O.A. 10/2/91 087

FILED
SID J. WHITE
MAY 28 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Fourth District Court
of Appeal Case No: 89-02906

Supreme Court Case No.:76,925

AETNA CASUALTY AND SURETY COMPANY, a foreign insurance corporation and PAPPALARDO CONSTRUCTION COMPANY,

Petitioners,

vs.

GORDON F. BUCK, P.E., d/b/a AMERICAN METAL FABRICATING,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

John M. Jorgensen, Esquire
SCOTT, ROYCE, HARRIS, BRYAN & HYLAND, P.A.
Attorneys for Petitioner
4400 PGA Boulevard - Suite 900
Palm Beach Gardens, Florida 33410
(407) 624-3900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGES

STATUTES

ABBREVIATIONS

The Defendant and Appellant below, Pappalardo Construction Company, will be referred to as "PAPPALARDO". The Petitioner, Aetna Casualty and Surety Company, will be referred to as "AETNA". The Plaintiff and Appellee below, Gordon F. Buck, P.E., d/b/a American Metal Fabricating, will be referred to as "BUCK".

The owner of the property in question, Bay Colony Land Company, and First American Juno Beach Corporation, a joint venture d/b/a Bay Colony, will be referred to as the "JOINT VENTURE".

Record is abbreviated as "R", and Transcript is abbreviated as "T".

STATEMENT OF THE CASE

BUCK filed a Complaint against AETNA and PAPPALARDO to secure payment on a bond transferring a mechanics' lien to security pursuant to Section 713.24 of the Florida Statutes (R1-12). PAPPALARDO filed a motion to dismiss in part on BUCK'S failure to plead compliance with the notice to owner requirement of Florida's mechanics' lien law. (R15, R16-18). The motion to dismiss was partially granted by the trial court in its order of July 5, 1988 (R-19).

BUCK filed an Amendment to the Complaint (R20-21) and AETNA and PAPPALARDO answered and raised affirmative defenses (R22-23). A joint pre-trial stipulation was filed with the court on May 12, 1989 (R77-83), and included, by agreement of counsel, separate actions for breach of contract and quantum meruit against PAPPALARDO, in addition to the action on the surety bond posted by AETNA.

After a non-jury trial held on June 12, 1989, the trial court entered a final judgment in BUCK'S favor on August 2, 1989 (R174-177).

AETNA and PAPPALARDO filed a motion for rehearing on August 11, 1989 (R178-181) and an Order Denying the Motion for Rehearing was entered on October 12, 1989 (R201).

BUCK filed a Motion for Rehearing and/or Clarification of the trial court's order of October 12, 1989. AETNA and PAPPALARDO filed a Motion to Limit Entitlement to Attorney's Fees on November 22, 1989. Buck filed a Motion for Attorney's Fees on December 5, 1989. These motions were heard by the trial court on December 14, 1989, and an order entitled Order Granting in Part and Denying in Part Defendant's Motion to Limit Attorney's Fees, and Granting Plaintiff's Motion for Attorney's Fees against AETNA and Motion for Costs against AETNA and PAPPALARDO and Increasing Bond Amount, was entered on January 8, 1990.

AETNA and PAPPALARDO filed an Amended Notice of Appeal on January 16, 1990, in the Fourth District Court of Appeals. After the issues were fully briefed by the parties on appeal, the Fourth District affirmed the final judgment of the trial court in its opinion filed on October 17, 1990. The Fourth

District also entered an order granting BUCK'S Motion for Attorney's Fees at the appellate level. The Fourth District's mandate was filed on November 2, 1990.

AETNA filed its Notice to Invoke Discretionary Jurisdiction of this Court on November 6, 1990. After AETNA and BUCK filed their jurisdictional briefs, this Court accepted jurisdiction of the case pursuant to its Order Accepting Jurisdiction and Setting Oral Argument of April 22, 1991.

STATEMENT OF THE FACTS

BUCK had an oral contract with PAPPALARDO to provide fabricated metal for a condominium known as Bay Colony located in Palm Beach County, Florida (T6-7). The materials were fabricated and delivered during the months of July, August and September of 1987 (R6). The JOINT VENTURE owned the Bay Colony property. The general contractor of the project was PAPPALARDO. The president and sole shareholder of PAPPALARDO was Vincent J. Pappalardo, who was also the president and sole shareholder of Bay Colony Land Company, one of two partners in the JOINT VENTURE.

