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Record No. 6841

In the Supreme Court of Appeals of Virginia at Richmond

CONTEE SAND AND GRAVEL COMPANY, INC.

v.

RELIANCE INSURANCE COMPANY

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6841

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 1st day of December, 1967.

CONTEE SAND AND GRAVEL COMPANY, INC., Plaintiff in error,

against

RELIANCE INSURANCE COMPANY, Defendant in error.

From the Circuit Court of the City of Norfolk
Clyde H. Jacob, Judge

Upon the petition of Contee Sand and Gravel Company, Inc., a corporation, a writ of error is awarded it from orders entered by the Circuit Court of the City of Norfolk on June 1, 1967, and July 25, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Reliance Insurance Company was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $300, with condition as the law directs.

RECORD

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page 1 }

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ASSIGNMENTS OF ERROR

1. Under the stipulations, evidence and law, the Court erred in sustaining the defendant's Motion to Dismiss and entering judgment for the defendant upon the ground that no suit or action was commenced against the defendant within one year following the date on which the principal ceased work and further the Court erred in ruling that there was no claim by the plaintiff that the defendant was guilty of fraud which resulted in a delay of the filing of the suit by the plaintiff, and the Court erred in ruling that the defendant was not *estopped* by its conduct from asserting the defense that the suit was not commenced within the one year period as required by the bond.

page 2 } 2. Under the stipulations, evidence and law, the Court erred in overruling the plaintiff's Motion to Set Aside the Court's Order of June 1, 1967 sustaining the defendant's Motion to Dismiss on the grounds that same was contrary to the law and the evidence.

CONTEE SAND AND GRAVEL
COMPANY, INC., a corporation

By WILLIAM E. BAGGS
Attorney

Filed 7-27-67. T. A. W. GRAY, D.C.

* * * * *

page 14 }

* * * * *

MOTION TO DISMISS

The defendant, Reliance Insurance Company, hereby moves the Court to dismiss a motion for judgment filed herein on the following grounds:

1. It alleges that Carter Contracting Company, Inc. ceased work on the contract described in that certain Labor and Material Payment Bond, which is referred to by the plaintiff in paragraph 5 of the motion for judgment, in 1964, or in any event, on a date which was more than one year preceding the filing of the motion for judgment herein. Pursuant to the provisions of Rule 3:11, Rules of the Supreme Court of Appeals of Virginia, the defendant expressly requests a reply to this allegation.

2. It alleges that paragraph 3 of the Labor and Material Payment Bond, which is referred to by the plaintiff in paragraph 5 of the motion for judgment filed herein, provides as follows:

"3. No suit or action shall be commenced hereunder by any claimant.

"b) After the expiration of one (1) year following the date on which Principal ceased work on said Contract, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling page 15 } the construction hereof such limitation shall be deemed to be amended so as to be equal to the minmium period of limitation permitted by such law."

Pursuant to the provisions of Rule 3:11, Rules of the Supreme Court of Appeals of Virginia, the defendant expressly requests a reply to this allegation.

RELIANCE INSURANCE COMPANY

By JAMES L. MILLS
Counsel

WILLIAMS, COCKE, WORRELL & KELLY, p.d.
1200 Maritime Tower
Norfolk, Virginia

Filed 12-12-66. DAVE WARD, D.C.

* * * * *

page 18 }

* * * * *

This case came on to be heard by the Court on May 23, 1967 on the motion to dismiss filed by the defendant, the reply to said motion to dismiss filed by the plaintiff, the stipulations of the parties and the evidence introduced that day before the Court, and was argued by counsel.

It appearing to the Court that this suit was instituted by the plaintiff against the defendant on September 29, 1966 under the provisions of a certain labor and material payment bond, dated October 25, 1963; that said bond provides that no suit or action shall be commenced thereunder by any claimant after the expiration of one year following the date on which the principal ceased work on the contract described in said bond; that the principal had ceased work on said contract in September or October 1964; that there is no claim by the plaintiff that the defendant was guilty of fraud which resulted in a delay in the filing of the suit by the plaintiff; and that the defendant was not *estopped* by its conduct from asserting the defense that the suit was not instituted within the one-year period required by the terms of the aforesaid bond;

page 19 } It is ORDERED that the motion to dismiss filed by the defendant be, and the same hereby is, SUSTAINED and judgment is hereby entered for the defendant, to all of which action of the Court the plaintiff, by counsel, duly excepts.

