IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 20, 2015 Session

DIAZ CONSTRUCTION v. THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ET AL.

Appeal from the Chancery Court for Davidson County
No. 131655II Carol L. McCoy, Chancellor

No. M2014-00696-COA-R3-CV - Filed March 6, 2015

A subcontractor filed suit to enforce a mechanic's lien. The subcontractor, which was also a remote contractor, was required by Tenn. Code Ann. § 66-11-145(a) to serve a notice of its claim of nonpayment on the owner of the project as well as on the "prime contractor in contractual privity with the remote contractor." The subcontractor notified the owner, but it did not notify the prime contractor. The subcontractor asserted it was not required to notify the prime contractor because it had no contractual relationship with the prime contractor. The defendants moved to dismiss the subcontractor's complaint due to its failure to comply with the statute and notify the proper parties. The trial court granted the motions and dismissed the subcontractor's lien claims. The subcontractor appealed, and we affirm the trial court's judgment. The subcontractor is required by statute to notify both the owner and the prime contractor of the project of nonpayment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Russell E. Edwards, Hendersonville, Tennessee, for the appellant, Diaz Construction.

John T. Blankenship, Murfreesboro, Tennessee; James Timothy Crenshaw, Nashville, Tennessee; and Gregory L. Cashion, Nashville, Tennessee, for the appellees, The Industrial Development Board of the Metropolitan Government of Nashville and Davidson County, Allegheny Solid Surface Technologies, LLC, and Brasfield & Gorrie, LLC.

OPINION

This case involves the question of which entities a remote contractor is required to notify of nonpayment when the contractor intends to claim a mechanic's or materialman's lien pursuant to Title 66, Chapter 11 of the Tennessee Code.

FACTUAL AND PROCEDURAL BACKGROUND

Diaz Construction ("Diaz") asserts in an amended complaint that in 2013 it was hired by Sunago Builders, Inc. ("Sunago") to work on improved real property known as the Omni Nashville Hotel and Country Music Hall of Fame Expansion ("Omni Hotel"), located in Nashville. The owner of the Omni Hotel at that time was The Industrial Development Board of the Metropolitan Government of Nashville and Davidson County (the "IDB"). Brasfield & Gorrie ("B&G") was the general contractor for the project. According to Diaz's complaint, B&G hired Allegheny Solid Surface Technologies, LLC ("Allegheny") to be a subcontractor, and Allegheny hired Sunago. Sunago, in turn, hired Diaz to perform framing, flooring, roofing, and tile work. Diaz alleges it worked from on or around May 3, 2013, until about June 28, 2013. Diaz asserts it ceased working after June 28 because it was not being paid and was owed $72,748.

Diaz initially filed a complaint against the IDB, B&G, Allegheny, and Sunago to enforce a mechanic's lien on the Omni Hotel. Diaz also claimed Sunago had misapplied its payments from Allegheny and was in violation of Tenn. Code Ann. § 66-11-138.[1] Then, after Allegheny obtained a Subcontract Payment Bond from Great American Insurance Company to release Diaz's lien from the Omni Hotel, Diaz filed a motion to amend its complaint, *inter alia*, to add Great American Insurance Company as a defendant.

Allegheny, the IDB, and B&G filed motions to dismiss Diaz's complaint and opposed Diaz's motion to amend on the ground that Diaz had not properly perfected its mechanic's lien. Allegheny, the IDB, and B&G argued that Diaz was required to serve a notice of

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[1] Tennessee Code Annotated section 66-11-138(a)(1) provides:

> Any prime contractor or remote contractor who, with intent to defraud, uses the proceeds of any payment made to that contractor on account of improving certain real property for any purpose other than to pay for labor performed on, or materials, services, equipment, or machinery furnished by that contractor's order for the real property, and overhead and profit related thereto, while any amount for the labor, materials, services, equipment, machinery, overhead, or profit remains unpaid shall be liable to an injured party for any damages and actual expenses incurred, including attorneys' fees, if the damages and expenses incurred are the result of the misapplication of the payment.

