

CAUSE NO. _____

LELAND PENNINGTON, INC.	§	IN THE COUNTY COURT
	§	
V.	§	AT LAW NO. _____
	§	
MICHAEL S. CLEM, STEVEN A. CLEM, BROOKTEXLYN LLC, GREGORY L. & JENNIFER L. ROSLUND	§	TARRANT COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Leland Pennington, Inc. and files its Plaintiff's Original Petition on file herein, and by way of such petition would respectfully show the Court the following:

Discovery Level and Parties

1. Plaintiff intends that discovery be conducted under Level 2 and affirmatively pleads that this suit is not governed by the expedited-actions process in TRCP 169. The damages sought are within the jurisdictional limits of this Court. Plaintiff seeks monetary relief over \$100,000 but not more than \$200,000.
2. Plaintiff is a Texas corporation doing business in Tarrant County.
3. Defendant Michael S. Clem is an individual who may be served at 1200 Brophy Drive, Pflugerville, TX 78660. Defendant Steven A. Clem is an individual who may be served at 2705 Hanover, Dallas, TX 75225.
4. Defendant Brooktexlyn LLC is a Texas limited liability company that may be served through its registered agent, Seth Koppel, 9850 Westminster Avenue, Austin, TX 78730.
5. Defendants Gregory L. & Jennifer L. Roslund are individuals who may be served at 2900 Lovers Lane, Dallas, TX 75225.

Facts

6. Leland Pennington, Inc. contracted with Bella Vita Custom Homes, LLC to provide concrete construction work for incorporation into multiple construction projects. Leland Pennington, Inc. supplied the construction work but was not paid within the time frame allowed Bella Vita Custom Homes, LLC.

7. At the time Leland Pennington, Inc. supplied the work, the property where the work was performed were owned by others. Brooktexlyn LLC owned the property at the construction project at the postal address 178 Jellico Circle, Southlake, Tarrant County, Texas. Gregory L. & Jennifer L. Roslund owned the property at the construction project at the postal address 2900 Lovers Lane, Dallas, Dallas County, Texas. With respect to all the projects the original contractor (as defined by Property Code §53.001(7)) was Bella Vita Custom Homes, LLC.

8. In compliance with Property Code Chapter 53, Leland Pennington, Inc. gave timely notice of the indebtedness incurred for the work performed by certified mail to Brooktexlyn LLC, and Gregory L. & Jennifer L. Roslund. In further compliance with Chapter 53, Leland Pennington, Inc. timely filed with the appropriate county clerk an affidavit claiming a lien on the Property (Lien Affidavit) and sent the Lien Affidavit by certified mail to Brooktexlyn LLC, and Gregory L. & Jennifer L. Roslund.

9. Michael S. Clem is the Chief Financial Officer of Bella Vita Custom Homes, LLC. Steven A. Clem is the Chief Executive Officer of Bella Vita Custom Homes, LLC.

10. Leland Pennington, Inc. has reason to believe the following facts:

- a. Construction payments were made to Michael S. Clem and Steven A. Clem, Bella Vita Custom Homes, LLC or an officer, director, or agent of Bella Vita Custom

- Homes, LLC under a construction contract for the improvement of specific real property in Texas (“Trust Funds”).
- b. Michael S. Clem and Steven A. Clem or Bella Vita Custom Homes, LLC received Trust Funds.
 - c. Leland Pennington, Inc. furnished the work for the construction or repair of an improvement on specific real property in Texas and is a beneficiary of the Trust Funds.
 - d. Leland Pennington, Inc. invoiced Bella Vita Custom Homes, LLC for the work and payment was not received within 35 days.
 - e. Michael S. Clem and Steven A. Clem misapplied Trust Funds by retaining, using, disbursing or otherwise diverting them without first fully paying Leland Pennington, Inc.
11. As a result of the foregoing, Leland Pennington, Inc. has been required to retain an attorney to prosecute its causes of action and has agreed to pay a reasonable fee.
12. Leland Pennington, Inc. has satisfied all conditions precedent to the filing of this suit.

Causes of Action

Judicial Foreclosure

13. Leland Pennington, Inc. has properly perfected a lien against the properties owned by Brooktexlyn LLC, and Gregory L. & Jennifer L. Roslund to secure the amount owed for the work; therefore, Leland Pennington, Inc. is entitled to judicial foreclosure and sale of those properties to satisfy its claim for damages.

Trust Fund Violations

14. Construction payments are trust funds under this Texas Property Code Chapter 162 if the payments are made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor, under a construction contract for the improvement of specific real property in Texas (§162.001(a)). A contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds (§162.002). An artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or material for the construction or repair of an improvement on specific real property in this state is a beneficiary of any trust funds paid or received in connection with the improvement (§162.003). A trustee who retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds (§162.031(a)). A misapplication of trust funds subjects the trustee to not only criminal action pursuant to 162.032 but also civil liability. *See Lively v. Carpet Services, Inc.*, 904 S.W.2d 868, 871 (Tex. App.--Houston [1st Dist.] 1995, writ denied) and *C&G, Inc. v. Jones*, 165 S.W.3d 450, 453-54 (Tex. App.--Dallas 2005, pet. denied). As a result of Michael S. Clem and Steven A. Clem's misapplication of trust funds, Michael S. Clem and Steven A. Clem is liable to Leland Pennington, Inc. for payment for the work.

Damages

15. Leland Pennington, Inc. is entitled to recover for the work provided as follows:
- a. Defendant Brooktexlyn - \$14,946.60.
 - b. Defendants Gregory L. & Jennifer L. Roslund - \$22,768.50.
 - c. Defendants Michael S. Clem and Steven A. Clem - \$130,564.69.

16. Leland Pennington, Inc. is entitled to recover prejudgment interest as permitted by law against all Defendants.

17. Leland Pennington, Inc. is entitled to recover its costs and reasonable attorney's fee pursuant to §53.156.

Wherefore, premises considered, Leland Pennington, Inc. requests that Defendants be cited to appear and answer, and that on final hearing Leland Pennington, Inc. have:

1. Damages as specified above.
2. Reasonable attorney's fee.
3. A judgment decreeing that Leland Pennington, Inc. has a lien on the properties.
4. An order of foreclosure of the liens.
5. Pre-judgment interest at the rate of 18% per year.
6. Post-judgment interest as provided by law.
7. Costs of court.
8. Such other and further relief to which Leland Pennington, Inc. may be justly entitled.

Respectfully submitted,

/s/ C.D. Peebles
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