IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

FILED
November 6, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
November 6, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27778

GATEWAY COMMUNICATIONS, INC., A CORPORATION,
Plaintiff Below, Appellant

v.

JOHN R. HESS, INC., A CORPORATION;
INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION;
AND STIEGLITZ, STIEGLITZ, TRIES, P.C.,
ARCHITECTS/PLANNERS, A CORPORATION,
Defendants Below

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Defendant Below, Appellee

Appeal from the Circuit Court of Cabell County
Honorable John L. Cummings, Judge
Civil Action No. 90-C-548

AFFIRMED

Submitted: October 4, 2000
Filed: November 6, 2000

C. Robert Schaub, Esq.
Schaub Law Offices, L.C.
Huntington, West Virginia
Attorney for Plaintiff Below, Appellant

Randall L. Trautwein, Esq.
Lamp, O'Dell, Bartram, Levy & Trautwein

Huntington, West Virginia
and
Jarrell D. Wright, Esq.
Eckert Seamans Cherin & Mellott, L.I.
Pittsburgh, Pennsylvania
Attorneys for Defendant Below, Appellee

CHIEF JUSTICE MAYNARD delivered the Opinion of the Court.
JUSTICE STARCHER and JUSTICE MCGRAW dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "In a contract of suretyship the obligation of the principal and his surety is original, primary, and direct, and the surety is liable for the debt, default, or miscarriage of his principal." Syllabus Point 3, in part, *U.S. Fidelity and Guar. Co. v. Hathaway*, 183 W.Va. 165, 394 S.E.2d 764 (1990).

2. As a general rule, the liability of the surety is coextensive with that of the principal.

3. The liability of a surety is a legal as distinguished from a moral one. The surety's obligation arises out of positive contract, and the contract generally measures the extent of the surety's liability.

4. The surety on a building construction contract is bound only in the manner and to the extent provided in the instrument.

Maynard, Chief Justice:

The appellant, Gateway Communications, Inc., appeals from the October 18, 1999 order of the Circuit Court of Cabell County which dismissed the appellant's action against the appellee, Insurance Company of North America, on the ground that the action was barred by the time limitation contained in the performance bond on which the action was brought.

I.

FACTS

The appellant, Gateway Communications, Inc., (hereinafter "Gateway" or "appellant") owns and operates WOWK-TV, a commercial television broadcast station. In 1983, the appellant contracted with John R. Hess, Inc. (hereinafter "Hess"), a Pennsylvania corporation, for the construction of a new broadcast facility in Huntington, West Virginia. The facility was constructed in accordance with plans prepared by Stieglitz, Stieglitz, Tries, P.C., Architects/Planners (hereinafter "Stieglitz"). Hess executed a performance bond with the appellee, Insurance Company of North America (hereinafter "INA" or "appellee"), a Pennsylvania corporation, whereby INA became surety for Hess's completion of the contract. The performance bond provides that "[a]ny suit under this bond must be instituted before the expiration of two (2) years from the date on which final

payment under the Contract falls due." The construction of the new broadcast facility was completed in 1985, and Hess was paid all amounts owed to it by the appellant.

On April 10, 1990, the appellant filed an action in the Circuit Court of Cabell County against Hess, Stieglitz, and INA, in which it alleged damage to the facility as a result of water leakage which was discovered in 1989. According to the appellant, the water leakage was caused by Hess's failure to construct underground drainage facilities in accordance with the contract. In its complaint, the appellant claimed breach of contract, breach of express and implied warranties, and negligence against Hess, and breach of contract against Stieglitz. In addition, the appellant sought a declaratory judgement as to the duties owed to it by INA, as surety, under the performance bond.[1]

Stieglitz eventually reached a settlement with the appellant and was dismissed from the action. In October 1991, during the pendency of the proceedings, Hess filed a petition for Chapter 7 bankruptcy which automatically stayed the appellant's action against it.[2] In March 1997, INA moved to dismiss the appellant's action on the ground that it was untimely under the express provisions of the performance bond. The circuit court agreed

---

[1]Also, the appellant sought a declaration of the duties of Hess and INA arising from an indemnity agreement executed by the parties. The indemnity agreement is not relevant to the issue before us.

