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Vekic v. Popich

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THE OYSTER AND THE LITIGANTS: *VEKIC V. POPICH*

George Day*

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Keywords: British petroleum, cultching, Deepwater Horizon spill, equity, equitable, Gulf of Mexico, Louisiana Civil Code, oil spill, oysters, oyster lease, subrogation

*Two pilgrims travelling o'er the sands one day,
Saw a great oyster that was washed their way:
Their fingers pointed-wildly stared their eyes;
Their mouths both watered for the tempting prize:
One springing, stooped in haste to seize the prey,
The other bawled while driving him away:
'Not quite so fast-let us decide our right;
'Tis his to whom it first appeared in sight,
And while he sucks, the other may look on.'
'If that's the argument you go upon,
My sight is good, thank God,' his neighbour cried.
'And mine's not bad,' his friend as quick replied;
'I saw it first, or may I die!'
'Be it,' his neighbour made reply;
'You'll own. I first the oyster fait.'
While thus in vain dispute they dwelt,
John Doe came past-as judge they bid him sit.*

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*The clients' eyes with pleasing hope were lit.
Grave John the oyster oped and swallowed it.
He wiped his mouth, and said in judge-like speech:
'Whereas the court allows a shell to each,
Free of all costs-go home, and live like friends.'*

*Count what it costs before a lawsuit ends;
Count what it takes from starving families' backs:
John gets the cash and home the client sends,
And barely for their papers leaves them sacks.*

Jean de La Fontaine, *The Oyster and the Litigants*, Fables, IX, 9 (1671)

I. INTRODUCTION

May a party to a contract when subrogated to the other party's rights to compensation for actual damages benefit from a windfall when compensation payable under a settlement is well in excess of the actual loss? *Vekic v. Popich*, a case decided in the wake of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, illustrates the idea that subrogation should be interpreted in light of the agreement as a whole while also considering equity in situations not previously contemplated by the parties.

II. BACKGROUND

In 2009, plaintiff, Nikola Vekic, attempted to purchase three oyster leases owned by Dragutin Popich and his family.¹ While Mr. Popich was unwilling to execute a credit sale, he agreed to enter a sublease with an option to purchase.² With the help of an attorney, the Popich family prepared a sublease with the option to purchase, and a proposed act of sale. These documents were then sent to Mr. Vekic along with a letter indicating that Mr. Popich was "unwilling to do a credit sale." Mr. Vekic consented to a sublease for four years unless it was terminated earlier by either party according to the

1. *Vekic v. Popich*, 215 So. 3d 483-484 (La. Ct. App. 2017).

2. *Id.* at 484.

lease's provisions. The amount of rent was not to exceed \$90,000, with \$30,000 due upon execution of the agreement³ and \$20,000 due annually over the next three years.⁴ Under the terms of the sublease, Mr. Vekic had the option to purchase the leases at any time on or before April 30, 2012. On April 20, 2010 the Deepwater Horizon well exploded in the Gulf of Mexico.⁵ At the time of the explosion, Mr. Vekic had not exercised his option to purchase and as such the Popich family remained the leaseholder of record. However, the following year on or about June 19, 2011, Mr. Vekic exercised his option. The act of sale originally prepared in 2009 was executed with no alterations to the original terms proposed.

Shortly after the explosion, a plaintiff class sued BP for damages and losses as a result of the explosion. By 2012, BP and the plaintiff's Steering Company had reached a settlement agreement establishing a compensation plan for qualified oyster leaseholders in exchange for settling their claims with BP and other released parties. In order to receive a settlement payout, claimants were required to (1) file a claim form with the Deepwater Horizon Economic Claim Center (DHECC), (2) produce documents verifying that they were the record owners of the leases with the Department of Wildlife Fisheries on the day of the explosion, (3) show that their oyster leases had state ID numbers, and (4) provide documents showing the geographic area in which the oyster leases were located.

