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SURETYSHIP

I'M WITH THEM!
A SURETY MAY RELY ON THE DEFENSES OF THE BONDED PRINCIPAL

By: William B. Beasley

If the general doesn't pay, the claimant has a bad day.

Travelers Casualty and Surety Co. of America v. Sweet's Contracting, Inc., 450 S.W.3d 229 (Ark. 2014)

On a construction site, money is the lubricant that keeps the project moving forward. When the money stops flowing, the work on the project will often be replaced with finger pointing. The question then becomes, where is the correct place to point the finger, who should bear the risk of loss?

In August of 2008, BCC Construction, LLC ("BCC"), as general contractor, entered into a subcontract with Sweet's Contracting, Inc. ("SCI") to perform excavation work on a Walgreens project in Batesville, Arkansas. The subcontract between BCC and SCI contained a pay if paid clause making BCC's payment from the owner an absolute condition precedent to BCC's obligation to pay SCI.

When the money stopped flowing on the project, the finger pointing began. SCI disputed the amount of payment it was due, and filed a materialmen's lien. BCC responded by enlisting Travelers Casualty and Surety Company ("Travelers") to issue a lien-release bond on behalf of BCC. SCI eventually took their finger pointing to court by suing under the bond for $70,184.38 in damages.

The circuit court directed a verdict in favor of BCC, ruling that the pay if paid clause barred recovery by SCI against it because the owner had not paid BCC for the work SCI had performed. The court did not dismiss SCI's claim against Travelers however, and at trial the jury returned a verdict for $25,478.20. To add insult to injury, the circuit court also slapped Travelers with $48,197.45 in attorney's fees in favor of SCI. To recap, the circuit court found Travelers' liability—as surety—exceeded that of its principal by $73,675.65.

Luckily for Travelers, the Supreme Court of Arkansas offered reprieve. The court reversed the decision of the circuit court on the grounds that Travelers was bound only to perform the acts that BCC had promised to perform per the subcontract. Because the pay if paid clause absolved BCC of its obligation to pay SCI, it also absolved Travelers of any obligation to pay.

In the end, justice was done and both the damage award and the attorney's fees award against Travelers were overturned. The Court's well-reasoned opinion correctly pointed the finger on the party who assumed the risk of the loss.

LANGLEY | LLP
ATTORNEYS & COUNSELORS

Texas • Florida
Oklahoma • Arkansas

Dallas
1301 Solana Blvd.
Bldg. 1, Suite 1545
Westlake, Texas 76262
(214) 722-7160

Miami
1200 Brickell Avenue
Suite 1950
Miami, Florida 33131
(305) 961-1691

info@l-llp.com

www.l-llp.com

LET’S GET READY TO RUMBLE!

In the red corner, the undisputed payment and performance bond surety, Liberty Mutual Insurance Company. And in the blue corner, the Nan Indemnitors and their undisputed obligation to indemnify. The fight to recover indemnification is on!

Liberty Mut. Ins. Co. v. Sumo-Nan LLC, No. CIV. 14-00520 DKW, 2015 WL 4093337 (D. Haw. July 6, 2015)

Liberty Mutual Insurance Company (“Liberty”) leads out with the opening move, pointing to the General Indemnity Agreement (“GAI”) and the Nan Indemnitors unwavering obligation to indemnify. The Nan Indemnitors respond with a novel defensive maneuver, claiming that they are only secondarily liable under the GAI and that Liberty impaired their ability to minimize losses. Liberty responds by asserting that the Nan Indemnitors are jointly and severally liable with the principal under the GAI

Who will triumph? Liberty, on behalf of Sumo-Nan LLC (“Sumo-Nan”), issued Miller Act payment and performance bonds in connection with a construction project at Tripler Army Medical Center in Honolulu, Hawaii. In consideration for furnishing the bonds, Sumo-Nan executed a GAI in favor of Liberty. Under the GAI, Sumo-Nan and other indemnitors (the “Nan Indemnitors”) agreed to indemnify Liberty against any liability for losses, fees, costs and expenses Liberty incurred as a consequence of furnishing the bonds on behalf of Sumo-Nan.

When Sumo-Nan was unable to meet its obligations on the project, Liberty received demands on the issued bonds in excess of $1,638,409.00. Sumo-Nan failed to deposit cash or other property as collateral security to protect Liberty, leading Liberty to file suit to enforce the GAI against both Sumo-Nan and the Nan Indemnitors. In response, both Sumo-Nan and the Nan Indemnitors filed a laundry list of counterclaims against Liberty. One defense in particular stood out—the Nan-Indemnitors used impairment of suretyship principles to argue that it was discharged from its obligation under the GAI because Liberty’s actions increased its financial risk

The Court, in a tightly reasoned opinion, emphatically denied the Nan indemnitors claim that they should be excused from their obligation because Liberty’s conduct increased their risk of loss. The Court ruled that only a surety may rely on impairment of suretyship principles, and the Nan indemnitors were not a surety because they were jointly and severally liable along with Sumo-Nan.

William Beasley is an associate at Langley LLP and may be contacted at wbeasley@l-llp.com.