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.

Ct. App. No. 30,068
District Court Case:
LIBERTY MUTUAL INSURANCE COMPANY, No. CV-2007-08460

Defendant/Appellant.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO 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. COURSE OF PROCEEDINGS

Appellee, Solsbury Hill, LLC d/b/a Neumark Irrigation ("Neumark") argues that Liberty Mutual Insurance Company ("Liberty") did not set forth a specific attack on any finding, so that the District Court's findings must be deemed conclusive. Neumark's argument is without basis, as Liberty's summary of proceedings, as well as its argument, clearly include the substance of the evidence bearing on the proceedings relating to all issues raised by Liberty. Liberty's arguments set forth specific attacks on not only the findings related to each issue, but the conclusions of law. Moreover, the District Court's findings are not helpful to Neumark, because the District Court did not apply the correct law.

II. ARGUMENT

A. CONTRARY TO NEW MEXICO LAW THAT A SUPPLIER MUST PROVE ACTUAL DELIVERY AND ACTUAL INCORPORATION OF MATERIALS IN SPECIFIC PUBLIC WORKS PROJECTS, THE COURT ONLY FOUND THAT NEUMARK PROVIDED IRRIGATION MATERIALS FOR THE UNSER PROJECT

1. Standard of Review.

The standard of review is de novo, as the Court did not apply New Mexico law.

2. Contentions of Appellant.

Appellant Liberty 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 actual 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 Second, Fourth and Eleventh Circuit Courts of Appeal.

3. Argument.

Neumark argues that the District Court's Conclusion of Law, that "Neumark had a reasonable good faith belief that the irrigation materials at issue for the Unser Project...were being supplied for the prosecution of work specified in the contract for the Unser Project" [RR 806, Conclusions of Law, ¶ 5] is, in fact, not a conclusion of law but a finding of fact. Thus, Liberty has waived any challenge to the District Court's findings of fact. However, that is precisely what Neumark asked the District Court to conclude in its requested Conclusions of Law [RP 781, Plaintiff's Conclusions of Law ¶ 7]. Thus, for Neumark to now argue that the Court's Conclusion of Law numbered 5 is not a conclusion of law but a finding of fact is unsupported by its own requested Conclusions of Law. Moreover, Neumark fails to recognize that irrespective of the District Court's findings of fact, the District Court ignored New Mexico and federal Tenth Court of Appeals case law in interpreting what a supplier must establish in order to collect against a surety on a public works project pursuant to N.M.S.A. §13-4-19(A). The District Court, relying on case law cited by Neumark, including United States ex. rel. Krupp Steel Products, Inc. v Aetna Insurance Co., 831 F.2d 978, 980 (11th Cir, 1987), United States ex. rel. Westinghouse Electric Supply Co., v Endebrock-White Co., 275 F.2d 57, 60 (4th Cir. 1960) and United States ex. rel. J.P. Byrne & Co. v Fire Association of Philadelphia, 260 F.2d 541, 542 (2nd Cir. 1958), holding that a supplier need only have a reasonable good faith belief that the materials were supplied for prosecution of the work in order to collect from the surety to the Miller Act, issued its Conclusion of Law holding that "Neumark had a reasonable good faith belief that the materials were being supplied for the Unser Project." [RP 806, Conclusions of Law, ¶ 5.]

In so doing, the Court ignored specific New Mexico case law requiring a supplier to not only prove that the materials were delivered, but that the materials were actually incorporated into the project. 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). In Goodman's, Goodman's Office Furnishings, the supplier, asserted that the district Court erred in allowing the general contractor a credit for excess materials and equipment delivered but not incorporated into the project. Goodman's did not contest the use of the materials, but claimed that the mere delivery of materials to the project, as opposed to actual incorporation, was sufficient to allow recovery. The Supreme Court disagreed with Goodman's argument, holding that the District Court properly determined that the contractor was entitled to a credit for the excess materials that were delivered to the project site but were not actually incorporated. *Id* at 24. The Supreme Court's holding is consistent with its rulings regarding the New Mexico Mechanics' and Materialmens' Lien Law, N.M.S.A. 1978, §48-2-1 et. seq., which is interpreted similarly to the Little Miller Act. State of New Mexico ex. rel. W.M. Carroll & Co. v K.L. House Construction Co., Inc., 99 N.M. 187, 656 P.2d 236 (1982).

