STATE OF MICHIGAN

COURT OF APPEALS

SUPERIOR PRODUCTS COMPANY,

Plaintiff–Appellee,

v

ARTCO CONTRACTING INCORPORATED and FIREMAN'S FUND INSURANCE COMPANY,

Defendants–Appellants,

and

J.R. EDWARDS TRUCKING AND EXCAVATING INCORPORATED,

Defendant.

UNPUBLISHED
September 27, 1996

No. 174160
LC No. 92-232932-CK

Before: Reilly, P.J., and Cavanagh, and R.C. Anderson,* J.J.

PER CURIAM.

Defendants Artco Contracting Incorporated (Artco) and its insurance carrier, Fireman's Fund Insurance (Fireman's) appeal by leave granted the trial court's order granting plaintiff's motion for summary disposition, denying their motion for summary disposition and entering judgment against them in this construction bond case.[1] We affirm.

In 1991, Artco, as principal contractor, entered into an agreement with Wayne County and the City of Romulus for a project at Detroit Metro Airport. As required by MCL 129.201; MSA 5.2321(1), Fireman's, Artco's insurance carrier, provided a labor and material payment bond in the amount of $5,348,000 securing payment to suppliers of the project. Joba Construction (Joba) was a subcontractor to Artco, until Joba was removed from the project after it failed to perform its work in an adequate manner. Artco then contracted with J.R. Edwards Trucking and Excavating, Inc. (Edwards) to provide materials and labor regarding the portable water systems, pipe underdrains, and the storm sewer system for the project. Plaintiff supplied materials (concrete pipe and accessories) beginning January 11, 1991 to Joba, and then later to Edwards.

Plaintiff experienced difficulty obtaining timely payments from Joba and Edwards. On September 16, 1991, plaintiff and Artco entered into an agreement whereby Artco agreed to pay plaintiff for the materials that had already been supplied to Joba, and to "insure payment" on the amount that Edwards owed plaintiff as of September 16, 1991, as well as any amounts that Edwards would owe plaintiff in the future. Artco agreed to pay Edwards with checks made payable to plaintiff and Edwards "in such amounts as are sufficient to insure payment to [plaintiff] for the materials provided." The agreement also resolved litigation between the parties for some projects unrelated to the present case.

On November 25, 1992, plaintiff filed this action in Wayne Circuit Court alleging in part that Artco had breached the September 16, 1991, agreement that it had with plaintiff and that Fireman's, as the bondholder of the project, was required to pay for the materials that plaintiff had supplied to Edwards. Defendants moved for summary disposition, pursuant to MCR 2.116(C)(10), claiming that Fireman's was not liable to plaintiff under the performance bond because plaintiff had failed to comply with the thirty and ninety day statutory notice requirements stated in the bond statute, MCL 129.207; MSA 5.2321(7), and that Artco was not liable under its agreement with plaintiff because plaintiff failed to comply with the condition precedent in that agreement. Plaintiff also filed a motion for summary disposition. According to plaintiff, it was not required to comply with the notice provisions of the bond statute, but, in any event, it had adequately complied with those provisions. Plaintiff also argued that the agreement with Artco did not contain a condition precedent. On December 3, 1993, the trial court granted plaintiff's motion for summary disposition and thereafter entered a judgment against Artco and Fireman's in the amount of $86,554.85.

Defendants argue that the trial court should not have heard plaintiff's motion for summary disposition because the brief in support of the motion was served four days too late according to MCR 2.116(G)(1)(a). However, defendants' argument that they were prejudiced by the late filing of plaintiff's brief is disingenuous. Defendants were served with plaintiff's brief seventeen days before the summary disposition motion was heard. This gave defendants ample time to consider and respond to the arguments being raised by plaintiff. In the absence of prejudice, we are not persuaded that reversal is required on this issue.

The court rules provide that unless a different time is set by the court, a motion for summary disposition with a supporting brief must be filed with the court and served upon opposing counsel at least twenty-one days before the time set for hearing the motion, "[u]nless a different period is set by the court.". MCR 2.116(G)(1)(a). Thus, the trial court, in its discretion, had authority to consider the plaintiff's untimely brief. We find no abuse of discretion.

Defendants contend that the trial court erred in granting plaintiff's motion for summary disposition with respect to Artco on the basis of the court's conclusion that a direct contractual relationship existed between plaintiff and Artco. We disagree.

MCL 129.207; MSA 5.2321(7) provides that a claimant who has furnished labor or materials and who has not been paid in full within ninety days may sue on the payment bond for the unpaid amount, prosecute to a final judgment and execute on the bond. However, "a claimant not having a

direct contractual relationship with the principal contractor" does not have a right of action against the bond unless the claimant complies with certain notice provisions specified in the statute. Generally speaking, the claimant is required (1) to give the principal contractor written notice, within thirty days after first furnishing materials or labor, stating the nature of materials or labor, the party contracting for the materials or labor, and the site for performance or delivery; (2) to give the principal contractor and the governmental unit involved written notice, within ninety days from the completion of performance, stating the amount of the claim, and the name of the party to whom the materials were supplied or for whom the labor was done.

