

STATEMENT FROM STUART S. ZISHOLTZ

Take a look at this scenario:

You are a subcontractor to a General Contractor on a public improvement job. The General Contractor has a payment bond, is in default and gets terminated. You had \$180,000 in outstanding bills when the clock stopped for the General Contractor, representing \$85,000 in charges against the General Contractor and \$95,000 in equipment.

The surety company takes over the job and your equipment and uses your equipment to finish the job. Somehow, your equipment disappears and is never returned. You make a claim against the surety 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 lower Court awards you the whole \$180,000, but on appeal, the Appellate Court reverses and says you have to go to trial on the issue of whether or not the bonding company has to pay you for the lost equipment. The rationale is very interesting and informative.

A payment bond is for labor and material consumed on the job. Unless it is specifically identifiable separately and it is reasonably contemplated to cover capital equipment not consumed on the job, a payment bond does not ordinarily cover capital equipment. Capital equipment is defined as material and items that can be taken from one job to another.

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

The bottom line 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. You would have to look to the General Contractor or possibly the successor General Contractor.

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.