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,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant/Appellant.

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

APPELLANT'S BRIEF IN CHIEF

Civil Appeal from The Second Judicial District, County of Bernalillo

The Honorable Valerie M. Huling

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I. SUMMARY OF THE PROCEEDINGS

A. NATURE OF THE CASE

This is an appeal from a Judgment of the Second Judicial District Court by Liberty Mutual Insurance Company ("Liberty"), the surety on a public works project subject to N.M.S.A. 1978, §13-4-18 *et al.* (Little Miller Act), known as the City of Rio Rancho Unser Boulevard Widening Project, wherein Salls Brothers Construction, Inc. ("Salls") was the general contractor, Desertscapes, Inc. ("Desertscapes") was the irrigation system and landscaping subcontractor, and Solsbury Hill d/b/a Neumark Irrigation ("Neumark"), a supplier of irrigation system materials, supplied at least some irrigation system materials to Desertscapes for the Project. Neumark claimed Desertscapes failed to pay it for irrigation system materials, and as a result Neumark filed its complaint to recover payment for irrigation system materials supplied from the payment bond posted by Liberty [RP1, Complaint]. Liberty answered the Complaint, and asserted affirmative defenses that Neumark's notice of its claim against the payment bond was not timely, and that Neumark had failed to establish that the materials it provided were, in fact, incorporated into the Unser Boulevard Widening Project [RP11, Answer to Complaint]. The District Court entered judgment against Liberty Mutual in the amount of $42,321.29 based on Neumark's account managers' "good faith belief" that the irrigation materials were provided for the Unser Boulevard Widening Project and awarded prejudgment interest at the rate of 18% per annum pursuant to the open account credit agreement between the subcontractor, Desertscapes, and the supplier, Neumark.

Liberty contends that the District Court ignored federal Tenth Circuit and New Mexico law requiring, at a minimum, proof of actual delivery of the irrigation materials

to the Project. In addition, Liberty argues that the District Court erred in placing the burden of proof on Liberty that the materials were not delivered to or used in the Unser Widening Project. Liberty further argues that the District Court erred in granting pre-judgment interest to Neumark pursuant to the open account agreement between Neumark and Desertscapes, erred in ruling that Neumark's notice of claim met the requirements of NMSA 1978, §13-4-19(A) and erred in ruling that Neumark met the requirements of NMSA 1978 §§13-4-19(B) and (C) regarding notice to the obligee of the beginning of the lawsuit.

B. COURSE OF PROCEEDINGS

A two day trial on the merits of Neumark's claim for payment from the public works payment bond was held in the Second Judicial District Court, County of Bernalillo, on August 20-21, 2009. The District Court issued Findings of Fact and Conclusions of Law finding that Neumark had a good faith belief that the irrigation materials were supplied for the prosecution of work specified in the contract for the Unser Project, that Liberty produced no evidence to contradict Neumark's good faith belief that the materials were being provided for the Unser Project, that Neumark's notice of its claim against the payment bond was timely, that interest of 18% was due to Neumark pursuant to the open account agreement between Desertscapes and Neumark and N.M.S.A 1978 §56-8-5, and that failure by Neumark to notify the City of Rio Rancho of the lawsuit until July 2009 did not bar Neumark's claims, as no judgment was entered within thirty (30) days after giving notice to the City of Rio Rancho [RP 806, Findings of Fact and Conclusions of Law]. On October 16, 2009, the District Court granted Judgment to Neumark in connection with the Rio Rancho Unser Widening

Project. This appeal of the Judgment in favor of Neumark was perfected within thirty days of the entry of the Judgment [RP 836].

C. DISPOSITION OF DISTRICT COURT

The District Court granted Judgment to Neumark in connection with the Rio Rancho Unser Widening Project in the amount of $42,329.21, 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 at the rate of 8.75% per annum until paid in full [RP 816].

D. SUMMARY OF FACTS RELEVANT TO ISSUES

In 2004, Salls Brothers Construction, Inc., ("Salls"), entered into a public works contract with the City of Albuquerque in connection with a project known as the City of Albuquerque Unser Boulevard Extension Project ("City of Albuquerque Unser Extension Project"), wherein Salls agreed, among other things, to install the irrigation system, landscaping and ground cover for the City of Albuquerque Unser Extension Project [Vol. I, TR-158, lines 1-25]. The contract also required Salls to provide a two-year maintenance warranty, which commenced in February 2006 [Vol. I, TR-158, lines 13-25 and Vol. II, TR-31, lines 1-20]. Salls subcontracted the irrigation system, landscaping, ground cover and warranty portion of the Project to Desertscapes, Inc. ("Desertscapes") in connection with the City of Albuquerque Unser Extension Project [Vol. II, TR-29, lines 11-24]. Desertscapes purchased its irrigation system materials from Neumark [Appellant's Trial Exhibit 33, page 15, lines 10-18].