[2]*See* 11 USC § 362 (1994). It appears from the record that Hess was dissolved in 1993 and did not again participate in the underlying action.

and by order of October 18, 1999 dismissed the appellant's complaint. The appellant challenges this dismissal.

II.

STANDARD OF REVIEW

This case was dismissed by the circuit court during the pleading stage because, in its view, the appellant's action was untimely. We have said that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick,* 194 W.Va. 770, 775, 461 S.E.2d 516, 521 (1995) (citation omitted). With this standard as our guide we now consider the issue before us.

III.

DISCUSSION

The appellant asserts that the time limitation for bringing an action contained in the performance bond is voided by the unambiguous language of W.Va. Code § 33-6-14 (1957)[3] which states in pertinent part:

> No policy delivered or issued for delivery in West Virginia and covering a subject of insurance resident, located, or to be performed in West Virginia, shall contain any condition, stipulation or agreement . . . limiting the time within which an action may be brought to a period of less than two years from the time the cause of action accrues. . . . Any such condition, stipulation or agreement shall be void[.]

The appellant reasons that its cause of action accrued in 1989 when it discovered the defect in the construction of the facility. Accordingly, the performance bond provision limiting the bringing of the action to within two years from the date of final payment under the contract is void.

[3]The parties do not dispute the applicability of W.Va. Code § 33-6-14 to the performance bond at issue. According to W.Va. Code § 33-1-10(f)(2) (1986), surety insurance, which is covered by Chapter 33 of the Code, includes "[i]nsurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship[.]"

The appellee responds that according to W.Va. Code § 55-2-6a (1983),[4] an action, such as the instant one, to recover damages for deficiencies in construction and improvements to real property accrues when the real property is occupied or accepted by its owner, whichever occurs first. Because the appellant's acceptance of the new facility occurred on June 7, 1985, upon final payment, the appellant's action accrued at that time and had to be brought no later than June 7, 1987. Therefore, avers the appellant, the time limitation in the performance bond is entirely consistent with W.Va. Code § 33-6-14. The appellant also contends that this Court has declined to extend the discovery rule to actions brought under W.Va. Code § 55-2-6a. *Citing Cart v. Marcum,* 188 W.Va. 241, 423 S.E.2d 644 (1992) and *Shirkey v. Mackey,* 184 W.Va. 157, 399 S.E.2d 868 (1990).

---

[4]W.Va. Code § 55-2-6a (1983) states, in part:

> No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or, to recover damages for any injury to real or personal property[] . . . may be brought more than ten years after the performance or furnishing of such services or construction[]. . . . The period of limitation provided in this section shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of real property, whichever occurs first.

The sole issue in this case is whether the performance bond's limitation period for bringing an action to within two years from the due date of the final payment of the construction contract is void under W.Va. Code § 33-6-14 which says that an insurance policy issued in this State shall not limit the time for bringing an action to less than two years from the time the cause of action accrues. In order to resolve this issue, it is necessary to determine when the causes of action brought under the bond accrued. If any of these causes of action accrued later than the due date of the final payment of the construction contract, the bond's limitation period is void as it relates to that specific cause of action.

To determine what actions were brought under the performance bond, and when those actions accrued, we look to the actions the appellant brought against Hess arising from Hess's construction of the broadcast facility. As surety under the performance bond executed by INA and Hess, INA generally shares Hess's liability for any default under the construction contract. This is because the performance bond is a contract of suretyship and "[i]n a contract of suretyship the obligation of the principal and his surety is original, primary, and direct, and the surety is liable for the debt, default, or miscarriage of his principal." Syllabus Point 3, in part, *U.S. Fidelity and Guar. Co. v. Hathaway,* 183 W.Va. 165, 394 S.E.2d 764 (1990). We have recognized that "[a]s a general rule, the liability of the surety is coextensive with that of the principal." *State ex rel. Mayle v. Aetna Casualty & Surety Co.*, 152 W.Va. 683, 687, 166 S.E.2d 133, 136 (1969) (citations

omitted). It must be remembered, however, that "[t]he liability of a surety is a legal as distinguished from a moral one. His obligation arises out of positive contract, and the contract . . . generally measures the extent of [the surety's] liability." 74 Am.Jur.2d *Suretyship*, § 24, p. 27 (1974) (footnotes omitted). Accordingly, INA's liability as surety is limited by the obligations it undertook in the performance bond. We now proceed to examine the causes of action that the appellant brought against Hess, the accrual dates of the causes of action, and the potential liability of INA, as Hess's surety, under the performance bond.

In the first two counts of its complaint, the appellant alleges breach of contract and breach of express and implied warranties against Hess. "[T]he statute of limitations begins to run [and these contract actions accrue] when the breach of the contract occurs or when the act breaching the contract becomes known." *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 749, 466 S.E.2d 810, 817 (1995). It has also been said that "a right of action upon a contract does not accrue and the statute of limitations does not begin to run until the agreement is to be performed or payment becomes due." 51 Am Jur 2d, *Limitation of Actions*, § 160, p. 555 (2000) (footnote omitted). "Generally, the statute of limitations begins to run, when a construction contract is involved, when the work is completed[.]" 54 C.J.S., *Limitations Of Actions*, § 131, p. 175 (1987) (footnote omitted).

Applying these rules to the instant facts, we conclude that the appellant's contract actions against Hess accrued either in 1984 when the work was completed[5] or in 1985[6] when the appellant made its final payment on the construction project. Although the appellant alleges that it did not discover the breach of contract until 1989, this Court has not expressly held that the discovery rule tolls the running of limitation periods in actions arising from breaches of construction contracts.[7] INA would obviously be liable, under the performance bond, for Hess's breach of the construction contract. However, the performance bond limits the institution of an action under the bond to within two years from the date on which final payment under the contract fell due which, we have determined, is also the last date on which the appellant's contract action could have accrued. Therefore, the performance bond does not limit the time within which an action may be brought to a period of *less than* two years from the time the cause of action accrued in violation of W.Va. Code § 33-6-14. Accordingly, the circuit court did not err in dismissing the appellant's contract actions on the performance bond as untimely.

---

[5]The appellant states in its brief that a certificate of substantial completion was issued dated September 24, 1984.

[6]The appellee states in its brief that the appellant made full and final payment to Hess on or before June 7, 1985.

[7]Some courts have applied the discovery rule to breach of construction contract cases while other courts have expressly declined to do so. *See* Sonja Larsen, J.D., *Modern Status Of The Application Of "Discovery Rule" To Postpone Running of Limitations Against Actions Relating To Breach Of Building And Construction Contracts,* 33 A.L.R.5th 1 (1995).

In count three of its complaint, the appellant alleged that "Hess negligently performed its acts of duty and obligation in the construction of the . . . project," which this Court construes as an action in tort. In Syllabus Point 4, in part, of *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988) we held that "[a] builder is under a common law duty to exercise reasonable care and skill in the construction of a building[.]" Therefore, we believe that the appellant could properly bring a tort action against Hess for negligent construction. The next question is whether the appellant can hold INA, as surety under the performance bond, liable for Hess's alleged negligent construction.

As noted above, INA's liability as Hess's surety arises out of the performance bond and is limited by the provisions of that instrument. Further, this Court has recognized that the purpose of a performance bond is to guarantee that the contractor will perform the construction contract. *See Middle-West Concrete v. General Ins. Co.*, 165 W.Va. 280, 283 n. 2, 267 S.E.2d 742, 745 n. 2 (1980) ("A performance bond guarantees that the contractor will perform the contract and usually provides that if the contractor defaults and fails to complete the contract, the surety can itself complete the contract or pay damages up to the limit of the bond"). Conversely, the purpose of a performance bond is not to insure against the negligent acts of the contractor unless the performance bond so provides.

