CIVIL DISTRICT COURT FOR PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 07-1746 DIV: "K" SEC: 5

BROTHERS ROOFING & SHEET METAL

VERSUS

WOLFE WORLD, L.L.C. d/b/a WOLFMAN CONSTRUCTION

FILED DEPUTY CLERK

MEMORANDUM IN OPPOSITION TO PLAINTIFF' MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Defendant, WOLFE WORLD, LLC d/b/a WOLFMAN CONSTRUCTION, (hereinafter "Wolfman" or "Defendant"), who submits this Memorandum in Opposition to Brother's Roofing & Sheetmetal's Motion for Summary Judgment.

Procedural Background

On or around April 30, 2007, the Plaintiff filed a "Labor and Material Lien" for "roofing material and labor for the construction of a home" located at 17 Warbler Street, New Orleans, Louisiana, 70124. Shortly thereafter, on June 7, 2007, Defendant Wolfe World, L.L.C. filed a bond to release the lien, and a certified check in the amount of $14,768.75, representing 125% of the principal amount of the lien.

The Plaintiff filed a "Petition to Collect From A Release of Claim Bond" on August 13, 2007. The Defendant answered the suit and filed a reconventional demand, and the parties began the discovery process. On December 27, 2008, the Plaintiff moved this Court for Summary Judgment and/or Partial Summary Judgment in its favor.

The Defendant avers that the Plaintiff is not entitled the judgment as plead, and that there are genuine issues of material fact that require a trial on the merits.

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FACTS & BACKGROUND

The facts of this case are a matter of clear dispute. Among other reasons more fully expressed in this Memorandum, it is for this reason that the instant Motion for Summary Judgment should be denied.

For the purpose of presenting this Court with some clarity as to the issues of this case, the Defendant has used this Facts & Background portion of its Memorandum to break down some of the facts and allegations into varying sections, as well as summarizing the matters currently before the Court for decision.

What is the Object of this Suit?

Putting all of the legal arguments and positioning aside, the object of this lawsuit – and this Motion for Summary Judgment – is quite simple.

Brother's Roofing claims to have performed construction services at a property for Wolfman, and being unpaid. For a variety of reasons, Wolfman avers the amounts in controversy are not due.

At stake is approximately $14,768.75, being held in the registry of this Court.

Describing and Classifying the *Work*

In the Court's determination of whether summary judgment is proper in these circumstances, it will be important for it to understand the construction project at the center of these proceedings and the work allegedly performed by Plaintiff.

The "Work" has been identified by the Plaintiff themselves on a number of occasions throughout these proceedings:

- On or around April 30, 2007, the Plaintiff filed a "Labor and Material Lien," representing by sworn affidavit that it sold to Wolfman Construction "as owner, 80 Squares of Latakia Tiles to entire roof, labor only…," and that the labor to Wolfman Construction was used in "the construction of a home on the property described

as…17 Warbler, New Orleans, Louisiana, Orleans Parish."

- On August 13, 2007, the Plaintiff filed a "Petition to Collect from a Release of Claim Bond" with this Honorable Court. Within this petition, the Plaintiff represented that it provided "services" to the defendant as set forth on an invoice attached to the Petition as an Exhibit, and describing the services provided as "80 SQUARES OF LIDOWICHI TILES TO ENTIRE ROOF LABOR ONLY," for an amount of $22,120.00;

- In its December 21, 2008 Motion for Summary Judgment supporting Memorandum, Plaintiff described the work as follows: "Months went by with the shingles completely torn off the Jensen home. At some point in time, Wolfman engaged Brother's to finish the job. Brother's in fact did replace the shingles, and finished the re-roofing job to the satisfaction of the owner, Richard Jensen."

Understanding the Agreement Between the Parties

The Plaintiff's have described the "agreement" between Plaintiff and Defendant as follows: "Wolfman and Brother's reached an agreement for Brother's to replace the shingles on the Jensen home. It is undisputed that Wolfman agreed to pay Brother's $22,120.00 for their labor only in two equal installments of $11,060.00 each." *See Memorandum in Support of Motion for Summary Judgment,* p. 4 of 13.[1]

More specific than the Plaintiff's representation of the contract between the parties, is the written contract itself, which was attached to the Plaintiff's Motion for Summary Judgment as Exhibit 6.[2]

The contract executed between the parties is a standard AIA A401, *Standard Form of Agreement Between Contractor and Subcontractor.* According to the contract document, executed on December 8, 2006, Brother's Roofing would perform certain construction services at the 17 Warbler Street property as a subcontractor for the Contract Sum of $15,200.00. See Article 10, Subcontract Sum, p. 9 of A401. Payment of the Contract Sum would be "upon completion" with invoice being submitted to Wolfman by the "1st and 15th." See Article 11,

[1] The Defendant uses this quote to demonstrate how the Plaintiff has characterized the "agreement" of the parties, but the Defendant avers that the agreement in controversy is in writing and speaks for itself, and specifically does not admit that the matter represented as undisputed in this quote is indeed so, or that the agreement is properly characterized or summarized by the Plaintiff within the quote.

[2] On page 9 of the contract marked by Plaintiff as Exhibit 6, there is in handwriting under "Subcontract Sum" the words "+$7,000 = total $22,120.00" The Defendant disputes that this handwriting is part of the contract, and objects to the introduction of Exhibit 6 as a true and correct copy of the contract between the parties.

Progress Payments, p. 9 of A401.

To have an increase of the contract sum to the alleged amount of $22,120.00, there must have been an increase in the sum of approximately $7,000.00. Changes in the Work are governed by Article 5 of the Subcontract, on p. 6 of A401.

Furthermore, while not discussed by the Plaintiff in its Motion for Summary Judgment, a separate contract with Brother's Roofing on a separate project is also implicated by these proceedings. The project and contract is discussed in more detail in the contents of this memorandum, as well as in the Defendant's Answer, Affirmative Defenses and Reconventional Demand. The contract in controversy is also an A401, and is attached hereto as **Exhibit B**.

