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IN THE COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

CROSNO CONSTRUCTION, INC., et al.,

Plaintiffs and Appellants,

vs.

TRAVELERS CASUALTY AND SURETY OF AMERICA

Defendants and Respondent.

AMICUS CURIAE BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION

Appeal from the Superior Court of the State of California
Case No. CIVDS1511273, Honorable Brian McCarville, Judge Presiding

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INTRODUCTION

American Subcontractors Association, Inc. ("ASA"), the *Amicus Curie* submitting this brief, is a national non-profit corporation supported by business membership dues paid by its approximately 2500-member businesses trading as construction subcontractors and suppliers throughout the country. More than 300-member subcontractor firms are located in California and are members of one of ASA's four California chapters. The primary purpose of ASA is to promote fairness in the construction industry and assure the equitable treatment of subcontractors. In this regard, ASA is actively involved in the promotion of legislative action across the nation and has regularly intervened in legal actions that affect the construction industry at large.

In this case, Appellant, Travelers Casualty and Surety Company of America (hereinafter "Travelers") is a payment bond surety that issued a payment bond procured by Clark Bros., Inc. (hereinafter "Clark"). Travelers provided a Public Works Payment Bond as required by *Civil Code* Section 9550. Respondent, Crosno Construction, Inc. (hereinafter "Crosno")

completed its work on a Public Works Project and there is no dispute that Crosno was owed for work performed. The only dispute is the timing as to the entitlement for payment for the undisputed sums owed for Crosno's work.

If this Court affirms the Trial Court, the law regarding mechanics' liens, stop notices, and payment bonds will be maintained, along with the equities which have been established through the development of such law which all interested parties involved in public and private construction count on to provide security and certainty for payment and their respective interests. On the other hand, if this Court rules in favor of Appellant, Travelers, subcontractors such as Crosno will lose any meaningful security for payment as the operation of the contract voids such claims. Further if this Court accepts an alternative argument raised in the reply to stay[1] any action it would conflict with bond being a primary obligation independent of the contract- the very intention of payment

[1]Appellant mentions *Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App4th 1107 in its opening brief but using the phrase, "postponement" and does not argue for a stay and did not at the trial court as done in *Federal Ins. Co. v. Superior Court, supra*. Appellants opening brief page 38.

protection to assure payment to subcontractors and material suppliers in a reasonable time.

A thorough analysis of the relevant case law and statutes, as follows in this brief, will show that there is no support for Appellant, Travelers' position in case law or statutes. The contract as drafted conflicts with California Public Policy protecting payment to subcontractors according to controlling case law as well as the plain language of the relevant statutes. Moreover, case law discussed herein shows the payment bond is an independent obligation from the subcontract.

ISSUES TO BE BRIEFED

There are 2 main issues in this case:

1. Can contract language delaying payment to a subcontractor until after completion of litigation between an owner and contractor be enforced to delay payment to a payment bond claimant until after the owner-contractor litigation concludes or is such contractual language an impermissible waiver prohibited by *Civil Code* Section 8122.

2. Is the bond claim an independent obligation to be enforced regardless of delayed payment language in a subcontract.

Amicus will point out herein that under, *Civil Code* Section 9558 subcontractors are required to file suit within 6 months of the time to enforce stop payment notice rights to enforce a payment bond claim. Appellant, Travelers, contends, such contract language is simply a "pass-through" of payment provisions similar to Notice, Dispute Resolutions and other Contract terms. (Appellant's Opening Brief pages 25-27). However, Appellant, Travelers' argument fails to acknowledge that in operation such contractual language acts to "waive, affect, or impair" payment bond rights which is expressly forbidden by *Civil Code* 8122.

Appellant, Travelers also argues that the bond is limited to what is owed under the contract and such right has not matured until completion of litigation between the Owner and Direct Contractor. This argument ignores the express language of *Wm. Clark v. Safeco Ins. Co.* (1997) 15 C4th 882, 890 and *Capitol Steel Fabricators v. Mega Construction Co.* (1997) 58 Cal.App.4th 1049, 1061 that the obligation of the surety is based on the bond, not the subcontract.

STATEMENT OF THE CASE

To conserve the Court's resources, the Amicus Curiae opts to omit this section and relies upon the statement of factual and procedural history as set forth in the Brief of Respondent Crosno.

ARGUMENT

I. CIVIL CODE SECTION 8122 PROHIBITS LANGUAGE SOUGHT TO BE ENFORCED BY APPELLANT

> *Civil Code* Section 8122 expressly provides, "An owner, direct contractor, or subcontractor may not, by contract or otherwise, waive, affect, or impair any other claimant's rights under this part, whether with or without notice, and any term of a contract that purports to do so is void and unenforceable unless and until the claimant executes and delivers a waiver and release under this article."
>
> Further *Civil Code* Section 9558 provides:
>
> "A claimant may commence an action to enforce the liability on the bond at any time after the claimant ceases to provide work, but not later than six months after the period in which a stop payment notice may be given under Section 9356 (30 days after notice of completion or if no notice of completion 90 days after cessation or completion)."

