

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000605-MR

PBI BANK, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 08-CI-007644

E-Z CONSTRUCTION COMPANY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: PBI Bank, Inc. appeals from an Order and Judgment of the Jefferson Circuit Court, which was entered on remand from a February 14, 2014 Opinion of this Court. PBI raises two alleged errors in this Second Appeal: 1) that the trial court erred in allowing E-Z Construction Company, Inc. ("E-Z") to recover more than a bond issued by PBI to "bond off" a mechanics lien, and 2) that even if

the Judgment against PBI is not limited to the amount of the bond, the trial court erred in calculating interest from the date of invoices rather than the date of the Judgment. For the reasons stated below, we find no error and AFFIRM the Order and Judgment on appeal.

This is the second appeal involving the same parties and arising from the same operative facts and procedural history. Accordingly, in the interest of judicial economy we adopt the recitation of facts as set out in an Opinion of this Court rendered on February 14, 2014. That appeal, i.e., the "First Appeal," involved a bond executed by PBI Bank, Inc. pursuant to Kentucky Revised Statutes (KRS) 376.100, to allow for the release of a mechanics' and materialman's lien recorded on property known as Harrods Creek Overlook Condominiums. Premier Land Company owned and developed the parcel. The issues in the First Appeal concerned the amount of the Judgment against PBI and whether the Jefferson Circuit Court properly awarded interest at the rate of 18% provided for in the underlying contract between Premier and E-Z. A panel of this Court affirmed the trial court's award of interest at the rate of 18%, but reversed the court's Judgment in the amount of \$166,170.55. That panel directed the trial court to enter a new Judgment in the amount of \$157,827.58 and award interest at the rate of 18%. The panel of this Court recited the facts and procedural history as follows:

Premier and E-Z entered into a contract for certain site excavation work to be performed by E-Z at the Harrods Creek Property. The contract provided that payments

due were to be paid within twenty days of Premier's receipt of invoices sent by E-Z and amounts unpaid would bear interest from the payment due date at 1 1/2% per month, or 18% per year. PBI was not a party to the Premier contract but provided financing on the property.

After submitting invoices to Premier and not receiving payment, on May 22, 2008, E-Z filed a mechanics' and materialman's lien statement asserting a lien on the Harrods Creek property to secure the payment of \$157,827.58. The lien statement referred to the Construction Contract between E-Z and Premier, and among other items stated "there is presently due and owing to E-Z . . . the sum of [\$157,827.58], against which there are no just credits or set-offs[.]" The lien statement neither referred to interest nor stated a rate of interest. On June 27, 2008, PBI, as surety, executed a bond for \$315,655.16, double the amount of E-Z's lien, to release the lien on the Harrods Creek property. The bond instrument provided that the bond "will satisfy any judgment that may be rendered in favor of the person or persons asserting the above referenced lien claim(s) by reason of said improvements or services being furnished to the above described property." In its final provision it stated:

The undersigned SURETY joins herein to offer its Bond to satisfy any judgment that may be rendered in favor of the person or persons filing the above-referenced lien(s) to the full amount of said Bond.

E-Z filed the present action alleging breach of contract by Premier and seeking foreclosure of its lien on the Harrods Creek property. PBI filed an answer to the complaint. Premier did not respond or appear in the action. Issues litigated concerned the timeliness of the lien and the amount of damages, including the interest owed on the billings. E-Z sought interest against PBI at 18% based on its contract with Premier. PBI contended that when it bonded off the \$157,827.58 lien claim, it was responsible for the lien plus interest at 12% provided for in KRS 360.040.

At a bench trial, E-Z presented proof that it had sent unpaid invoices to Premier for \$166,170.65. On January 25, 2011, a judgment and order was entered. The trial court found that the lien was timely filed and entered a default judgment against Premier for \$301,292.22, which included \$166,170.65 owed to E-Z and the contracted 18% interest rate accruing from the date the invoices became due. E-Z was awarded judgment against PBI, but the trial court reserved ruling on the amount of judgment pending the court's receipt of post-trial briefs.

After briefs were submitted regarding the amount recoverable by E-Z against PBI, the court entered an opinion and order on September 14, 2011, against PBI in the amount of the judgment against Premier, \$301,292.22, to be satisfied by PBI's posted bond. The court subsequently denied PBI's motion to alter, amend, or vacate on January 13, 2012. At this point, further interest accrued on the judgment against PBI. Consequently, the trial court awarded E-Z a judgment against PBI in the amount of \$315,655.16, the amount of the bond.

PBI Bank, Inc. v. E-Z Const. Co., Inc., 2014 WL 631519, 1-2 (Ky. App. 2014).