Neither Bay Colony Land Company, nor First American Equity Juno Beach Corporation, the other JOINT VENTURE partner, had any ownership interest in PAPPALARDO. PAPPALARDO was not a subsidiary of either Bay Colony Land Company or First American Equity Juno Beach Corporation (R33-34).

PAPPALARDO claimed Buck was slow in delivering materials to the job site, which allegedly caused delay damages, and thus a dispute arose over payment to BUCK. Consequently, Buck filed a mechanics' lien on October 22, 1987 in the amount of $6,625 (R6). BUCK did not serve a notice to owner either to the JOINT VENTURE or PAPPALARDO (T82). Buck's lien was transferred to a surety bond in the face amount of $9,510.00, on April 8, 1988 (T-12).

Vincent J. Pappalardo, as president of PAPPALARDO, knew that BUCK was a materialman on the job and also knew that BUCK had a problem in timely delivery of the fabricated steel. The JOINT VENTURE did not deal with BUCK, and there was no contract between the JOINT VENTURE and BUCK, whether express or implied. Any knowledge the JOINT VENTURE had about BUCK would have been through Vincent J. Pappalardo, since he was also the president and sole shareholder of Bay Colony Land Company.

Even though the JOINT VENTURE may have known of BUCK through the imputed knowledge of Vincent J. Pappalardo, there was no evidence presented at trial to establish that the JOINT

VENTURE made any statement or took any action which would cause BUCK to believe that the JOINT VENTURE had assumed a contractual obligation to pay BUCK (T82).

In fact, the opposite is true. BUCK said he was not looking to the owner for payment, but rather, recognized that he was working for PAPPALARDO, the general contractor (T81). Buck said he never talked to anyone from Bay Colony, and he had never met Vincent J. Pappalardo until the day of trial (T82). Further, Buck acknowledged that there was a notice of commencement on site, and he was free to inspect it to determine who the actual owner was (T82).

BUCK made no claim nor presented any evidence that PAPPALARDO was the alter ego of the JOINT VENTURE, or of Bay Colony Land Company. BUCK made no claim nor presented any evidence to pierce PAPPALARDO'S, or Bay Colony Land Company's corporate veil. PAPPALARDO and Bay Colony Land Company were otherwise valid Florida corporations entitled to be treated as distinct legal entities under Florida law.

SUMMARY OF THE ARGUMENT

BUCK'S lien is invalid since BUCK failed to serve a notice to owner. Buck was not in privity with the JOINT VENTURE owner. Thus he cannot avoid the notice to owner requirement since he was a lienor not in privity under the mechanics' lien statute. This Court has defined privity in a mechanics' lien context to require both knowledge and an express or implied assumption by the owner of a contractual obligation to pay.

The trial court found that the JOINT VENTURE had actual knowledge of Buck working on the job site, but did not find that the JOINT VENTURE expressly or impliedly assumed PAPPALARDO'S contractual obligation to pay BUCK. Thus, the evidence at trial did not establish privity as defined by this Court. Since all lienors not in privity with the owner must serve a notice to owner to perfect their lien, BUCK'S lien is unenforceable.

The Fourth District agreed with the trial court that knowledge alone by the JOINT VENTURE was sufficient in this context to avoid the notice to owner requirement. The Fourth District concluded that the common identity created by Vincent J. Pappalardo's involvement in both the JOINT VENTURE and PAPPALARDO excused the notice to owner requirement even though there was no evidence of an express or implied assumption of a contractual obligation. When there is a common identity between the general contractor and the owner the Fourth District requires only knowledge of a lien claimant, and not an assumption of a contractual obligation.

The Fourth District's opinion directly conflicts with the opinions of the Second District found in Floridaire Mechanical Systems, Inc. v. Alfred S. Austin - Daper, Tampa, Inc., 470 So.2d 717 (Fla. 2nd DCA 1985), review denied 480 So. 1293 (Fla. 1985); and New Image Carpets v. Sandery Construction, Inc., 541 So.2d 1235 (Fla.2nd DCA 1989). The Second District follows this Court's definition of privity even in the context of common identity and requires both knowledge and an assumption of a contractual obligation by the owner before excusing the notice to owner requirement.

The Second District Court's view is the better one. By following this Court's definition of privity, the Second District preserves the statutory integrity of the mechanics' lien law under which the pervasive notice to owner requirement is vital in determining the proper method of payment to lienors, as well as the owner's liability for such payment.