Enter this Order: 6-1-1967. C. H. J., Judge

Seen: objected and exception taken

WM. E. BAGGS, p.q.
JAMES L. MILLER, p.d.

* * * * *

page 21 }

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ORDER

On June 7, 1967 the plaintiff, by counsel, and the defendant, by counsel, came upon the plaintiff's Motion to set aside the Court's Order entered on June 1, 1967, on the grounds that the same is contrary to the law and the evidence.

The plaintiff's grounds were that the defendant and its agent were barred by the doctrine of equitable estoppel from asserting the defense that the suit was not instituted within the one year period required by the terms of the bond; that by reason of the defendant's and its agent's conduct the aforesaid bond provision had been waived or else the defendant was estopped; that the defendant and its agent were guilty of constructive fraud which would not toll a Statute of limitation but would under these circumstances bar or estop the defendant from asserting the aforesaid bond provision; and that the plaintiff had satisfied the aforesaid provision by suing the principal within the year period.

The Court heard argument from counsel on these points and, after due consideration:

ORDERED that the plaintiff's Motion to set page 22 } aside the Court's Order of June 1, 1967 was overruled.

To which action the plaintiff noted its objection and exception to the Court's ruling.

Enter July 25, 1967. C. H. J.

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page 4 }

* * * * *

Mr. Baggs: I think first I will just read the stipulation we have entered into and enter into the evidence these documents.

The Court: Very well, sir.

Mr. Baggs: "On October 25, 1963, Standard Accident Insurance Company (now Reliance Insurance Companies) issued through its agent, Littleton W. Parks, a Labor and Material Payment Bond with Carter Contracting Company as Principal, Standard Accident Insurance Company as Surety, and Jeanne Dixon and James L. Dixon and American

National Bank of Maryland as Obligees in the amount of $33,000 for the construction of a 7-Eleven Store at Bowie Road and Marshall Avenue, Laurel Maryland." And a copy of said bond is attached as Exhibit Number 1.

* * * * *

The Court: All right. Let it be a stipulation, and page 5 } it may be marked an exhibit by both sides.

Mr. Baggs: Yes.

Mr. Miller: Yes, Your Honor.

The Court: That's all right.

Go ahead, sir.

Mr. Baggs: "In late April, 1965, the plaintiff retained William E. Baggs to collect from Carter Contracting Company of Norfolk, Virginia, their claim in the amount of $4,160.49 for work done at aforesaid 7-Eleven Store, Laurel, Maryland.

"On or about May 3, 1965, plaintiff's attorney talked by phone with J. L. Carter, President of Carter Contracting Company, explaining to him that the plaintiff had employed him to collect from Carter Contracting Company the aforesaid amount claimed on the said 7-Eleven Store, Laurel, Maryland. Mr. Carter replied that Carter Contracting Company was bankrupt in a big way; that he had so many jobs that he did not know what bond was on this job and referred Mr. Baggs to Littleton Parks of the Walke-Parks Insurance Corporation as they had written all of Carter Contracting Company's bonds.

"On the same day Plaintiff's attorney called Mr. Parks explaining that he represented the plaintiff in col- page 6 } lecting monies due from Carter Contracting Company on the aforesaid job and that Mr. Carter had referred him to Mr. Parks. Mr. Parks acknowledged that they had written bonds for Carter Contracting Company and upon checking told plaintiff's attorney that the only bond issued by Parks for this particular job was an 'Owner' or 'Performance' type of bond which would not inure to the benefit of a material man such as the plaintiff. Parks had in fact issued a 'Performance Bond' on this particular job dated October 16, 1963. Mr. Parks suggested that plaintiff's attorney write to the Home Office in Philadelphia and gave plaintiff's attorney the bond information and the address of the Home Office. Thereafter, on May 3, 1965, plaintiff's attorney did write to the Home Office inquiring as to the conditions of the bond referred to by Mr. Parks. Thereafter, plaintiff's attorney received a letter dated May 5, 1965,

from the defendant," and the same is asked to be marked Exhibit Number 2 by both the parties.

We would also like to introduce into evidence as Exhibit Number 3 my letter to Reliance Insurance Company—I'm sorry—plaintiff's attorney's letter to Reliance Insurance Company.

page 7 } (Three documents have been marked by the Court as Exhibits up to this point.)

