045
w/app

IN THE SUPREME COURT OF FLORIDA

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

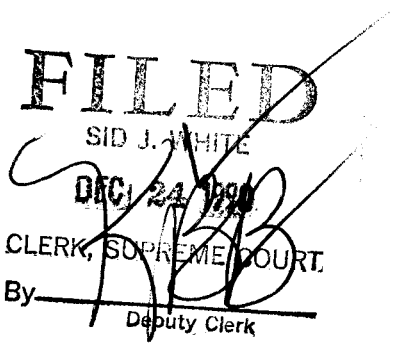
Petitioners,

vs.

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

Respondent.
_____/

Case No.: 76,925
4th DCA Case No.: 89-02906



RESPONDENT'S AMENDED BRIEF ON JURISDICTION

JOSEPH A. VASSALLO, P.A.

BY: ISIDRO M. GARCIA, ESQUIRE
3501 South Congress Avenue
Lake Worth, FL 33461
(407) 964-9455

Florida Bar No.: 437883

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

STATEMENT OF THE CASE AND FACTS

Respondent substantially agrees with petitioner's statement of the case.

Respondent substantially agrees with paragraphs one (1), two (2) and three (3) of petitioner's statement of the facts, but not with paragraph four (4) because of important omissions not set forth therein. The notice of commencement lists the joint venture address as c/o Vincent J. Pappalardo individually (Appendix, 1). Pappalardo was the developer, owner, sales representative and general contractor on the project. Although he has a bewildering number of corporate entities, partnerships, etc. that he disguises himself under, in the end, after the corporate shells are cracked, he is the yolk of all these enterprises.

When the transfer bond was posted, Pappalardo was listed individually as principal on the bond and "owner" on the clerk's certificate. (Appendix, 2). Section 713.24(1) requires that the lien transfer may be effected "...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..." The fact that Pappalardo, not Bay Colony Land Co., or First American Equity Juno Beach Corporation (as owners), nor Pappalardo Construction Company (as contractor) are listed as principal on the bond exposes the shell game Pappalardo was involved in and reveals that after all the layers are peeled away, he is the owner of the property which was liened.

SUMMARY OF THE ARGUMENT

Respondent concedes that there is apparent conflict jurisdiction on the first issue, whether privity between the lienor and owner excuses the Notice to Owner requirement under Chapter 713, because recent decisions of the Second District are, on the surface, in conflict with the Fourth District on this issue. However, a close analysis of the Second District cases relied upon by petitioner shows that they are factually distinguishable from the case here and therefore not in conflict at all.

Respondent denies that the Fourth District decision here, and its prior decisions on this issue, are in conflict with the decisions of this Court concerning the issue of privity, because the cases of this Court relied on by petitioner are clearly factually distinguishable.

Respondent does not agree that there is a conflict between the Third District and Fourth District on the effect of the legislative revision to Section 713.24, Fla. Stat. (1987). The Third District did not, in the face of the decision petitioner alleges creates a conflict, adjudicate the issue of the effect of the 1987 statutory revision to Section 713.24. Moreover, because of the date that the claim of lien was filed in that case (prior to 1987), the statutory revision, if determined to be substantive rather than procedural, may not even apply in the Third District case.

ARGUMENT

Point 1. This and prior decisions of the Fourth District Court of Appeal are not in conflict with recent decisions of the Second District Court of Appeal.

The Fourth District Court of Appeal decision below, and prior cases by that Court, do appear to conflict with the recent decisions of the Second District Court of Appeal, but not with the seminal case of Boux v. East Hillsborough Apartments, Inc., 218 So.2d 202 (Fla. 2nd DCA 1969). In fact, in Boux, supra, the Second District held that where there is common ownership/identity between the owner and the party contracting with the lienor, the lienor is excused from the requirement of furnishing a notice to owner. The Second District has never expressly repudiated Boux, even in the recent cases on this issue noted by petitioner. See: 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); New Image Carpets v. Sandery Construction, Inc., 541 So.2d 1235 (Fla. 2nd DCA 1989).

Although the cases seem to conflict, the facts between these two recent Second District cases and the case here are sufficiently different as to reconcile then.

Hence in Floridaire Mechanical Systems, Inc., supra, a partner who owned the property was also 96 per cent stockholder and president of the general contractor, with which the lienor had contracted. However, unlike the case here, there is no

indication that the person who served in a dual capacity in that case had any notice of the contract between the lienor and the general contractor, unlike the case here, where the Fourth District noted from the trial transcript that petitioner's counsel admitted during trial that "[o]bviously we have notice to the owner who knew about it, even though there was no [formal] notice to owner." Pappalardo Construction Company, ___ So.2d __, 15 FLW D2596 (Fla. 4th DCA 1990). From the facts appearing in the Floridaire case, the person who owned the property and was president of the general contractor does not appear to have had any knowledge of the contractual relationship between the lienor and the general contractor, and for that reason a notice to owner was necessary.

