

RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001724-MR

CRACE CONSTRUCTION COMPANY  
AND OHIO FARMERS INSURANCE COMPANY APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 05-CI-00335

ANTHONY CRANE RENTAL, LP,  
D/B/A MAXIM CRANE WORKS;  
GBBN ARCHITECTS; ASHLAND HOSPITAL  
CORPORATION, D/B/A KING'S DAUGHTERS'  
MEDICAL CENTER; KENTUCKY ECONOMIC  
DEVELOPMENT FINANCE AUTHORITY;  
TIFFOM, INC.; LOUIS T. OLLESHEIMER &  
SON, INC.; KREPS & ZACHWIEJA, ARCHITECTS/  
CONSULTANTS, INC. APPELLEES

OPINION AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

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BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.  
CLAYTON, JUDGE: Crace Construction Company (Crace) and Ohio Farmers

Insurance Company (Ohio Farmers) appeal from judgments of the Boyd Circuit

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Court finding the bond which they posted to release a mechanic's lien covers the full amount of a judgment rendered against Crace's subcontractor, Tiffom, Inc., (Tiffom). We agree with the trial court that Crace and Ohio Farmers are precluded from relitigating issues related to Tiffom's liability under that judgment, and that the release bond covers the full amount of that judgment, including interest and attorney fees allowed under the contract. While we find no statutory or contractual basis for the court's additional award of attorney fees against Crace and Ohio Farmers, we conclude that the equities of this case would support an award of additional attorney fees incurred to collect on the judgment. However, we note that the trial court failed to make any findings as to the reasonableness of those fees, and the court's award appears to include fees which are not related to the claims against Tiffom, Crace or Ohio Farmers. Hence, we affirm in part, reverse in part, and remand for additional findings and a new supplemental judgment awarding these attorney fees.

The underlying facts of this action are not in dispute. Crace was the general contractor on a project for the construction of a building known as "Medical Plaza B" on real estate owned by Ashland Hospital Corporation d/b/a King's Daughters' Medical Center in Ashland, Kentucky. Crace hired Tiffom as a subcontractor on the project. On July 19, 2004, Tiffom entered into a contract with Anthony Crane Rental, LP d/b/a Maxim Crane Works (Maxim Crane) to lease heavy equipment and to provide supplies for the project. Between August 24 and

September 8, 2004, Tiffom also entered into ten short-term rental agreements with Maxim Crane to lease equipment and provide supplies for the project.

After Tiffom failed to pay three invoices, Maxim Crane filed a mechanic's/materialman's lien against the property on February 11, 2005. Subsequently, Maxim Crane filed this action seeking to foreclose on the lien. On April 22, 2005, Crace, as principal, and Ohio Farmers, as surety, executed a release bond pursuant to Kentucky Revised Statutes (KRS) 376.100, discharging the lien.

In its answer, Tiffom disputed the amounts claimed by Maxim Crane. Tiffom also filed a counterclaim, asserting that Maxim Crane had breached the contracts by delivering defective equipment. On October 21, 2005, Maxim Crane filed a motion for summary judgment on its claims against Tiffom. Following a hearing on the motion, the trial court gave Tiffom an additional thirty days to submit an affidavit containing specific information to support its defenses to Maxim Crane's claims. On January 17, 2006, after Tiffom failed to submit the affidavit, the trial court granted Maxim Crane's motion for summary judgment. In its order, the court entered judgments totaling \$30,785.00, representing all amounts outstanding under the invoices. The court also directed that interest of 1.5% per month would run on the judgment from the dates of the invoices as provided in the contracts. Finally, the court awarded Maxim Crane attorney fees of \$15,633.71 and costs of \$252.86, also as provided in the contracts.

After entry of this judgment, Tiffom filed a motion to alter, amend or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. Tiffom

attached an affidavit to the motion, again asserting that the equipment provided by Maxim Crane was defective and that Maxim Crane had overcharged. On February 3, 2006, the trial court denied the motion and noted that Tiffom's affidavit was untimely. Subsequently, the trial court awarded Maxim Crane an additional \$1,175.64 for additional attorney fees and expenses incurred responding to Tiffom's motion to reconsider.

Thereafter, on April 17, 2006, Maxim Crane filed a motion for summary judgment to collect on the judgment from the bond posted by Crace and Ohio Farmers. On June 15, 2006, the court entered a judgment against Crace and Ohio Farmers for the full amount of the judgment against Tiffom, including interest and attorney fees. The trial court subsequently denied Crace's motion to alter, amend or vacate. The trial court also granted Maxim Crane's motion for a supplemental judgment of attorney fees against Crace and Ohio Farmers in the amount of \$6,448.92. This appeal followed.