The second issue on appeal is the amount of attorney's fees assessed by the trial court against AETNA under the 1987 revision to Section 713.24 of the Florida Statutes. The Fourth District determined that deletion of the surplus language from the statute "and costs not to exceed $100.00" evidenced legislative intent to expose sureties to liability for all reasonable attorney's fees incurred by a lien claimant in an action brought against a surety on a lien transferred to surety bond. This is despite the language in the revised statute which delineates that only $500.00 of the total bond amount is to apply to any court costs to be taxed. Since attorney's fees are taxed as costs under the lien statute, the revised statutory language limits attorney's fees to be assessed against the surety to $500.00.

This was the view adopted by the Third District in Fidelity and Deposit Company of Maryland v. DiStefano Construction Company, Inc., 562 So.2d 845 (Third DCA 1990). It is also the better view since the Third District's interpretation of the revised statute correctly follows the specific statutory language limiting costs to $500.00.

ARGUMENT

POINT I

THIS COURT'S DEFINITION OF PRIVITY SHOULD BE APPLIED IN ALL CASES TO DETERMINE WHETHER A LIENOR MUST SERVE A NOTICE TO OWNER.

Section 713.06 of the Florida Statues requires lienors not in privity with the owner to serve a notice to owner as a prerequisite to perfecting a lien. Under Section 713.06(2)(a), failure to serve the notice is a complete defense to the enforcement of the lien by any person. Pursuant to Section 713.05, lienors in privity with an owner are not required to serve a notice to owner to perfect their lien

Although Chapter 713 does not define privity, the overall scheme of the mechanics' lien law makes it clear that a party is in privity if he has a direct contract with the owner. Direct contract is defined under Section 713.01(4) as a contract between the owner and any other person. Thus, under the mechanics' lien law, a lienor that has a direct contract with the owner is in privity with the owner.

Whether a lienor is or is not in privity with the owner is a vital distinction under the mechanics' lien law. As referenced above, lienors not in privity must serve a notice to owner to perfect their lien. A subcontractor or materialman must serve a copy of the notice not only to the owner, but also to the contractor. Under Section 713.06(2)(a) the notice must be served regardless of whether the method of payment by the owner was proper or improper.

Pursuant to Section 713.06(3)(c)(1), when a payment becomes due to the contractor from the owner on a direct contract, except for final payment, the owner must pay each lienor giving notice. The statute specifically provides that the owner has absolutely no obligation to pay any lienor, except laborers, who have not served a notice to owner. Even if a lienor is listed on the contractor's affidavit required under Section 713.06(c)(1), he is not entitled to be paid by the owner if he has not properly served a notice to owner.

Thus, the notice to owner requirement impacts on the rights and obligations of nearly all persons that come within Chapter 713. A notice to owner is mandatory for lienors not in privity.

Obviously, there are many circumstances when an owner knows about a lienor, not in privity, who is doing work on a project. The owner's knowledge of this lienor does not excuse the lienor's obligation to serve a notice to owner to perfect his lien.

The mechanics' lien law has always been strictly construed because it is purely statutory in nature, Hardrives Company v. Tri-County Concrete Products, 489 So.2d 1211 (4th DCA 1986). This Court has most recently reiterated the strict construction of the mechanics' lien law in Home Electric of Dade County, Inc. v. Gonas, 547 So.2d 109 (Fla. 1989). Since the legislature has determined that it is mandatory for lienors not in privity to serve a notice to owner, it is not for the courts to make exceptions to the rule. To do so would reek havoc with the process for making payment under the lien statute, so meticulously engineered by the legislature.

Although privity is not directly defined in the mechanics' lien law, a number of cases in Florida do discuss the concept. In First National Bank of Tampa v. Southern Lumber and Supply Co., 106 Fla. 821, 145 So. 594 (1932), and later in Foley Lumber Co. v. Koester, 61 So.2d 634 (Fla. 1952), this Court stated:

> "The word privity as used in the lien statute providing for acquisition of liens by persons in privity with the owner, against the latter's real property, is not employed in the technical sense of the common law, but implies special knowledge showing active consent or concurrence.....
>
> "In order to create privity under the lien statute, there must be, in addition to knowledge of the owner that a certain person is furnishing labor or material for the contractor to be used in the execution of his contract, an express or implied assumption by the owner of a contractual obligation to pay for the labor or materials furnished. While such privity may be made out by circumstantial, as well as direct and positive, evidence, the ultimate conclusion must be made to appear that the owner voluntarily put himself in such a situation toward the materialman or laborer as to make him liable on an

implied agreement to pay for the labor or material furnished, not as a secondary, but as a primary debtor on the account".

