IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

GRIFFIN DEWATERING CORPORATION, an Alabama corporation, *

Plaintiff, *

v. *

B. W. KNOX CONSTRUCTION CORPORATION, a Delaware corporation, J. A. MOORE & SONS, INC. a/k/a J. A. Moore Construction, Inc. and J. A. Moore & Sons Construction Co., a Delaware corporation, and VIRGINIA CREST VILLAGE, INC., a Delaware corporation, and VIRGINIA CREST, INC., a Delaware corporation, and BETTER HOMES OF SEAFORD, INC., a Delaware corporation, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and BARTLEY W. KNOX, an individual. *

Defendants. *

CIVIL ACTION NO: 98L-09-008

MEMORANDUM OPINION

Date Submitted: February 21, 2001
Date of Decision: May 14, 2001

Robert J. Leoni, Esquire and Carrie I. Dayton, Esquire, Mason, Ketterman, Morgan & Shelsby, 200 Continental Drive, Suite 109, Newark, Delaware 19713, attorney for Plaintiff Griffin Dewatering Corporation;

Adam C. Harrison, Esquire, pro hac vice, 40 West Chesapeake Avenue, Suite 405, Towson, Maryland 21204, attorney for Plaintiff Griffin Dewatering Corporation;

Donald L. Logan, Esquire and Joseph Scott Shannon, Esquire, 710 North King Street, Suite 500, P.O. Box 1031, Wilmington, Delaware 19899, attorney for Defendants.

GRAVES, J.

This case presents cross-motions for summary judgment from Plaintiff Griffin Dewatering Corporation ("Griffin") and Defendants J.A. Moore & Sons, Inc., under various names (collectively referred to as "Moore"), Virginia Crest Village, Inc., Virginia Crest, Inc., Better Homes of Seaford, Inc., and Fidelity and Deposit Company of Maryland. For the reasons stated herein, this Court holds that 6 Del. C. §3506 does not preclude Griffin's claims. The Court further holds that Moore is entitled to summary judgment on the quantum meruit, unjust enrichment, and mechanics' lien claims, and Griffin is entitled to summary judgment on its claim against the payment bond.

PROCEDURAL HISTORY

On September 9, 1998, Griffin filed a Statement of Claim and Complaint for a mechanics' lien against the following Defendants: subcontractor B. W. Knox Construction Corp. ("Knox"), contractor Moore, owner Virginia Crest Village, Inc. and Virginia Crest, Inc. (collectively referred to as "Virginia Crest"), and managing agency Better Homes of Seaford, Inc. ("Better Homes").

On September 29, 1998, Defendants Moore, Virginia Crest and Better Homes filed their Answer to Griffin's mechanics' lien claim. On October 16, 1998, Defendant Moore posted a bond and filed a Petition to Discharge Mechanics' Lien to which Griffin responded on November 4, 1998. This Court granted Moore's petition by Order dated November 6, 1998, and pursuant to that Order, the bond was properly lodged with the Court on November 16, 1998.

On January 7, 1999, with the Court's permission, Griffin filed an Amended Statement of Claim and Complaint which brought in two additional defendants, Bartley W. Knox, individually, and Fidelity and Deposit Company of Maryland ("F&D") and added new claims for breach of contract, unjust enrichment, quantum meruit, claims related to a payment bond, and breach of guaranty. Defendants Moore, Virginia Crest, Better Homes and F&D filed an Answer to the Amended Statement of Claim and Complaint on January 21, 1999.

On April 30, 1999, Griffin filed a Motion for Default Judgment against Defendants Knox and Bartley W. Knox. This Court stayed signing of the Judgment until Knox's bankruptcy cleared. On or about July 9, 1999, Griffin voluntarily dismissed both Knox, and Bartley W. Knox from the suit.

On February 3, 2000, Griffin filed a Motion for Summary Judgment. Defendants Moore, Virginia Crest, Better Homes, and F&D filed a Cross-Motion for Summary Judgment and Answer to Plaintiff's Motion for Summary Judgment on September 14, 2000. The parties briefed the motion and oral argument was held on February 21, 2001. This Court is now called upon to decide those Motions.

