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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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OBS COMPANY, INC.,

Petitioner,

vs

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

Respondents.
_____/

SUPREME COURT CASE NO. 73,296

APPEAL NO. FROM SECOND DISTRICT COURT OF APPEALS: 87-2954

PETITIONER'S REPLY BRIEF

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PREFACE

In this Brief, Petitioner/Appellee/Plaintiff-Subcontractor OBS COMPANY, INC., will be referred to either by "OBS" or as the Subcontractor. Respondent/Appellant/Defendant, PACE CONSTRUCTION CORPORATION, TRANSAMERICA INSURANCE COMPANY and SEABOARD SURETY COMPANY will be referred to either as "PACE", "TRANSAMERICA" or "SEABOARD", respectively, or collectively as "Respondents."

The symbol "R" will denote the record-on-appeal and the symbol "App" will denote the appendix filed together with this Initial Brief.

STATEMENT OF THE FACTS

Petitioner takes issue with the facts as stated in Respondent's Brief. Respondent has improperly attempted to place new facts before this court, not contained in the record. Petitioner adamantly objects to this practice.

As the record reflects, the Payment Bond clearly states:

> "2. ... every claimant ... who has not been paid in full ... may sue on this bond ... for such sum or sums as may be justly due claimant..." (R-79)

The sums justly due are already liquidated. The parties factually agreed, by affidavit in the Trial Court, that the amount justly due is $47,917.60. (R 061-62, Paragraph 5; R-63, Paragraph 13); (R-95, Paragraph 5). Indeed, before the Trial Court the parties agreed that there were no factual issues. (R-213). Respondents have never raised a claim for a backcharge, setoff or defective work, and accordingly, no factual dispute exists as to the amount that is justly due. The sole defense raised or plead by the Respondents was that PACE had not received final payment for OBS'S work from the owner. (R-024). Accordingly, the sole issue before this Court is when the obligation to make payment became due for the Surety under the Payment Bond, and for the Contractor under the separate Subcontract Agreement.

A R G U M E N T

POINT I: THE SURETY IS CLEARLY BOUND BY THE TERMS AND EXPRESS PROMISES SET FORTH IN ITS SURETY AGREEMENT.

Respondents have failed to cite any case which has held, as they suggest before this Court, that a surety is not bound by the express terms and promises set forth in its Surety Agreement. The Payment Bond-Suretyship Contract expressly provides that if the claimant (OBS) did not receive payment in full within ninety (90) days after it completed its work, then it may sue the surety, jointly or severally, on the bond.

The well settled rule in Florida is that the terms of the bond govern the liability of the surety. United Stated Fidelity & Guarantee Company v. Gulf Florida Development Corporation, 365 So.2d 748, 751 (Fla. 1st DCA 1978). As the Court explained in Travelers Indemnity Company v. Housing Authority of Miami, 256 So.2d 230, 234 (Fla. 3rd DCA 1972):

> "A surety company is bound by any terms of its bond which extend beyond the statutory requirements (citations omitted). Florida has viewed construction bonds as contracts of insurance, and therefore in construing the terms of these contracts, they must be read and interpreted strictly against the bonding company which prepared them. (citations omitted)".

See also, Travelers Indemnity Company v. Mercer, 250 So.2d 283, 285 (Fla. 4th DCA 1971); Gulf Power Company v. Insurance Company of North America, 445 So.2d 1141, 1142 (Fla. 1st DCA 1984); and General Insurance Company v. Sentry Indemnity Company, 384 So.2d 1305, 1306 (Fla. 5th DCA 1980).

Both the Principal and the Surety executed the Payment Bond in the case at hand. Both agreed, jointly and severally, that if OBS and other claimants were not paid in full within ninety (90) days after they had finished their work, then such claimant may sue on the bond. The bonding company is obligated by the terms in its bond, all of them. To hold, as Respondents suggest, that the liability of the surety is determined by the subcontract, directly conflicts with the well settled authority in this state.

