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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-07647

Appellate Case No. 2021-000666

Meritage Asset Management, Inc.
d/b/a Century Glass Company……Appellant

v.

Freeland Construction Company, Inc.
and South Carolina Military Department……Respondents.

Of which South Carolina Military Department is the Respondent.

RETURN TO APPELLANT'S PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In September, 2014, the South Carolina Military Department ("Respondent") and Freeland Construction Company, Inc. ("Freeland") entered into a contract for work on the Saluda Armory, one of Respondent's properties. (R. p. 4.) Meritage Asset Management, Inc. ("Meritage") was hired by Freeland as a subcontractor. The Subcontractors' and Suppliers' Payment Protection Act, S.C. Code Ann. §§29-6-210 through 29-6-290 (the "SPPA") imposed a duty on Respondent to "take reasonable steps to assure that [an] appropriate payment bond is issued and is in proper form," § 29-6-250(3), but a payment bond was not secured.

On May 20, 2016, Meritage submitted a final invoice to Freeland for $50,000, with payment due on June 20, 2016. (R. p. 4.) On June 3, 2016, Freeland submitted a final invoice to Respondent. (R. p. 4.) Respondent posted the amount due to Freeland on June 7, 2016, and the final amount was deposited ten days later. (R. p. 4.) Unbeknownst to Respondent, Freeland had not paid Meritage for its May 20 invoice.

On August 8, 2016, Meritage notified Respondent that it had not been paid by Freeland. (R. p. 4.)

On December 29, 2016, Meritage filed an action against Freeland and Respondent. (R. p. 10.) Against Respondent, Meritage alleged a third-party beneficiary breach of contract claim, based on the SPPA, and an equitable claim for *quantum meruit*. (R. pp. 16-17.) After Respondent answered the complaint, both Meritage and Respondent filed a motion for summary judgment. (R. p. 3.)

The Honorable Thomas G. Cooper, Jr. heard the competing motions on December 8, 2017. (R. p. 3.) At the hearing, Meritage abandoned its *quantum meruit* claim, leaving only the third-party beneficiary breach of contract claim. (R. pp. 3-4).

On January 8, 2018, Judge Cooper entered an order, which relied heavily on *Sloan Construction Company, Inc. v. Southco Grassing, Inc.* ("*Sloan*")[1] and *Shirley's Iron Works, Inc. v. City of Union* ("*Shirley*"),[2] granting Respondent's motion for summary judgment and denying Meritage's motion. (R. p. 3-8.)

Meritage served a Notice of Appeal on February 5, 2018.

After briefing, the Court of Appeals heard oral arguments on September 14, 2020. On February 10, 2021, the Court of Appeals issued a unanimous opinion affirming the grant of summary judgment in favor of Respondent. (R. pp. 114-119.)

Meritage then filed a Motion for Rehearing on February 25, 2021, which the Court of Appeals denied on May 25, 2021. (R. pp. 120-131, 136.)

Meritage now appeals to this Court for a writ of certiorari.

[1] 377 S.C. 108, 659 S.E.2d 158 (2008).
[2] 403 S.C. 560, 743 S.E.2d 778 (2013).

QUESTIONS PRESENTED

Respondent accepts Meritage's statement of the first question presented, namely:

1. With respect to the private cause of action created by the SPPA, whether the limitations placed on such cause of action by the *Sloan* Court should be eliminated as inconsistent with the purpose and language of the Act?

Regarding Meritage's second question, Respondent submits that the question should be phrased as:

2. What effect should nonpayment to a subcontractor, which occurs after payment to the general contractor by the state, have on the limitation of liability from *Sloan*?

ARGUMENT

Meritage urges the Court to issue a writ of certiorari for both of the questions it presents. A writ of certiorari is a matter of sound judicial discretion which will only be granted when there are special and important reasons, such as:

1. Novel questions of law,
2. There is a dissent in the decision of the court of appeals,
3. The decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court,
4. Substantial constitutional issues are involved, or
5. A federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR 242(b). As explained below, neither question presented herein involves a "special or important reason" which would justify the issuance of a writ. Accordingly, this Court should deny certiorari on both questions.

I. With respect to the private cause of action created by the SPPA, whether the limitations placed on such cause of action by the *Sloan* Court should be eliminated as inconsistent with the purpose and language of the Act?

