IN THE SUPREME COURT OF FLORIDA

TAYLOR WOODROW CONSTRUCTION CORP.
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

PETITIONERS' INITIAL BRIEF ON MERITS

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

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PRELIMINARY STATEMENT

References to Petitioners/Defendants will be "Taylor Woodrow" and "American Home." References to the Respondent/Plaintiff will be plaintiff or "Burke." References to the subcontractor, Bruce M. Ross Company, a Florida corporation, not a party to this appeal, will be "Ross."

STATEMENT OF THE CASE AND FACTS

Petitioner, Taylor Woodrow, contracted with the City of Jacksonville to build a pre-trial detention facility. Pursuant to Section 255.05, Florida Statutes, Taylor Woodrow posted a statutory bond issued by American Home. Certain work involved in the project was subcontracted by Taylor Woodrow to Ross. Ross contracted with Burke to rent equipment to be used by Ross in performing its agreement with Taylor Woodrow.

Burke supplied rental equipment to Ross and delivered the last of the equipment to the project on June 26, 1989. The equipment remained on site until July 19, 1989. Burke's notice of non-payment, required to be delivered within 90 days of "complete delivery of materials," was delivered on October 10, 1989, 106 days after the last equipment was delivered to the job site.

Burke initiated this action seeking recovery under the statutory bond against Taylor Woodrow and American Home. Taylor Woodrow and American Home moved for summary judgment, arguing that Burke's notice of non-payment was untimely. The trial court entered final summary judgment in favor of Taylor Woodrow and American Home. Burke appealed the decision to the First District Court of Appeal. The First District reversed the trial court, expressly disagreeing with the Second District's opinion in Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990).

The First District's opinion was filed on August 15, 1991. On August 30, 1991 Taylor Woodrow filed a timely and authorized motion

for rehearing which was denied on October 4, 1991. Petitioner's notice to invoke discretionary jurisdiction of this court was timely filed on November 1, 1991. By order dated November 14, 1991, this Court postponed its decision on jurisdiction and required the filing of briefs on the merits.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal erred in construing the statutory language of Section 255.05(2), Florida Statutes, to permit those who supply rental materials to subcontractors to withhold notice of non-payment until 90 days after the last date the equipment was available for use on the project. The statute requires notice of non-payment within 90 days after "complete delivery of materials". The unambiguous meaning of "complete delivery of materials" requires that notice be given within 90 days of the last delivery of rental equipment to the job site. Moretrench American Corporation v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990).

ARGUMENT

SECTION 255.05(2), FLORIDA STATUTES, UNAMBIGUOUSLY REQUIRES A SUPPLIER OF RENTAL EQUIPMENT WHO IS NOT IN PRIVITY WITH THE CONTRACTOR TO PROVIDE NOTICE OF NON-PAYMENT WITHIN 90 DAYS AFTER FINAL DELIVERY OF RENTAL EQUIPMENT.

Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990) squarely holds that Section 255.05(2), Florida Statutes, requires a lessor of rental equipment to a subcontractor to give notice of non-payment to the general contractor within 90 days of the last delivery of equipment, if the lessor seeks protection under a public construction bond.

The trial court's summary judgment was proper because Burke failed to comply with the mandatory notice requirements to recover under the bond. Burke, the supplier of rental equipment not in privity with the contractor, was entitled to rely on the bond if the subcontractor failed to pay. However, to receive payment from the surety, Burke was required to provide notice of non-payment within 90 days after "complete delivery of materials." Section 255.02, Florida Statutes.

The phrase "complete delivery of materials" does not need construction by the courts. Its plain meaning is the last day a supplier brings materials to the job site. No statutory construction is necessary or permitted when the statute is clear and unambiguous. Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987); Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982).

Burke made its last delivery of rental equipment on June 26, 1989. Burke's notice of non-payment was delivered on October 10, 1989, more than 90 days after its last delivery. Therefore, the notice was untimely and summary judgment for the defendant was correct.