POINT II: THE SURETY IS LIABLE BY THE EXPRESS PROVISIONS SET FORTH IN FLA. STAT. §713.23.

Pursuant to Florida Statute Sections 713.02(6) and 713.23, an owner's property may be insulated from a mechanics' lien by virtue of the issuance of a payment bond. The Florida Mechanics' Lien Act does not mandate that an owner have a payment bond issued but rather makes it permissive. If the Owner elects to have a payment bond issued, the effect is simply to substitute the security of the bond for the owner's property. Coordinated Construction v. Florida Fill. Inc., 387 So.2d 1006, 1008 (Fla. 3rd DCA 1980); Guin & Hunt, Inc. v. Hughes Supply, Inc., 335 So.2d 842 (Fla. 4th DCA 1976).[1]

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[1]The bond in question is clearly a Florida Statute Section 713.23 payment bond. In the 1970's some confusion arose as to whether a claimant should perfect his lien rights in the property or perfect his bond rights, not knowing whether the bond would be construed as a common law bond or a statutory payment bond under Florida's Mechanics' Lien Act. The Courts held that,

> "it would be inconsistent with the Mechanics' Lien Law and the statutes allowing a bond in lieu of exposure to liens that potential lien claimants be left in doubt as to whether they may rely on the bond or must perfect their liens".

In 1980, the Florida Legislature amended 713.23(1)(a) adding the language:

> "Any form of bond given by a contractor conditioned to pay for labor, service, and materials used to improve real property shall be deemed to include the condition of this Subsection." 1980 Laws of Florida, Chapter 80-97, Section 8 (effective January 1, 1981).

Accordingly, the Legislature has made it abundantly clear that all payment bonds issued on private construction projects shall be deemed to include the mandatory conditions of the statute. The mandatory condition of the statute is equally clear.

> "The bond... shall be conditioned that the contractor shall promptly make payments for labor, services, and materials to all lienors under the contractor's direct contract". (emphasis added) (Fla. Stat. §713.23(1)(a)-(1985)

Liability quite simply could not be clearer. The bond includes the condition of the prompt payment automatically whether it is actually stated in the bond or not. If the condition of prompt payment to lienors, such as OBS, is not satisfied, then a direct

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Guin, Supra at 844; Houdaille Industries, Inc. v. United Bond Insurance Company, 453 F.2d 1048, (5th Cir. 1972) The Court in Guin, following Houdaille, cleared the confusion holding:

> "It is not mandatory under Section 713.23 for a private owner to require a bond to protect lien claimants. But if the private owner, rather than remaining subject to the lien laws, chooses the alternate of a bond which protects against liens, he may not employ a bond other than a Section 713.23 bond." Guin, Supra at 844.

The Florida Legislature codified these Court opinions by amending Fla. Stat. §713.23(1)(a) in 1980 making it clear that regardless of the bond form, a payment bond issued in the Florida would be construed as a statutory payment bond under Fla. Stat. §713.23; 1980 Laws of Florida, Chapter 80-97, Section 8 (effective January 1, 1981).

right of action on the bond against the surety is mandated. Fla. Stat. §713.23(g).

The record is undisputed that OBS satisfied each and every requirement under the Statute to perfect its bond rights. It served all requisite notices and nothing further was required of OBS to perfect its bond rights under the Statute. Respondent's contention that a subcontractor/lienor who perfects his bond rights is nevertheless not entitled to "a direct right of action on the bond against the surety" where the statutory condition of prompt payment has not been satisfied ignores the Statute. If this Court would hold as Respondents suggest, then the very purpose of Florida's Mechanics' Lien Act would be undermined and destroyed, and Florida's Construction Industry would suffer tragic losses.

POINT III: THE LIQUIDATED AMOUNT JUSTLY DUE OBS HAS NEVER BEEN AN ISSUE.

