1965

Whiting Brothers Construction Company, Inc. v. M & S Construction and Engineering Company, Kent Hoyt, Smith Welding and Steel, et al. : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

WHITING BROTHERS CONSTRUCTION COMPANY, INC., a corporation,
Plaintiff-Appellant,

vs.

M & S CONSTRUCTION AND ENGINEERING COMPANY, a corporation, KENT HOYT, SMITH WELDING AND STEEL, et al,
Defendants-Respondents.

Case No. 10390

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Aldon J. Anderson

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STATEMENT OF THE KIND OF CASE

This case was commenced by Whiting Brothers Construction Company, Inc., a building contractor, against M & S Construction and Engineering Company, a defaulting subcontractor, and various other defendants primarily consisting of unpaid claimants who furnished labor or materials at the request of M & S, seeking to determine the nature, validity and priority of the various claims and specifically offering to pay claims which were perfected against it pursuant to the provisions of 40 U.S.C. Sec 270b (commonly called the "Miller Act").

DISPOSITION IN LOWER COURT

The case was argued to the lower court on Motions for Summary Judgment filed by defendants Kent Hoyt and Smith Welding and Steel. Upon oral argument the court granted Summary Judgment against plaintiff and in favor of defendant Hoyt in the amount of $565.00, and in favor of defendant Smith in the amount of $361.00, together with interest, costs and attorneys' fees for both parties.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal as to both parties of the Summary Judgments granted against it. No other parties named in the lower court are involved in this appeal.

STATEMENT OF FACTS

On the 5th day of July, 1963, an agreement was executed entitled "Standard Form of Subcontract" wherein plaintiff appeared as prime contractor and defendant M & S Construction and Engineering Company (hereinafter called "M & S") appeared as subcontractor. Said defendant agreed to perform certain work in construction of runways and facilities at the municipal airport at Cedar City, Utah. The subcontract was made pursuant to plaintiff's contract with Cedar City Corporation and the Federal Aviation Agency under a contract designated F.A.A.P. #9-42-024-04 (R.2). Pursuant to 40 U.S.C. §270a, plaintiff furnished a bond issued by The Travelers Indemnity Company, who is not a party to the action (R.4).

Defendant M & S defaulted in performance of its obligations, and so far as may be applicable on this appeal, failed to pay many of its suppliers, including the labor and material claims of defendants Kent Hoyt and Smith Welding and Steel (hereinafter called "Hoyt" and "Smith", respectively). Plaintiff has refused to pay said claims for the principal reasons: (1) Plaintiff has no express or implied contractual obligation toward said defendants, and (2) Plaintiff obtained a bond for payment of claims in accordance with the provisions of 40 U.S.C. Section 270a, but said defendants failed to file a notice of claim with plaintiff within the statutory period of ninety days. Plaintiff has been willing to make payments of valid claims which have been perfected under the bonding statutes (R.7 and 8). It is admitted, for purposes of this appeal, that defendant Hoyt furnished materials of the reasonable value of $565.00 during the period September 17, 1963 to December 17, 1963 (R. 16) and defendant Smith furnished labor and materials of the value of $361.00 from August 1, 1963 to September 25, 1963 (R. 22).

Subsequently, said defendants filed Motions for Summary Judgment with attached Affidavits (R.14-26), and the case was heard by Judge Aldon J. Anderson on April 22, 1965. Oral arguments were presented to the court and Judge Anderson granted the Motions. After filing a Notice of Appeal, plaintiff's counsel attempted to obtain a transcript of the record made of the oral arguments and oral ruling of the court, but found that no record had been made by the reporter. Accordingly, the record of the court's ruling consists of the minute entry

(R.27) and the judgments (R.28-31). Evidently, the clerk's minute entry is in error in speaking of the plaintiff's Motion, where in fact it was the Motion of defendants Hoyt and Smith. Counsel for plaintiff represents, notwithstanding the record does not clearly reflect it, that Judge Anderson specifically announced from the bench that he believed the defendants appearing in this appeal were misled by the provisions of the letter sent by Las Vegas counsel of plaintiff to said defendants under date of December 26, 1963 (see duplicate copies of the letter at R.19-21 and R.24-26). Summary Judgment was granted on that basis. The effect of that letter is, therefore, a primary but not exclusive ground for this appeal. The issue to be decided by this Court is whether or not defendants Hoyt and Smith perfected their claims against plaintiff and the bonding company or were so misled by the letter of December 26, 1963 and other circumstances, that in the exercise of reasonable prudence they were induced by plaintiff not to file claims as required by statute.