The First District Court of Appeal improperly determined the phrase in Section 255.05(2), "complete delivery of materials," to be ambiguous in the context of delivery of rental equipment. Specifically, the District Court held the word "materials" to be "sufficiently ambiguous" (opinion, page 6) to permit consideration of Section 713.01, Florida Statutes, which defines terms for purposes of the Florida Construction Lien Law (and which is specifically referred to in Section 255.05(a)(1), Florida Statutes). "Furnish materials" is defined in Section 713.01 to include the supply of tools, appliances or machinery used on the improvement. No one denies that this rental equipment was "material" furnished to the job. The issue is not whether a bond claim exists for rental equipment, but whether notice was furnished as required by statute. The notice period runs from "complete delivery". Those words are unambiguous, do not cause unfair or unintended harsh results, and must be enforced by Florida courts. Any request for modification must be addressed to the legislature. Heredia v. Allstate Insurance Co., 358 So.2d 1353 (Fla. 1978).

The First District Court of Appeal directly disagreed with Moretrench American Corp. v. Taylor Woodrow Construction Corp., 565 So.2d 861 (Fla. 2d DCA 1990). The Moretrench court affirmed the dismissal of a complaint filed against the general contractor and

the surety by the supplier of rental equipment. Moretrench supplied rental equipment to a subcontractor. More than 90 days after delivery of the last item of rental equipment, Moretrench gave the general contractor notice of non-payment. The Second District Court of Appeal held that Section 255.05(2), Florida Statutes, requires such notice to be delivered within 90 days after delivery of the last item of rental material. Moretrench, 565 So.2d at 862. The Second District rejected the argument that the 90 day period should begin to run on the last day that rental equipment was actually used stating:

> However wise it would appear to be to adopt the 90 day period argued for by appellant, the legislature has not done so. It is not the function of the courts to engraft an exception onto to a clear and unambiguous statutory provision. It is neither the function nor prerogative of the court to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning. Heredia v. Allstate Ins. Co., 358 So.2d 1353, 1355 (Fla. 1978), as quoted in City of St. Petersburg v. Clark, 492 So.2d 685 (Fla. 2d DCA 1986).

Moretrench, 565 So.2d at 862.

The First District Court of Appeal distinguished the delivery of purchased materials from that of rental materials based on its unsupported statement that payment for purchased materials is generally due on the date of delivery. (Opinion, page 6) Relying on Section 713.01(6), Florida Statutes, the district court held that materials delivered, in the rental context, refers to each period of actual use. The district court thereby concluded that delivery was not complete until the completion of actual use of the

equipment.

Section 713.01(6) defines "furnish materials" as, among other things:

> . . . supply materials used for the construction and not remaining in the improvement, subject to diminution by the salvage value of such materials; and includes supplying tools, appliances, or machinery used on the particular improvement to the extent of the reasonable rental value for the period of actual use (not determinable by the contract for rental unless the owner is a party thereto) . . . . §713.01(6) (emphasis supplied).

The First District Court of Appeal misconstrued the import of Section 713.01(6). As explained in Essex Crane Rental Corp. v. Millman Construction Co., 516 So.2d 1130 (Fla. 3d DCA 1987), the "period of actual use" language refers to the extent of the rental amount protected by the lien. It describes the amount of payment secured by the construction (mechanics) lien law, not the timing of commencement of the notice period. Section 255.05 provides the timing in unambiguous terms - when delivery is complete.

In Essex Crane, the Third District held a supplier of rental equipment failed to comply with the notice requirement in the mechanic's lien statute. The supplier argued that the 45 day notice requirement of Section 713.23(1)(d) did not begin to run until the equipment was put into "actual use" by the renter. The supplier relied on the reference in Section 713.01(6) to "the extent of the reasonable rental value for the period of actual use" to support its argument. The Third District, rejecting the supplier's argument, stated:

> We think that Essex's reliance on that portion of Section 713.01(6) which refers to the supplying of machinery 'to the extent of the reasonable rental value for the period of actual use' is misplaced; this portion of the admittedly difficult subsection appears, however murkily, to refer to the amount of payment protected under the mechanic's lien law rather than to the notice issue before us.

Essex Crane, 516 So.2d at 1131.