Mr. Baggs: "On or about May 21, 1965, the plaintiff instituted suit in the Circuit Court of the City of Norfolk against Carter Contracting Company, Inc. in the amount of $4,160.49. On or about July 7, 1965, the plaintiff took a default judgment against Carter Contracting Company and thereafter on or about July 30, 1965, the writ of *fieri facias* was sent to the City Sergeant and a levy and execution requested against Carter Contracting Company. The attempted execution on the property of Carter Contracting Company resulted in a return of 'no effects' on October 4, 1965.

"On or about April 20, 1966, the plaintiff requested that a summons be issued for J. L. Carter, President of Carter Contracting Company, to appear before Commissioner T. J. Amelson on May 10, 1966, to answer questions concerning the personal property and real estate on which a writ of *fieri facias* was a lien. On May 10, 1966, plaintiff's attorney questioned Mr. J. L. Carter before Commissioner T. J. Amelson and at the conclusion of such hearing Mr. Carter said that it was useless to pursue Carter Contracting Com-
page 8 } pany and that the plaintiff should try the bonding company. Plaintiff's attorney told him that he had received information from Mr. Parks to the effect that no bond was applicable to the plaintiff but Mr. Carter said that plaintiff's attorney should check again.

"On May 10, 1966, plaintiff's attorney called Mr. Parks' office and when Mr. Parks was not in requested that a copy of the bond written on the 7-Eleven Store at Laurel, Maryland be sent to said attorney. On May 11 plaintiff's attorney returned a call from Mr. Parks and at that time Mr. Parks read to plaintiff's attorney the title and the conditions of the bond and it was obvious that same was a Labor and Material Bond. Plaintiff's attorney reminded Mr. Parks of his previous statement that the only bond issued on the job was a 'Performance' type bond and immediately went to Mr. Parks' office. Thereafter, on May 12 Mr. Parks wrote to the defendant a letter which is marked as Exhibit Number" 4, which is requested to be marked as Exhibit 4.

(So marked by the Court.)

"The defendant's answer to this letter was June 9, 1966, and" it is requested to be marked Exhibit Number 5.

(So marked by the Court.)

page 9 } "Plaintiff instituted the present suit against the defendant on or about September 29, 1966, and the parties agreed that the principal, Carter Contracting Company, ceased work on the 7-Eleven Store, Laurel, Maryland, sometime in September or October 1964.

"It is further agreed that neither the plaintiff nor its attorney knew of the existence of the Labor and Material payment bond until so informed by Mr. Parks in May of 1966; that the only inquiries made by plaintiff or its attorney regarding the existence of Labor and Material Bond was to" Carter Contracting Company, principal, Parks, the agent, and the defendant.

That's the stipulation, Your Honor.

Mr. Miller: Your Honor please, that is the stipulation of facts and the exhibits which are agreed to by the defendant.

The Court: All right.

* * * * *

page 10 } LITTLETON W. PARKS, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Miller:

* * * * *

page 11 }

* * * * *

Q. Can I stop you, Mr. Parks? Let's proceed on what you did first, and then you can explain what happened thereafter. Is this the bond that was issued in October, '63, or not; Plaintiff's Exhibit 1?

A. It's one of them.

Q. All right.

A. If I may tell you what happened.

Q. All right.

A. Prior to the execution of this bond we were called upon to execute a bond to the Dixons for Carter Contracting Company, Incorporated and we used what we called a short form Performance Bond, which was not a Payment Bond. It was just a contract and Performance Bond. It gave no benefits for material or men on the job. That bond was duly executed and sent off by Carter Contracting Company to the Dixons. Then it was returned to us with the re-
page 12 } quest that it be re-executed on a form which is known as an AIA form, I think A-311. Now, that bond is in two parts. It is a Labor and Material Payment Bond as well as a Performance Bond. So, as I said, the original copy, original document of that first bond was returned to us and this second bond on an IA form was substituted for it.

Q. Did you notify Standard Accident Insurance Company when you issued the first bond, that is, the Performance Bond only?

A. All right. I'll go a little further and give you a blow by blow description. When the first bond was executed, the report of execution, which is normally sent to the bonding company, contains a copy of the bond which we execute or some memorandum of the form, when it is a standard form. That was sent off to Reliance Insurance Company and the file was made up and that was it. When the request came for the substitution of the bond for the broader form, that was done, but the girl in the office who attends to these things happened to be sick for a couple of weeks and it was handled by one of the other girls under my direction, and the company copies and the original bond, the first bond, were stuck in the file rather than being sent on to Reliance Insurance Company, which would be the usual practice. I say Reliance because it took over Standard Accident Insurance Company.
page 13 } It is one and the same. The purpose of sticking these papers in the file was to hand it over to the girl who usually handles it when she returned. It was never done. And so the home office was not advised of the substituted bond. According to their file and record they had only the record of the first bond until my letter of May 12th.

