THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court Of Common Pleas

S. Jackson Kimball, III, Special Circuit Court Judge

Case No. 2010-CP-46-01951

Hard Hat Workforce Solutions, LLC, ... Plaintiff Appellant,

v.

Mechanical HVAC Services, Inc., Liberty Mutual Insurance Company, and Great American Insurance Company, ... Defendants
Of Whom Great American Insurance Company is the ..... Defendant Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the trial court's grant of summary judgment in favor of Great American Insurance was based upon a proper construction and application of S.C. Code Ann. § 29-5-440 to the undisputed facts in this matter?

STATEMENT OF THE CASE

Plaintiff-Appellant Hard Hat Workforce Solutions, LLC commenced this action by filing a summons and complaint on May 12, 2010, naming as defendants Mechanical HVAC Services, Inc. and Great American Insurance Company. Hard Hat filed an amended complaint on June 18, 2011, adding Liberty Mutual Insurance Company as a Defendant. Hard Hat sought recovery against Mechanical HVAC Services, Inc. for breach of contract and against Great American and Liberty Mutual as sureties on respective payment bonds on the underlying construction project. Great American and Liberty Mutual filed answers denying liability under the bonds sued upon by Hard Hat. Mechanical HVAC Services went into default and Hard Hat secured a default judgment against it on November 24, 2010. Liberty Mutual Insurance Company was dismissed by consent on December 28, 2010. Thereafter, Hard Hat proceeded with its claim against the payment bond on which Great American was the surety.

Great American filed its motion for summary judgment on June 30, 2011. The motion was heard by the Honorable S. Jackson Kimball III acting as special circuit court judge on September 15, 2011. Judge Kimball's order granting summary judgment in favor of Great American was filed on October 13, 2011. Hard Hat gave notice of its appeal from this order on October 31, 2011.

STATEMENT OF FACTS NOT IN DISPUTE

This matter arises out of the construction of a new high school in York County known as York Comprehensive High School and Floyd D. Johnson Tech Center (the "Project"). Edifice, Inc. was the general contractor for the Project and Walker White, Inc. was the mechanical subcontractor to Edifice with responsibility for constructing the mechanical and plumbing work for the Project. Walker White, in turn, subcontracted certain work to Mechanical HVAC Services, Inc. ("MHS"). MHS entered into an agreement with Hard Hat Workforce Solutions, LLC ("Hard Hat") wherein Hard Hat would provide temporary skilled labor to MHS to assist MHS with performing the work under its subcontract with Walker White. [Order Granting Def.'s Mot. S.J., p. 2, Oct. 13, 2011]

As part of the requirements of its subcontract with Edifice, Walker White furnished a labor and materials payment bond covering its work on the Project. Defendant Great American Insurance Company ("Great American") acted as surety on this payment bond with Walker White as the principal on the bond. [Affidavit of Robert White, ¶ 6, Ex. 1] Hard Hat made a claim against this payment bond seeking to recover $108,337.68 which represents the amount that MHS owed Hard Hat for the temporary labor provided to the Project. Hard Hat gave notice of its claim for payment to Great American and to Walker White, as the principal on the payment bond, by certified mail on March 5, 2010. With respect to Walker White, Hard Hat sent the letter to the attention of the J. Robert White, the registered agent and an officer of the corporation. [White Aff. ¶ 7, Ex. 2] Walker White maintains its permanent office at 5728 Shakespeare Road, Columbia, S.C. 29223. This is also the same address shown for Walker White on the records of the Department of Labor, Licensing and Regulation, and on the payment bond on which Hard Hat makes its claim. [White Aff. ¶¶ 5 &8, Ex. 1]

