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SUPREME COURT
OF THE STATE OF FLORIDA

Case No. 77,286

AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

v.

LARKIN GENERAL HOSPITAL, LTD., ETC.,

Respondent.

On Discretionary Review Upon Certified Conflict From the District Court of Appeal, Third District

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES E. GLASS ASSOCIATES
6161 Blue Lagoon Drive
Suite 350
Miami, Florida 33126
Attorneys for Larkin

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LAW OFFICES OF JAMES E. GLASS ASSOCIATES • 6161 BLUE LAGOON DRIVE • SUITE 350 • MIAMI, FLORIDA 33126 • (305) 264-6688

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PRELIMINARY STATEMENT

This Court has been requested to review an Opinion issued from the Third District Court of Appeal, affirming per curiam the trial court's Corrected Final Judgment, citing as authority recent decisions of the Fourth and Second District Courts of Appeal, and certifying conflict with a 1978 opinion rendered by the First District Court of Appeal.

The Corrected Final Judgment affirmed by the Third District Court of Appeal confirmed an Arbitration Award in favor of LARKIN GENERAL HOSPITAL, LTD., n/k/a LGH, LTD. ("LARKIN") and against AMERICAN HOME ASSURANCE COMPANY ("AMERICAN"), adjudicated AMERICAN's Counterclaim for declaratory relief, and dismissed H CORPORATION/CAZO-ARDAVIN JOINT VENTURE II's ("CONTRACTOR") Amended Complaint to foreclose mechanic's lien.

The proceedings below involved two actions arising out of a construction project for the "Addition and Alteration to Larkin General Hospital", in Miami, Dade County, Florida (the "Project") owned by LARKIN, being:

(1) An action by LARKIN against AMERICAN on a Performance Bond issued by AMERICAN, as surety, and CONTRACTOR; and

(2) An action by CONTRACTOR against LARKIN to foreclose a mechanic's lien.

The following symbols will be used:

"R" - Record on Appeal;

"Tr. Ex." - Trial Exhibit

The transcript of the trial held March 6, 1990, in the Dade County Circuit Court, the Hon. Ronald M. Friedman presiding, comprises the entire Volume III of the Record. References to the transcript will be "R.III-(page)"

Unless otherwise stated, all emphasis is ours.

STATEMENT OF THE CASE AND THE FACTS[1]

In 1982, LARKIN entered into a Standard Form of Agreement Between Owner and Contractor ("Construction Contract") with CONTRACTOR, wherein CONTRACTOR was required to furnish all labor and material for the Project and was to achieve substantial completion of the work no later than May 31, 1984. (Tr.Ex.1) The Project consisted of building a new five-story tower adjacent to, and adding a fifth story over, the existing four-story hospital, and altering portions of the old hospital to interface with the new to achieve one integrated medical facility. (Tr.Ex.1)

AMERICAN executed and delivered to LARKIN a Performance Bond ("Bond") conditioned upon CONTRACTOR promptly and faithfully performing the terms and conditions of the Construction Contract. (Tr.Ex.2)

CONTRACTOR failed to perform the Construction Contract and on November 23, 1985, LARKIN terminated the Construction Contract and gave AMERICAN and CONTRACTOR simultaneous notice of CONTRACTOR's default. (R.158) In the event of default under the Bond, AMERICAN was obligated:

> "Whenever Contractor shall be, and declared by Owner to be in default under the contract ... the Surety may promptly remedy the default, or shall promptly -
>
> 1. Complete the contract in accordance with its terms and conditions: or
>
> 2. Obtain a bid or bids for completing the contract in accordance with its terms and conditions and ... make

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[1] LARKIN disagrees with the Statement of the Case and the Facts contained in Petitioner's Initial Brief on the Merits which fails to include many basic facts. LARKIN offers this Statement of the Case and the Facts pursuant to Rule 9.120(c), Fla.R.App.P.

