

STATE OF MICHIGAN
COURT OF APPEALS

JOBA CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellee,

v

V & Y CONSTRUCTION SERVICES, INC.,

Defendant,

and

FLORA CONSTRUCTION, INC., and AMCO
INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED

November 17, 2005

No. 263258

Wayne Circuit Court

LC No. 04-427657-CK

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendants Flora Construction, Inc. ("Flora"), and AMCO Insurance Company ("AMCO"), appeal as of right from the trial court's order granting plaintiff's motion for summary disposition and awarding plaintiff judgment of \$115,457.23 in this action for recovery under a payment bond. We affirm.

The underlying facts are generally not in dispute. The State of Michigan entered into a contract with Flora, as a general contractor, for work on the state's Tri-Centennial Park and Harbor Project in the City of Detroit. Pursuant to the public works bond act, MCL 129.201 *et seq.*, Flora obtained a payment bond with AMCO as the surety. Flora entered into a subcontract with V & Y Construction Services, Inc. ("V & Y"), which in turn contracted with plaintiff to perform work on the project. Plaintiff alleges that V & Y made one payment for the work plaintiff performed on the project, but refused to pay any additional amounts. Plaintiff and V & Y thereafter agreed to a settlement in which it was agreed that plaintiff was owed \$115,457.23 for its work on the project. According to plaintiff, V & Y failed to make any payments under the settlement agreement.

Plaintiff subsequently sought payment under the payment bond issued by AMCO. Plaintiff complied with a 90-day notice requirement prescribed in the bond and demanded payment from Flora and AMCO, but neither made the requested payment. Plaintiff then filed

this action for breach of contract against V & Y, and additionally sought recovery against Flora and AMCO under the payment bond. Plaintiff obtained a default judgment against V & Y and moved for summary disposition in its favor against Flora and AMCO, arguing that it complied with the terms of the payment bond and that defendants had no defense to their liability under the bond. Defendants requested summary disposition in their favor, arguing in part that plaintiff failed to comply with a statutory 30-day notice requirement under the public works bond act, MCL 129.207. The trial court held that plaintiff was not required to comply with this statutory notice provision, because it was not included as a condition of the payment bond.

Defendants argue that the trial court erred in concluding that plaintiff was not required to comply with the statutory 30-day notice provision in the public works bond act.

This Court reviews a trial court's decision on summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court appeared to grant summary disposition under MCR 2.116(C)(10). Summary disposition may be granted under this subrule if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The payment bond issued by AMCO provides that a claimant not having a direct contract with the contractor must provide notice of its claim within 90 days after last performing labor or furnishing materials. It is undisputed that plaintiff complied with this notice requirement. At issue here is the effect of MCL 129.207 of the public works bond act, which also provides that a claimant not having a direct contract with the contractor must provide notice of materials furnished or labor performed within 30 days after furnishing the materials or performing the labor. It is undisputed that the payment bond issued by AMCO did not expressly refer to this 30-day notice requirement, and that plaintiff did not provide this 30-day notice. We agree with the trial court that plaintiff's failure to comply with the statutory 30-day notice provision, which was not included as a requirement in the payment bond, did not preclude plaintiff from seeking recovery under the payment bond.

Defendants principally rely on *Williamson v Williams*, 262 Mich 401; 247 NW 704 (1933). In that case, the plaintiff and his assignors were subcontractors who tried to recover for their work on a highway construction project, but the defendants argued that, under the terms of their surety bond, payment was limited to only principal contractors. *Id.* at 402-404. The Supreme Court held that when "a bond is given under the authority of a statute, that which is not expressed but should have been incorporated, is included in the bond." *Id.* at 404, quoting *Chambers v Cline*, 60 W Va 588; 55 SE 999 (1906). Because the parties intended that the bond be drafted in reference to the statute, the statutory requirements were properly imposed against the defendants. *Williamson, supra* at 404-406. Therefore, the Court allowed the subcontractors to recover on their claims, although the defendants' bond attempted to limit their liability to principal contractors only.