Prior to sending its notice of claim on March 5, 2010, Eric Schmidt, Hard Hat's Territory Manager, sent three electronic mail messages to J.T. East, Walker White's assistant project manager. These e-mails are dated August 4, 2009, September, 29, 2009 and October 22, 2009. [Affidavit of Eric Schmidt, Exs. A, B, C] J.T. East was a lower level management employee with Walker White. His duties included assisting with the coordination of the work of Walker White's own forces and assisting with the management and coordination of the work of any of Walker White's subcontractors on the Project. He was not involved with coordinating, processing or handling payment to any suppliers or subcontractors of Walker White. East worked under the immediate supervision of Amy Miller, Walker White's project manager for the Project. He worked from a jobsite trailer located at the Project in York County and received the Hard Hat e-mails on his computer at the jobsite trailer. [Affidavit of J.T. East, ¶¶ 1, 3, 4, 6]

Walker White entered into a labor-only subcontract with MHS on the Project for the installation of ductwork. Walker White made weekly payments to MHS for its labor by wire transfer. Walker White made its last payment to MHS on January 28, 2010. As of this date, Walker White had paid the total sum of $535,357.06 to MHS and did not owe any money to MHS under the subcontract. On or about February 8, 2010, Walker White gave notice to MHS that it was in default under its subcontract with Walker White and that Walker White would have to supplement MHS's scope of work with its own forces and those of another subcontractor to maintain the required schedule for the Project. MHS thereafter abandoned the Project and never performed any additional work. Due to MHS's abandonment of the Project, Walker White completed the remaining scope of work under MHS's subcontract by using its own forces and the forces of another subcontractor, Purvis Mechanical. [Affidavit of Amy Miller ¶¶ 8, 12, 13, 14]

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF GREAT AMERICAN BY CORRECTLY CONSTRUING AND APPLYING S.C. CODE ANN. § 29-5-440 TO THE UNDISPUTED FACTS IN THIS MATTER.

I. The trial court properly concluded that the provisions of S.C. Code Ann. § 29-5-440 apply to Hard Hat's payment bond claim.

South Carolina has enacted statutes governing all payment bond claims on construction projects within the state. For projects involving the South Carolina Department of Transportation, S.C. Code Ann. § 57-5-1660 applies. For projects subject to South Carolina's Consolidated Procurement Code, S.C. Code Ann. § 11-35-3030 applies. For all other projects in South Carolina, whether the project is public or private in nature, claims against a payment bond are governed by S.C. Code Ann. § 29-5-440. Indeed, the heading for this particular statute is "Suit on payment bond."[1] As evidenced by the above statutes, the South Carolina legislature has the power to enact legislation relating to payment bonds.

Payment bonds furnished by contractual agreement, rather than statutory mandate, are often referred to as a "private bond." While "private" payment bonds are contractual in nature, they are not free from government regulation in South Carolina. As a threshold matter, in order to act as a surety on a private payment bond in South Carolina, the surety company must be licensed with the South Carolina Department of Insurance and supervised by the director or his designee. *See* S.C. Code Ann. §§ 38-5-10, 38-1-20(33). In addition, S.C. Code Ann. § 29-6-270 states that "where the payment bond is required by the contract or otherwise, the bond may only be issued by a surety company licensed in the State with a "B+" minimum rating as stated in the most current publication of 'Best Key Rating Guide, Property Liability.'" This statute only

[1] Hard Hat refers to § 29-5-440 as a recent amendment to South Carolina's mechanic's lien laws. It is neither. While the statute is included in Chapter 5 of Title 29 which is captioned "Mechanic's Liens", the statute has nothing to do with a mechanic's lien. It is also a stretch to characterize the statute as "recent" as it was enacted in 2000.

applies to private payment bonds. Thus, not only are sureties on private bonds regulated by the South Carolina Department of Insurance, the South Carolina legislature has imposed minimum ratings standards for such sureties. Therefore, it is clear that the South Carolina legislature not only has the power to regulate private surety bonds, it has exercised that power. In light of the past legislative action to the contrary, Hard Hat's argument that S.C. Code Ann. § 29-5-440 does not apply to private bonds is not credible.

