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 REPLY BRIEF ON CROSS-APPEAL

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

KELEHER & McLEOD, P.A.
James Rasmussen
Justin Breen
Post Office Box AA
Albuquerque, New Mexico 87102
Telephone: (505) 346-4646
Facsimile: (505) 346-1370

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I. Argument

Issue A. **Whether the District Court erred in ruling that Neumark is not entitled to recover reasonable attorneys' 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 attorneys' fees, and whether under the Little Miller Act this constitutes sufficient privity of contract as a matter of law, if privity is required.**

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.

Contention of Cross-Appellant: The District Court erred in not awarding Solsbury Hill, LLC d/b/a Neumark Irrigation ("Neumark") its attorneys' fees as part of the sums justly due to Neumark, under New Mexico's Little Miller Act (the "Act"), pursuant to its credit agreement with Desertscapes, Inc.

Preservation of Issue: Neumark originally requested attorneys' fees in its Complaint to Recover Payment for Materials Supplied. Neumark also requested attorneys' 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 attorneys' fees and the issue has been preserved.

Argument on Issue A

Liberty Mutual Insurance Co. ("Liberty") argues that the District Court correctly denied Neumark attorneys' fees because the Act's language entitling a claimant to the "sums justly due" is insufficient to "judicially obviate the American Rule based on privity of contract." Liberty's Answer Br. at 1. Liberty's analysis of this issue is too narrow in that it relies substantially on the application of the American Rule, disregarding persuasive authority permitting attorneys' fees under identical statutory language in the federal Miller Act when there is a provision for fees in contracts between a supplier and subcontractor. The issue is whether a supplier is entitled to fees under the Act's language regarding entitlement to "sums justly due" when the contract upon which its claim is based contains an attorneys' fees provision.

In its Answer Brief, Liberty cites a number of cases purportedly supporting its argument that the District Court was correct in denying Neumark attorneys' fees. Most of those cases are not factually on point. Those that are on point have been questioned in light of later developments in the law. As discussed below, a number of courts interpreting language in the federal Miller Act, identical to the language of New Mexico's Little Miller Act, have held that interest and attorneys' fees are part of what is justly due to a successful claimant under the Miller Act. The Little Miller Act adopted in New Mexico, is modeled after the federal Miller

Act. See State ex rel. Nichols v. Safeco Ins. Co., 100 N.M. 440, 446, 671 P.2d 1151, 1157 (Ct. App. 1983).

Most of Liberty's argument focuses on the "American Rule" and cases that are not at all instructive on the issue before the Court. Liberty relies first on United States ex rel. C.J.C., Inc. v. Western States Mech. Contractors, Inc., 834 F.2d 1533, 1543 (10th Cir.1987). The Court in Western States merely noted "[a]bsent a provision in the *contract* or payment bond awarding attorneys' fees, a Miller Act plaintiff may only recover under one of the federally recognized exceptions" to the American Rule. Id. at 1543 (emphasis added). The reference to "contract" does not specify the particular contract to which the holding in Western States may apply and the focus was merely on a lack of an attorneys' fees provision in the contract at issue there. Id. at 1543. There is an attorneys' fees provision in the contract at issue here and Western States is not on point. For the same reason, Liberty's reliance on United States ex rel. D & P Corp. v. Transamerica Ins. Co., 881 F. Supp. 1505 (D. Kan. 1995) is equally misplaced. See Id. at 1510.

Considerable doubt has been cast by other courts on the only line of cases relied upon by Liberty pertinent to this issue. Liberty relies on United States ex rel. K.L. Assoc. v. Crockett & Wells Constr., Inc., 730 F. Supp. 1066 (D. Utah 1990). Crocket & Wells relied on Krupp Steel Prod. v. Aetna Ins. Co., 831 F.2d 978 (11th Cir. 1987) ("Krupp I"). Krupp I relied on F.D. Rich Co. v. Indus.