In 2006[1], Salls entered into a contract with the City of Rio Rancho, known as the City of Rio Rancho Unser Boulevard Widening Project ("City of Rio Rancho Unser Widening Project") wherein Salls, among other things, agreed to install the irrigation system, landscaping and ground cover [Vol. I, TR-156, lines 16-25, TR-157, lines 9-25]. Salls again subcontracted the work to Desertscapes and Desertscapes again purchased at least some irrigation materials from Neumark for the Unser Widening Project [Appellant's Trial Exhibits 3 and 8 and Appellee's Trial Exhibit H]. At the time, Neumark did not have truck delivery procedures in place proving the delivery of materials to a particular project or even a particular place. All it did was have whoever accepted the materials sign his or her name to an invoice, whether the materials were delivered to the project site, Desertscapes' yard or the materials were picked up at Neumark's place of business [Vol. I, TR-84, lines 3-5 and 22-25, TR-85, lines 1-25, TR-86, lines 1-25, TR-87, lines 1-25, TR-88, lines 1-25, TR-89, lines 1-25. TR-90, lines 1-25, TR-91, lines 1-25, TR-92, lines 1-25, TR-93, lines 1-2, Appellee's Trial Exhibit H and Appellant's Trial Exhibit 20]. Desertscapes, through its principal, Carlo Papazian, also testified that it did not know whether the materials claimed by Neumark had been provided for the Unser Widening Project [Appellant's Trial Exhibit 33, page 154, lines 14-25, page 155, lines 1-15, page 143, lines 11-25, and page 144, lines 1-15]. Desertscapes further testified that the amounts claimed by Neumark for irrigation system materials was not reasonable for the Project [Appellant's Trial Exhibit 33, page 138, lines 15-25 and page 139, lines 1-24].

[1] In 2006, Salls also entered into a contract with the City of Albuquerque known as the Paseo del Norte Extension Project. Salls had also subcontracted the irrigation system and landscaping installation to Desertscapes. Desertscapes failed to pay Neumark for the materials, and Neumark also sued Liberty on the payment bond in this matter. The issues were identical and the Unser Widening and Paseo Extension Projects were tried in the District Court together. The Court granted Judgment in favor of Liberty on the Paseo Extension Project, and the Paseo Extension Project is not on appeal.

Desertscapes' subcontract for the irrigation system, landscaping and ground cover was for the amount of $381,857.80, and of that amount, the contract cost for the irrigation system was $130,945.00 [Appellant's Trial Exhibit 3, pages 11-13]. Desertscapes estimated the irrigation system material costs to be approximately $ 55,600 to $56,000.00 [Appellant's Trial Exhibit 33, page 114, lines 19-25 and page 115, lines 1-6]. Neumark had also prepared an estimate of the materials required for the Unser Widening Project based on plan take-offs provided by Desertscapes in the amount of $51,991.94 [Appellant's Trial Exhibit 5, pages 4-11]. It was Neumark's opinion that Desertscapes was an experienced estimator [Vol. I, TR-139, lines 10-16].

Salls and Desertscapes had agreed that all of the materials required by Desertscapes would be purchased at the beginning of the Projects [Vol. II, TR-31, lines 23-25, TR-32, lines 1-7, Appellant's Trial Exhibits 5 and 8 and Appellant's Trial Exhibit 33, page 42, lines 18-25 and page 43, lines 1-10]. Thus, on August 31, 2006, Desertscapes billed Salls $51,991.94 for the irrigation materials required for the Unser Widening Project [Appellant's Trial Exhibit 8, page 1, Appellant's Trial Exhibit 33, page 130, lines 10-25 and page 131, lines 1-9]. The City of Rio Rancho would not have paid for materials not on hand [Vol I, TR-181, lines 4-24 and Vol. II, TR-33, lines 6-23].

Desertscapes began work on the City of Rio Rancho Unser Widening Project in early September 2006, and substantially completed the irrigation system on February 24, 2007 [Appellant's Trial Exhibit 8]. Desertscapes invoiced Salls for the irrigation system work on August 31, 2006, October 25, 2006, November 28, 2006, December 28, 2006, January 24, 2007, February 20, 2007 and April 5, 2007. Desertscapes' final invoice to Salls dated April 5, 2007, sought payment for ground cover and landscaping only [Appellant's Trial Exhibit 8]. Salls paid Desertscapes the total amount of $231,045.36 for

work completed through February 24, 2009, including the $51,991.94 for irrigation materials [Appellant's Trial Exhibits 8 and 9]. Neumark's last invoice to Desertscapes specifically identifying the City of Rio Rancho Unser Widening Project was dated December 28, 2006 [Appellant's Trial Exhibit 20].