Section 713.01(6), Florida Statutes, limits claims by suppliers of rental equipment against owners to the reasonable rental value for the period of actual use rather than some potentially collusive contractual amount. Likewise, the preceding phrase of 713.01(6) allows recovery for materials delivered to but not incorporated in projects, reduced by the salvage value. The two phrases, clearly parallel, both address the amount of protection afforded suppliers not the timing of notice. Thus, read as a whole, Section 713.01(6), Florida Statutes, further demonstrates that the First District's interpretation of that section is incorrect.

In Harvester's Group, Inc. v. Westinghouse Electric Corp., 527 So.2d 257 (Fla. 3d DCA 1988), the court strictly construed the "complete delivery" language holding that the notice must be given 90 days after delivery is complete, not substantially complete. The court in Harvester's Group relied on the plain and unambiguous language of Section 255.05(2) in reaching its conclusion that no statutory construction was necessary. Harvester's Group, 527 So.2d at 259. The wording "complete delivery" should be given an ordinary, everyday meaning. Harvester's Group, 527 So.2d at 259,

citing, Seaboard Systems R.R. v. Clemente, 467 So.2d 348, 355 (Fla. 3d DCA 1985).

Recent cases reinforce the proposition that strict compliance with the construction lien law is required, despite any harsh consequences which would result from failing to enforce a lien. Stresscon v. Madiedo, 581 So.2d 158 (Fla. 1991) (failure to notarize statement of account barred lien notwithstanding absence of prejudice); Home Electric of Dade County, Inc. v. Gonas, 547 So.2d 109 (Fla. 1989) (demand letter must track statutory language). A construction lien, like a public bond claim, is a creature of statute and precise compliance with statutory requirements is required.

In the instant case, a literal interpretation of the statutory language works no hardship on an equipment lessor, who is able to protect himself by contract from any substantial default by his lessee. Burke correctly argued to the First District that a supplier of rental equipment might be left without recovery under the bond if a subcontractor initially made rental payments but failed to pay after the expiration of the 90 days from complete delivery of the materials. Conversely, the interpretation given the statute by the First District could leave the general contractor responsible for making regular payments to its subcontractor and not discovering until 90 days after the project was complete that a rental equipment supplier was unpaid. The legislature used clear words to demonstrate that the supplier must accept the risk of nonpayment.

In fact, the rental equipment supplier is in a better position than the contractor to protect himself by contract terms and his ability to retake the rental property if not paid for its use. The rental company is in a much different posture than a materialman who sells material to a contractor on a public project. The rental company retains ownership of the equipment and has a right to retake upon an event of default such as non-payment. Regardless of lien rights or bond claims, an equipment lessor can contract for nearly complete protection. For example, the lease could provide for advance payment of monthly rental charges, with five days default triggering a repossession option. Alternatively, if statutory payment protection is critical, a series of 90 day leases with new deliveries could be required. These and other strategies would, however, force a lessor to give the contractor or surety prompt notice following any default in rental payment.

The statute bases the notice requirement upon "complete delivery", not "complete use". §255.05(2), Fla. Stat. (1989). Courts must assume the legislature knew the meaning of the words it chose to use in the statute. See e.g. Rinker Materials Corp. v. City of North Miami, 286 So.2d 552 (Fla. 1973). The application of the statute is not unreasonable or illogical in its operation and the court may not go beyond the statute to give it a different meaning. See e.g., Jones v. Utica Mutual Insurance Company, 463 So.2d 1153 (Fla. 1985).

CONCLUSION

Section 255.05(2) requires notice of non-payment to be given within 90 days of complete delivery of materials. The plain meaning of "complete delivery of materials" dictates that notices of non-payment by suppliers of rental equipment must be given within 90 days of final delivery. The opinion of the First District Court of Appeal should be reversed and the summary judgment of the trial court reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Stephen A. Hould, Esquire, P.O. Box 50457, Jacksonville Beach, Florida 32240-0457 and Charles V. Choyce, Jr., Esquire, Rumberger, Kirk, Caldwell & Wechsler, P.A., P.O. Box 1873, Orlando, Florida 32802, on this 9th day of December 1991.

Attorney