In June of 2012, Mr. Vekic filed a claim for all of his lease holdings including the three oyster leases purchased from the Popich family. In January 2013, Helen Popich, an attorney and daughter of Mr. Popich filed claims for herself, her father, and her sister. The submitted forms expressly informed the DHECC of the 2009 sublease to Mr. Vekic and the post-explosion sale of the leases. The forms also indicated that there had been no transfer or assignment

3. *Id.*

4. *Id.* at 485.

5. The Deepwater Horizon Well is an offshore drilling rig that was leased to British Petroleum (BP) at the time of the explosion on April 20, 2010.

of rights to Mr. Vekic regarding the cause of action for the Deepwater Horizon incident.

Subsequently, Mr. Vekic received a proposed settlement offer for his lease holdings but not for the leases he had purchased from Mr. Popich. The Popich family in turn received and accepted a settlement offer for \$901,999 in exchange for a release of any claims arising out of or in any way related to the Deepwater Horizon incident.⁶ Mr. Vekic sued the Popich family alleging that he was entitled to the settlement proceedings pursuant to their agreement.

The Popich family later received notice of eligibility for a second round of payments. However, before the funds could be recovered, the trial court had the money deposited into a trust account until further direction from the court. The trial court ultimately interpreted the sublease agreement as a sale of subleased property to Mr. Vekic for \$90,000 and consequently awarded Mr. Vekic all of the proceeds less 10% for attorney fees for past BP settlements and costs according to the contingency fee agreement between the Popich family and their attorney. The trial court further ruled that any future payments from BP belonged exclusively to Mr. Vekic without any reduction for additional attorney's fees. The Popich family timely filed an appeal.

III. DECISION OF THE COURT

A. The Court of Appeals Decision

On appeal, the court focused on determining whether or not the sublease was a sale in disguise.⁷ In reaching its verdict, the court broke down its analysis into examining the intent of the parties and entitlement to the BP settlement proceeds. In addressing the intent issue, the court considered Louisiana Civil Code Articles 2046 and 2049⁸ and concluded that the agreement between Mr. Vekic and Mr. Popich was a sublease as evidenced by the instrument, which clearly

6. *Vekic*, 215 So. 3d at 483-486.

7. *Id.* at 487.

8. LA. CIV. CODE. ANN. art. 2046, 2049 (2018).

described the intent of the lessor to lease the oyster leases to Mr. Vekic. What was less clear was the function of the option to purchase.⁹ Mr. Vekic argued that the format of a sublease with an option to purchase was used because a conditional sale in which the owner retained title until payment was made in full is prohibited in Louisiana. However, the court noted that while it is true that the conditional sale of a movable is prohibited, the conditional sale of an immovable is not. Given that the oyster leases were immovables, there was no need to disguise a credit sale as a sublease with an option to purchase. A credit sale can be distinguished from a lease in that the sale contemplates ultimate ownership by the purchaser. The court determined that this contemplation was absent given that both the plain language of the lease and the fact that Mr. Vekic knew Mr. Popich was “unwilling to do a credit sale” as expressed in the transmittal letter conveyed to Mr. Vekic along with the other pertinent documents prior to the lease agreement. The court was not persuaded by Mr. Vekic’s argument that the lease was a sale in disguise because it lacked a stipulation that an additional consideration be paid in order to exercise the purchase option. Though there was not any stipulation requiring the payment of additional consideration,¹⁰ the concept of consideration contained in the Louisiana Civil Code of 1870 was eliminated as inconsistent with the Louisiana legal system.¹¹

Moving on to the issue of entitlement to the BP settlement proceeds, the court noted that the sublease had a section stipulating that in the event of damage to the lease, Mr. Vekic was entitled to receive his actual loss.¹² The sublease further defined actual loss to be the cost of bedding oysters in the damaged area. Under the sublease, Mr. Vekic had the right to damage proceeds in the amount sufficient to reimburse him for actual losses with any surplus of the reimbursed

9. *Vekic*, 215 So. 3d at 488.