Accordingly, waiting until the conclusion of legal proceedings would be beyond the statute of limitations set forth in *Civil*

Code Section 9558 waiving any viable claim on the payment bond. As such the language of the contract cannot be used to delay Crosno's payment bond claim.

II. PUBLIC POLICY IN ADDITION TO EXPRESS STATUTORY LANGUAGE PROHIBITS ENFORCEMENT OF CONTRACTUAL LANGUAGE TO DELAY PAYMENT.

Appellant, Travelers attempts to argue that a claimant's right to claim on the payment bond is subject to contractual language defining "Reasonable Time" as no less than time required to pursue to conclusion legal remedies against the Owner. (Appellant's Opening Brief p. 16). Travelers in its opening brief argued that the Trial Court "should have followed contract interpretation rules" (see Appellant's Opening Brief p. 45) and that the delay until the conclusion of legal proceedings called for in the contract does not run afoul of *Civil Code* Section 8122. Travelers claimed *Civil Code* Section 8122, "does not show favor of subcontractors or direct contractor." (Appellant's Opening Brief Page 24). This argument contradicts the express language of *Civil Code* Section 8122

which prohibits contract language that will "waive, affect or impair . . . claimants rights" since waiting until after pursuing legal remedies would be after the required time frame to pursue an action within six months of the time to pursue a stop notice claim required in *Civil Code* Section 9558.

Appellant, Travelers in its reply brief tweaks its argument to claim the language of the contract seeks a stay for the entire period required for litigation. (Reply Brief page 26). Apparently, Appellant, Travelers now realizes to wait to file legal action until the conclusion of litigation against the owner would be beyond the period allowed by *Civil Code* Section 9558 and as such would waive any payment bond right. However, this argument is inconsistent with express prohibition of 8122 to affect or impair claimants' rights.

> The Trial Court correctly recognized,
> "Separate specific statutory provisions control the requirements of a public bond (see Section 9550, et seq.) and the protections of Section 8122 apply to such bonds. Therefore, where it is without dispute that Crosno performed under the contract and $562,435.65 remains unpaid, a provision that requires Crosno to wait until the contractor's litigation with the public entity has ended before it can seek payment on the bond is against public policy as unreasonably affection and impairing Crosno's right under the payment bond where no waiver

> and release has been provided. The fact Clark is asserting it does not have to pay Crosno's right now does not mean that it is not already obligated to pay Crosno for undisputed amounts that remain due." (AA 1899)

Amicus would point out that the trial court could have found the language an express violation of *Civil Code* Section 8122 without relying on any public policy since by its operation it would take the payment bond claim beyond the time required by *Civil Code* Section 9558 to pursue such a claim and as such improperly impacts payment bond rights. Further, the trial court is supported by the express language in In *Wm. Clark v. Safeco Ins. Co*. (1997) 15 C4th 882, 890, where the court specifically stated,

> "a pay if paid provision is in substance a waiver of mechanic's lien rights because it has the same practical effect as an express waiver of those rights."

The court further explained,

> "We conclude that pay if paid provisions like the one at issue here are contrary to the public policy of this state and therefore unenforceable because they effect an impermissible indirect waiver or forfeiture of the subcontractors' constitutionally protected mechanic's lien rights in the event of nonpayment by the owner. Because they are unenforceable, pay if paid provisions in construction subcontracts do not insulate either general contractors or their payment bond sureties from their contractual obligations to pay subcontractors for work performed."

Id. at 889.

In this case, the "when" – defining as a reasonable time after the conclusion of pursuing legal remedies- has the impact of a waiver just as in *Wm. Clark v. Safeco Ins., supra*, since by its operation the contract makes the payment due after the time to enforce the payment bond right has passed. Accordingly, the "when" should be declared "unreasonable" and void as against public policy just as the trial court did in this case. The claimant, Crosno, and similarly situated subcontractors should be allowed to pursue the payment bond claim before the underlying owner/general contractor litigation is complete with the contract language delaying payment beyond the statute of limitations of *Civil Code* Section 9558 declared void and against public policy.

III. ARBITRATION CLAUSE OF *Federal Ins. Co. v. Superior Court* DOES NOT SUPPORT STAY OF ACTION

Appellant, Travelers argues by analogy that stay of claims against a surety for Arbitration of claims as called for in a contract has "no functional distinction" from a direct contractor litigating under a "pay-when-paid" clause. Such argument is without merit on multiple fronts. First, the court in

Federal Ins. Co. v. Superior Court, supra, specifically cited the fact that,

> "Because it is considered to be a speedy and relatively inexpensive method of resolving disputes, there is a strong presumption favoring arbitration"

In contrast, Appellant, Travelers seeks to complete the legal process which includes appeals that are not part of the arbitration process, so subcontractors are not awaiting completion of a "speedy" process but instead years of litigation.

