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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.

FILED
SID J. WHITE
DEC 24 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Respondent (Buck) sued Petitioners (Pappalardo Construction Co. and Aetna) in Palm Beach County Circuit Court to secure payment on a bond transferring a mechanic's lien to security pursuant to §713.24 of the Florida Statutes (R1-12). The case was also tried on breach of contract pursuant to the pretrial stipulation filed by counsel (R77-83).

The trial court entered final judgment in favor of Buck on August 2, 1989 (R174-177). The trial court's order granting attorney's fees in favor of Buck was entered on January 8, 1990.

Pappalardo Construction Co. and Aetna filed their amended notice of appeal with the Fourth District Court of Appeal on January 16, 1990. The Fourth District filed its opinion in the appeal on October 17, 1990. Pappalardo Construction Co. and Aetna filed their notice to invoke discretionary jurisdiction of this Court on November 6, 1990.

STATEMENT OF THE FACTS

Included in this statement are facts contained in the Fourth District's opinion, and necessary for discussion of jurisdiction.

Gordon Buck, d/b/a American Metal Fabricating ("Buck") had an oral contract with Pappalardo Construction Co. to furnish metal construction materials to a development called Bay Colony. There was a dispute over timeliness of delivery and Pappalardo Construction Co. did not pay Buck in full. Buck filed a claim of lien which was transferred to surety bond by Vincent J. Pappalardo.

The property was owned by Bay Colony Land Co. and First American Juno Beach Corporation, a joint venture d/b/a Bay Colony. The president and sole shareholder of Bay Colony Land Co. was Vincent J. Pappalardo. He was also the president and sole shareholder of Pappalardo Construction Co., the general contractor for the development.

Buck did not serve a notice to owner. The notice of commencement correctly listed the joint venture as the owner of the project. The contractor was correctly listed as Pappalardo Construction Co. Vincent Pappalardo was the general agent for the joint venture, and had knowledge of the contract between Pappalardo Construction Co. and Buck. There was not an express or implied assumption by the joint venture of the contractual obligation owing from Pappalardo Construction Co. to Buck.

SUMMARY OF THE ARGUMENT

This appeal presents three conflicts. The first conflict exists between the Fourth District and the Second District. The Fourth District determined privity to exist between the materialman Buck and the joint venture owner based on an "identity of relationship" that the Fourth District found between the joint venture owner and the general contractor, Pappalardo Construction Co. Since Vincent J. Pappalardo was the president and sole shareholder of one of the joint venture partners, Bay Colony Land Co., and also the sole shareholder and president of the general contractor, the Fourth District determined there was privity between Buck and the owner and dispensed with the lien statute's notice to owner requirement. Under identical facts, the Second District has ruled just the opposite, finding that there was not an "identity of relationship" and therefore no privity between the joint venture owner and subcontractor.

The second conflict exists between the Fourth District and this Court concerning the definition of privity under the lien statute. This Court requires both knowledge and an express or implied assumption of a contractual obligation between an owner and a contractor before it finds privity. The Fourth District has ruled that privity existed between Buck and the joint venture owner, even though there was no express or implied assumption of a contractual obligation. Rather, there was only knowledge of Buck's contract by the joint venture owner.

The third conflict is between the Fourth District and the Third District involving the assessment of attorneys fees against a surety when a mechanic's lien is transferred to surety bond. The Fourth District has interpreted a 1987 revision to §713.24 of the Florida Statutes to permit a prevailing lienor to obtain, without statutory limitation, an award of reasonable attorneys fees against the surety. The Third District has interpreted the same statute and has found that it limits an award of attorneys fees against the surety to $500.00.

The resolution of these three conflicts is important for maintaining uniformity among the District Courts of Appeal, and for an even-handed application of the rights and duties under the lien statute.

ARGUMENT

POINT I

THE FOURTH DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT ON THE SAME QUESTION OF LAW.

The opinion rendered by the Fourth District expressly conflicts with the case of Floridaire Mechanical Systems, Inc. v. Alfred S. Austin - Daper, Tampa, Inc., 470 So.2d 717 (Fla. 2nd DCA 1985), Rev.Denied, 480 So.2d 1293 (Fla. 1985). The Fourth District acknowledged the conflict in its opinion.

