

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001064-MR

RELIABLE MECHANICAL, INC.

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 92-CI-00158

NAYLOR INDUSTRIAL SERVICES, INC.;  
FIRST STAINLESS, INC.; AND  
STAINLESS STEEL INVEST, INC.

APPELLEES

AND

NO. 2000-CA-001242-MR

FIRST STAINLESS, INC. AND  
STAINLESS STEEL INVEST, INC.

CROSS-APPELLANTS

v. CROSS-APPEAL FROM CARROLL CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 92-CI-00158

NAYLOR INDUSTRIAL SERVICES, INC. AND  
RELIABLE MECHANICAL, INC.

CROSS-APPELLEES

AND

NO. 2000-CA-001250-MR

NAYLOR INDUSTRIAL SERVICES, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM CARROLL CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 92-CI-00158

RELIABLE MECHANICAL, INC.;  
FIRST STAINLESS, INC.;  
STAINLESS STEEL INVEST, INC.;

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This case concerns a construction contract between First Stainless, Inc. and Stainless Steel Invest, Inc. (NAS)<sup>1</sup> and Reliable Mechanical, Inc. (Reliable) for work performed on a stainless steel processing facility in Carroll County, Kentucky. Further at issue is a subcontract between Reliable and Naylor Industrial Services, Inc. for the pickling and flushing of hydraulic and lubricating pipe systems in a sector of the facility. All parties asserted claims for breach of contract and/or unjust enrichment against each other. The trial court entered its order finding in favor of Naylor on its claims and against NAS and Reliable. Having reviewed the record and applicable law, it is our opinion that the trial court correctly concluded the issues before it; hence, we affirm.

The principal controversy between the parties centers on the contract between NAS and Reliable calling for Reliable to perform construction services on the Sendzimir stainless steel rolling mill (Z-Mill).<sup>2</sup> Reliable was to supply and install hydraulic and lubricating oil pipe systems for the Z-Mill as well

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<sup>1</sup>First Stainless, Inc. and Stainless Steel Invest, Inc. formed the partnership North American Stainless.

<sup>2</sup>Reliable entered into five (5) separate contracts with NAS for performance of various jobs on the stainless steel processing facility of which the Z-Mill contract was one.

as perform pre-operational chemical cleaning and of pipe systems they installed. The cleaning process consisted of pickling and flushing the systems. Simply stated, this process involved the introduction of a chemical solution in the pipe systems to remove rust, scale or other contaminants (pickling) followed by the high speed circulation of an oil based solution to remove debris (flushing). Since Reliable had no experience with the pickling and flushing operations, it subcontracted those duties out to Naylor, a Texas corporation.

Naylor proceeded with cleaning and flushing the pipes in late December 1991, completing the job in early January 1992. As required by the subcontract, a NAS representative inspected and approved Naylor's performance at the conclusion of each phase of the work, granting acceptance and signing off on the entire project upon completion. Approximately one week following Naylor's performance, NAS supervisory employees returned from their Christmas holiday in Spain. Upon visual inspection, these officials found debris particles in the pipes and "rust blooms" on the top of some of the pipes. Based on the inspection, NAS determined that the hydraulic system had been correctly pickled but not properly flushed and the lube oil system had not been either correctly pickled or flushed. NAS then demanded that Reliable re-pickle and re-flush the lube oil system and re-flush the hydraulic system. Consequently, Reliable threatened to withhold payment from Naylor on the subcontract if it did not return to re-clean the system as originally contracted. Naylor did so only after Reliable agreed to pay \$50,000 toward the

original contract price with the balance of \$53,750 due if it was determined that the first cleaning had satisfied the objective cleanliness criteria.