FACTUAL STATEMENT

In 1997, Moore, as general contractor, entered into a construction contract with Virginia Crest and/or Better Homes for the construction of 27 residential units and a community center, to be located on Virginia Avenue, Seaford, Sussex County, Delaware ("the Project"). As a condition of Moore's contract with Virginia Crest and/or Better

Homes, and as required by the lender, the United States Department of Housing and Urban Development ("HUD"), under Federal law, Moore, as principal, executed a dual obligee performance-payment bond ("the Bond") with F&D as surety. The Bond reads in relevant part as follows:

> ...if the Principal shall...promptly make payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of the work provided for in such contract, and any authorized extension or modification thereof, including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment, and tools, consumed or used in connection with the construction for such work, ...then this obligation shall be void; otherwise to remain in full force and effect.

During the course of construction on the Project, Moore executed a subcontract agreement with Knox whereby Knox was to perform sitework and concrete work on the Project. In order to perform its subcontractual obligations, Knox executed a Uniform Rental Agreement ("Rental Agreement") and a Credit Application with Griffin on March 28, 1998. Griffin then supplied dewatering equipment to Knox from March 25, 1998, through June 14, 1998, for the ground dewatering of the Project during construction.

Pursuant to the terms of the Rental Agreement, the aggregate amount due and owing to Griffin from Knox for the dewatering equipment totaled $22,368.41. Moore avers, and Griffin does not contest, that Moore paid Knox in full, yet Knox failed to remit payment of this amount, and the entire balance remains due and owing to Griffin. In addition, pursuant to the terms of the Rental Agreement, Griffin claims it is also owed interest and attorneys' fees as a result of Knox's failure to pay for the use of the

dewatering equipment. Griffin has filed its Complaint in an attempt to recover damages for Knox's non-payment.

ISSUES PRESENTED

I. Whether the doctrine of federal preemption precludes the application of 6 Del. C. §3506(e)?

II. Whether the specific provisions of 6 Del. C. §3506(e) barring claims for payment by a subcontractor against a contractor or surety after payment has been made are applicable to Plaintiff's claims?

III. May Griffin pursue a mechanics' lien against the Project?

IV. May Griffin recover against Moore under the theory of quantum meruit?

V. May Griffin recover against Moore under the theory of unjust enrichment?

VI. May Griffin recover against F&D, as surety, under the terms of the Bond?

VII. May Griffin recover attorneys' fees and interest?

DISCUSSION

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680 (1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must

provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991), cert. den., 112 S. Ct. 1946 (1992); Celotex Corp. v. Catrett, supra. If however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. Ebersole v. Lowengrub, Del. Supr., 180 A.2d 467, 470 (1962). In a case involving cross motions for summary judgment, the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions. Browning-Ferris v. Rockford Enterprises, Del. Super., 642 A.2d 820 (1993).

I. Is the application of 6 Del. C. §3506 precluded under the doctrine of federal preemption?

Delaware courts recognize the doctrine of federal preemption in the three following situations:

> first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law; second, when it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby "left no room for the States to supplement" federal law; and, finally, when compliance with both state and federal law is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

O'Malley v. Boris, Del.Supr., 742 A.2d 845 (1999).

Griffin argues that Moore's interpretation of 6 Del. C. §3506(e)[1] would stand as an obstacle to the federal law that required the bond, that compliance with both §3506(e) and the terms of the bond would be impossible, and therefore federal law should be applied. However, "the fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant that all aspects of its performance or nonperformance are to be governed by federal law rather than state law applicable to similar contracts in businesses not under federal regulation." Virgin Islands Housing Authority v. Coastal General Constr. Services Corp., 3rd Cir., 27 F.3d 911, 916 (1994)(Court of Appeals found that local law, not federal law, governs a dispute over the termination provisions of a contract between a public housing authority and a private construction company).

By merely requiring a payment bond as a condition of financing the Project, the federal government has not so occupied the field that Delaware law must be pre-empted by federal law. In Linan-Faye Constr. Co., Inc. v. Housing Authority of the City of Camden, 3rd Cir., 49 F.3d 915 (1995), HUD contracted with a private construction company. The construction company did not contract directly with the United States government, although HUD forms were used in the contract and HUD funded the

[1] 3506(e) reads as follows:
Once a contractor has made payment to the subcontractor or supplier according to the payment terms of the construction contract or the provisions of this section, future claims for payment against the contractor or any surety of the contractor by parties owed payment from the subcontractor or supplier shall be barred.

construction project in part. The Court found that the law of New Jersey, not the federal common law, should be applied to decide the issue because no significant conflict with a federal interest was identified.