10. *Id.*

11. LA. CIV. CODE. ANN. art. 2620 (2018), comment (h).

12. *Vekic*, 215 So. 3d at 489.

amount to be received by the Popich family as advance rent. However, Mr. Vekic stated at trial¹³ that he had suffered no “actual loss” as defined in the sublease and no evidence was admitted showing that the oil spill damaged the oyster leases.¹⁴ The sublease provision did not address whether Mr. Vekic would be eligible to damage proceeds beyond oyster bedding reimbursement. The court considered Louisiana Civil Code article 2054, which provides that when no provision for a particular situation is made, it must be assumed that the parties intended to bind themselves to the express provisions of the contract.¹⁵ The sale of the oyster leases which occurred after the BP spill contained no reference to an assignment of rights to seek damages from BP. This was important because the Popich family were the record owners of the oyster leases at the time of the spill and, in order to recover from BP, it was necessary to produce documentation evidencing record ownership at the time of the spill.¹⁶ Mr. Vekic could have requested that the act of sale be modified to include an assignment of rights and he could have exercised his option to purchase the leases prior to the spill but chose not to. The court further noted that Mr. Vekic purchased the oyster leases “as is” and that Louisiana courts have consistently held that a purchaser is precluded from claiming damages to property that occurred prior to the purchaser’s acquisition of the property (the subsequent-purchaser doctrine). The court concluded by finding that the sublease with option to purchase was not a sale in disguise and that Mr. Vekic was not entitled to the BP settlement proceeds pursuant to the terms of the sublease with option to purchase.¹⁷

B. The Louisiana Supreme Court Decision

In contrast to the appellate court analysis, the Louisiana Supreme Court focused on determining whether the damages clause of

13. *Id.*

14. *Id.* at 490.

15. LA. CIV. CODE. ANN. art. 2054 (2018).

16. *Vekic*, 215 So. 3d at 490.

17. *Id.*

the sublease agreement would allow Mr. Vekic to recover the BP settlement proceeds and whether Mr. Vekic was precluded from recovery under the subsequent purchaser doctrine.¹⁸ Beginning with the first issue, the court noted that section 9 of the sublease specifically stated that “[c]laims for damage to or destruction of any portion of the subleased property shall be adjusted by the Lessee.” The court determined that because the use of the word “shall,” represents a mandatory requirement, the Popich family had expressly assigned their right to adjust all damage claims to Mr. Vekic. Consequently, Mrs. Harris’s act of filing a claim with the DHECC constituted a breach of contract.¹⁹ Although the agreement did not expressly stipulate that excess damages would go to Mr. Vekic, it did not allow anyone other than Mr. Vekic to adjust claims for damages.²⁰ It also did not provide that the Popich family would receive anything other than the \$90,000 for “rent” and any fees or costs associated with late payment or default. The court felt that the terms of the agreement clearly contemplated that all claims for damages would be covered by its provisions and that the appellate court erred in conducting a de novo review without giving any deference to the trial court’s decision. In the court’s opinion, the agreement contained support for an argument that it was the intent of the parties for Mr. Popich to receive \$90,000 for the oyster leases and nothing more.²¹ In section 10.2 of the agreement, it was stipulated that if a complete taking occurred, the lessor would retain the first \$90,000 awarded or paid less the total amount of rent previously paid by the lessee with any remaining amounts being awarded to the lessee.²² Furthermore, the court noted that although the agreement was labeled a sublease, the agreement provided in section 10.82 that captions and heading shall not be considered in the construction or interpretation of the lease. Therefore, the court determined that even though the agreement

18. Vekic v. Popich, 236 So. 3d 526, 529 (La. 2017).

19. *Id.*

20. *Id.* at 530.

21. *Id.*

22. *Id.* at 531.

was labeled a sublease, this was not significant in establishing which party could recover damages.²³ Based on these factors, the court decided that the settlement of a claim fell within the plain meaning of the word “adjust” and that, although the Popich family argued that Mr. Vekic has not proved actual damages, the court’s legal analysis did not hinge on whether Mr. Vekic’s claim against BP was meritorious, but rather was one of contractual interpretation.²⁴ Additionally, the court found it was not necessary to prove actual damages in order for there to be a determination that Mr. Vekic was entitled to damages beyond \$90,000.²⁵