Following completion of the project, NAS refused to pay Reliable's contract balances asserting, inter alia, that the necessity of conducting the second cleaning and flushing caused a delay in operation of the Z-Mill resulting in lost profits. Therefore, on November 11, 1992, Reliable filed its complaint against NAS alleging breach on numerous contracts between those parties. In turn, NAS filed a counterclaim seeking recovery of more than \$11 million dollars claimed lost due to the delays in completing the pipe cleaning. Reliable then filed a third-party complaint against Naylor seeking indemnification for any sums awarded to NAS. As a result, Naylor filed a counterclaim against Reliable and cross-claim against NAS seeking to recover its additional costs associated with the second pickling and flushing job, and alleging that NAS was unjustly enriched by the performance of those services. NAS filed a cross-claim against Naylor for whatever costs it incurred as a result of the second cleaning operation. Likewise, included in Reliable's complaint against NAS and third-party claim against Naylor was a claim for costs incurred in the performance of the second cleaning.

By agreement of the parties, the entire matter was submitted to the trial court for a decision based upon the extensive record developed through discovery. On March 8, 2000, the court rendered its findings of fact, conclusions of law and order wherein it awarded Naylor its outstanding sum due on the

original subcontract with Reliable (\$53,750) plus pre- and post-judgment interest. Likewise, the court concluded that Naylor was entitled to recover \$103,750 for the second cleaning job; however, the court denied any pre-judgment interest on that sum. The claims of Reliable and NAS were dismissed. From that judgment, these appeals ensued.

Before this Court, NAS argues: (1) Naylor is not entitled to recover from NAS on the basis of quantum meruit; (2) the trial court erred in permitting Naylor to pursue its counterclaim since Naylor never obtained a certificate of authority to transact business in Kentucky; and (3) the court erred in dismissing NAS's claim for damages against Reliable. Reliable contends: (1) the trial court erred in refusing to indemnify it from NAS for the monetary award to Naylor; and (2) Reliable was entitled to its costs associated with the second pipe system cleaning. Naylor counters that the trial court erred in calculating the amount owed as a result of the second cleaning procedure and by failing to award pre-judgment interest on that sum.

We first address the issue of whether Naylor was required to obtain a certificate of authority to transact business in Kentucky. KRS 271B.15-020(1) provides that "[a] foreign corporation transacting business in this state without a certificate of authority shall not maintain a proceeding in any court in this state until it obtains a certificate of authority." However, KRS 271B.15-010 contains a list of exceptions, albeit not exhaustive, of what activities do not constitute "transacting

business." Specifically, "conducting an isolated transaction that is completed within thirty (30) days and that is not one (1) in the course of repeated transactions of a like nature" does not trigger the requirement for a certificate of authority. KRS 271B.15-010(j).

While technically on the job site for 32 days, Naylor actually performed its duties under the subcontract in 17 days (December 16, 1991 - January 3, 1992). The remaining 15 days were occupied by one or two of Naylor's employees loading or unloading equipment for purposes of transportation. Likewise, Naylor does not maintain an office, telephone listing, employees, agents or inventory in the state of Kentucky. Similarly, it does not own any property or transact continuous or ordinary business within the state. Naylor does not advertise, pay taxes or maintain a bank account within Kentucky's borders. Rather, Naylor's presence in this state was for the limited purpose of conducting the isolated transaction at the NAS plant. As such, it was not obligated to obtain a certificate of authority to conduct business as contemplated by KRS 271B.15-020. See Commonwealth ex rel. Stephens v. Nat'l Steeplechase & Hunt Assoc., Inc., Ky. App., 612 S.W.2d 347 (1981).