nonpayment on B&G as well as the IDB, and because Diaz only served a notice of nonpayment on the IDB, Diaz did not have a properly perfected mechanic's lien.[2] Diaz agreed that it served a notice of nonpayment on the owner of the Omni Hotel, the IDB, and asserted that it served a notice of nonpayment on Sunago, the entity that hired Diaz. Diaz concedes that it did not serve a notice of nonpayment on B&G, the general contractor on the project, but contends it was not required to do so because it was not in contractual privity with B&G. According to Allegheny, the IDB, and B&G, however, Diaz was statutorily required to serve notice of nonpayment on B&G to have a properly perfected lien.

Tennessee Code Annotated section 66-11-145 identifies the entities Diaz was required to notify of nonpayment, and provides, in pertinent part, that:

> Every remote contractor with respect to an improvement, except one-family, two-family, three-family and four-family residential units, shall serve, within ninety (90) days of the last day of each month within which work or labor was provided or materials, services, equipment, or machinery furnished and for which the remote contractor intends to claim a lien under this chapter, a notice of nonpayment for the work, labor, materials, services, machinery, or equipment to *the owner and prime contractor in contractual privity with the remote contractor* if its account is, in fact, unpaid.

Tenn. Code Ann. § 66-11-145(a) (emphasis added). If a remote contractor fails to provide the requisite notice of nonpayment, the remote contractor "shall have no right to claim a lien under this chapter . . . ." Tenn. Code Ann. § 66-11-145(b).

A "remote contractor" is defined as an entity that "provides work or labor or who furnishes material, services, equipment or machinery in furtherance of any improvement under a contract with a person other than an owner." Tenn. Code Ann. § 66-11-101(14). A "prime contractor" includes an entity "other than a remote contractor who supervises or performs work or labor or who furnishes material, services, equipment, or machinery in furtherance of any improvement; provided, that the person is in direct privity of contract with an owner, or the owner's agent, of the improvement." Tenn. Code Ann. § 66-11-101(12). Thus, for purposes of this statute, B&G is the prime contractor, and Allegheny, Sunago, and Diaz are all remote contractors.

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[2]The specific information the remote contractor is required to include in the notice of nonpayment is set forth in Tenn. Code Ann. § 66-11-145(a)(1)-(5). Today, however, the issue is limited to whether Diaz was required to notify B&G of nonpayment; we do not consider whether the notice Diaz served on the IDB was defective.

The question, then, becomes what the legislature intended by the phrase "prime contractor in contractual privity with the remote contractor," as that phrase is used in Tenn. Code Ann. § 66-11-145(a). The trial court determined that the prime contractor, B&G, was also the prime contractor in contractual privity with Diaz. Because Diaz failed to serve B&G with a notice of nonpayment, the trial court concluded Diaz did not have a valid mechanic's lien. The trial court explained:

> The Court has considered the plaintiff's argument that service of a notice of nonpayment upon Sunago Builders, Inc. satisfied the statutory requirement of service upon the "prime contractor in contractual privity with the remote contractor" but the Court is not persuaded by that argument. The Court concludes that the language "in contractual privity" in T.C.A. § 66-11-145 is intended to identify the prime contractor in the chain of contractual privity with the person sending the notice of nonpayment, which in this case was B&G.

The court continued:

> The Court finds it both telling and persuasive that T.C.A. § 66-11-145 does not utilize the phrase "direct privity of contract" as is utilized in the T.C.A. § 66-11-101(12) definition of prime contractor. In that regard, the Court also notes that Black's Law Dictionary defines privity to include successive interests or relationships and is consistent with the concept of a chain of contractual privity. Finally, the Court concludes that the purpose of the notice required by T.C.A. § 66-11-145 is to alert the owner and the prime contractor, who are the two parties with the primary interests in avoiding liens, to the potential for such a claim due to nonpayment at a lower level.