> available as work progresses sufficient funds to pay the cost of completion ..." (Tr.Ex.2)

AMERICAN failed to remedy CONTRACTOR's default, failed to complete the Construction Contract, and failed to make funds available for the completion of the Construction Contract. (R.158) AMERICAN chose to do nothing in this particular case and at trial, AMERICAN's Bond Claim attorney testified:

> "In effect we are deciding that the construction is in such a delay that the surety does not want to get involved in picking up the pieces at this particular time, and in effect the Owner was told to complete it, and the Surety will discuss the cost of completion and ... what it may be liable for at a later date." (R.III-34)

AMERICAN failed to advise LARKIN of this "decision" and LARKIN was forced to hire and pay a substitute contractor to correct and complete the Project. (R.III-78)

Thereafter, LARKIN brought suit against AMERICAN for breach of the Bond (the "Bond Action") (R.1) CONTRACTOR then filed a Demand for Arbitration against LARKIN with the American Arbitration Association (Tr.Ex.3), and filed suit against LARKIN in the Dade County Circuit Court to foreclose its Mechanic's Lien (the "Mechanic's Lien Action"). Almost immediately after filing the Mechanic's Lien Action, CONTRACTOR filed a Motion to Abate the [Mechanic's Lien] Action Pending Arbitration.[2]

AMERICAN failed to answer the Complaint in the Bond Action, and in an effort to gain AMERICAN'S attention, LARKIN moved for a default.[3] (R.9) AMERICAN filed a Verified

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[2] The Mechanic's Lien Action was subsequently consolidated with the Bond Action. (R.31) For reasons unknown, the pleadings filed in the Mechanic's Lien Action were not included in the record. These pleadings have no bearing on any of the issues on appeal.

[3] No default was entered against AMERICAN.

Motion to Vacate Default and Default Final Judgment (if Entered) ("Verified Motion to Vacate") advising the Court that (1) counsel for AMERICAN was also counsel for CONTRACTOR; (2) the dispute between LARKIN and AMERICAN was already the subject of an active and pending arbitration between LARKIN and CONTRACTOR; and (3) the Bond specifically incorporated the construction contract and therefore the arbitration clause was binding as well on all disputes between AMERICAN and LARKIN. (R.10)

The Verified Motion to Vacate purported to set forth the legal requirements of "excusable neglect" and "meritorious defense", in both instances relying on the pending arbitration. AMERICAN swore to the Court that it relied on the arbitration as grounds for not answering the Complaint: "Counsel ... in good faith believed that the dispute was not being resolved in Court, where no jurisdiction exists, but, in fact, in the arbitration". (R.11) The Verified Motion to Vacate sets forth AMERICAN'S "meritorious" defense to the action based on the claims made by its principal (CONTRACTOR) in the Demand for Arbitration. (R.11) The Verified Motion to Vacate was verified by AMERICAN'S Bond Claim attorney and by counsel for AMERICAN and CONTRACTOR. (R.13) Shortly thereafter, AMERICAN filed a Motion to Dismiss or Abate Action Because of the Pending Arbitration Case (R.29) again advising the Court that the Arbitration Panel was deciding all disputes between the parties and that AMERICAN would be bound by the arbitration. (R.30)

The Bond Action and the Mechanic's Lien Action remained dormant while LARKIN and CONTRACTOR proceeded to arbitrate.

Prior to the Final Arbitration Hearing, AMERICAN was being represented by the firms of VALDES-FAULI, COBB & PETRY, P.A. (who also represented CONTRACTOR) and by

KIMBRELL & HAMANN. (R.160) In response to a letter from VALDES-FAULI inquiring whether KIMBRELL & HAMANN wished to participate in the arbitration, Mr. Robert Tucker of the firm of KIMBRELL & HAMANN responded:

> "... I do not see any advantage for Surety to participate in the Arbitration hearing. I presume your client [CONTRACTOR] will be satisfying any amount LARKIN GENERAL HOSPITAL may recover in the event of an adverse Arbitration award. Therefore, is there any reason for Surety to participate in the Arbitration hearing?
>
> As far as the Circuit Court action is concerned, it appears that the issues in that case will become moot when the Arbitration matter has been resolved. My client [AMERICAN] has full confidence in your firm's ability to properly represent them in the Circuit Court action." [Emphasis supplied] (Tr.Ex.7)

