FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BRYNGELSON CORPORATION,

Appellee,

vs.

BLUFFS HOMES, INC.: UNITED STATES FIDELITY AND GUARANTY COMPANY: and AUDINO BROTHERS CONSTRUCTION COMPANY,

Appellants.

Filed September 9, 1977

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2-58562

Appeal from Pottawattamie District Court - Leroy H. Johnson, Judge.

Appeal from judgment for plaintiff subcontractor against general contractor and surety company on a performance bond. - Affirmed.

Roderic A. Pearson, of Council Bluffs, for Appellee.

Jack W. Peters, of Council Bluffs, for Appellant, Bluffs Homes, Inc.

P. D. Furlong, of Sioux City, for Appellant, United States Fidelity and Guaranty Company and Audino Brothers Construction Co.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant general contractor, Audino Construction, and its surety, United States Fidelity and Guaranty, appeal the trial court award of $4,197.36 damages to the plaintiff subcontractor, Bryngelson Corporation. We affirm.

We agree with the appellants Audino Construction and United States Fidelity and Guaranty that Bryngelson's mechanics liens afford no basis for recovery due to late filing and the fact the owner had previously fully paid Audino. However, the performance bond obtained by Audino states it is drawn "for the use and benefit of claimants." Bryngelson is such a claimant by virtue of its direct contract with Audino.

The appellants contend that Bryngelson cannot recover on the bond because he failed to comply with the notice requirements. However, the notice provision, paragraph 3(a) of the bond, states: "3. No suit or action shall be commenced hereunder by any claimant: (a) Unless claimant, other (emphasis supplied) than one having direct contract with the principal . . ." Thus, Bryngelson having a direct contract with the principal Audino is exempted from this provision.

The appellants also claim that chapter 572, The Code, limits Bryngelson's right to recover on the bond. The court in Bourrett v. W.M. Bride Construction Co., 248 Iowa 1080, 84 N.W.2d 4 (1957) ruled the bond referred to in chapter 572 is not a private performance bond. The §572.11 bond is the §572.15 statutory bond filed for twice the amount of the claim made in a mechanics lien filing. 248 Iowa at 1089, 84 N.W.2d at 9. Recovery was denied upon the bond in **Bourrett** since the owner alone was indemnified by the terms of the bond. The subcontractor in **Bourrett** was simply not a person intended to be benefitted by the bond. Rowe v. Stufflebeam, 249 Iowa 985, 993, 89 N.W.2d 875, 879 (1958). Clearly Bryngelson, by the express terms of the bond, is a claimant entitled to sue on the bond.

Appellants also contend for the first time that the action on the bond is a joinder of claims contrary to §572.26, The Code. The Court in Consolidated Construction Co. v. Begunck, 233 Iowa 463, 472, 9 N.W.2d 390 (1943) held the misjoinder claim is not jurisdictional, and the remedy is a motion to transfer to the proper docket.

Finally, the appellants urge that a check accepted by Bryngelson in March of 1972 represented full payment of the claim. Accord and satisfaction is grounded in agreement. Olson v. Shuler, 203 Iowa 518, 523, 210 N.W. 453, 455 (1926). It is a new contract substituted for the old. Kellogg v. Iowa State Traveling Men's Association, 239 Iowa 196, 211, 29 N.W.2d 559, 567 (1948). The check was exchanged while the actual work and its cost were under dispute. We find no basis for holding such a record establishes that the check tendered between the parties was intended by both parties to completely resolve their controversy. **Kellogg,** 239 Iowa at 211, 29 N.W.2d at 567.

Affirmed.