Factually, the cases are essentially identical. Both involve joint venture owners, and a general contractor whose stockholder and president have an "identity of relationship" with the joint venture. Vincent J. Pappalardo was the president and sole shareholder of Bay Colony Land Co. He was also the president and sole shareholder of Pappalardo Construction Co. Vincent J. Pappalardo was additionally the managing agent of the joint venture.

In Floridaire, Alfred S. Austin was one of the two partners of the joint venture, its managing agent, and was also a 96% stockholder and president of the general contractor, id at 717. Indeed, there is more of an identity of relationship in the Floridaire case, since Alfred S. Austin was individually a partner of the joint venture, whereas Vincent J. Pappalardo was a shareholder of Bay Colony Land Co., a partner in the joint venture.

Both cases involve subcontractors foreclosing mechanic's liens where notices to owner were not served. Service of a notice to owner is a prerequisite to perfecting a lien under the lien statute, unless the lienor is in privity with the owner. The statute does not define privity. The Second District used the definition of privity provided by this Court in Foley Lumber Co. v. Koester, 61 So.2d 634 (Fla. 1952). Privity requires an express or implied assumption by the owner of a contractual obligation to pay for the subcontractor's services.

The Second District found that the interests of Alfred S. Austin in the joint venture and in the general contractor did not create an identity of relationship between the two which would create privity between the subcontractor and the joint venture owner, Floridaire Mechanical Systems, Inc. v. Alfred

S. Austin -Daper, Tampa, Inc., 470 So.2d at 718. The Fourth District, on the identical facts, ruled just the opposite.

Conflict certiorari exists because the decisions of the Fourth District and Second District are wholly irreconcilable, Williams v. Duggan, 153 So.2d 726 (Fla. 1963). If the Fourth District's opinion had been rendered by the Second District, it would have had the effect of overruling the decision in the Floridaire case, Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). Had the case been tried within the Second District's jurisdiction, the result would have been just the opposite. Indeed, the more recent Second District case of New Image Carpets v. Sandery Construction, Inc., 541 So.2d 1235 (Fla. 2nd DCA 1989), is also in direct conflict with the Fourth District.

Further, there is decisional conflict sufficient to invoke the jurisdiction of this Court since the Fourth District has announced a rule of law which conflicts with the Second District's expressions of law, City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fla. 1976). This conflict appears on the face of the Fourth District's opinion, Hardy v. State, 534 So.2d 706 (Fla. 1988). The Court thus has jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

The Court should accept jurisdiction and resolve the conflict between the Fourth District and Second District Court of Appeals. It is very common in the Florida construction industry to have an "identity of relationship" between the owner and general contractor. The notice to owner requirement is of paramount importance in the determination of rights and priorities under the lien statute. Contractors, subcontractors and materialmen will receive uneven and conflicting treatment depending on which district court of appeal's jurisdiction they come under.

POINT II

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

In Foley Lumber Co. v. Koester, 61 So.2d at 639, this Court reiterated its definition of privity as used in the lien statute, previously set forth in First National Bank of Tampa v. Southern Lumber and Supply Co., 145 So.2d 594 (Fla. 1932), as follows:

> "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, and 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 situation towards 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 has failed to follow this rule of law by finding privity between the materialman Buck and the joint venture owner without finding an express or implied assumption by the owner of a contractual obligation to pay. In fact, the Fourth District has expressly announced its own rule of law, contrary to this Court's decision, finding privity where there is simply knowledge by the owner, and not an express or implied assumption of a contractual obligation.

There is thus a direct and express conflict between the Fourth District and this Court on the definition of privity. The statute itself provides no definition of privity and thus lien claimants and owners must rely on the definition provided by this Court. The conflict between the Fourth District and this Court has generated confusion, instability and uncertainty within the construction industry, Kyle v.

Kyle, 139 So.2d at 885 (Fla. 1962). The conflict appears within the four corners of the Fourth District's decision, Reaves v. State, 485 So.2d 829 (Fla. 1986), and therefore, the Court has jurisdiction to accept this appeal pursuant to Article V §3(b)(3) of the Florida Constitution.

POINT III

THE DECISION OF THE FOURTH DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT ON THE SAME QUESTION OF LAW.