Moreover, Naylor has not voluntarily availed itself of the rights and privileges of this jurisdiction by maintaining a legal proceeding. Conversely, Naylor was hauled into the Kentucky court vis à vis Reliable filing a third-party complaint against it. The statutory prohibition of a non-certified corporation bringing suit in this state does not address the

assertion of a compulsory counterclaim or cross-claim such as those filed by Naylor. It is unlikely that the legislature intended to permanently preclude a foreign corporation the right to ever assert those claims under circumstances such as those in the matter sub judice. Although never addressed under the Kentucky statute, see Clayton Carpet Mills, Inc. v. Martin Processing, Inc., 563 F.Supp. 288 (N.D. Ga. 1983), wherein the Court held that a foreign corporation that did not possess a certificate of authority when the action was commenced could, nonetheless, file a compulsory counterclaim since it would otherwise be permanently deprived of the right to assert its claim. The statute in issue before the Georgia Court was sufficiently similar to KRS 271B.15-020(1) to permit the drawing of an analogy thereto.<sup>3</sup>

It is our opinion, therefore, that Naylor was not required to obtain a certificate of authority to transact business in the state of Kentucky as it qualified for the isolated transaction exemption from that requirement. KRS 271B.15-010. Further, even if Naylor were subject to the certificate of authority requirement contained in KRS 271B.15-

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<sup>3</sup>The statute in issue was O.C.G.A. § 14-2-331(b) which provided:

No foreign corporation that under this chapter is required to obtain a certificate of authority shall be permitted to maintain any action, suit, or proceeding in any court of this state unless before commencement of the action it shall have obtained such a certificate.

020, it is not precluded from asserting a compulsory counterclaim or cross-claim under the terms of that statute.

We next address NAS's allegation that Naylor was not entitled to recover from it on the basis of quantum meruit. The trial court held NAS and Reliable jointly and severally liable to Naylor in the amount of \$103,750 as costs for the second cleaning. NAS contends that there is no privity of contract between Naylor and itself and recovery under the theory of quantum meruit is inappropriate since Naylor should look to its subcontractor, Reliable, for payment of its costs. We disagree.

A contract implied by law permits recovery in quantum meruit where one party has been unjustly enriched by another party's performance. The theory is not premised on an actual contract but is a legal fiction created to permit recovery where justice and equity so require, as if promises had been made. The courts invent the fiction as though the promises had, in fact, been made in order to permit reclamation from those unjustly enriched. "Furthermore, recovery quantum meruit may be had irrespective of the intentions of the parties, and sometimes even in violation of them." Perkins v. Daugherty, Ky. App., 722 S.W.2d 907, 909 (1987).

We believe that the evidence contains sufficient support for the trial court's determination that Naylor should recover from NAS in quantum meruit. The record reflects that the subcontract between Reliable and Naylor provided that Naylor would perform to the satisfaction of NAS. Specifically, the subcontract stated that "it is agreed that [Naylor] will meet the



owner's level of satisfaction, not to exceed the requirement of the contractor's written specifications before considering the job complete." The "written specification" referred to the objective cleanliness criteria set forth in Naylor's original proposal. Thus, while the subcontract obligated Naylor to perform to NAS's satisfaction, it further provided that NAS could not withhold conferring acceptance after the objective cleanliness criteria were met. Further, Naylor's proposal which was incorporated into the subcontract specifically stated that Naylor's bid was for one mobilization and that upon acceptance by NAS, Naylor would not return its personnel and equipment to the plant.

Due to Naylor having to perform subject to the acceptance of NAS, Michael Brate, an NAS engineer, was designated as the representative to approve Naylor's work. Although NAS contends that Brate was not authorized to accept the work, the written record clearly refutes any such contention. Rather, unquestionably, Brate was the NAS-designated representative cloaked with apparent, if not actual, authority to scrutinize the processes being performed by Naylor. As the designated representative, Brate signed Naylor's log book upon completion of every phase of the project. On January 3, 1992, Brate signed a statement acknowledging that "North American Stainless (Michael Brate) . . . accepts systems and states that Naylor's contractual commitments have been satisfied." Relying on this final approval, Naylor demobilized its equipment and personnel. Thereafter, the pipes remained empty for several days, making

them susceptible to contamination from atmospheric conditions at the plant.