The sums justly due OBS are liquidated as the record clearly demonstrates. There is clearly no issue with respect to the amount that is justly due. The summary judgment in this action, was determined solely upon two affidavits which established that there was no genuine issue as to any material fact, particularly the amount justly due. No interrogatories, requests for admissions or depositions were entered as evidence before the Trial Court. The affidavits establish that the amount justly due OBS is $47,917.60. Respondents have not asserted nor plead any affirmative defense as to a setoff, backcharge, or in any way dispute amount justly due

OBS. Accordingly, Respondents may not now raise, for the first time on appeal, an issue as to the amount justly due.

POINT IV: PACE DEFAULTED ON ITS BOND OBLIGATIONS BY NOT PAYING OBS NINETY (90) DAYS AFTER OBS COMPLETED ITS WORK, THEREFORE, THE SURETY HAS NO DEFENSE.

Respondents suggest that they escape liability under the rule that the surety's liability is coextensive with that of the principal. The fatal flaw with Respondent's contention is that Respondent ignored PACE'S default of Paragraph 2 of the Payment Bond, and further misapplies the rule. This rule was announced by this Court in Cone v. Benqaminn, 8 So.2d 476 (Fla. 1942) when Justice Chapman explained:

> "The liability of a surety is coextensive with that of its principal, within the terms of the contract of suretyship..." (emphasis added) Id. at 480.

Indeed, PACE'S obligation as "Principal" can only be determined by a review of the terms of the bond. PACE is not a "principal" under the Subcontract Agreement, but rather, PACE is only a "principal" under the bond and its obligations are set forth therein. A review of the obligations of PACE as "principal" under the Payment Bond clearly reflect that PACE has defaulted on its promises. PACE as "principal" under the Payment Bond, like the surety, agreed that if payment was not made in full ninety (90) days after OBS and other claimants completed their work, then they could make a claim on the Bond. By providing the form statutory payment bond in Fla. Stat. §713.23(3)(a), the Legislature has made this point abundantly clear. Fla. Stat. §713.23(3)(a) in pertinant part provides:

"THE CONDITION OF THIS BOND is that if principal (PACE):

1) Promptly makes payment to all lienors supplying labor, materials, and supplies used directly or indirectly by principal (PACE) in the prosecution of the work...

Then this bond is void; otherwise it remains in full force."

The "principal's" obligations are found in the Payment Bond, not the Subcontract Agreement. A "principal's" obligations are simply to guarantee payment where none has been made. Since PACE as "principal" under the payment bond failed to satisfy either the statutory condition of "prompt payment" or its express promise of payment in full ninety (90) days after OBS completed its work, PACE as "principal" is in default of its bond obligations. Since PACE as "principal" has no defense then neither does the surety. Respondents have misapplied the rule in an attempt to avail themselves of a defense where none exists.

Moreover, Respondents reliance on Aetna Casualty & Surety Company v. Warren Brothers Company, 355 So.2d 785 (Fla. 1978) is misplaced. The sum and substance of Respondents' defense arises out of its inverse application of the broad general language invoked in a factual situation wholly distinguishable from the case at hand. First of all, the Court in Aetna imposed liability against the surety, rather than exonerating it. Secondly, in Aetna the obligations of the principal under the payment bond were identical to the obligations of the contractor under the Subcontract Agreement. Furthermore, in Aetna the Court held that the "pay when paid" clause was merely a timing provision and did not

set a condition precedent for the obligation of payment. In the case at hand, assuming arguendo, that the "pay when paid" clause did shift the risk, then a significantly different and distinguishable issues arises than those addressed by this Court in Aetna.

The rule announced by this Court in Aetna is not a new concept and provides no support to Respondents. In Aetna this Court specifically relied upon Scott v. National City Bank of Tampa, **107** Fla. 810, **139** So. **367** (Fla. **1931)** which held:

> "the condition that the principal will pay one money the failure of the principal to do so constitutes a breach of the surety's contract so as to render him liable." Id. at **369.**

This Court in Aetna also relied upon Cincinnati Insurance Companv v. Putnam, **335** So.2d **855** (Fla. 4th DCA **1976)** which held:

> "The liability of the surety is ordinarily measured by the liability of the principal... and generally the surety is not liable if the principal is not liable." Id. at **856.**