CONTRACTOR and LARKIN proceeded to arbitrate all claims pending between the parties, as set forth in the Demand for Arbitration, Answer and Counterclaim: whether CONTRACTOR breached the Construction Contract; whether CONTRACTOR timely performed the Construction Contract; whether CONTRACTOR was properly terminated; and damages. (Tr.Ex.3, 4 and 5)

After a Final Arbitration Hearing, the Arbitration Panel entered a net Award of the Arbitrators ("Arbitration Award") against CONTRACTOR and in favor of LARKIN in the amount of $1,860,544.00. (Tr.Ex.6)

LARKIN thereafter filed an Application to Confirm Arbitration Award in the Bond Action, seeking to confirm the Arbitration Award against CONTRACTOR and AMERICAN. R.44) AMERICAN then filed a Counterclaim and moved to stay the confirmation proceeding pending a determination of the "coverage" issue raised by the Counterclaim. (R.51) Simply stated, by the Counterclaim AMERICAN sought a declaration that AMERICAN'S liability to

LARKIN on the Bond was limited to the cost of completion and did not include delay damages. (R.37) The Court entered an Amended Order Granting Motion to Stay Confirmation of Arbitration Award, pending resolution of the issues raised in AMERICAN's Counterclaim for declaratory relief. (R.63)

Since the "coverage" issue was a pure question of law, AMERICAN presented the issue by a Motion for Partial Summary Judgment relying on *United States Fidelity & Guaranty Company v. Gulf Florida Development Company, 365 So.2d 748 (Fla. 1st DCA 1978)*, for the proposition that a surety on a performance bond was not liable for "delay" damages and was only responsible for the cost of completion and correction. (R.80)

LARKIN filed a Memorandum of Law in Opposition to American Home's Motion for Partial Summary Judgment, citing, inter alia, the more recent Fourth District Court of Appeal decision of *St. Paul Fire & Marine v. Woolley/Sweeney Hotel No.5, 545 So.2d 958 (Fla. 4th DCA 1989), rev.den. 553 So.2d 1166 (Fla. 1989)*, which held that a surety was liable for all damages assessed against a contractor in an arbitration proceeding between contractor and owner, including delay damages. (R.93) The Trial Court denied AMERICAN's Motion for Partial Summary Judgment, and, acknowledging conflict between the First District and the Fourth District, concluded that: "The Fourth District's opinion in *Woolley/Sweeney* is the better reasoned and more compelling rule of law." (R.136) The Court thereafter vacated the stay and set the remaining issues for non-jury trial. (R.151)

At the eleventh hour, AMERICAN sought leave of Court to "amend" its affirmative defenses and raise defenses "personal" to the Surety. (R.146) The additional affirmative defenses alleged that AMERICAN was prejudiced by LARKIN delaying termination of the

CONTRACTOR for 18 months after the original contract completion date. (R.149)[4] LARKIN and AMERICAN proceeded to trial on LARKIN's Application to Confirm Arbitration Award and on AMERICAN's "personal" affirmative defenses. The parties stipulated to all significant factual issues, including: the identity and relationship of the parties; CONTRACTOR's default; AMERICAN's notice of the default; AMERICAN's failure to cure CONTRACTOR's default and/or complete the contract; AMERICAN's opportunity to participate and decision not to participate in the arbitration; and the Arbitration Award. (R.156)

At trial, LARKIN offered the stipulated facts and accompanying uncontested exhibits, and rested. (R.III-3 through 16)

Over LARKIN's objections, (R.III-26) AMERICAN then presented its "personal" defenses. (R.III-26 through 74)

After considering all of the evidence, the Court found AMERICAN's "personal" defenses to be without merit, and entered a Final Judgment in favor of LARKIN. (R.210)