In New Image Carpets, Inc. v. Sandery Construction, Inc., 541 So.2d 1235 (Fla. 2nd DCA 1989), the Second District held that knowledge to the owner could not be imputed through the general contractor, by mere virtue of the fact that the G.C. was a member of the joint venture which owned the property, since there was no allegation that the joint venture was involved with the G.C. on the work on the property. Id. at 1236. In this case, contrary to New Image, Pappalardo, the owner of the G.C. and property, was involved in the work on the property, and testified to that effect at trial. In fact, Pappalardo was involved to the point of having to approve every subcontract, including respondent's. Moreover, in New Image, unlike here, there is no express finding in the appellate decision that the owner had any notice of the

contract between the G.C. and lienor, making the notice to owner necessary.

The Floridaire and New Image, supra, cases are, on the particular facts adduced in the appellate decisions, distinguishable from the facts before this Court, and accordingly, not in conflict. Therefore, this Court does not have conflict jurisdiction to hear petitioner's appeal. Further, the fact that the Second District has not departed from Boux, supra, supports the argument that Floridaire, supra, and New Image, supra, are confined to fact situations where the persons who served in a dual capacity did not have notice of the lienor's contract. As noted in Boux, "[i]t can not be said [from the particular record in that case] that... the officers of both corporations, were ignorant of this claim." 218 So.2d at 202; such a finding is not reflected in the decisions of Floridaire and New Image.

Point 2. The Fourth District Court of Appeal decision does not conflict with prior decisions of this Court on the same question of law.

Petitioner argues that the Fourth District decision is contrary to two prior decisions of this Court, Foley Lumber Co. v. Koester, 61 So.2d 634 (Fla. 1952), and First National Bank of Tampa v. Southern Lumber and Supply Co., 145 So.2d 594 (Fla. 1932). An examination of the facts of these cases reveals that neither involved common ownership/identity between the owner and the party contracting with the lienor, accordingly said cases are not applicable to the case decided by the Fourth District here.

In Foley, supra, a materialman (Foley) and tile subcontractor (Moyer) sought to enforce a lien against the home owners (the Koesters). 61 So.2d at 635. The Koesters had retained Leeds and Brinn as the contractors, Id. at 635. Leeds and Brinn in turn contracted with Foley to furnish materials to the job site. Id. at 636. Foley billed Leeds, one of the two contractors. Id. at 636. Foley never billed or dealt with the Koesters "in any way," Id. at 636, although the Koesters had made one check payable directly to Foley. Id. at 636. Foley claimed money was due for materials, but the Koesters refused to pay. Foley filed a lien and sued the Koesters, but without providing the cautionary notice. Id. at 636.

This Court held that because Foley had neither filed a notice of intention to claim lien, nor a notice to owner, it could not proceed against the Koesters under the mechanic's lien law. Id. at 638. Further, this Court rejected Foley's claim that Leeds and Brinn were "agents" of the Koesters (and thereby Foley's dealings with the former put him in privity with the latter) because it found the contact to be insufficient as a matter of law to establish privity. Id. at 638. As to the tile subcontractor, Moyer, the Court held that there was sufficient evidence of privity between he and the Koesters, thereby excusing him from the notice requirements, since Moyer dealt directly with the Koesters, not through Leeds and Brinn. Id. at 639.

Similarly, in First National Bank of Tampa, supra, the owner (Halle) had contracted with a contractor (Anderson Investment

Company), who in turn contracted with a material supplier (Southern Lumber and Supply Company). 145 So. at 595. Because the owner was in no way related to the contractor, the material supplier, who had never dealt with the owner, could not claim privity through the contractor.

Unlike the case presently before this Court, Foley and First National Bank of Tampa did not involve common ownership/identity between the owner and the party contracting with the lienor. Accordingly the rule of privity applied in those cases (knowledge of the owner and an express or implied assumption by the owner to pay for the labor or materials furnished), is not applicable here. In Foley and First National Bank of Tampa, the owners' obligation was to the general contractor(s), not the lienors who had contracted with the general. In the case here, the owner and general contractor, were, in fact, one and the same, albeit disguised under differently named corporate shells. Vince Pappalardo was the president and sole owner of the general contractor (Pappalardo Construction Co.) and president and sole owner of one[1] of the owners of the project to which respondent supplied materials (Bay Land Co.). Pappalardo acknowledged at trial that he knew of and in fact had expressly approved Buck's contract. In Foley and First National Bank of Tampa, the owners did not have such knowledge, nor gave such approval, since they

---

[1]The other "owner" of the project was a nominal party not named in the case, a corporation set up by the construction lender. Mr. Pappalardo served as agent for the joint venture and was listed in the notice of commencement as the receptacle through which the owner could be noticed.

never directly dealt with the lienors, but rather relied upon the general contractors to assume that responsibility.