In their appeal, Crace and Ohio Farmers raise four arguments. First, they assert that the trial court erred in finding that the doctrine of collateral estoppel bars them from relitigating the issues determined by the January 17, 2006, judgment against Tiffom. Second, they argue that the trial court erred in finding that the bond executed by Crace and Ohio Farmers covers amounts for interest and attorney fees provided under the contracts between Tiffom and Maxim Crane. Third, they contend that the trial court failed to make a determination as to the reasonableness of the attorney fees claimed by Maxim Crane. And fourth, they

claim that the trial court erred by including attorney fees and expenses related to other defendants.

As to the first issue, we agree with the trial court that Crace and Ohio Farmers are bound by the judgment against Tiffom. *Res judicata* consists of both claim preclusion and issue preclusion. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). Crace and Ohio Farmers assert that the party to be bound must be the same party against whom the judgment was rendered in the prior action. But while identity of parties is necessary for claim preclusion to bar further litigation, it is not an element to establish issue preclusion. *Id.*

Rather, collateral estoppel, or issue preclusion, the other subset of “*res judicata* . . . bars the parties from relitigating any issue actually litigated and finally decided in an earlier action.” *Id.* For issue preclusion to operate as a bar to further litigation, a court must find that there was: “(1) a final decision on the merits; (2) identity of issues; (3) issues actually litigated and determined; (4) a necessary issue; (5) a prior losing litigant; and (6) a full and fair opportunity to litigate.” *May v. Oldfield*, 698 F. Supp. 124, 126 (E.D. Ky. 1988). *See also Sedley v. City of West Buechel*, 461 S.W.2d 556, 558 (Ky. 1970). The court must inquire whether the judgment was rendered under such conditions that the party against whom collateral estoppel is pleaded had a realistically full and fair opportunity to present his case. *Id.* at 559.

Crace and Ohio Farmers further contend that there was no final decision on the merits. Crace and Ohio Farmers assert that they are not bound by

the judgment against Tiffom because the issues in that claim were different from those asserted against them, Tiffom's defenses were not actually litigated, and Tiffom was not afforded a full and fair opportunity to litigate these issues. We disagree with all of these arguments.

The trial court's judgment was based upon Tiffom's contractual liability to Maxim Crane. The mechanic's/materialman's lien secures that obligation. While there is a question whether the lien also secures the judgment for attorney fees and costs, the trial court's resolution of the underlying contractual issues against Tiffom conclusively resolves those issues as to Crace and Ohio Farmers.

Moreover, the trial court's judgment was clearly decided on the merits. A motion for summary judgment may only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. In support of its motion for summary judgment, Maxim Crane presented the underlying contracts, evidence that it performed under the contracts, and the unpaid invoices. Consequently, the trial court entered a judgment against Tiffom for the full amount claimed by Maxim Crane. That judgment has never been appealed. Consequently, the trial court's summary judgment conclusively resolved the issues between Maxim Crane and Tiffom.

Finally, we conclude that Tiffom had a full and fair opportunity to litigate these issues. Tiffom admitted to the contracts and that it had not paid the

invoices submitted by Maxim Crane. In its defense, Tiffom asserted that Maxim Crane had breached the contracts by delivering defective equipment. However, Tiffom failed to present any affirmative evidence to support its defenses even after the trial court gave it an additional month to submit an affidavit detailing its defenses. A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Since Tiffom failed to present timely evidence supporting its defenses, Crace and Ohio Farmers are not entitled to relitigate those issues.

The central issue in this case concerns the scope of bond executed by Crace and guaranteed by Ohio Farmers. Maxim Crane argued, and the trial court agreed, that the bond secures the full judgment rendered against Tiffom, while Crace contends that the bond does not cover the judgment for interest and attorney fees awarded under the contract.

Resolution of this question turns on the scope of KRS 376.100, which provides for release of a lien by execution of a surety bond as follows:

The owner or claimant of property against which a lien has been asserted, or any other person contracting with the owner or claimant of such property for the furnishing of any improvements or services for which a lien is created by this chapter, may, at any time before a judgment is rendered enforcing the lien, execute before the county clerk in which the lien was filed a bond for double the amount of the lien claimed with good sureties to be approved by the clerk, conditioned upon the

obligors satisfying any judgment that may be rendered in favor of the person asserting the lien. The bond shall be preserved by the clerk, and upon its execution the lien upon the property shall be discharged. The person asserting the lien may make the obligors in the bond parties to any action to enforce his claim, and any judgment recovered may be against all or any of the obligors on the bond.