Section 713.24 of the Florida Statutes, as amended, effective October 1, 1987, concerns the transfer of liens to security, whether by cash or surety bond. The amendment to the statute increased from $100 to $500 the amount of costs to be added to the total amount required to transfer a lien to bond. The $500 is to "apply on any court costs which may be taxed in any proceeding to enforce said lien".

Prior to the amendment, the Fourth District had ruled in Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982), that a surety of a transfer bond was liable for a lien claimant's attorney's fees only to the extent of $100. The Third District, in Old General Insurance Company v. E.R. Brownell & Associates, Inc., 499 So.2d 874 (Fla. 3rd DCA 1986), had ruled in a similar fashion.

In the present case, the Fourth District relied on the deletion of language previously in the statute, "and costs not to exceed $100", in ruling that the $100 cost recovery limitation had been repealed by statutory amendment. Nor, according to the Fourth District, is there a $500 limitation on costs. Rather, the Fourth District held that all of Buck's reasonable attorneys and costs could be recovered against the surety Aetna.

The Third District, in Fidelity and Deposit Company of Maryland v. DiStefano Construction Company, Inc., 562 So.2d 845 (Fla. 3rd DCA 1990) held that §713.24 only authorized payment of costs up to $500, thereby disallowing DiStefano's attorney's fees in excess of this amount against the surety.

The Fourth District expressly stated in its decision that it is in conflict with the Third District. The cases are factually indistinguishable, and further, are wholly irreconcilable, Williams v. Duggan, 153 So.2d 726 (Fla. 1963). The decisions are out of harmony, thereby causing confusion and instability, Kyle v. Kyle, 139 So.2d at 887. The conflict appears on the face of the Fourth District's opinion, Hardy

v. State, 534 So.2d at 708. Accordingly, this Court has jurisdiction pursuant to Article V §3(b)(3) of the Florida Constitution.

The Court should accept jurisdiction since the conflicting decisions create uncertainty among owners, lien claimants, and sureties. In particular, the decisions will have an unsettling impact on the underwriting criteria of sureties when issuing bonds to transfer liens to security. The exposure that sureties face within the Third District is far less than the sureties' exposure within the Fourth District. This Court must resolve this conflict to provide uniformity throughout the state for sureties, owners and lien claimants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on jurisdiction has been furnished by to JOSEPH VASSALLO ESQUIRE, 3501 South Congress Avenue, Lake Worth, Florida 33461 and an original and five (5) 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 21st day of December, 1990.

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JMJ\fgm\25518\brief

IN THE SUPREME COURT OF FLORIDA

Fourth District Court
of Appeal Case No: 89-02906

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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.

PETITIONERS' APPENDIX

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JMJ/25518/APPLE.11

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on jurisdiction has been furnished by regular U.S. Mail, this 16th day of November, 1990, to JOSEPH VASSALLO ESQ., 3501 South Congress Avenue, Lake Worth, Florida 33461 and an original and five (5) copies were mailed to The Supreme Court - State of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925.

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JMJ/25518/APPLE.7

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1990

PAPPALARDO CONSTRUCTION COMPANY and the AETNA CASUALTY AND SURETY COMPANY,

Appellants,

v.

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

Appellee.

CASE NO. 89-2906.

Opinion filed October 17, 1990

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Palm Beach County; Richard I. Wennet, Judge.

John M. Jorgensen of Scott, Royce, Harris, Bryan & Hyland, P.A., Palm Beach Gardens, for appellants.

Joe Vassallo and Isidro M. Garcia of Joseph A. Vassallo, P.A., Lake Worth, for appellee.

PER CURIAM.

We affirm the final judgment and order herein, finding no error.

Gordon Buck d/b/a American Metal Fabricating entered into an oral contract with Pappalardo Construction for the furnishing of metal construction materials. These materials were delivered to the construction site at Bay Colony and incorporated into the improvement. The parties disputed the reasonableness of the delivery time. Pappalardo Construction did not pay fully for the materials. Buck filed a claim of lien which Vincent J. Pappalardo transferred to a surety bond.

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Bay Colony Land Co. and First American Juno Beach Corporation, a joint venture d/b/a Bay Colony, owned the property. Vincent J. Pappalardo was the president and sole shareholder of Bay Colony Land Co. In addition, Vincent J. Pappalardo was the president and sole shareholder of Pappalardo Construction Co., which acted as the general contractor for the development.