Finally, this Court relied upon National Union Fire Insurance Companv of Pittsburg, PA v. Roebuck, 203 So.2d 204 (Fla. 1st DCA **1967)** which held:

> "A surety's obligation is generally coextensive with that of the principal, and contracts of a surety for hire are construed most strongly in favor of the obligee." Id. at **206.**

It is abundantly clear that the obligations of PACE as "principal" are set forth in the Payment Bond. In Aetna, since the payment provisions in the Subcontract Agreement did **not** conflict with the payment provisions in the Payment Bond, this Court did not address the issue presented here. In Aetna "Peti-

tioner's obligations under its bond agreementwas commensurate with that (of the general contractor) under the Subcontract." Therefore the liability of the general contractor under the Subcontract, and the liability of the principal and surety under the Payment Bond occurred at the same time. This Court did not announce any new concept and was not addressing liability where there was a conflicting payment provision existed between a payment bond and a subcontract agreement. Respondents reliance on Aetna is therefore misplaced.

Once a payment bond is issued, the lienor/subcontractor's rights are fixed and cannot be taken away. Again, Guin & Hunt, Inc. vs Hughes Supply, Inc., supra at **844**, held that a subcontractor's rights in the payment bond are vested and may **not** be subsequently defeated. See also, Cohen v. Lungsford, supra; and Houdaille Industries, Inc. v. United Bonding Insurance Company, supra. Moreover, Respondent's reliance upon cases from other jurisdictions such as Louisiana which interpret that state's codes and laws is totally misplaced.[2]

POINT V: OBS MAY MAINTAIN ITS ACTION ON THE BOND AGAINST THE PRINCIPAL OR THE SURETY OR BOTH.

Another contention raised by Respondents is that OBS cannot sue the Surety directly on the Bond without also including PACE as the principal under the Bond. Respondents' contention is without merit. First Respondent never raised or plead such a defense.

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[2]For example, the LOUISIANA PRIVACY WORK ACT (R **181-189)** is significantly different and dissimiliar to FLORIDA'S MECHANICS' LIEN ACT.

Secondly, the plain language in the Payment Bond provides that the Surety agrees to joint and several liability. In addition, Fla. Stat. S713.23 gives a direct right of action against the Bond. Fla. Stat. §713.23(1)(f) provides that suit must be brought on the Bond within one year of performance "against the contractor or against the surety" . Indeed, the Court in Walter E. Heller & Company Southeast, Inc. v. Palmer-Smith, 504 So.2d 511 (Fla. 5th DCA 1987) stated:

> The purpose of giving the notices pursuant to section 713.23 by a supplier of materials is to permit him to file a law suit against the contractor or surety. Id. at 513.

See also, American Insurance Company v. Coley Electric Supply Company, Inc., 354 So.2d 390 (Fla. 1st DCA 1978) (where suit was permitted directly against surety without joining the contractor/principal); Schick v. Browarkik, 121 So.2d 690 (Fla. 3rd DCA 1960) (where the court held that the joint and several obligations of the surety under a written agreement to pay payee within ten days after written notice gave the payee the ability to proceed against the principal or the surety, or both, notwithstanding any other obligations of principal.) Accordingly, it is clear that OBS can maintain an action directly against the Surety for the liquidated amount of $47,917.60.

POINT VI: PARAGRAPH 6.3 OF THE SUBCONTRACT AGREEMENT DID NOT WAIVE, MODIFY OR RELEASE ANY OF THE SURETY'S OBLIGATION UNDER THE PAYMENT BOND.

Respondents suggest that OBS waived, modified or released the Surety's liability under the Payment Bond. Such contention is also without merit. First, Respondent's have never raised or plead any

of these as an affirmative defense. Secondly, the record is completely void of any evidence to suggest OBS waived, modified or released its Bond rights. In fact, there is some question that such rights can even be waived. **See,** e.g., Fla. Stat. §713.20(2). Respondents have **not** cited any portion of the record which even suggests OBS agreed to waive, modify or release the Surety from its obligations under the Bond. Indeed, the separate Subcontract Agreement which is the sum and substance of Respondents' defense does not mention or refer to the Payment Bond, Florida's Mechanics' Lien Act, Fla. Stat. S713.23, the Surety, or the Principal, nor does that provision mention waiver, modification, or release. Respondent's contention is wholly without merit.

POINT VII: THE **TRIAL COURT FOUND AMBIGUITY IN THE SUBCONTRACT AGREEMENT AND SUCH FINDING WAS IMPROPERLY REVERSED.**

The Trial Court found that the Subcontract Agreement was ambiguous. Indeed, Respondent's primary argument to overcome the conflicting provisions in the Subcontract Agreement is its reliance on cases which hold that the more specific provisions in an agreement supercede conflicting general provisions. However, the well settled law in this State is when such conflicting provisions involve a "pay when paid" provision in a construction subcontract agreement, then any ambiguity "must be construed in favor of the subcontractor". Snead Construction Corporation v. Langerman, 369 So.2d 591, 593 (Fla. 1st DCA 1978) (following Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977).

The provisions in the Subcontract Agreement conflict with the "pay when paid" provision. This is precisely why the case at hand is distinguishable from those relied upon by Respondents. None of the cases which Respondents' rely upon involved a reimbursement for cost plus fee contract being incorporated and made a part of the Subcontract Agreement. [3]

In the case at hand, however, the construction documents require the funding of the project to be accomplished by the general contractor first paying its subcontractors incurring that cost and requesting reimbursement plus an additional fee from the owner. Since the cases relied upon by Respondent's do not involve a reimbursement contract being incorporated into this Subcontract Agreement creating conflicting conditions with the "pay when paid" provisions, those cases are therefore clearly distinguishable and of no support to Respondents. In like manner, the Construction Manual written by Mr. Lieby did not discuss the impact of such inconsistent provisions with the "pay when paid" provisions.

As this Court has already announced, the individual terms of a contract are to be considered **not** in isolation but as a whole, in relation to one another. Bvstra v. Federal Land Bank of Columbia, 72 Fla. 472, 90 So. 478 (1921); see also 4 S. Williston, A Treatise on the Law of Contracts, Section 618 (3rd Edition 1961).

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[3]The only case cited by Respondents similar to the case at hand is Scarboroush Constructors, Inc. v. Pace Construction Corp. is pending before the Eleventh Circuit Court of Appeals and, therefore, is not final and, as such, has no precedential value. The Florida Star v. D.J.F., 530 So.2d 280 (Fla 1988).

The ambiguous or conflicting provisions in the Subcontract Agreement are required to be resolved in favor of OBS.

Moreover, since the Second District Court of Appeals reversed the Trial Court's decision without finding that no legal basis existed for the conclusion reached by the Trial Court, and that the evidence did not support the Trial Court's decision, and that the Trial Court's decision was "clearly incorrect", the Second District Court of Appeals improperly reversed the Trial Court's decision. See, Safeco Insurance Company v. Rochow, 384 So.2d 163, 164 (Fla. 5th DCA 1980); General Insurance Company of America v. Sentry Indemnity Company, 384 So.2d 1305, 1306 (Fla. 5th DCA 1980); and Spurrier v. United Bank, 359 So.2d 908, 910 (Fla. 1st DCA 1978). Accordingly, the Second District Court of Appeals improperly reversed the Trial Court's decision, and the Trial Court's decision, therefore, should be reinstated.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the District Court of Appeal's decision be reversed and that the Trial Court's decision be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express delivery, this 4 day of August, 1989, to J. M. Crowder, Esq. and John B. Grandoff, III., Esq., Allen, Dell, Frank & Trinkle, Suite 1240, Barnett Plaza, 101 East Kennedy Boulevard, Tampa, FL 33601; and to J.D. Humphries, 111, Esq., Varner, Stephens, Wingfield, McIntyre & Humphries, 1000 Grant Building, Atlanta, GA 30303.

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