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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, et al.,

Petitioners,

vs.

THE SOUTHWEST FLORIDA RETIREMENT CENTER, INC., d/b/a THE VILLAGE ON THE ISLE, et al.,

Respondents.

SUPREME COURT CASE NO. 89,574

DISTRICT COURT CASE NO. 95-62153

Discretionary Proceeding to Review a Decision of the Second District Court of Appeal

Petitioner Firemen's Insurance Company of Newark, New Jersey's Reply Brief an the Merits

Sylvia H. Walbolt
Florida Bar No. 033604
J. Bert Grandoff
Florida Bar No. 30806
Wm. Cary Wright
Florida Bar No. 862796
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
Post office Box 3239
Tampa, Florida 33601
(813) 223-7000

Attorneys for Petitioner Firemen's Insurance Company of Newark, New Jersey

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In its initial brief,[1] Firemen's showed that the Second District's decision below expands the liability of sureties under standard performance bonds beyond their express terms, so as to render sureties liable for latent defects discovered years after the completion of construction. That decision directly conflicts with decisions of this Court and the First and Fifth District Courts holding that the surety's liability is limited to completion of the construction upon the contractor's default. See American Home Assur. Co. v. Larkin General Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992) (surety not liable for delay damages, even though contractor was liable for such damages under construction contract incorporated in bond), citing with approval, U.S. Fid. & Guar. v. Gulf Florida Dev., 365 So. 2d 748, 750-51 (Fla. 1st DCA 1992) (surety not liable for all damages contractor liable for under construction contract) and Florida Brd. of Regents v. Fidelity & Deposit Co. of Md., 416 So. 2d 30 (Fla. 5th DCA 1982) (bond did not cover claims for defective workmanship discovered after completion).

In its answer brief, the owner all but concedes the correctness of Firemen's position. Rather than attempting to square the decision below with this Court's controlling decision

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[1] All references in this brief are the same as in Firemen's initial brief. A supplemental appendix containing the owner's complaint is filed with this reply brief and referred to as "S.A. - -" All emphasis in quoted materials is supplied.

in Larkin, the owner now asserts that it did not sue the contractor and surety for damages from "latent defects," as stated in the majority's opinion below, but rather sued for the contractor's failure to perform its alleged contractual obligation "to return to the project and perform corrective work as required by the terms of the contract." [Ans. Br. 11]. According to the owner, it "did not sue on the 'I promise to do a good job' type of warranty; it sued on [the] 'if I make a mistake, I will return and fix it' type of warranty." Id.

Contrary to this assertion, however, the Court expressly noted below that "all parties" to the appeal "agreed[d]" that it arose out of the owner's action against the contractor and surety for "latent defects." [Op. at 4, A. 4]. Indeed, the record makes absolutely clear that the owner did sue for "latent defects" damages. In paragraph 13 of its complaint (which was incorporated into the count as to Federal, the general contractor's surety) the owner expressly alleged that "[t]he defects and nonconformities complained of herein are latent defects and deficiencies . . . ." [S.A. 1]. There can be no doubt then, that the owner's complaint sought damages for alleged "latent defects" caused by defective workmanship.

The record likewise makes it clear that the owner did sue the contractor on the "'I promise to do a good job' type of warranty." For example, in paragraph 16 of Count I, the owner alleged that:

> CONTRACTOR materially breached its GENERAL CONTRACTS with RETIREMENT CENTER by failing to construct the PROJECT in accordance with the plans and specifications which were approved by the local building official and by constructing the buildings in violation of the permitted plans and specifications, by failing to perform its work in a good and workmanlike manner and by constructing the buildings in violation of good and acceptable construction means, methods and techniques.

[S.A. 1]. In Count II, paragraph 19, the owner alleged that the contractor breached its express warranty in section 4.5.1 of the contract that "all work would be of good quality, free from faults and defects and in conformance with the Contract Documents." Id. Finally, in Count III, paragraph 27, the owner sued for the alleged breach of the contractor's implied warranty that its work "would be performed in a good and workmanlike manner and in accordance with good usage and accepted construction practices." Id.