Lumber Co., 417 U.S. 116, 126 (1974). 831 F.2d at 983. Both Crocket & Wells and Krupp I have been subject to criticism for their statements that a supplier to a subcontractor is not entitled to attorneys' fees. For reasons discussed below, F.D. Rich is factually distinguishable and does not support Liberty's position.

As noted by 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), "the continued vitality of Crockett & Wells, which takes its direction from Krupp I, is dubious.[1]" In Krupp I, the Court noted that, because it reversed the summary judgment at issue, the attorneys' fees issue was moot. 831 F.2d at 983. The discussion regarding fees, relied upon in substance by Appellant, was mere dictum.

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[1] Expert Envtl. Control also notes that:

> The Eleventh Circuit has subsequently abandoned this reasoning and has adopted 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. See United States ex rel. Southeastern Mun. Supply Co. v. National Union Fire Ins. Co., 876 F.2d 92, 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).

Id. at 898.

Furthermore, that language in Krupp I has been expressly repudiated by the Eleventh Circuit, the Court which issued the Krupp I opinion. In 1989, the Eleventh Circuit revisited Krupp I in United States ex rel. Southeastern Mun. Supply Co. v. Nat'l Union Fire Ins. Co., 876 F.2d 92, stating that the Krupp I discussion was mere dictum: "It is true that language in [Krupp I] appears to reach the opposite conclusion. That language, however, is merely dictum." 876 F.2d at 93. The Eleventh Circuit also noted in Southeastern Mun. Supply Co. that the Supreme Court, in United States ex rel. Sherman v. Carter, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957), allowed the recovery of attorneys' fees as "sums justly due" under the Miller Act "where a provision for the award of attorneys' fees was contained in a contract between the general contractor and the trustees of an employees' welfare fund...." 876 F.2d at 93.

There are two separate lines of Supreme Court cases often cited regarding this issue: (1) the F.D. Rich, 417 U.S. 116, line of cases, and (2) the United States ex rel. Sherman v. Carter, 353 U.S. 210 (1957) line of cases. In F.D. Rich, the Supreme Court merely noted that the federal Miller Act does not expressly provide for an award of attorneys' fees to any party. Id. at 126. Importantly, there was no contractual provision concerning attorneys' fees in that case, distinguishing it from the case at bar. Id. at 126. The dispute in F.D. Rich was between a supplier and a subcontractor, a fact held in common with this case which Liberty erroneously

argues is dispositive. In Carter, there was an attorneys' fees provision in the contract. 353 U.S. at 214. The claim in Carter was not by a supplier, but by trustees of an employee benefit plan consisting of employees employed by a contractor on a Federal Miller project. Id. at 215. Carter held that the attorneys' fees were part of what was "justly due" the trustees. Id. at 220.

What controlled in those cases was whether the contract at issue contained an attorneys' fees provision. Liberty generally focuses on cases applying the American Rule and wholly fails to address what happens when there is an attorneys' fees provision in the contract at issue. Liberty fails to address the soundness of Carter's reasoning, i.e., that "[a] surety's 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. That reasoning has trickled down through the various circuits addressing this very issue and has even been applied in New Mexico. See Nichols, infra.

In Southeastern Mun. Supply Co., the Eleventh Circuit relied on the Carter rationale when it held that a supplier was entitled to attorneys' fees where there was a contractual provision between the supplier and subcontractor for recovery of attorneys' fees. 876 F.2d at 93. New Mexico's Court of Appeals relied on the Carter rationale in Nichols: "Reasonable attorneys' fees should be included where

the written terms of the contract sued upon expressly provided for the allowance of attorneys' fees." 100 N.M. at 446, 671 P.2d at 1157

Keller v. Cavanaugh, 64 N.M. 86, 324 P.2d 783 (1958), relied on by State ex rel Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co., 102 N.M. 22, 690 P.2d 1016 (1984), illustrates why Goodmans is not controlling on the question presented, contrary to Liberty's argument. Keller involved a breach of a real estate contract. 64 N.M. at 87. There was no attorneys' fees provision in the real estate contract. Id. at 88. Neither Keller nor Goodmans directly addresses the question of law before the Court in this case.

