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SUPREME COURT OF FLORIDA

DEC ELECTRIC, INC.,

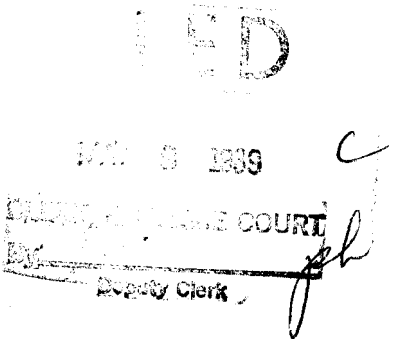
Petitioner,

vs.

RAPHAEL CONSTRUCTION CORP.,

Respondent,
_____/

CASE NO. 73,938
DCA CASE NO. 87-3164



INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE FACTS AND OF THE CASE

This is an appeal from a decision af the Fourth District Court affirming a Final Judgment in a breach of contract case holding that a Subcontractor was not entitled to payment from a Contractor because the Contractor had not been paid by the Owner.

Petitioner, DEC ELECTRIC, INC. (hereafter "Petitioner"), was a Subcontractor working for Respondent, RAPHAEL CONSTRUCTION CORP. (hereafter "Respondent"), on a project known as Shoppes at Village Point located in Boca Raton, Palm Beach County, Florida (R-27, 54). The parties entered into approximately fifteen (15) subcontracts to perform various functions at different tenant locations throughout the project (R-27, 54). It was stipulated that Petitioner was owed the sum of Twenty-five Thousand Six Hundred Twelve Dollars ($25,612.00) for work performed on five (5) of said Subcontracts (R-28, 54).

Work at the project commenced sometime in January, 1986. All work on the project was halted by the Owner on or about May 8, 1986 through no fault of either the Petitioner or Respondent. Thereafter, Petitioner performed no additional work on the project (R-27, 28, 54, 55).

On December 31, 1986, Petitioner filed this action seeking damages arising out of a breach of the aforesaid Subcontracts. On November 2, 1987, this matter was tried before the Honorable Paul M. Marko, III. The parties stipulated to all the essential facts and the case proceeded based upon Respondent's

sole remaining defense that certain language in the subcontracts constituted conditions precedent to Petitioner's right to payment from Respondent (R **1-26, 54-60).** Each subcontract entered into between the parties was identical, except for scope of work and contract price.

After hearing argument from both parties, the Trial Court found that as a matter of law, the language contained within Paragraph 6 of the subcontracts constituted a condition precedent to payment by Respondent to Petitioner and hence, Petitioner's action was premature (R-68). It is from this Final Judgment dated November **5**, 1987, that Petitioner took its single issue appeal.

Petitioner's single issue before the Fourth District was whether, as a matter of law, Paragraph 6 of the subcontract contained language constituting a condition precedent to Respondent's obligation to make payment to Petitioner. To make that determination, the Court needed to decide whether the subcontract clearly and unambiguously expressed such an intent.

Although the Fourth District found the language relied upon to be a condition precedent as "somewhat" confusing and ambiguous, it nevertheless affirmed the decision of the Trial Court.

The Fourth District went on to say that ordinarily it felt that any such ambiguity should be resolved by the trier of fact, based upon evidence offered by the parties to resolve the ambiguity, and then determine their intent. However, the court felt, as did the litigants, that such an approach may have been

foreclosed by this Court's decision in Peacock Construction Company v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977) which requires all such provisions to be construed as a matter of law, regardless of their ambiguity. As stated earlier, the Court affirmed the Trial Court's decision, but did certify the following question to this Court as one of great public importance in order to resolve what appeared to be a recurring and troubling issue for the Florida construction industry:

> Must all payment provisions in contracts between contractors and subcontractors or suppliers that concern a condition or time of payment provision be construed as a matter of law?

It is from this affirmance that Petitioner takes its appeal to this Court. This Court has jurisdiction pursuant to Article V, §4(2), Florida Constitution, to review the matter of DEC Electric, Inc. v. Raphael Construction Corp., 538 So.2d 963 (Fla 4DCA 1989).

