IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff/Appellee and Cross-Appellant,

v.

Ct. App. No. 30,068
Case No. CV-0202-2007-08460

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant/Appellant and Cross-Appellee.

CROSS-APPELLANT'S BRIEF-IN-CHIEF ON CROSS-APPEAL

On Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Valerie A. Huling, Presiding

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I. Nature of the Case

This is a Cross-Appeal by Solsbury Hill, LLC, d/b/a Neumark Irrigation ("Neumark") from a Judgment on its Complaint to Recover Payment for Materials Supplied. [RP 816, Judgment on Compl. to Recover Payment for Material Supplied]. The action was brought by Neumark pursuant to New Mexico's Little Miller Act, NMSA 1978, §§ 13-4-18, *et seq.* (1987) (the "Act"). [RP 1, Compl. to Recover Payment for Material Supplied]. Neumark was a supplier of irrigation materials for a public works project, the City of Rio Rancho Unser Boulevard Widening Project ("Unser Project")[1] covered by the Act. Neumark supplied irrigation materials to Desertscapes, Inc. as the irrigation and landscaping subcontractor for the Unser Project. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶4]. Liberty Mutual Insurance Company ("Liberty") is the surety on the Unser Project and Salls Brothers Construction, Inc. ("Salls") was the general contractor on the Unser Project. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶¶ 1, 3].

[1] Neumark filed a claim to recover for materials supplied to Desertscapes, Inc. as a subcontractor on two public works projects: the Paseo del Norte Extension Project and the Unser Project. [RP 1, Compl. to Recover Payment for Materials Provided]. The District Court did not rule in Neumark's favor as to the Paseo del Norte Extension Project. The Unser Project is the project concerned in Neumark's Cross-Appeal.

II. Course of Proceedings and Disposition in District Court

The District Court entered a judgment against Liberty as to the Unser Project, after a two-day trial, in the principal amount of $42,321.29, plus accrued interest of $18,249.31 through August 19, 2009, plus interest at 18% per annum on the principal amount from August 19, 2009, to October 16, 2009, plus interest on the total judgment at 8.75% per annum until paid in full. [RP 816, Judgment on Compl. to Recover Payment for Material Supplied]. Although the Court awarded pre-judgment interest to Neumark based on its credit agreement with Desertscapes, the Court did not award Neumark its attorney's fees or post-judgment interest at the rate of 18% per annum as provided in the credit agreement. [RP 806, Findings of Fact & Conclusions of Law, Conclusions of Law ¶¶ 9, 10, 15.] The District Court erred, as a matter of law, in failing to award post-judgment interest at the rate of 18% per annum and attorney's fees.

III. Summary of Facts Relevant to the Issues Presented

Desertscapes, through its agent Brian Bachuzewski, submitted a credit application to Neumark on January 10, 2003. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 5; Plaintiff's Trial Exhibit A]. Desertscapes, through its agent, Carlo Papazian, submitted a second credit application to Neumark on August 31, 2005. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 6; Plaintiff's Trial Exhibit B]. Neumark

accepted those credit applications and they became the credit agreements between Desertscapes and Neumark. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 7]. The credit agreements between Desertscapes and Neumark provide for "interest . . . at the rate of eighteen percent (18%) per annum from original due date." [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 8]. The credit agreements also provide for the award of attorney's fees incurred by Neumark in endeavoring to collect under the credit agreements. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 9; Trial Exhibits A and B]. Salls was not a party to the credit agreements. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 9].

In 2006, Salls entered into a contract with the City of Rio Rancho for the Unser Project wherein Salls agreed, among other things, to install the irrigation system for the project. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 1]. Salls subcontracted the irrigation work for the Unser Project to Desertscapes. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 4]. Neumark provided Desertscapes irrigation materials for the installation of the irrigation system. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 27]. Neumark supplied irrigation materials to Desertscapes as a subcontractor on the Unser Project from August 30, 2006, to May 3, 2007. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 27].

Neumark was not paid for materials provided for the Unser Project from November 13, 2006, through May 3, 2007. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 29]. On September 25, 2007, Neumark brought this action against Appellant under the Act which ultimately resulted in the judgment concerned herein. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶ 40].