Summary of the Disputes

- *Open Account v. Construction Contract*
  The Plaintiff alleges that the parties had an "open account," or that it is otherwise entitled to make a claim against Defendant under the Open Account statutes. As the Defendant will argue in this opposition memorandum, the contract between the parties was clearly a traditional construction contract, and the parties did not conduct business on an "open account." Accordingly, the Plaintiff cannot avail itself of LA R.S. 9:2781.[3]

- *Offset v. Amount Owed*
  The Plaintiff alleges in matter-of-fact fashion that it is owed approximately $11,000.00 under the contract between the parties, and requests summary judgment relief without regard to the factual disputes surrounding the amount owed. The matters in dispute are summarized in the next section of this Memorandum.

  Nevertheless, it is also important to note that the Defendant has maintained throughout this action – in its Answer, Affirmative Defenses, Reconventional Demand, and in this Opposition – that any amounts owed to the Plaintiff are offset by amounts owed to the Defendant by Plaintiff. Defendant has specifically indicated that the $7,000.00 change order was not proper under the circumstances and that the workmanship and contractual breaches at the "Browning" project offset any amounts owed by Wolfman to Brother's on the Jensen project.[4]

  The Plaintiff has met these allegations with absolute silence.

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[3] Page 3 of 14 of Plaintiff's Memorandum in Support of the instant Motion for Summary Judgment identifies the contract in dispute as an "open account." The Plaintiff also avers in its original Petition for Damages, under ¶ 5, that it is entitled to Attorneys Fees under the open account statute.

[4] See the argument within this Memorandum in Opposition to the Summary Judgment motion, as well as the Answer and Reconventional Demand filed on February 14, 2008 and February 28, 2008.

- *Disputed v. Undisputed Facts*

  As more fully explained in the next section of this Opposition Memorandum, the Plaintiff has represented facts as undisputed when they are clearly in dispute, and has withheld undisputed facts that do not support its position.

  Furthermore, the Plaintiff has submitted certain items as undisputed facts based on hearsay, and as explained more fully below, has introduced as exhibits and "evidence" certain documents that are hearsay.[5]

- *Jensen Project Only v. Jensen and Browning Project*

  As briefly mentioned *supra*, the Plaintiff's have focused completely on the Jensen project at 17 Warbler Street, in New Orleans, and claim that they have not been compensated for this project. However, on December 8, 2006 (the same date the parties signed the Jensen contract), the parties to this litigation also signed a contract whereby the Plaintiff would perform work at 4445 Perkins Dr, in Metairie, LA for what would be referred to as the Browning project.

  The Defendant has alleged, and still alleges that workmanship at the Browning project was substandard and that this caused it damages, and furthermore that the Defendant has overpaid the Plaintiff with respect to this project. Accordingly, any amounts owed to Plaintiff are *offset* by the amounts owed to Defendant with respect to this project.

- *Has Defendant Made a Judicial Confession?*

  Using a very liberal interpretation of a comment made by Mr. Wolfe Sr. in his deposition, the Plaintiff represent to this Court that the Defendant has made a judicial confession. As more fully explained in this Memorandum, however, it is clear that no such judicial confession has been made.

- *Procedural Flaws with the Motion for Summary Judgment*

  Finally, the Defendant avers that the movers carries the burden of proof in a Motion for Summary Judgment according to La. C.C.P. 966(C)(2). The type of proof required in a Motion for Summary Judgment is set forth in La. C.C.P. Art. 967. As more fully expressed in this opposition memorandum, the Plaintiff has failed to meet its burden, and the introduced evidence to not meet the standards of Art. 967.

[5] It would be overburdensome for Defendant to make an exhaustive list of circumstances when the Plaintiff has used hearsay as fact, especially considering the other insufficiencies of the instant Motion for Summary Judgment. Here, however, are some examples: (i) Plaintiff's uncontested fact number two stipulates that "Wolfman Construction first hired Edgar Rios, L.L.C. as subcontractor to remove and replace Mr. Jensen's roof" based on Mr. Jensen's deposition, who was not a party to the contracting between Wolfman and Rios, and his understanding of the same would be hearsay; (ii) Plaintiff's uncontested fact number six stipulates that "Wolfman did not have the proper shingles to complete the job and had to reorder them on more than one occasion" based on Mr. Jensen's deposition, who is the homeowner and not an expert in roofing shingles or without personal knowledge as to whether Wolfman Construction in fact reordered the shingles on a number of occasions.

DISPUTED PORTION OF
PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Within the Plaintiff's supporting memorandum, on pages 5 and 6 of 13, it sets forth 13 matters that it purports to be "undisputed facts." The Defendant, however, disputes many of these statements as follows:

1. The contract between Mr. Jensen and Wolfe World, L.L.C. speaks for itself as far as terms and scope. However, one item disputed within this first paragraph is that Mr. Scott Wolfe Sr. had entered into a contract on behalf of Wolfe World, L.L.C. d/b/a Wolfman Construction. In fact, the party who signed the contract was Mr. David Wilson, an employee of Wolfman Construction at the time of contracting. Another item disputed within this "undisputed fact" is that the contract was to "remove and replace the shingles on Mr. Jensen's home." The terms of the contract provide that the Defendant was to "repair, remove and replace roof as per scope of work."

2. It is disputed that Mr. Jensen has personal knowledge of when Wolfman Construction first hired Edgar Rios, L.L.C., and in what capacity Edgar Rios, L.L.C. was hired. The exact date of contracting with Edgar Rios, L.L.C. is not known at this time.

3. It is disputed that Mr. Jensen has personal knowledge about whether or not Edgar Rios, L.L.C. made an attempt to replace the shingles at the property, and whether he was unsuccessful after such attempts. It is undisputed that Edgar Rios, L.L.C. did not finish the project, but the reasons for him not finishing are in dispute.

