

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2005

PROFESSIONAL PLASTERING &
STUCCO, INC.,

Appellant,

v.

Case No. 5D03-2572

BRIDGEPORT-STRASBERG JOINT
VENTURE, ET AL.,

Appellee.

Opinion filed January 28, 2005.

Appeal from the Circuit Court
for Seminole County,
Clayton Simmons, Judge.

Phillip C. Dozier, Apopka, for Appellant.

William L. Grant and Earnest DeLoach, Jr.,
of Shutts & Bowen, LLP, Orlando, for
Appellee.

THOMPSON, J.

Professional Plastering & Stucco, Inc. ("Professional Plastering") appeals the dismissal of its claim against General Accident Insurance Company of America ("General Accident").

Professional Plastering is the subcontractor on a construction project. It sued the contractor in count one for breach of contract claiming the contractor owed it money for

working on the construction project. In count two, it sued General Accident on a bond issued in connection with the construction project. Professional Plastering alleged in its complaint that it was owed \$88,387.12 for unpaid labor and materials and sought payment from General Accident under the bond. It alleged that the bond was a common law bond and that the requirements of section 713.23, Florida Statutes, did not apply. The court ruled that the bond was a statutory bond and dismissed count two.

Under section 713.02(6), Florida Statutes,¹ a property owner may require its contractor to provide a payment bond as provided in section § 713.23. Receipt of the payment bond exempts the property from lien claims by subcontractors. § 713.23(6), Fla. Stat.; Corp. of the President of the Latter Day Church of Jesus Christ v. Seymour Elec. Supply Co., Inc., 558 So. 2d 88 (Fla. 1st DCA 1990). Under the statute, the bond must be: (1) furnished before "commencing the construction of the improvement under the direct contract;" (2) in an amount at least the contract price; (3) executed by a surety authorized to do business in this state; and (4) "conditioned that the contractor shall

¹ Section 713.23 (1)(a) provides:

(1)(a) The payment bond required to exempt an owner under this part shall be furnished by the contractor in at least the amount of the original contract price before commencing the construction of the improvement under the direct contract, and a copy of the bond shall be attached to the notice of commencement when the notice of commencement is recorded. The bond shall be executed as surety by a surety insurer authorized to do business in this state and shall be conditioned that the contractor shall promptly make payments for labor, services, and material to all lienors under the contractor's direct contract. Any form of bond given by a contractor conditioned to pay for labor, services, and material used to improve real property shall be deemed to include the condition of this subsection.

promptly make payments for labor, services, and material to all lienors under the contractor's direct contract." Thus, if an owner obtains a payment bond, the owner's property is exempt from mechanics' liens, and the subcontractors are protected by the payment bond.

The statute also imposes notice and time requirements. A copy of the bond must be attached to the notice of commencement when it is recorded. § 713.23(1)(a), Fla. Stat. A subcontractor must give notice that it is relying on the bond for protection by giving notice to the contractor before or within 45 days of beginning to furnish labor, materials, or supplies. § 713.23 (1)(c), Fla. Stat. As a condition precedent to recovery under the bond, the subcontractor must serve written notice of nonpayment to the contractor and the surety not later than 90 days after it finally furnishes labor, services, or materials. § 713.23 (1)(d), Fla. Stat. A subcontractor may not institute suit against the contractor or surety unless the subcontractor has given both notices. § 713.23 (1)(e), Fla. Stat. A subcontractor has one year after completing its work within which to bring an action on the bond. Id.

In the instant case, there were two alleged deviations from the statutory scheme. First, work began on the site before the bond was provided. Professional Plastering asserts that this is contrary to the statute's requirement that the bond must be furnished before "commencing the construction of the improvement under the direct contract." The record shows that a subcontractor's preparation of the site included the demolition of houses, stables, a pool, sheds and miscellaneous items, and the removal of mobile homes. Second, Professional Plastering allegedly did not provide a notice of nonpayment. Because Professional Plastering did not provide a notice of nonpayment,

General Accident contends that it is not required to perform under the bond. Professional Plastering responds that it was not required to give notice because General Accident's failure to issue the bond before work began on the site renders the bond a common law bond rather than a statutory bond.

Florida law is clear that a payment bond is a common law bond rather than a statutory bond if it provides more expansive coverage than that provided for in section 713.23. Nat'l Fire Ins. Co. of Hartford v. L.J. Clark Const. Co., 579 So. 2d 743, 744 (Fla. 4th DCA 1991) (citing Standard Heating Ser., Inc. v. Guymann Constr., Inc., 459 So. 2d 1103, 1105 (Fla. 2d DCA 1984)). See also Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994) (discussing section 255.05, Florida Statutes, and holding that "the term 'common law bond' still means, as it always has meant, a bond whose protections exceed the minimum obligations imposed by statute."). Since there is no showing or allegation in the instant case that the bond issued by General Accident provided more expansive coverage than is provided for in the statute, it cannot be considered a common law bond. Compare Nat'l Fire Ins., 579 So. 2d at 745 (holding that bond's lack of requirement that contractor be given notice did not render bond common law bond because coverage was not expanded).

Furthermore, even if the bond in the instant case can be deemed a common law bond, it contains a notice requirement that binds Professional Plastering. Paragraph 3 of the bond provides:

No suit or action shall be commenced hereunder by any claimants:

a) Unless claimant, other than one having a direct contract with the Principal [i.e. the contractor] shall have given written notice to any two of the following: the Principal,

the Owner, or the Surety above named, within ninety (90) days after claimant and or performed the last of the work or labor

The bond defines a "claimant" in paragraph 1 as "one having a direct contract with the Principal [i.e. the contractor] or with a subcontractor of the principal for labor, material, or both, used or reasonably required for use in the performance of the contract"

Generally, common law bonds are governed by their own terms. See Martin Paving Co., 646 So. 2d 268 (holding that a bond, which lacks the time restrictions of section 220.05 governing public construction projects, is a common law bond and is governed by its own terms). An exception is when the terms are against public policy. See W.F. Thompson & Constr. Co. v. Southeastern Palm Beach County Hosp. Dist., 174 So. 2d 410 (Fla. 3d DCA 1965) (holding in context of section 255.05 that one-year limitations period set in the bond was against public policy, but that 90-day notice provision was enforceable). In the instant case, because the bond had an enforceable 90-day notice provision, Professional Plastering was bound by it.

Professional Plastering also argues that the court should not have dismissed its complaint with prejudice. The order dismissing count two states that the bond in issue was "a statutory bond in accordance with section 713.23." The order goes on to explain:

This ruling is limited to the foregoing, and is not based on issues of whether notices were required, were given, or were timely given by the Plaintiff in accordance with the requirements of Section 713.23 or other applicable provisions of the Florida Statutes.

Thus, the use of the term "with prejudice" may have been inadvertent. In any case, we reverse the order on appeal because Professional Plastering may be able to amend its

complaint to make a sustainable claim against General Accident. See Yun Enters., Ltd. v. Graziani, 840 So. 2d 420 (Fla. 5th DCA 2003) (holding that leave to amend shall be freely granted).

REVERSED.

SHARP, W. and MONACO, JJ., concur.