ARGUMENT

POINT 1.

DEFENDANTS HOYT AND SMITH FAILED TO FILE NOTICE OF THEIR CLAIM WITHIN NINETY DAYS AFTER COMPLETION OF THEIR WORK AS REQUIRED BY STATUTE.

The construction project involved in this case was financed largely through Federal funds and by law was supervised by the Federal Aviation Agency. By reason thereof, the Federal law of contract procedures must

apply. The relevant statutes are explicit as to the issues particularly involved in this appeal. The act commonly known as the "Miller Act", found in Section 270a of Title 40, U.S.C.A. requires a sufficient bond for faithful performance of any public works construction. Section 270b sets forth the terms and conditions under which a materialman can enforce his rights against the bonding company:

> (a) Every person who furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him; Provided, however, That *any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made,* stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

> *Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or his residence,* or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.
> (40 U.S.C.A., page 435) (Emphasis supplied)

We may note in passing that the principles of law governing this appeal would be identical even if Utah law were applicable, for Section 14-1-5, U.C.A., 1953, requires a sufficient surety bond for public works construction and Section 14-1-6, U.C.A., 1953, sets forth the right of action on the bond in terms obviously similar to the Federal statute:

> Every claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under this act, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final judgment for the sum or sums justly due him and have execution thereon; *provided, however, that any such claimant having a direct contractual relationship with a subcontractor of the contractor furnishing such payment bond but no contractual relationship expressed or implied with such contractor shall not*

> *have a right of action upon such payment bond unless he has given written notice to such contractor within ninety days from the date on which such claimant performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or supplied or for whom the labor was done or performed.* Each notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence.
> (Emphasis supplied)

The relevant facts governing this point are undisputed. Defendants Hoyt and Smith expressly admit in their respective Affidavits that they did not give the written notice as provided by statute (R.18 and R.22). By reason of those clear admissions, the failure of the defendants to comply with the statute need not be belabored further. Suffice it to say that defendants expressly failed to perfect their respective claims against the plaintiff and the bonding company. Their right of action is prima facie defeated.

Notwithstanding that The Travelers Indemnity Company, the bondsman of plaintiff in this matter, is not before the court, it is appropriate to specify that the prime contractor and the surety are in an identical position so far as concerns the requirement of notice. In holding the notice requirement to be a strict condition precedent to a right of action, the court in *Bowden v. United States,*

(9th Cir. 1956) 239 F. 2d 572, cert. den. 353 U. S. 957, 77 S. C. 864, 1 L. Ed. 2d 909, stated:

> . . . The statute providing the cause of action on the bond, 40 U.S.C.A. Sec. 270b(a) makes no distinction between the liability of the contractor and that of his surety. Recovery can be had against neither unless the condition precedent to the existence of the right of action—giving of the statutory notice—has been complied with.
> (239 F. 2d, page 578)

POINT 2.

BY THE LETTER OF PLAINTIFF'S COUNSEL DEFENDANTS HOYT AND SMITH WERE PUT ON NOTICE THAT BY REASON OF FINANCIAL DIFFICULTIES THEY MUST TAKE STEPS TO PROTECT THEIR CLAIMS.

Plaintiff submits that defendants Hoyt and Smith were not misled to their detriment by any act or omission of plaintiff. Plaintiff's actions, though honestly intended and charitably motivated, should have constituted a warning to defendants.

The lower court granted Summary Judgments against plaintiff solely on the basis of the letter dated December 26, 1963, written by plaintiff's Las Vegas counsel to all persons who had furnished labor and materials on the Cedar City airport project (R.19-21).

Neither the Affidavit of Hoyt (R.16) nor the Affidavit of Smith (R.22) alleges that the letter of Decem-

ber 26, 1963, induced said defendants not to file the notice required by statute. As respects defendant Smith, the letter could have had no effect whatever since the ninety day period for filing his claim had expired prior to the date of actual receipt of the letter. His services and material were completed September 25, 1963, and his ninety day period for filing the notice would have expired before December 24, 1963 (R.22). He admits that the letter in question was not received until December 27, 1963 (R.23).