The instant case is similar to *Royalite Co v Fed Ins Co*, 184 Mich App 69, 72-75; 457 NW2d 96 (1990), wherein this Court held that although the plaintiff failed to comply with the 30-day notice requirement in the public works bond act, but did comply with the notice requirements prescribed in the bond itself, the plaintiff was entitled to recover on its claim. The Court observed that the bond company provided more liberal coverage than that afforded under the public works bond act. *Id.* at 74. Relying on *Hub Electric Co, Inc v Gust Constr Co, Inc*,

585 F2d 183, 188 (CA 6, 1978), the Court concluded that coverage for the claim was available, notwithstanding the plaintiff's failure to meet the statutory 30-day notice requirement:

Here, the circuit court found the Sixth Circuit's opinion persuasive. The question in *Hub Electric, supra*, was whether a subcontractor's satisfaction of the ninety-day notice requirement in the bond executed between the parties, the principal and the surety, was sufficient to permit the subcontractor to recover on its claim, or whether the thirty-day notice requirement of the statute must also be met. The Sixth Circuit stated:

"We therefore hold that the surety by its bonding contract may agree to accept a greater liability than that required under the Michigan bonding statute, although for reasons of public policy it may not contract for less. The statute specifically provides that the payment bond is solely for the benefit of the claimants, and nothing suggests that the Act was intended to establish a ceiling as well as a floor upon the liability which a surety may undertake by contract. Because the bond here provided only for the 90-day notice and the trial court has correctly held that the plaintiff had complied in all respects with the conditions of the bond as written, plaintiff is entitled to recover upon it. [*Hub Electric, supra* at 188.]"

Although this Court is not bound by a federal court decision construing a Michigan statute, it may follow the decision if the reasoning is persuasive. *Hardy v Maxheimer*, 429 Mich 422, 432; 416 NW2d 299 (1987); *Continental Motors Corp v Muskegon Twp*, 365 Mich 191; 112 NW2d 429 (1961). We are persuaded the decision in *Hub Electric, supra*, is correct. The failure to reference the thirty-day notice requirement within the bond itself excused compliance with that requirement. [*Royalite Co, supra* at 74-75.]

As in *Royalite Co*, AMCO here included more liberal bond requirements, only requiring a subcontractor to submit notice of its claim within 90 days after finishing its work on the project, which plaintiff did. The 30-day notice requirement included in the public works bond act was not included as a condition of AMCO's payment bond. Thus, as in *Royalite Co*, plaintiff was not required to satisfy this 30-day notice requirement in order to recover under the bond.

Defendants argue that paragraph 13 of AMCO's payment bond incorporated the statutory 30-day notice requirement. We disagree. Paragraph 13 of the payment bond provides:

13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

In *Trustees for Michigan Laborers' Health Care Fund v Warranty Builders, Inc*, 921 F Supp 471, 476-477 (ED Mich, 1996), aff'd 137 F3d 427 (CA 6, 1998), the federal district court

examined an identical paragraph 13 in a similar payment bond and concluded that it did not incorporate the statutory 30-day notice requirement:

The question is whether the language of paragraph 13 of the bonding contract incorporates the thirty day notice requirement of the Act. The Court finds that it does not.

Paragraph 13 of the bonding contract is a "savings clause" that would preserve the legality of the bond where its terms are in conflict with any statutory provisions. In the event of such a conflict, the requirements of the state law would supersede the conflicting provisions provided within the bonding contract. The statute requires that those performing labor or furnishing materials are provided at least thirty days after the commencement of their work to provide the required notice to the general contractor. The bonding contract provision requiring notice within ninety days after completion of work satisfies this statutory minimum. Thus, the bonding contract in this case does not "conflict" with the state statute but rather complies with the requirements of a statutory bond. As the *Hub Electric* court indicated, the statutory notice requirements provide a floor, not a ceiling, and where a more generous period is provided by contract, that period is controlling. In expanding by contract its statutory responsibility under the bond, defendant has foregone any right to the thirty day notice required under the Act. *Hub Electric*, 585 F2d at 187-88; *Royalite*, 184 Mich App at 74-75, 457 NW2d 96.

The savings clause of the bonding contract does not incorporate any state law provisions that happen to have been omitted from the contract; it only acts to delete any contractual provisions which are in conflict with the law and provides that the conflicting legal provisions are to supersede the contractual language. To construe the bonding contract to add the additional thirty day notice provision would allow the surety to profit by its own ill-drafted bond notice requirements. Where the bonding contract sets terms less stringent upon the laborer, the surety must be bound by its language, especially where that language is relied upon to the laborer's detriment. The case law cited by plaintiffs does apply to the present matter and does support such a holding. Therefore, the Court finds that plaintiffs did comply with the notice provisions required to make a claim under the bond. [Footnote omitted.]

We agree with the decision in *Trustees for Michigan Laborers' Health Care Fund* and further conclude that it, as well as *Royalite Co* and *Hub Electric Co, Inc*, are not inconsistent with the Supreme Court's decision in *Williamson*.