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[4] By these "personal" affirmative defenses, Surety was in essence taking the position that its Principal, CONTRACTOR, was in breach of the Construction Contract for failing to complete on time and that Surety was somehow prejudiced by LARKIN's failure to formally declare CONTRACTOR in default and terminate the Construction Contract. This position is completely contrary to the position taken by AMERICAN's principal at the Arbitration: that LARKIN was responsible for the delays and was in breach of the Construction Contract. The issue of who as between CONTRACTOR and LARKIN was responsible for delay was a key issue in the arbitration! Having lost that issue in the arbitration, AMERICAN attempted to switch sides to try to avoid liability.

The Court entered a Corrected Final Judgment (correcting a mathematical error) (R.245) and thereafter assessed attorneys fees against AMERICAN for attorney's fees incurred by LARKIN in the confirmation proceeding (i.e. after the arbitration).[5] (R.252)

AMERICAN appealed both of these orders to the Third District Court of Appeal. (R.240, 241) The parties filed appropriate briefs, basically re-arguing the issues raised in AMERICAN's Motion for Partial Summary Judgment: whether AMERICAN was liable for all damages awarded in Arbitration against CONTRACTOR, including delay damages. Again, AMERICAN rested primarily on the 1978 decision of the First District Court of Appeals in *United States Fidelity & Guaranty Company v. Gulf Florida Development Company, 365 So.2d 748 (Fla. 1st DCA 1978)*. In response, LARKIN cited the recent *Woolley/Sweeney* decision, and also cited the recent decisions handed down by the Fourth and Second District Courts of Appeal. *Arbor Club of Boca Raton, Inc. Ltd. v. Omega Construction Co., 565 So. 2d 357 (Fla. 4th DCA 1990)*; and *Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989)*.

After entertaining oral argument, the Third District Court of Appeal issued its Opinion, affirming the trial court per curium, citing *Woolley/Sweeney*, *Arbor Club of Boca Raton*, and *Fewox*. (R.255-256). On AMERICAN's motion, the Third District Court of Appeal rendered its Opinion on Motion for Certificate of Conflict certifying conflict with *Gulf Florida* (R.257-258)

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[5] The Court disallowed attorneys fees and other costs incurred by LARKIN in the arbitration proceeding since the Arbitration Award did not "itemize the damages" and could have included attorneys fees.

ISSUES PRESENTED

I. CAN AN ARBITRATION AWARD BE CONFIRMED AGAINST A SURETY WHERE THE SURETY HAS NOTICE OF THE ARBITRATION BETWEEN ITS PRINCIPAL (CONTRACTOR) AND THE OBLIGEE ON THE BOND (OWNER) AND AN OPPORTUNITY TO PARTICIPATE IN THE ARBITRATION BUT DOES NOT PARTICIPATE?

II CAN A SURETY RE-LITIGATE ISSUES OF PERFORMANCE, DEFAULT AND NOTICE AS "PERSONAL DEFENSES" WHERE THESE ISSUES WERE PREVIOUSLY DETERMINED IN ARBITRATION BETWEEN OWNER AND CONTRACTOR?

SUMMARY OF ARGUMENT

I. A surety is liable for all damages awarded against its principal in an arbitration proceeding, including delay damages, where the performance bond incorporates the construction contract by reference, and the construction contract contains an arbitration provision. Where a surety has notice of the arbitration instituted against its principal, the surety is bound by the award, regardless of whether surety was a party to the arbitration, and the prevailing party is entitled to an order confirming the award in its favor and against the surety.

II. AMERICAN's "personal" defenses concerning whether CONTRACTOR timely performed the Construction Contract, and whether LARKIN timely terminated CONTRACTOR and timely notified SURETY of the default were resolved in the arbitration and cannot be re-litigated. The pleadings filed in the arbitration proceeding clearly and unambiguously set forth the issues which were the subject of the arbitration proceeding: whether CONTRACTOR breached the Construction Contract; whether CONTRACTOR timely performed the Construction Contract; whether CONTRACTOR was properly terminated; and damages. The principle of collateral estoppel prohibits the re-litigation of facts or issues which were fully litigated and determined in a prior proceeding. A surety is bound by issues resolved in an arbitration involving its principal, where the surety has notice of the arbitration and an opportunity to participate.