The issues in the First Appeal concerned the amount of the Judgment against PBI and whether the Jefferson Circuit Court properly awarded interest at the rate of 18% provided for in the underlying contract between Premier and E-Z. In affirming in part and reversing in part, this Court directed the trial court to "enter a new judgment in the amount of \$157,827.58, and award interest accordingly, accruing at the rate of 18%."

On remand, E-Z sought payment on the Judgment amount, plus interest at the rate of 18%. PBI responded by seeking to pay the funds to the trial court, contending that there was a dispute as to how much E-Z was entitled to receive. E-Z maintained that the current issue was "whether E-Z is entitled to a

Judgment against PBI [for more than \$315,655.16] as a result of the Opinion rendered by the Court of Appeals on February 14, 2014."

The matter proceeded before the trial court, whereupon the court determined that it did not have the authority to overrule this Court and must render an order consistent with this Court's February 14, 2014 Opinion. It then rendered an Order and Judgment in favor of E-Z in the amount of \$157,827.58, with interest at the rate of 18% on the underlying construction invoices, with the total Judgment amount as of March 25, 2014, in the amount of \$428,077.41. This appeal followed.

PBI first argues that the trial court erred in allowing E-Z to recover more than \$315,655.16 when it had judicially admitted that PBI was capped at such amount. PBI notes that in E-Z's response to PBI's Motion to Alter, Amend or Vacate, E-Z expressly stated that, "the penal limit of PBI's obligation under the Bond is double the lien amount - \$315,655.16 E-Z respectfully requests that the Judgment against PBI be established at \$315,655.16."¹ PBI now contends that this statement is a judicial admission by E-Z that establishes the cap of PBI's obligation herein as a matter of law. PBI directs our attention to *Center v. Stamper*, 318 S.W.2d 853, 855 (Ky. 1958), for the proposition that a judicial admission is conclusive and removes the proposition in question from the field of dispute. In the present matter, PBI argues that because the language set out in

¹ A bond's "penal sum" is the limit of the surety's liability under the bond, or twice the amount of the lien claimed. See generally, *Polk v. American Casualty Co. of Reading, Pa.*, 816 S.W.2d 178 (Ky. 1991); KRS 376.100.

E-Z's pleading is neither ambiguous nor equivocating, and is clearly a judicial admission, the trial court erred in allowing E-Z to recover more than \$315,655.16.

PBI is now complaining that when this case was remanded to the trial court after the First Appeal, the trial court erred by entering a Judgment in favor of E-Z in the amount of \$428,077 plus interest (i.e., \$157,826.58 plus 18% interest), which exceeded the bond's penal sum of \$315,655.16. However, E-Z correctly notes that PBI's penal sum defense was already resolved when, 1) the trial court rendered a Judgment on January 13, 2012, under which PBI liability exceeded the bond's penal sum, and 2) PBI's First Appeal resulted in a Judgment whereby PBI's liability again exceeded the bond's penal sum. E-Z properly argues that the prior rulings made by the trial court and this Court resulted in PBI's liability exceeding the bond's penal sum, but PBI did not challenge these rulings on the basis that they exceeded PBI's alleged maximum cap liability under the bond. We find E-Z's argument on this issue persuasive. The trial court's Judgment and the Opinion resulting from the First Appeal, are unrestricted by any liability cap. They became the law of the case and cannot be challenged via subsequent appeal. *See generally, Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 750 (Ky. App. 2007). At the time this Court rendered its ruling in the First Appeal, the Judgment plus accrued interest already exceeded the penal amount by approximately \$110,000, and no cap was placed on the amount of interest which could accrue. We find no error.

PBI also argues that even if the Judgment against it is not limited to the bond amount and/or penal sum of \$315,655.16, the trial court erred in calculating interest from the date of the invoices rather than the date of the Judgment. This matter was resolved in the First Appeal, wherein the panel of this Court stated,

With respect to interest accruing on the principal amount, we understand PBI's argument to be that interest should only accrue from the date E-Z filed its lien

. . . Despite PBI's argument to the contrary, the underlying contractual obligation between E-Z and Premier, on the one hand, cannot be disconnected from the lien claim and resultant judgment, on the other. The lien and the judgment flow from the contract which established the terms to be enforced.

PBI Bank at 3.

The construction contract between Premier and E-Z provided that payments due and unpaid shall bear interest at 1 1/2% per month or 18% annually from the date payment was due until paid. This matter was properly resolved via the First Appeal and *arguendo* had it not, we would find no error in the imposition of interest from the date of the invoice as this matter was agreed to prior to the commencement of construction by Premier and E-Z.

For the foregoing reasons, we AFFIRM the Order and Judgment of the Jefferson Circuit Court.

ALL CONCUR.

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