4. The sequence of events as implied by "Wolfman then hired Brother's" is disputed. Wolfman disputes that the total amount of the contract was $22,120.00. Wolfman disputes and objects to the introduction of the documents referenced to by Plaintiff in this undisputed fact number 4, as not being of the reliability required by La. C.C.P. Art. 967.

5. Wolfman disputes that the check for $11,060.00 was for payment of "the first half of the total due to Brother's." It is undisputed that a check was returned unpaid to Brother's

Roofing. Wolfman disputes and objects to the introduction of testimony by Scott Wolfe Sr. without providing the Court with a copy of said testimony to indicate its reliability, and further objects to the introduction of any documents that do not meet the reliability requirements of La. C.C.P. Art. 967.

6. Wolfman disputes that Mr. Jensen has personal knowledge as to what Wolfman did and did not have, and whether it "had to reorder them on more than one occasion." Further, Wolfman disputes and objects to the introduction of testimony by Scott Wolfe Sr. without providing the Court with a copy of said testimony to indicate its reliability. Wolfman also disputes the statement in total.

7. Wolfman disputes that La. R.S. 9:4822(H)(2) defines substantial completion of the work with respect to the parties contract, which specifically has a provision regarding the substantial completion of the work. With respect to La. R.S. 9:4822(H)(2), Wolfman disputes that March 30, 2007 is the substantial completion date according to this definition of substantial completion. According to the portion of the deposition quoted, this would be the date of final completion, since Mr. Jensen states that "I signed off on a final punch list, just a few remaining items that were open….We signed off on that on March 30, 2007." These "few remaining items" would have been considered items that made the project *finally* complete, and therefore, substantial completion would be a date earlier than March 30, 2007. The likely date of *substantial* completion was February 26, 2007, which is reported to be the "last date work was performed" by Brother's Roofing in ¶ 3 of its Petition for Damages. Wolfman disputes the remainder of this undisputed fact #7.

8. This is undisputed.

9. Wolfman disputes this fact, as it disputes the foundation of the fact (that the second half was owed). Further, Wolfman disputes and objects to the introduction of testimony by Scott Wolfe Sr. without providing the Court with a copy of said testimony to indicate its reliability.

10. Wolfman disputes this fact. Wolfman disputes that the substantial completion date

was March 30, 2007, and that the lien was timely recorded.

11. This is undisputed.

12. It is uncertain what the Plaintiff is alleging with this statement of undisputed fact. There is not a one-year time limitation with respect to the action between Plaintiff and Defendant as per La. R.S. 9:4822.

13. This is disputed. Scott Wolfe did not make any such admissions during his deposition. Further, Wolfman disputes and objects to the introduction of testimony by Scott Wolfe Sr. without providing the Court with a copy of said testimony to indicate its reliability.

DEFENDANT'S STATEMENT OF DISPUTED FACTS

The following is a list of disputed facts that the Defendant avers bar summary judgment in this matter:

1. Plaintiff and Defendant dispute the quality of workmanship on the Browning project;
2. Plaintiff and Defendant dispute whether, and to what extend, Defendant sustained damages with respect to Plaintiff's performance under the contract to perform construction services at the Browning project;
3. Plaintiff and Defendant dispute the subcontract amount;
4. Plaintiff and Defendant dispute that Edgar Rios, L.L.C. was terminated from the project because it was unable, or lacked the experience or knowledge to perform the work at the Jensen project;
5. Plaintiff and Defendant dispute that Wolfman did not provide the correct shingles for the Jensen project;
6. Plaintiff and Defendant dispute that the lien in controversy is timely;
7. Plaintiff and Defendant dispute the date of substantial completion;
8. Plaintiff and Defendant dispute that the lien was filed as per the requirements of the Private Works Act, aside from its requirement to be filed timely;

9. Plaintiff and Defendant dispute that a meeting took place between Mr. Scott Wolfe Sr., agent of Wolfe World, L.L.C., and Mr. George Malta, agent of Brother's Roofing, whereby Brothers agreed that Wolfman would apply the overpayment to Brother's on the Browning job against the Jensen job.
10. Plaintiff and Defendant dispute that "Brothers came to Wolfman's rescue" on the Jensen project;
11. Plaintiff and Defendant dispute that Brother's "caused the right kind of shingles to be ordered and purchased…" for the Jensen project;
12. Plaintiff and Defendant dispute that the balance due to Brother's Roofing is $11,060.00;
13. Plaintiff and Defendant dispute that Wolfman has misapplied any funds;
14. Plaintiff and Defendant dispute whether Wolfman owes $5,000.00 to Brother's;
15. Plaintiff and Defendant even dispute whether Mr. Wolfe Sr.'s comments during his deposition – in their context – set forth that "there is no question of fact that he [Mr. Wolfe Sr.] owes Brother's at least five thousand dollars";
16. Plaintiff and Defendant dispute whether a change order in the amount of $7,000.00 was executed by the parties;
17. Plaintiff and Defendant dispute whether a change order, in the amount of $7,000.00, was required, allowed or otherwise authorized under the contract.