ARGUMENT

ISSUE I

AN OWNER IS ENTITLED TO CONFIRMATION OF AN ARBITRATION AWARD AGAINST A SURETY FOR ALL DAMAGES AWARDED OWNER (INCLUDING DELAY DAMAGES) WHERE SURETY HAS NOTICE OF ARBITRATION PROCEEDING BETWEEN ITS PRINCIPAL (CONTRACTOR) AND OBLIGEE (OWNER) AND SURETY IS AFFORDED AN OPPORTUNITY TO PARTICIPATE, BUT DOES NOT PARTICIPATE

The purpose of a performance bond is to insure completion of the work upon default and to insure against any loss the owner suffers as a result of the default. *Florida Board of Regents v. Fidelity & Deposit Company of Maryland, 416 So.2d 30 (Fla. 5th DCA 1982).*

The liability of the surety is measured by the liability of the principal, the surety's liability being co-extensive with that of its principal. *Aetna Casualty & Surety Company v. Warren Brothers Company, Division of Ashland Oil, Inc., 355 So.2d 785 (Fla. 1978); Crabtree v. Aetna Casualty & Surety Co., 438 So.2d 102 (Fla. 1st DCA 1983). Henderson Investment Corp. v. International Fidelity Insurance Co., 16 FLW 640 (Fla. 5th DCA, Mar. 7, 1991)* ("if the contractor owes the debt, so does the surety").

A judgment against a principal is conclusive against a surety even though the surety did not participate in the earlier proceeding. This common law principle applies to an arbitration award obtained against a general contractor where a surety has actual knowledge of the arbitration proceeding, is afforded an opportunity to defend, but chooses not to. *St. Paul Fire and Marine v. Woolley/Sweeney Hotel #5, 545 So.2d 958 (Fla. 4th DCA 1989), rev.den. 553 So.2d 1166 (Fla. 1989).*

Woolley/Sweeney involved an action by an owner against a surety on a performance bond. The Fourth District Court of Appeal held the surety liable for all damages awarded against its principal in an arbitration proceeding, including delay damages, where the performance bond incorporated the construction contract by reference, and the construction contract contained an arbitration provision:

> "We approve the trial court's holding that the appellant, [SURETY] was contractually bound to participate in arbitration with the owner and contractor in a dispute over a hotel construction contract for which the appellant provided a performance bond. The construction contract contained an arbitration provision, and the performance bond incorporated the construction contract by reference. In so doing the appellant bound itself to participate and be bound by the arbitration of any disputes under the construction contract." 545 So.2d at 958-959

See also *Kidder Electrical of Florida, Inc. v. United States Fidelity & Guaranty Company, 530 So.2d 475 (Fla. 5th DCA 1988)* (surety bound by arbitration determination although not a party to arbitration proceeding); *Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989)* (where surety has actual notice of arbitration proceedings instituted against its principal, surety is bound by arbitration determination against its principal and recipient of award is entitled to order confirming arbitration award in its favor against principal and also against surety).

The Fourth District Court of Appeal recently re-visited its *Woolley/Sweeny* decision in *The Arbor Club of Boca Raton, Inc., Ltd. v. Omega Construction Co., Inc., 565 So.2d 357 (Fla. 4th DCA 1990) petition for review dismissed per stipulation*, No. 76, 644 (Fla. Dec. 20, 1990) which also involved an action by an owner against a surety on a performance bond. In *Arbor Club*, the contractor defaulted and surety elected to furnish a contractor to complete the project.

Surety refused to accept responsibility for delay to the project caused before and after contractor's default, i.e. delay caused by contractor and delay caused by surety after contractor's default.