For purposes of this Brief, references to the Record on appeal shall be indicated by the designation (R-) and references to the Appendix to this Brief shall be indicated by the designation (A-).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals has certified the following question as one of great public importance in order to resolve a recurring and troubling issue in this State's construction industry:

> Must all payment provisions in Contracts between Contractors and Subcontractors or Suppliers that concern a condition or time of payment provision be construed as a matter of law?

This Court, in the 1977 decision of Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840, said the nature of the transaction or relationship between Subcontractors and Contractors is a common one and that their intent usually does not differ from transaction to transaction such that the intention of those parties may be determined from the contract as a matter of law. This Court noted that the intent, in most cases, is that payment by the Owner to the General Contractor is not a condition precedent to the General Contractor's duty to pay the Subcontractors.

This Court should answer the certified question in the affirmative and reaffirm the vitality of Peacock and its public policy statements. In doing so, this Court must then overturn the decision of the Fourth District and reverse the Trial Court's decision. That is, since the Fourth District found the contract's time of payment provision to be confusing and ambiguous, Peacock thus required judicial interpretation against a condition precedent. The decision of the Fourth District should have

reversed the Trial Court's ruling that said provisions constituted a condition precedent to payment by Respondent to Petitioner.

In its review, this Court will likewise conclude that the language of the Contracts fails to clearly and unambiguously express an intent to shift the risk of Owner non-payment to Petitioner. Accordingly, this Court should quash the decision of the Fourth District and reverse the Trial Court's Judgment and remand for entry of Judgment in favor of Petitioner.

ARGUMENT

POINT I

AS A MATTER OF LAW, THE SUBCONTRACTS DO NOT CONTAIN LANGUAGE PROVIDING THAT OWNER PAYMENT TO RESPONDENT IS A CONDITION PRECEDENT TO PAYMENT BY RESPONDENT TO PETITIONER.

The single issue presented to the Trial Court and, hence, the single issue on appeal is whether Paragraph 6 of the subcontracts entered into between the parties contain language constituting an absolute condition precedent to payment by Respondent to Petitioner. All the subcontracts in dispute are identical in form, save for the scope of work identified in each and the costs associated therewith. A sample Subcontract is attached hereto as Appendix-1.

The suspect language is contained within Paragraph 6 of the subcontracts on the back of the form and is reprinted below verbatim:

> 6. Upon final payment a sworn statement with supporting waiver of lien from your material suppliers and/or subcontractors must be furnished with your final waiver of lien. A sworn statement must be furnished to us listing major material suppliers and subcontractors and the amounts of their contracts at the time of first payout. Interim payments require partial waivers with supporting material supplier's waivers in exchange for payment. Your payments are made in accordance with our interim draws as we show you on our sworn statement with your percentage of completion as we estimate it at the time of our billing to the Owner. This may not conform to your billing to us. No funds will be owed to the subcontractar unless the General Contractor is paid by the owner in

> accordance to the sworn statement. The subcontractor fully understands that in the event of non-payment by the owner to the General Contractor, the subcontractor has legal recourse against the owner through the Mechanics Lien Laws or other legal procedures for their correct monies due. [Emphasis supplied].

Generally, interpretation of a particular document is a question of law, rather than a question of fact, such as the meaning of certain language within a document. 4 Williston on Contracts, 3rd Ed., $616. Additionally, the nature of the transaction between the parties may be such that the intention of the parties may be determined from the contract as a matter of law. This Court has recognized that contracts between small subcontractors and General Contractors on large construction projects are such transactions. Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977). The Court reasoned that the relationship between these parties is a common one and that their intent usually does not differ from transaction to transaction or project to project, although it may be expressed differently from time to time. Id, at **842**.

As noted by this Court, the intent in most cases, is that payment by the Owner to the General Contractor is not a condition precedent to the General Contractor's duty to pay the Subcontractors. This is true because Subcontractors must pay their suppliers and laborers and must have payment for their work in order to remain in business. The Subcontractor will not ordinarily assume the risk of non-payment by Owner to the General Contractor.

