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NO. COA09-1077

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

BOATWRIGHT DISTRIBUTION &  
SUPPLY, INC.,

Plaintiff-Appellee,

v.

Wake County  
No. 07 CVS 7889

NORTH STATE MECHANICAL  
INCORPORATED and  
INTERNATIONAL FIDELITY  
INSURANCE COMPANY,

Defendant-Appellants.

Appeal by defendants from judgment and order entered 11 March 2009 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 February 2010.

*William M. Black, Jr. Attorneys, by William M. Black, Jr., for plaintiff-appellee.*

*Collins and Maready, PA, by George L. Collins, for defendant-appellants.*

ELMORE, Judge.

North State Mechanical, Inc. (North State), and International Fidelity Insurance Company (International Fidelity; together, appellants) appeal from an order holding them liable to Boatwright Distribution & Supply, Inc. (Boatwright), for \$97,882.21. We find no error.

*Facts*

The evidence tended to show the following: North State was a first tier subcontractor for the construction of Mainside Primary and Intermediate Schools at Camp Lejeune. On 12 March 2004, North State and International Fidelity issued a subcontractor's payment bond assuring payment to persons supplying labor and/or materials for the Mainside Schools Project. Boatwright was a third tier subcontractor on this project, responsible for selling and delivering materials to MIC Insulation, Inc. (MIC), a second tier subcontractor on the project. The invoice for each transaction between Boatwright and MIC contained the following language: "TERMS: NET 30 DAYS. 1 1/2% PER MONTH (18% A.P.R.) SERVICE CHARGE ON PAST DUE BALANCE" and "INTEREST: All overdue payments and judicial and arbitration awards in favor of Seller relating to this Contract bear interest at a rate of 1 1/2% per month."

The parties disagreed as to how negotiations to settle the debt went, with Boatwright claiming they were never offered joint checks, and North State claiming that Boatwright denied a joint check offer. Ultimately, Boatwright claims that it is owed \$97,882.21 for supplies that were never paid for by any of the contractors. It tried to recover through the payment bond created by North State and International Fidelity, but both challenged the recovery. After a bench trial, the Superior Court ultimately entered a judgment in favor of Boatwright in the amount of \$97,882.21 in principal plus interest, with North State and International Fidelity jointly and severally liable; both appeal.

*Arguments*

Appellants contend that the trial court (I) committed reversible error by finding that there was sufficient evidence to support Boatwright's right to recover against North State and International Fidelity, notwithstanding that Boatwright did not have privity of contract with either defendant; (II) erred by failing to find that Boatwright is estopped, by virtue of its conduct, from recovering from North State and International Fidelity; and (III) erred by finding that Boatwright is entitled to recover prejudgment interest at a rate of 18% per annum. We find no error.

I

Appellants first contend that the trial court committed reversible error by finding that sufficient evidence existed in support of Boatwright's right to recover against North State and International Fidelity. We find no error.

When reviewing the judgment from a bench trial, our standard of review is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Town of Green Level v. Alamance Co.*, 184 N.C. App. 665, 668-69, 646 S.E.2d 851, 854 (2007) (quotations and citations omitted).

North State and International Fidelity argue that there can be no recovery by Boatwright because no privity of contract exists between Boatwright and North State. This contention misstates the

requirements for recovery as provided by the payment bond created by appellants.

When "[t]he payment bond expressly states that it was for 'the benefit of any subcontractor, materialman or laborer'" the bond's "express terms allow it to institute an action against the surety if it is not paid by the contractor," even if the subcontractor "was not a party to the payment bond." *Beachcrete, Inc. v. Water Street Ctr. Assocs., L.L.C.*, 172 N.C. App. 156, 159, 615 S.E.2d 719, 721 (2005). Here, the payment bond expressly stated that any claimant who, among other things, supplied materials that were "reasonably required for use in the performance of the Subcontract" shall be promptly paid. The payment bond defines a claimant as "one having a direct contract, written or oral, with the Principal or with a subcontractor of the Principal for labor, material, or both[.]" By this definition, Boatwright is a claimant. In fact, the parties stipulated that "Boatwright Distribution and Supply, Inc. is a proper 'claimant' under the terms of the Payment Bond." It does not appear to be in dispute that Boatwright and MIC had a contract together in which Boatwright agreed to supply MIC with the necessary materials to complete its portion of the subcontract; North State admitted in its Answer that it subcontracted out the insulation work to MIC, thus making MIC its subcontractor. There can also be no doubt that North State is the principal in the payment agreement, because the agreement itself clearly states that North State is "(hereinafter called the 'Principal')." As such, North State failed to adequately dispute, and indeed for the most