By January 12, 2007, Neumark had stopped extending credit to Desertscapes [Vol. I, TR-79, lines 3-25 and TR-80, lines 1-15]. On May 17, 2007, Desertscapes filed bankruptcy. At the time of the bankruptcy, Desertscapes had not completed the landscaping or ground cover on the Unser Widening Project, and Salls was forced to hire Sequoia Landscape to complete the Desertscapes subcontract. Salls also used its own forces to complete Desertscapes' subcontract [Appellant's Trial Exhibits 15 and 35]. On May 22, 2007, Neumark mailed a certified letter to Salls, providing notice of a claim against the payment bond in the amount of $42,607.71 in connection with the Rio Rancho Unser Widening Project making claim for the following Neumark invoices:

Date	Invoice No.	Amount	Shipped To
12-19-06	65172	26.17	Unser Blvd.
12-22-06	65243	196.06	Unser
12-27-06	65311	1,124.16	Unser/Northern
12-28-06	65327	258.50	Unser
1-08-07	65423	22.40	Unser – R-627*
2-19-07	66646	12,660.19	Unser Blvd. Extension
2-19-07	66647	18,591.49	Unser Blvd. Extension
2-19-07	66648	1,979.39	Unser Blvd. Extension
3-26-07	68732	103.35	Unser-Albuquerque, NM 87199
4-12-07	70584	6,348.36	Unser Blvd – 30
5-1-07	73019	258.68	Desertscapes P O Box 94053 Alb NM
5-2-07	73176	237.55	Unser
5-3-07	73240	240.00	Unser-Mario

*R=Residential Project

[Appellee's Trial Exhibit L and Trial Exhibit H, NEU pages 128-160, and Appellant's Trial Exhibit 33, page 143, lines 11-20 and page 154, lines 1-9 and lines 14-24]. The certified letter was delivered to Salls' post office box [Appellee's Trial Exhibit L]. On September 25, 2007, Neumark filed suit against Salls' surety, Liberty Mutual Insurance Company [RP1, Complaint]. On July 23, 2009, twenty-six days prior to the trial, Neumark provided notice to the City of Rio Rancho of the beginning of the lawsuit against Liberty [Appellee's Trial Exhibits P and Q].

Based on the testimony of Neumark's account manager, whose job responsibilities were accounts receivable, accounts payable, payroll, human resources, collections and approving credit applications, the District Court found that the account manager had a good faith belief that the irrigation system materials were used in the prosecution of the Unser Widening Project [Vol. I, TR-68, lines 8-25], even though the branch manager, Mr. Batista, and sales personnel took the material orders from customers, including Desertscapes [Vol. I, TR-70, lines 7-25, TR-71, lines 1-6, TR-72, lines 21-24 and TR-75, lines 12-18]. The Court also found that it was Liberty's burden to establish the materials were not delivered for the Unser Widening Project, that Neumark was entitled to pre-judgment interest at the rate agreed between Neumark and Desertscapes pursuant to their open account agreement, that Neumark's notice of claim against the payment bond was timely, and that Neumark's notice to the City of Rio Rancho did not bar its claim.

II. ARGUMENT

A. WHETHER THE DISTRICT COURT ERRED IN RULING THAT A SUPPLIER OF MATERIALS NEED ONLY HAVE A GOOD FAITH BELIEF THAT THE MATERIALS IT CLAIMED IT SUPPLIED WERE FOR A PARTICULAR PUBLIC WORKS PROJECT IN ORDER TO RECOVER AGAINST THE SURETY.

1. Standard of Review.

The standard of review is de novo. Conclusions of law by a District Court are reviewed de novo. Allen v Timberlake Ranch Landowners' Association, 138 N.M. 318, 119 P.3d 743 (2005).

2. Contentions of Appellant.

Appellant, Liberty Mutual Insurance Company, contends that the District Court ignored New Mexico statutory and case law and United States Tenth Circuit Court of Appeals decisions relating to public works projects requiring proof of delivery and actual use of materials provided by a supplier to a specific public works project, and instead applied a "good faith" standard adopted in the United States Fourth and Eleventh Circuit Courts of Appeal.

3. Preservation of Issue.

The District Court issued its Findings of Fact and Conclusions of Law finding that Appellee Neumark had a good faith belief that the irrigation materials for the Unser Project were supplied for the prosecution of work specified in the contract for the Unser Project [RP-806, Conclusions of Law, ¶5].