This Court also pointed out that the foregoing was the reason for the majority view in the country that provisions of the kind disputed herein do not set conditions precedent but, rather, constitute absolute promises to pay, fixing payment by the Owner as a reasonable time for when payment to the Subcontractor is to be made. Peacock, supra, at 841, 842.

Florida law thus requires judicial interpretation of ambiguous provisions for final payment in Subcontracts in favor of Subcontractors. While this may appear to be pro-Subcontractor, it is simply a recognition by Florida courts that this is the fairest way to deal with this problem. Further, as stated in Peacock, there is nothing to prevent a General Contractor from contractually shifting the risk of payment failure by the Owner to the subcontractor. However, in order to shift such a risk, the Subcontract language must unambiguously express that intention. Peacock, supra at 842, 843.

The written subcontracts before the Peacock court pravided that Peacock would make final payment to the subcontractors,

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

The Court held that this language was ambiguous and subject to two interpretations, that is, setting up a condition precedent or fixing a reasonable time for payment. Hence, the Court construed the ambiguous provision in favor of the Subcontractor and held as a

matter of law the subject language was insufficient to shift the credit risks to the Subcontractor.

In Snead Construction Corporation v. Langerman, 369 So.2d 591 (Fla 1DCA 1978), the First District construed a Subcontract with the following provision:

> "No payment for work under this Agreement shall be made to the Sub-Contractor until the Owner shall have paid the contractor therefor."

The Snead Court, relying upon Peacock and its concern regarding intent to shift risk of non-payment, held the foregoing provision to be ambiguous and construed it in favor of the Subcontractor. Id. at 593. Further, the Snead Court stated that the Contracts before it did not state that the Contractor will not be obligated to pay the Sub-contractor if the former was not paid by the Owner. The Court pointed out that the Contracts did, as here, unambiguously state the mutual agreement of the parties that a sum certain was to be paid by the Contractor to the Subcontractor for work performed by the latter. Id. The Snead Court went on to say, absent a clear expression that the Contractor would be free of nay obligation to pay under the Subcontract if it were not paid by the Owner, the foregoing provision could not be held to shift the burden of non-payment to the Subcontractor. Id.

In Dyser Plumbing Company v. Ross Plumbing & Heating, Inc., 515 So.2d 250 (Fla 2DCA 1987), the Second District Court of Appeals held the following language to be an express contractual condition precedent to the General Contractor's obligation to pay the Subcontractor's retainage:

> Final payment, inclusive of retention, shall be made within thirty (30) days of completion of the construction project, acceptance of the same by the Owner, and as a condition precedent, receipt of final payment by Dyser Plumbing and Mechanical from the Owner or Prime Contractor, as the case may be. [Emphasis added].

The Dyser Court, after quoting from Peacock, stated "[i]n reading the contract clause above, it is hard to imagine a more clear expression of an intent to shift the risk of payment failure by the owner to the subcontractor [Emphasis added]. Dyser, supra, at 252. Thus the Dyser Court held the Owner's final payment to Dyser was a condition precedent to Dyser's obligation to pay Ross' retainage. Id.

Recently, the Third District Court of Appeal had the following provisions of a Subcontract before it:

> Condition 34
>
> "When all work has been fully accepted by the Architect and WILSON/WOODCRAFT, final payment is contingent upon payment to the contractor and shall be made within thirty (30) days after said payment from the Owner; ..." [Emphasis added].
>
> Condition 20
>
> "No Change Orders will be issued for additional work of any kind unless so approved by the Architect and Owner prior to its issuance. In the event a controversy occurs between the Owner and the General Contractor concerning the Contract with the Owner or these Change Order(s), then it is expressly agreed that no compensation for these items shall be due the Subcontractor from the Contractor until payment for them is received by the Contractor, regardless of the fact that payment is delayed due to the Contractor negotiating with the

> Owner, Arbitration, Administrative Actions, litigation, appeals or other similar activities". [Emphasis added]. Robert F. Wilson, Inc. v. Post-Tensioned Structures, Inc., 522 So.2d 79 (Fla. 3DCA 1988).