It is true that the owner also alleged, as part of its express warranty claim in Count II, that the contractor was required under section 13.2.2 of its contract to return to the project and correct defective work. This is the only provision that the owner sued upon in claiming that the contractor was required to return to the project and perform corrective work,[2/] and that is obviously the provision that the owner relies on in its brief as imposing a "post-construction performance"

[2/] Section 4.5.1, "Warranty," contains no agreement to return to the project and correct defective work. [S.A. 1]. Nor is there any other provision in the contract imposing any such obligation.

obligation upon the contractor. But, noticeably absent from the owner's brief is any recitation of the actual language of section 13.2.2, nor does the owner otherwise disclose that this "post-construction performance" obligation of the contractor is expressly limited to a period of "one year after the Date of Substantial Completion of the Work . . . ." [S.A. 1].

Thus, as the contract attached to the owner's complaint establishes,[3/] the contractor's only obligation to return to the project and perform corrective work is set forth in Article 13, "Uncovering and Correction of Work," and in particular in Section 13.2.2, "Correction of Work." [S.A. 1]. It provides as follows:

> 13.2.2 If, within one year after the Date of Substantial Completion of the Work or designated portion thereof or within one year after acceptance by the Owner of designated equipment or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be defective or not in accordance with the Contract Documents, the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This obligation shall survive termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.

[3/] "[U]nder the Florida Rules of Civil Procedure, and case law interpreting the rule, exhibits attached to a pleading become a part for all purposes; and if an attached document negates the pleader's cause of action or defense, the plain language of the document will control and may be the basis for a motion to dismiss." Health Application Systems v. Hartford Life, 381 So. 2d 294, 297 (Fla. 1st DCA 1980); see also American Seafood, Inc v. Clawson, 598 So. 2d 273, 274 (Fla. 3rd DCA 1992)(same).

The owner's complaint affirmatively establishes that this work was not found to be defective within "one year of the Date of Substantial Completion of the Work ..."[4/] In fact, the owner's notice to the contractor was not given until January 11, 1994 -- more than a decade after the project was completed. [Compare paragraph 2 of complaint with paragraph 22, S.A. 1].

On its face, then, Section 13.2.2 of the contract did not require the contractor to return to the project in 1994 and correct the allegedly defective construction work. Nor could the owner force the contractor to return to the project in 1994 to correct work done in 1982 by claiming that the defects were not discovered until then. That would render completely meaningless the express contractual limitation upon the contractor's obligation to return and perform corrective work if -- and only if -- "the work is found to be defective" within "one year after the Date of Substantial Completion of the Work. . . ." See Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313, 316 (Fla. 2d DCA 1963)(contracts must be construed to give effect to contract language; construction that would lead to absurd results must be rejected).

[4/] The owner has not suggested that there is any independent provision of Florida law that would, apart from this specific contractual provision, require the contractor to return to the project and specifically perform corrective work more than a decade after completion of the construction. Nor could there be any such requirement, since any obligation to specifically perform corrective work would be governed by Florida's one-year statute of limitations for specific performance. See p. 10, infra.

Accordingly, the owner's only contractual remedy in 1994 was to sue for damages resulting from latent defects.[5] That is exactly what the owner in fact did, and its complaint makes that perfectly clear. As such, this case cannot be distinguished from the authorities cited in Firemen's initial brief, nor can the decision below be explained away as supposedly misapprehending the nature of the owner's claims.

The owner's effort to retreat from the decision below is telling. By its decision below, the Second District expanded the liability of sureties issuing standard performance bonds so as to be absolutely coincident with the contractor's liability under the construction contract itself, notwithstanding the terms of the bond limiting the surety's liability to completion of the construction. As the owner obviously recognizes, that decision cannot stand, given this Court's explicit holding in **Larkin** that:

> The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor. Florida Bd. of Regents v. Fidelity & Deposit Co., 416 So. 2d 30 (Fla. 5th DCA 1982). Ordinarily a performance bond only ensures the completion of the contract. The surety agrees to

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[5] The courts have consistently recognized that the standard provision in a construction contract imposing obligation to return and perform corrective work only extends for one year from completion of the construction; however, they also recognize that this is not an exclusive remedy and the owner can accordingly pursue its other contractual remedies after the expiration of that one-year cure period. See, e.g., The John W. Cowper Co., Inc. v. Buffalo Hotel Dev. Venture, 496 N.Y.S. 2d 127 (Sp. Ct. 1985) ; The Omaha Home for Boys v. Stitt Const. Co., Inc., 238 N.W. 2d 470 (Neb. 1976); Provo City Corp. v. Nielson Scott Co., 603 P. 2d 803 (Utah 1979); Idaho State Univ. v. Mitchell, 552 P. 2d 776 (Idaho 1976).

