SANDBERG PHOENIX

CONSTRUCTION BLOG

Sub left holding empty bag: No lien, no bond claim, big problem

AUTHOR: RICHARD A. STOCKENBERG

Subcontractors are accustomed to believing their payments are secured by either a mechanic's lien or a payment bond, sometimes both. For example, when the public utility, AmerenUE, convinced the Missouri Court of Appeals that due to its quasi-governmental status, it should be immune from mechanic's liens, the court went on to say that AmerenUE would be required to have its prime contractors post payment bonds for the protection of subcontractors.

By requiring a payment bond as a substitute for a mechanic's there would appear to be a seamless-continuum for the protection of subcontractors built into the payment process. However, the Missouri Supreme Court has cast a cloud over this notion. Only time will tell whether the cloud will give way to the bright sunshine of clarification or if the cloud will burst letting loose a deluge of harmful decisions further limiting subcontractor protection.

The case casting new doubt on payment protection for subcontractors was decided by Missouri's highest court, the Supreme Court. *Brentwood Glass Company, Inc. v. Pal's Glass Service, Inc.* 499 S.W.3d 296 (MO. 2016). In this case St. Louis County owned property it planned to develop for the headquarters of Smurfit-Stone Container Enterprises. The County was to issue industrial revenue bonds to finance the project, upon which only Cornerstone VI, LLC could draw. The County and Cornerstone had a contract requiring Cornerstone to construct the project "on behalf of the County" and it authorized Cornerstone to act "as agent of the County."

Clayco, Inc., the general contractor, entered into a subcontract with Pal's Glass to supply glass and glazing. In turn, Pal's entered into a sub-subcontract with Brentwood Glass for some of the work. Brentwood Glass served notice of its intent to file a mechanic's lien. Thereafter, because it was still not paid it filed its mechanic's lien against the County's ownership interest in the real estate and also against Cornerstone's leasehold interest. While the court said Brentwood Glass could place a lien against Cornerstone's leasehold interest, it could not place a lien against the more valuable asset, namely, St. Louis County's ownership interest in the real estate.

The court's decision is noteworthy not only because of the result, but also because of its lack of analysis. In its written opinion the court cited to the general rule that liens against property owned by the government are not allowed, but it failed to discuss or analyze the well-known exception allowing liens on property owned by the government and used for non-governmental purposes. Until the Supreme Court's decision it has been generally understood that mere ownership of real estate by a Missouri governmental body will not by itself preclude liens against the property *if the property is not used for public purposes.* A 1991 decision of the Missouri Court of Appeals said, "Only such property held by [the government] for the benefit of the public which can be determined to be reasonably necessary for public use is exempt." *Redbird Engineering v. Bi-State Dev.*, 806 S.W.2d 695, 698 (Mo.App. 1991). While the Supreme Court's decision in the *Brentwood Glass* case recites that the building was to be used "for the headquarters of Smurfit-Stone Container Enterprises, Inc.," the court inexplicably failed to mention or discuss this well-known exception to the general rule of "no lien against government property." Using the property as a corporate headquarters for a private entity can hardly be viewed as a public purpose. Nothing in the court's decision suggests a public use of the building. Thus, a lien should have been allowed, assuming all of the statutory requirements were met unless the Supreme Court was exercising its authority to over- rule the *Redbird Engineering* decision. It that were the intent, the court would have said so. It did not.

Hopefully, the current cloud hanging over subcontractors will give way to a decision indicating whether this well-known exception was intended to be abolished or whether it was merely overlooked. Stay Tuned.

No doubt believing that it was protected by either a lien or a payment bond, Brentwood Glass also made a claim in its lawsuit against St. Louis County attempting to hold the County liable for failing to obtain a payment bond for the benefit of unpaid subcontractors. There is an established body of case law in Missouri permitting such actions against the governmental employees/officials who fail in their duty to obtain a payment bond when one is required.

In the *Brentwood Glass* case five of the seven judges on the Supreme Court said no bond was required because "Cornerstone did not 'provide construction services' under its contract with the County…." The court again was skimpy on analysis. The court merely noted the statute "requires a bond of a 'contractor' that '*provides* construction services under contract to a public entity,' not a party that merely arranges for such services to be provided by others." (court's emphasis).

It is regretful that the court failed to provide any analysis. If it had done so, it may have reached a different result. The court based its decision on its belief that Cornerstone, the developer who had a contract with the County to construct the property, did not "provide" construction services to the County. No bond was required apparently because Cornerstone did not self-perform work, but merely hired others to do so. The court recognized Cornerstone as the "agent" of the County but did not find it had the responsibility the County would have had to obtain a bond.

An analysis of prior case law would show in the context of construction law that a party may be deemed to "provide" services even if those services are to be performed by others, such as subcontractors. For example, in *Strain-Japan R-16 School District v. Landmark Systems, Inc.*, 965 S.W.2d 278 (Mo. App. 1998), the court said that a contract to "provide" engineering services should not be confused with a contract to "render" those services. In other words, if a general contractor enters into a design-build contract and uses a professional engineer as a subconsultant for the design, the general contractor is deemed to have "provided" the engineering services even if they are rendered by a licensed professional engineer and not the unlicensed contractor. Using this precedent and interpretation, Cornerstone could have been deemed to be "providing" construction services and thus obligated to obtain a payment bond for the protection of subcontractors. Unfortunately, the court's decision could mean that in the future a contractor hired by a governmental body to serve as its construction manager may not have to obtain bond protection for subcontractors if that construction manager does not self-perform any of the work.

This case cries out for legislative relief.