The Fourth District recognized this special definition of privity under the mechanics' lien statute in Tompkins Land Co., Inc. v. Edge, 341 So.2d 206 (Fla. 4th DCA 1976).

Some district court decisions have found privity in cases where there was an "identity of relationship" between the owner and the general contractor. In other words, if the owner and general contractor have a certain degree of common ownership, district courts have dispensed with the requirement that a subcontractor or materialman serve a notice to owner.

One of the earliest and most frequently cited cases for finding privity in this context is Boux v. East Hillsboro Apartments, 218 So.2d 202 (Fla. 2nd DCA 1969). In Boux, there were two individuals that were officers of both the owner corporation and the contractor corporation. Because of this, the court concluded that the subcontractor Boux was in privity with the owner since the owner could not have been ignorant of the claim due to the common ownership in both corporations. The Second District stated that the purpose of the notice to owner requirement was to protect an owner from the possibility of paying over to his contractor money which ought to go to his subcontractor who remains unpaid. Thus, Boux focused on protecting an owner from having to pay twice for the same work. Boux did not utilize the definition of privity established by this Court.

Subsequent to Boux, the Second District revisited the issue of privity under the mechanics' lien law. In Floridaire Mechanical Systems, Inc. v. Alfred S. Austin - Daper Tampa, Inc., 477 So.2d 717 (Fla. 2nd DCA 1985), one of the two partners in the general partnership/owner of the project was also a 96% stockholder and president of the general contractor corporation. The subcontractor contracted with the general contractor, and did not serve a notice to owner. On Motion for Rehearing, the Second District followed the definition of privity in Foley Lumber Company v. Koester, 61 So.2d 634. The Second District determined there was no privity between the subcontractor and the owner since there had been no express or implied assumption by the owner of a contractual obligation to pay for the subcontractor's services. According to the Second District, the common ownership interest by one of

the partners in both the owner and contractor corporations did not create an identity of relationship between the two which would put the subcontractor in privity with the owner. The Second District then quoted from one of its previous decisions, Bishop v. James Ingols, Inc., 292 So.2d 415 (Fla. 2nd DCA 1974), as follows:

> "The statutory intent appears clear. The notice is more than written advice that a particular subcontractor is working on the job. If this were the only purpose, there would be many instances where there would be no need for the notice to be served because owners often have knowledge of the identify of one or more of the subcontractors involved in the construction of their building. The notice of intent to claim a lien is a notification that pursuant to the statute the subcontractor is looking to the owner for payment."

The Fourth District has addressed the issue of privity on a number of occasions and has generally followed the Boux decision. In Atlantic Gardens Landscaping v. Boca Raton Land Development, 360 So.2d 1278 (Fla. 4th DCA 1978), the Fourth District held that where an owner acted as his own contractor, there was no need for a lien claimant to serve a notice to owner. Id at 1280.

In Broward Atlantic Plumbing Company v. RLP, Inc., 402 So.2d 464 (Fla. 4th DCA 1981), the Fourth District reviewed a case in which the three owners of the property were also the sole stockholders, officers and directors of the corporate general contractor. Under these facts, the Fourth District held that the subcontractor who had contracted with the general contractor had established privity with the owner, thereby obviating the need for a notice to owner. Id at 466.

A third case decided by the Fourth District, Simons Corporation v. Tartan - Lavers Delray Beach, Inc., 456 So.2d 1254 (Fla. 4th DCA 1984), involved facts where an owner and general contractor were subsidiaries of the same parent corporation with a common corporate officer. Under these facts, the Fourth District held that the notice to owner need not be served on both the owner and general contractor in order to perfect a mechanic's lien. Id. at 1256.

The Fourth District did not use this Court's definition of privity in any of the above cited cases. Rather, the Fourth District focused on the Boux case, even though the Second District has since retreated from Boux.

The most recent Second District case on the issue, New Image Carpets, Inc. v. Sandery Construction, Inc., 541 So.2d 1235 (Fla. 2nd DCA 1989), also follows this Court's definition of privity. The facts in that case are strikingly similar to the facts in the present case. In New Image, the appellant had contracted with a general contractor who was a member of a joint venture which owned the property. The subcontractor provided materials to the general contractor but failed to serve a notice to owner. In upholding a dismissal of the amended complaint filed by appellant, the Second District held that the general contractor's membership in the joint venture did not provide a basis for arguing that there was privity between the subcontractor and the owner sufficient to waive the obligation to serve a notice to owner, Id.at 1236. The Second District further stated that even if it could be argued that notice to the general contractor was notice to the joint venture owner, it would still not give notice to the owner that a subcontractor is looking to the owner for payment. Id. at 1236.

