IN THE SUPREME COURT OF FLORIDA

TAYLOR WOODROW CONSTRUCTION CORPORATION, a Florida corporation; and AMERICAN HOME ASSURANCE CO., a New York corporation,

Defendants/Petitioners

v.

THE BURKE COMPANY, a California corporation,

Plaintiff/Respondent

Case No. 78,880

RESPONDENT'S ANSWER BRIEF ON MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

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PRELIMINARY STATEMENT

References to the Respondent/Plaintiff will be Plaintiff or "Burke."

References to the Petitioners/Defendants will be "Taylor Woodrow" and "American Home."

References to the record will be (R -).

STATEMENT OF THE CASE AND THE FACTS

The Respondent accepts the Petitioners' Statement of the Case and the Facts.

SUMMARY OF ARGUMENT

The proper construction of the statutory language of §255.05(2), Florida Statutes, permits and allows a supplier of rental materials to a subcontractor to give notice of nonpayment within ninety (90) days after its equipment was last available for use on the public project. The delivery of rental equipment is not complete so long as that equipment is available for use on the project. The court in Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2nd DCA 1990), did not consider the definition of materials contained in §713.01(6), Florida Statutes, and erred in the application of §255.05(2), Florida Statutes.

ARGUMENT

THE PROPER CONSTRUCTION OF THE STATUTORY LANGUAGE OF SECTION 255.05(2), FLORIDA STATUTES, PERMITS AND ALLOWS A SUPPLIER OF RENTAL MATERIALS TO A SUBCONTRACTOR TO GIVE NOTICE OF NONPAYMENT WITHIN NINETY (90) DAYS AFTER ITS EQUIPMENT WAS LAST AVAILABLE FOR USE ON THE PUBLIC PROJECT

The threshold question is whether §255.05, Florida Statutes, is ambiguous. The ambiguity in §255.05(2), Florida Statutes, appears when you consider the nature and character of an equipment rental contract in light of the statutory definition of equipment rental as within the phrase "furnish materials." The nature of a rental contract extends itself over time and is severable by nature in the sense that the amount due is determined by the amount of time the rented equipment is used. It is respectfully submitted that the language used by the legislature is much more than "slightly ambiguous" on its face and allows the court to consider legislative intent and statutory construction. Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987); State v. Egan, 2887 So.2d 1, 4 (Fla. 1973).

The relevant portions of the statutes state:

> Such bond shall be conditioned that the contractor perform the contract in the time and manner prescribed in the contract and promptly make payments to all persons defined in §713.01 whose claims derived directly or indirectly from the prosecution of the work provided for in the contract.

Section 255.05(1)(a), Florida Statutes (1989) (emphasis added.)

> A claimant who is not in privity with the contractor and who has not received payment for his labor, materials or supplies, shall, within ninety days after performance of the labor or after complete delivery of the materials or supplies, delivered to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment.

Section 255.05(2), Florida Statutes (1989) (emphasis added.)

> "Furnish materials" ... includes supplying tools, appliances, or machinery used on the particular improvement to the extent of the reasonable value for the period of actual use.

Section 713.01(6), Florida Statutes (1989) (emphasis added.)

The starting point in the construction of a statute is the statute itself. Florida Statute Section 255.05 does not contain a specific definition of the phrase "complete delivery of materials." However, the legislature clearly provided that the payment bond provided under Section 255.05, Fla. Stat., shall protect "...all persons defined in Section 713.01, Fla. Stat., whose claims derive directly or indirectly from the prosecution of the work..." Section 713.01, Fla. Stat., is the definition section of the Florida Mechanics Lien Statute. One of the persons to whom the Mechanics Lien Statute offers protection under Section 713.01, Fla. Stat., is a "materialman," defined to include, any person who furnishes materials under contract to a subcontractor. The term "furnish materials" is defined in Section 713.01(6), Fla. Stat., as including:

> Supplying tools, appliances, or machinery used on the particular improvement to the extent of the reasonable rental value for the period of actual use . . (emphasis added).

Thus, there is no question that the Florida legislature intended the courts to look to the definitions set forth in Section 713.01, Fla. Stat., in determining who is entitled to the protection of a bond and what types of claims would be cognizable under the bond. Since the terms "furnish materials" and "materialmen," are defined as including rental equipment for the period of actual use on the project, there is no question that the ninety-day notice provision set forth in Section 255.05, Fla. Stat., runs for the period of actual use which necessarily extends to the last use of the rental equipment, rather than from the time additional rental equipment is last delivered to the project.

No other result makes sense. In this case Burke delivered equipment to the project which was then used on the job over a period of several months. Following financial difficulties, the equipment lessee failed to pay for the rental equipment. Burke gave timely notice from the time the rental equipment was last used on the project. However, under the trial court's view, Burke is not entitled to recover under the bond. This result makes no sense. For example, if a tower crane is furnished to a project at the beginning of the project and used on the project for a period of eighteen months, and the contractor makes payment to the rental company for a period of twelve months, but does not pay the final six months, then the rental supplier has no recovery under the bond. Such a result was clearly not intended by the Florida legislature when Section 255.05, Fla. Stat., was enacted.