DEFENDANT'S STATEMENTS OF UNDISPUTED FACTS

1. It is undisputed that the Statement of Claim and Privileged (identified on the document by Plaintiff as "Labor and Materialmen Lien") does not identify the property with a legal property description;
2. It is undisputed that on May 23, 2007, via facsimile transmission and U.S. Certified Mail No. 7005 1820 0001 2209 5820, counsel for Wolfman delivered to counsel for

Brother's a letter requesting that the lien in controversy be removed as per the requirements of La. R.S. 9:4533;

3. It is undisputed that this letter gave the Plaintiff notice that the lien did not adequately describe the property as required by La. R.S. 9:4801 et seq.;
4. It is undisputed that the Plaintiff has refused to so cancel the lien;
5. It is undisputed that Wolfman deposited $14,768.75 with the Orleans Recorder of Mortgages to bond out the lien on June 7, 2007;
6. It is undisputed that the final payment from the property owner was not made to Wolfman until June 8, 2007;
7. It is undisputed that the parties signed an AIA Contract A401, and agreed to be bound by the terms thereof;[6]
8. It is undisputed that Article 12, Final Payment, reads that final payment is due the subcontract when "Work is fully performed in accordance with the requirements of the Subcontract Documents, a certificate of payment has been issued covering the Subcontractor's completed Work and when the Contractor has received payment from the Owner."
9. It is undisputed that the Change Order for $7,000.00 related to the installation of 22 additional squares is unsigned by the parties;

LOUISIANA MOTION FOR SUMMARY JUDGMENT STANDARD

La. C.C.P Art. 966 states in pertinent part that "a motion which shows that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law shall be granted." Further, "a material fact is one that would matter in the trial on the merits." *Knight v. Owens*, 869 So. 2d 188 (La App. 5th Cir. 2004).

It is clear from Article 966 that the burden of proof remains with the movant. To be

[6] See Footnote 2.

successful on its motion for summary judgment, Plaintiff must demonstrate to the Court that it has properly formulated and filed a satisfactory motion for summary judgment which satisfies movant's burden of showing no genuine issue of material fact. "Mover for summary judgment must meet strict standard by showing that it is quite clear as to what truth is, and that excludes any real doubt as to existence of material fact." *Broom v. Leebron & Robinson Rent-A-Car, Inc.*, 626 So.2d 1212 (App. 2 Cir.1993).

Furthermore, in support of a Motion for Summary Judgment, C.C.P. Article 967 sets forth that the following may be considered by the Court: (i) Supporting and opposing affidavits made on personal knowledge; and (ii) Sworn or certified copies of all papers or parts thereof referred to in an affidavits.

Louisiana courts have extensively considered the requirements of C.C.P. Art. 967, and have consistently required that only sworn or verified documents be considered by courts in examining a Motion for Summary Judgment.

In *Citibank S.D., N.A. v. Stanford*, for example, the 2nd Circuit held that granting of summary judgment in favor of a creditor was not proper when the offered evidence consisted of copies of an example of an agreement, monthly statements and a check without a sworn affidavit of explanation and verification. The documents introduced were considered "not competent evidence." 956 So.2d 756 (La. App 2 Cir. 2007).

GENUINE ISSUES OF MATERIAL FACT EXIST THAT PRECLUDE SUMMARY JUDGMENT

There are Genuine Issues of Material Fact as to Whether the Defendant owes the Plaintiff $11,060.00, and therefore, whether Plaintiff is entitled to a Judgment for the same.

The Plaintiff's lack of clarity in its argument and prayer should not be lost on this Court. An example of its vagueness and ambiguity is when it refers to the agreement between these parties as an "open account," but does not make an argument for the same. Furthermore, it then

discusses a cause of action under the Private Works Act that is tied to the construction lien at controversy, but then fails to avail itself of any remedy available to it through the Private Works Act.[7]

Nevertheless, from the Defendant's understanding of Plaintiff's argument, they are looking to recover $11,060.00 from Defendant, the alleged balance of a roofing contract, and "penalties" for Wolfman Construction's "misapplication of funds."

The requested penalties, provided for in La. R.S. 9:4814, is discussed in the following section. For the purposes of this discussion, the Defendant will demonstrate that genuine issues of material fact exist as to whether the Defendant owes Plaintiff $11,060.00.

First, it's important to look at the items Plaintiff has submitted to this Court to meet its burden that $11,060.00 is owed to it. It has submitted (i) excerpts of a deposition that has not been produced to the Court; (ii) an unverified contract; and (iii) a self-serving affidavit.

While Defendant avers that only the self-serving affidavit meets the evidentiary burden of La. C.C.P. art. 967, it will discuss both (i) and (iii).

With respect to (i), the deposition of Scott Wolfe Sr. only supports the Plaintiff's position if it is delicately twisted to do so. With regard to the items on page 9 & 10 of 13 of Plaintiff's supporting memorandum, Mr. Wolfe Sr. never says that the $11,060.00 is owed to the Plaintiff. In fact, Mr. Wolfe Sr. says the opposite. When asked about the "balance due Brothers" indicated within his internal documents, the Defendant explains "*Again*, that's only a summary for me. That's it. That's not to be interpreted as a smoking gun for you." *Emphasis added.* After being pressed further on the issue, the Defendant states again, "I'm telling you, I separated them and looked at them independently. That is the information that is reflective of the payments, correct."[8]

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[7] The Private Works Act, codified in La. R.S. 9:4801 et seq. provides – in some instances – subcontractors a cause of action against the property owner. The property owner is not a party to this case, and so it is unclear what type of action (under the Private Works Act) is even being alleged by the Plaintiff.

[8] It is extremely important that the Court note that the Plaintiff has failed to produce the deposition transcript for the Court's review. Instead, it has lifted statements from the transcript when convenient to Plaintiff. When reviewing

The back and forth between Mr. Wolfe Sr. and counsel for Plaintiff relates to an internal Wolfman Construction document. The document – a spreadsheet – kept track of financial information related to construction projects. The spreadsheet at controversy consisted of three or four pages, with each project being marked separately. The page being discussed in the deposition, is only one of the three / four.

The other page set forth the financial information related to the Browning project, which was worked upon by Brother's concurrently with the Jensen project. This spreadsheet reflected a negative balance – in other words, with respect to this job, Brother's *owed* Wolfman money.

As demonstrated through the attached affidavit of Mr. Wolfe Sr., and as indicated by Mr. Wolfe Sr. during his deposition much to the dissatisfaction of Plaintiff's counsel, the "balance due" on this spreadsheet does not indicate that Wolfman Construction owes Brother's Roofing this amount. To the contrary, Wolfman Construction specifically disputes this.