Thus, the Second District has strictly construed and severely limited the Boux case. Boux is simply bad law, and in recognizing this the Second District has effectively written it out of existence. In its more recent decisions, the Second District has properly applied this Court's definition of privity in determining whether a lienor is excused from the notice to owner requirement.

In the present case, Vincent J. Pappalardo was president and sole stockholder of Bay Colony Land Company, one of the two partners in the JOINT VENTURE. Vincent J. Pappalardo was also the president and sole shareholder of PAPPALARDO. As president of PAPPALARDO, Vincent J. Pappalardo would be expected to know about BUCK, and to know that BUCK was providing materials on the job. The JOINT VENTURE has never denied that it had knowledge of BUCK. However, under the lien statute, knowledge alone does not establish privity.

The issue is whether the definition of privity used by this Court should be applied where there is common ownership between the owner and the general contractor. Since Boux, the Second District

has strictly adhered to this Court's definition of privity in cases involving common ownership between the owner and general contractor. The Fourth District has chosen not to use this Court's definition of privity, but rather, only requires knowledge on the owner's part to find privity sufficient to waive the notice to owner requirement. The Second District has the better view since it strictly construes the statutory language of Chapter 713, and correctly applies this Court's definition of privity.

When the correct definition of privity is applied to the facts of this case, it is clear that BUCK was not in privity with the JOINT VENTURE. There was no evidence presented by BUCK to prove that he was looking to the JOINT VENTURE for payment. There was no evidence to establish that the JOINT VENTURE had expressly or impliedly assumed a contractual obligation to pay BUCK. BUCK quite truthfully stated that he was looking to PAPPALARDO, the general contractor, for payment, rather than the owner (T81).

It is evident that the trial court's decision, and the Fourth District's opinion was based on the JOINT VENTURE'S knowledge, as imputed through Vincent J. Pappalardo, of BUCK'S presence on the job. The issue framed by the trial court in its final judgment was whether the actual knowledge of Vincent J. Pappalardo, as president of PAPPALARDO, was also actual knowledge to Vincent J. Pappalardo as president of Bay Colony Land Company. Clearly, the trial court did not find privity between the JOINT VENTURE and BUCK as defined by the Florida Supreme Court. Only actual knowledge was found, and knowledge, in and of itself, does not establish privity under the lien statute.

In adopting the trial court's decision, the Fourth District focused on what it perceived to be the purpose of the notice to owner requirement. Citing Boux, the Fourth District stated that the purpose of providing notice to an owner not in privity with a lienor is to protect the owner from paying the contractor unpaid sums which ought to go directly a subcontractor. In other words, the notice to owner requirement is to protect an owner from paying twice for the same work.

The Fourth District's analysis of the notice to owner requirement's purpose is incomplete, and therefore, flawed. In addition to providing actual notice that a lienor is working on the job, the notice to owner is also notification that the lienor is looking to the owner for payment, Bishop v. James Ingols,

Inc., 292 So.2d 415 (Fla.2nd DCA). If a lienor does not serve a notice to owner the owner is not on notice that the lienor is looking to him for payment. Further, under Chapter 713, if a lienor not in privity does not serve a notice to owner the owner is not obligated to pay the lienor irrespective of whether the owner has knowledge of the lienor.

In short, actual knowledge by the owner of subcontractors and materialmen working on the job site does not control the rights and obligations of the parties under the lien statute. Knowledge imputed by common ownership should be treated no differently than knowledge gained by an owner through other means. In situations where a lienor does not have a direct contract with the owner, the legislature has determined that serving a notice to owner is mandatory for a lienor to perfect his lien. It is not for the Fourth District to carve out exceptions to the mandatory notice to owner requirement.

In essence, the Fourth District has found PAPPALARDO to be the alter ego of the JOINT VENTURE, without any showing of fraud or improper conduct as required by this Court in Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984). Even though BUCK offered no evidence under an alter ego theory, the Fourth District's opinion disregards the distinct corporate entity of PAPPALARDO and treats the JOINT VENTURE and PAPPALARDO as one. This emasculation of Dania Jai-Alai is all the more disturbing since it has occurred within the confines of the mechanics' lien law, which is statutory law that must be strictly construed.