The very nature of the letter, that it was duplicated in quantities with the addressee left blank, and then mailed to the various defendants, clearly suggests the purpose of the letter, to wit: an explanation to all persons who had furnished labor or materials to the job that the subcontractor could not pay its bills. An analysis of this "red flag"letter leads to the inescapable conclusion that no reasonably prudent businessman could be misled by that letter to believe that he was not obligated to file his notice of claim against the prime contractor and the bond in order to perfect his rights in accordance with law. The fifth and last paragraph of page 1 of said letter specifically states that M & S had assigned the contract proceeds to the Clearfield State Bank, thus suggesting to the materialmen receiving the letter that no funds whatever may be available to pay the creditors. Such funds as Whiting Brothers had were to be paid to the bank, and Whiting Brothers had no way of knowing which of the materialmen had been paid by the bank, unless the unpaid claimants gave proper notice. The first two paragraphs of page 2 specify the difficulties arising from federal tax lien prior-

ities. The third paragraph of page 2 describes legal action in the nature of an interpleader which was then contemplated but not actually filed until nine months later. The very prospect of relying on a court to determine the rights and priorities of the various materialmen should have prompted a prudent businessman to file his notice of claim as required by law.

More importantly, the fifth paragraph of page 2 of said letter specifically states that Whiting Brothers owes nothing to the materialmen, but would hold such funds as may be due M & S only to determine who of the bank and other claimants was entitled to the money and in what amounts. Again, every materialman is deemed to have constructive knowledge of the law that a claim cannot be perfected against the prime contractor and its surety without giving the ninety days notice specified in the Miller Act. What more clear language could plaintiff reasonably use to warn the creditors of the possibility of losing their claims than to state that Whiting Brothers owes nothing and that funds held belonging to M & S are subject to prior creditors, including the Clearfield State Bank and the United States of America. And, if that were not enough, Whiting Brothers' letter firmed up the necessity of the materialmen taking their own steps by stating in the first paragraph on page 3 of said letter that Whiting Brothers itself has a claim against M & S of an unknown amount by reason of the default of M & S (R.21). As a matter of fact, many creditors filed notices of their claim by registered letter immediately after receiving the December 26th communication from plaintiff's Las Vegas counsel. The specific failure of defendants

Hoyt and Smith to take steps necessary for perfection of their claim is the very reason they should not be allowed to have judgment against plantiff contrary to law.

Many authorities with factual circumstances closely analogous to the case at bar firmly support the strict statutory requirement that a materialman give proper notice to the prime contractor. The notice contemplated as a condition precedent to a right of action is more than just a writing showing the amount due, but must affirmatively allege that the creditor is making claim against the prime contractor. As previously mentioned, notice to the prime contractor sets up the right of action against the surety. The cases discussed below firmly establish that even if the prime contractor has knowledge that some materialmen have not been paid and has knowledge of the amount of the claim, no liabilities of the prime contractor or its surety can be imposed unless the materialmen have taken specific steps in writing to inform the prime contractor that a claim is being presented against it and the surety.

A most convincing case is *USA for use of Charles R. Joyce & Son, Inc. v. Baehner, Inc.,* (2d Cir. 1964) 326 F. 2d 556. In an action on a Miller Act bond by a subcontractor's materialman, the court held three written communications from the plaintiff to be insufficient notice of claim to the prime contractor. The first letter referred to an alleged understanding that the prime contractor would guarantee payment of liabilities accumulated by the subcontractor, to which the prime contractor replied denying any agreement to guarantee payments. The

next letter referred to the amount claimed by the materialman, without any indication that he was looking to the prime contractor for payment. The third letter, from the materialman's lawyer, discussed the dispute regarding payment of the account and alleged an understanding that final settlement could not be reached until satisfactory provision had been made for payment of the materialman's claim.

The court stated and held:

> This has very naturally been construed by the courts as requiring that "the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill." *Bowden v. United States*, 9 Cir., 1956, 239 F. 2d 572, at page 577, citing numerous authorities. The ruling in this Circuit is the same. *United States for Use and Benefit of J. A. Edwards & Co. v. Thompson Construction Corp.*, 2 Cir., 1959, 273 F. 2d 873, 876. True it is that the Act is to be liberally construed. But to eliminate the minimal requirement just set forth would entirely emasculate the statute.
>
> Applying this test, and disregarding the fact that the first letter was sent before the completion of the work to be performed by Joyce, the letters are plainly insufficient. They do not even intimate or suggest that any claim is being asserted against the prime contractor or that Joyce is looking to the prime contractor for the payment of his bill. (326 F. 2d page 558)

In *USA for the use of Carter-Schneider-Nelson, Inc. v. Campbell*, (9th Cir. 1961) 293 F. 2d 816, cert. den.