Neumark requested that it be awarded both post-judgment interest at the rate of 18% and the attorney's fees incurred by Neumark in endeavoring to collect or realize on the obligations of Desertscapes to Neumark in connection with the Unser Project, based on the credit agreement. [RP 1, Compl. to Recover Payment of Cost for Material Provided]. The District Court granted Neumark pre-judgment interest at 18%, in accordance with the credit agreement, and granted post-judgment interest. However, the District Court set the post-judgment interest rate at the statutory rate of 8.75% as opposed to the rate of 18% as provided in the credit agreement. [RP 816, Judgment on Compl. to Recover Payment for Materials Supplied]. The District Court did not address why post-judgment interest at the rate of 18% was not applied, commensurate with the credit agreement rate.

The District Court, as a matter of law, erroneously denied Neumark's request for attorney's fees on the grounds that "[a]bsent privity of contract, a payment bond claimant cannot recover attorney's fees from a contractor. Neither

the defendant [Liberty Mutual], nor the contractor, were parties to the credit agreement, and therefore, the claim for attorney's fees is denied." [RP, 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 15].

IV. Statement of Issues on Appeal

Issue A. **Whether the District Court erred in ruling that Neumark is not entitled to recover reasonable attorney's fees incurred by Neumark in endeavoring to collect or realize on the obligations of Desertscapes to Neumark in connection with the Unser Project, when there is a contract between Desertscapes and Neumark which provides for attorney's fees, and whether under the Act this constitutes sufficient privity of contract as a matter of law, if privity is required.**

Contention of Cross-Appellant: The District Court erred in not awarding Neumark its attorney's fees as part of the sums justly due to Neumark, under the Act, pursuant to its credit agreement with Desertscapes. The District Court ruled: "[Liberty] is liable as a surety on the bond issued pursuant to the Little Miller Act for sums justly due to Neumark under its credit agreements with Desertscapes (not including attorney's fees) for materials supplied for the Unser Project." [RP 806, Findings of Fact & Conclusions of Law, Conclusions of Law, ¶ 9].

Standard of review: Issue A concerns a question of statutory interpretation, a question of law, subject to *de novo* review. Maes v. Audubon Indem. Ins. Group, 2007-NMSC-46, ¶ 11, 142 N.M. 235, 164 P.3d 934. The appellate court reviews the award of attorney's fees for an abuse of discretion.

However "even when we review for an abuse of discretion," the court's review of "the application of the law to the facts is conducted de novo" and the courts "may characterize as an abuse of discretion a discretionary decision that '[is] premised on a misapprehension of the law.'" N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-28, ¶ 7, 127 N.M. 654, 986 P.2d 450.

Preservation of Issue: Neumark originally requested attorney's fees in its Complaint to Recover Payment for Materials Supplied. Neumark also requested attorney's fees in its Requested Findings of Fact & Conclusions of Law. The District Court issued its Findings of Fact & Conclusions of Law denying Neumark's request for attorney's fees and the issue has been preserved.

Argument on Issue A

NMSA 1978, Section 13-4-19(A) (1975) provides:

> Every person, firm or corporation who has furnished labor or material in the prosecution of work provided for in such contract . . . 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* . . . [.]

(Emphasis added).

The District Court correctly awarded Neumark pre-judgment interest at the rate of 18% per annum pursuant to the open account credit agreement between Desertscapes and Neumark based on the Act and NMSA 1978, § 56-8-5 (1983). The District Court reasoned that Liberty was liable "for sums justly due to

Neumark under its credit agreements with Desertscapes . . ." [RP 806, Findings of Fact & Conclusions of Law, Conclusion ¶ 9] and that "[i]nterest of 18% was justly due to Neumark and part of the balance unpaid on the Unser Project at the time of institution of the suit." [RP 806, Findings of Fact & Conclusions of Law, Conclusion ¶ 10]. Those conclusions are in accord with New Mexico Supreme Court precedent holding that a claimant, under Section 13-4-19(A), may sue for all contract liability under a bond, including amounts representing prejudgment interest, because those amounts are what are "justly due." See State ex rel. Bob Davis Masonry v. Safeco Ins. Co. of Am., 118 N.M. 558, 562, 883 P.2d 144, 148 (1994). The District Court's rationale with respect to pre-judgment interest is equally applicable to Neumark's claim for attorney's fees.