Q. They had no notice that there had been a Labor and Material Payment Bond issued until your letter of May 12, 1966?

Littleton W. Parks

A. That's correct.

The Court: You did actually execute the bond in your office?

The Witness: Yes, sir, there's no question about that.

The Court: You did everything you are supposed to do in connection with the transaction except notify the home office?

The Witness: Yes, sir.

The Court: All right.

The Witness: That was explained to the company—do you want me to go on and account from my standpoint what happened further?

By Mr. Miller:

Q. Yes, sir.

page 14 } A. Mr. Baggs phoned me, as these Exhibits show, in 1965, in April or May, and I went to the file to check the form of bond which we had for this job, and from the papers I pulled out I saw the first bond only and did not see any record of the second bond.

Q. When you say the second bond—

A. That's the Labor and Material Bond.

Q. All right.

A. So I advised him in good faith that the only bond we had was a Performance Bond which did not give his client any rights directly. That was the end of the matter as far as I was concerned until May, 1966.

Q. Now, for that year's period, from May, '65 until May, '66, did you receive any further inquiries from Mr. Baggs, the plaintiff, or any other person regarding the existence of a Labor and Material Payment Bond on this particular job by Carter Contracting Company?

A. Just a minute. I don't believe so. Hold on. I don't recall any, Mr. Miller.

Q. All right, sir.

A. Then in May, '66, Mr. Baggs came in the office to discuss the bond again and I got out the file and to my amazement and embarrassment I found the complete file at that time. I explained to him the error which had been made the year before, the best I could, which was rather

page 15 } difficult under the circumstances, and promptly wrote the bonding company explaining the error to them, and that's where it stands. Then following that the bonding company asked me to get a photocopy of the original bond as we still didn't have a carbon copy of the bond. We

had a skeleton copy which only copies on a copy sheet the insertions which we make in the form. I then wrote to the bank, which was the obligee under this bond, and asked them for a photocopy of the original Performance and Payment Bond, which the bank sent me and I forwarded to the company.

Q. And this was in approximately May, 1966?

A. I think it was in June by the time I got that. I have it here exactly if you want to know.

Q. All right.

A. It was sent to the bonding company—I wrote to American National Bank on May 26th and the bank returned to me under a letter of June 1st the photostatic copy, and it was sent to the Reliance Insurance Company on June 3, 1966.

Q. Now, what is your authority as an agent for Reliance Insurance Company with respect to claims that are made under the bonds?

A. We have no authority at all. I'm not a claims agent or claims attorney or anything like that for them.

page 16 } If we have a claim reported—matter of fact, well, we just send it on to the bonding company.

* * * * *

CROSS EXAMINATION

By Mr. Baggs:

Q. Mr. Parks, in order to clarify it, there's no doubt that when the plaintiff's attorney called you the first time in May of '65 you went to the file and all the information that you gave him from your file concerned the Performance Bond; is that correct?

A. That's correct, uh-huh.

Q. And not the Labor and Material Bond?

A. That's correct.

Q. And is it not true that the Labor and Material Bond was in fact in effect at the time the plaintiff's attorney first called you?

A. Yes, uh-huh.

Q. All right. Now, do you keep all your bonds in one file, or how do you do it? Do you have separate files or what?

A. No, they are all in one file for each contractor.

page 17 } Q. Are any notations made on the flyleaf as to what bonds are inside the file?

A. Yes.

Littleton W. Parks

Q. Was there any notation made concerning the Labor and Material Bond?

A. There would have been only one notation for this particular bond. Whether it was a Labor and Material Bond or a Performance Bond it would just show a bond number.

Q. I see. And you have the power of attorney to issue bonds for this company; is that correct?

A. Yes.

Q. And as part of the execution of such a bond, is it correct to say that it's really in two steps; one you write the bond, then you send a copy of it to the home office?

A. No. Execution of the bond may be a question of terminology. I consider it merely signing the bond and affixing the seal of the company, then the bond is executed. Now, for the company's record it doesn't know that it's been done until I send them a copy of the papers.

Q. All right. Is there any company policy against you giving out information to the general public or attorneys or material men what bonds you have written on a particular job?