If this Court were to adopt the Fourth District's view, it would effectively dismantle the mechanics' lien law's intricate notice and payment provisions at every construction site involving an owner and general contractor with common ownership. All of the subcontractors and materialmen contracting with the general contractor would be under no obligation to serve notices to owner. The owner would not know whom he was obligated to pay since the mechanism for proper payment under the lien statute could not be implemented. The orderly payment of subcontractors and materialmen is difficult enough in Florida when the mechanics' lien law is followed. If the mechanics' lien law is abrogated in all situations where there is common ownership with the owner and general contractor, the result will be chaos.

There would also be the problem of just what constitutes common ownership. If the principal of a general contractor corporation owned fifty percent of a joint venture partner, would that be sufficient? Or perhaps it would be enough it a limited partner of a partnership owner was also a principal in a general contractor corporation. The possible combinations that would have to be unraveled, on a case by case basis, are seemingly endless. These determinations would all have to be made in a lawsuit, long after the anguished owner had to make a decision on whether to pay a lienor not giving notice.

This Court's definition of privity adequately protects lienors who, for whatever reason, deal directly with the owner and establish a contractual relationship. If such a relationship is created then they may correctly proceed against the owner either on a breach of contract basis or by filing a lien. If such an express or implied contractual relationship is not established with the owner, then lienors must serve a notice to owner to perfect their lien.

By applying this Court's definition of privity there is no injustice visited upon BUCK. BUCK had a contract with PAPPALARDO, he had the right to enforce that contract for payment, and he did so effectively at trial. Further, BUCK had the opportunity to serve a notice to owner but failed to do so. It is not asking to much of BUCK for him to read the notice of commencement posted on the job site and serve the notices required by law. The JOINT VENTURE did not do anything or say anything which led BUCK to believe the JOINT VENTURE had expressly or impliedly assumed PAPPALARDO'S contractual obligation to pay BUCK. Simplified, this is merely a case where BUCK forgot to serve a notice to owner thereby losing his lien rights. It is not a case in which the Court should erode or limit the notice to owner requirement and override legislative intent.

In conclusion, the mechanics' lien statute requires privity with the owner before a lienor may be excused from the notice to owner requirement. Although Chapter 713 does not specifically define privity, this Court's definition of the term is consistent with the provisions of the mechanics' lien law and preserves the structured payment process enacted by the legislature. To make an exception to the notice to owner requirement in situations involving common ownership between the owner and general

contractor would undermine legislative intent and the proper payment process. The Court should reaffirm the correctness of its definition of privity and adopt the Second District's position as the better view.

POINT II

THE REVISIONS TO SECTION 713.24 DO NOT MAKE A SURETY LIABLE FOR ALL REASONABLE ATTORNEY'S FEES INCURRED BY A LIEN CLAIMANT IN AN ACTION ON A SURETY BOND.

Prior to the 1987 amendment to the statute, transferring a lien to security under Section 713.24 was accomplished by:

A. Depositing in the clerk's office a sum of money or

B. Filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state, either to be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at 6% a year for three years plus $100.00 to apply on any court costs which may be taxed on any preceding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded, and costs not to exceed $100.00.

In 1987, Section 713.24 was amended to increase the interest to the legal rate, and further to increase the cost to $500,00, up from $100.00. Section 713.24 now reads in part:

C. Filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state, either to be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for three years, plus $500.00 to apply on any court costs which may be taxed in any preceding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded.

Both the previous statute and the 1987 revision to Section 713.24 provide that an interested party may apply to the court for an increase or reduction in security, a change or substitution of sureties or payment or discharge. Prior to 1987, Section 713.24(3) called for the filing of a complaint in chancery to obtain this relief. The 1987 revision provides that an increase or decrease in the bond

amount, or other action affecting the bond, may be accomplished by filing a complaint in chancery or by filing a motion in a pending action to enforce a lien.

Prior to the present case, and prior to the 1987 amendment, the Fourth District held that both a principal and surety of a transfer bond were liable for a lien claimant's attorney's fees only to the extent of $100.00, Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982). The limitation on attorney's fees was due to the specific language contained in Section 713.24, and the language of 713.29 which states that attorney's fees are taxed as costs.