Meritage's first question does not implicate any of the factors enumerated in support of the issuance of a writ in Appellate Court Rule 242(b). This is not a novel question of law. In fact, the nature of the remedy available under the SPPA has been addressed, and affirmed, by this Court twice in the last fifteen years. *See Sloan*, 377 S.C. 108, 659 S.E.2d 158 (2008), and *Shirley*, 403 S.C. 560, 743 S.E.2d 778 (2013). There is not a dissent in the decision of the Court of Appeals. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court, and Meritage does not allege that there is either a substantial constitutional issue or a federal question involved.

Moreover, this question does not, on its own, present a special or important reason for issuing a writ. The duty imposed on governmental entities by the SPPA is clear. The remedy for aggrieved subcontractors, and its limitations, is clear. Twice, this Court has already addressed the

limitation of governmental liability when a payment bond is not in place. In *Sloan*, a payment bond was secured but then expired, *Sloan*, 377 S.C. at 111, 659 S.E.2d at 160, and in *Shirley*, a payment bond was never secured, *Shirley*, 403 S.C. at 564, 743 S.E.2d at 780. Thus, Respondent's actions do not present a novel or distinct issue.

Meritage suggests that this case presents "the remaining issue," but no issue remains. Pet. at 4-5. In *Sloan* this Court announced the remedy available to subcontractors and suppliers under the SPPA. *Sloan*, 377 S.C. at 120-121, 659 S.E.2d at 165-166. Also in *Sloan*, the Court placed a limit on that remedy. *Id.* Then in *Shirley*, the Court clarified the exact nature of the remedy available under the SPPA. *Shirley*, 403 S.C. at 573, 743 S.E.2d at 784 ("we now clarify that no tort action arises under the SPPA. "). Nothing remains to be clarified.

Meritage argues the limitation announced in *Sloan* is inconsistent with the purpose and provisions of the SPPA. Pet. at 5-11. That is not so. The purpose of the SPPA is clear. In short, it was created to provide protections to subcontractors who perform work for a government entity. *See Sloan*, 377 S.C. at 115, 659 S.E.2d at 162 and at 117-118, 659 S.E.2d at 163-164 ("[T]he very title of the SPPA clearly indicates the General Assembly intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects." and "[T]he enactment of the SPPA in 2000 illustrates the legislature's intent to, in essence, pick up where the Little Miller Acts left off by outlining a more extensive payment protection scheme dedicated specifically to subcontractors and suppliers."). The Court in *Sloan* recognized this purpose and, as a result, created a private cause of action to enforce the SPPA. *Id.* at 120, 659 S.E.2d at 165. However, the Court emphasized, "the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." *Id.* "The subcontractor's lien . . . is not intended to create a windfall to the subcontractor." *Id.* at 121, 659 S.E.2d at 165. Thus, "in a tort or contract action arising under the SPPA, the government entity's liability is limited to the remaining unpaid

balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." *Id.* at 121, 659 S.E.2d at 165-166. In *Shirley*, the Court remanded the case for further proceedings to determine the precise application of the limitation, thereby affirming the limitation. *Shirley*, 403 S.C. at 575, 743 S.E.2d at 786.

The limitation from *Sloan* is consistent with the SPPA. First, it is important to note that the limitation does not completely bar recovery under the SPPA, as Meritage's vigor implies. *See Sloan*, 377 S.C. at 121, 659 S.E.2d at 165. *Sloan* simply demarcates the outer edge of a supplier's potential recovery. *Id.* It was sensible, and proper, for the Court to describe the limitation of the remedy it created in *Sloan.* Moreover, Meritage attempts to paint the limitation as two-parts, namely a cap on liability and a time when that cap attaches. While the *Sloan* limitation does contain both of these provisions, they work in tandem. Considering them in isolation distorts their purpose and function. Moreover, construing the latter as a notice requirement, as Meritage does, misrepresents its character. The limitation does not create a notice requirement, it simply states when the limitation attaches.

The rationale behind the limitation in *Sloan* aligns with the purpose of the SPPA. First, the limitation prevents the state from being exposed to unlimited liability while still allowing the state to hire general contractors. The plain purpose of a general contractor is to improve efficiency through the delegation of some authority. By design, the state has only limited oversight and control over the subcontractors hired to work on a project. The state does not oversee the bidding and contracting process for subcontractors. As a result, the state has no knowledge of or control over the amount that may be due to a subcontractor. The *Sloan* limitation protects the state in the midst of this limited control. Without the *Sloan* limitation, the state would be forced to act as the general contractor and deal directly with each individual supplier or risk being obligated to pay far and above the amount it contracted for the whole project because of the rates agreed to between

the general contractor and a supplier. The SPPA was meant to protect suppliers, not disincentivize the use of general contractors.