Unlike the plaintiff in Goodmans, Neumark argues that attorneys' fees and pre-judgment interest are part of what is justly due a claimant under the Act. Liberty's reliance on the American Rule disregards the express language in the Act regarding a claimant's entitlement to "sums justly due" and the persuasiveness of cases supporting Neumark's position.

Liberty also argues that the District Court correctly denied Neumark its attorneys' fees, and post-judgment interest at the contract rate, because of a lack of privity between Neumark and Salls Brothers Construction, Inc. The claim at issue here is not between Neumark and the contractor or the subcontractor – it is between Neumark and the surety, Liberty Mutual. The contract sued upon is between Neumark and Desertscapes, a supplier and a subcontractor. Neumark,

however, has a statutorily created cause of action against Liberty based on that contract, as a surety on a public works project bonded under the Act.

Liberty's lack of privity argument, regarding both fees and interest, is significantly undermined by the purpose and language of the Little Miller Act itself. NMSA 1978, §13-4-19(A) creates a cause of action by "any person having direct contractual relationship with a subcontractor, but *no contractual relationship*, express or implied, *with the contractor furnishing such payment bond* . . . ." (Emphasis added). Congress and the New Mexico legislature, in enacting their respective Miller Acts, have created statutory remedies that would not exist in the absence of such legislation. In doing so, they have abrogated the common law's privity requirement to a certain extent as between the claimant and the surety and as between the claimant and the general contractor.

In any event, Liberty's lack of privity argument is of little assistance in this analysis. The question before the Court is whether a supplier under the Act is entitled to the full protection of the Act as to "sums justly due." Several circuits have held that interest and attorneys' fees are recoverable if they are part of the contract between the subcontractor and supplier. See United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332, 336 (4th Cir. 1996) ("The Miller Act does not, by its own terms, provide for attorneys' fees or interest. Several circuits have held, however, that interest and attorneys' fees are

recoverable if they are part of the contract between the subcontractor and supplier"), citing: United States ex rel. Southeastern Mun. Supply Co., Inc., 876 F.2d at 93 (attorneys' fees provision); United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc., 554 F.2d 164, 166 (5th Cir. 1977) (attorneys' fees); Travelers Indem. Co. v. United States, 362 F.2d 896, 899 (9th Cir. 1966) (attorneys' fees); and D & L Constr. Co. v. Triangle Elec. Supply Co., 332 F.2d 1009, 1013 (8th Cir. 1964) (interest and attorneys' fees).

Based on one of the purposes of the Act, to protect suppliers supplying material for public works projects, the answer must be that the protection is coextensive with rights contained in the contract upon which the claim is based, which is commensurate with the Carter rationale. See Goodmans, 102 N.M. at 25, 690 P.2d at 1019 ("...the [Act] is remedial in nature and...its principal purpose is to protect the supplier of labor and materials, and that it should be liberally construed to effectuate the obvious legislative intent.") (internal citation omitted); United States ex rel. Moody v. American Ins. Co., 835 F.2d 745, 747 (10th Cir. 1987) ("In general, the Miller Act is 'entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects.'").

In its response to Neumark's argument as to post-judgment interest, Liberty refers to the "commercial" nature of the case, arguing that such nature has a

bearing on the result of this appeal. Liberty does not explain the significance of the reference to "commercial cases." Neumark believes the reference is related to this excerpt from F.D. Rich: "Miller Act suits are plain and simple commercial litigation. In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation." 417 U.S. 116, 130. As discussed above, F.D. Rich merely reiterated the American Rule and the reference to "commercial cases" occurred in that context, where there was no attorneys' fees provision. Here, obviating the American Rule is not the issue because the governing contract contains a provision for attorneys' fees.