4. Argument.

In its Findings of Fact and Conclusions of Law, the District Court ruled that "Neumark had a good faith belief that the irrigation materials at issue for the Unser Project, reflected in Neumark's invoices dated November 13, 2006, though May 3, 2007 (Appellee's Trial Exhibit H) were supplied for the prosecution of work specified in the contract for the Unser Project." [RP 806 Conclusions of Law, ¶5]. Liberty believes the District Court erred in applying a "good faith" standard.

It is well established in New Mexico that in order for a materials supplier to collect against a payment bond, the supplier must not only prove the materials were delivered but that they were incorporated into the project. See Crane O'Fallon v Via, 56 N.M. 772, 251 P.2d 260 (1952), where the New Mexico Supreme Court, in reversing the trial court, stated, "[a]pparently, the trial court took the view that if materials were furnished to a subcontractor by a materialman who, at the time of furnishing them, believed in good faith they were to be used in the performance of a public building contract, a recovery on the bond could be had therefore, whether or not such materials were actually used in due performance of the contract; provided, of course, the statutory notice was duly given within 90 days after furnishing of the last item thereof." *Id.* at 776. See also State of New Mexico ex rel. Goodman's Office Furnishing, Inc., v Page & Wirtz Construction Company, 102 N.M. 22, 690 P.2d 1016 (1984). In Goodman's, the District Court had allowed the contractor and its surety a credit for excess materials and equipment delivered but not incorporated into the Project. Goodman's argued that the district court erred in deducting the cost of excess materials from Goodmans' damage award. The New Mexico Supreme Court disagreed with

Goodman's, finding that the contractor was entitled to a credit for materials and supplies not incorporated into the Project. *Id* at 24.

The United States Tenth Circuit Court of Appeals has followed the same reasoning, although it does not require that a supplier prove that the materials were actually incorporated into the Project, only that the supplier prove that the materials were actually delivered for use on the Project. See United States for the Use of State Electric Supply Co., v Hesselden Construction Co., 404 F.2d 774 (10th Cir. 1968). See also St. Paul Indemnity Company v United States for the Use of H.C. Jones, 238 F.2d 917 (10th Cir. 1954) ([l]iberality of statutory construction, however, is not a substitute for the burden placed on claimant to prove that the labor or materials making up his claim were furnished in the prosecution of the work. There must be some reliable evidence from which it can reasonably be inferred that the labor and materials went into the prosecution of the bonded job. Conjecture or guesswork is not enough). *Id.* at 925.

In the instant case, Neumark not only failed to establish that it actually delivered the irrigation system materials but that the irrigation system materials were in fact incorporated into the Unser Widening Project. As testified to by the account manager, it made no difference to Neumark where the material was delivered [Vol. I, TR-84, lines 3-5]. Moreover, Neumark did not verify where the materials were going to, did not verify that it was going to any particular job, and did not even bother to verify if the projects were legitimate [Vol. I, TR-88, lines 24-25, TR-89, lines 1-8].

Finally, none of Neumark's paperwork established that the materials provided to Desertscapes after December 28, 2006, were delivered or incorporated into the Rio Rancho Unser Widening Project, as the seven invoices after December 28, 2006, showed shipping to addresses of Unser R-627 (a residential purchase order number), Unser Blvd

Extension (a City of Albuquerque Project which was still under warranty by Desertscapes), Unser-Albuquerque NM 87199, Unser Blvd-30 (a purchase order number different from the other Unser Widening purchase order numbers) and Desertscapes PO Box 94053 Alb NM [Appellant's Trial Exhibit 20].

Based on the foregoing, it is clear that Neumark failed to prove that it delivered the material to the Unser Widening Project or that the material was used on the Unser Widening Project. Accordingly, the District Court's decision should be reversed.

B. WHETHER THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROOF ON THE CONTRACTOR/SURETY THAT THE MATERIALS CLAIMED TO HAVE BEEN PROVIDED BY A SUPPLIER TO A PUBLIC WORKS PROJECT WERE, IN FACT, NOT PROVIDED BY THE SUPPLIER.

1. Standard of Review.

The standard of review is de novo. Conclusions of law by a District Court are reviewed de novo. Allen v Timberlake Ranch Landowners' Association, 138 N.M. 318, 119 P.3d 743 (2005).

2. Contentions of Appellant.

Appellant contends that to the extent the District Court shifted the burden of proof to the Appellant to establish that the irrigation system materials were not delivered or used on the Unser Widening Project, it erred.

3. Preservation of the Issue.

The District Court issued its Findings of Fact and Conclusions of Law finding that Liberty produced no evidence to contradict that Neumark had a good faith belief

that the materials were provided for the bonded Unser Project [RP-836, Conclusions of Law, ¶6].

4. Argument.

The District Court determined that all Neumark required in order to be paid from the payment bond was a good faith belief that the irrigation system materials were supplied for the prosecution of the work specified in the contract for the Unser Widening Project. The District Court also determined that Liberty produced no evidence to contradict that Neumark had a good faith belief the materials were provided for the bonded Unser Widening Project. By doing so, the District Court placed the burden of proving that the materials were not supplied for the Unser Widening Project onto Liberty. This is contrary to New Mexico and United States Tenth Circuit Court of Appeals law.

As noted by the Tenth Circuit Court of Appeals in the St. Paul Indemnity case, *infra* at 925, "the burden of proof remains upon a materialman to prove by reliable evidence from which it can be reasonably inferred that the labor and materials went into the prosecution of the bonded job. Conjecture or guesswork is not enough."

To the same effect is New Mexico law as it applies to the New Mexico Mechanics' and Materialmens' Lien Law at N.M.S.A. 1978 §48-2-1 *et seq.*, which is intended to provide a remedy equivalent to that of the Little Miller Act. State ex. rel. W.M. Carroll & Co v K.L. House Construction Co., Inc., 99 N.M. 186, 656 P.2d 236 (1982). The burden is on the supplier to establish that the materials it claims it provided were in fact delivered and actually used on the project. See Consolidated Electrical Distributors, Inc., v Santa Fe Hotel Group, LLC, 138 N.M. 781, 126 P.3d 1145 (2005), and

Tabet v Davenport, 57 N.M. 540, 260 P.2d 772 (1953). See also Consolidated Electrical Distributors, Inc., v Kirkham, Choan & Kirkham, 18 Ca. App. 3d 54, 94 Cal. Rptr. 673 (Ct. App. 1971).

To the extent the District Court shifted the burden to Liberty to prove the irrigation system materials were not delivered or used in the Project, the District Court erred, as the burden of proof is on the supplier, Neumark.

C. WHETHER THE DISTRICT COURT ERRED IN AWARDING INTEREST TO A SUPPLIER AGAINST THE SURETY, BASED ON THE OPEN ACCOUNT CREDIT AGREEMENT TERMS BETWEEN THE SUPPLIER AND THE SUBCONTRACTOR.

1. Standard of Review.

The standard of review is de novo. Matters of statutory construction are reviewed de novo. Martinez v Sedillo, 137 N.M. 103, 107 P.3d 543 (2005).

2. Contentions of the Appellant.

The District Court awarded Neumark pre-judgment interest at the rate of 18% per annum pursuant to the open account agreement between Desertscapes and Neumark and N.M.S.A. 1978 §56-8-5 [RP 801, Conclusions of Law, ¶¶ 10 and 11]. It is Appellant's contention, assuming that Neumark was entitled to a judgment, that the Court erred in awarding interest pursuant to §56-8-5, and the open account agreement between Neumark and Desertscapes, as there is no privity of contract between Salls and Neumark, and the open account statute does not extend to third parties.

3. Preservation of Issue.

The District Court issued Findings of Fact and Conclusions of Law finding that with respect to pre-judgment interest, NMSA 1978 §56-8-5 provides, "In current or open accounts there shall not be collected more than fifteen percent interest annually thereon, thirty days after the delivery of the last article or service; provided that the parties may set a higher rate by agreement." In this case, Desertscapes and Neumark agreed to an interest rate of 18% on open accounts." [RP-806, Conclusions of Law, ¶11].

4. Argument.

The Little Miller Act at N.M.S.A 1978 §13-4-18 through 20 does not provide for an award of interest. However, the New Mexico Supreme Court has allowed subcontractors who contracted directly with a contractor to collect pre-judgment interest from the contractor and its surety, pursuant to N.M.S.A. 1978 §56-8-3. State ex rel. Bob David Masonry v Safeco Insurance Company of America, 118 N.M. 558, 883 P.2d 144 (1994).

In the instant case, the District Court awarded pre-judgment interest to Neumark pursuant to the open account agreement between Neumark and the subcontractor, Desertscapes, and N.M.S.A. 1978 §56-8-5, against the surety. N.M.S.A. 1978 §56-8-5 provides:

> In current or open account, there shall not be collected more than fifteen percent interest annually thereon, thirty days after the delivery of the last article or service; provided **the parties** may set a higher rate of agreement.