The District Court ruled Neumark was not entitled to attorney's fees because, "[a]bsent privity of contract, a payment bond claimant cannot recover attorney's fees from a contractor. Neither the defendant, nor the contractor, were parties to the credit agreement, and therefore, the claim for attorney's fees is denied." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 15]. Although the District Court couched its ruling in terms of a lack of privity of contract, and failed to mention that statutory entitlement is also a basis for an award of attorney's fees, other courts analyzing this issue have held that suppliers

are entitled to attorney's fees as part of what is justly due them under the federal Miller Act.[2]

Appellee acknowledges that neither the Act nor the federal Miller Act expressly provides for an award of attorney's fees. However, Section 13-4-19(A) provides:

> Every person, firm or corporation who has furnished labor or material in the prosecution of work provided for in such contract . . . 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* . . . [.]

(Emphasis added).

The language regarding entitlement to judgment for the sum or sums justly due, under the Act, permits a court to award attorney's fees. See United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332 (4th Cir. 1996). "The Miller Act does not, by its own terms, provide [explicitly] for attorney's fees or interest. Several circuits have held, however, that interest and attorney's fees are recoverable if they are part of the contract between the subcontractor and supplier." Id. at 236.

The United States Supreme Court, in United States ex rel. Sherman v. Carter, 353 U.S. 210 (1957) explained the principle when it ruled that "[a] surety's

[2] New Mexico's Act is modeled after the federal Miller Act. State ex rel. Nichols v. Safeco Ins. Co., 100 N.M. 440, 446, 671 P.2d 1151, 1157 (N.M. Ct. App. 1983).

liability on a Miller Act bond must be at least coextensive with the obligations imposed by the Act if the bond is to have its intended effect." Id. at 215. The Supreme Court focused on, among other things, the identical language in the Federal Miller Act which provides that a claimant "shall have the right to sue on such payment bond . . . for the sum or sums justly due him . . . ." Id. Carter involved a claim by trustees of an employee health and welfare fund against the contractor and its surety for contributions owed to the fund. Id. at 214. The Court held that the "trustees' claim for . . . attorney's fees . . . and other related expenses of litigation has equal merit." Id. at 220.

In United States ex rel. Southeastern Mun. Supply Co. v. National Union Fire Ins. Co., 876 F.2d 92 (11th Cir. 1989), the Eleventh Circuit relied on the Carter rationale when it held that a supplier was entitled to attorney's fees where there was a contractual provision between the supplier and subcontractor for recovery of the same:

> The question presented is whether, in an action where there is a contractual provision between a supplier . . . and a subcontractor . . . for the recovery of attorney's fees, that provision is enforceable under the Miller Act . . . against the contractor . . . and its surety . . . . This court answered the question in the affirmative in United States f/u/b/o Carter Equipment Co., Inc. v. H. R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977). And, we follow that holding.

876 F.2d at 93[3].

[3] United States ex rel. Trustees of Colorado Laborers Health & Welfare Trust Fund v. Expert Envtl. Control, Inc., 785 F. Supp. 895, 898 (D. Colo. 1992), cites a

New Mexico's Court of Appeals relied on the Carter rationale in Nichols, 100 N.M. 440, 671 P.2d 1151. In that case, the New Mexico Court of Appeals analyzed the issue of attorney's fees under the Act. "Reasonable attorney's fees should be included where the written terms of the contract sued upon expressly provided for the allowance of attorney's fees." Id. at 446. The plaintiff in that case, a lessor, brought suit against a contractor and surety for failure to pay amounts due under equipment leases. Id. at 442. Each of the leases, between the lessor and contractor, contained attorney's fees provisions. Id. at 445. Nichols relied on Carter:

> The rationale adopted by the Court in United States ex rel v. Carter is applicable to construction of § 13-4-19 and the allowance of reasonable attorney's fees where, as here, the lease contracts expressly provide for the collection of attorney's fees. The obligations of a

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number of other cases supporting the rule that a general contractor and its surety must pay attorney fees when there is an agreement between a subcontractor and the claimant providing for such fees, noting that "A majority of courts also follow this approach" citing: "Southeastern Mun. Supply Co., 876 F.2d at 93 (adopting rule), reh'g denied, 886 F.2d 1322 (11th Cir. 1989); United States ex rel. Krupp Steel Prods. v. Aetna Ins. Co., 923 F.2d 1521, 1527 (11th Cir. 1991) (expressly repudiating "the suggestion in Krupp I that a contractual provision between a supplier and a subcontractor for the recovery of attorney's fees is not enforceable under the Miller Act against the general contractor or its surety"). A majority of courts also follow this approach. See, e.g., Gergora v. R. L. Lapp Forming, Inc., 619 F.2d 387, 391 (5th Cir. 1980) (state law case looking to federal law under Miller Act); United States ex rel. Carter Equip. Co. v. H. R. Morgan, Inc., 554 F.2d 164, 166 (5th Cir. 1977); Travelers Indem. Co. v. United States ex rel. Western Steel Co., 362 F.2d 896, 899 (9th Cir. 1966); Ibex Indus., Inc. v. Coast Line Waterproofing, 563 F. Supp. 1142 (D. D.C. 1983)." 785 F. Supp. 895, at 898.