At the conclusion of the trial, the trial judge instructed the jury that the surety was not obligated under its bond to pay any delay damages caused by contractor, and the jury found in favor of the surety on this issue.

The Fourth District Court of Appeal reversed, citing *Woolley/Sweeney* and again holding that delay damages are recoverable against the surety. The *Arbor Club* court also relied on *Amerson v. Christman, 261 Cal. App.2d 811, 68 Cal.Rptr. 378 (1968)*, which also interpreted an identical bond as covering delay damages:

> "To decide whether the surety should also be liable for delay damages, the *[Amerson]* court made the following observations: First, it noted the old rule that the surety's liability is co-extensive with its principal's. Next, it found that the bond incorporated the construction contract by reference, and that the contract provided for timely performance. The court bolstered its conclusion by pointing to the following language in the bond: 'Hartford is obligated to make available sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the surety may be liable hereunder, the amount set forth above' " [Emphasis in original]

The Arbor Club of Boca Raton, Inc., Ltd. v. Omega Construction Company, 565 So.2d at 360 (Fla. 4th DCA 1990) citing *Sobel, Owner Delay Damages Chargeable to Performance Bond Surety, 21 Cal.W.L.Rev.128, 137 (1984).*

The bonds in *Arbor Club, Woolley/Sweeney* and *Amerson* are identical to the bond furnished by AMERICAN in the present suit. (R.131); 565 So.2d at 359.

The *Woolley/Sweeney* and the *Arbor Club* courts both noted conflict with *Gulf Florida*, but both courts determined that the surety's obligation on the performance bond included delay damages. The *Arbor Club* court noted two particularly compelling reasons. First, the bond specifically obligates the contractor to "promptly and faithfully perform" the construction contract, and the surety is liable for the contractor's breach of contractual provisions. *Arbor Club*, 565 So.2d at 360. Second, the *Arbor Club* court noted that the bond obligates the surety, in the event of breach by contractor, to:

> "Make available sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which surety may be liable hereunder the amount set forth above." Arbor Club, 565 So.2d at 360 (Emphasis in original)

AMERICAN had the opportunity to participate in the arbitration and defend against LARKIN's claim. For reasons best known to AMERICAN, it did not do so. CONTRACTOR (AMERICAN's principal) suffered an adverse award in the arbitration proceeding, and now AMERICAN simply does not want to be bound by the result. The trial court correctly concluded that AMERICAN was liable for all damages assessed against CONTRACTOR in the arbitration proceeding.

ISSUE II

A SURETY CANNOT RE-LITIGATE ISSUES OF PERFORMANCE, DEFAULT, AND NOTICE AS "PERSONAL DEFENSES" WHERE THESE ISSUES WERE PREVIOUSLY DETERMINED IN AN ARBITRATION PROCEEDING BETWEEN OWNER AND CONTRACTOR

After suffering an adverse Arbitration Award, and an adverse decision on its Motion for Partial Summary Judgment, AMERICAN sought leave of court to raise as "personal" defenses factual issues concerning CONTRACTOR's timely performance and/or LARKIN's timely termination of CONTRACTOR. In effect, AMERICAN for the first time, took the position that because CONTRACTOR was not defaulted for some eighteen (18) months after the original Construction Contract completion date, LARKIN was untimely in its notice of default to AMERICAN, and AMERICAN was thus relieved from any further liability, or a portion of its liability, under the Bond.

The trial court permitted AMERICAN to offer proof of this alleged prejudice through the testimony of an "expert" witness, who proceeded to dissect and pro rate the Arbitration Award to try to carve out the "delay" portion. For example, the expert compared the contract completion date of May 31, 1984 with the date of default and termination in November 1985, and thereby determined that the CONTRACTOR must have actually defaulted on May 31, 1984, and that LARKIN "waited" 18 months to notify AMERICAN of the default. This simply is not the evidence in either the arbitration or the trial. The CONTRACTOR was declared in default and terminated immediately thereafter. (R.III-76) LARKIN gave notice of the default and termination simultaneously to CONTRACTOR and AMERICAN. (R.158) CONTRACTOR's claim that it was wrongfully terminated was an issue in arbitration as were all of LARKIN's and

CONTRACTOR'S disputes with respect to termination, default, performance, etc. AMERICAN sought to establish this fact at trial in support of its "personal" affirmative defenses simply by comparing two dates "in the dark" without reference to any of the real issues and facts surrounding that time period. AMERICAN's assumption is not supported by any evidence in any proceeding.

