

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ELIZABETH SEWELL, et al,
Plaintiffs,

v.

**SEWERAGE & WATER BOARD OF NEW
ORLEANS, et al.,**
Defendants.

CIVIL ACTION NO.: 2:15-cv-03117

**SECTION “N”
JUDGE: Hon. Kurt Engelhardt**

**DIVISION (3)
MAGISTRATE: Hon. Daniel E.
Knowles**

**MEMORANDUM IN REPLY TO CAJUN CONSTRUCTORS, LLC, B&K
CONSTRUCTION CO., LLC, AND BOH BROTHERS CONSTRUCTION CO., LLC’S
OPPOSITIONS TO PLAINTIFFS’ MOTION TO SEVER AND REMAND**

MAY IT PLEASE THE COURT:

I. INTRODUCTION

Plaintiffs respectfully submit their Reply to Cajun Constructors, LLC, B&K Construction Company, LLC, and Boh Brothers Construction Co. LLC (collectively “the Contractors”), opposition to the Plaintiffs’ Motion to Sever and Remand. Plaintiffs have not sued the Contractors, and the Contractors are not the subjects of Plaintiffs’ Motion to Sever and Remand. Plaintiffs’ Motion is directed solely at the Sewerage and Water Board of New Orleans (“SWB”), which has asserted Third Party Demands against the Contractors seeking indemnity for future payments or judgments in favor of Plaintiffs and against the SWB.

The Contractors essentially repeat the same jurisdictional arguments as those asserted by the SWB in its Opposition. Accordingly, the Plaintiffs incorporate as though fully set forth at this point, the arguments made and evidence submitted in their Reply to the Opposition of the SWB to Plaintiffs’ Motion. (Dkt. 26).

Plaintiffs do not dispute the procedural history and background facts set forth in detail by the Contractors. Plaintiffs also do not dispute that the Contractors are under contract with the U.S. Army Corps of Engineers (“USACE”), thus qualifying them for Removal Jurisdiction of this Court. Plaintiffs have not argued to the contrary.

The appropriateness of the relief Plaintiffs seek, however, is reinforced by the presence of fatal flaws contained within the SWB’s Third Party Demands alleged against the Contractors. Lacking necessary, fundamental elements that cannot be cured by amendment, the Third Party Demands should be severed because they are unripe for suit. Severance of the SWB’s unripe claims against the Contractors removes the basis for federal jurisdiction over the Plaintiffs’ claims, which should therefore be remanded to State Court as requested.

II. THE SWB’S THIRD PARTY DEMANDS SHOULD BE SEVERED SINCE THE SWB HAS NOT SETTLED ANY OF THE PLAINTIFFS’ CLAIMS.

The SWB’s Third Party Demands and the Causes of Action contained therein, are unquestionably for Indemnification. This is made clear by the allegations in Paragraph 28, page 7, incorporated into all of Causes of Action of the Third Party Demand:

“...in the event [the SWB] is found liable to the Plaintiffs, which liability is denied, is entitled to recover from Third Party Defendants all damages, judgments, penalties, costs, expenses and attorney’s fees incurred, sustained, or resulting from the Petition, as supplemented and amended, as follows...”

This demand is plainly for indemnification. Critically, the SWB has not settled any of the Plaintiffs claims and does not allege otherwise. Since it has not done so, under controlling State law, the indemnity Cause of Action fails to state a claim upon which relief may be granted:

“In Louisiana, indemnification claims do not exist until the indemnity claimant suffers the loss, i.e., payment of the underlying claim or judgment. Reggio v. E.T.I., 15 So. 3d 951, 957 (La. 12/12/08); *see also* Smith Int’l, Inc. v. The Eagle Group, LLC, 490 F.3d 380, 388-89 (5th Cir. 2007).

SWB's Response does not allege any payments to Plaintiffs related to the Project, nor could it truthfully do so. The SWB's indemnity demands therefore do not exist under State law, fails to state a claim upon which relief may be granted, and should be severed out from plaintiffs' causes of action.

III. THE SWB HAS NO STANDING TO ASSERT CLAIMS AS A THIRD PARTY BENEFICIARY BECAUSE THERE IS NO WRITTEN STIPULATION POUR AUTRUI.

In the SWB's Second Cause of Action entitled "Breach of Contract" (Dkt. 14, p. 10), it alleges Third Party Beneficiary standing to written contracts between the Contractors and the USACE. Critically, however, the SWB attaches no contracts. Instead, the SWB alleges that it "believes that SWB is specifically identified in the contracts" between the USACE and Contractors, and it is thus a Third Party Beneficiary, entitled to sue the Contractors for breach of contract. (Dkt. 14, p. 10.) The SWB's allegations do not meet the pleading requirements necessary to state a claim for relief for Breach of Contract as a third party beneficiary.

The required elements for this claim were set forth by Court in *Albe, et al. vs. Scottsdale Ins. Co.* Case No. 13-6654 (E.D. La. 9/2/14):

"Ordinarily, '[a] contracting party may stipulate a benefit for a third person called a third party beneficiary.' LA. CIV. CODE art. 1978. '[S]uch a contract for the benefit of a third party is commonly referred to as a 'stipulation pour autrui.' *Joseph v. Hospital Serv. Dist. No. 2 of Parish of St. Mary*, 939 So. 2d 1206, 1211 (La. 2006).