Liberty cannot be held liable for interest pursuant to a contract to which its obligor (Salls) was not a party, or pursuant to §56-8-5, as it is clear the statute

contemplates an agreement between contracting parties. Were this a case where Salls had contracted directly with Neumark and agreed to pay interest at 18% per annum, Liberty would be liable for the interest at 18% per annum. However, where Salls had no say in the matter, Liberty should not be held responsible for any interest agreements between Neumark and Desertscapes, especially where Neumark was fully aware of Desertscapes' financial condition, having cut off its credit in January 2007 [Vol. I, TR-79, lines 3-25], and the fact that the Little Miller Act does not specify that interest may be awarded to a supplier. This is in keeping with the majority of Miller Act case law, which does not award attorneys' fees unless there is privity of contract. See F.D. Rich Co. v Industrial Lumber Co., 417 U.S. 116 (1974); United States of America for the use and benefit of Ray Moody v The American Insurance Company, 835 F.2d 745 (10th Cir. 1987); United States for the use of C.J.C., Inc., v Western States Mechanical Contractors, Inc., 834 F.2d 1533 (10th Cir. 1987); United States of the use of Krupp Steel Products v Aetna Insurance Company, 831 F.2d 978 (11th Cir. 1987); United States of America for the use of L.K.L. Associates v Crockett & Wells Construction, Inc., et al, 730 F. Supp. 1066 (D. Utah 1990); State of New Mexico ex rel Goodman's Office Furnishings, Inc., v Page & Wirtz Construction Company, 102 N.M. 22, 690 P.2d 1016 (1984).

D. WHETHER THE DISTRICT COURT ERRED IN RULING THAT A SUPPLIER'S NOTICE OF A CLAIM AGAINST A LITTLE MILLER ACT PAYMENT BOND WAS TIMELY AND SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF N.M.S.A. 1978, §13-4-19(A) WHEN THE SUPPLIER FAILED TO SERVE NOTICE TO THE CONTRACTOR BY REGISTERED MAIL AT ITS OFFICES, MAILED THE NOTICE OVER 140 DAYS FROM ITS LAST INVOICE REFERENCING THE PUBLIC WORKS PROJECT AT ISSUE AND OVER 90 DAYS AFTER THE SUBCONTRACTOR'S LAST INVOICE TO THE CONTRACTOR FOR THE WORK FOR WHICH THE MATERIALS WERE SUPPLIED.

1. Standard of Review.

The standard of review is de novo. Matters of statutory construction are reviewed de novo. Martinez v Sedillo, 137 N.M. 103, 107 P.3d 543 (2005).

2. Contentions of the Appellant.

Appellant contends that Neumark failed to substantially comply with the statutory provisions of N.M.S.A. 1978 §13-4-19(A) in providing notice to the contractor of its claim against the public works payment bond.

3. Preservation of the Issue.

The District Court entered its Findings of Fact and Conclusions of Law finding that Neumark's notice on its claim on the bond for the Unser Project, mailed to Salls on May 22, 2007, substantially complied with the notice requirements of New Mexico's Little Miller Act, NMSA 1978 §13-4-19(A), and was timely [RP 806, Conclusions of Law at ¶¶ 7 and 8].

4. Argument.

The Little Miller Act at N.M.S.A. §13-4-19(A) sets forth five requirements in order for a supplier such as Neumark to collect against a contractor's payment bond:

1. It must serve written notice to the contractor;
2. stating the amount of the claim with substantial accuracy;
3. the notice must be served on the contractor within 90 days of last providing materials to the project;

4. such notice shall be served by registered mail in an envelope;

5. addressed to the contractor at any place he maintains an office or conducts his business, or his residence.

While the New Mexico Supreme Court has ruled that both the Little Miller Act and the Mechanics' Lien statutes are remedial and should be liberally construed, the Supreme Court has also ruled that:

> "Liberal construction, however, must not by process of extension be carried too far, lest destruction of the statutory purposes be accomplished."

See Komac Paint & Wallpaper Store v McBride, 74 N.M. 233, 392 P.2d 577 (1964), citing Silver v Fidelity & Deposit Co. of Maryland, 40 N.M. 33, 53 P.2d 459 (1935). The Komac Court further stated:

> The federal courts, construing the Miller Act, all agree that the notice provision should be liberally construed...they have nevertheless held uniformly that there must be **substantial compliance** with the notice requirement.

Id. at 236.

In the instant case, Plaintiff met only one of the jurisdictional requirements of the Little Miller Act. Plaintiff did indeed prepare a written notice, but the amount claimed was incorrect, the notice was not timely, it was not served by registered mail and it was not served on Salls at its place of business.

As Appellee's Trial Exhibit L establishes, Neumark did not serve notice to Salls by registered mail. Rather, it served the notice by certified mail. Neumark also did not serve the notice to Salls at its place of business, but to its post office box. Neumark also did not accurately state the amount owed, as it produced additional invoices at trial and initially attempted to collect for tools and equipment, which are not generally allowed

as an item of recovery against a payment bond [Appellee's Trial Exhibit L and Appellee's Trial Exhibit H].

