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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001058-MR

HAYWARD BAKER, INC. APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 06-CI-00051

ABS SERVICES, INC.; AND
AMERICAN SAFETY CASUALTY
INSURANCE COMPANY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

STUMBO, JUDGE: Hayward Baker, Inc. appeals from Findings of Fact, Conclusions of Law and Judgment of the Elliott Circuit Court in its action to recover damages for breach of contract. Baker was awarded $104,000 plus interest

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

based on the court's determination that ABS Services, Inc. improperly failed to pay for construction work performed by Baker. Baker now argues that the court erred in failing to determine that it also was entitled to recover from American Safety Casualty Insurance Company, Inc., which was serving as a surety for ABS Services, Inc. For the reasons stated below, we affirm the Judgment on appeal.

In 2001, Ray Bell Construction Company, Inc. began serving as general contractor on the construction of the Medium Security Correctional Facility in Elliott County, Kentucky. As part of the project, Bell executed a subcontract with ABS Services, Inc. which provided in relevant part that ABS would furnish all labor and materials to design and install an approximately 3900 square foot retaining wall. Pursuant to the subcontract, ABS was to provide a Labor and Material Payment Bond from American Safety to secure ABS's obligation to pay for labor and materials associated with its construction of the retaining wall.

In January and February, 2002, ABS installed the retaining wall. Sometime thereafter, it became apparent that the wall might be moving or bulging. The parties decided to monitor the wall to determine what approach, if any, was required to stabilize it. In February, 2004, Bell and ABS President Anthony Bertas determined that the wall was continuing to crack or bulge, and that something had to be done to stabilize the structure.

The parties entered into discussions regarding how best to approach the repair, and which party would bear the cost of repair. Bell believed that ABS

was solely responsible for the defective retaining wall and should bear the entire cost of the repairs. Conversely, ABS asserted that it bore no responsibility for the wall repairs, pointing to inadequate soil compaction and improper draining as causes of the wall's cracks and bulging. As such, ABS believed that Bell should pay for the repairs.

Eventually, Bell and ABS agreed to split the cost of the repair. On April 28, 2005, they executed the "MSE Retaining Wall Rock Anchor Stabilization Agreement" (hereinafter "Repair Agreement"),[2] which stated in relevant part that Bell and ABS would equally share the cost of the repair, and that American Safety was not a party to the Agreement. The Repair Agreement also stated that it represented their entire agreement, that no other agreement would be recognized, and that all previous communications and conduct were merged and integrated into the Agreement.

In order to complete the repair work, ABS retained the Appellant, Hayward Baker, Inc., a construction company with expertise in mechanically stabilized retaining wall design and construction. In April, 2005, ABS and Baker executed a contract stating that Baker was to provide the equipment and personnel to complete the repair, and that the personnel would be working under the direction of ABS.

Baker subsequently completed the remediation, and submitted an invoice to ABS for its costs in the amount of $104,000. When ABS did not pay

[2] The circuit court and American Safety employ the term "Repair Agreement" to describe this agreement, whereas Baker uses the term "Stabilization Agreement."

Baker, Baker filed the instant action against ABS seeking damages arising under the April, 2005 agreement. Baker also sought recovery from American Safety as surety.

The action proceeded to a bench trial in Elliott Circuit Court. After taking proof, the court rendered its Findings of Fact, Conclusions of Law and Judgment on April 30, 2009, ruling in favor of Baker on its claim against ABS. The court went on, however, to deny Baker's claim as against American Safety, holding that Baker's work was performed pursuant to the Repair Agreement between Bell and ABS to which American Safety was not contracted as surety. In denying Baker's claim against American Safety, the court determined that the repair work was not required as a result of ABS's original work on the wall; that it was performed pursuant to the separate Repair Agreement; and, that the subcontract between Bell and ABS was terminated prior to ABS undertaking repairs on the wall. This appeal followed.

Baker now argues that the Elliott Circuit Court erred in failing to render a Judgment in its favor against American Safety. It contends that the court improperly failed to find that the labor and materials payment bond executed for the construction project covers not only the original contract work, but also the remedial work necessary as a result of the original work being defective. That is, Baker maintains that the payment bond between ABS and American Safety, which was executed pursuant to the original contract between Bell and ABS, should cover the remedial work performed by Baker to repair the defective wall. Baker argues

that public policy discourages allowing a paid surety to avoid liability under a payment bond, and that the bond should be construed liberally to effectuate the purpose for which it was given. Baker also directs our attention to case law which it claims stands for the proposition that any ambiguity in a payment bond should be construed most strongly against a compensated surety. Baker argues that the payment bond continues until the project is completed, and that American Safety's approval was not required for Baker to engage in the remediation. In sum, Baker contends that the Repair Agreement was not a contract for new work, but was simply a settlement agreement or change order required to complete the project work.