Moving on to the second issue, the Louisiana Supreme Court found that the appellate court erroneously applied the subsequent-purchaser doctrine in this case.²⁶ In *Eagle Pipe and Supply Inc. v. Amerada Hess Corp.*, the court found that:

[A]n owner of property has no right or actual interest in recovery from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.²⁷

In this case, however, the court contended that Eagle Pipe and the subsequent-purchaser doctrine did not apply because the Popich family assigned Mr. Vekic the express right to adjust claims for damage or destruction before the damage at issue occurred.²⁸ The court agreed with the court of appeals that there had been no express assignment of rights in the act of sale. However, the court found that no such reservation was needed because section 17 of the sublease established that no provision of the agreement would be deemed waived or amended except by a written instrument unambiguously setting forth the matter to be waived or amended. The act of sale did

23. *Id.*

24. *Id.* at 534.

25. *Id.*

26. *Id.* at 535.

27. *Eagle Pipe and Supply, Inc., v. Amerada Hess Corp.*, 79 So. 3d 246, 256-257 (La. 2011).

28. *Vekic*, 236 So. 3d at 536.

not unambiguously waive section 9 of the original sublease.²⁹ Given its analysis, the court reversed the court of appeal's decision and reinstated the trial court's judgement.

IV. COMMENTARY

This commentary will first conduct a more thorough analysis of the Louisiana Supreme Court's decision that there was an assignment of rights in the sublease which entitled Mr. Vekic to adjust for and receive damage claims. Next, a synthesis approach to the appellate court's and supreme court's decisions will be considered. Finally, the principle of equity and its application to this case will be explored.

A. Subrogation of Rights

As an initial matter, the Supreme Court appears to be correct in concluding that the agreement contained a subrogation of rights. This conclusion is supported by the language in section 9 of the agreement, which provides that claims for damage or destruction of any portion of the subleased property shall be adjusted by the lessee. However, section 9 of the agreement goes on to say that the lessee shall have the right to proceeds derived from the claims which are sufficient to reimburse the lessee for actual damages with any excesses to be paid to the lessor as advance rent. This provision suggests that, though there may have been a subrogation of rights, the subrogation was limited to claims involving actual damages. If this is true, Mr. Vekic's recovery would be limited and possibly precluded given the fact that he testified that there were no actual damages at trial.

The subrogation that occurred is conventional because it arose by agreement rather than by operation of law.³⁰ Louisiana Civil Code article 1827 provides that a conventional subrogation is subject to the

29. *Id.*

30. LA. CIV. CODE. ANN. art. 1829 (2018).

rules governing the assignment of rights.³¹ Therefore, under the Code, the rights of Popich would be assigned to the lessee (Mr. Vekic) unless the rights were limited by the provisions of the agreement. In this case, the idea that the subrogation of rights was limited is not far-fetched if one considers both the nature of an oyster lease and the intent of the parties. Generally, the success of an oyster lease depends on the favorable effort of the lessee in raising oysters. As such, it makes sense that the parties would provide for instances where damages result in a difficulty or inability to raise oysters. While it is true that these damages can extend beyond what is physical, the parties likely did not intend to give this interpretation to section 9. Even though there is no specific language saying that the subrogation of rights applies only to claims for actual damages, there are facts that support an inference to this end. Not only does section 9 limit the lessee's recovery to actual damages, but the sublease also provided that actual damages are defined as the cost of bedding oysters in the damaged area.³² Louisiana Civil Code article 2051 says that, although a contract may be worded in general terms, it must be interpreted to cover only those things that the parties apparently intended to include. Based on this article, it is an overly broad stretch to say that the subrogation extended to rights beyond recovery for actual damages. The counter to this argument would incorporate a reference to the takings provision of the sublease. Section 10.2 of the sublease establishes that, in the event of a complete taking, the lessor will retain the first \$90,000 with any remaining amounts to be paid to the lessee.³³ The Supreme Court determined that this provision was proof that the agreement intended for the Popich family to recover \$90,000 and nothing more.³⁴ However, a complete taking never occurred in this case. An application of article 2051 would not support a conclusion that this provision applies to other situations not clearly contemplated by the parties. Generally, the finding of a complete taking

31. *Id.* at art. 1827 (2018).