In a further attempt to whittle down the Arbitration Award, AMERICAN's expert witness dissected the damages awarded by the Arbitration Panel. The expert considered the lump sum award to LARKIN (which was not "itemized" by the Arbitration Panel) and compared the lump sum to the total of the eight elements of damage LARKIN sought to recover in arbitration. The expert declared that the Arbitrators must have given equal weight to each of the eight items, and pro rated the award accordingly. After making these assumptions, the expert proceeded to extrapolate what AMERICAN should and should not be responsible for based, of course, on the assumption that LARKIN delayed giving notice to AMERICAN by 18 months.

The principle of collateral estoppel prohibits the re-litigation of facts or issues which were fully litigated and determined in a prior litigation. Collateral estoppel applies where the issues are identical, and where the same parties are involved. *Mobile Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977); Nationwide Mutual Fire Insurance Company v. Race, 508 So.2d 1276 (Fla. 3d DCA 1987).* The "prior" litigation includes arbitration proceedings. *Mendelsund v. Southern-Aire Coats of Florida, Inc., 210 So.2d 229 (Fla. 3d DCA 1968) cert.den. 225 So.2d 524 (Fla. 1968).* A surety is bound by an action involving its principal, where the surety has notice of the action and an opportunity to participate. *St. Paul Fire & Marine v. Woolley/Sweeney Hotel #5, 545 So.2d 958 (Fla. 4th DCA 1989), rev. den. 553 So.2d 1166 (Fla.*

1989); Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989); Kidder Electrical of Florida, Inc. v. United States Fidelity & Guaranty Company, 530 So.2d 475 (Fla. 5th DCA 1988).

AMERICAN never contested the arbitration proceeding. AMERICAN was fully aware of the arbitration proceeding and, in fact, used the arbitration proceeding as a means for staying the Bond action in the lower court on the basis that the arbitration proceeding would resolve all issues. All issues concerning CONTRACTOR's performance, or lack thereof, were resolved in arbitration, including the determination of whether CONTRACTOR was properly and timely defaulted. AMERICAN is collaterally estopped from asserting these claims as "new issues" in this action. See, *City of Gainesville, Florida v. Island Creek Coal Sales Company, 618 F.Supp. 513, aff. 771 F.2d 1495 (11th Cir. 1985)* (City was collaterally estopped from bringing RICO and fraud action in connection with a contract to supply coal, since the issue of allegedly deceptive coal sales necessarily included issue of whether the contract had been breached, which issue was decided against the City in prior arbitration proceeding).

The Fifth District recently considered the practical concerns of allowing parties to re-litigate issues which were, or should have been, resolved in arbitration in *PRG, Inc. v. Oviedo Material, Inc., 15 FLW 2796 (Fla. 5th DCA Nov. 15, 1990).*

Oviedo involved a claim by a sub-subcontractor against a subcontractor for monies due under its subcontract. The subcontractor brought a third-party action against the contractor and the owner, and on the owner/contractor's motion, the third-party action was stayed and the parties were compelled to arbitrate. The only issue presented for resolution at the arbitration was a determination of the balance due subcontractor under its subcontract with the owner and

contractor. The Arbitration Panel found in favor of the owner and contractor. The contractor then proceeded to request an award of attorneys fees in the circuit court, pursuant to a clause in the subcontract which allowed recovery of attorneys fees in the event the subcontractor "defaults".