368 U.S. 987, 82 S. C. 601, 7 L. Ed. 2d 529, the court considered various problems including the sufficiency of an alleged written notice. In addition to other problems regarding the notice, the court declared that a copy of a letter from the materialman addressed to the surety on one of the jobs involved was sent to the prime contractor. Even though the letter asks the surety about its intentions regarding payment of the claim, the letter was held insufficient as notice for the reason that it did not inform the prime contractor that the materialman was looking to it for payment.

One of the landmark cases which is often cited is applicable here. The court in *USA for use of American Radiator and Standard Sanitary Corporation v. Northwest Engineering Company,* (8th Cir. 1941) 122 F. 2d 600, affirmed the trial court's decision that a written notice of claim is jurisdictional under the statute, and that it cannot be waived by a verbal denial of liability on the part of the general contractor. On appeal the plaintiff claimed sufficient notice was given by reason of invoice copies furnished to the subcontractor as the materials were being supplied, which invoices the subcontractor in turn gave to the general contractor for use in arriving at the estimated payments which the government was to make during construction progress. In finding that such invoice copies were not notice of a claim being presented against the prime contractor or its surety, the court made the following significant statements:

> . . . We are unable, from this language, to arrive at any other conclusion than that the giving of a written notice must be held to be mandatory, as a strict

> condition precedent to the existence of any right of action upon the payment bond. Since the right is purely a statutory grant, Congress necessarily could impose such creating conditions as it saw fit. While the statute uses the general term "notice", its other language clearly shows that it is intended to be, in legal effect, the presentation of a claim. That presentation is required to be made in written form, "stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed".
>
> Since the statute gives a materialman or laborer no cause or right of action upon the bond until such a written notice has been furnished, it follows that the mere assertion of the contractor in this case that nothing was owing to the subcontractor, and that there was accordingly no liability to plaintiff, or any other declaration that might have been made, could not constitute an effectual waiver of the necessity for furnishing a written notice under the statute. . . .
>
> . . . They could accordingly not be treated as a substitute for the written notice of claim which the statute imposed as a condition precedent to any right of action upon the bond.
> (122 F. 2d, pages 602-603)

The claim of defendant Hoyt is specifically defeated by a 4th Circuit U. S. Court of Appeals decision in which an assignment similar to that alleged by Hoyt was declared to be insufficient notice of claim. In *USA for the use of Henry Walke v. Van De Riet, et al,* (4th Cir. 1963) 316 F. 2d 912, the financially unstable subcontractor sought to assure payment of its materialmen, including

plaintiff, by executing an assignment of the contract proceeds which recited the contract between the prime contractor and the United States. The form of the assignment was specifically approved in writing by the prime contractor. At the time of the assignment no materials had actually been furnished, and therefore, no claim was actually due. During the performance of the contract the prime contractor paid some sums of money to the plaintiff by reason of the assignment.

The prime contractor was not aware that the full amount of the materialman's claim had not been paid until long after the ninety day notice period had expired. There was no contract, express or implied, whereby the prime contractor agreed it would be responsible for the claims of the materialman.

The court specifically found that a letter from the prime contractor to the materialman acknowledging receipt of the assignment and the approval of the assignment by the prime contractor, did not constitute a notice of claim to the prime contractor, nor was the acceptance and approval of the assignment an acknowledgment of a claim or a waiver of any further notice of unpaid claims. The notice being insufficient, the materialman could not sustain a claim against the contractor or the surety.

