IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
SOLSBURY HILL, LLC d/b/a
NEUMARK IRRIGATION,

Plaintiff/Appellee and Cross-Appellant

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant/Appellant and Cross-Appellee

Ct. App. No. 30,068
District Court Case:
No. CV-2007-08460

ANSWER BRIEF TO CROSS-APPELLANT'S

BRIEF IN CHIEF ON CROSS-APPEAL

Civil Appeal from The Second Judicial District, County of Bernalillo

The Honorable Valerie M. Huling

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I. ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN DENYING ATTORNEY FEES TO NEUMARK UNDER THE LITTLE MILLER ACT, AS THE LANGUAGE "SUMS OR SUMS JUSTLY DUE" IS INSUFFICIENT TO JUDICIALLY OBVIATE THE AMERICAN RULE ABSENT PRIVITY OF CONTRACT

1. Contentions of Cross-Appellee.

The District Court did not err in denying Neumark attorney fees, as the United States Supreme Court has ruled that attorney fees are not part of the sum to make the supplier whole where there is no direct contract between the supplier and the contractor.

2. Standard of review.

Statutory interpretation is subject to de novo review.

3. Argument.

N.M.S. A. 1978 §13-4-19(A) 1875 provides:

> Every person, firm or corporation **who has furnished labor or materials** in the prosecution of work **provided for in such contract in respect of which a payment bond is furnished under Section 13-4-18 N.M.S.A. 1978,** shall have the right to sue on such payment bond for **the amount of the balance thereof unpaid at the time of the institution of such suit,** and to prosecute such action to final execution and judgment for the sum or sums justly due him...

Neumark would have the Court believe that attorney fees are to be awarded as a matter of right to suppliers under the Little Miller Act, a position totally contrary to the American Rule regarding attorney fees. Federal courts interpreting the federal Miller Act have ruled that absent a provision in the contract or payment bond awarding

attorney fees, a Miller Act plaintiff can only recover under one of the recognized exceptions to the general principle that each party should bear the costs of its own legal representations. United States for Use of CJC, Inc., v Western Mechanical Contractors, 834 F.2d 1533, 1542-43 (10th Cir. 1987), United States for the Use and Benefit of D & P Corporation v Transamerica Insurance Co., 881 F. Supp. 1505 (1995). Moreover, a clear reading of the statute only allows recovery for the labor and materials actually furnished under the contract, "in respect of which a payment bond is furnished under Section 13-4-18 N.M.S.A. 1978." In United States for the Use of L.K.L Associates v Crockett & Wells Construction, Inc., 730 F. Supp. 1066 (1990), the Utah District Court, following Western Mechanical Contractors, held that any attorney fee provisions must be included in either the "general" contract or the payment bond. *Id* at 1068.

Finally, the United States Supreme Court has answered the question in F.D. Rich Co., Inc. v Industrial Lumber Co., 417 U.S. 116, 94 S. Ct. 2157, 40 L. Ed 2d 703 (1974). In F.D. Rich, the Court was unwilling to include attorneys' fees as part of the sum to make the supplier whole. *Id* at 130-131. In addition, The Supreme Court in F.D. Rich decided that, in the absence of statutory or contractual guidance, the commercial aspect of Miller Act cases should not allow an exception to the American Rule that parties must pay their own way for legal costs in the absence of privity.

While Plaintiff cites United States for the Benefit of Sherman v Carter, 353 U. S. 210 (1956), a case decided prior to F.D. Rich, in support of its claim, the dispute in Sherman was between a contractor and its subcontractor.

Finally, the Court need only look at State ex rel Goodman's Office Furnishings, Inc. v Page & Wirtz Construction Co., 102 N.M. 22, 690 P2d 1016 (1984), citing Keller v Cavanaugh, 64 N.M. 86, 324 P.2d 783 (1958), for the New Mexico rule regarding attorney fees: "[a]bsent authority or rule of the Court, attorneys' fees are not

recoverable as an item of damage." *Id* at 23. Moreover, the Goodman's Court found no contract between Goodman's, the supplier, and Page & Wirtz, the contractor, in response to Goodman's claim for attorney fees based on its contract with the subcontractor. *Id* at 24.

The Little Miller Act does not provide for an award of attorney fees. Awarding attorney fees under the provisions for sums or sums justly due absent a contract between a supplier and contractor would create an exception to the American Rule that has been rejected by the United States Supreme Court. Thus, the District Court's decision was correct and should be affirmed.

B. THE DISTRICT COURT DID NOT ERR IN GRANTING POST-JUDGMENT INTEREST AT THE RATE OF 8.75%[1]

1. Contentions of Cross-Appellee.

Liberty contends, assuming that Neumark was entitled to a judgment, that the District Court did not err in awarding post-judgment interest at the rate of 8.75%.

2. Argument.

Neumark consistently fails to understand that Salls never entered into a contract with Neumark. There is simply no privity of contract. Although the Court deviated from the majority opinion in granting pre-judgment interest to Neumark pursuant to the "secret" open account contract between Neumark and Desertscapes, the Court recognized it could not carry it into the realm of post-judgment interest, as there is no privity of contract between Salls and Neumark.

[1] Liberty disputes that Neumark is entitled to any interest.

The reasoning is identical to that discussed above regarding attorney fees. These are commercial cases. F.D. Rich, *infra* at 130. Even assuming that pre-judgment interest was proper pursuant to the open account agreement between Neumark and Desertscapes and N.M.S.A. 1978 §56-8-5, the commercial aspects of the case, and the lack of privity does not allow post-judgment interest to be awarded at the rate of 18%. Moreover, it is abundantly clear that the District Court interpreted the Little Miller Act's "justly due" provision as only being part of the unpaid balance at the time of the institution of the suit [RP 806, Conclusions of Law, ¶10]. Clearly, the District Court recognized the limitations of liability on the contractor regarding payment for "...labor or material furnished in the prosecution of work provided for in such contract, in respect of which a payment bond is furnished under Section 13-4-18..." Thus, the District Court's award of post-judgment interest at the rate of 8.75% was correct.

III. CONCLUSION

Assuming Neumark was entitled to judgment on its claim under the bond for amounts due for materials, the District Court correctly ruled that it was not entitled to attorney fees and correctly ruled that post-judgment interest should be awarded at the rate of 8.75%. The District Court's rulings should be affirmed.

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A true and correct copy of the foregoing was hand delivered this 30th day of August, 2010, to:

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