In response, American Safety argues that the trial court properly determined that Baker's work – which was not part of the original subcontract agreement between Bell and ABS – was not covered by American Safety's bond. It contends that under Kentucky law, the scope of a surety's liability is not determined by the demands of third parties, but by the terms of the bond. It notes that the bond at issue expressly relates solely to the contract between Bell and ABS, and further expressly provides coverage only as to Bell's subcontractors. American Safety points out that it is not a party to either the Repair Agreement or the contract executed by ABS and Baker, and that the bond only covers work performed under the subcontract between Bell and ABS.

We have closely examined the record and the law, and find no basis for disturbing the Judgment on appeal. In denying Baker the relief it sought as

against American Safety, the court first determined that no formal determination of fault was ever sought or made by the parties prior to the commencement of the repair project. Based on this finding, in conjunction with Bertas' adamant opinion that the problems experienced in 2005 were distinct and separate from any issues which arose during the construction of the wall, the court opined that the repairs undertaken by ABS and Baker did not arise from, nor were part of, the subcontract.

The court went on to find that the repair work resulted from the Repair Agreement, which was separate and distinct from the subcontract. The Repair Agreement, it found, expressly stated that no other agreement would be recognized and that all previous communications and conduct were deemed merged in and superceded by the Repair Agreement. And finally, the court found substantial evidence upon which it concluded that the subcontract had been fully terminated at the end of March, 2005, which was before the repair work had been undertaken.

We find no error in the court's determinations on these issues. A trial court's findings of fact will not be disturbed if they are supported by substantial evidence. CR 52.01; *Owens-Corning Fiberglas Corporation v. Golightly*, 976 S.W.2d 409 (Ky. 1998). The conclusions of law which are based on those findings are subject to *de novo* review on appeal. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005). Substantial evidence is found in the record in support of the trial court's conclusion that the defects in the wall which were corrected by Baker's anchor stabilization project were not the result of deficiencies in the work of ABS

during the wall construction project. Bertas testified that the problems experienced in 2005 were separate and distinct from any issues which arose during the construction of the wall. Additionally, no determination of fault was sought or made by the parties prior to the commencement of the repair project, and the parties agreed to split the cost of repairs. It is also noteworthy that Baker's installation of anchors was not part of the original design nor encompassed by the subcontract upon which American Safety served as surety.

Furthermore, the Repair Agreement contained a merger clause expressly stating that the agreement constituted the "entire agreement with regard to the work contemplated and no other agreement will be recognized in that all previous communications and conduct shall be deemed merged in, integrated, and superseded by this Agreement." In addition, neither Baker nor American Safety were parties to the Repair Agreement. The court properly concluded that the parties could have incorporated provisions of the subcontract into the Repair Agreement, but chose not to.

Finally, the court relied in part on its determination that the subcontract had terminated prior to the execution of the Repair Agreement and before any repair work had commenced. Bertas produced a letter from Bell to ABS dated March 28, 2005, stating that, "[T]his letter will serve as formal, written notice of the termination of the ABS Services, Inc. subcontract." The letter went on to give ABS 48 hours to cure a purported default by conducting repairs on the wall. Testimony was adduced that ABS undertook no such repairs during those 48

hours, thus providing substantial evidence in support of the court's conclusion that the subcontract was terminated at the end of March, 2005. American Safety's liability, if any, arose from a bond agreement which referenced only the subcontract. Irrespective of whether the subcontract terminated in March of 2005, though, the trial court concluded that the "language of the merger clause clearly indicates that the terms and/or conditions of any other agreements or of any other understandings or actions were not to govern or control the repair work being performed. This language obviously encompasses the subcontract. As such, the Payment Bond is inapplicable to the debt owed by ABS to Hayward Baker."

This conclusion is supported by substantial evidence of record. American Safety's bond expressly limited claimants to persons providing "labor, material, or both, used or reasonably required for use in the performance of the Contract." The contract to which the bond language refers is the subcontract between Bell and ABS dated November 27, 2001. As testimony and documentary evidence exists to support the conclusion that the Repair Agreement under which ABS and Baker were operating was a wholly separate and distinct agreement from the subcontract under which American Safety was providing coverage, we find no error in the trial court's conclusion that Baker is not entitled to recovery as against American Safety.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law and Judgment of the Elliott Circuit Court.

ALL CONCUR.

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