More importantly, however, Neumark failed to timely serve the notice. The following discussion establishes the time frame regarding completion of the irrigation system. First, Desertscapes estimated the costs of the irrigation system materials for the Unser project to be approximately $55,600-56,000 [Appellant's Trial Exhibit 33 at page 114, lines 19-25 and page 115, lines 1-6]. Second, it was agreed by Desertscapes and Salls that Desertscapes would purchase all of the required materials at the beginning of the Project [Vol. II, TR-31, lines 23-25, TR-32, lines 1-7 and Appellant's Trial Exhibit, page 42, lines 18-225 and page 43, lines 1-10]. Third, Neumark provided Desertscapes with an estimate of the materials required for the Unser Widening Project in the amount of $51,991.94 [Appellant's Trial Exhibit 5, pages 4-11]. Fourth, Desertscapes billed Salls for the materials in the amount of $51,991.94 [Appellant's Trial Exhibit 8]. Fifth, as established by Liberty's Trial Exhibits 8 and 15, Desertscapes had invoiced and completed the irrigation system by February 20, 2007. Desertscapes' final invoice to Salls dated April 5, 2007, only billed for landscaping work [Appellant's Trial Exhibit 8]. Sixth, none of Neumark's invoices after December 28, 2006 establish that the materials were for the Unser Widening Project [Appellant's Trial Exhibits 20 and 33 at page 143, lines 11-20, page 144, lines 1-15, page 154, lines 1-5 and lines 14-25, and page 155, lines 1-10]. Seventh, Neumark had cut off Desertscapes' credit by January 20, 2007 [Vol. I, TR-79, lines 3-25]. Eighth, according to Desertscapes' testimony, the amounts claimed by Neumark for irrigation system materials was not reasonable [Appellant's Exhibit 33, page 139, lines 8-24, page 147, lines 17-25, page 148, lines 1-25 and page 149, line 1-11]. Finally, based on Appellant's Trial Exhibits 15 and 35, the only work performed by Salls

after Desertscapes' bankruptcy was landscaping and seeding. Thus, it is clear that the irrigation system had been completed on or before February 20, 2007. In that the Neumark notice letter was not mailed until May 22, 2007, Neumark's claim was not mailed within 90 days of last providing materials to the Unser Widening Project.

Moreover, even if it could be argued that the last two Neumark invoices were properly identified as being for the Unser Widening Project, these items were clearly for repair or corrective work. The federal courts, in interpreting the federal Miller Act, have consistently ruled that repairs, replacement parts or corrective work do not toll the 90-day notice period. See State Electric Supply Co. v Hesselden Construction Co., 404 F. 2d 774 (10th Cir. 1968), United States use of Austin v Western Electric Co., 337 F.2d 568 (9th Cir. 1964) and United States use of Greenwald-Supon, Inc., v Gramercy Contractors, Inc., 433 F. Supp. 156 (S.D. N.Y. 1977). The federal courts, in interpreting the commencement of the 90-day notice period of the Miller Act, have also ruled that notice properly given within 90 days after a March 1957 delivery of electrical supplies was ineffective as to a claim for items delivered during August, September and October of the preceding year. See United States ex. rel. J. A. Edwards & Co. v Peter Reiss Construction Co., 273 F.2d 880 (2nd Cir. 1959), cert. denied 362 U.S. 951 (1960).

Although there are no New Mexico Little Miller Act cases interpreting when the last of the materials was furnished, the New Mexico Supreme Court has held as untimely a mechanics' lien filed within ninety days of minor alterations or adjustments on the punch list, which included the installation of a bar sink, mirrors and handrails, weatherstripping two doors, adjusting the furnace and hooking up and wiring an air conditioner. See Tabet Lumber v Baughman, 79 N.M. 57, 439 P.2d 709 (1968).

Based on the foregoing, it is clear that Neumark failed to substantially comply with the notice requirements of N.M.S.A. 1978 §13-4-19(A) as to form and timeliness. Therefore the District Court's decision should be reversed.

E. WHETHER THE DISTRICT COURT ERRED IN GRANTING JUDGMENT TO A SUPPLIER WHO FAILED TO PROVIDE NOTICE TO THE OBLIGEE NAMED IN THE BOND OF THE BEGINNING OF THE LAWSUIT.

1. Standard of Review.

The standard of review is de novo. Matters of statutory construction are reviewed de novo. Martinez v Sedillo, 137 N.M. 103, 107 P.3d 543 (2005).

2. Contentions of the Appellant.

Appellant contends that no judgment could be entered in favor of Neumark because it failed to provide notice of the beginning of the lawsuit to the City of Rio Rancho within the one-year statute of limitations.