Even a plain reading of the quoted language, along with an ignoring of the remainder of the deposition transcript, would not yield the conclusion reached by the Plaintiff that "Scott Wolfe Sr. admitted in his deposition that he still owed Brother's the second half of the contract in the amount of $11,060.00 on the Jensen job."

And even if this Court's reading of the transcript did yield this conclusion, it would not meet the movant's burden for summary judgment – as there are still genuine issues of material fact related to the Browning project, the meeting between Wolfman Construction and a representative of Brother's Roofing, and a potential offset of amounts owed to Plaintiff.

With respect to the self-serving affidavit (item iii), the affirmative statements by Marcelino Alvarez for Brother's Roofing do not address the questions of whether Wolfman is entitled to an offset or the workmanship problems at the Browning project. Furthermore, the affiant makes statements with respect to items that are matters of legal conclusions (i.e. that the lien was filed "well within the time specified by law"), and with respect to matters of which it

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the quoted statements, it is important to note that they are not sequential, and that references to other components of the deposition within certain statements (such as Defendants use of the term *Again*), are left out.

does not have personal knowledge (i.e. Owner of home paid Wolfman final balance on June 8, 2007; Wolfman's records evidence that he owes us the second half of our payment; There is no dispute that Wolfman owes us $11,060.00, etc.).[9]

The Plaintiff has twisted the meaning of an unverified and non-certified document (Wolfman's internal spreadsheet), and has liberally interpreted portions of Scott Wolfe Sr.'s deposition transcript to request that this Court conclude that there aren't any genuine issues of material fact with regard to whether Defendant owes Plaintiff $11,060.00.

Clearly, for the reasons expressed herein, and the attached affidavit of Scott Wolfe Sr., this is not so. The Plaintiff has failed to meet its burden here.

<u>There are Genuine Issues of Material Fact as to Whether the Plaintiff is entitled to penalties under La. R.S. 9:4814</u>

The Plaintiff contends that it is entitled to penalties as per La. R.S. 9:4814. According to the Plaintiff's understanding of this statute, the elements it must prove to avail itself of the penalties are to demonstrate that there is no genuine issue of material fact that: (a) Payment to Wolfman by owner for the work completed by Brother's; and (b) Non-payment of the second half of the amount due to Brother's for their labor to replace the shingles.

As evidenced by this understanding of the statute, however, it is clear that the Plaintiff does not understand the statute's requirements and/or its burden.

The terms of the statute clearly provide that the penalties of 9:4814 are available when a contractor is "found by the court to have *knowingly failed* to apply construction payments as required by Subsection A." Subsection A of the statute states that money received for construction of a building, should be applied as necessary to "settle claims to sellers of movables or laborers due for the construction or under the contract."

[9] Furthermore, the affidavit on numerous occasions refers to Wolfman with the pronoun "he," which doesn't make sense. It is uncertain whether the affiant is talking about Wolfman Construction – the entity – or someone else (i.e. Scott Wolfe Sr.). Furthermore, while certain documents are referenced within the affidavit, they are not sworn to, verified or certified by the same, and mere reference to the document is not verification with regard to its authenticity.

There are a few problems with the Plaintiff's cause of action, and Motion for Summary Judgment requesting relief under this statute.

First, the Plaintiff has completely ignored the requirement of showing that the Defendant has "knowingly failed to apply construction contract payments" as required. The Plaintiff does not even request that this Court make an assumption that Wolfman did this "knowingly."

Second, the Plaintiff ignores that the funds in controversy were not "misapplied." Instead, one day *before receiving* the funds in controversy, the Defendant deposited the funds with the Orleans Recorder of Mortgages to bond out an improperly filed lien by the Plaintiff.

Third, the Plaintiff ignores the requirements under the Contract Documents that final payment be made once "a certificate of payment has been issued covering the Subcontractor's completed Work," and fails to stipulate that certificate had been issued.

Fourth, and perhaps most importantly, the Plaintiff does not even qualify for the penalties by the terms of the statute. As is clear by its terms, La. R.S. 9:4814 applies to sellers of movables and laborers. Clearly, the Plaintiff is not a seller of movables, and therefore, must qualify as a "laborer" to qualify for penalties under this statute. The Plaintiff does not present any evidence or assert in its affidavit that it is a laborer.

A reading of the Private Works Act will illustrate that the Plaintiff is a subcontractor as contemplated by La. R.S. 9:4807, and not a laborer. 9:4807 defines a subcontractor as "one who, by contract made directly with a contractor, or by a contract that is one of a series of contracts emanating from a contractor, is bound to perform all or part of a work contracted for by the contractor." By contrast, La. R.S. 9:4802 makes it clear that there is a different between a subcontractor (defined by 9:4807) and a laborer, referred to as: "laborers or employees of a contractor or subcontractor" by the Private Works Act.[10]

[10] In their conclusion, Plaintiff even refers to itself as the "Subcontractor"

Therefore, there are genuine issues of material fact as to whether the Defendant "knowingly" misapplied funds, or whether it misapplied funds at all. Nevertheless, however, the Plaintiff is not entitled to penalties because they do not qualify under the statute.

There are Genuine Issues of Material Fact as to Whether the Defendant Owes Plaintiff $5,000.00, and whether Defendant has made a "Judicial Confession"

It is contended that a statement made by Scott Wolfe Sr. during his August 19, 2008, deposition should be considered an adverse admission that is tantamount to a "judicial confession." Plaintiff specifically represents the language of Mr. Wolfe Sr. as follows:

> Why are you asking for the $11,000.00? Why don't you take the difference that we actually do owe you? I've agreed that we owe you 5,000 bucks and we have agreed to give it to you. We have been agreeing to give it to you from day one. I don't know why you are trying to steal the other $6,000. Why would you be doing that? Why would you want to get paid an additional $6,000?
>
> See Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 10 of 13

In summary fashion, the Plaintiff has used this statement to conclude as follows: "Scott Wolfe Sr.'s admission, that he has not paid Brother's for the second half of the Jensen job in the amount of $11,060.00, and that under any circumstances he owes Brother's five thousand ($5,000.00) dollars.[11] *Id.* at 11.

The Plaintiff contends that the above-quoted statement qualifies as a Judicial Confession as defined by La. C.C. Article 1853. That article provides:

> A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.
>
> A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

[11] It is important to note that this very statement, within Plaintiff's own memorandum, demonstrates that there are genuine issues of material fact precluding the granting of summary judgment with respect to the issues of whether Defendant owes Plaintiff $11,060.00. It is clear from this statement that the Plaintiff disputes the factual allegation that $11,000.00 is owed.

Statement is not a Judicial Admission because Defendant did not make an explicit admission to an Adverse Fact and was Settlement Communications

Louisiana jurisprudence analyzing this code article does not lightly qualify statements as judicial admissions, instead requiring them to be an explicit admission of an adverse fact. *See generally Cichirillo v. Avondale Industries, Inc.*, 917 So.2d 424, 429 (La. 1979).

In *Newman v. George*, for example, a creditor's statement at trial that its records were not accurate was not considered a judicial confession, as the testimony as a whole provided support for the amounts claimed due. 968 So. 220, 223-224 (La. App. 4th Cir. 2007).[12]

The statement in controversy was made at the end of Mr. Wolfe Sr.'s deposition, and in an attempt to further settlement communications with the Plaintiff.[13] Revealing of this intent is the phrase "I've agreed that we owe you 5,000 bucks and we have agreed to give it to you. We have been agreeing to give it to you from day one," whereby the Defendant references its other attempts to settle this case with the Plaintiff, and the reasons for the same.[14]

Wolfman Construction has made several offers to settle this case with Plaintiff, increasing the amount that was negotiated on "day one" from $5,000.00 to $7,000.00. However, these settlement offers, and the discussion of $5,000.00 quoted by the Plaintiff from the deposition of Mr. Wolfe Sr., are all *settlement communications* that is not admissible as evidence in this proceeding. The Defendants offers this information in this Memorandum only to frame the statement alleged to be a "judicial confession," and does not waive its objections to the introduction of the offers and/or communications about the offers as evidence. To the contrary, the Defendant herein specifically objects to the introduction, and does not waive its objection to

[12] Louisiana courts have consistently looked to the entirety of testimony in determining whether there has been a judicial admission, such as in *Matchum v. Allstate Ins. Co.*, which provides that a statement was not a judicial confession when "the passenger's testimony was not consistent to a degree that no uncertainty existed." 192 So.2d 364 (La. 1966). In the instant matter, the Plaintiff has not submitted the testimony transcript for this Court's review.

[13] The Defendant actually contends that the statement is "Settlement Communications" and not admissible as evidence, and makes an objection to the same through this footnote. Further, the Defendant reserves its right to object at the introduction of this statement at trial, or at any other time, based on the statement being settlement communications.

[14] Mr. Wolfe Sr. was also referencing a meeting between himself and Mr. George Malta, a representative of Brother's Roofing, when this $5,000.00 settlement amount was discussed. This meeting is referenced in the affidavit of Mr. Wolfe Sr., attached with this Memorandum, and is further evidence that genuine issues of material fact are at dispute between the parties.

the same by its discussion of the matter through this section of the Memorandum, which is only made in an abundance of caution.

The statement itself has a practical problem as well, as it references an amount "owed from day one." A lot has occurred "since day one," including the filing of a Statement of Claim and Privilege by the Plaintiff (alleged faulty) and the bonding out of that lien. The filing of the construction lien without reasonable cause qualifies the Defendant for attorneys' fees in having it removed, both remedies being prayed for by Defendant in its Reconventional Demand.

Therefore, it is – and always has been – the Defendant's contention that the improper lien has caused it damages, cost it in lost interest and legal expense, and that it is entitled to an offset of these expenses and costs as to any amount owed to Plaintiff.

Statement is not a Judicial Admission regardless of its content
Because the "admission" can be contradicted at trial

Even more relevant to this proceeding that *Newman* and the question of whether the quote by Mr. Wolfe Sr. is an "express admission of an adverse fact," Louisiana jurisprudence has held that deposition testimony cannot be considered a judicial confession. Citing comment (c) of Art. 1853, the Louisiana 4th Circuit held that "deposition testimony was not a judicial admission which [he] could not contradict at trial." *Howell v. American Cas. Co.*, 691 So.2d 715, 722 (La. App. 4th Cir. 1995). Referencing the comment, the court stated "If even 'testimony on the witness stand' does not constitute a judicial confession which precludes further evidence on the subject, the deposition testimony does not."[15] *Id.*

The strict requirements of the "judicial confession" was further discussed in *Crawford v. Deshotels*, wherein the Louisiana Supreme Court clarified that "a judicial confession by a party does not preclude that party from denying the correctness of the admission, unless the party

[15] The referenced comment provides: "Under this Article, testimony given on the witness stand by a party, without intention of waiving evidence as to the subject matter of that testimony, or factual allegations made in other proceedings, do not constitute judicial confession. *See* Jackson v. Gulf Ins. Co., 250 La. 819, 199 So.2d 866 (1967).

claiming the benefit of the admission has relied on the admission to his prejudice." 359 So.2d 118 (La. 1978).

In 2006, the 3rd Circuit re-iterated that a confession must be an "express acknowledgement of an adverse fact," and summarized the jurisprudence above-discussed by stating that in *addition to* the requirement that the confession must be express, "the adverse party must have believed the fact was no longer at issue or must have relied on it, to his detriment." 944 So.2d 732, 735 (La. 3rd Cir. 2006).