As discussed, supra, NAS subsequently revoked its acceptance, insisting that the pickling and flushing processes were flawed. However, the totality of the evidence reveals that the contamination in the lubrication system was the result of either NAS's or Reliable's failure<sup>4</sup> to fill the pipe with oil immediately upon completion of the cleaning. With regard to the hydraulic system, Naylor agreed to re-flush a portion of same only after NAS agreed that it would assume financial responsibility for Naylor's costs should Naylor prove that the system satisfied the original specification. After the hydraulic system was flushed, oil samples were taken and a microscopic examination of the samples indicated that the system satisfied the original specification. NAS's own test produced the same results. Nonetheless, NAS insisted that substitute testing be performed and an additional test be conducted following the system's attachment to another pipeline. Naylor rejected this proposal due to concern that the entire system would be contaminated by hooking it up to the other pipeline, which Naylor perceived to be dirty. As such, Reliable and NAS completed the subsequent work on the hydraulic system while Naylor moved on to re-pickling and re-flushing the lubrication system.

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<sup>4</sup>Reliable contends that it was unable to attach the system to another piping system due to NAS's failure to have that portion of the plant completed. NAS rebuts that it was Reliable's duty to assure that the pipes were properly maintained until attachment was available, specifically by introducing nitrogen into the system.

In sum, NAS's agent, Michael Brate, approved and signed off on Naylor's performance under the subcontract, that is, that the cleaning and flushing of the piping systems conformed to NAS's specifications for approval. As observed by the trial court, a principal is bound by and liable for the acts of its agent performed within the scope of the agent's employment. City of Covington v. Reynolds, 240 Ky. 86, 41 S.W.2d 664 (1931). The court concluded, and we agree, that the systems were cleaned in compliance with the subcontract the first time. However, even if the pipe systems were not within the objective cleanliness criteria following the first cleaning, Naylor is entitled to payment for its performance by virtue of Brate's acceptance of that work. The preponderance of proof contained in the record firmly establishes that all parties involved considered Brate to have had at least apparent authority to act on NAS's behalf. As such, Naylor is entitled to payment for its second cleaning procedure in quantum meruit. The services rendered during this performance enured to NAS's benefit without any remuneration to Naylor. Naylor re-mobilized its equipment and personnel to the NAS plant and re-serviced the pipe systems, the contamination of which had occurred by no fault of Naylor's. NAS recognized the benefit of this service through the enhancement of its production plant as a whole. Equity and justice, therefore, require that NAS compensate Naylor for this accrued benefit.

We next address Naylor's contention that the court wrongfully calculated the amount it was to recover for the second cleaning job and that the court failed to award pre-judgment

interest on that sum. Specifically, Naylor claims that it was entitled to recover \$204,875 for the second cleaning. It computed this amount based upon the rates and fees set forth in its proposal, multiplied by the number of man hours and equipment information documented in Naylor's logs. The court, however, found that Naylor was entitled to \$103,750 in damages for its repeat performance, stating:

The Court finds no convincing proof was provided by Naylor as to why the second job would be double the cost of the first. This is particularly true since it did not redo, for good reason, the hydraulic system the second time. Having found for Naylor on its claims against both Reliable and NAS, their claims against Naylor must fail.

The trial court, sitting as the trier of fact, is vested with the discretion to ascertain the reasonableness of the amount of damages claimed. Where the court acts as fact finder, its findings will not be disturbed unless clearly erroneous. Faulkner Drilling Co. v. Gross, Ky. App., 943 S.W.2d 634 (1997). If supported by substantial evidence the trial court's findings will not be deemed erroneous. Id. In our opinion, the trial court's determination that Naylor could not justify expenses exceeding twice the amount of its original contract price, where one-half the amount of work was required, is supported by the record. Therefore, we adjudge no abuse of this discretion and the trial court's decision will not be disturbed. CR 52.01.