Griffin has failed to establish a significant conflict between HUD's requirement of a payment bond issued for the Project and the use of Delaware law to settle disputes as to who is protected under the Bond. Because a lawsuit which involves a federal interest is a "necessary, not a sufficient, condition for the displacement of state law," id. at 920, I will not apply the doctrine of federal preemption, but will apply Delaware law to determine the outcome of the issues presented in this matter.

II. Having concluded that Federal law is not applicable to the instant controversy, are Griffin's claims barred by 6 Del. C. §3506(e)?

6 Del. C. §3506(e) ("subsection (e)") reads as follows:

> Once a contractor has made payment to the subcontractor or supplier according to the payment terms of the construction contract or the provisions of this section, future claims for payment against the contractor or any surety of the contractor by parties owed payment from the subcontractor or supplier shall be barred.

Moore argues that subsection (e) is unambiguous, and that the Court must therefore give effect to the plain meaning of the statute. If taken at face value, subsection (e) prevents Griffin from asserting a valid claim against Moore because Moore paid Knox in full for the work Knox performed on the Project. Moore has submitted to this Court receipts issued by Knox which acknowledge payments received from Moore in connection with the Project. Griffin has not contested that payments were so made.

Based on these facts, Moore argues that subsection (e) bars Griffin's claim against Moore for damages.

Griffin asserts that the Court cannot read subsection (e) in isolation, but must consider it as part of the statute as a whole. Griffin argues that proper application of subsection (e) must be limited solely to claims for interest penalties by a subcontractor's lower-tier subcontractors or suppliers against a prime contractor, and that subsection (e) cannot therefore be construed as a bar to Griffin's claims. In other words, Griffin contends that the prohibition against future claims for "payment" applies only to claims for interest penalties, and does not prohibit all claims for compensation.

6 Del. C. §3506 reads in full as follows:

> §3506. Interest penalties on late payments.
> (a) Each construction contract awarded by a contractor shall include:
> (1) A payment clause which obligates the contractor to pay the subcontractor and each supplier for satisfactory performance under the subcontract within 30 days out of such amounts as are paid to the contractor; and
> (2) An interest penalty clause which obligates the contractor to pay the subcontractor and each supplier an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the contract pursuant to paragraph (1) of this subsection.
> (b) The interest penalty shall apply to the period beginning on the day after the required date and ending on the date on which payment of that amount due is made and shall be computed at the legal rate in effect at the time the obligation to pay a late payment interest penalty accrues. Any amount of an interest penalty which remains unpaid at the end of any 30-day period shall be added to the principal amount of the debt and thereafter interest penalties shall accrue on such amount.
> (c) The clauses required by subsection (a) of this section shall not be construed to impair the right of the contractor to include in its subcontracts provisions which permit the contractor to retain a specified percentage of

each progress payment otherwise due to a subcontractor and each supplier for satisfactory performance under the subcontract without incurring any obligation to incur an interest penalty, in accordance with the terms and conditions agreed to by the parties to the contract. In such a case, the contractor must provide written notice to the subcontractor or supplier as to why payment is being withheld within 7 days of the date required for payment to the subcontractor or supplier.

(d) If it is determined by a court of competent jurisdiction that a payment withheld pursuant to subsection (c) of this section was not withheld in good faith for reasonable cause, the court may award reasonable attorney's fees to the prevailing party. In any civil action brought pursuant to this section, if a court determines after a hearing for such purpose that the cause was initiated, or a defense was asserted, or a motion was filed or any proceeding therein was done frivolously or in bad faith, the court shall require the party who initiated such cause, asserted such defense, filed such motion or caused such proceeding to be had to pay the other party named in such action the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney's fees.

(e) Once a contractor has made payment to the subcontractor or supplier according to the payment terms of the construction contract or the provisions of this section, future claims for payment against the contractor or any surety of the contractor by parties owed payment from the subcontractor or supplier shall be barred.

This Court has established the search for legislative intent as its standard for statutory interpretation. Richardson v. Wile, Del. Supr., 535 A.2d 1346, 1348 (1988). Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls. Evans v. State, Del. Supr., 516 A.2d 477, 478 (1986). If uncertainty exists, however, rules of statutory construction are applied. To that end, the statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided. Daniels v. State, Del. Supr., 538 A.2d 1104, 1110 (1988).