The performance bond at issue is titled "The American Institute Of Architects Performance Bond" (AIA Document A311). Under the terms of the bond, Hess and INA "are held and firmly bound" unto the appellant, as obligee, in the amount of $1,899,000 "for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally[.]" The construction contract between the appellant and Hess is by reference made a part of the performance bond. The bond further provides:

> NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.
>
> The Surety hereby waives notice of any alteration or extension of time made by the Owner.
>
> Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default, or shall promptly
>
> 1) Complete the Contract in accordance with its terms and conditions, or
>
> 2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the Owner elects, upon determination by the Owner and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Owner, and make available as Work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety

> may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by Owner to Contractor under the Contract and any amendments thereto, less the amount properly paid by Owner to Contractor.
>
> Any suit under this bond must be initiated before the expiration of two (2) years from the date on which final payment under the Contract falls due.
>
> No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of the Owner.

By the plain terms of the bond, INA's obligation as surety commences only when the contractor is "in default under the Contract." The words "default under the Contract" clearly limit INA's liability to breaches of the construction contract committed by Hess, and not to Hess's tortious conduct. To hold that INA is liable for Hess's negligent acts in the construction of the broadcast facility would transform INA into Hess's liability insurer, a result that clearly is not contemplated in the terms of the performance bond. Therefore, we conclude that INA's obligation as Hess's surety under the performance bond does not extend to negligent acts committed by Hess in its performance of the construction contract.

We also believe that this conclusion does not reach an inequitable result in the present case. When the appellant contracted with Hess for the construction of its new facility, it demanded that Hess execute a performance bond to guarantee the performance

of the contract. According to INA, the appellant specifically requested the AIA performance bond. Further, the appellant received a copy of the performance bond and was aware that INA guaranteed Hess's completion of the contract, and that any suit brought under the performance bond must be brought within two years from the final payment on the contract. The appellant cannot now complain about the provisions of the performance bond when it was aware of these provisions from the beginning.

In summary, we have decided that any action brought by the appellant against INA under the performance bond is limited to a contract action. W.Va. Code § 33-6-14 says that an insurance policy shall not limit the time for bringing an action to less than two years from the time the cause of action accrues. The appellant's contract actions against Hess, and INA as Hess's surety, accrued either in 1984 when the work was completed or in 1985 when the appellant made its final payment on the construction project. Therefore, the performance bond does not impermissibly limit the time within which the appellant can bring an action to less than two years from the date the cause of action accrues because the date on which final payment under the contract fell due is also the last date on which the appellant's contract action could have accrued for the purpose of W.Va. Code § 33-6-14. Because the appellant did not bring its contract action under the bond until 1990, approximately five years from the date on which final payment under the construction

contract fell due, and its cause of action accrued, the appellant's contract action against INA is untimely.[8]

III.

CONCLUSION

For the foregoing reasons, the final order of the circuit court dismissing the appellant's action against INA, as Hess's surety, as untimely is affirmed.

Affirmed.

[8]INA argues that the appellant's action is foreclosed by W.Va. Code § 55-2-6a which states that an action to recover for defective construction accrues when the real property is occupied or accepted by the owner. INA's reliance on W.Va. Code § 55-2-6a is misplaced. In Syllabus Point 2 of *Gibson v. W.Va. Dept. of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991), we characterized W.Va. Code § 55-2-6a as a statute of repose as distinguished from a statute of limitation. "A statute of limitations ordinarily begins to run on the date of the injury; whereas, under a statute of repose, a cause of action is foreclosed after a stated time period regardless of when the injury occurred." Syllabus Point 2, *id*. Further, in the syllabus of *Shirkey v. Mackey*, 184 W.Va. 157, 399 S.E.2d 868 (1990), we held that "West Virginia Code § 55-2-6a (1983) sets an arbitrary time period after which no actions, whether contract or tort, may be initiated against architects and builders. Pre-existing statutes of limitation for both contract and tort actions continue to operate within this outside limit."