2/25/03).*

As explained in *Robinson v. North American Royalties, Inc.*, in deciding an exception of no cause of action, all well-pleaded allegations of fact are accepted as true and no reference can be made to extraneous supportive or controverting evidence. 470 So.2d 112 (La. 1985). The court must determine whether the law affords any relief to the plaintiff if the factual allegations of the petition are proven at trial. *Id.*

II. The Challenges Made by the Defendants and Argument for the DENIAL of Defendant’s Exception and Prayer

In its Exception of No Cause of Action, the Defendants assert to this Court that the Plaintiffs have failed to state a cause of action for two separate enumerated reasons, but essentially both relying on this same premise: that the Plaintiffs have failed to allege that they complied with the requirements of the Private Works Act.

The Defendants pray for two importantly distinct remedies in its prayer for relief. First, that the Petition of Plaintiffs be dismissed against them based on their peremptory exception. Second, that the Statement of Claim and Privilege (‘lien’) itself be ordered removed from the records of the Orleans Mortgage Office.

For the reasons more fully discussed below, both forms of relief should be denied to the Defendants, and they should be ordered to answer the Plaintiff’s petition as per the Louisiana Code of Civil Procedure.

A. An Exception of No Cause of Action is not the proper procedural vehicle to request the removal of a lien filed under the Private Works Act, and accordingly, the Defendants are not entitled to the relief of the lien's removal as prayed.

In the event that a construction lien is filed improperly or against the law of this State, Louisiana Revised Statute 9:4833 provides the affected party with a remedy to seek the removal of the associated inscription. According to this statute, the affected party is required to deliver to the claimant a written request for cancellation. In the event this is unsuccessful, an evidentiary hearing shall be scheduled by the affected party pursuant to La. R.S. 44:119 to determine whether the lien is or is not in fact recorded improperly.

The determination of whether a lien is or is not filed properly has been called a "complex issue" by our courts, and it is clear from La. R.S. 9:4833, La. R.S. 44:119, and Louisiana jurisprudence that to make such a determination, evidence can and should be heard from both parties and the proper burdens of proof met. *See generally Norman H. Voelkel Constr., Inc. v. Recorder of Mortgs.*, 859 So.2d 9, (La. App. 1 Cir 2003).

Similar to the clarity within Louisiana jurisprudence that the determination to the validity of a construction lien under the Private Works Act requires an evidentiary hearing, is the principal that in deciding an exception of no cause of action no reference can be made to extraneous supportive or controverting evidence. *Robinson*.

The request of the Defendant that this Court order the controversial lien removed from the mortgage records through an exception of no cause of action, therefore, is contrary to both the nature of the exception and the terms of La. R.S. 9:4833.

For this reason alone, the Plaintiffs aver that the Exception of No Cause of Action should be denied by this Honorable Court to the extent it requests that the Orleans Mortgage Office's inscription be cancelled. The forced removal of the Statement of Claim and Privilege should be considered and allowed only after the procedural steps of §9:4833 are followed, and specifically, after an evidentiary hearing on the lien's validity.

Furthermore, however, the Plaintiffs aver that this component of the Defendants' Exception should be denied because the facts, when taken as true, do state a cause of action based upon the Private Works Act in that the Petition clearly states on more than

one occasion that the lien was filed “properly” by the Plaintiffs. *See Petition*, ¶¶ 7, 13, and 21.

Taking this allegation as true – that the lien was filed timely and properly – the Plaintiffs have alleged that the requirements to file the lien were met, and they therefore have a cause of action against the Defendants as per the Louisiana Private Works Act.

La. R.S. 9:4801 et seq.

B. Plaintiffs have properly alleged that the Statement of Claim and Privilege was filed in accordance with Louisiana R.S. 9:4801 et seq, and therefore the Exception of No Cause of Action should be denied.

The Defendants argue to this Court that the Plaintiffs’ Petition against them is materially deficient because it (a) fails to “allege that they performed work[ed] within the statutory definition of ‘work’”; and (b) fails to “allege that it complied with the written notice requirement.”

The Plaintiffs, however, reject both assertions, claiming that these matters were plead to satisfaction, and request that this Honorable Court deny the Exception of No Cause of Action.

On three separate occasions in its Petition, the Plaintiffs aver and allege that the Statement of Claim and Privilege at controversy was filed “timely and properly.” *See Petition*, ¶¶ 7, 13, and 21. Despite this, the core of the Defendants’ objection to the Petition is that the Plaintiffs have failed to allege that their lien is proper. Clearly, the argument of Defendants lack merit.

In its Exception, the Defendants attempt to break-down the numerous requirements within the Private Works Act, focusing on the definition of “work” and the notice requirement of La. R.S. 9:4802(A)(5). While these two requirements were selected for discussion, the Defendants could have easily selected from the horde of statutory conditions, including, but not limited to: (a) the varying time requirements for filing a lien; (b) the definition of a subcontractor, contractor, supplier, property owner; (c) the required contents of a Statement of Claim and Privilege; (d) the dollar amounts that

may be secured by a lien; etc.

Through this partial list of conditions within La. R.S. 9:4801 *et seq.*, the Plaintiffs look to illustrate that the law on the particular subject of construction liens are complex, varied and voluminous. The pleading requirements of the Louisiana Code of Civil Procedure clearly do not require that a litigant exhaustively discuss each detailed component of the statute(s) relevant to its suit, and qualify its suit to the same.

By stating the lien is “timely and properly” filed, the Plaintiffs have made an allegation to this Court that the requirements of La. R.S. 9:4801 *et seq.* have been met, including that the Plaintiffs’ work was the type of work to allow the filing of the lien, and that all applicable notices have been sent.

III. Conclusion

As discussed at the beginning of this Memorandum, and as this Court is of course aware, the allegations of the plaintiffs’ petition must be taken as true when determining whether to grant or deny an Exception of No Cause of Action.

In this particular circumstance, the Defendants argue that the liens filed by the Plaintiffs were not filed properly.

On three occasions in its Petition, however, the Plaintiffs allege the exact opposition: that they were filed timely and properly.

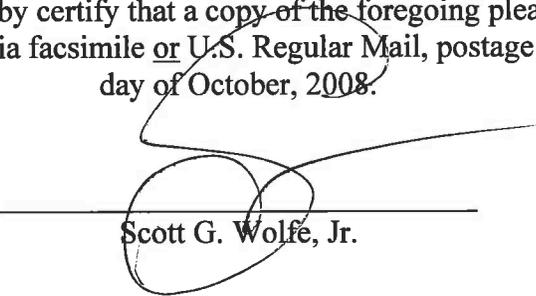
This Honorable Court must accept the Plaintiffs’ allegation that the liens are proper as true, and DENY the Exception of No Cause Of Action filed by the Defendants.

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

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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 10th day of October, 2008.



Scott G. Wolfe, Jr.