Thus, the trial court dismissed Diaz's claims against the IDB, B&G, and Allegheny. Diaz's claims against Sunago were not disturbed.[3]

Diaz appeals the trial court's dismissal of its claims. First, Diaz contends Allegheny lacks standing to complain about Diaz's failure to notify B&G of its claim for nonpayment. Second, Diaz argues that B&G was not in contractual privity with Diaz, as required by the statute. Therefore, Diaz argues, it was not required to serve B&G with a notice of nonpayment. Finally, Diaz contends that, even if we find it was required to notify B&G of

[3]The trial court allowed Diaz to amend its complaint to add breach of contract and unjust enrichment claims against Sunago, and Diaz was able to move forward on its claim against Sunago for misapplication of funds.

its nonpayment, we should conclude Diaz was in "substantial compliance" by notifying the owner and Sunago.

ANALYSIS

A. Standing

Diaz argues that Allegheny has no standing to argue that Diaz's lien is invalid based on Diaz's failure to notify B&G of its claim of nonpayment. Diaz points out that the statute did not require it to notify Allegheny of its claim for nonpayment. Because it did not owe Allegheny a duty, Diaz argues, Allegheny was not prejudiced by Diaz's failure to serve notice on B&G and, thus, has no standing to argue that Diaz's lien is invalid. The trial court did not address the issue of Allegheny's standing. However, by granting Allegheny's and the other defendants' motions to dismiss, the trial court implicitly found Allegheny did, in fact, have standing to challenge Diaz's lien.

Standing "is a judge-made doctrine used to determine whether a particular plaintiff is entitled to judicial relief." *SunTrust Bank, Nashville v. Johnson*, 46 S.W.3d 216, 222 (Tenn. Ct. App. 2000) (citing *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976)). Plaintiffs are usually the focus of questions involving standing in civil actions, not defendants. *See, e.g.*, *Fannon v. City of LaFollette*, 329 S.W.3d 418 (Tenn. 2010); *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612 (Tenn. 2006); *Watson v. Waters*, 375 S.W.3d 282 (Tenn. Ct. App. 2012). When a party alleges that a plaintiff does not have standing, the court considers whether the plaintiff has "sustained a distinct and palpable injury"; whether "the injury was caused by the challenged conduct"; and whether "the injury is one that can be addressed by a remedy that the court is empowered to give." *SunTrust Bank*, 46 S.W.3d at 222 (citing *In re Youngblood*, 895 S.W.2d 322, 326 (Tenn. 1995)). If a plaintiff has a "sufficiently personal stake in the outcome of the controversy to warrant a judicial resolution of the dispute," that person or entity has standing to pursue the relief at issue. *Id*. at 222 (citing *Browning-Ferris Indus., Inc. v. City of Oak Ridge*, 644 S.W.2d 400, 402 (Tenn. Ct. App. 1982)).

Diaz named Allegheny as a defendant in this case. In its initial complaint, Diaz sought judgment against all the defendants, jointly and severally, for all unpaid amounts owed to Diaz. In its amended complaint, Diaz sought relief against Allegheny based on the performance bond Allegheny obtained to discharge Diaz's purported lien.[4] Diaz asserted in

[4]Diaz asserted in its amended complaint that Allegheny was named as the principal on the performance bond that was obtained "to secure payment of any claims made for the performance of labor or the furnishing [of] equipment, materials or supplies incurred in connection with the work to be performed

its amended complaint that, if the court found the bond was valid and enforceable for Diaz's work on the Omni Hotel, the recording of the bond "transfers the Plaintiff's lien from the subject property to the bond." In its amended complaint, Diaz sought judgment against Allegheny, as the principal on the bond, for all unpaid amounts owed to Diaz.

Although Allegheny is not a plaintiff, we believe the principles regarding standing that apply to plaintiffs apply to Allegheny here. In light of the fact that Diaz named Allegheny as a defendant and sought judgment directly from Allegheny, there is no doubt that Allegheny has a stake in the outcome of this case. The validity of the performance bond is directly linked to the validity of Diaz's lien claim. If Allegheny can show Diaz did not properly perfect its mechanics' lien, the performance bond will not be available to satisfy Diaz's claim. Thus, we conclude Allegheny had standing to challenge the validity of Diaz's mechanic's lien.

