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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000377-MR

MID-STATE SURETY CORPORATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 01-CI-007878

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹
BARBER, JUDGE: Appellant, Mid-State Surety Corporation (Mid-State), appeals the Jefferson Circuit Court's grant of summary judgment in favor of Appellee, Jefferson County Metropolitan Sewer District, (Metropolitan). We affirm the trial court's entry of summary judgment.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Mid-State entered into a contract whereby it provided a surety bond in favor of Appellee Metropolitan with regard to a contract between Metropolitan and HP Contracting, Inc., (HP) the company charged with work on the Lewiston Drive Sanitary Drainage and Improvement Project. HP began to work on the project in January, 2000. The terms of the contract between Mid-State and Metropolitan required that no payments be made to HP until the work was reviewed and approved as correct. Metropolitan paid HP for work completed periodically throughout the contract period.

In August, 2000, HP removed its equipment from the site and filed for bankruptcy. The project was not completed when HP withdrew. Metropolitan filed a claim with Mid-State requiring Mid-State to complete the project. Mid-State complained that Metropolitan had paid for defective or incomplete work by HP. Mid-State contends that this was a breach of the contract. Because of this alleged breach, Mid-State asserts that the total cost for them to remediate the allegedly defective work completed by HP was \$349,218.04. Mid-State filed suit against Metropolitan for breach of contract in overpaying for HP's improperly performed work, impairment of Mid-State's right in the contract funds, and Metropolitan's negligent inspection of the project.

After extensive memoranda were filed by the parties, the trial court ruled in favor of Metropolitan and granted Metropolitan summary judgment. Review of the record indicated that the plain contractual terms supported Metropolitan's position. The trial court found that no genuine issue of material fact precluded the entry of summary judgment. Mid-State appeals the trial court's ruling.

Mid-State contends that the record established that Metropolitan had failed to properly inspect the ongoing work and that Metropolitan was negligent in performing its duty to ensure the quality of work. Mid-State argued that contractual provisions required Metropolitan to review and approve all work done before making any partial payment to the contractor HP. The trial court found that the terms of the contract at issue stated that Metropolitan "shall review the Payment request and *may also* review the work at the Project Site." The court held that this language did not impose a duty on Metropolitan to review and approve work for which payment was requested. The terms of a contract shall be given their plain meaning by a reviewing court. MGA Ins. Co., Inc. v. Glass, 131 S.W.3d 775, 777 (Ky.App. 2004). Where the language in the agreement between the parties is plain and unambiguous, it must be enforced as written. Id. For this reason we find no error in the trial

court's ruling that the contract did not require review of work before partial payment.

Mid-State argues that Metropolitan's conduct resulted in impairment of collateral funds which Metropolitan owed Mid-State a duty to protect. Mid-State argues that Metropolitan essentially wasted funds by paying HP when the work completed by HP was allegedly defective. The contract expressly provides that:

Neither payment to the Contractor, utilization of the Project for any purpose by the Metropolitan Sewer District, nor any other act or omission by the Metropolitan Sewer District shall be interpreted or construed as acceptance of any Work of the Contractor not strictly in compliance with this Contract.

Thus, Metropolitan had the right to reject any work completed, either paid for or not, and to require Mid-State to remediate or complete the work. This is exactly what Metropolitan did. In the agreement between the parties at the time Mid-State took over the right to payment from HP, Mid-State agreed to expend its own funds, if necessary, to ensure that performance was completed. Mid-State stepped into HP's shoes at the time HP filed for bankruptcy, and Mid-State was then bound to finish the contracted for performance. See: Buck Run Baptist Church, Inc. v. Cumberland Surety Ins. Co. Inc., 983 S.W.2d 501, 503 (Ky. 1998), holding that where a surety has to

take over for a contractor, the surety becomes, in effect, the contractor for the job.

The contract required that Mid-State "shall, at no cost in time or money to the Metropolitan Sewer District, correct work rejected by the Metropolitan Sewer District as defective or failing to conform to this Contract." As portions of the work completed by HP did not conform to contractual requirements, Metropolitan demanded that Mid-State bring those items into compliance. The trial court held that Metropolitan was within its rights in making such a demand. Mid-State denies the propriety of this requirement. Mid-State focuses on contractual language requiring the contractor (HP) to perform the work in strict compliance with the contract to attempt to impose a duty of strict compliance upon Metropolitan. Mid-State contends that because Metropolitan failed to ensure adequate completion of the project parts before partial payment was made, Metropolitan should be estopped from claiming that Mid-State should complete the tasks. The trial court ruled that the contractual language and the law permit Mid-State to go against HP for reimbursement for the remedial work, but not against Metropolitan. The law requires that the bond, agreements, and contract must be read together. ABCO-BRAMER Inc. v. Markel Ins. Co., 55 S.W.3d 841, 844 (Ky.App. 2000). The terms of the documents found in the record do not require certification of

proper completion by Metropolitan before payment was made to HP. The terms of the contract also require Mid-State to ensure satisfactory completion of the work. For this reason, no reversible error is shown in the trial court's ruling.

Mid-State claims that Metropolitan was unjustly enriched by the trial court's decision in the sum of the costs to Mid-State to remediate the allegedly improper work completed by HP. Metropolitan shows the Court that Mid-State was assigned HP's last pay application by the Bankruptcy Court. Any funds available or paid to HP are now the property of Mid-State. The terms of the contract between Mid-State and Metropolitan are binding and enforceable. The contractual terms must be given their plain meaning. O'Bryan v. Massey-Ferguson Inc., 413 S.W.2d 891, 893 (Ky. 1966). Kentucky law is clear in holding that "[t]he doctrine of unjust enrichment has no application in a situation where there is an explicit contract which has been performed." Codell Construction Co. v. Commonwealth, 566 S.W.2d 161, 165 (Ky.App. 1977). As surety for the job Mid-State stands in the shoes of the contractor and has no greater rights than the contractor did. U.S. Fidelity & Guar. Co. v. Preston, 26 S.W.3d 145, 150 (Ky. 2000). We affirm the trial court's ruling.

ALL CONCUR.

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