Crace and Ohio Farmers point out that the bond serves as a mere substitute for the lien property. *Jungbert v. Marret*, 313 Ky. 338, 231 S.W.2d 84, 85 (Ky. 1950). They also note that the purpose of the mechanic's lien statutes is to protect a mechanic or materialman to the extent of the value of improvements which he makes on property. *Id.* Consequently, they contend that any recovery on the bond must be limited to the value of the improvements and does not extend to additional amounts allowed by the underlying contract.

However, we agree with Maxim Crane that KRS 376.100 specifically requires a surety to execute a bond for "double the amount claimed . . . conditioned upon the obligors satisfying any judgment that may be rendered in favor of the person asserting the lien." The statute's requirement that the bond be for double the amount claimed indicates that the General Assembly considered the possibility that a lien judgment may be for a greater amount than the parties originally stated. Moreover, the plain language of KRS 376.100 states that bond is conditioned upon Crace and Ohio Farmers "satisfying any judgment" rendered in favor of Maxim Crane.



Nevertheless, Crace notes that its obligation to pay for material and labor furnished to Tiffom arises by statute, and not under the contract between Tiffom and Maxim Crane. Crace further contends that it should not be bound by the terms of a contract to which it was not a party. But while Crace's statutory liability arises under KRS 376.070, it assumed liability for the full amount of the judgment against Tiffom by executing a release bond pursuant to KRS 376.100. Since the contract between Tiffom and Maxim Crane provided for interest and attorney fees and the trial court's final judgment against Tiffom included those amounts, we agree with the trial court that Crace's bond covers the full amount of the judgment rendered against Tiffom.

Crace and Ohio Farmers also contest the reasonableness of the attorney fees awarded to Maxim Crane. But as previously noted, Tiffom did not appeal the January 16, and March 9, 2006, judgments awarding those fees. Therefore, the trial court's findings that the claimed fees were reasonable are *res judicata*.

However, we note that on July 19, 2006, the trial court awarded an additional \$6,448.92 for attorney fees. Maxim Crane incurred these fees while attempting to collect on the judgment from Crace's bond. Since these fees do not arise from the prior judgments against Tiffom, Crace and Ohio Farmers were not barred from relitigating the reasonableness of these claimed fees.

Furthermore, it is well-established that attorney fees are generally not recoverable without a specific contractual provision or a fee-shifting statute. *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415, 420 (Ky. 2006). The additional fees claimed do not arise from the contract between Tiffom and Maxim Crane, but from Maxim Crane's efforts to collect on the judgment from the bond posted by Crace and Ohio Farmers. In turn, Crace's liability on the judgment arises from its posting of a release bond pursuant to KRS 376.100. The bond clearly secures the judgment against Tiffom. But the statute contains no language indicating that the bond secures any other liabilities, such as attorney fees incurred to pursue a claim to enforce the bond. Consequently, we find no contractual or statutory basis for the trial court's supplemental judgment of July 19, 2006, awarding additional attorney fees against Crace and Ohio Farmers.

Nevertheless, the trial court noted that it has the equitable discretion to award attorney fees depending upon the circumstances of the particular case. *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998), *citing Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984). In this case, the clear language of KRS 376.100 allowed Maxim Crane to collect on its judgment against Tiffom from Crace's bond. In defending against Maxim Crane's efforts to collect on that judgment, Crace attempted to interpose defenses which had been previously resolved against Tiffom. In essence, Crace sought to escape liability for the judgment by stepping into Tiffom's shoes. Since Crace's efforts in this regard were unsuccessful and further delayed collection of Maxim Crane's judgment, we

agree with the trial court that the equities of this case support the award of additional attorney fees to Maxim Crane.

However, we agree with Crace that the trial court failed to make a finding as to the reasonableness of these fees. Furthermore, the fee affidavit attached to Maxim Crane's motion shows that some of the additional attorney fees involved matters concerning other parties to the litigation. In particular, the invoices filed by Maxim Crane's counsel include charges for work on claims against GBBN Architects, Inc. The trial court ultimately dismissed these claims, concluding that there was no basis to hold GBBN liable for any of the obligations arising under the contract between Tiffom and Maxim Crane.

Under the circumstances, we conclude that the trial court abused its discretion by awarding attorney fees incurred while pursuing these other claims. We also conclude that the trial court failed to make necessary findings concerning the reasonableness of the attorney fees incurred by Maxim Crane to collect on the judgment from the release bond posted by Crace. Consequently, the trial court's supplemental judgment must be set aside and remanded for additional findings and entry of a new judgment.

Accordingly, the July 19, 2006, judgment against Crace and Ohio Farmers awarding \$6,448.92 in additional attorney fees is affirmed in part, reversed in part, and remanded for additional findings as set forth in this opinion. In all other respects, the judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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