In this case, Walker White furnished the payment bond as part of its obligations under its subcontract with Edifice, the general contractor for the Project, rather than pursuant to any statutory requirement. Absent the subcontract requirement to furnish a bond, Walker White would not have been required to do so. Hard Hat argues that because the payment bond on which it claims is a private bond, the terms of the payment bond should govern exclusively without regard to the provisions of S.C. Code Ann. § 29-5-440. Hard Hat further argues that § 29-5-440 should not be construed so as to destroy the freedom of contract, and as a compensated surety, ambiguities in the bond should be construed against the compensated surety and in favor of bond coverage.[2] While Hard Hat is correct that a private payment bond is contractual in nature, that does not mean that the provisions of S.C. Code Ann. § 29-5-440 can, or should, be ignored. The statutory law of South Carolina is a part of every contract whether stated therein or not. "It is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract." *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 528, 642 S.E.2d 751, 756 (2007)(quoting *City of North Charleston v. N. Charleston Dist.*, 289 S.C. 438, 442, 346 S.E.2d 712, 715 (1986)). Therefore,

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[2] Hard Hat incorrectly claims that Great American drafted the bond form. Great American did not draft the bond form. The bond form was part of the subcontract documents issued to Walker White by Edifice, Inc. [*See* White Aff. ¶ 6, Ex. 1].

the trial court correctly concluded that the terms and provisions of § 29-5-440 are a part of the payment bond upon which Hard Hat claims.

In this instance, the payment bond contains no specific notice requirements or provisions. Therefore, the application of the notice requirements of § 29-5-440 is not in conflict with any provision of the payment bond itself. Moreover, as the payment bond is silent on how a claimant is to give notice under the bond, the statute does not create any ambiguity or conflict with any terms of the bond.[3] The statute simply provides the requirements for giving notice and bringing suit that, in this case, are absent from the bond itself. Contrary to Hard Hat's contention, the trial court's application of § 29-5-440 did not render "the language of the bond . . . of no consequence or moment as to scope or coverage." [App.'s Initial Brief p. xvi]. Nor did the trial court find that "the language in the actual bond . . . means absolutely nothing . . ." as Hard Hat claims. [*Id.*]. The language of the payment bond itself was simply never at issue in the motion for summary judgment.

II. The trial court properly found as a matter of law that Hard Hat failed to meet the requirements set forth in § 29-5-440 with respect to providing a "Notice of Furnishing" to the bonded contractor.

In this matter, the central issue before the trial court was whether Hard Hat, as a remote claimant, gave Walker White, the bonded contractor, notice of furnishing labor as required by S.C. Code Ann. § 29-5-440. There is no dispute that Hard Hat is a "remote claimant" and that

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[3] While not the case in this instance, a claimant has appropriate remedies for addressing situations where the terms of the payment bond might be in conflict with the terms of § 29-5-440. Courts have, in appropriate situations, applied the doctrine of equitable estoppel to bar sureties from taking positions inconsistent with prior representations to claimants on payment bonds. *See U.S. for the Use and Benefit of Humble Oil & Refining Co. v. Fidelity and Casualty Co. of New York,* 402 F.2d 893 (4th Cir. 1968); *U. S. for Use & Benefit of Bagnal Builders Supply Co. v. U. S. Fid. & Guar. Co.*, 411 F. Supp. 1333, 1337 (D.S.C. 1976).

Walker White, as principal on the bond sued on, is the "bonded contractor" as those terms are defined and used in § 29-5-440.

S.C. Code Ann. § 29-5-440 contains four requirements with respect to a remote claimant giving notice of furnishing labor: (1) notice must be in writing; (2) notice must be to the bonded contractor; (3) notice must be given through a specified manner of delivery (personal service, fax, electronic mail, or by registered or certified mail); and (4) notice must be sent to any place the bonded contractor maintains a permanent office or the address listed for the bonded contractor on records of Department of Labor, Licensing, and Regulation. It is undisputed that there were no other means of delivery or service of the purported notice of furnishing labor other than the three e-mail messages sent from Eric Schmidt of Hard Hat to J.T. East of Walker White.[4]