Typically, in the construction of buildings, highways, major improvements, and the like, a payment bond is required. Historically, such bonds protect not only the owner of the project, but also subcontractors, materialmen, and those providing labor as third-party beneficiaries. The State of Delaware requires bonds similar to the HUD Bond that was required in this case. To interpret subsection (e) to mean that the legislature intended to remove the protection the Bond provided to the owner of the Project, as well as the historical third-party beneficiary protection provided by these bonds, creates a mischievous result. The owner of a project could exercise the utmost diligence, contracting for protection under a bond, yet never be able to guarantee that he would not be exposed to possible mechanics' liens. If the legislature had intended such a result, I believe they would have made this fact clear, and I expect the legislative history or bill synopsis would have so designated. I do not believe that such a drastic change would be placed in the final subsection of a statute concerning interest without specific comment by the legislature.

Art. I, §10 of the United States Constitution prohibits states from passing any law which unreasonably impairs the obligation of contracts[2]. In conformity with this federal prohibition, Delaware Courts have held that "the States may not use the police power to alter or strike away the substantive rights and obligations of the contracting parties without paying compensation. Only minor impairment or infringement of contractual

[2] "No State shall...pass any bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..." U.S. Const., Art. I, §10.

rights is permissible." Globe Liquor Co. v. Four Roses Distillers Company, Del. Supr., 281 A.2d 19, 21 (1971). See also Grant v. Nellius, Del. Supr., 377 A.2d 354, 356 (1977); Pusey & Jones Co. v. Love, Del. Supr., 66 A. 1013, 1015 (1906). To construe §3506 broadly would effectively remove bargained-for protection that the owner of a project wisely drafted for his own commercial security and subject him to possible mechanics' lien liability despite his exercise of the utmost caution. I see no public policy reasons or societal benefit that allows me to find that this was the legislature's intended purpose for enacting §3506, and I therefore decline to give the statute such a broad application.

This Court finds that because subsection (e) appears in a Code section entitled "Interest penalties on late payments", it therefore only pertains to claims for interest penalties and has no bearing on any other claims a supplier or subcontractor might wish to bring against a contractor. Del. Const., art II., §16 provides that "No bill or joint resolution...shall embrace more than one subject, which shall be expressed in its title." In this case, I find that the headnote to §3506 clarifies the meaning of "payment" as it appears in subsection (e), and limits its meaning solely to payments of interest penalties. In so ruling, I recognize that I have narrowly construed the impact of §3506(e).

Because I find that subsection (e) applies only to interest payments and is not fatal to Griffin's claims, I now proceed to examine each theory of recovery advanced by Griffin against Moore, Virginia Crest Village, Inc., Virginia Crest, Inc., Better Homes of Seaford, Inc., and Fidelity and Deposit Company of Maryland.

III. Is Griffin entitled to pursue a mechanics' lien against the Project?

Because Delaware's mechanics' lien statute, codified at 25 Del. C. ch. 27, is in derogation of the common law, the Court must be strictly construe it. Ianotti v. Kalmbacher, Del. Super., 156 A. 366 (1931).

Griffin concedes that the mechanics' lien statute does not specifically list the provision of rental equipment as a lienable service under the terms of the statute, but argues that it should nevertheless be allowed to pursue a lien because the dewatering site work performed on the Project, with the equipment Griffin supplied, was necessary for the performance of the construction work on the Project. Griffin presents Jones v. Julian, Del. Supr., 195 A.2d 388, 390 (1963) ("Jones"), as authority for this argument. In Jones, the Court held that site work, specifically paving work, was a component part of the structure itself and not merely an improvement to the land alone. Griffin asserts that the site dewatering work achieved through the use of its equipment was the same type of site work that the Court allowed as a lienable service in Jones, and therefore the rental charges may serve as the basis for a mechanics' lien on the Project.

25 Del. C. §2702[3] indicates the persons who are entitled to obtain a mechanics'

[3] 25 Del. C. §2702 reads in full as follows:

(a) It shall be lawful for any person having performed or furnished labor or material, or both, to an amount exceeding $25 in or for the erection, alteration, or repair of any structure, in pursuance of any contract, express or implied, with the owners of such structure or with the agent of such owner or with any contractor who has contracted for the erection , alteration or repair of the same and for the furnishing of the whole or any part of the materials therefor, including any person who has performed or furnished labor or material, or both, for or at such structure under a contract with or order from any subcontractor to obtain a lien upon such structure and upon the ground upon which the same may be situated or erected.

lien. Nowhere in this list is there a provision entitling providers of rental equipment to obtain a mechanics' lien. The purpose of this section of the Code is to protect the interests of persons furnishing materials for the erection or repair of buildings under a contract with the owner or his agent or to a contractor who had contracted with the owner or his agent for the erection or repair of the buildings. J.G. Justis Co. v. Spicer, Del.Super., 95 A. 239 (1915). Griffin provided neither labor nor supplies to the Project, but solely provided equipment which Knox used in the dewatering of the site for the Project. Because Delaware's mechanics' lien statute makes no provision for the providers of rental equipment to protect their interests through a lien, this Court denies Griffin's petition to establish a mechanics' lien against the Project.