If the Defendant has relied on the statement, it was only for the purposes of making a settlement offer, which is not admissible as evidence and expressly objected to being used in that fashion. The Defendant did not believe that the fact was no longer at issue, because even a plain reading of the spreadsheet documents referenced by the Defendant in making the statement shows that the Defendant considered this amount to be subject to other offsets – such as the legal expense of this proceeding.

Perhaps the best summary comes from *Jackson v. Gulf Ins. Co.*, which is the foundation of the Article's Comment (c) whereby the Court summarized that:

> A judicial confession…is a party's admission, or concession, in a judicial proceeding of an adverse factual element, waiving evidence as to the subject of the admission. A party's testimony is offered as evidence, not as a waiver of it. To be an effective agency of truth, the trier of fact must be allowed to weigh the disserving testimony of a party, as well as other evidence. When the truth is found elsewhere, the party's disserving testimony must yield in order to achieve the ends of justice. Hence, we reject as unsound the several expressions of the Courts of Appeal tending to equate a party's disserving factual testimony with a judicial confession. 199 So.2d 866 at 832.

Perhaps the best summary comes from *Jackson v. Gulf Ins. Co.*, which is the foundation of the Article's Comment (c) whereby the Court summarized that:

Plaintiff's Offered Precedent is Distinguishable or Otherwise Not Applicable

In support of its position, the Plaintiff has discussed a few cases related to judicial confessions. However, as demonstrated herein, the Defendant avers that these precedents are distinguishable or otherwise not applicable to the matter at hand. Each is discussed in turn.

A) Martin v. Holzer Sheet Metal Works, Inc.

This particular matter did not involve La. C.C. Art. 1853 at all, but instead involved a compromise between an injured employee and his employer made in open court on the day the case was to be tried. The issue before the Court in *Martin* was La. C.C.P. Art. 2085, and whether an appeal could be taken by a party who has *confessed judgment*, and not by someone who has made a judicial confession.

Notwithstanding the fact that the case itself was later overruled by *Colbert v. Louisiana State University Dental School*, 446 So.2d 1204 (La. 1984), the case simply has not applicability to the civil code article at issue or the facts at hand.

B) Seals v. Pittman

Again, in this case, the Court was not really analyzing whether a statement should or should not be considered a judicial confession. In this matter, the issue was whether a transaction or compromise under La. C.C. Art. 3071 or a "confession of judgment" had been made by the parties as per statements and actions of counsel made in chambers. The Court in that case determined that "all cases finding a confession involve the agreement of counsel *in open court* on the record to the terms of a settlement." *Seals* at 125-26. Interesently, the only discussion of La. C.C. Art. 1853 is in favor of the Defendant's position, whereby the Court states that "It is an express acknowledgment by a party *in the proceedings in the trial court* of the validity of the opponent's claim made

in *such a way as to leave no issue to be tried*....In order for the statement and actions of counsel to be interpreted as an admission these acts *must occur within the judicial proceeding in open court*." Id. at 125, *emphasis ours.*

C) Starns v. Emmons

This case involved a clear admission in a pleading. It does not discuss whether such admission can be amended, which is allowed upon a cursory review of jurisprudence analyzing Art. 1853.

D) Smith v. Board of Trustees of Louisiana School Employees Retirement System

In *Smith*, the Court was called upon to determine whether the defendant, in its answer and in the pre-trial order, confessed to be a "member in service" at the time he applied for benefits. The Court stated that "a fair construction of defendant's answer and stipulation indicates that defendant may well have meant only that plaintiff was being carried as a 'member of service,'" and therefore, that it was "clear that defendant did not intentionally concede plaintiff's status within the retirement system." The Court went on to decide the factual element without use of Article 1853, and did not discuss the requirements of said article.

E) McNeer Elec. Contracting, Inc. v. CRL, Inc.

Perhaps the most relevant of all precedent cited by Plaintiff, this case is distinguishable from the matter at hand. First, and most obviously, the statement made in the deposition by Mr. Wolfe Sr. was settlement communications and is not admissible as evidence in a proceeding to prove anything, much less liability. The statement in the McNeer case, to the contrary, was not settlement communications.

Second, in the McNeer case, the confession was determined to "leave no issue to be tried." *McNeer* at 102. This is in contrast to the instant case, whereby as above-discussed, there are many issues to be tried with regard to whether the $5,000.00 is indeed owed by the Defendant, whether it has been offset, and whether the change order of $7,000.00 was properly executed or required under the circumstances, thus making even the settlement discussions about $5,000.00 being owed inaccurate.

Third, and finally, the statements by the parties in *McNeer* are not equivalent to the statement made by Mr. Wolfe Sr, or of the same nature. In McNeer, the party clearly made the admission, relied upon it to the party's detriment and did so in a manner that did not require any further decisions at trial. Furthermore, the comment was not contradicted by the entirety of the deposition transcript. As evidence that the statements in McNeer are not equivalent to the statements herein, the court in McNeer cited *Martin, Starns and Smith* as precedent to support its holding. The Defendant has demonstrated that these cases do not have any relevance or applicability to the matter at hand. Therefore, if these distinguishable cases were the foundation for the court's decision in McNeer, those cases – nor McNeer – should be the foundation for the Court's decision here.

CONCLUSION

In Conclusion, the Defendant requests that the Summary Judgment of the Plaintiff be DENIED for the reasons expressed in this Memorandum. Specifically, despite Plaintiff's affirmative contention to the contrary, the Plaintiff has clearly failed to meet its burden under La. C.C.P. Art. 967. There are genuine issues of material fact that must be decided a trial of this matter. [16]

RESPECTFULLY SUBMITTED,

SCOTT G. WOLFE, JR. (30122)
THE WOLFE LAW GROUP, L.L.C.
4821 PRYTANIA STREET
NEW ORLEANS, LA 70115
DIRECT: 504.894.9653
FAX: 866.761.8934

ATTORNEY FOR DEFENDANT AND PLAINTIFF-IN-RECONVENTION,
WOLFMAN CONSTRUCTION, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleadings have been served on all counsel of record to this proceeding by telephonic facsimile transmission **or** by placing a copy in the United States Mail, first class postage prepaid and properly addressed this 4th day of February 2009.