32. *Vekic*, 215 So. 3d at 489.

33. *Vekic*, 236 So. 3d at 531.

34. *Id.* at 530.

depends on whether there was a “complete loss.” As it applies to oyster leases, a “complete loss” would involve actual damages stemming from the inability to raise oysters. Consequently, it might be that Mr. Vekic can recover beyond the value of his actual damages but only in the event of a complete taking. This interpretation eliminates the perceived conflict between the sublease provisions on taking and damages in terms of contractual interpretation. In other words, both provisions suggest that the parties intended these provisions to apply in the context of actual damages rather than other kinds of damages. In light of this consideration, the takings clause in the sublease operates as a “worst-case scenario” with respect to recovering for actual damages.

Louisiana Civil Code article 2050 stipulates that each provision in a contract is to be interpreted in light of the other so that each is given the meaning suggested by the contract as a whole.³⁵ It is not enough then to say that, because the agreement allows the lessee to adjust for damages, there was a subrogation of all rights to claims for damages. Section 9 must be read in *pari materia* with its entire contents and with the agreement as a whole to accurately establish the intent of the parties.

B. A Synthesis Approach

Assuming for the purposes of analysis that Mr. Vekic had a right to adjust for actual damages, the question of whether this right extends to the BP settlement remains unclear. This is both because, as noted above, Mr. Vekic admitted to the absence of actual damages and because, in order to obtain a settlement from BP, it was stipulated that documentation must be presented to show record ownership of the oyster leases at the time of the incident. The court of appeals rightly noted that the oyster leases are incorporeal immovables and that the conditional sale of immovables is not prohibited under Louisiana law.³⁶ If the parties wanted to contract a

35. LA. CIV. CODE. ANN. art. 2050 (2018).

36. *Vekic*, 215 So. 3d at 488.

sale at the time of the purported lease, they could have. Nevertheless, the intent to this end was almost certainly lacking since Mr. Popich included with the other original documents a transmittal letter stating that he was “unwilling to do a credit sale.” The appeals court accurately pointed out that whether or not Mr. Vekic intended to one day obtain title from the beginning is irrelevant because he obligated himself to the terms of the sublease which required him to exercise his option in order to take title of the leases.³⁷ As a result, even if Mr. Vekic was entitled to adjust for claims to actual damages, this entitlement appears to be limited in the sense that only Mr. Popich could bring a claim for damages against BP since he was the record owner at the time of the incident.

The Louisiana Supreme Court stated that this case involved a matter of contractual interpretation. To the extent that it pertains to Mr. Vekic’s recovery, this conclusion is correct. The original sublease between Mr. Vekic and Mr. Popich provided that Mr. Vekic could recover his actual damages. Accordingly, as a matter of contractual interpretation, Mr. Vekic should be entitled to recover. This recovery however might be contractually limited to the extent of his actual damages. Furthermore, based on the guidelines set forth by BP and the facts presented, Mr. Vekic may be precluded from bringing the claim himself since he was not the record owner at the time of the incident.

C. The Principle of Equity

Justice Weimer, in his partly concurring, partly dissenting opinion, stated that Mr. Vekic testified to spending approximately \$250,000 on rock and oyster shells after the spill to provide cultch for the purpose of remediating the leases. The use of the word “remediate” suggests that the leases were likely in a state of damage or disrepair prior to the expenditure. Though Mr. Vekic testified that

37. *Id.* at 491.

there were no actual losses, it is possible that after his testimony the oyster beds were determined to be damaged by the spill. If by the facts and evidence presented this is deemed to be the case, Mr. Vekic may have a contractual basis for recovering his expenditure. What is then left to be determined is whether the result would be different if the expenditure enhanced the condition of the leases rather than functioning to repair an “actual loss” as defined in the sublease.

