Buffalo Law Review

Volume 5 | Number 2 Article 42

1-1-1956

Miscellaneous—Suit on Payment Bonds

Thomas Hagmeir

are two possible constructions,[18] "resort to a literal construction may not be had when the result would be to thwart the obvious and clearly expressed purpose which the parties intended to accomplish, or where such a construction would lead to an obvious absurdity."[19]

The dissenters claimed that the "plain meaning" of the contract was that just such an occurrence as this was covered; water was one of the specific exceptions to what was excluded from coverage. They believed the court was now rewriting the contract for the parties according to what the parties intended. The majority decided in part on the assumption that the court must interpret the contract, where there is an ambiguity, as a reasonable business man would. The dissent contended that there was no ambiguity.

MISCELLANEOUS

Suit on Payment Bonds

In *McGrath v. American Surety Co.*,[1] plaintiff, a supplier of labor to a subcontractor, sued to recover on a payment bond given by the latter to indemnify the general contractor against liability to the subcontractor's suppliers of labor and materials under the Miller Act.[2] The Miller Act imposed upon the general contractor an obligation to furnish the Federal Government with both performance and payment bonds in public works projects. Parties such as the plaintiff, who have no contractual relation with the general contractor but have with a subcontractor, are given an action on the *payment bond.* The defendant is a surety on a *common law bond* given by the subcontractor. Whether plaintiff has a cause of action on this common law bond or whether his sole remedy would be under the Miller Act was the issue; the Court held, plaintiff had no cause of action. "The rights o f these laborers and materialmen of the subcontractor were definitely fixed and considered to be protected adequately by the Miller Act. The object in giving the bond in suit was to protect the contractor against this very liability imposed upon him by Federal Law."[3]

18. *Hartol Products Corp. v. Prudential Ins. Co. of America,* 290 N. Y. 44, 47 N. E. 2d 687 (1943). The dissent cites *Mutchnick v. John Hancock Mutual Life Ins. Co.,* 157 Misc. 598, 284 N. Y. Supp. 565, (1935), for the proposition that whether the results to the insured are harsh or beneficial there is no warrant for interpreting the deliberate language of the policy in other than its natural meaning.

19. *McGrail v. Equitable Life Assurance Society,* 292 N. Y. 419, 55 N. E. 2d 483 (1944).

1. 307 N. Y. 552, 122 N. E. 2d 906 (1954).
2. 40 U. S. C. 270-a, 270-b.
3. 308 N. Y. 464, 126 N. E. 2d 750 (1955).

A closely related problem was considered in the same term by the Court in *Daniel Morris Co. v. Glens Falls Indemnity Co.*[3] There a supplier of materials to a contractor sued to recover on a payment bond executed by the defendant as surety, the subcontractor as principal and in favor of the general contractor as obligee. A separate performance bond was also executed between the parties. The Court held that the plaintiff had a cause of action on the common law payment bond. "The inference is irresistable that the parties intended to benefit unpaid materialmen." The fact that separate performance and payment bonds were given, together with the language used in both the payment bond and underlying contract, that the contractor agreed to furnish materials and labor "free of the lien of any third party," the Court felt evidenced an intent to benefit the plaintiff.

Whether third party suppliers of labor or materials have a good cause of action on a payment bond appears to turn on whether the parties in executing the bond intended to benefit them,[4] and whether they relied on such bond in extending credit.[5] In determining intent to benefit, the courts rely on a number of factors including the precise wording of the bond itself,[6] the wording of the underlying contract between the principal and obligee (where the contract is made part of the bond to explain it[7] or even where the contract is not expressly made part of the bond),[8] the public policy behind a statute the bond was given to satisfy,[9] and whether or not performance and payment provisions are contained in the same or separate bonds.[10] If one bond contains both performance and payment provisions, it will be held to be for the purpose of protecting the obligee only, on the theory that any payment made to creditors of the principal will tend to exhaust the penalty named in the bond, to the detriment of the bond's performance provisions.[11] Where there are separate performance and payment bonds, the instant cases indicate that third party suppliers will be able to sue on the payment bond unless there is another apparent purpose for having separate bonds.

Non Resident Admissions to the Bar

Petitioner in *Application of Harvey*[12] applied to the Appellate Division under former Rule II of the Court of Appeals for admission to the New York Bar without examination, on the ground that he had been admitted to and practiced

4. *Ibid.*
5. *Buffalo Cement Co. v. McNaughton,* 156 N. Y. 702, 51 N. E. 1089 (1895).
6. *McClare v. Massachusetts Bonding and Insurance Co.,* 266 N. Y. 371, 195 N. E. 15 (1935).
7. *Duffy Co. v. Board of Education,* 280 N. Y. 773, 21 N. E. 2d 527 (1939).
8. See note 3 *supra.*
9. *Fosmire v. National Surety Co.,* 229 N. Y. 44, 127 N. E. 472 (1920).
10. *Ibid.*
11. *Ibid.*
12. 309 N. Y. 46, 127 N. E. 2d 801 (1955).