In the context of the Mechanics' and Materialmens' Lien Law, the Supreme Court has consistently held that in order to establish a valid lien, a lien claimant must provide evidence that the material was actually used in the project. Stearn-Roger Manufacturing Co. v Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908) (It is the furnishing of materials to be used in the construction and the putting them into the building which entitled the subcontractor to a lien upon the premises.) *Id* at 320. See also Consolidated Electrical Distributors, Inc. v Santa Fe Hotel Group, LLC, 138 N.M. 781, 126 P.2d 1145 (Ct. App. 2005) and Tabet v Davenport, 57 N.M. 540, 260 P.2d

722 (1953). While direct evidence is not necessary to establish actual incorporation of materials, in the instant case the record is devoid of even an inference of incorporation.

The District Court also ignored the decisions of the Tenth Circuit Court of Appeals. In interpreting the federal Miller Act, the Tenth Circuit Court of Appeals requires a supplier to prove that the materials were actually delivered to the project site before it can collect against a payment bond. Again, the fact that Neumark "provided irrigation materials for the Unser Project" or "had a good faith belief that the materials were supplied" is irrelevant. What is relevant is that the District Court could not find or conclude as a matter of law that Neumark "actually delivered the materials" or that the materials it claims to have provided were "actually incorporated" into the Unser Project. In fact, the District Court concedes that materials were picked up at Neumark's place of business [RP 806, Findings of Fact, ¶10]. Thus, the District Court erred in granting judgment to Neumark, whether it based its ruling on whether Neumark "provided materials to the Unser Project," or whether it had a "good faith belief that the materials is claimed it supplied for the prosecution of work specified in the contract were for the Unser Project." The District Court simply failed to apply the correct law that requires the supplier to prove actual delivery to the project and actual incorporation of the materials into the project.

It should also be noted that in each case cited by Neumark for the proposition that a supplier need only have a good faith belief that the materials were for the particular project," the federal appellate courts found that the suppliers proved actual delivery or actual use on the projects. See Westinghouse Electric, *infra* at 62 (the bushings were actually used in the Heliport job); Krupp Steel, *infra* at 980 (each invoice and each delivery ticket for shipment designated the project); J.P. Byrne & Co., *infra* at

544 (at the time of delivery, the parties expected the tires to be substantially used under the contract).

It should also be noted that in Crane O'Fallon v Via, 56 N.M. 772, 776, 251 P.2d 260, 262 (1952), the New Mexico Supreme Court stated:

> Apparently, the trial court took the view advanced by counsel for Plaintiff 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.

Clearly, the Supreme Court rejected the "good faith" standard.

Finally, there is nothing to prevent unscrupulous suppliers from billing all materials purchased by a subcontractor to bonded jobs in order to collect under the bonds, especially as was the case here, where Neumark knew Desertscapes was in financial trouble as early as January 2008, when Neumark cut off its credit [RP 806, Findings of Fact ¶18].

The law in New Mexico requires a supplier to prove not only actual delivery of the materials to the project, but actual incorporation of the materials into the project before it can make a claim against a payment bond. In that the District Court only found that materials were "provided" to the Unser Project, the District Court's decision should be reversed.

B. THE DISTRICT COURT CONCLUDED AS A MATTER OF LAW THAT LIBERTY PRODUCED NO EVIDENCE TO CONTRADICT THAT NEUMARK HAD A GOOD FAITH BELIEF THAT THE MATERIALS WERE BEING PROVIDED FOR THE UNSER PROJECT.