part admits, that Boatwright is a claimant as defined by the payment agreement. Therefore, there was competent evidence to support the trial court's findings of fact, and this assignment of error is overruled.

II

Appellants next contend that the trial court committed reversible error by failing to find that Boatwright is estopped, by virtue of its conduct, from recovering from North State. We find no error.

North State's sole contention as to why Boatwright should be estopped from recovery is that Boatwright allegedly refused to accept an offer from North State to receive joint checks with MIC, and, by doing so, failed to mitigate its damages. As mentioned previously, all "[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Town of Green Level*, 184 N.C. App. at 669, 646 S.E.2d at 854.

In order to succeed on an estoppel claim, the party invoking estoppel must lack knowledge and the means to acquire knowledge as to the real facts in question. *Five Oaks Homeowners Assoc., Inc. v. Efirds Pest Control Co.*, 75 N.C. App. 635, 636, 331 S.E.2d 296, 297 (1985) (citation omitted). "[E]stoppel is not available to protect a party from the consequences of its own negligence." *Id.* at 637, 331 S.E.2d at 298 (citation omitted).

In this case, the "real facts" were that MIC was not sending payments to Boatwright for the materials it received. The trial

court determined in finding of fact i that "[Boatwright] gave oral notices to [North State] that [Boatwright] was owed money by [MIC] for materials supplied to [MIC]." The trial court found that North State "had the means to acquire knowledge from [MIC] regarding the status of the [MIC] payments to and account with [Boatwright] for materials sold to [MIC] for the Project." Under these facts, North State had the means to acquire knowledge of the "real facts" in question. North State must have known that MIC was behind on payments or, through some fault of its own, failed to look into the matter. Therefore, North State cannot succeed on the estoppel claim, and this assignment of error is overruled.

III.

Appellants contend that the trial court committed reversible error by finding that Boatwright is entitled to recover prejudgment interest at the contract rate of 18 percent per annum. We find no error.

In order to receive prejudgment interest on recoveries stemming from a breach of contract involving a payment bond, it must be shown that the "amount of damages can be ascertained from the contract." *Noland Co. v. Poovey*, 58 N.C. App. 800, 802, 295 S.E.2d 238, 239 (1982) (quotations and citations omitted). In this case, there is an accurate record of how much is owed to Boatwright by MIC. The trial court concluded that Boatwright was owed \$97,882.21 for all unpaid invoices dating 28 March 2006 and before, and North State does not dispute this amount.

The invoices from Boatwright to MIC set forth the measure of damages, which includes interest at the rate of 18% per annum. "[T]he extent of the surety's obligations is ordinarily measured by the terms of the principal's agreement." *Equipment Co. v. Smith*, 292 N.C. 592, 596, 234 S.E.2d 599, 601 (1977). As noted above, the payment bond defines a claimant under the bond as "one having a direct contract, written or oral, with the Principal or with a subcontractor of the Principal for labor, material, or both[.]" Under the terms of the bond, a contract either directly with the Principal, North State, or with a subcontractor of the Principal, is entitled to recovery under the bond. The uncontested findings of fact establish that Boatwright had a contract with MIC which required the payment of interest at the rate of 18% per annum. As stated in section I above, Boatwright has a right to recover under the payment bond, thus satisfying the requirements to receive prejudgment interest on recoveries stemming from a breach of contract involving a payment bond. See *Noland Co.*, 58 N.C. App. at 802, 295 S.E.2d at 239. Therefore, this claim is without merit, and this assignment of error is overruled.

No error.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).