The Wilson Court, in reversing the lower court decision, held the foregoing provisions of the construction subcontract between the parties plainly and unambiguously made payment by the Owner to the General Contractor a condition precedent to payment by the Contractor to the Subcontractor, citing Peacock for the proposition that the parties could, and did, contract to shift the risk of payment failure by the Court from the General Contractor to the Subcontractor.

In addressing the issue before this Court, it is necessary to read Paragraph 6 of the Subcontracts in its entirety. The first two sentences of Paragraph 6 discuss the procedure by which Subcontractors will receive final payment. In particular, final payment will be made upon the furnishing of a Sworn Statement and Final Waiver of Lien from the Subcontractor together with supporting Waivers and Lien from his material suppliers and/or Subcontractors. No where within those sentences dealing with final payment is there express intent to shift the risk of non-payment to the General Contractor by the Owner to the Subcontractor. Actually, the language is such that it appears, final payment is made to the Subcontractors first, in exchange for requested documents.

Next, Paragraph 6 discusses in detail the procedure by which interim payments will be made. In particular, interim

payments require Partial Waivers with supporting material supplier waivers. Paragraph 6 goes on to state that payments to the Subcontractor are made in accordance with the General Contractor's interim draws as the General Contractor shows the Subcontractor on the General Contractor's Sworn Statement with the Subcontractor's percentage of completion as the General Contractor estimates it at the time of the General Contractor's billing to the Owner.

Paragraph 6 states that the General Contractor's Sworn Statement with its version of the percentage of completion, may not conform to the Subcontractor's billing to the General Contractor. Then, and only then, does Paragraph 6 state that no funds will be owed to the Subcontractor unless the General Contractor is paid by the Owner in accordance with the Sworn Statement (presumably the General Contractor's) submitted to the Owner for interim draws. A few observations are appropriate at this juncture. First, while it might be inferred, the language "no funds will be owed..." to whom does it refer. Second, is it no funds will be owed at all or no funds will be owed for that interim draw. Third, does it apply to interim draws, final payment, or both? Finally, in accordance with whose sworn statement, the General Contractor's or Subcontractor's?

Paragraph 6 finally informs the Subcontractor of legal rights it may already have, that is, that the Subcontractor, in the event of non-payment to the General Contractor by the Owner, has legal recourses against the Owner under the Mechanic Lien Laws for the correct monies due. The word "correct" should be emphasized since it seams clear that the General Contractor envisioned, maybe

not a disputed with the Subcontractor, but at least a discrepancy between the Subcontractor's billing, the General Contractor's estimates, and the Owner's payments. Additionally, a particular subcontractor, for any number of reasons, may in fact ultimately not have mechanic's lien rights. The subcontractor does, in deed have other legal remedies, namely, a breach of contract action against the General Contractor for one.

Petitioner's position is that the language "no funds will be owed to the subcontractor unless the General Contractor is paid by the Owner in accordance to the Sworn Statement..." , must refer only to interim or progress payments and is not applicable to final payment which is the subject of this litigation. As stated earlier, the Owner of the subject project terminated all work. There necessarily could be no more interim requests on this project. Hence, Petitioner sought recovery of its final payment of 5 subcontracts that remained unpaid out of a total of 15 subcontracts.

In either event, the aforesaid language is ambiguous in its intent and applicability and therefore judicial interpretation in favor of Appellant (Petitioner) is required. Peacock, supra. Rased upon the authority of Peacock, this language can hardly be said to be a clear expression of an intent to shift the risk of payment failure to the Subcontractor. The language does not contain words such as "expressly agreed" [Wilson, supra] , "condition precedent" [Dyser, supra] or "contingent'' [Wilson, supra]. However, it does contain language more akin to the

language before the Snead court which held the language "no payment...shall be made... until the Owner shall have paid the Contractor therefore" to be ambiguous and therefore to be construed in favor of the subcontractor.