Likewise, the damages claimed by Naylor as a result of its second performance were an unliquidated sum. In such cases, the award of pre-judgment interest is left to judicial discretion. The court is not required to grant pre-judgment

interest but may do so if, in its discretion, it believes under the facts and circumstances of the case that equity and justice require such an award. Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d 136 (1991). We believe the trial court acted within its discretion and its judgment will not be altered on this issue.

Finally, we discuss the various claims asserted by both NAS and Reliable. Collectively, our review of the record accords that these remaining arguments were properly disposed of by the trial court and we adopt its well reasoned opinion, to wit:

14. Concerning the claims by Reliable and by NAS for damages against each other as well as the establishment of which of those parties is responsible for the damages of Naylor, the Court finds the parties are jointly and severally responsible.

NAS accepted the performance of Naylor through its agent Michael Brate and thereafter required Reliable to have Naylor return to the site for the second time. The Court finds that the changing of specifications relative to the hydraulic system upon the second inspection when Naylor returned was unreasonable under the circumstances. Furthermore, after accepting the lubrication system through its representative Brate, NAS had no right to require Reliable to have Naylor return regarding that system. For that reason NAS injected itself into the agreement between Naylor and Reliable and should be held accountable for damages resulting therefrom, being Naylor's expenses. As previously stated, a quantum mer[ui]t recovery is warranted against NAS by Naylor under the facts herein.

Reliable is also responsible for Naylor's damages, despite the previously referenced liability of NAS, for requiring Naylor to return to the site for not properly preserving the system. Reliable is ultimately accountable to NAS for all parts

of the contracts it undertook regardless of whether Reliable did the work or subbed it out as here. It was Reliable's responsibility to have a properly maintained system ready to connect to the rest of the mill when the time came. It is very doubtful, under the facts in this case, if Reliable was prepared to introduce the oil or nitrogen to preserve the system even if it had been available. In other words, some of the problems that occurred with regard to Naylor being required to return to the site resulted from the overlooked areas that often occur in construction contract situations. Since Reliable had the primary contract with NAS, it was its responsibility to stay on top [of] any of those gaps and responsibilities, and make sure the system was either put in operation once Naylor left the site or to preserve the system in an appropriate fashion. It was further the responsibility of Reliable to clean out all the traps and other areas that might have resulted in contamination to the system, and which the Court finds was a factor that resulted in the problems with the lube system. For that reason, the Court finds that any damages that either NAS or Reliable may have suffered, and those damages are clearly suspect based on this Court's review, to be off-set and will award neither damages against the other.

15. There is insufficient evidence to support NAS's claim that Reliable lost or damaged materials. Their argument that Reliable should be held responsible because it did not come forward to challenge NAS's assertion that it had lost or damaged materials require Reliable to prove a negative. Kentucky law does not place such a burden on a party defending a claim. *Ash v. Marsh*, Ky., 412 S.W.2d 853 (1997); *Jones v. Vitumuous Casualty Corp.*, Ky., 821 S.W.2d [d] 798 (1992). Therefore NAS's claim against Reliable for the lost or damage [sic] materials has not been proven.

16. NAS has also failed to establish any legal or contractual basis for its claim that it is entitled to funds for steel not used by Reliable in construction of the structural supports. The contract clearly calls for a lump sum to be paid to Reliable for performing specified work and did not set

unit prices for the amount of steel saved or used. Furthermore, even if a contractual or legal basis existed, NAS has waived or is estopped to recover any "saving" from Reliable. Finally NAS has failed to establish that Reliable has saved any money by the installation of the pipe supports in a different manner than originally shown in the drawing. Therefore, NAS has failed to prove its claim in regard to this issue.

For the foregoing reasons the judgment of the Carroll Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT/CROSS-  
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INC.:

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BRIEF FOR APPELLEE/CROSS-  
APPELLEE/CROSS-APPELLANT,  
NAYLOR INDUSTRIAL SERVICES,  
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BRIEF FOR APPELLEES/CROSS-  
APPELLANTS/CROSS-APPELLEES,  
FIRST STAINLESS, INC.;  
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