1. Standard of Review.

The District Court concluded that "Defendant produced no evidence to contradict that Neumark had a good faith belief that the materials were being provided

for the bonded Unser Project [RP 806, Conclusions of Law, ¶6]. In so concluding, the Court placed the burden of proof on Liberty to establish that the materials were in fact, not used for the Unser project. Determining who has the burden of proof is an issue of law.

2. Contentions of Appellant.

Liberty contends that Neumark had the burden of proving that it not only actually delivered the materials to the project site, but that its materials were actually incorporated into the project.

3. Argument.

Neumark acknowledges that it has the burden of proof on a Miller Act claim. That having been established, Neumark did not meet its burden of proof that it actually delivered the materials to the project and that the materials were actually incorporated into the project. Goodman's, *infra* at 24. The fact that it proved that it had a good faith belief that the materials were being provided to the Unser Project is irrelevant, as is the Court's finding that Neumark supplied materials for the Unser Project. [RP 806, Conclusions of Law, ¶¶ 4 through 6]. Thus, the Court should reverse the District Court's decision.

C. THE DISTRICT COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST TO NEUMARK, BASED ON THE OPEN ACCOUNT AGREEMENT BETWEEN NEUMARK AND THE SUBCONTRACTOR.

1. Contentions of Appellant.

Liberty contends that the Court erred in granting prejudgment interest to Neumark pursuant to the open account agreement, of which Salls had no knowledge, and pursuant to N.M.S.A. 1978 §56-8-5.

2. Argument.

In a public works project, a contractor solicits bids from subcontractors for the purpose of submitting a bid to a governmental entity, who pays the contractor from funds obtained from taxpayers. The goal of competitive bidding in the public arena is to protect the public and it is the duty of a public entity to award public works contracts to the lowest responsible bidder. BC & L Pavement Services, Inc., v Higgins, 132 N.M. 490, 51 P.3d 533, (2002) and Mays v Bassett, 17 N.M. 193, 125 P. 609 (1912). The bidding of public works projects is highly competitive among contractors.

The Little Miller Act at N.M.S.A. §13-4-19 provides in relevant part:

> [A]ny person having direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the contractor furnishing such payment bond, shall have a right of action upon said payment bond **upon giving written notice to said contractor** within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed...

The federal Miller Act requires the same notice. It is well established that the proviso in the statute requiring that notice be given to the prime contractor within ninety days is for the benefit of the prime contractor. United States for use of General Electric Company v H.I. Lewis Construction Co., 375 F.2d 194 (2nd Cir. 1967). As stated in United States for Use and Benefit of J.A. Edwards & Co., v Thompson Construction Corporation, 273 F.2d 873, 875-876 (2nd Cir. 1959), *cert. denied*, 362 U.S. 951, 80 S. Ct. 864, 4 L. Ed. 2d 869 (1960):

> The reason why the Miller Act conditions the rights of a person having "no contractual relationship express or implied with the contractor furnishing said payment bond upon the giving of proper notice... readily understandable. It was assumed that such third parties would first endeavor to collect from the subcontractor with whom they have a contract relation. During a reasonable period, while these efforts are going forward, the contractor withholds the payments due the subcontractor.... A

> statute which gave rights on the contractor's bond to laborers and materialmen having no contractual relations with him but which did not require timely and adequate notice to him, would lead either to double payments or to interminable delay in settlements between contractors and subcontractors....