Alternatively, I find that Griffin may not prevail on its mechanics' lien claim because it failed to strictly comply with the technical requirements for filing such claim. The equipment was not provided on the credit of the structure as required by 25 Del. C. §2712(b)(8).

Summary judgment is granted in favor of the owners of the property, Virginia Crest Village, Inc., Virginia Crest, Inc., and Better Homes of Seaford, Inc., on Count IX

(b) Liens may also be obtained in connection with: labor performed and materials furnished in plumbing , gas fitting, paper hanging, paving, placing iron works and machinery of every kind in mills and factories, bridge building, the erection, construction and filling in of wharves, piers and docks and all improvements to land by drainage, dredging, filling in, irrigating and erecting banks and the services rendered and labor performed and materials furnished by architects.

of Griffin's amended complaint. No further theories of liability are advanced against these parties.

IV. Is Griffin entitled to recovery under the theory of quantum meruit?

In its complaint, Griffin alleges that it provided rental equipment to Knox, and therefore to the Project, with the intention of receiving payment. Griffin further alleges that as general contractor, Moore accepted these services, received the benefit of these services, and knew that Griffin expected to be paid for providing them.

Under the theory of quantum meruit, a plaintiff may recover the reasonable value of his services only if he establishes that the services were performed with an expectation that the recipient of the benefit would pay for them, and that the services were performed, absent a promise to pay, under circumstances which should have put the recipient of the benefit upon notice that the plaintiff expected to be paid. Bellanca Corp. v. Bellanca, Del. Supr., 169 A.2d 620, 623 (1961).

In the instant case, there was no privity of contract between Moore and Griffin. The underlying contract was between Griffin and Knox only. In Chrysler Corp. v. Airtemp Corp., Del. Super., 426 A.2d 845, (1980), the Court held that the defendant, a third-party beneficiary under a sales agreement between the plaintiff and a corporation, which had created a subsidiary to effectuate the transfer of assets from the plaintiff, was not liable on the theory of quantum meruit or implied contract to the plaintiff for services rendered by the plaintiff, at least in the absence of an inability to recover under the

underlying contract. Also, in Gilbane Bldg. Co. v. The Nemours Foundation, D. Del., 606 F.Supp. 995, 1008 (1985), the District Court refused to allow subcontractors to recover through a quantum meruit claim against an owner as third-party beneficiary when the subcontractors did not allege that they would not ultimately be compensated by the contractor or that the owner failed to pay the contractor for the services rendered by the subcontractors under the subcontracts. Because Griffin has not alleged its inability to recover the money owed to it from Knox, and because Griffin has not contested that Moore paid Knox for all services provided, I grant summary judgment on Count V of Griffin's complaint in favor of Moore on the issue of quantum meruit.

Furthermore, quantum meruit is a remedy rooted in equity. It is uncontested that Moore paid Knox for the work which Knox performed on the Project. This Court will not distort the principle of equity by forcing Moore to pay for the same services twice under one of its theories. If Griffin is entitled to recovery against Moore, it will not be through equity.

V. Is Griffin entitled to recover against Moore on the basis of unjust enrichment?

Griffin also claims that it is entitled to recovery against Moore based on the theory of unjust enrichment. Griffin alleges that Moore was aware of, and had knowledge of, the benefits conferred upon the Project by Griffin, and that Moore's acceptance and retention of the unpaid services make it inequitable for Moore to retain those benefits without payment for their value.

In order to recover under the theory of unjust enrichment, Moore's retention of the benefit must be unjust. Griffin must have been deprived of something or some right which it was entitled to retain, and Moore must have received some benefit to which it was not rightfully entitled. Chrysler Corp. v. Airtemp Corp., 426 A.2d at 855. "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person." Id. (citing Restatement of Restitution §110).

