

STATEMENT FROM STUART S. ZISHOLTZ

Imagine this scenario:

You are a subcontractor on a public improvement job. The General Contractor has failed to pay you., is in default under its prime contract and gets terminated from the project. You are owed \$180,000, representing \$85,000 in charges and \$95,000 in equipment.

The bonding company takes over the project and immediately starts using your equipment to finish the project. Somehow, your equipment disappears and is never returned. What are your rights? What can you do?

In a recent decision, the subcontractor brought a claim against the bonding company for \$180,000 for breach of contract, unjust enrichment (getting something for nothing) and conversion (appropriating your equipment). The bonding company admits that it owes you the \$85,000 for the work that you did but not the \$95,000 for the equipment because that is not part of the bond.

The Appellate Court found that the issue involving whether or not the bonding company has to pay for the lost equipment must go to trial. The rationale is very interesting and informative.

A payment bond is for labor and material consumed on the job. Unless certain items are specifically identifiable under the bond, a payment bond usually will not extend to missing equipment. The equipment we are discussing in this article consists of items that can be taken from one job to another.

As with everything in the law, there are exceptions. The catchwords here are items that are reasonably expected to be consumed or are substantially consumed in the performance of the work. Things that can be removed from one job to another are not considered consumable. Again, there are exceptions.

It has been held, for example that a bond would pay for overhaul of trucks that were used in a construction project if it was contemplated that the trucks would suffer considerable damage as a normal incident of the project. The trucks were considered consumable. It has also been held that tires sold by a supplier for heavy earth-moving equipment and destroyed on the job are considered consumable for which a surety is chargeable. In those instances, it is the intent of the parties in the contract that govern. Even where scaffolds and concrete planks are used, the Courts have conceded that sometimes brackets, bolts and fastening equipment could very well be destroyed in the course of construction and can be chargeable as consumable materials.

The bottom line, therefore, is that if you have equipment on the job and there is a bond, do not, in the ordinary course of events, expect the bonding company to reimburse you for the cost of equipment.

Never let your lien time run out!

For a free copy of a pamphlet pertaining to mechanic's liens and payment bond claims, please contact me or the Association.