Defendants assert that the agreement between Artco and plaintiff was not sufficient to establish a "direct contractual relationship" for the purposes of the statute because (1) the agreement did not exist as of January 11, 1991, the date plaintiff first delivered materials; and (2) the agreement was not a contract to supply materials.

We are not persuaded by these arguments. First, there is no indication in MCL 129.207; MSA 5.2321(7) that the "direct contractual relationship" must exist at the time the materials are first delivered. We decline to judicially impose such a requirement. Second, the statute also does not require that the contract that is the basis for alleging a "direct contractual relationship" must be a contract to supply materials. Federal courts interpreting the Miller Act, 40 USC § 270a, *et seq*. have held that an agreement between a prime contractor and a materialman in which the prime contractor agreed to issue checks jointly to the subcontractor and the materialman does not establish a direct contractual relationship for the purposes of the Miller Act. See *United States v P W Parker Inc*, 504 F Supp 1066, 1072 (D Md, 1980), and cases cited therein. However, in this case, Artco's obligation under the contract was more than issuing joint checks. Artco agreed to pay plaintiff directly for amounts attributable to materials supplied to Joba, and agreed to "insure payment of the current amount owing to [plaintiff] for materials supplied to J.R. Edwards, as well as future amounts which may become owing for materials supplied to J.R. Edwards on the Metro Airport Project." We agree with the trial court that this agreement was adequate to establish a "direct contractual relationship" between plaintiff and Artco.

Because we have concluded that Artco and plaintiff had a direct contractual relationship, we need not reach the merits of defendants' claims that the trial court erroneously determined that plaintiff provided the thirty and ninety day notice which would have been required under MCL 129.207; MSA 5.2321(7) in the absence of a direct contractual relationship.

Defendants argue that the trial court erred in determining that the agreement between Artco and plaintiff did not contain a condition precedent, which because it was unfulfilled, precluded Artco's liability based on the agreement. We disagree. "Stipulations of a contract are not usually construed as conditions precedent unless the court is compelled to do so by the language of the contract plainly expressed." *Vergote v K Mart Corp (Aft Remand)*, 158 Mich App 96, 107; 404 NW2d 711 (1987). We agree with the trial court that the agreement in the present case does not have language which "plainly expresse[s]" that the parties intended plaintiff's sending copies of shippers and invoices to a be a condition precedent to Artco's "insur[ing]" payment. Accordingly, defendants are not entitled to relief on this basis.

Defendants also contend that the trial court erred in determining that plaintiff was entitled to recover 1½% per month service charge from Artco and Fireman's. We conclude that the trial court correctly ruled that plaintiff was entitled to recover the service charge.

The invoices submitted to Joba and Edwards stated, "TERMS: Payment due [illegible] 30 days. A service charge of 1½added to the unpaid balance. (Annual rate of 18%.)" When Artco agreed to "insure" payment of the "current amount owing" and "future amounts which may become owing for materials supplied by [plaintiff] to J.R. Edwards", Artco did not disclaim its liability for amounts owed by Edwards that were attributable to the service charge accruing on the unpaid balance. With respect to Fireman's liability pursuant to the surety bond, we find this case indistinguishable from *Price Bros Co v Charles J Rogers Construction Co*, 104 Mich App 369; 304 NW2d 584 (1981). In that case, this Court examined the language in the bond, which is similar to that in the Fireman's bond[2], and concluded that service charges were properly included within the terms of the payment bond. *Id.* at 379. Therefore, we agree with the trial court that as a matter of law, plaintiffs were entitled to recover the service charge on the unpaid balance.

In their discussion of whether the trial court erred in determining that plaintiffs could recover the service charge, defendants also argue that the amount of interest included in the judgment was in error. We conclude that defendants waived appellate review of this issue. The issue is not identified in the statement of issues presented. *Orion Twp v State Tax Comm*, 195 Mich App 13, 18; 489 NW2d 120 (1992). Furthermore, in its objections to plaintiff's notice of entry of judgment, defendants stated, "The Judgment should provide that Plaintiff, Superior Products, Co., is entitled to judgment against Defendant, Artco Contracting, Inc., and Defendant, Fireman's Fund Insurance Company, **jointly and severally,** in the amount of $86,554.85, plus statutory interest, until satisfied." Inasmuch as defendants agreed with plaintiff that the court should enter the judgment for this amount, defendants should not now be heard to complain that the amount was incorrect.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Michael J. Cavanagh
/s/ Robert C. Anderson

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[1] Defendant J.R. Edwards Trucking and Excavating, Inc., against which plaintiff has a default judgment for $78,384.20, is not a party to the present appeal. Hereinafter, defendants will refer to Fireman's and Artco only.

[2] The Fireman's bond provided in pertinent part:

> NOW, IF THE SAID Principal shall pay, as the same may become duly payable, all indebtedness which may arise payable by said Contractor to a subcontractor or party performing labor or furnishing materials, or payable by any subcontractor to any person, firm or corporation on account of any labor performed, or materials furnished in the

erection, repairing or ornamentation of such building, improvement, or works, in accordance with the provisions of Act No. 213 of the Public Acts of the State of Michigan, for the year 1963, then this obligation shall be void; otherwise it is to remain in full force and effect.