Extending Paragraph 6 to its extreme, any reason the General Contractor is not paid to the letter of its Sworn Statement, would excuse the General Contractor from paying the Subcontractor. This would be an incredible hardship no subcontractor would knowingly agree to, absent absolutely unambiguous and clear language expressing that very intent. Conditioning the obligation to make subcontractor payments as a function of the General Contractor's Sworn Statements puts each and every subcontractor at the mercy of, not only the General Contractor, but their co-subcontractors as well. To illustrate, assume the electrical subcontractor performs pursuant to a Subcontract and submits a request for payment. The General Contractor agrees with and adopts the electrical subcontractor's percentage of work completed and prepares the "Sworn Statement" and submits it to the Owner for payment. Contained in this "Sworn Statement" is, along with the electrical subcontractor's request, the request for payment , as computed by the General Contractor, of each and every other trade subcontractor working on the project. The Owner, however, does not accept the work of the drywall subcontractor and the work of the landscape subcontractor and reduces the payment to the General Contractor accordingly. Hence, the Owner does not pay in accordance with the "Sworn Statement".

The General Contractor could, arguably, in reliance upon Paragraph 6, refuse to pay any of his Subcontractors since technically he has not been paid in "accordance to the Sworn Statement".

The foregoing scenario is not an uncommon one on construction projects. The illustration does not attempt to imply that this has occurred or may have occurred here. It does however, extend Paragraph 6 of the Subcontract to its extreme absurdity or abuse. While it is not suggested that each and every pitfall needs to be explained or detailed in the Subcontract, it is respectfully submitted that the foregoing is not a risk a Subcontractor would agree to accept absent absolutely clear language to that effect.

As noted by the Fourth District, post Peacock cases finding conditions precedent to payment involved contract language employing terms such as "condition" or "contingent". Cases finding no condition precedent to exist involved contracts employing language "until" or "unless" were used. DEC, supra.

The Fourth District did not fault the lower court's "plain meaning" construction of the words relied upon as a condition precedent here. Curiously, however, the Court nonetheless found the language somewhat confusing and ambiguous. In making this determination, the Court was obliged, under the authority of Peacock, to reverse the decision of the Trial Court.

The Fourth District chose not to disturb the decision however. Instead, the Court felt that any such ambiguity should be resolved by the trier of fact based upon any evidence that the parties submitted to resolve the ambiguity and then determine their

intent. Since this avenue appeared to be closed by Peacock, the Court certified the question before this Court to be of great public importance affecting this state's construction industry.

It is therefore respectfully submitted that the Trial Court committed reversible error in holding that, as a matter of law, the language contained within Paragraph 6 of the subcontracts was unambiguous and constituted an absolute condition precedent to payment. Further, since the Fourth District found the language to be confusing and ambiguous, it should have reversed the decision of the Trial Court with directions to enter a Final Judgment in favor of Petitioner. Hence, this Court should reaffirm Peacock, find the contract provision to be ambiguous, and direct that Judgment be entered in favor of Plaintiff. Moreover, in addition to benefitting the Petitioner, expanding on Peacock at this time will prove to be of invaluable guidance to Florida's extraordinarily competitive Construction Industry as it moves forward into the nineties.

CONCLUSION

For all the foregoing reasons, it is clear that the Trial Court erred in holding that, as a matter of law, Paragraph 6 of the Subcontracts entered into between the parties contained language constituting a condition precedent to payment by Respondent to Petitioner. The Fourth District agreed, but declined to reverse that decision and chose to certify the question before this Court. Accordingly, Petitioner requests that this Court render an opinion answering the certified question in the affirmative, find the contract language to be ambiguous and reverse the Final Judgment below and remand with instructions to enter a Final Judgment in favor of Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to Stuart H. Sobel, Esq., Sobel & Sobel, P.A., 155 South Miami Avenue, PH I, Miami, FL 33130 this 4th day of May, 1989.

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