A. If we have an inquiry—of course, I think that an agent as a representative of the bonding company must

page 18 } use his discretion in protecting its principal. However, the bond is posted for the benefit of whom it may concern, and if inquiries are made as to the bond being in effect on a certain job and so forth, we always give it. Say yes or no, as the case may be.

Q. I see. Between the time plaintiff's attorney talked to you in May of 1966—'65 and in May of 1966, which was on the second occasion, had you ever discussed with Mr. Carter this particular type of bond? I mean, the type of bond that was written on the 7-Eleven Store that we are talking about in Laurel, Maryland?

A. Better still, the bonding covering this specific job?

Q. Yes.

A. Not that I recall.

Q. I see. In other words, you are not sure whether you had a conversation or not?

A. That's correct. You see, there were a number of jobs on which material and labor bills had not been paid at the time Carter Contracting Company got into financial difficulties, and we had so many discussions and so many jobs were involved I wouldn't know whether we had any particular discussion on this one. I doubt it though. I don't recall anything specific.

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page 19 }

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By Mr. Baggs:

Q. All right. On the second time the plaintiff's attorney called you, Mr. Parks, do you recall why you picked up the bond this time and not the first time?

A. No.

Q. I refer to your letter of May 12, 1966, which you wrote after plaintiff's attorney's second visit to you and the existence of the Labor and Material Bond was brought forth. You wrote this letter to the company and I refer you to the third paragraph, the first sentence, in which you are referring to the fact that you wrote no letter to the company. You say, "We see no letter in our file advising the company of the substitution of bonds, and it is apparent that we have been guilty of a gross oversight." Do you feel that that is a correct statement?

A. Of course.

* * * * *

page 20 } RE-DIRECT EXAMINATION

By Mr. Miller:

Q. Mr. Parks, that letter which Mr. Baggs just referred to, to whom was a copy of that letter to the defendant by you sent?

A. I sent a copy to Mr. Baggs.

* * * * *

page 25 }

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The Court: What could the plaintiff do that he didn't do? What he could have done is what he did do. His contention, I take it, will be that he waived certain rights.

Mr. Miller: Uh-huh. Well, he sat back and didn't do anything because he thought there wasn't anything to do insofar as this defendant was concerned.

The Court: Could he have found out? Could he have made a more thorough examination?

Mr. Miller: That is the point. He could have inquired of the owner, he could have inquired of the lending institution.

The Court: That's right.

Mr. Miller: And they had the bond and they would have told him, yes, there is a Labor and Material Bond. That bonding company was wrong. But he didn't do that and he admits he didn't do it, and that is really the whole point of our argument insofar as *estopping* is concerned.

The Court: You may suspend and I will hear from the plaintiff.

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page 37 }

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The Court: I think it is stipulated that there is no fraud.

Mr. Miller: There is no fraud or actual concealment. It was an honest mistake, which doesn't constitute the *estoppel* under these circumstances.

Mr. Baggs: Your Honor, may I answer? At first, I think Lindsay is a real estate case and *estoppel* involving title to propertly is a vastly different situation than other *estoppel.*

page 38 } In other words, for example, you must actually prove that the man intended to mislead you. And you don't have to prove that in order for *estoppel,* but you do where title and property is being affected. I would like to read to you *Mears* versus *Accomac,* which was another incident where a banker misled a man regarding the value of his investment, and the Court held that the bank was *estopped.* In other words, he told the man your bonds are okay, don't worry about them, the bonds were okay. The law is well settled that if one represents as true what is really false in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on, and he to whom the representation is made believing it to be true acts on it, and in consequence thereof sustains damage, there is such fraud as will support an action for deceit at law, or a bill for recision of the transaction in equity. Whether the representation is made innocently or knowingly, if acted on, the effect is the same. In one case the fraud is constructive and the other case it is actual, and I don't see the argument that he made the innocent mistake. If the

innocent mistake has been made to the detriment of the plaintiff and is between the plaintiff and the defendant
page 39 } and its agent, who should bear the responsibility for it?

The Court: That's all?

Mr. Baggs: Yes.

The Court: You gentlemen have stipulated certain things, one of those things was there is no fraud perpetrated by Mr. Parks, and the mistake was made by him. It was an innocent mistake. The Court is of the opinion that you are bound by the terms of the contract, and the statement in the contract as to when an action might be brought is binding on the person who it relies on.

You draw up the decree accordingly.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Assignments of Error	2
Motion to Dismiss	2
Judgment—June 1, 1967	4
Order—July 25, 1967	5
Proceedings	5, 13
Witnesses:	
Littleton W. Parks	8