> complete the construction or to pay the obligee the reasonable costs of completion if the contractor defaults.

Id. at 198.

This Court could hardly have been clearer in Larkin that the surety's liability did not extend beyond its obligation to step in and complete the construction upon the contractor's default. In its words, the parties contracted in the performance bond for "completion" of the construction contract upon default of the contractor "and nothing more." Id. at 198.

The owner argues that delay damages were at issue in Larkin, whereas defective construction damages are claimed here. (Ans. Br. 13). But that does not in any way limit the applicability of the Larkin Court's holding here. A claim for delay damages is every bit as much a claim for the contractor's failure to perform a contractual obligation (complete construction in a timely manner) as the owner's claim for latent defects (perform construction with good workmanship). The contractor in Larkin was liable under the construction contract for delay damages upon failing to complete the work by the date agreed to under the contract, just as the contractor would be liable here under the construction contract for latent damages resulting from its alleged failure to perform the work with a specified degree of quality workmanship. Neither claim would exist apart from the construction contract between the owner and contractor, which was expressly incorporated in the performance bond.

Thus, the point the owner fails to come to grips with is that, under the majority's opinion below, the incorporation of the construction contract into the bond renders the surety liable for all damages that could be imposed upon the contractor under that contract -- including, a fortiori, delay damages as well as defective construction damages. But this Court squarely held to the exact opposite in Larkin, refusing to extend the surety's liability to include delay damages for which the contractor was liable under the construction contract:

> . . . The terms of the performance bond control the liability of American. The language in the performance bond, construed together with the purpose of the bond, clearly explains that the Performance bond merely guaranteed the comnletion of the construction contract and nothing more. Upon default, the terms of the performance bond required American to step in and either complete the construction or pay Larkin the reasonable costs of completion. Because the terms of the performance bond control the liability of the surety, American's liability will not be extended beyond the terms of the performance bond.

Id.

That holding is equally controlling with respect to the claim by the owner in this case for damages resulting from the contractor's alleged failure to perform the construction in a workmanlike manner. Just as the surety in Larkin was not liable for delay damages because the parties had not specifically contracted for that coverage under the performance bond, the bonds issued here did not specifically provide for liability for damages from latent defects in the construction discovered more

than a decade after completion of construction. Hence, just as in Larkin, the sureties' liability was improperly extended under the decision below beyond the express terms of the bonds.

Any possible doubt in that regard is removed by the Larkin Court's express approval of Florida Brd. of Resents v. Fidelity & Deposit Co. of Maryland, 416 So. 2d 30 (Fla. 5th DCA 1982), where the Fifth District expressly held that the surety's performance bond did not cover claims for defective workmanship discovered after completion of the project. Accordingly, the latent defects in construction that were discovered more than one year later were not covered by the bond, whose purpose was "'to ensure the physical completion of the work upon default.'" Id. at 32. Florida Brd. of Resents is squarely on point here and establishes that the decision below erroneously expands the sureties' liability beyond the explicit terms of their performance bonds.

Simply put, Larkin and Florida Brd. of Resents dispose of the owner's argument that a performance bond does not simply ensure completion of the construction but also "ensures against any losses which OWNER may suffer if other performance defaults occur" [Ans. Br. 9]. If the owner's arguments were correct, the "performance default" of untimely completion of construction would be insured against by a performance bond. Larkin holds it is not. If the owner's arguments were correct, the "performance default" of defective construction work would be insured against by a performance bond. Larkin's approval of Florida Brd. of Regents makes clear it is not.

Just as in those cases, the sureties here were relieved from any further responsibility under the performance bonds once construction was completed without default. The existence of damage claims against the contractor for other breaches of contract cannot serve to expand the sureties' obligation beyond completion of construction.

It remains only to note in this regard that, if the owner were only suing to require the contractor to return to the project and perform corrective work, as it now urges in its brief, that would plainly be a claim for specific performance. As such, that claim would be barred as a matter of law by Florida's one-year statute of limitations, see Fla. Stat. §95.11(5)(a), even apart from the one-year contractual limitation bar on such a claim. And, although the contractual limitations period for that one-year "post-construction performance" obligation does not affect the limitations period for the owner's claims for other damages, (see section 13.2.6, and authorities in footnote 5, supra), the owner has expressly disclaimed those remedies in an effort to avoid Larkin and the decisions approved therein.