Further support for the position of plaintiff is given in *Bowden v. United States,* (9th Cir. 1956) 239 F. 2d 572, cert. den. 353 U. S. 957, 77 S. C. 864, 1 L. Ed. 2d 909. In that case the prime contractor on a government project received a letter from a subcontractor authorizing the prime contractor to make checks payable jointly to the subcontractor and certain specified creditors who were

named in the letter The complaining creditor, the largest claim listed in the letter, did not take any steps in the nature of filing notice with the prime contractor that payment had not been made of its claim within ninety days after completion of the work. The lower court found in favor of the claimant but was reversed on appeal, with instructions to dismiss the appeal. In determining the effect of the letter, the court said:

> We think the teaching of the cases which have dealt most soundly with questions regarding the sufficiency of notice when it is required to be given by Section 270b(a) may be fairly summarized as follows: The giving of the written notice specified by the statute is a condition precedent to the right of a supplier to sue on the payment bond; the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill. . . .
> (239 F. 2d, page 577)

In answer to the claimant's argument that the Miller Act is remedial and should be liberally construed, and that the prime contractor possessed all of the knowledge it would have had if the materialman himself had given notice, the court replied:

> . . . But this argument goes too far, too fast. It overlooks entirely the fact that the statute makes the requirement of written notice from the supplier a condition precedent to a right of action on the bond; and no rule of liberality in construction can justify reading out of the statute the very

> condition which Congress laid down as prerequisite to the cause of action.
> (239 F. 2d, page 577)

A similar holding is seen in *USA for the use of Old Dominion Iron & Steel Corp. v. Massachusetts Bonding and Insurance Company,* (3rd Cir. 1959) 272 F. 2d 73. The defaulting subcontractor wrote a letter to the prime contractor stating that a certain sum was due a material supplier and that the subcontractor would indemnify the prime contractor against any materialman's claim. The subcontractor then wrote to the materialman stating that it had gone so far as to list its unpaid account with the prime contractor so that the interests of the supplier would be protected. The unpaid materialman having taken no action to give notice to the prime contractor within the ninety day statutory period, the court held that by reason thereof it was precluded from realizing any benefits of the Miller Act. The subcontractor's letter was not sufficient notice.

In *USA for the use of J. A. Edwards & Co., Inc. v. Thompson Construction Corp.,* (2d Cir. 1959) 273 F. 2d 873, cert. den. 362 U. S. 951, 80 S. C. 864, 4 L. Ed. 2d 869, 78 ALR 2d 421, the court also considered the effect of a letter from the subcontractor authorizing the prime contractor to make payments to a material supplier, said letter being construed to be an assignment. The court held that such letter was insufficient as notice to the prime contractor that the supplier would look to it for payment. In response to an argument of the supplier, the court stated:

> . . . It says in its brief (p. 12) that "In the factual setting here presented, it would require the exercise of very little imagination on the part of the general contractor Thompson to tie in the letter with the furnishing of electrical material by the use plaintiff under the prime Government contract." We think the need for exercising imagination was what the notice provision of the Miller Act was intended to prevent. . . .
> (273 F. 2d, page 877)

Notwithstanding some additional contacts between the supplier and the prime contractor, the court held no notice was given which was sufficient to perfect the claim of the supplier against the prime contractor or the bonding company.

Finally, some applicable pronouncements of the applicable law are found in *USA for the Use of Davison v. York Electric Construction Co.*, (D.C. N.D. 1960) 184 F. Supp. 520, 25 F.R.D. 478. The unpaid materialman admittedly gave no notice to the prime contractor within the ninety day period required by the Miller Act. It relied on the fact that the prime contractor received copies of invoices as to all materials furnished, which had to be approved by the prime contractor. The court held (1) there was no express or implied contractual relationship between the supplier and the prime contractor, and (2) the furnishing of invoices was not sufficient to constitute the notice required by the Miller Act. The court relied on the plain wording of the statute evidencing the intent of Congress in making the notice a prerequisite to the cause of action, and cited some of the cases which have hereinabove been discussed.

As applied to the facts of this case the foregoing authorities clearly establish that defendant Hoyt has no claim against plaintiff or its surety for the reasons: (1) No written notice of the unpaid claim was given to plaintiff by Hoyt in the manner required by statute; (2) the alleged assignment of contract proceeds from M & S to Hoyt did not constitute notice to plaintiff, even when received by plaintiff's agent, that Hoyt was looking to plaintiff and its surety for payment, except through the assignment; (3) the assignment was possibly invalid by reason of the prior assignment to the Clearfield State Bank; and (4) the assignment was ineffective because of the offset claim of plaintiff itself, in view of the default of M & S which was known to the parties.

POINT 3.

DEFENDANTS HOYT AND SMITH HAVE NO EXPRESS OR IMPLIED CONTRACT WITH PLAINTIFF.