Scott G. Wolfe Jr.

[16] While there are genuine issues of material fact that require trial as to the issues before the Court on this Motion for Summary Judgment, as evident from Defendant's arguments herein, there are some matters ripe for summary judgment – such as the applicability of the open account statute, the applicability of the 9:4814 penalties, and whether the mechanics lien was properly filed. The Defendant will properly bring a motion for summary judgment on these issues.

CIVIL DISTRICT COURT FOR PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 07-1746 DIV: "K" SEC: 5

BROTHERS ROOFING & SHEET METAL

VERSUS

WOLFE WORLD, L.L.C. d/b/a WOLFMAN CONSTRUCTION

_____ _____

FILED DEPUTY CLERK

AFFIDAVIT OF SCOTT G. WOLFE, SR.

BEFORE ME, undersigned Notary Public, of and for the State of Louisiana and Parish of Orleans, personally came and appeared Mr. Scott G. Wolfe, Sr., known to me to be said individual, who under oath did swear and state:

1. That he is a Member of Wolfe World, L.L.C. d/b/a Wolfman Construction (hereinafter referred to as "Wolfman"), and is authorized to make this affidavit on its behalf;
2. That he has personal knowledge of the facts stated in this affidavit, an that the facts asserted herein are true to the best of his knowledge, information and belief;
3. That at some time in 2006, Wolfman contracted with Richard Jensen to perform construction services at the property located at 17 Warbler Dr., New Orleans, Louisiana;
4. That the original contract amount was for $155,360.00, and that the signed agreement between Wolfman and Jensen is the best evidence of its contents;
5. That prior to contracting with Brother's Roofing, Edgar Rios, L.L.C. had performed work on the project;
6. That Edgar Rios, L.L.C. did not finish the work at the Jensen property, but because the subcontractor was working on other projects and not because it lacked the ability or knowledge;

7. That Wolfman contracted with Brother's Roofing to perform construction services at the property on December 8, 2006;

8. That Brother's Roofing was a subcontractor;

9. That Brother's Roofing was not paid on an "open account" basis;

10. That the original contract sum was $15,120.00, and the agreement between Wolfman and Brother's is the best evidence of its contents;

11. That the contract attached to Plaintiff's Motion for Summary Judgment as Exhibit 6 is not a true and correct copy of the contract, and the handwriting under Article 10 of the agreement is an illustrative example of why it is not a true and correct copy;

12. That his notes from the project indicate that there was discussion of a $7,000.00 change order in favor of Brother's roofing for an additional 22 squares of roofing installation, but that the change order was never executed by the parties (the Change Order);

13. The Wolfman's records reveal that no change order for an additional 22 squares of roofing installation was passed onto the property owner, Mr. Jensen;

14. That Wolfman did not execute or authorize the $7,000.00 Change Order;

15. That contemporaneously with the December 8, 2006, contract executed in connection with the Jensen property, that it also contracted with Brother's Roofing to perform construction services at 4445 Perkins Dr., in Metairie, Louisiana (the "Browning Property");

16. That Brother's Roofing did not adequately perform under the contract related to the Browning Property;

17. That there were workmanship problems at the Browning Property, including, but not limited to: (i) bad cut-ins not completed; (ii) the use of old flashing; (iii) the exposure of flashing in many places; (iv) missing drip-edge; (v) lifted shingles; (vi) the use of old stacks; (vii) flashing installed incorrectly; (viii) water-leaks from the roof to the inside of the building; (ix) improperly cut shingles; (x) cracks on the internal walls caused by movement of roofers; (xi) crushed landscaping caused by movement of plaintiff; and (xii) nails and debris left at the jobsite.

18. That these workmanship problems were not corrected by Plaintiff, Brother's Roofing, after request;

19. That the workmanship problems and Brother's failure to repair caused Wolfman damages, including, but not limited to, Wolfman being require to hire and pay additional subcontractor(s) to correct the problems;

20. That Wolfman did not knowingly misapply any construction funds from the Jensen property;

21. That Wolfman does not owe Brother's Roofing $11,060.00;

22. That Wolfman does not owe Brother's Roofing $5,000.00;

23. That Wolfman does not owe Brother's Roofing any amount, specifically disputes the same, and specifically avers – as per its Reconventional Demand and its Memorandum in Opposition to the Motion for Summary Judgment– that Brother's Roofing owes it money;

24. That the comment quoted by Plaintiff whereby I discuss owing $5,000.00 to the Plaintiff, was settlement communications and conversation for the purposes of settlement;

25. That according to Wolfman's records, Wolfman does not owe Brother's Roofing $11,060.00;

26. That during the first half of 2007, Brother's Roofing went missing and did not return the calls of Wolfman, causing Wolfman hardship with respect to the Jensen Property and the Browning Property, both of which had workmanship flaws;

27. That Wolfman had a meeting with an agent of Brother's Roofing, George Malta, whereby Mr. Malta agreed that there were certain deficiencies with Brother's work at both the Browning Property and Jensen Property, and promised to correct the same;

28. That Mr. Malta reported corrective work to Wolfman at the Browning Property, but that no such corrective work had been performed;

29. That Mr. Malta agreed during a meeting with Wolfman that overpayments on the Browning Property would be applied to offset amounts owed to Brother's under the Jensen project;

30. That the date of substantial completion was on or before March 1, 2007;

Scott G. Wolfe, Sr.,
Member of Wolfe World, L.L.C. d/b/a
Wolfman Construction

Witness: _____
Roger Breland

Witness: _____
Curtis Hickey

Sworn to and subscribed before me,
And these two witnesses, on this 4th
Day of February 2009.

_____
Scott Wolfe Jr.
LSBA 30122
Commission is for Life