The owner cannot have it both ways. If the owner is suing upon the contractor's **post-construction performance" obligation with respect to defective work, the contract provided that the defects had to be discovered within one year of the completion of the work; the owner cannot negate that one-year limitation by asserting its lack of knowledge of the defects until 1994. If,

on the other hand, the owner is suing for damages resulting from latent defects, then, under Larkin and Florida Board of Resents, it has no claim upon the performance bond.

Finally, even if such a claim somehow existed in the face of the dispositive authorities cited above and in Firemen's initial brief, the owner would in all events be barred by Florida's five-year limitations period. As the Second District correctly recognized in District School Brd. of DeSoto Cty. v. Safeco Ins. co., 434 So. 2d 38, 39 (Fla. 2d DCA 1983), the "naturally understood statute of limitations period as to actions against the surety" is the "certificate of substantial completion and the acceptance of a constructed building by the owner. , . . " The Court went on to expressly hold that this limitations period was not tolled by the owner's lack of knowledge of the latent defects. Id.

Citing the Second District's decision in Safeco and its own earlier decision in Florida Brd. of Regents, the Fifth District held that an owner's suit against a surety for latent defect damages was time-barred because it was filed more than five years after completion of construction. School Brd. of Volusia Ctv. v. Fidelity Co. of Md., 468 So. 2d 431, 433 (Fla. 5th DCA 1985). The fact that there were latent undisclosed defects in the construction did not serve to toll the time for filing suit. Id.

These decisions are fully consistent with the terms of the standard performance bond, which specify completion of construction as the triggering event for the statute of

limitations. As Judge Blue observed in dissent below, "[c]learly, it was not the intent to have [the] extended period of limitations [applicable to the construction contract] applicable to this bond." [Op. at 16-17, A. 4]. By nevertheless holding that the limitations period against the surety was extended so as to be coincident with the limitations period against the contractor, thereby allowing the owner to sue the surety more than a decade after completion of the construction, the majority's decision once again extends the surety's liability beyond the express terms of the bond.

CONCLUSION

The Second District's decision is contrary to settled precedents of this Court and other Florida courts. It should be reversed and the cause remanded with directions to reinstate the trial court's order of dismissal.

Sylvia H. Walbolt
Florida Bar No. 033604
J. Bert Grandoff
Florida Bar No. 30806
Wm. Cary Wright
Florida Bar No. 862797
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601-3239
(813) 223-7000
Attorneys for Petitioner
Firemen's Insurance Company
of Newark, New Jersey

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and supplemental appendix has been furnished by United States Mail to all counsel on the attached service list this 24th day of July, 1997.

Sylvia H. Walbolt
Attorney

SERVICE LIST

Thomas F. Munro II, Esquire
John P. Cole, Esquire
Foley & Lardner
777 South Flagler Drive
Suite 200 - East Tower
West Palm Beach, Florida 33401
(McCarthy and Federal)

Philip D. Parrish, Esquire
Stephens, Lynn, Klein & Mc
9130 S. Dadeland Boulevard
PH I & II
Two Datran Center
Miami, Florida 33156
(Cotton States Mutual)

Sidney M. Crawford, Esquire
Crawford & Roddenbery, P.A.
Post Office Box 5947
Lakeland, Florida 33807
(Miller Window)

Michael J. McGirney, Esquire
Stephens, Lynn, Klein & Mc
4350 West Cypress
Tampa, Florida 33607
(Cotton States Mutual)

Philip J. Sypula, Esquire
Nelson, Hesse, Cyril, Smith
2070 Ringling Boulevard
Post Office Box 2524
Sarasota, Florida 34236
(Miller Window)

David E. Gurley, Esquire
Norton, Moran, Hammersley
1819 Main Street, Suite 610
Sarasota, Florida 34236
(Southwest Florida Retirement

Daniel L. Moody, Esquire
1519 North Dale Mabry Hwy
Suite 104
Lutz, Florida 33549
(Garrison Glass/Great American Insurance Companies)

Craig R. Stevens, Esquire
George, Hartz, Lundeen
Barnett Center, Suite 402
2000 Main Street
Ft. Myers, Florida 33901
(Roman Weatherproofing)

R. Jackson McGill, Esquire
2033 Main Street,Suite 402
Sarasota, Florida 34237
(Florida Horizons, Inc.)

John Richard Hamilton, Esquire
Foley & Lardner
P.O. Box 2193
Orlando, FL 32802-2193
(McCarthy & Federal)