In the instant case, Desertscapes' subcontract for the irrigation system was for the amount of $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]. 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 started work on the Unser Widening Project in September 2006. Neumark was not paid for materials it provided for the Unser Project from November 13, 2006 through May 3, 2007. Neumark stopped extending credit to Desertscapes on January 10, 2007 [RP 806, Findings of Fact, ¶¶ 17, 28 and 29]. On February 19, 2007, Neumark claimed it was owed in excess of $35,000.00 [Appellee's Trial Exhibit H]. On May 17, 2007, Desertscapes filed bankruptcy [*Id* at ¶22]. On May 22, 2007, Neumark

provided notice to Salls of its claim. At the time of the notice, Salls did not owe Desertscapes any money for materials [Appellant's Trial Exhibit 8]. If Neumark is successful on its claim in this appeal, Salls, the contractor, will pay twice for the same materials.[1]

The Little Miller Act does not provide for an award of interest. The District Court awarded interest in the amount of $18,249.31 pursuant to the open account agreement between Neumark and Desertscapes and pursuant to N.M.S.A. 1978 §56-8-5.

Given the above circumstances, the District Court has determined that a contractor or surety may be liable for an extra $18,000 in interest on a contract of which it has no knowledge.[2] This is precisely why the Miller Act does not provide for an award of interest, and is the reason that the Mechanics' and Materialmans' Lien Law was amended to require suppliers, who the contractor is rarely aware of, to file pre-lien notices within sixty days of first supplying materials to a project. N.M.S.A. 1978, §48-2-2.1.

Moreover, in this case, Neumark knew by January 17, 2007, that Desertscapes was in financial trouble when it cut off its credit. Yet Neumark chose to wait until May 22, 2007, to provide notice to Salls. Neumark is not entitled to pre-judgment interest pursuant to the open account statute at N.M.S.A. 1978 §56-8-5, as there is nothing to prevent a supplier like Neumark, who failed to collect from Desertscapes, its subcontractor, in a reasonable time, to wait to provide notice in order to collect substantial amounts in interest. The Courts have consistently held that notice should not be delayed by suppliers. See, e.g., 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)

[1] Liberty is not an insurer, but a guarantor. Restatement of Security, §82, Comment g (1941).
[2] The District Court found that Salls was not a party to the credit agreements between Neumark and Desertscapes and concluded that there was no privity of contract between Salls and Neumark [RP 806, Finding of Fact ¶9 and Conclusion of Law, ¶15].

(notice properly given within 90 days after a March 1957 delivery of electrical supplies was ineffective as to a claim for items delivered during October of the preceding year on the same project). This is especially true in this case, as Neumark never kept track of the progress of any project or have any expectation of the purchase of materials for a project at any given time. [Vol 1, TR-96, lines 14-25, TR-97, lines 1-2 and TR-96, lines 8-20].

Finally, Neumark's interpretation of the Little Miller Act is incorrect as it relates to suppliers. N.M.S.A. §13-4-19(A) provides:

> Every person, firm or corporation who has **furnished labor or materials** in the prosecution of such work **provided for in such contract in respect of which a payment bond is furnished under Section 13-4-18**...shall have the right to sue on such payment bond **for the amount of the balance thereof unpaid at the time of institution of such suit....**

In the context of a public works project, the contractor has a "contract" with the governmental entity based on its bid, and the contractor has a "contract" with the subcontractor based on the subcontractor's bid. The contractor has no contract with a supplier and therefore a supplier may not collect interest based on its open account agreement with the subcontractor on a contract of which the contractor has no knowledge, much less its interest terms. There is no privity of contract and any sums justly due are only for the sums due for the actual materials provided and used on the Project. The contractor should be able to rely on its contract with its subcontractor for amounts due, and which it relied on to bid the project.

Accordingly, assuming the District Court correctly applied New Mexico law on Neumark's claim for principal amounts due, the Court's award for pre-judgment interest should be reversed.