It is clear from the language of the agreement that the parties had not previously contemplated the windfall of the BP settlement. According to Louisiana Civil Code article 2054, when the parties make no provision for a particular situation it must be assumed that they intended to bind themselves not only to the express provisions of the contract but also to whatever the law, equity, or usage regards as implied in the contract of that kind necessary for the contract to achieve its purpose.³⁸ The spirit of the agreement between Mr. Popich and Mr. Vekic works against an argument for full recovery of the settlement by one of the parties as does the concept of equity.

The settlement amount of \$901,999.50³⁹ largely exceeded the compensation previously contemplated, equaling more than ten times the agreed-upon price.⁴⁰ As Justice Weimer aptly put it, the parties in the original agreement intended there to be a mutual benefit, with one party receiving \$90,000 and the other receiving a sublease with the possibility of obtaining title to the oyster leases. Bringing equity into the fold and allowing Mr. Vekic to recover the costs of remediating the leases would be consistent with achieving the purpose of the agreement—contracting for the mutual benefit of the parties.

38. LA. CIV. CODE. ANN. art. 2054 (2018).

39. *Vekic*, 236 So. 3d at 528.

40. The \$901,999.50 settlement represents part of \$20.8 billion paid by BP for its role in the Deepwater Horizon spill in the Gulf. See Coral Davenport & John Schwartz, *BP Settlement Raised to \$20.8 billion*, N.Y. TIMES, <https://perma.cc/SJE7-D8GB>.

One of the requirements for recovery from BP was that an individual must be the record owner at the time of the spill. This requirement leaves only Mr. Popich with the ability to file for recovery given that he was the record owner at the time of the spill. As a result, any legal fees incurred during the settlement proceedings might fall on his shoulders, which would make it unfair to deny him reimbursement for court expenses in the event that he is awarded nothing. An equitable solution to the question of which party should be entitled to recover is that they both should. Mr. Vekic can recover the remediation expenses even if they were not incurred as a consequence of the damage inflicted by the spill. Mr. Popich, in turn, can receive the remainder of the settlement.

Judge Barbier, in his stated reasons for approving the original plaintiff class settlement agreement with BP, said that oyster leaseholders are being compensated through the Oyster Compensation Fund in part to pay out-of-pocket expenses for re-cultching or otherwise tending to oyster lease beds.⁴¹ Mr. Vekic's remediation costs are exactly the kind of damage contemplated by the spirit of the BP's agreement and the original sublease agreement between Mr. Popich and Mr. Vekic. This fact goes to an argument for equity given that Mr. Popich had sold the leases after the spill and, as a result, no longer needed to pay for remediation expenses. The settlement consequently represents pure profit after any court costs for Mr. Popich because he has already received the \$90,000 provided for in the sublease with option to purchase. Mr. Vekic's decision to spend \$250,000 on remediating the oyster beds was likely based on facts establishing a need and almost certainly was not carelessly made. While it may be important for a contractually based argument for recovery, it is unnecessary to establish that damage was inflicted by the spilling of oil into the Gulf to recover under the principle of equity. Furthermore, by the clear language of

41. *Vekic*, 236 So. 3d at 535.

article 2054, equity should be considered when the parties make no provision for a particular situation, which is the case here.

In sum, keeping an eye on the bigger picture helps make a confusing situation a bit less mind-boggling. It is plausible to conclude that neither party should be entitled to the full settlement both as a matter of contractual interpretation and according to the principle of equity, which aims at avoiding unjust enrichment. The doctrine of enrichment without cause, enshrined in article 2298, is not irrelevant but need not be relied upon given the existence of a valid juridical act to which the litigants were parties. Louisiana Civil Code article 2054 establishes that when the parties make no provision for a particular situation it must be assumed that they intended to bind themselves not only to the express provisions of the contract but also to whatever the law, equity, or usage regards as implied in the contract of that kind necessary for the contract to achieve its purpose. Balancing the concepts of contractual interpretation and equity embraces article 2054 and the spirit of article 2298 by reconciling what appears at first glance to be conflicting legal principles and bringing to light a solution that is appropriate for the circumstances. Equity may echo the fable by Jean de La Fontaine, but in *Vekic v. Popich* there is more than just one oyster to be shared among the litigants.