That Moore paid Knox for the work which Knox performed on the Project is not a fact in dispute. Moore duly paid for any benefits Knox conferred upon Moore, and it therefore cannot be argued that Moore's receipt of those benefits was unjust. Furthermore, 6 Del.C. §3502 mandates that those payments from Moore to Knox should have been placed into a trust for the payment of subcontractors and suppliers of Knox. Again, Griffin has not alleged its inability to recover from Knox. I find that Moore is entitled to summary judgment on Count VI of Griffin's complaint regarding the issue of unjust enrichment.

VI. May Griffin recover against Moore under the terms of the Bond?

Griffin argues that under the terms of the Bond,[4] Moore, as principal, and F&D, as

[4] The basis for Griffin's argument rests in the following language contained within the Bond:

> ...if the Principal shall...promptly make payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of the work provided for in such contract, and any authorized extension or modification thereof, including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment, and tools, consumed or used in connection with the construction

surety, executed to protect unpaid subcontractors and suppliers on the Project, Griffin is entitled to recovery from F&D as a valid claimant under the express language of the Bond. Griffin contends that because it supplied equipment to the Project, it is specifically included within the class of persons protected under the terms of the Bond. Therefore, when Moore failed to assure payment to Griffin for the equipment it supplied on the Project, Moore failed to fulfill its obligations thus triggering protection under the particular terms of this Bond.

Moore argues that Griffin may not recover against F&D through the Bond unless it can establish some separate basis of liability on the part of Moore. Moore cites to Bd. of Public Education v. Aetna Casualty and Surety Co., Del. Super., 152 A. 600, 602 (1930) ("Bd. of Public Education"):

> Where a bond is signed by a general contractor as principal and by a surety company as surety, it must be true that the liability of the surety is co-extensive with the liability of the principal and no suit on the bond can be maintained against the surety unless a corresponding suit would be maintainable against the principal.

Griffin argues that even if this Court finds that Moore is not liable on any of the theories of recovery advanced by Griffin, Griffin may still recover against F&D solely under the terms of the Bond.

> for such work,...then this obligation shall be void; otherwise to remain in full force and effect.

Although Bd. of Public Education provides the general rule for surety liability, in that case, the Court found that because the bond and its conditions were broader than statutorily required, a material man who furnished supplies to a sub-contractor could recover under the express terms of the bond. Bd. of Public Education v. Aetna Casualty & Surety Co., 152 A.2d at 603. See Smith Plumbing Co., Inc. v. Aetna Casualty & Surety Co., Ariz. App., 720 P.2d 520 (1984), aff'd, Ariz. Supr., 720 P.2d 499 (1986) ("Smith Plumbing") (Materialman was a beneficiary who could maintain a direct action against the surety without joinder of the principal); Sims' Crane Service, Inc. v. Reliance Insurance Company, S.D. Ga., 514 F. Supp. 1033 (1981), aff'd, 11th Cir., 667 F. 2d 30 (1982) ("Sims'") (Supplier of subcontractor recovered rental value of equipment from surety under the terms of the bond). The Bond in the case *sub judice* contains language identical to that found in the bonds analyzed in the Smith Plumbing and Sims' cases. In both of those cases this bond language was found to provide broad coverage that made the principal liable under the specific terms of the bond itself. I find that upon executing this Bond, Moore incurred the obligations described in the Bond's express terms. Because Moore failed to confirm that Griffin was paid for the equipment that it supplied to the Project , Griffin is entitled to recovery under the Bond.[5] Parties are free to contract

[5] As originally bid by Knox, sewer and water lines for the Project were to be laid across Virginia Avenue adjacent to the Project through an "open cut". However, due to an unforseen determination by the City of Seaford that an "open cut" across Virginia Avenue would not be permitted, Knox was unable to perform that work as expected, and instead chose to "bore" under Virginia Avenue to accomplish its aims for the Project. Whether or not Knox used Griffin's machinery for the bore procedure has not been conclusively established in the pleadings. In its brief, Moore contended that this substitution of work procedures was an unapproved

for the level of coverage they feel meets their purposes. State of Delaware t/u/o Certain-Teed Prod. Corp. v. United Pac. Ins. Co., Del. Super., 389 A.2d 777, 779 (1978), and the language of the Bond clearly states that the Principal shall promptly pay *all* persons who have provided equipment for use on the Project. Griffin was such a person. The Bond places no limitation on the obligation of the principal that would serve to ameliorate Moore's contractual duty to assure that Griffin was paid. Having contracted for this coverage, Moore cannot now deny Griffin the benefits that inure to it as a supplier of equipment to the Project when this class of claimant is expressly protected by the Bond. If Moore did not wish to protect second-tier suppliers, it could have provided limitations in the Bond that excluded this class of claimant; however no such limitations were provided, and Moore breached its duty under the terms of the Bond. Because Moore failed to perform its obligations under the Bond, I find that F&D is liable for the amounts owing to Griffin. I grant summary judgment in Griffin's favor on Count VII of its complaint.