Appellee did not file a notice to owner and filed his claim of lien against Vincent J. Pappalardo, rather than the joint venture. The notice of commencement on the job site listed as the owner the joint venture and gave as the address c/o Vincent J. Pappalardo, 4440 P.G.A. Blvd., Suite 501, Palm Beach Gardens, Florida 33410. The contractor was listed as Pappalardo Construction Co. at the same address minus the suite number.

At trial James Palermo, the project manager for Pappalardo Construction, testified that he believed the owner of the property to be Mr. Pappalardo, that he dealt with Mr. Pappalardo, and that he had discussed this information with Mr. Buck who had asked him who owned the property.

Pappalardo testified that as the general agent for the joint venture he went on the job site once or twice a day, and testified as to knowledge and approval of the contract between Pappalardo Construction and Buck.

I

Whether the absence of a notice to owner can be excused depends upon whether privity requires both knowledge and an express or implied assumption of the contract obligation or

only knowledge. Appellants argue that both are needed. Appellee responds that only knowledge is required where there is common identity between the owner and general or subcontractor with which the contract was entered. The trial court agreed with appellee, as do we.

In Broward Atlantic Plumbing Co. v. R.L.P., Inc., 402 So.2d 464 (Fla. 4th DCA 1981), this court adopted the reasoning of the second district made in Boux v. East Hillsborough Apartments, Inc., 218 So.2d 202 (Fla. 2d DCA 1969), in concluding there was privity between the claimant and the owners, who were also the principals in the contracting corporation. The said notice to owner was not required. See also Symons Corp. v. Tartan-Lavers Delray Beach, Inc., 456 So.2d 1254 (Fla. 4th DCA 1984), and Fidelity & Deposit Co. v. La Centre Trucking, Inc., 559 So.2d 1242 (Fla. 4th DCA 1990).

Both parties acknowledge that privity is not defined in the mechanic's lien law. Tompkins Land Co. v. Edge, 341 So.2d 206, 207 (Fla. 4th DCA 1976). The courts have determined when privity arose on the particular facts of each case. A presumption of privity arises where the owner acts as his own contractor and contracts with the lien claimant, albeit in his capacity as contractor. These circumstances relieve the lien claimant of the statutory obligation of section 713.06(2)(a), Florida Statutes, to notify the owner of the claim of lien. Broward Atlantic Plumbing Co., 402 So.2d at 466.

The purpose of the notice to owner requirement is important in determining when such notice is unnecessary; namely,

notice to one not in privity with the claimant is to protect an owner from paying to the contractor sums which ought to go to a subcontractor who remains unpaid. Boux, 218 So.2d at 202. The cases finding no privity between owner and subcontractor where the owner did not expressly assume or impliedly assume the obligation to pay are cases in which owner and contractor do not share an identity. Such is not the case here; therefore, Tompkins Land Co. is factually distinguishable.

As appellee points out, findings of fact by the trial court are clothed with a presumption of correctness. Marsh v. Marsh, 419 So.2d 629 (Fla. 1982), rev. dismissed, 427 So.2d 737 (Fla. 1983). The trial court found privity between the owner and the contractor in the instant case so that notice to owner was not required. If competent, substantial evidence supports the finding, this court should not disturb it. Marcoux v. Marcoux, 475 So.2d 972 (Fla. 4th DCA 1985), rev. denied, 486 So.2d 597 (Fla. 1986). The trial court's findings are supported by the record. Vincent J. Pappalardo knew of and ratified the contract with Buck.

In fact, Pappalardo's attorney stated at trial, "Obviously we have notice to the owner who knew about it, even though there was no notice to owner." Appellants' argument is not based on lack of actual or implied notice. It rests on the requirement of express or implied assumption of the contractual obligation to pay. Since this court, as discussed above, has not recognized an assumption requirement where common identity exists, we affirm the trial court's holding that the notice to owner requirement was excused.

Nevertheless, we acknowledge conflict between our decision in this case and Floridaire Mechanical Systems, Inc. v. Alfred S. Austin-Daper Tampa, Inc., 470 So.2d 717 (Fla. 2d DCA), rev. denied, 480 So.2d 1293 (Fla. 1985).