Prior to the 1987 revision to Section 713.24, the Third District was in agreement with the Fourth District on this issue. In Old General Insurance Company v. E. R. Brownell and Associates, Inc., 499 So.2d 874 (Fla. 3rd DCA 1986), the Third District also limited a prevailing parties attorney's fees assessed against the surety to $100.00. The court further held that where costs exceeded $100.00, the lienor was left with an unsecured judgment for the balance, Id. at 875. The Second District had similarly analyzed Section 713.24, prior to its amendment, in Gulfstream Pump and Equipment Company v. Grosvenor Development, Inc., 487 So.2d 330 (Fla. 2nd DCA 1986).

The issue in the instant case is whether deletion of the language "and costs not to exceed $100.00", evidences a legislative intent to make sureties responsible for all reasonable attorney's fees assessed in favor of a prevailing lien claimant on a lien transferred to surety bond.

In the present case, BUCK sued AETNA in an action on the transfer bond, and also added PAPPALARDO as a party (R1-12). In the pre-trial stipulation, BUCK added causes of action for breach of oral contract against PAPPALARDO, as well as a cause of action for quantum meruit (R77-83).

In its final judgment, the trial court found that BUCK was entitled to a reasonable attorney's fee from both AETNA and PAPPALARDO. The trial court reserved jurisdiction to determine the amount of the fee (R174-177). Subsequently, in its order of January 8, 1990, the trial court ruled that BUCK was not entitled to attorney's fees against PAPPALARDO, but was entitled to attorney's fees against AETNA in the amount of $8,553.55. Further, the trial court entered judgment for taxable costs against PAPPALARDO and AETNA in the amount of $826.30. The final judgment entered by the trial court on

August 2, 1989 against both PAPPALARDO and AETNA was for $7,442.34. Thus the total dollar amount of judgments against AETNA was $16,822.19.

The $16,822.19 amount far exceeded the face amount of the bond, $9,510.00 (R1-12). BUCK never made application to the trial court for an increase in the bond until a belated ore tenus petition for an increase in the bond made post judgment at the end of the January 8, 1990 hearing. In order to determine the proper amount of attorney's fees to assess against AETNA, the revisions, and deletion to Section 713.24 must be analyzed.

Even though the language "and costs not to exceed $100.00" was stricken from the statute, there remains an expressed limitation to court costs evidenced in the statutory language. That occurs in the language "plus $500.00 to apply on any court costs which may be taxed in any preceding to enforce said lien". Since attorney's fees under the lien statute are considered costs under Section 713.29, it is evident that the legislature intended to limit an award of attorney's fees against the surety to $500.00. If the $500.00 was simply to be an amount over and above the interest calculated at the legal rate, then the statutory language would have stopped at "plus $500.00", rather than continuing to delineate that the $500.00 is to apply to court costs.

A fundamental rule of statutory interpretation is the mention of one thing implies the exclusion of another, Tillman v. Smith, 533 So.2d 928 (Fla. 5th DCA 1988). Thus, when the legislature specified that $500.00 was to apply to court costs, it excluded the ability of a lienor to get additional attorney's fees taxed as costs over and above the $500.00 limitation.

The Fourth District concluded that the deletion of the language "and costs not to exceed $100.00" removed any restriction on the amount of court costs which could be taxed against the surety. The Fourth District agreed with the trial court that it was inconsistent to allow a lienor to recover attorney's fees on a lien, and then limit the lienor to $500.00 in costs when the lien was transferred to surety bond. The Fourth District further agreed with the trial court that the deletion of the language "and costs not to exceed $100.00." was an effort on the part of the legislature to correct this discrepancy.

In interpreting the same revised statutory language, the Third District held in Fidelity and Deposit Company of Maryland v. DiStefano Construction, Inc., 562 So.2d 845 (Fla. 3rd DCA 1990), that Section 713.24 only authorized payment of costs up to $500.00. The Third District further held that when costs exceeded the statutory amount the lienor was left with an unsecured judgment for the balance. Id. at 846.

The problem with the Fourth District's interpretation of the statute is that it focused only the deletion of the language "and costs not to exceed $100.00". The Fourth District failed to consider the other statutory language in its interpretation of that deletion. Sentences of a statute have to be read in pari materia with other sentences in the statute in order to give the statute meaning, Caloosa Property Owners Association, Inc. v. Palm Beach County Board of County Commissioners, 449 So.2d 1260 (1st DCA 1983). Specifically, the Fourth District failed to consider the language "plus $500.00 to apply to any court costs". This language evidences a legislative intent that only $500.00 of the total bond amount be applied to the payment of court costs. When construing a statute, courts must avoid interpretations which would render part of the statute meaningless, Finlayson v. Broward County, 471 So.2d 67 (Fla. 4th DCA 1985). The Fourth District's interpretation of the statute has rendered meaningless the specific provision requiring only $500.00 of the face amount of the bond be applied to court costs.