In short, the cases of Foley and First National Bank of Tampa, duly considered by the Fourth District and briefed by the parties, are distinguishable from the facts of this case. Hence, there is no conflict between those decisions and that of the Fourth District here.

Point 3. The Third District decision concerning Section 713.24, Fla. Stat. (1987) concerns said statute prior to the effective date of amendment in 1987, and is therefore not in conflict with the Fourth District decision here.

Petitioner argues that the case of Fidelity and Deposit Company of Maryland v. DiStefano Construction, Inc., 562 So.2d 845 (Fla. 3rd. DCA 1990), pet. for rev. pending, ___ So.2d __ (Fla. 199__) is in conflict with the case here. From consultation with counsel for DiStefano Construction, Inc., Mr. Ronald Gosett, undersigned can represent to the Court that the lien in said case was filed prior to when the 1987 legislative revision to Section 713.24 went into effect in 1987. The claim of lien here was filed October 26, 1987, after the statutory revision went into effect. In this case it is clear that Section 713.24, as revised, applies.

The Third District in DiStefano, supra, purported to apply the 1987 statutory revision, but unexplainably cited a 1986 Florida Statutes book which, as the Fourth District pointed out here, "...must be in error as this section is not contained in

the 1986 Suppl. and the increase to $ 500 was made in 1987." Pappalardo Construction Company v. Gordon F. Buck, supra, 15 FLW at D2597. Regardless, it is clear, as the Fourth District noted, that 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." Id. at D2597.

The Third District decision, although noted by the Fourth District decision to be in conflict with the latter's decision here, Id. at 2597, is perhaps not in conflict at all, since the statutory revision applied was not fully considered by the Third District. Moreover, if that statutory change is deemed substantive rather than procedural, the lienor in the Third District case may be precluded from relying upon the revision in Section 713.24, since its lien was filed prior to the effective date of the amendment. The Third District decision focused not on the change in Section 713.24, but on the applicability of Section 627.428 , Florida Statutes (1987) to lien claims under Chapter 713. Although there is an implicit conflict if this Court determines that the revision to Section 713.24 applies in DiStefano, supra, it was an issue that was not considered on the face of the Third District decision, hence it cannot be said to be in conflict with the Fourth District decision here.

Accordingly, it is respectfully submitted that this Court does not have conflict jurisdiction to review the decision of the Fourth District on this issue.

CONCLUSION

Respondent concedes apparent conflict exists between recent decisions of the Second District and the decisions of the Fourth District on the first issue, whether privity between the owner and lienor excuses the notice to owner requirement; however, a close review of the facts reveals that the Second District decisions are distinguishable from the facts relied upon here by the trial court and Fourth District. Further, since the Second District has not receded from Boux, supra, it is reasonable to assume that where there is notice to the person acting in a dual capacity, e.g. as owner and G.C., the privity exception to the notice to owner requirement will apply in the Second District, just as it does in the Fourth District. Further, it is clear that no conflict between the decisions of this Court and the decision of the Fourth District exists on the privity issue, as the cases relied upon by petitioner are obviously factually distinguishable. Finally, on the third issue, the decision of the Third District is not, on its face, in conflict with the decision of the Fourth District, since it is not apparent that the Third District even considered the effect of the 1987 statutory revision to Section 713.24, nor is it clear that said revision applies to the case decided by the Third District.

Respondent respectfully requests that this Court deny review in this case and let stand the decision of the Fourth District.

Respectfully submitted,

JOSEPH A. VASSALLO, P.A.

By: _____

ISIDRO M. GARCIA, ESQUIRE
3501 South Congress Avenue
Lake Worth, Florida 33461
(407) 964-9455

Fla. Bar No.: 437883

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U. S. Mail this 20th day of December, 1990 to JOHN M. JORGENSEN, ESQUIRE, Scott, Royce, Harris, Bryan & Hyland, P.A., 4400 PGA Blvd., Suite 900, Palm Beach Gardens, FL 33410.

_____

ISIDRO M. GARCIA, ESQUIRE

Q47

FILED
SID J. WHITE
DEC 19 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

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.
_____/

Case No.: 76,925
4th DCA Case No.: 89-02906

RESPONDENT'S APPENDIX

JOSEPH A. VASSALLO, P.A.

BY: ISIDRO M. GARCIA, ESQUIRE
3501 South Congress Avenue
Lake Worth, FL 33461
(407) 964-9455

Florida Bar No.: 437883

INDEX TO APPENDIX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U. S. Mail this 18th day of December, 1990 to JOHN M. JORGENSEN, ESQUIRE, Scott, Royce, Harris, Bryan & Hyland, P.A., 4400 PGA Blvd., Suite 900, Palm Beach Gardens, FL 33410.

ISIDRO M. GARCIA, ESQUIRE