> surety under its bond are construed strictly in favor of the beneficiaries.

100 N.M. at 446.

The only other New Mexico case that discusses attorney's fees awards in Little Miller Act claims is State ex rel Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co., 102 N.M. 22, 690 P.2d 1016 (1984). However, Goodmans did not directly address the question of law before the Court in this case. There the court noted that, "Goodmans' claims that attorney fees are . . . collectible if called for by the underlying contractual agreement. However, in this case the district court found that there was no contract between Goodman's and Page & Writz." Id. at 24. The court in Goodmans merely noted that "[a]bsent authority or rule of the court, attorney's fees are not recoverable as an item of damage." Id.

Unlike the plaintiff in Goodmans, Neumark argued that attorney's fees and pre-judgment interest are part of what is justly due a claimant under the Little Miller Act. The District Court concluded that "[i]nterest was justly due to Neumark and part of the balance unpaid on the Unser Project at the time of the institution of the suit," [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 10]. The same reasoning applies to Neumark's claim for attorney's fees, i.e., it is part of what is justly due Neumark Under the Little Miller Act.

Although Salls was not a party to the credit agreement, that credit agreement was the "contract sued upon" here. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶¶ 5-7]. The District Court correctly concluded that "[Appellant] is liable as a surety on the bond issued pursuant to the Little Miller Act for sums justly due to Neumark under its credit agreements with Desertscapes..." for the materials Neumark supplied for the Unser Project. [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law ¶ 9]. In awarding Appellee pre-judgment interest, the District Court correctly applied the reasoning of the Supreme Court in Carter, as incorporated into New Mexico law in Nichols and Bob Davis. That reasoning applies with equal force to Neumark's request for attorney's fees. There is no basis to treat a supplier to a subcontractor differently under either the Little Miller Act or the Miller Act when a supplier is also entitled to "sums justly due." Nor does the language of the Act distinguish between a supplier providing materials to a subcontractor and one providing directly to a general contractor, for purposes of determining the sums justly due. Accordingly, Neumark requests that this Court reverse the District Court's decision denying Neumark its attorney's fees and that it remand the matter for further proceedings as to the amount of attorney's fees to which Neumark is entitled in connection with the proceedings in the trial court, in this court, and other

proceedings and efforts to collect that fall within the scope of the provisions of the credit agreement.

Issue B. Whether the District Court erred in denying Neumark post-judgment interest at the rate of 18%, as specified in the credit agreement between Desertscapes and Neumark.

Contention of Cross-Appellant: The District Court erred in not awarding Neumark its post-judgment interest at the rate of 18% per annum as part of the sums justly due to Neumark under the Act, pursuant to the credit agreement. The District Court correctly ruled: "[Liberty] is liable as a surety on the bond issued pursuant to the Little Miller Act for sums justly due to Neumark under its credit agreements with Desertscapes . . ." for the materials supplied Neumark for the Unser Project. [RP 806, Findings of Fact & Conclusions of Law, Conclusions of Law, ¶ 9]. The District Court also ruled that: "Neumark is entitled to post-judgment interest at 8.75% per annum." [RP 806, Findings of Fact & Conclusions of Law, Conclusions of Law, ¶ 20]. It is Neumark's contention that the District Court correctly awarded pre-judgment interest to Neumark at the rate provided in the credit agreement between Desertscapes and Neumark, as part of the sums justly due Neumark. It is also Neumark's contention that the failure to award commensurate post-judgment interest was in error and was inconsistent with the District Court's correct ruling and rationale as to pre-judgment interest. The District Court did not articulate the basis for applying two different rates.