Alternatively, if my construction of §3506(e) is mistaken, the Bond, which I found to create liability, was entered into on October 21, 1996, before the effective date of the legislation, July 3, 1997,[6] and gives greater protection than that conferred by §3506. As a

modification of the contract between Knox and Moore, and was unauthorized work for which Moore cannot be held responsible. However, prior to this decision, the parties agreed to waive their arguments with regard to this issue. As a result, the Court will not now consider this aspect in formulating its decision in this matter.

[6] §3506 was enacted on June 30, 1996.

result of its provision for greater protection, as illustrated by the clear language of the Bond, Moore is liable for the payment of all persons who have provided equipment to the Project. Therefore, Griffin is entitled to recover the rental value of the equipment which it provided to the Project. I grant summary judgment in Griffin's favor on Count VII of its complaint.

VII. May Griffin recover interest and attorneys' fees?

Griffin further argues that in addition to the amount due for rental equipment, under the Uniform Rental Agreement entered into between Knox and Griffin, Griffin is entitled to recover interest on amounts due, and attorneys' fees for its collection efforts. The Court declines to grant Griffin the requested interest and attorneys' fees.

Sims' Crane Serv., Inc., v. Reliance Ins. Co., 514 F. Supp. 1033, presents a factual scenario very similar to the case at hand. In Sims' the Court found that the bond condition provided only that the surety would pay all persons for *materials* and *equipment* used in connection with the work. The bond made no promise to pay those individuals for the costs associated with collection of those amounts. The Court reasoned:

> While such a provision for payment of attorney's fees may exist in the agreement between [the supplier] and [the sub-contractor], that agreement, or any agreement between a lessor materialman and a subcontractor, is neither expressly specified in the payment bond nor incorporated by reference. Thus, under a reasonable interpretation of the bond language, a materialman's claim for attorneys' fees based on an agreement with a subcontractor, is not actionable.

Id. at 1046. This Court agrees with the reasoning of the Sims' Court and therefor denies Griffin's petition for attorneys' fees and interest with regard to this matter. I granted Griffin's recovery for amounts due for the provision of rental equipment because such recovery was anticipated and included in the express terms of the Bond. The Bond contains no provision for a supplier to recover attorneys' fees or interest on amounts due, and I will not expand its coverage to include such amounts.

Alternatively, the clear wording of §3506 does not provide for the recovery of interest penalties unless payments were late. In this case, Moore paid Knox in a timely fashion according to the terms of their contract, and did not believe any amounts were still outstanding. Under these circumstances, no interest penalties may attach. Furthermore, §3506 allows for the recovery of attorneys' fees only when the moving party can show that payments were withheld, or causes were asserted, in bad faith. This Court does not find that Moore acted in bad faith. Therefore, §3506 does not provide a vehicle for Griffin's recovery of either interest or attorneys' fees in this matter.

CONCLUSION

For the reasons set forth above, I find that 6 Del. C. §3506(e) applies solely to interest penalties, and therefor, does not bar Griffin's claims. After examining the claims put forth by Griffin, the Court grants summary judgment in Moore's favor with regard to Griffin's mechanics' lien claim because 25 Del. C. ch. 27 makes no provision for a supplier to obtain a lien for amounts due for rental equipment. The Court also grants summary judgment in Moore's favor with regard to Griffin's quantum meruit and unjust

enrichment claims because Griffin failed to allege that it could not recover the amounts due it from Knox, and because it is uncontested that Moore paid Knox for the work which Knox performed for the Project. However, although Griffin fails to carry its burden on its other claims, the Court holds that Griffin is entitled to summary judgment under the express terms of the Bond. Suppliers of equipment are specifically protected under the terms of the Bond. This Court holds that as a member of a protected class under the Bond, Griffin is entitled to full recovery of the amounts due for the rental equipment it provided to the Project, but is not entitled to interest or attorneys' fees incurred in the recovery of those amounts.

IT IS SO ORDERED.