After reviewing the e-mail messages, the trial court properly concluded that the Hard Hat e-mails were not a notice of furnishing labor pursuant to § 29-5-440, but were instead merely solicitations for business by Hard Hat. In construing the notice requirements of S.C. Code Ann. § 29-5-440, the Court noted that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). In doing so, the trial court properly concluded that with respect to a notice of furnishing labor, the legislature intended more than what is set forth in the Hard Hat e-mail messages. By way of example, the trial court noted the specific and detailed requirements set forth in S.C. Code Ann. § 29-5-20(B) for purposes of giving notice of furnishing labor for a mechanic's lien which are not present in the Hard Hat e-mails. While § 29-5-440 has no specific requirements as to the information a remote claimant must provide in

[4] It is interesting to note that Hard Hat never offers any of the three e-mails as the specific notice of furnishing labor. [App.'s Initial Brief pp. viii, xviii-xix.] Instead, Hard Hat seems to invite the court to pick which one of the e-mails might be satisfactory notice of furnishing.

a notice of furnishing, it follows that the legislature envisioned more than that contained in the Hard Hat e-mail messages; particularly when looking to § 29-5-20(B) for guidance—a similar statute in terminology, form and function. If there is any legitimate issue about whether an e-mail was effective notice, nothing in § 29-5-440 suggests that the remote claimant should get the benefit of the doubt when the confusion over the purported notice was caused by the remote claimant.

Moreover, the Hard Hat e-mail messages were sent to a lower level management employee of Walker White at the Project jobsite rather than an officer or managing agent at Walker White's permanent place of business in Columbia, S.C. The trial court properly concluded that the legislative intent for a notice of furnishing labor under S.C. Code Ann. § 29-5-440 is that written notice be delivered to a responsible person employed with the bonded contractor at its permanent place of business. None of the three e-mails sent by Hard Hat were sent to Walker White's permanent place of business nor were they sent to an officer or managing agent of the company. Therefore, the trial court properly found as a matter of law that Hard Hat did not provide Walker White with sufficient notice of furnishing labor under S.C. Code Ann. § 29-5-440.

Hard Hat's position regarding service of a notice of furnishing would render it immaterial to whom the notice is provided as long as it was provided to any employee of the bonded contractor—regardless of the position or level of responsibility of such employee. While there may be a number of responsible individuals with the bonded contractor upon whom service can be made, such as the registered agent, an officer, or other managing agent of the company, it could not have been the intention of the legislature to allow service of a notice of furnishing on any employee of the company. This is evident from the language of the statute which requires

service on the "bonded contractor." In this instance, it would be unfair to charge Walker White, as the bonded contractor, with receipt of a notice of furnishing labor when such purported notice was sent in an informal e-mail to a lower level manager, with limited responsibilities, who did not work in the permanent office. Such a communication hardly constitutes actual legal notice to Walker White as required by § 29-5-440.

Hard Hat further contends that the language of § 29-5-440 about delivering notice of furnishing to the bonded contractor's permanent office applies only to notice sent by registered or certified mail. [App.'s Initial Brief pp. xvii-xviii] Hard Hat argues that the statute would permit personal service or service by fax to a "non-fixed geographic location." [*Id.*] This is clearly not the proper construction of the statute as a claimant would need to know the location to serve notice by other means as well, such as through personal service or by fax.[5] The statute makes it clear that while the manner of service of the notice of furnishing may take different forms, the notice must be served upon the bonded contractor at one of two possible locations. In this instance, the notice of furnishing had to be served upon Walker White at its permanent office in Columbia which is the same address as that listed on the records of the Department of Labor, Licensing and Regulation. [White Aff. ¶ 5] The trial court rightfully rejected Hard Hat's efforts to manipulate the plain language of the statute and correctly ruled that, in this instance, the notice of furnishing had to be sent to the bonded contractor's permanent office to be effective.