Lastly, the New Mexico Supreme Court has previously held, with respect to the New Mexico's mechanics and materialmen lien statute, that that statute "creates privity of contract between the owner and those contributing to the enhancement of the property . . . ." Vulcraft v. Midtown Business Park, 110 N.M. 761, 765, 800 P.2d 195, 199 (1990). Although in Vulcraft, the Court was addressing NMSA 1978, § 48-2-2 (1978, Repl. Pamp. 1987), Liberty has argued in recent briefing that the mechanic and materialmen lien law, "N.M.S.A. 1978, §48-2-1 et seq. . . . is interpreted similarly to the Little Miller Act." (See Appellant's Reply Br. at 3, 9). For the sake of argument, Neumark would also offer that the mechanic's lien statute is another instance where the legislature has abrogated the

common law's requirement of privity, as traditionally understood. It makes no difference to the result whether this is described as an abrogation of a common law privity requirement or as the legislature's creating any required "privity" by statute.

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.**

Standard of Review: Issue B concerns a question of statutory interpretation, a question of law, subject to *de novo* review. 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." Id. ¶ 22.

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. 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.

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

Liberty did not dispute that post-judgment interest is mandatory and must be applied at the rate specified in the contract sued upon. See Sunwest Bank, N.A. v. Colucci, 117 N.M. 373, 872 P.2d 346, n.7 (1994). The issue is whether, under the Act, Neumark is entitled to the rate of interest provided for in the credit agreement. Liberty argues that because Neumark did not enter into a contract with Salls Brothers Construction, it is not entitled to post-judgment interest (or attorneys' fees) at the rate provided in the credit agreement. Liberty also emphasizes that these are "commercial cases" (Answer Br. at 4) and that the commercial aspects of the case and the lack of privity of contract do not allow post-judgment interest at the contract of rate of 18%. The reference to the "commercial" aspect of this case is discussed above and is not relevant to the analysis.

As discussed above, Liberty's lack of privity argument is of little assistance in this analysis. The case law cited above regarding a Miller Act claimant's entitlement to attorneys' fees is equally applicable to a claim for post-judgment interest. While traditional privity is lacking between Liberty and Neumark, the Act creates a type of statutory privity, or makes the privity irrelevant, whereby a supplier may maintain an action against a general contractor/and or a surety, even though the supplier has no contract with either the general contractor or the surety. See State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co., 99 N.M. 186, 656 P.2d 236 (1982). The only authority cited by Liberty as to this issue was F.D. Rich, which has been addressed above.

Liberty also states that 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*." Liberty's Answer Br. at 4 (emphasis added). However, the District Court applied the contract's interest rate of 18% to the pre-judgment interest awarded to Neumark. [RP 806, Conclusion of Law, ¶10.] Conclusion of Law No. 10 says nothing about post-judgment interest. The District Court concluded: "Judgment should be entered...in the principal amount of $42,321.29, with interest accrued through August 19, 2009... plus interest at 18% per annum... from August 19, 2009 to the date of entry of judgment." [RP 806, Conclusion of Law, ¶16.] The District Court did not

interpret the "justly due" provision as only being part of the unpaid balance at the time of institution of the suit: it applied the contract rate of interest at the time of default, at the time of filing the suit, and throughout the entire proceeding up to the entry of the judgment. Nor should "justly due" be interpreted as Liberty suggests. In deed, it has not been interpreted as Liberty suggests based on the above-referenced authorities.

The District Court awarded post-judgment interest rate at 8.75%, without explaining why a different rate was applied. Regardless of the District Court's reasoning, it is Neumark's position that post-judgment interest, at the contract rate, was mandatory. See NMSA, 1978, § 56-8-4 (2004). 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.

II. CONCLUSION

The Court should reverse the judgment of the District Court denying Neumark its attorneys' 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 _____

James L. Rasmussen
Justin Breen
P.O. Box AA
Albuquerque, New Mexico 87103
Telephone: (505) 346-4646
Facsimile: (505) 346-1370
Attorneys for Neumark Irrigation

CERTIFICATE OF SERVICE

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

Attorneys for Defendant:
Lillian G. Apodaca
Bingham, Hurst & Apodaca, P.C.
3908 Carlisle Blvd. NE
Albuquerque, New Mexico 87107
Telephone: (505) 881-4545
Facsimile: (505) 889-0988

_____
Justin Breen