IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

ESCCO INC., a Corporation,)
Plaintiff-Appellant,) **110**
vs.)
SEABOARD SURETY CO.,) 9-127
A Corporation 88-1045
Defendant-Appellee.)

Appeal from the Iowa District Court for Pottawattamie County (Law 58450), Glen M. McGee, Judge.

Plaintiff appeals from a district court's granting of a summary judgment to defendant. **AFFIRMED.**

W. Russell Bowie, of Omaha, Nebraska, and Richard D. Crotty, Council Bluffs, for the plaintiff-appellant

Jacob J. Peters, Council Bluffs, for the defendant-appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J. 111

The question we must address is whether the trial court was correct in determining on summary judgment plaintiff-appellant Escco, Inc., should be denied recovery under a performance bond and a Labor & Material Payment Bond written by defendant-appellee Seaboard Surety Co. We affirm the trial court.

The facts are not disputed. Seaboard wrote the bonds at the request of Anderson Construction Company after Anderson received a general contract for a restoration project for Iowa Power & Light Co. Iowa Power required Anderson to supply both of the bonds.

Anderson subcontracted certain work to Jessco, Inc. Jessco in turn subcontracted with plaintiff. When the subcontract was made, plaintiff was not aware of the bonds. Plaintiff filed no mechanic's liens and does not claim Iowa Power or Anderson are legally responsible for the payment of his account. Jessco is now bankrupt and plaintiff has not been paid by Jessco. Anderson owes Jessco $24,000 which Anderson is ready, willing and able to pay and will pay when directed to pay by the bankruptcy court. Apparently plaintiff and others have claims against the $24,000 owed Jessco.

Plaintiff claims the trial court erred in holding it was not a beneficiary under the performance bond. There is

no claim the performance bond is ambiguous. There are no disputed facts. The liability of a surety is determined by the specific conditions of a bond and cannot be enlarged beyond them. Bourrett v. W. M. Bride Construction Co., 248 Iowa 1082, 1084, 84 N.W.2d 4, 6 (1957).

We recognize, as plaintiff urges, laborers and materialmen may recover on a contractor's bond where the conditions are the contractor shall pay all claims for labor and material or shall faithfully perform a contract providing for such payment, although the owner alone is the named obligee on the bond. Bourrett, 248 Iowa at 1085, 84 N.W.2d at 7. The question is whether the bond provided Anderson would pay plaintiff. See Hoakinson v. Beaty Co. v. McPherson, 182 Iowa 476, 478 (1918).

There is no claim Anderson had responsibility to pay Jessco. Plaintiff having no right of recovery against either Anderson or Iowa Power, we determine the bond did not guarantee the payment of plaintiff's claim and we find no compelling reason to extend it to do so. We consider in arriving at this result plaintiff could have but did not file a mechanic's lien to assure his payment. This distinguishes this case from a bond given on a construction project of a school district or a city where the protection of the bond was determined necessary because claims against the school district or city by materialmen would not lie. See Bourrett, 248 Iowa at 1088, 84 N.W.2d at 9; Baker &

Co. v. Bryan, 64 Iowa 561, 21 N.W. 83 (1884); Getchell & Martin Lbr. & Mfg. Co. v. Peterson & Sampson, 124 Iowa 599, 100 N.W. 550 (1904).

Plaintiff next claims it should recover under the performance bond. Without addressing whether plaintiff was an intended beneficiary of the Labor & Material Payment Bond, we determine any claim it may have had was lost by failing to give notice of its claim within the ninety days provided for in the bond.

AFFIRMED.