II

Both parties agree that the second issue is controlled by section 713.24, Florida Statutes, as amended, which became effective October 1, 1987. This section states in relevant part:

> 713.24 Transfer of liens to security.--
> (1) Any lien claimed under part 1 may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either:
> (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 the legal rate for 3 years, plus $500 to apply on any court costs which may be taxed in any proceeding 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.

Prior to the amendment, section 713.24 limited costs to $100. Section 713.29 states that attorney's fees are taxed as costs. Prior to 1987, Florida case law was clear that the language which limited costs to $100 meant that both a principal and surety of a transfer bond that transferred a mechanic's lien to security were liable for a lien claimant's attorney' fees only to the extent of the $100. Gesco, Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982), rev. denied, 426 So.2d

27 (Fla. 1983). See also Old General Ins. Co. v. E.R. Brownell & Assoc., Inc., 499 So.2d 874 (Fla. 3d DCA 1986); Gulfstream Pump & Equip. Co. v. Grosvenor Dev., Inc., 487 So.2d 330 (Fla. 2d DCA 1986).

Appellee asserts that the 1987 revision not only increased the amount the surety was required to post for any imposition of court costs, but also eliminated any restriction on the amount of court costs for which the surety could be held liable. Appellee offers two reasons for this view, which the trial court recounted in its order and which we find persuasive. The first reason is the inconsistency in allowing a lienor to recover attorney's fees on a mechanic's lien and limiting the recovery to $100 in costs once the lien is transferred. No apparent reason for the discrepancy exists, particularly since the purpose of the mechanic's lien law is to protect subcontractors and materialmen.

The second reason follows from the first. The legislature sought to correct the discrepancy by omitting the language "and costs not to exceed $100.00" in the 1987 revisions. Appellee argues that such an omission is a statutory revision and is not ambiguous, citing Capella v. Gainesville, 377 So.2d 658 (Fla. 1979), for the proposition that the omission of a word in the amendment of a statute will be assumed to be intentional. Hence, when the legislature amends a statute by omitting words, the presumption is that the legislature intended the statute to have a different meaning than that accorded it before the amendment. Id. at 660.

Following this view leads to the conclusion that while the amendment increased to $500 from $100 the amount the surety had to post toward any imposition of costs, it repealed the $100 cost recovery limitation so that no limitation now exists on section 713.24 bonds. Appellee notes that a leading treatise on the Florida Mechanic's Lien Law takes this view. Rakusin, Florida Mechanic's Lien Manual 16.

The third district failed to find this view appealing. In a recent case, which the parties did not bring to this court's attention, the third district held that section 713.24, Florida Statutes (1986) [sic], only authorized payment of costs up to $500. (The use of 1986 must be error as this section is not contained in the 1986 Supp. and the increase to $500 was made in 1987.) Fidelity & Deposit Co. v. DiStefano Constr. Inc., 562 So.2d 845 (Fla. 3d DCA 1990). The third district relied on case law prior to the 1987 amendment and did not comment on any effect the deleted words of section 713.24, Florida Statutes (1987) may have had.

We believe the trial court expressed the better view of the 1987 amendment based on both the rules of statutory construction and the philosophy behind the mechanic's lien law; and we acknowledge conflict with the third district's decision in Fidelity & Deposit Co.

Finally, appellants argue that any recovery against the surety is limited to the face amount of the bond posted, citing Ohio Cas. Ins. Co. v. Oakhurst Homes, Inc., 512 So.2d 1156 (Fla. 2d DCA 1987). While true that a trial court cannot

increase the liability of a security company beyond the amount of the bond, the trial court can order the party providing the bond to increase the amount. Id. at 1157. Appellee asserts that because the surety did not object to the ore tenus motion when appellee made it, it cannot now complain. The trial court stated in its order increasing the bond amount that appellants did not object at the hearing. In addition, as appellee notes, section 713.24(3), Florida Statutes (1987), empowers the trial court to require additional security "at any time, and any number of times." Accordingly, we affirm the trial court's order granting appellee attorney's fees against the surety, Aetna, and increasing the bond amount.

LETTS, GLICKSTEIN and GARRETT, JJ., concur.