Standard of Review: Statutory interpretation is an issue of law, which courts review *de novo*. Maes, 2007-NMSC-46, ¶ 11. Furthermore, Nava v. City Santa Fe, 2004-NMSC-39, 136 N.M. 647, 103 P.3d 571 held that "while an award of pre-judgment interest under Section 56-8-4(B) is discretionary, an award of post-judgment interest under Section 56-8-4(A) is mandatory.[4]" Id. at ¶ 22.

Preservation of Issue: Neumark originally requested post-judgment interest at the rate of 18% in its complaint. [RP 1, Compl. to Recover Payment for Materials Supplied]. Neumark also requested post-judgment interest at 18% in its Requested Findings of Fact & Conclusions of Law. The District Court issued its Findings of Fact & Conclusions of Law as to post-judgment interest and the issue has been preserved.

Argument on Issue B

NMSA 1978, Section 56-8-4(A) provides:

> Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of eight and three-fourths percent per year, *unless*: *the judgment is rendered on a written instrument having a different rate of interest, in which case interest shall be computed at a rate no higher than specified in the instrument* . . . .

In Maddux Supply, 86 F.3d 332, the Fourth Circuit held that "[t]he Miller Act does not, by its own terms, provide for attorney's fees or *interest.* Several

[4] Neumark notes that the 1993 version of Section 56-8-4 was discussed in Nava, 2004-NMSC-39, ¶ 1. However, the 2004 amendment contains the same language

circuits have held, however, that *interest* and attorney's fees are recoverable if they are part of the contract between the subcontractor and supplier." Id. at 336 (emphasis added). The case law cited above regarding a Miller Act claimant's entitlement to attorney's fees is equally applicable to a claim for post-judgment interest. In this case, the judgment was rendered on the credit agreements between Desertscapes and Neumark, a written instrument having an interest rate of 18% per annum. Interest at the rate of 18% per annum until paid in full is therefore part of what Neumark is justly due under the Act, just as pre-judgment interest at the rate of 18% is justly due to Neumark under the Act. The District Court therefore erred in not awarding post-judgment interest at the rate of 18%.

In Sunwest Bank, N.A. v. Colucci, 117 N.M. 373, 872 P.2d 346 (1994), the New Mexico Supreme Court discussed, in a footnote, the mandatory nature of the post-judgment interest at the contract rate, provided in Section 56-8-4, noting that a prior version of Section 56-8-4 provided:

> Interest shall be allowed on judgments . . . from entry and shall be calculated at the rate of fifteen percent per year, unless the judgment is rendered on a written instrument having a different rate of interest, *in which case interest shall be computed at the rate specified in the instrument.*

(Emphasis added).

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discussed in Nava.

The court noted that the statute had been amended, effective June 18, 1993, to read:

> Interest shall be allowed on judgments . . . from entry and shall be calculated at the rate of eight and three-quarters percent per year, unless the judgment is rendered on a written instrument having a different rate of interest, *in which case interest shall be computed at a rate no higher than specified in the instrument* or the judgment is based on tortious conduct, bad faith, intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.

Sunwest Bank, 117 N.M. at 379, 872 P.2d at 352. The court then noted that the statute sets two different rates for post-judgment interest and that it "*continues to allow for the contract on which the judgment is based to set its own rate of postjudgment interest.*" 117 N.M. at 379, 872 P.2d at 352, n.7 (emphasis added). The language from the 1993 amendment, discussed in Sunwest Bank, is the same as the language in the current version of Section 56-8-4. In this case, the judgment is based upon the surety bond and the credit agreement which determines the interest comprising a part of the "sums justly due" under the Little Miller Act.

Accordingly, post-judgment interest at the rate provided in the credit agreement is mandatory, under Section 56-8-4. Alternatively, to the extent that the District Court exercised discretion by awarding a lower interest rate, the District Court abused its discretion by failing to award post-judgment interest at the rate provided in the credit agreement, that rate of interest, until paid in full, being part

of the sums justly due to Neumark. Neumark therefore requests that the Court modify the District Court's ruling to reflect that Neumark is entitled to post-judgment interest at the rate of 18% per annum and that the Court remand for further proceedings for the entry of a judgment including post-judgment interest at the rate of 18% per annum.

V. CONCLUSION

The Court should reverse the judgment of the District Court denying Neumark its attorney's fees, award Neumark post-judgment interest at the rate of 18% per annum, until paid in full, and remand for further proceedings.

Respectfully Submitted,
KELEHER & McLEOD, P.A.

By_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered on July 16, 2010 to the following:

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