It is interesting to note that Hard Hat sent its *notice of claim* on the payment bond by registered mail to J. Robert White, an officer and the registered agent of Walker White. [White Aff. ¶ 7, Ex. 2] Pursuant to S.C. Code Ann. § 29-5-440, a remote claimant must give written notice of its claim by certified or registered mail to the bonded contractor within 90 days of its

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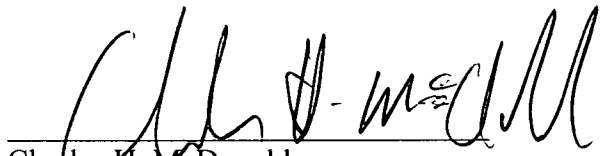
[5] While a fax machine technically has a phone number rather than an address, no rational argument can be made that the legislature did not envision fax machines having a fixed location at the bonded contractor's principal place of business.

last furnishing of labor or materials in order to bring suit on the payment bond. Unlike the e-mails relied upon by Hard Hat as its purported notice of furnishing, the language of Hard Hat's notice of claim is specific and unequivocal as to the subject of the notice. [White Aff., Ex. 2] While § 29-5-440 permits service of a notice of furnishing by e-mail, it is clear that other, perhaps more reliable, methods for giving notice were readily available to Hard Hat and that Hard Hat knew how to properly avail itself of notice by means other than e-mail. Thus, Hard Hat cannot be excused from complying with the requirements of the statute because it opted to give its purported notice of furnishing by e-mail.

CONCLUSION

In this matter, the trial court properly applied S.C. Code Ann. § 29-5-440 to the undisputed facts and found that Great American was entitled to summary judgment on Hard Hat's payment bond claim. Hard Hat failed to give notice of furnishing to Walker White as the bonded contractor pursuant to the requirements of S.C. Code Ann. § 29-5-440. Accordingly, Hard Hat's recovery on the bond was limited to the amount that Walker White, as the bonded contractor, owed its direct subcontractor, MHS, when Walker White received notice of Hard Hat's payment claim on March 5, 2010. At the time Hard Hat gave Walker White notice of its claim, there is no factual dispute that Walker White owed no further money to MHS. Nor is that an issue which Hard Hat presents for review in its appeal of the trial court's order. Therefore, pursuant to § 29-5-440, Hard Hat was not entitled to recover any amount against the payment bond and Great American was entitled to summary judgment in its favor. The ruling of the trial court should be affirmed.

Respectfully Submitted,



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April 26, 2012

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court Of Common Pleas

S. Jackson Kimball, III, Special Circuit Court Judge

Case No. 2010-CP-46-01951

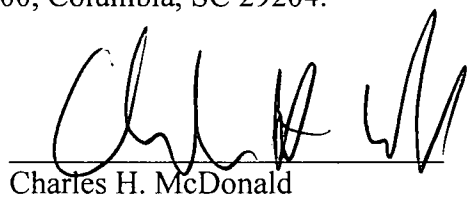
Hard Hat Workforce Solutions, LLC, ... Plaintiff Appellant,

v.

Mechanical HVAC Services, Inc., Liberty Mutual Insurance Company, and Great American Insurance Company, ... Defendants
Of Whom Great American Insurance Company is the ..... Defendant Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent by hand delivering a copy of same to the Appellant's attorney of record, Henry P. Wall, Bruner, Powell, Wall & Mullins, LLC, 1735 St. Julian Place, Suite 200, Columbia, SC 29204.



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April 26, 2012

Via Hand Delivery

The Honorable Jenny Abbott Kitchings, Clerk of Court
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Re: Hard Hat Workforce Solutions, LLC. v. Great American Insurance
Case No. 2010-CP-46-01951

Dear Ms. Kitchings:

Enclosed for filing are an original and one copy of the Initial Brief of Respondent and Proof of Service. Please return the extra file-stamped copy with our courier.

A copy is also being served upon Henry P. Wall, attorney for the Appellant, by hand delivery today.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.

Charles H. McDonald

CHM/rhs

Enclosures

cc: Henry P. Wall, Esquire