3. Preservation of the Issue

The District Court issued Findings of Fact and Conclusions of Law finding that failure by Neumark to notify the City of Rio Rancho until July 2009 did not bar Neumark's claims, as no judgment was entered thirty (30) days after giving notice [RP 806, Conclusions of Law, ¶18].

4. Argument

N.M.S.A. 1978 §§13-4-19(B) and (C) provide as follows:

> B. Claimant in such suit shall notify the obligee named in the bond of the beginning of such action, stating the amount

claimed, and no judgment shall be entered in such action within thirty days after giving such notice. The obligee and any person, firm, corporation or the state having a cause of action on such bond may be admitted on motion as a party to such action, and the court shall determine the rights of all parties thereto. If the amount realized on such bond be insufficient to discharge all claims in full, such amount shall be distributed among the parties entitled thereto pro rata.

C. Except for suits by the state with respect to taxes, which shall be brought in the name of the bureau of revenue [abolished], every suit instituted under this section shall be brought in the name of the state of New Mexico for the use of the person suing in the district court in any judicial district in which the contract was to be performed and executed, or where the claimant resides, but no such suit, including one brought by the bureau of revenue, shall be commenced after the expiration of one year after the date of final settlement of such contract., The date of final settlement herein shall be that date set by the obligee in the final closing and settlement of payment, if any, due the contractor. The state of New Mexico shall not be liable for the payment of any costs or expenses of such suit.

The statute clearly required Neumark to provide notice to the City of Rio Rancho of the beginning of its lawsuit so that the City of Rio Rancho might have the opportunity to also commence an action regarding Neumark's claims within the one-year statute of limitation. Neumark failed to do this, as it commenced its lawsuit on September 25, 2007 [RP 1, Complaint] but did not provide notice to the City of Rio Rancho until July 24, 2009 [Appellee's Trial Exhibits P and Q]. By this time, The City of Rio Rancho could not file any action pertaining to Neumark's action, because the one-year statute of limitations had run. Thus, the District Court did not have jurisdiction to issue a judgment.

III. CONCLUSION

The District Court erred in failing to apply New Mexico and United States Tenth Circuit Court of Appeals case law interpreting the New Mexico Little Miller Act, N.M.S.A. §§13-4-19 et seq., regarding what a supplier must prove in order to be paid from a payment bond when it claims it furnished materials to a public works project. Instead, the District Court adopted a more liberal standard of a good faith belief the materials were furnished utilized in two other federal circuits. Moreover, the good faith finding was based solely on the testimony of the Appellee's account manager, who had no duties relating to the sale of the materials to the subcontractor, Desertscapes.

In addition, the District Court erred in ruling that Appellant had the burden of proving that the materials were not delivered or used on the Unser Widening Project. Again, this is contrary to New Mexico and United States Tenth Circuit Court of Appeals decisions clearly placing the burden on the supplier that it actually delivered materials, and that the materials were actually used on the Project.

The District Court further erred in awarding pre-judgment interest to Appellee based on its open account agreement with the subcontractor, Desertscapes, and N.M.S.A. 1978, §56-8-5, especially since the Little Miller Act does not provide for an award of interest. Moreover, there is no privity of contract between Appellee and Appellant or its obligor, Salls Brothers Construction, Inc.

Finally, it is clear that Appellee utterly failed to comply with the conditions precedent of N.M.S.A. 1978 §13-4-19(A). While the New Mexico Supreme Court has ruled that the Little Miller Act should be liberally construed, a total disregard for four of the five conditions destroys the statutory purpose.

More importantly, however, Appellee's notice was not timely. Based on Appellee's invoices, its last invoice identifying the Unser Widening Project is dated December 28, 2006. In addition, based on the subcontractor's invoices, it is clear that the irrigation system was in place by February 20, 2007. Accordingly, notice was to have been provided by Appellee to the contractor by no later than March 26, 2007. Appellee's notice was not mailed until May 22, 2007. Appellee's notice was therefore not timely.

'Finally, the Court did not have jurisdiction to enter a judgment, as Appellee failed to comply with the provisions of N.M.S.A. 2978, §§13-4-19(B) and (C) in providing notice of its lawsuit to the City of Rio Rancho within the one-year statute of limitations. Here, Appellee provided notice to the City of Rio Rancho twenty-six days prior to trial.

Based on the foregoing, Liberty Mutual Insurance Company asks the New Mexico Court of Appeals to reverse the District Court's judgment in favor of Appellee.

BINGHAM, HURST & APODACA, P.C.

By _____
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A true and correct copy of the foregoing was hand delivered this 1st day of June, 2010, to:

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