The Fifth District affirmed the trial court's determination that the contractor waived its claim for attorneys fees by not raising it prior to the arbitration. The court noted that while the amount of the attorneys fees can only be set by a court (and not by an arbitration panel), the issue of "default" should have been determined in arbitration, and the contractor was precluded from raising and re-litigating that issue in the circuit court action:

> "Here the contractor was only entitled to recover attorneys fees if the subcontractor defaulted in performance of any of the terms of the subcontract. 'Default' lies peculiarly within the expertise of the arbitrator and its precisely the issue usually arbitrated in a construction case. It would be illogical, as in this case, to arbitrate the subcontractor's claim for monies claimed due under the contract and then go to the circuit court to obtain an adjudication whether the *reason* no monies were due the subcontractor was that the subcontractor was in default. To make the determination whether [subcontractor] was in default of its duties under the subcontract, or whether there was some other reason why it was not entitled to be paid, the circuit court would either have to review the transcript of the arbitration proceedings (if there were one) or conduct another evidentiary hearing. To resort to such a procedure to determine attorney's fees would be absurd." 15 FLW at 2798 (Emphasis in original)

The attorneys fees issue, like the "coverage" issue in the case sub judice, was a legal issue for the court and was not tried in the arbitration. However, the factual issues (i.e. default) as they relate to the legal ones are deemed conclusively determined by the arbitration.

In the instant litigation, the coverage issue was raised in the lower court via AMERICAN'S Motion for Partial Summary Judgment, and was properly disposed as a legal

issue: the motion was denied. However, the facts on which the court below was obligated to apply the law were conclusively decided in the arbitration. AMERICAN is not free to re-litigate these facts or to dissect the Arbitration Award. AMERICAN is, in effect, requesting this Court to give AMERICAN a clean slate and allow AMERICAN to start litigation anew. Alternately, AMERICAN would request this Court to allow it to carve out of the Arbitration Award (which was a lump sum award!) those portions of the award which AMERICAN feels are likely to be attributable to delay, and for which AMERICAN believes it is not liable. In the words of Judge Griffin in *Oviedo*: "To resort to such a procedure ... would be absurd". 15 FLW at 2798.

CONCLUSION

In exchange for a premium, AMERICAN guaranteed that CONTRACTOR would "promptly and faithfully" perform the Construction Contract. CONTRACTOR defaulted and AMERICAN breached the Bond by failing: (1) to remedy the default; (2) to fund the completion of the construction; or (3) to engage others to complete.

LARKIN completed the Project and filed suit against AMERICAN. AMERICAN then refused: (1) to litigate, swearing to the court that it would be bound by the arbitration; and (2) to participate in the arbitration proceeding, relying on the CONTRACTOR.

The Arbitration Award fixed the amount of damages owed LARKIN for CONTRACTOR's failure to "promptly and faithfully" perform the Construction Contract. AMERICAN now argues it is not liable for all of the damages.

A fundamental principle of surety law is that the liability of a surety is measured by the liability of its principal. It is no great surprise that the courts in this State have surged into the 20th Century and applied this fundamental principle to sureties who issue performance bonds. The trial court recognized and properly applied this law in confirming the Arbitration Award against AMERICAN. The Third District properly affirmed.

LARKIN respectfully requests this Court to put an end to this litigation and affirm the Third District's Opinion, following *Woolley/Sweeney*, *Arbor Club*, and *Fewox* so that can LARKIN can finally collect a just debt long overdue.

Respectfully submitted,
JAMES E. GLASS ASSOCIATES

By:_____
JAMES E. GLASS
Florida Bar No. 029093

By:_____
LINDA DICKHAUS AGNANT
Florida Bar No. 708623

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Answer Brief on the Merits was served by mail on KIMBRELL & HAMANN, P.A., Suite 900, Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131-2805, this 22 day of March, 1991.

JAMES E. GLASS ASSOCIATES

By: _____
JAMES E. GLASS
Florida Bar No. 029093

By: _____
LINDA DICKHAUS AGNANT
Florida Bar No. 708623

6161 Blue Lagoon Drive
Suite 350
Miami, Florida 33126
(305) 264-6688
Attorneys for Larkin