Both the Fourth District and the trial court based their opinions on what they perceived to be a disparity in a lienor's ability to collect attorney's fees on a mechanics' lien action versus a lienor's ability to collect fees once the lien is transferred to surety bond. The Fourth District concluded that since there was no apparent reason for the inconsistency, the legislature had intended to correct it by omitting the language "and costs not to exceed $100.00".

This rationale is erroneous for two reasons. First of all, it is not the prerogative of the Fourth District to modify the plain meaning of the statute based on what it believed to be a discrepancy in a lienor's ability to collect attorney's fees. This is especially true when there is specific language in the statute directing only $500.00 of the bond amount be applied to court costs. Secondly, though a

lienor's ability to collect attorney's fees against a surety may be limited when a lien is transferred to surety bond, the lienor is not prevented from obtaining an unsecured judgment for the balance of fees owing, Simons Corporation v. Tartan - Lavers Delray Beach, Inc., 456 So.2d at 1260. BUCK could have named the principal on the bond, Vincent J. Pappalardo, as a party to the suit, and had he done so, BUCK would have been entitled to a judgment for his balance of attorney's fees against Vincent J. Pappalardo. Williams, Hatfield and Stoner v. A & E Design, Inc., 538 So.2d 505 (Fla. 4th DCA 1989). BUCK failed to name Vincent J. Pappalardo as well as the JOINT VENTURE as party defendants in his lawsuit. Accordingly, BUCK lost his ability to be fully compensated for all attorney's fees incurred in his action on the surety bond.

Thus, there is no real disparity between foreclosing a lien and bringing an action on a surety bond when it concerns a lienor being fully compensated for reasonable attorney's fees incurred. In fact, a lienor is very often more secure when his lien is transferred to bond. Frequently, a mechanics' lien will be inferior to the lien of a large construction loan mortgage and subject to being foreclosed out should the owner default. When the lien is transferred to surety bond this danger disappears and a lienor is more likely to be made whole.

In conclusion, a correct interpretation of the 1987 revision to Section 713.24 limits a surety's exposure for a lien claimant's attorney's fees to $500.00. The legislature's deletion of the surplus language "and costs not to exceed $100.00", was not intended to invoke a drastic change in a surety's responsibility for attorney's fees. Had the legislature intended such a radical departure from existing law it would have inserted express language effecting the change. The legislature also would have deleted the specific directive "plus $500.00 to apply on any court costs" had it intended, to redefine the surety's liability for attorney's fees.

CONCLUSION

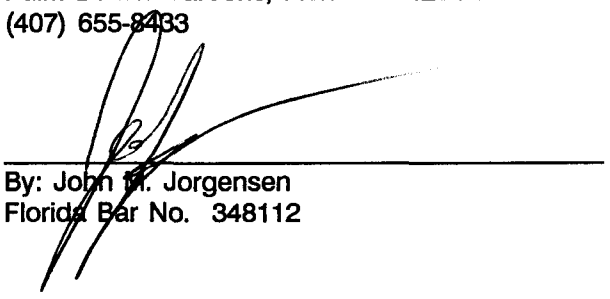
AETNA requests the Court to vacate the final judgment as it applies to AETNA, to grant reasonable attorney's fees to AETNA for this appeal, and to remand the case to the trial court for a determination of reasonable attorney's fees due AETNA for both the trial, and for the appeal to the Fourth District.

In the alternative, AETNA requests the Court to vacate that portion of the trial court's order granting reasonable attorney's fees against AETNA, and to remand the case to the trial court with instructions to limit attorney's fees and costs assessed against AETNA to $500.00.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Initial Brief on the Merits has been furnished by to JOSEPH VASSALLO ESQUIRE, 3501 South Congress Avenue, Lake Worth, Florida 33461 and an original and seven (7) copies were mailed to The Supreme Court - State of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925 by U.S. Mail this 17th day of May, 1991.

SCOTT, ROYCE, HARRIS, BRYAN & HYLAND, P.A.
Attorneys for Petitioner
P.o. Box 32727
Palm Beach Gardens, Florida 33420-2727
(407) 655-8433



By: John M. Jorgensen
Florida Bar No. 348112

JMJ\fgm\25518\brief.2