D. NEUMARK'S NOTICE DID NOT COMPLY WITH THE REQUIREMENTS OF N.M.S.A. 1978 §13-4-19(A)

1. Standard of Review.

As noted by Liberty in its Brief in Chief, the District Court entered Findings of Fact and Conclusions of Law that Neumark's notice on its claim on the bond for the Unser Project, mailed to Salls on May 22, 2007, by certified mail, return receipt requested, substantially complied with the notice requirements of the New Mexico Little Miller Act at N.M.S.A. §13-4-19(A), and was timely. [RP 806, Conclusions of Law, ¶¶ 7 and 8]. Liberty contends that Neumark failed to substantially comply with the provisions of the Little Miller Act in providing notice to the contractor of its claim against the payment bond, i.e. can the supplier send the notice by certified mail when the Little Miller Act requires it be sent by registered mail? The issue is one of a matter of law. United States for the Use and Benefit of Ray Moody v The American Insurance Company, 835 F.2d 745 (10th Cir. 1987)(The Court may review de novo the sufficiency of a notice of the Miller Act.)

2. Contentions of 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. Argument.

Neumark cites several federal Miller Act cases for its argument that Neumark substantially complied with the notice requirements of the Little Miller Act. However, the federal Miller Act differs from the Little Miller Act, in that the federal Miller Act allows for notice to "be served by any means that provides written, third-party verification to the contractor at any place he maintains an office or conducts business, or

his residence..." 40 U.S.C. 3131 . On the other hand, the Little Miller Act explicitly states that the notice must be served by "registered mail". N.M.S.A. 1978 §13-4-19. It is undisputed that the notice was served by certified mail [RP 806, Findings of Fact, ¶ 37].

It is also undisputed that the notice was not served on Salls at its place of business or residence. [Appellee Trial Exhibit L, NEU-000193]. The District Court made no finding of actual service at Salls' place of business, only that the "notices were mailed to each of Salls' addresses reported by Salls to the New Mexico Public Regulation Commission..." [RP 806, Findings of Fact, ¶37].

In addition, as noted in Liberty's Brief in Chief, Neumark failed to state with substantial accuracy the amount claimed and failed to timely send the notice. Thus, in sum, the question is how many times can a supplier ignore the explicit provisions of the Little Miller Act? It is Liberty's position that failure to meet four out of the five requirements does not constitute substantial compliance with the notice requirements of the Little Miller Act, especially when it is well established that the notice requirements are for the benefit of the contractor. In that Neumark completely disregarded the most basic and rudimentary requirements of the Little Miller Act notice provisions and having met only four out of the five requirements, the District Court's decision should be reversed. Otherwise, the notice requirements should simply be eliminated.

E. NEUMARK'S FAILURE TO PROVIDE NOTICE TO THE OBLIGEE OF THE BEGINNING OF THE LAWSUIT CONSTITUTES YET ANOTHER FAILURE ON THE PART OF NEUMARK TO COMPLY WITH THE REQUIREMENTS OF THE LITTLE MILLER ACT.

1. Contentions of 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.

2. Argument

Again, the question must be asked. How many times can a supplier ignore the provisions of the Little Miller Act? Neumark failed to notify the City of Rio Rancho "of the beginning of such action." Not until July 24, 2009, did Neumark notify the City of Rio Rancho of the beginning of the lawsuit, which was filed on September 25, 2007. Neumark would have the Court believe that a bond claimant can provide notice to the obligee on a bond years after it has filed suit, and that despite the one-year statute of limitations, any party, including the obligee, may be admitted on motion as a party. Thus, the obligee and any other party are not subject to the one-year statute of limitation because there is a pending action by a supplier. With its argument, Neumark has eliminated untimely actions by the obligee or any other claimant. All another claimant has to do is file a motion and whether two years to five years after the date of final settlement, it can proceed on its own bond claim.

By failing to again provide notice to the obligee, Neumark has thumbed its nose at the requirements of the Little Miller Act and therefore it should not be permitted to utilize the Little Miller Act for its benefit, and the Court's decision should therefore be reversed.

III. CONCLUSION

The Court should reverse the judgment of the District Court awarding Neumark judgment in the amount of $42,321.29 plus pre-judgment interest in the amount of $18,249.31.

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