IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3649

Summary Calendar

TRAVELERS INSURANCE COMPANY, THE,

Plaintiff,

v.

J.A. JONES CONSTRUCTION COMPANY, ET AL.,

Defendants.

* * * * * * * * * * * * * * * * * * * *

RTKL ASSOCIATES INC.,

Third Party Plaintiff-Appellant,

v.

SOUTHEAST DISTRIBUTORS, INC., ET AL.,

Third Party Defendants,

TRANSAMERICA INSURANCE COMPANY and
INSURANCE COMPANY OF NORTH AMERICA,

Third Party Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92-1966 M)

(March 30, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

RTKL Associates, Inc. (RTKL), filed a third party demand against Transamerica Insurance Company (Transamerica) and Insurance Company of North America (INA). The district court granted summary judgment for Transamerica and INA. RTKL appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Travelers Insurance Company (Travelers) is the present owner of a project known as Canal Place II. RTKL was the architect on the project, and J.A. Jones Construction Company (J.A. Jones) was the general contractor for the project. Because of alleged defects in the project, Travelers brought suit against RTKL and J.A. Jones.

RTKL filed a cross-claim for contribution against J.A. Jones and a third party demand against various subcontractors including The Robert M. Vickery Company (Vickery) and the Binswanger Glass Company (Binswanger). RTKL also filed a third party demand against Transamerica and INA. Transamerica and INA had issued performance bonds for Vickery and Binswanger respectively.

INA filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), and Transamerica filed a motion for summary judgment.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Both INA and Transamerica contended, inter alia, that RTKL was not a beneficiary of their performance bonds and therefore had no right to recover under the performance bonds. The district court treated the motions filed by INA and Transamerica as motions for summary judgment, and it granted the motions. The district court determined that the plain and unambiguous language of the bonds excluded a right of action for anyone except the general contractor, J.A. Jones. The district court's ruling was certified as a final judgment pursuant to FED. R. CIV. P. 54(b).

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the criteria which the district court used in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Dawson, 4 F.3d at 1306. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. DISCUSSION

RTKL asserts that the district court erred in granting summary judgment for Transamerica and INA because Transamerica and INA are solidary obligors from whom RTKL is entitled to seek contribution. According to RTKL, because the bonds issued by

Transamerica and INA incorporated both the subcontract and the general contract into the bonds themselves, the performance bonds, subcontract, and the general contract all operate as one contract to bind Vickery and Transamerica, and Binswanger and INA in the solidary obligation to perform defect free work on the project. Initially, RTKL notes that both bonds provide that:

> KNOW ALL MEN BY THESE PRESENTS: that [Binswanger or Vickery], as Principal, hereinafter called Subcontractor, and [Transamerica or INA] as Surety, hereinafter called Surety, are held and firmly bound unto J.A. JONES CONSTRUCTION COMPANY, One South Executive Park, Charlotte, North Carolina 28231, as Obligee, hereinafter called General Contractor, in the amount of . . . for the payment whereof Subcontractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents (emphasis added).

RTKL argues that this underlined portion solidarily binds INA with Binswanger and Transamerica with Vickery for the performance of the subcontractor's work.

Next, RTKL points out that the bonds further provide that the "subcontract, as duly modified or amended from time to time, is by reference made a part hereof and is hereinafter referred to as the Subcontract." Furthermore, the subcontracts provide that the

> Subcontractor shall be bound by all the terms of the Contract and assumes all the obligations of Contractor as stated therein, which are applicable to this Subcontract, including any provisions of the Contract required to be asserted or incorporated into this and other subcontracts, and all such terms, obligations and provisions of the Contract are hereby inserted and incorporated into this subcontract as fully as though copied herein.

By incorporating the general contract into the performance bonds, RTKL argues that Transamerica and INA expressly agreed to assume

all of the obligations which J.A. Jones owed to the owner, Travelers. Thus, RTKL asserts, Vickery, Binswanger, Transamerica, and INA have all agreed to be bound to Travelers. RTKL further asserts that a careful reading of the specific obligations assumed by Vickery, Binswanger, INA, and Transamerica demonstrates that the underlying purpose of all the documents was to provide the owner with a defect free project.

