IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GEORGIA HILLER,

Appellant/Defendant,

v.

PHOENIX ASSOCIATES OF SOUTH FLORIDA, INC.,

Appellee/Plaintiff.
_____/

Case No. 2D15-2827
L.T. No.: 11-2014-CA-002390

ON APPEAL FROM A NONFINAL ORDER OF THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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III. REPLY ARGUMENT

The Answer Brief is a legal anachronism. Phoenix's argument belongs in a different era; it has no merit after the Florida Legislature amended section 713.24 in 2005. As Phoenix did in the trial court, it continues to rely almost exclusively on a case which no longer is good law, *Am. Fire & Cas. Co. v. Davis Water & Waste Indus., Inc.*, 358 So. 2d 225 (Fla. 4th DCA 1978), *aff'd*, 377 So. 2d 164 (Fla.1979).

Phoenix argues that the transfer of its lien to a bond, *after* Phoenix had filed suit to foreclose its lien, had no effect on its rights. Thus, despite the transfer of the lien to a bond *during the lien enforcement proceeding*, and despite the service of a Notice of Contest, Phoenix suggests it was not required to take action against the bond or the surety within any deadline. Instead, Phoenix could simply continue with its lien foreclosure case.

Before 2005, the statute and the case law interpreting it likely supported Phoenix's argument. *E.g.*, *Am. Fire*. But after 2005, that argument is wrong. The Florida Legislature amended section 713.24(4), Fla. Stat. (2005), which now clearly and unambiguously applies to the very situation Phoenix found itself in B a bond was posted during the pendency of a lien foreclosure claim. *Am. Fire* was abrogated or superseded by the 2005 statutory amendment, as noted in the well-

reasoned opinion in *Cool Guys, LLC v. Jomar*, 84 So. 3d 1076, 1078 (Fla. 4th DCA 2012).

Section 713.24(4) provides, as its first sentence, that "[i]f a proceeding to enforce a transferred lien is not commenced within the time specified in s. 713.22," the clerk ***shall*** return the bond. The relevant statutory change was made in the second sentence, amended as follows:

> If a proceeding to enforce a lien is commenced in a court of competent jurisdiction within the time specified in s. 713.22 and, ***during such proceeding, the lien is transferred pursuant to this section or s. 713.13(1)(e)***, an action commenced within 1 year after the transfer, unless otherwise shortened by operation of law, in the same county or circuit court to recover against the security shall be deemed to have been brought as of the date of filing the action to enforce the lien, and the court shall have jurisdiction over the action.

'713.24(4), Fla. Stat. (2005).

Breaking down this second sentence of section 713.24(4):

> $ "If a proceeding to enforce a lien is commenced in a court of competent jurisdiction" B **Phoenix filed an action to enforce its lien.**
>
> $ "and, during such proceeding, the lien is transferred pursuant to this section" B **Hiller transferred the lien to a bond and served a Notice of Contest.**
>
> $ "an action commenced within 1 year after the transfer, ***unless otherwise shortened by operation of law***, . . . to recover against the security " B **Phoenix failed to sue on the bond within 60 days.**

Phoenix tries to excuse its failure to sue the surety on the bond within 60 days of Hiller serving a Notice of Contest, by suggesting so long as it had a pending lien enforcement action, the transfer of the lien to a bond had no effect on

it. But that argument fails under the 2005 amendment. The phrase "during such proceeding," added to section 713.24(4), contemplates exactly this situation.

Phoenix also asserts that Hiller has misconstrued the statute by interpreting it to require some action on the part of the contractor "even if an action had been previously commenced to enforce a lien." Answer Br. at 32. However, by its clear and unambiguous terms, the amended language applies only when there already is a pending proceeding B one previously commenced to enforce a lien which is later transferred to a bond. There is no logic in Phoenix's argument; it is just an improper invitation to ignore (i) the 2005 amendment and (ii) *Cool Guys*.[1]

Phoenix received a Notice of Contest (which Phoenix implicitly concedes was valid because it was not challenged in the Answer Brief). Phoenix did not take the required action within 60 days (another fact Phoenix implicitly concedes). The

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[1] *Cool Guys* rejected the very argument Phoenix raises that the statute does not require more than one action be commenced (Answer Br. at 17):

> Appellant urges us to find that the rule announced in *American Fire* continues to be the law for cases like the instant one where the lien is transferred to security during the pendency of lien foreclosure litigation and the lienor subsequently seeks to join the surety in the pending action and ***that the sentence added to section 713.24(4) applies only where the lienor seeks to file an entirely separate action against the surety.*** We see no basis for reading the statute in this manner . . . . Thus, the legislature was aware of the *American Fire* holding and also aware of decisions from the district courts reaching a different result where suit was brought after the lien was transferred to bond. *Id*. at 1078.

deadlines in Florida's Construction Lien Law must be *strictly* construed and applied inflexibly. *Pierson D. Const., Inc. v. Yudell*, 863 So. 2d 413, 416 (Fla. 4th DCA 2003). Under section 713.22, because the property owner elected to serve a Notice of Contest, shortening the statute of limitations, the claim on the bond had to be filed "within the 60 day limitation period of section 713.22(2)." *Id*. at 416.