Despite the definitional language of Section 713.01, Fla. Stat., incorporated by reference into Section 255.05, Fla. Stat., the Second District Court of Appeals in the case of Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2nd DCA 1990) held that the ninety-day period for the notice of nonpayment of a supplier of rental equipment runs from the last day additional rental equipment was actually delivered. However, the court in Moretrench failed to give consideration to the definitions contained in §713.01(6). It is respectfully submitted that the decision of the Second District Court of Appeals in Moretrench was erroneous, and failed to focus on the specific statutory language the court was required to construe. From the decision it is unclear whether the Moretrench court actually rejected any consideration of the definition of provisions of the Mechanic's Lien Law or if it simply was not argued. However, in any event, the meaning of materials as specifically defined in the statute to include rental equipment for the duration of its use is not in any way addressed by the Moretrench court decision.

Rather than focusing in on this statutory language and the entire statutory scheme under which the underlying purpose of Section 255.05, Fla. Stat., was enacted, the Moretrench court as well as the attorneys who argued the case for the rental supplier, focused on cases construing the Miller Act, 40 U.S.C. Section 270(b). United States ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, 293 F.2d 816 (9th Cir. 1961), cert. denied, 368 U.S. 987 (1962); United States for the use of SGB Universal Builders Supply,

Inc. v. Fidelity & Deposit Company of Maryland, 475 F.Supp. 672 (E.D.N.Y. 1979). These cases held that under the Federal Miller Act, the ninety-day notice begins to run when the rental equipment is last available for use on the project. The Second District Court of Appeals in Moretrench, supra, declined to follow these cases, since the statutory wording of the Miller Act is different from that found in Section 255.05, Fla. Stat. Indeed, the basic argument advanced by the rental supplier was that the Miller Act cases offered a more logical result, which the Moretrench court conceded. However, the Moretrench court indicated that they were not permitted to rewrite the statute for the legislature and granted summary judgment to the contractor and surety.

The Moretrench court completely failed to focus in on the language of Section 255.05, Fla. Stat. First, the Moretrench court indicated that the term it had to construe was "complete delivery," not "complete delivery of materials." The statute refers to "... complete delivery of materials." See §255.05(2), Florida Statutes (1989). The question is how does rental equipment figure into the definition of "materials," the term critically omitted from the statutory analysis conducted by the Moretrench court.

The answer to the question is found by reviewing the statutory language. The bond posted by Taylor Woodrow in compliance with Section 255.05, Fla. Stat., was conditioned to pay all persons defined in Section 713.01, Fla. Stat., whose claim derived directly or indirectly from the prosecution of the work provided in the contract. Section 713.01(11), Fla. Stat. defines a "materialmen"

to include any person who furnishes materials. Subsection (6) of Section 713.01, Fla. Stat., further defines "furnish materials" to include supplying tools, appliances or machinery used on the particular improvements to the extent of the reasonable rental value for the period of actual use. There is no question that by enacting both the Mechanics Lien Statute Section 713.01, et. seq., as well as Section 255.05, Fla. Stat., the legislature intended to allow suppliers of rental equipment to claim under the bond. The purpose of the Public Works Statute, §255.05, was not to provide protection only to the contractor who is required to post the bond. Rather, the statute is intended to provide subcontractors and materialmen on public work projects with the same type of protection available to them on private construction under the Mechanic's Lien Statute. Winchester v. State, 134 So.2d 826 (Fla. 2nd DCA 1962); Miller v. Knob Const. Co., 368 So.2d 891 (Fla. 2nd DCA 1979); Hammet Co., Inc. v. Fed. Ins. Co., 560 So.2d 326 (Fla. 1st DCA 1990); Warrior Constructors, Inc. v. Harders, Inc., 387 F.2d 727 (5th Cir. 1967).

Since the Mechanics Lien definitional section is incorporated by reference into Section 255.05, Fla. Stat., the term "materials" or "furnish materials" can only mean the providing of rental equipment for the period of "actual use". Indeed, no other result makes sense. For example, many construction projects are built with the use of cranes which are delivered to the project at the initial stages of construction and used for many, many months to build and construct the project. Under the Moretrench court's

view, a notice of nonpayment would have to be sent within ninety-days after the initial delivery of the crane, even though, at that time, no monies may be due or owing. Such an absurd result should not be allowed in the absence of clear legislative intention to treat suppliers of rental equipment different from all other materialmen. In this case, the legislative expression is clear that in construing Section 255.05, Fla. Stat., the Court must look to the definitions provided in Section 713.01, Fla. Stat. Section 713.01, Fla. Stat., clearly provides that rental equipment, for mechanics lien purposes, is measured from the period of actual use of the rental equipment. Therefore, the delivery of equipment under a rental agreement is not "complete" so long as that equipment remains on the job.

CONCLUSION

The decision of the District Court for the First District was correct. The supplier of rental equipment on a public project should be entitled to the same protection afforded a supplier of rental equipment on a private project. Section 255.05 permits and allows notice of nonpayment to be given within ninety (90) days of when the rental equipment was last available for use since that is the point in time at which delivery is complete. The decision in Moretrench failed to consider the entire statute and should not be followed. This Court should affirm the decision of the First District herein.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MARGARET D. MATHEWS, Attorney at Law, and FRAZIER CARRAWAY, Esquire, Stagg, Hardy, Ferguson, Murnaghan & Mathews, P.A., P. O. Box 959, Tampa, FL 33601-0959, by U. S. mail this 3rd day of January, 1992.

STEPHEN A. HOULD