RTKL asserts that because Transamerica and INA willingly and expressly agreed to be bound to the owner, RTKL can seek contribution from them under the provisions of LA. CIV. CODE ANN. arts. 1797, 1805 (West 1987). Article 1797 provides that "[a]n obligation may be solidary though it derives from a different source for each obligor." Article 1805 provides that

> [a] party sued on an obligation that would be solidary if it exists may seek to enforce contribution against any solidary co-obligor by making him a third party defendant according to the rules of procedure, whether or not that third party has been initially sued, and whether the party seeking to enforce contribution admits or denies liability on the obligation alleged by plaintiff.

Transamerica and INA both assert that J.A. Jones is the sole beneficiary of their bonds. They rely on the following provision:

> No right of action shall accrue on this bond to or for the use of any person or corporation other than the General Contractor named herein or the heirs, executors, administrators or successors of the General Contractor.

INA and Transamerica argue that RTKL is not a third party beneficiary of the bond because Louisiana law clearly provides that, absent a contrary provision, actions ex contractu cannot be

maintained against an individual by an individual who was not a party to the contract.

In Fireman's Fund Am. Ins. Cos. v. Milstid, 253 So. 2d 571 (La. Ct. App.), writ denied, 255 So. 2d (La. 1971), a supplier sought to recover funds from the general contractor's surety, Fireman's Fund. The court held that the supplier had no cause of action on the bond because

> [b]y the very terms of the bonds . . . no cause of action shall accrue to anyone other than the owner . . . . The trial judge correctly determined this to be a conventional contract of surety to be governed by the related statutory law. Civil Code Article 3039 provides for such agreements in the following way: "Suretyship can not be presumed; it ought to be expressed, and is to be restrained within the limits intended by the contract."
>
> The limits of this contract have been clearly expressed between the parties; the sole obligee on the bond is [the owner]. That obligee only possesses a cause of action on the performance bond.

Id. at 574. Likewise, in Gateway Barge Line, Inc. v. R.B. Tyler Co., 175 So. 2d 867 (La. Ct. App. 1965), a barge company filed suit against a subcontractor's surety to recover barge rentals which the subcontractor had not paid. The barge company argued that it could maintain a cause of action against the surety because the bond incorporated provisions of the subcontract that obligated the subcontractor to provide a surety bond which guaranteed the payment of material, labor, and equipment rental. Id. at 870. The court held that the barge company did not have a right of action against the surety. Id. The court stated that to hold otherwise would be tantamount to creating a contract of suretyship "by implication and presumption, whereas the Article provides that the obligation must be specific and expressed."

Id. The court went on to state that a third party can enforce a contract only when the contract demonstrates that it was executed for his benefit. Id.

RTKL attempts to distinguish the Milstid and Gateway cases by arguing that those cases all involved suppliers or materialmen who sought payment for their own direct losses under a performance bond. RTKL asserts that those cases should be construed as holding that a performance bond will not be expanded to a payment bond unless the parties clearly intended the bond to be a payment bond.

RTKL further asserts that the clause in the bonds which attempts to limit a cause of action to J.A. Jones is at best extremely ambiguous when read with the entire bond, and at worst is completely contradictory to the intent of the bond as expressly stated on the face of the bond. Either way, argues RTKL, the clause must be construed against the sureties because they wrote the contracts.

Because INA and Transamerica are sureties of a subcontractor, they are conventional sureties whose obligations are governed by Louisiana contract law, rather than statutory sureties whose obligations are governed by the Private Works Act. Emile M. Babst Co. v. United States Fidelity and Guaranty Co., 497 So. 2d 1358, 1360 (La. 1986). "A conventional bond must be interpreted so as to give effect to the common intent of the parties." We agree with the district court that the bonds in question are not ambiguous, and that RTKL has no right of action

on the bonds. We note initially that RTKL's assertion that the subcontracts at issue in this case obligate Binswanger, Vickery and the sureties to all of the terms of the general contract is not completely accurate. Rather, the subcontract provides that the subcontractor is bound by the terms of the general contract to the extent that the general contractor's obligations "are applicable to this Subcontract." The bonds clearly provide that the general contractor is the only party with a right of action. The incorporation of the subcontracts and the general contracts into each of the bonds in question is not inconsistent with the parties' intent of limiting a right of action to J.A. Jones. Rather, this incorporation should be viewed merely as a means of defining the scope of each subcontractor's obligation to J.A. Jones.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.