In *Williamson*, the Supreme Court held that provisions allowing claims by subcontractors must be read into a bond that attempts to limit liability to only principal contractors. In that case, the drafter of the bond attempted to restrict the scope of the bond to avoid coverage to subcontractors, contrary to the purpose of the public works bond act, which is to protect the rights of contractors and subcontractors for work performed. See MCL 129.203. The act is to be liberally construed to protect these parties even if the notice requirements in the act are strictly enforced. *Grand Blanc Cement Products, Inc v Ins Co of North America*, 225 Mich App 138,

144; 571 NW2d 221 (1997). Therefore, where a bond imposes more restrictive conditions that limit liability to claimants, contrary to the purpose and intent of the statute, the statutory requirements should be imposed to protect those parties. Conversely, as in both this case and *Royalite Co, supra*, where the drafter of a bond chooses to provide more liberal standards for paying claims, statutory requirements should not be imposed later to limit liability to claimants.

For these reasons, the trial court properly held that plaintiff's failure to comply with the 30-day notice provision in MCL 129.207 was not a defense to plaintiff's right to recover under the payment bond, which did not contain the 30-day notice provision.

Defendants next argue that plaintiff waived its rights under the payment bond, or is estopped from pursuing its rights under the payment bond, because (1) defendant Flora made payment to V & Y after plaintiff and V & Y agreed on the amount that was owed to plaintiff, (2) V & Y agreed to pay plaintiff, and (3) plaintiff did not request that the check issued by Flora to V & Y be made payable jointly to plaintiff and V & Y. We disagree.

Plaintiff sent a letter to Flora notifying it that it had not been paid by V & Y. The letter included a request that Flora issue a check made payable jointly to plaintiff and V & Y. After plaintiff and V & Y agreed on the amount that was owed by V & Y to plaintiff, however, plaintiff sent Flora a second letter withdrawing its request for a joint check. The letter stated, in pertinent part:

Based on good faith representations by V & Y to pay Joba immediately upon payment from Flora Construction Joba agrees and hereby withdraws its request made on May 9, 2004 for Flora Construction to issue joint checks. *This letter in no way waives or otherwise diminishes Joba [sic] entitlement to be paid under the protections provided by the project documents*, the full amounts stated above. . . . [Emphasis added.]

Flora asserts that, relying on plaintiff's agreement with V & Y, it issued a check payable only to V & Y for \$91,800. Flora therefore argues that plaintiff should not be permitted to collect that amount a second time from defendants.

We reject defendants' argument that plaintiff waived its rights to pursue payment under the payment bond by withdrawing its request for a joint check. "Waiver" is defined as "an intentional abandonment of a known right." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002). Here, defendants have not cited any authority to support that plaintiff had a right to demand that Flora issue a joint check. More importantly, plaintiff's letter to Flora wherein plaintiff stated that it was no longer requesting a joint check also expressly informed Flora that plaintiff was not waiving entitlement to be paid under the protections provided by the project documents. Thus, there is no genuine issue of material fact with regard to defendants' argument that plaintiff intentionally abandoned a right to proceed under the payment bond.

We also reject defendants' argument that it was entitled to summary disposition in their favor because they reasonably relied on a representation by plaintiff that it would collect its debt only from V & Y, and that, had Flora not received the second letter from plaintiff, it would have issued a joint check, as plaintiff originally requested. Defendants maintain that plaintiff is therefore estopped from seeking payment from them.

In order for equitable estoppel to apply, "[t]he other party must not only have justifiably relied on this belief, but also must be prejudiced if the first party is permitted to deny the facts upon which the second party relied." *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 534-535; 464 NW2d 713 (1990).

Defendants' estoppel argument lacks merit because it was unreasonable for Flora to believe that, by issuing a check only to V & Y, any obligations under the payment bond would cease. As previously indicated, plaintiff's letter to Flora specifically stated that plaintiff was not waiving "entitlement to be paid under the protections provided by the project documents." This provision put Flora on notice that plaintiff was not relying solely on V & Y for payment of the debt, and that defendants could still be liable under the payment bond if V & Y did not make the promised payment to plaintiff.

Finally, plaintiff's notice of their claim against the bond, which was sent to defendants on June 21, 2004, was sufficient documentary evidence that plaintiff was never paid. Defendants have not identified any evidence indicating otherwise. Because defendants failed to show that there was a genuine issue of material fact with respect to this issue, the trial court properly granted summary disposition for plaintiff.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood