IN THE SUPREME COURT OF THE STATE OF FLORIDA

OBS COMPANY, INC.,

Plaintiff/Petitioner,

v.

PACE CONSTRUCTION CORPORATION, TRANSAMERICA INSURANCE COMPANY, and SEABOARD SURETY COMPANY,

Defendants/Respondents.

Supreme Court
Case No. 73296

Appeal No. 87-2954
Second DCA

JURISDICTIONAL BRIEF IN OPPOSITION TO DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF THE SECOND DISTRICT COURT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

There are several glaring misstatements and erroneous conclusions contained the Petitioner's Statement of Case and Facts. Petitioner asserts for the very first time that Pace Construction Corporation ("Pace") is liable to Petitioner under the terms of the subject bond. This alleged claim is totally unfounded. Petitioner did not allege such a claim in its Complaint nor did it argue this claim at trial or on appeal. See paragraph two on page two of Petitioner's Brief where it acknowledges the actual claims against the Respondents. On page two, paragraph one of Petitioner's Brief, Petitioner inaccurately characterizes and paraphrases the portions of the contract documents between the parties.

SUMMARY OF ARGUMENT

In this Answer Brief the following cases will be abbreviated as indicated: Peacock Construction Co., Inc. v. Modern Air Conditioning Co., Inc. 353 So.2d 840 (Fla. 1977) ("Peacock"); Cohen v. Lunsford, 363 So.2d 383 (Fla. 1st DCA 1978) ("Cohen"); Guin & Hunt, Inc. v. Hughes Supply, Inc., 335 So.2d 842 (Fla. 4th DCA 1976) ("Guin"); Aetna Casualty & Surety Co. v. Warren Brothers Co., 335 So.2d 785 (Fla. 1978) ("Aetna"); Pace Construction Corp. v. OBS Co., Inc., 531 So.2d 737 (Fla. 2d DCA 1988) ("Pace").

The contract provisions in Pace between the general contractor and subcontractor provided that the subcontractor would not be paid unless and until, as a condition precedent, the general

contractor received payment from the owner. The provison is clear, unambiguous and enforceable. Not only is it not in conflict with Peacock, the court below relied on Peacock in reaching its decision. The surities cannot be liable in this case because their principal is not liable [Aetna, supra].

The Pace decision does not conflict with either Cohen or Guin and is in harmony with Florida suretyship law. Pace turned on a provision in a subcontract; Cohen and Guin turned on bond provisions. Neither the general contractor nor the surety were parties in Cohen, hence, the subcontract was not an issue in the case. Likewise in Guin, the subcontract was not at issue in the decision.

There is no conflict between the Pace decision and Section 713.23, Fla. Stat. Even if a conflict did exist, it cannot be the basis for conflict jurisdiction because it is a statute, not a decision.

Since the Pace decision does not conflict with Peacock, Cohen or Guin, this Court should decline jurisdiction.

ARGUMENT

INTRODUCTION

This Court should not invoke its discretion to exercise jurisdiction as no conflict of decisions exists. Article V, Section 3(b)(3), Florida Constitution (1980), limits the review jurisdiction of this Court to only those district court of appeal decisions which expressly and directly conflict with a decision

of another district court of appeal or of this Court on the same question. See also, Fla. R. App. P., §9.030(a)(2)(A)(iv).

In The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), this Court held, in accordance with its long-standing policy, that it was bound to refuse to exercise its jurisdiction where the opinion of the district court establishes no point of law contrary to a decision of this Court or of another district court. Id. at 289.

All arguments asserted by the Petitioner have been asserted prior to the rendering of the decision complained of and the ensuing motion for rehearing. In a unanimous decision, the District Court of Appeal found such arguments unpersuasive, and no express and direct conflict in a decision is brought before this Court to permit an exercise of this Court's discretion. There being no express and direct conflict present in the decision under consideration, this Court should decline jurisdiction.

A. THERE IS NO CONFLICT WITH PEACOCK CONSTRUCTION CO., INC. v. MODERN AIR CONDITIONING CO., INC.

In Peacock, this Court addressed the issue of whether a final payment clause in a subcontract between a general contractor and a subcontractor was valid and enforceable under Florida law. The specific final payment clause read:

> . . . within 30 days after the completion of the work included in this sub-contract, written acceptance by the Architect and full payment therefor by the Owner.

Peacock at 841. This Court found "[t]hat the contractual provisions in dispute here are susceptible to two interpretations.

They may be interpreted as setting a condition precedent or as fixing a reasonable time for payment." Peacock at 842.

While the Court found the particular provision in Peacock unenforceable, it held that a clear and unambiguous "pay when paid" clause is valid under Florida law.

> Our decision to require judicial interpretation of ambiguous provisions for final payment in subcontracts in favor of subcontractors should not be regarded as anti-general contractor. It is simply a recognition that this is the fairest way to deal with the problem. There is nothing in this opinion, however, to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift, the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor.

Peacock at 842, 843.

The Pace case, using the Peacock standard, held the subject final payment clause "clearly states that payment from the owner shall be a condition precedent to the contractor's obligation to make final payment to the subcontractor." Pace, supra, at 739. The subject final payment clause states:

> In addition to any other requirements of this Subcontract and the Contract Documents, Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied: . . . (c) receipt of Final Payment for Subcontractor's work by Contractor from Owner. . . .

Pace at 738.

It is hard to imagine a contract provision which is more clear and unambiguous than one which says that as a "condition precedent," and "unless" and "until" payment is received from

the owner, no payment is due to the subcontractor. In an unpublished opinion considering the same language, the Fifth Circuit Court of Appeal of the United States found the identical verbage enforceable under Louisiana law. Lambert Electric Co., Inc. v. HCB Contractors, Summary Calendar No. 87-3791 (5th Cir. 1988) (decided May 31, 1988) (copy attached as Exhibit "A"). The decision below not only does not conflict with Peacock but is entirely supportive of it.

The only purported authority cited by Petitioner in support of the alleged conflict with Peacock is verbage in the trial court's summary judgment and provisions in the contract between the owner and general contractor. A re-argument of the issues rejected by the Second District Court of Appeal does not create a conflict between the Pace and Peacock decisions.

B. THE ALLEGED CONFLICT WITH COHEN v. LUNSFORD IS NON-EXISTENT.

Cohen involved a suit brought by a subcontractor against the owners of a construction project to foreclose a mechanics' lien. The general contractor and surety were not parties in Cohen. The Cohen case centered on owner liability to the subcontractor. In Pace, the subcontractor sued the general contractor and surety, not the owner. The general contractor was sued for breach of contract. There is a second claim against the sureties arising out of the general contractor's payment bond. Obviously, both the parties and the theories of liability are as different as night and day.

Cohen addressed a totally different and separate issue than the issue addressed by the Pace court. Certainly, a statutory payment bond was involved, but the issue was different. The issue addressed in Cohen is whether a contractor, surety and owner can agree in a bond agreement that unless the contractor gets paid by the owner, neither the surety nor the contractor have any obligation for payment to subcontractors.

Not surprisingly the Cohen court ruled that the "pay when paid" clause in the bond did not effect subcontractor's rights or the obligations of the general contractor and surety.

> A reading of the condition in the payment bonds here clearly shows that its only effect is to limit the surety's liability to the obligees (owners and lender). The condition does not limit the rights of the subcontractor. If it did, the limitation would be invalid and would be disregarded as surplusage.

Cohen at 384 (emphasis added).

In other words, since a contractor had a claim under the bond, the subcontractor's claim could not be waived or released absent the subcontractor's consent. No unilateral action (not involving the subcontractor) by the contractor, surety and owner could waive the subcontractor's right or deprive the subcontractor of its bond claim.

The issue is quite different in Pace. The court below found that when there was an enforceable "pay when paid" clause in the subcontract, then the general contractor did not have to pay until it was paid. The subcontractor affirmatively contracted and agreed that if the owner had not paid the contractor, the general contractor did not have to pay the subcontractor. While

it appears there may have been some type of "pay when paid" clause in the subcontract in Cohen, it was not an issue. Neither the general contractor nor the surety (who can assert general contractor's defenses) were a party in Cohen. The Cohen court did not discuss or in any way base its decision on the subcontract verbage.

Moreover and understandably, Petitioner has completely ignored the portion of the Pace decision which discusses the claim of surety liability. In Pace, the Second District Court, per Judge Schoonover, held:

> Because Pace is not liable to OBS unless and until it receives payment from the owner of the project, the trial court also erred in ruling that they were liable on their payment bond. A surety's obligation to the subcontractor under a payment bond is no greater than the contractor's obligation to the subcontractor under the subcontract agreement.

See Aetna Casualty & Surety Co. v. Brothers Co., 355 So.2d 785 (Fla. 1978); Cincinnati Insurance Co. v. Putnam, 335 So.2d 855 (Fla. 4th DCA 1976).

The Aetna case involved a statutory payment bond like Pace, Guin, and Cohen. The Florida Supreme Court, per Justice Sundberg, held that the surety was liable to the subcontractors under the terms of the subcontract. Justice Sundberg logically reasoned that since the general contractor was liable under the terms of the subcontract, then the surety was liable. Justice Sundberg stated:

> As surety of this obligation, [surety] stood in the shoes for the purpose of guaranteeing payment to [subcontractor] according to the subcontract's terms.

> Cf. Scott v. National City Bank of Tampa, 107 Fla. 810, 139 So. 367 (Fla. 1931); Cincinnati Insurance Company v. Putnam, 335 So.2d 855 (Fla. 4th DCA 1976); National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Robuck, 203 So.2d 204 (Fla. 1st DCA 1967). Because [surety's] obligation under its bond agreement was commensurate with that of [general contractor] under the subcontract, . . .

Aetna, supra, at 788.

The Second District correctly followed Aetna and the cases cited therein when it held that the sureties are not liable unless the general contractor is liable. In order to accept Petitioner's assertation of conflict between Pace and Cohen, the Court would have to reverse Aetna and overrule an established line of cases and destroy one of the basic premises of suretyship law that a surety's liability is founded on the liability of its principal.

As can be seen from a thorough reading of both cases, while both cases involve a surety's liability on a payment bond, they address two entirely separate legal issues. Cohen addresses language contained in a bond, a document not involving subcontractor participation. Pace involves a subcontract provision, bargained for and agreed to by the subcontractor. Thus, the issues are different, and the two cases are not only distinguishable but harmonized with existing Florida law.

C. A STATUTE IS NOT A DECISION AND NO CONFLICT WITH GUIN & HUNT, INC. v. HUGHES SUPPLY, INC. EXISTS.

The last argument made by Petitioner has to do with the lien statute itself. The constitutional provision involved does not permit the exercise of jurisdiction in cases involving statutory

interpretation, per se. A judicial decision must be at issue, that is, in express or direct conflict with another decision, not a statute. No such showing has been made in this case, and the exercise of discretion should consequently not be made. Article V, Section 3(b)(3), Florida Constitution (1980).

As Petitioner points out in quoting Guin, Guin like Cohen stands for the proposition that a "[Subcontractor's] rights may not be subsequently defeated by the failure of the owner or lender to comply with the special condition of the bond." Guin, supra, at 844 (emphasis added). Pace does not involve special conditions in a bond. This case deals with the rights, duties and obligations under a subcontract freely negotiated, entered into and agreed by the subcontractors.

Assuming that a conflict with a statute and an appellate decision would give this Court jurisdiction, Petitioner's construction of Section 713.23, Fla. Stat., is illogical, impractical and unsupported by and authority. The question of "when" prompt payment is due can only be determined by the terms of the subcontract agreed to by the parties. Petitioner cites no authority to the contrary. For a court to apply any other standards for payment terms other than the terms in the subcontract would create commercial chaos and involve the courts in determining the payment terms of every contract. The subcontractor is entitled to prompt payment when payment is due. In the instant case, payment is due when the general contractor receives payment from the owner. Once the owner has paid the general contractor, the surety becomes obligated to ensure that

prompt payment is made to the subcontractor. Petitioner's argument ignores that it is not entitled to receive payment until all conditions for payment, which the subcontractor agreed to and accepted, have been satisfied. Since the payment to subcontractor is not due, the sureties have not violated any statutory obligation of "prompt payment" under Section 713.23.

CONCLUSION

Petitioner has cited no case that the decision below expressly and directly conflicts with. Its requisite showing under Article V, Section 3(b)(3), Florida Constitution (1980), has not been made. Under the decision of this Court in Florida Star, infra, this Court should decline to exercise its jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a true and correct copy of the within and foregoing Jurisdictional Brief in Opposition to Discretionary Review of Decision of the District Court of Appeal of the Second District Court of Florida to opposing counsel by depositing a copy of same in the United States Mail with adequate postage affixed thereto and addressed as follows:

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This 16th day of December, 1988.

J.M. CROWDER, ESQUIRE