Defendants Hoyt and Smith had no written agreement with plaintiff which would obligate plaintiff to make payment of their claims. The record does not even suggest any such agreement. No provision of law creates an agreement between the parties absent any intent of the parties to effect a contract. It is expressly admitted by defendants Hoyt and Smith that they supplied their materials and performed their labor "at the instance and request of the representative of M & S Construction and Engineering Company" (R.16 and R.22). On construction contracts of the nature involved in this case, it is very customary as a matter of business practice that sup-

pliers deal directly with the subcontractor who has specifically requested their labor and materials. There is no reason either in logic or practicality which would compel a subcontractor's material supplier to deal directly with the prime contractor on a bonded government construction project. At the time defendants Hoyt and Smith entered into their agreements with M & S Construction and Engineering Company, plaintiff neither knew or needed to know of the arrangements between said parties. Hoyt and Smith looked to M & S, their contracting party, for payment of claims. They were informed by the nature of the construction, i.e. a municipal airport, that a government project was involved which by law must be bonded.

The allegations of defendant Kent Hoyt contained in his Affidavit made a part of the Motion for Summary Judgment (R.16-18) do not raise an express or implied in law contract obligating plaintiff in any way. The delivery of an assignment from the debtor, M & S, to the contractor does not, in the absence of an acceptance by the contractor, raise any obligation from the contractor to the assignee. *USA for the use of Henry Walke v. Van De Riet, et al,* (4th Cir. 1963) 316 F. 2d 912 and *USA for the use of J. A. Edwards & Co., Inc. v. Thompson Construction Corp.,* (2d Cir. 1959) 273 F. 2d 873, cert. den. 362 U. S. 951, 80 S. C. 864, 4 L. Ed. 2d 869, 78 ALR 2d 421. Any representation that money would be received by Hoyt the following day (R.17) does not constitute an obligation absent further consideration. That representation, which may be deemed as true for the purposes of this appeal, was based only on the assignment handed

Mr. Jack Whiting by defendant Kent Hoyt, and was made prior to the knowledge of said Jack Whiting that all of the accounts of M & S had been previously assigned to the Clearfield State Bank on October 9, 1963 (R.2). The assignment from M & S to Hoyt was, therefore, invalid and not sufficient to support any kind of obligation against Whiting Brothers. We further emphasize that Hoyt's discussion with Mr. Whiting took place on December 5, 1963, before his claim was fully due, since he claims rentals up to December 17, 1963. Under the holding in *USA for use of Henry Walke v. Van De Riet, et al,* supra, notice before the claim is due is premature and of no effect.

Defendant Smith has had little contact with plaintiff and makes no allegations which would even suggest any contractual obligation of plaintiff to defendant Smith, other than the effect of the letter of December 26, 1963, which matter has already been disposed of. Defendant Smith's Affidavit admits Mr. Whiting told him on December 5, 1963, that plaintiff was bonded (R.22). This was an affirmative "red flag" which should have prompted Smith to give the statutory written notice if, in fact, Smith intended to look to plaintiff or the surety for payment. His ninety day period would have expired about December 24, 1963, and sufficient time remained for him to file his notice following receipt of actual knowledge that the job was bonded. His failure to do so defeats his own claim.

CONCLUSION

Plaintiff submits that the court below erroneously interpreted the legal implications of the undisputed facts in the record, and particularly the effect of the letter

from plaintiff's Las Vegas counsel. The governing statutes and judicial decisions discussed above, as applied to the facts, clearly demonstrate that defendants Hoyt and Smith are not entitled to judgment against plaintiff for the following reasons:

(1) Defendants did not give written notice to plaintiff of their respective unpaid claims within ninety days after furnishing the last labor or materials as required by 40 U.S.C.A. Section 270b;

(2) The letter of December 26, 1963, from plaintiff's Las Vegas counsel to defendants did not mislead them or induce them not to give written notice, but warned them of the necessity of protecting their rights;

(3) Defendant Smith did not receive said letter of December 26, 1963, until after his ninety day filing period had expired;

(4) Defendant Hoyt presented an alleged assignment from the subcontractor prior to the maturity of his claim, and no sufficient notice to plaintiff can be implied therefrom, the validity of the assignment is otherwise not shown.

(5) Defendants Hoyt and Smith have no express or implied contract with plaintiff.

Based on the foregoing arguments and authorities, plaintiff urges this court to reverse the judgments rendered by the lower court with instruction that defendants Hoyt and Smith shall have no claim or right of action against the plaintiff or its surety.

Respectfully submitted,
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