Second, the *Sloan* limitation creates clarity. The limitation makes the state liable only for nonpayment which it is aware of when the state pays the general contractor. In contrast, under Meritage's theory, the state remains liable for additional nonpayment indefinitely. Because of the state's limited oversight, the state does not always know what every supplier is owed or if they have been paid. The limitation in *Sloan* provides a clear line for determining the state's liability. Meritage's theory prevents the state from having any certainty that it has finished paying for a job.

Moreover, the limitation in *Sloan* recognizes longstanding restrictions on who appropriates and directs spending by state agencies. "The General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriate monies shall be spent." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-314, 395 S.E.2d 633, 637 (1982). Shifting monies from other sources is impermissible in that "[i]t shall be unlawful for any monies to be expended for any purpose or activity except that for which it is specifically appropriated, and no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriations act." S.C. Code Ann. § 11-9-10. As stated in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002), "there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly." In short, Respondent, and other governmental agencies, cannot pay more than the price contracted between the state and the general contractor without additional appropriations because to do so would require spending money differently than how it was

appropriated by the General Assembly. The relief Meritage seeks would require Respondent to do just that. The limitation in *Sloan* recognizes this budgetary reality. To modify or overturn the limitation in *Sloan* runs against the large body of case law recognizing the limitations on how appropriated money may be spent.

Meritage submits that various differences between the SPPA and mechanics liens cuts against the *Sloan* limitation. However, Meritage overlooks that *Sloan*'s limitation is based primarily on the logic that the state, in hiring a general contractor, should not be exposed to unfettered liability. Thus, while Meritage does discuss several differences between the two statutory schemes, those differences do not diminish the purpose or utility of the *Sloan* limitation. Similarly, Meritage buttresses its argument by pointing to the decisions of the Florida and Texas courts interpreting their version of the SPPA. Foreign courts' interpretations of distinguishable statutes does not undercut the logic and purpose of the *Sloan* limitation.

In sum, Meritage's argument that the limitation is inconsistent with the SPPA is unpersuasive. Moreover, this question has been adequately addressed by this Court in the past, and therefore, there is not a "special or import" reason for the Court to grant certiorari. Accordingly, this Court should deny certiorari regarding this question.

II. What effect nonpayment to a subcontractor, which occurs after payment to the general contractor by the state, should have on the limitation from *Sloan*?

Meritage's second question does not implicate any of the factors enumerated in support of the issuance of a writ in Appellate Court Rule 242(b). This is not a novel question of law. In fact, the nature of the remedy available under the SPPA has been addressed, and affirmed, by this Court twice in the last fifteen years. *See Sloan*, 377 S.C. 108, 659 S.E.2d 158 (2008), and *Shirley*, 403 S.C. 560, 743 S.E.2d 778 (2013). Both *Sloan* and *Shirley* address governmental liability when there is not a payment bond in place. There is not a dissent in the decision of the Court of Appeals. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court,

and Meritage does not allege that there is either a substantial constitutional issue or a federal question involved. Moreover, this question does not, on its own, present a special or important reason for issuing a writ. While *Sloan* and *Shirley* did not address a situation where payment to the subcontractor is due until after payment by the state is due, the application of *Sloan* is clear and does not require additional analysis or explanation from this Court.

Furthermore, the payment date on a subcontractor's contract with the general should have no impact on the analysis announced in *Sloan.* The thrust of Meritage's second argument is that, even if the *Sloan* limitation is upheld, when nonpayment to the subcontractor occurs after the general contractor has been paid, the subcontractor should not be subject to the limitation. As is explained above, the state has limited oversight over subcontractors. Specifically, the state does not oversee such contractual minutia as the payment date for subcontractors. Allowing for this exception to the *Sloan* limitation would increase uncertainty for the state, thereby undermining the very purpose of the *Sloan* limitation. Additionally, subcontractors are free to negotiate any payment date which they like in their contracts. If subcontractors are concerned about a general contractor's willingness to pay, they can negotiate for an earlier payment date in their contract or other protective measures.

Finally, it is common practice for a general contractor to only pay a subcontractor after they have been paid by the owner. In contrast, creating the exception that Meritage requests would give rise to a situation whereby the state needs to confirm that all of the subcontractors have been paid prior to paying the general contractor, lest the state be subject to additional liability. This outcome would greatly undercut the purpose and effectiveness of hiring general contractors.

Therefore, the Court should not grant an exception to the *Sloan* limitation based upon the date of nonpayment, and the Court should deny certiorari to review this question.

CONCLUSION

For these reasons, Respondent, by and through the undersigned counsel, hereby moves this Court to deny Appellant's Petition for a Writ of Certiorari.

Respectfully submitted,

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