In determining whether such a stipulation exists, three requirements must be met. First, "[t]he most basic requirement of a stipulation pour autrui is that the contract manifest a clear intention to benefit the third party; absent such a clear manifestation, a party claiming to be a third party beneficiary cannot meet his burden of proof." *Id.* at 1212. This clear manifestation is "never presumed." *Id.* Further, "**if the contract must be in writing, then the stipulation pour autrui must also be in writing.**" *Id.* at 1215, n.13 (emphasis added).

Second, "there must be certainty as to the benefit to accrue to the beneficiary." *Id.* at 1212 (internal quotation omitted).

Third, the benefit must not be merely incidental.” *Id.*

The requirement for a written contract of the type alleged by the SWB is contained in La. R. S. § 38:2241 as follows:

“A.(1) Whenever a public entity enters into a contract in excess of five thousand dollars for the construction, alteration, or repair of any public works, the official representative of the public entity shall reduce the contract to writing and have it signed by the parties.”

The SWB is a public entity. The published construction cost for the Project is \$1.0 Billion. A written contract is obviously required under § 38:2241. Since a written contract is required for the SELA Projects, the contracts must clearly show an intent to benefit the SWB as a third party beneficiary. The absence of this written contract with the required specific intent is thus fatal to the Third Party Demands. The SWB’s alleged “belief” that it is an intended beneficiary utterly fails the “clear manifestation of intent” written requirement. *Albe, supra*. Since the Cause of Action fails to alleged necessary elements, SWB’s claim should not serve as a barrier to severance and remand.

IV. THE SWB’S NEGLIGENCE CLAIM SHOULD BE DISMISSED BECAUSE IT IS ALLEGED FOR IMPROPER PURPOSES.

The SWB’S Third Cause of Action is entitled “Negligence” and alleges that the Contractors deviated from Project plans and specifications and in so doing, caused the Plaintiffs’ damages. (Dkt. 14, p. 11.) As discussed in Plaintiffs’ reply to the SWB’s Opposition (Dkt. 26), the evidence from the SWB’s history of litigation arising out of the SELA Projects reveals that SWB has no intention of pursuing this Cause of Action to finality. In addition to the grounds discussed in Dkt. 26, III, the *Holzenthal* Court dismissed the SWB’s third party demands against the Contractors following their failure of proof, providing a detailed explanation of this curious gross omission.

Plaintiffs contend that the SWB's omission in *Holzenthal* is noteworthy, and should be taken into account in connection with their motion for severance:

“In order to avoid involuntary dismissal of its third party demand against James, SWB had the burden of establishing a prima facie case by a preponderance of the evidence. La. C. Civ. Pro. Art. 1672 B.”

“SWB did not produce evidence proving that it was more probable than not that James's alleged violations of USACE's plans and specifications for the Project caused the plaintiffs' damages.”

“Both Mr. Sullivan (SWB's General Superintendent) and Mr. Becker (SWB Chief Superintendent) testified that they had no evidence that James did not comply with its contract with USACE.”

“Neither was there testimony or other evidence that James's specifications and plans with regard to the system to prevent de-watering were not in compliance with the USACE contract.”

“Mr. Quick (SWB engineering expert) also testified that the USACE accepted James's work as having been performed in compliance with plans and specifications.”

“SWB called no one from ACOE to support its claim of James's deviation from the contract.”

“There is no evidence that the excess vibrations caused by the pile driving were caused by James's negligence.”

“The [Trial] court noted that neither of SWB's expert engineers established through their testimony the standard of care applicable to S & P or that S & P breached an applicable standard of care

“The plaintiffs made no claim against S & P. Their expert engineer, Mr. Heyer, offered no testimony that S & P's professional services deviated from the standard applicable to engineers in the New Orleans area. SWB's engineering expert, Mr. Quick, was not asked and did not offer evidence of such deviation.”

Holzenthal, 950 So.2d at 60, 81, and 83 (as recited by the Court of Appeal).

After the decision in *Holzenthal*, the SWB appealed that judgment to the 4th Circuit Court of Appeals, which affirmed the trial court's decision. See *Holzenthal v. Sewerage and Water Board*

of New Orleans, 06-0796 (La. App. 4 Cir. 1/10/07), 950 So.2d 55, *writ denied*, 07-0294 (La.3/30/07), 953 So.2d 71.

Holzenthal thus reveals the enormous and unnecessary waste of time, money, and judicial resources created by the SWB's Third Party Demands and imposed upon all Parties and the Court. *Holzenthal* further exposes that the SWB's third party demands are a proxy for delay.

V. CONCLUSION.

The SWB's Third Party Demands against the Contractors are fatally flawed, lack basic, required elements not cured by amendment, and are alleged only for the improper purposes of creating federal jurisdiction, creating delay and causing needless expense. The Contractors must be aware of these flaws. Further, the SWB's past litigation activities reveal it has no intention of pursuing its claims against the Contractors. This Court has grounds to sever the SWB's claims, and remand plaintiff's claims to State Court, sparing the litigants and the Court enormous time and expense.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2015, I electronically filed the foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

/s/ Joseph M. Bruno
JOSEPH M. BRUNO