No matter how many times Phoenix repeats the name *Am. Fire,* that case no longer applies. In fact, in its Answer Brief, Phoenix cites *Am. Fire* at least 19 times. According to Westlaw's KeyCite service, *Am. Fire* has been cited in only eight reported decisions since the opinion was issued, and only once after 2005. The seven decisions from 1978 to 1989[2] are neither helpful nor relevant to the interpretation of the 2005 statutory amendments. Only the eighth and final reported decision, *Cool Guys*, is relevant to this appeal. *Cool Guys* was decided in favor of Hiller's position.

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[2] *See*, *Canam Systems, Inc. v. Lake Buchanan Development Corp.*, 375 So. 2d 582, 583 (Fla. 5th DCA 1979); *Marks Landscape & Paving Co. v. R.P.B. Indus. Park, Inc.*, 552 So. 2d 256, 257 (Fla. 4th DCA 1989); *McCurry v. Eppolito*, 506 So. 2d 1110, 1115 (Fla. 1st DCA 1987); *Sewer Viewer, Inc. v. Shawnee Sunset Developers, Inc.*, 454 So. 2d 701, 702 (Fla. 2d DCA 1984); *Pembroke Villas of Broward, Inc. v. Raymundo*, 447 So. 2d 324, 325 (Fla. 4th DCA 1984); *Baumgartner Const. Co., Inc. v. Harrell*, 364 So. 2d 802, 803 (Fla. 1st DCA 1978); *Hutnick v. U.S. Fidelity & Guaranty Co.*, 253 Cal. Rptr. 236, 240 (Cal. 1988)(in bank).

Cool Guys is directly on point and includes a detailed analysis of the issue in this case, as interpreted under the new statute. Phoenix cites *Cool Guys* only once, and mentions it just three times overall. While not surprising, this speaks volumes as to the quality of Phoenix's position. *Cool Guys* is extensively discussed in the Initial Brief, but its holding bears repeating:

> It is clear from the language that if a lien foreclosure suit is pending and the lien is transferred to security during the pendency of that litigation, a claim to recover against the transferred security must be brought within one year of the transfer.

Id. at 1078.

In this case, the one year period was shortened to 60 days, by operation of law, once Hiller served a Notice of Contest. Phoenix admittedly missed that deadline. It is that simple. The bond must be released. Although Phoenix argues that it complied with the timing requirements of section 713.22 as to its lien enforcement action, it did not comply with the deadline once the lien was transferred to a bond. Phoenix failed to comply with section 713.24(4) in bringing a claim on the bond. The statute dictates the result of such failure: "the clerk shall return said security upon request of the person depositing or filing the same, or the insurer." *Id*. If the bond had been returned, the parties would move forward with the remaining claims and counterclaims in the case, just without a lien claim and without a bond claim.

Phoenix's entire argument in section I.A of its Answer Brief is misguided by its reliance on the older version of the statute. Phoenix cites only cases interpreting the old statute, primarily *Am. Fire*, but also many other cases from the 1960s, 1970s and early 1980s. Everything that needs to be said in response is covered by the 2005 amendment, *Cool Guys* and the arguments set forth in the Initial Brief.

Phoenix's argument on joinder of the surety is equally wrong. Section 713.24(4) expressly addresses this issue and requires that an action against the surety be commenced within 60 days of the filing of a Notice of Contest, which by operation of law shortens the time limit to 60 days. *See, Pierson D. Const.,* 863 So. 2d at 416. There is no other way to read section 713.24(4).

Cool Guys expressly addresses this issue. Case law from a half-century ago is of no assistance to understanding the 2005 amendment. *E.g.*, *Triangle Dist. Inc. v. Travelers' Indem. Co. of Hartford, Conn.*, 195 So. 2d 237 (Fla. 3d DCA 1967). Nor is any meaningful help provided by a case addressing a replevin bond. *E.g., Tokay Towing & Recovery, Inc. v. Kronen*, 906 So. 2d 1269 (Fla. 2d DCA 2005). Because there was no timely proceeding to enforce the transferred lien, the bond "shall" be returned.

IV. CONCLUSION

As explained in the Initial Brief, Hiller implemented the procedures under Florida's Construction Lien Law to contest and shorten Phoenix's time to sue on the bond. Phoenix failed to meet the statute's requirement. Thus, Hiller is entitled to the immediate return of the lien transfer bond.

The trial court applied the wrong version of the statute and followed the wrong law. The Order under review, denying Hiller immediate possession of the bond, must be reversed, and the case remanded with instructions that the trial court immediately release the lien transfer bond to Hiller.

V. CERTIFICATE OF SERVICE

WE CERTIFY that the foregoing Reply Brief has been electronically filed and that a copy has been furnished to all counsel and parties on the attached service list by e-mail portal service this 29th day of September, 2015.

VI. CERTIFICATE OF COMPLIANCE

WE CERTIFY that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) because this is a computer-generated brief and is submitted in Times New Roman 14-point font.

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