Further, in *Federal Ins. Co. v. Superior Court, supra,* the subcontractor is a party to the arbitration and the claims are both based on whether the subcontractor provided labor and materials to the project. Here, the claims between the owner and contractor involve the entire project and not just specifically subcontractors' claims. Moreover in *Federal Ins. Co. v. Superior Court, supra,* there is the concern that the subcontractor is attempting to avoid the arbitration requirement, which as pointed out in *Federal Ins. Co. v. Superior Court, supra,* has a strong presumption in its favor, by filing against the bond while here the subcontractor is merely seeking payment without seeking to avoid the arbitration process.

IV. APPELLANT INCORRECLTY TRIES TO USE PROMPT PAYMENT STATUTES TO ENFORCE CONTRACT LANGUAGE.

Appellant, Travelers cites to California's prompt payment statutes as a basis for allowing a delayed payment under the contract because the statutory scheme only imposes a penalty when a direct contractor withholds payment after receiving payment from an owner. (See Appellant's reply brief p. 11). Appellant, Travelers, the surety, goes on to claim a prime/direct contractor may be less able to weather non-payment than a subcontractor- even if true which Amicus disputes, Appellant, Travelers as the surety has no such claim. The reality is the subcontractor is less able to weather the non-payment since the subcontractor has already paid its laborers/employees and owes its suppliers regardless of whether it has been paid by the Direct Contractor. *See Subcontractor Negotiating Tips: A Compilation*, P. 34 *Payment timing*.

Further, the prompt payment laws do not endorse "pay-when-paid" clauses they simply assure payment is released and

not held an unreasonable time. *Civil Code* Section 9558 has no similar language conditioning timing on payment and *Civil Code* Section 8122 expressly forbids any such conditions.

V. THE PAYMENT BOND IS AN OBLIGATION INDEPENDENT OF THE CONTRACT.

Appellant, Travelers in its reply brief asserts, "Crosno is limited to what is owed under its own subcontract." (Reply Brief page 38). This argument is expressly contracted by California Case law. In Court in *Wm. Clark v. Safeco*, supra at 894, the Court made clear that the obligation of the bond is independent of the contract,

> "the default for which Safeco promised to answer was Keller's default *under the bond* and not Keller's default under the subcontracts."

Moreover, the Court in *Capitol Steel Fabricators v. Mega Construction Co.* (1997) 58 Cal.App.4th 1049, 1061, reinforced the fact that the bond is independent of the contract which states the bond:

> "create[s] a primary obligation by the surety whose liability is independent of a contractual relationship with the subcontractor or material supplier."

This makes clear Appellant, Travelers liability is not limited to liability under the subcontract and that the bond sets the terms of the right to payment. Despite these cases Appellant, Travelers attempts to use the contract language to delay payment. These cases make clear that payment is due under the bond without reference to the language of the contract the required the all legal remedies be exhausted before payment to the subcontractor. Accordingly, the contract language of subcontractor not being due funds until after conclusion of litigation is simply not enforceable against a subcontractor.

CONCLUSION

Appellant, Travelers issued a payment bond as required by *Civil Code* Section 9550. California Case Law cited herein makes clear the obligation of the bond is independent of the contract. Further, even if the contract were to control the right to payment, Civil Section 8122 makes clear any contractual language that waive, affects, or impairs a payment bond claim is void and against Public Policy. Accordingly, there is simply no legal or public policy basis to require subcontractors situated like Crosno to wait until after the conclusion of litigation

between the Owner and Direct Contractor to be entitled to payment on a payment bond. Therefore, the judgment of the trial court the judgment should be affirmed.

Dated: February 7, 2019

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CERTIFICATE OF WORD COUNT

PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

Pursuant to California Rules of Court, Rule 8.204(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing Amicus Curiae Brief of American Contractors contains 2395 words, excluding those materials not required to be counted under Rule 8.204(c)(3).

Dated: February 7, 2019

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, Amicus Curiae provides the following information:

American Subcontractors Association is the Amicus Curiae, and has made the primary monetary contribution for the preparation and filing of its brief.

Dated: February 7, 2019

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DECLARATION OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and the correspondence will be deposited with the United States Postal Service that same day in the ordinary course of business; my business address is 1290 E. Center Court Drive, Covina California 91724

On February 7, 2019, I served the following document described as: **AMICUS CURIAE OF AMERICAN SUBCONTRACTORS ASSOCIATION** on the interested parties in this action by placing copies thereof enclosed in sealed envelopes addressed as follows:

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X___ **(BY ELECTRONIC SERVICE)** I caused such document(s) to be Electronically Served for the above-entitled case to those parties as maintained on court's service list for this case. There was no error reported with this transmission. **EXECUTED ON February 7, 2019,** at Covina, California.

_X__ **FEDERAL** I declare that I am employed in the officer of a member of the bar of this court at whose direction the service was made.

MARIE MELENDEZ BY_____/S/_____