B. Interpretation of Tenn. Code Ann. § 66-11-145(a)

Allegheny, the IDB, and B&G filed motions to dismiss Diaz's complaint for failure to state a claim upon which relief could be granted, pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure. "A Rule 12.02(6) motion to dismiss admits the truth of all of the relevant and material allegations contained in the complaint, but it asserts that the allegations fail to establish a cause of action." *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004). The motion does not challenge the strength of the plaintiff's proof; it is limited to challenging only the legal sufficiency of the complaint. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). In our review of the trial court's grant of the defendants' motions to dismiss, we assume the factual allegations asserted in the complaint are true and undertake a de novo review of the trial court's conclusion that Diaz failed to state a claim, with no presumption of correctness. *Leach*, 124 S.W.3d at 90 (citing *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000)).

This case turns on the interpretation of Tenn. Code Ann. § 66-11-145(a). Statutory interpretation is an issue of law which we review de novo on appeal, granting the trial court's interpretation and decision no deference. *In re Kaliyah S.*, No. E2013-01352-SC-R11-PT, 2015 WL 273659, at *15 (Tenn. Jan. 22, 2015) (citing *Mills v. Fulmarque*, 360 S.W.3d 362, 366 (Tenn. 2012)). When interpreting a statute, we strive to "'ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Id*. at *15 (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). We are to presume that every word used in a statute has meaning and serves a purpose. *Nye v. Bayer Cropscience, Inc.*, 347 S.W.3d 686, 694 (Tenn. 2011). The most important feature

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by Allegheny under its subcontract with Brasfield and Gorrie."

of a statute is the language used. *In re Kaliyah* S., 2015 WL 273659, at *15.

As the trial court noted, the phrase "privity of contract" appears in two different statutory provisions of Title 66, Chapter 11. In the definition section, "prime contractor," is defined as a person other than a remote contractor "*in direct privity of contract* with the owner . . . ." Tenn. Code Ann. § 66-11-101(12) (emphasis added). In the notice section, remote contractors are directed to provide notice of nonpayment to the "owner and prime contractor *in contractual privity with* the remote contractor if its account is, in fact, unpaid." Tenn. Code Ann. § 66-11-145(a) (emphasis added).

> Statutes that relate to the same subject matter or have a common purpose must be read *in pari materia* so as to give the intended effect to both. "[T]he construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute." *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010) (quoting *Wilson v. Johnson Cnty*., 879 S.W.2d 807, 809 (Tenn. 1994)). We seek to adopt the most "reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws." *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997).

In re Kaliyah S., 2015 WL 273659, at *15.

From the use of the words "in direct privity of contract" in one section of the statute and "in contractual privity" in another section, it is fair to assume the legislature did not intend the two phrases to have the same meaning. "Privity" is defined by Black's Law Dictionary as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property)." BLACK'S LAW DICTIONARY (10th ed. 2014). It is undisputed that there was no contract between Diaz and B&G.

Tennessee Code Annotated section 66-11-145(a) was first enacted in 1990, and it was amended in 2007. The 1990 version required a "subcontractor" to notify the "owner and contractor contracting with the owner" if its account was unpaid. When the statute was amended in 2007, the legislators stated during the hearings that the reason for the amendment was, in part, to clarify the confusion surrounding the meaning of "contractor" and to give better, more descriptive, names to those with whom laborers and subcontractors contracted. *See Williamson Cnty. Ready Mix, Inc. v. Pulte Homes Tenn. Ltd. P'ship*, No. M2007-01710-COA-R3-CV, 2008 WL 5234730, at *2-3 (Tenn. Ct. App. Dec. 15, 2008) (addressing confusion created by terminology used in Tenn. Code Ann. § 66-11-145(a) prior to 2007 amendment). In an effort to eliminate some of the confusion, the general assembly

in 2007 replaced the term "subcontractor" with the term "remote contractor," and replaced the phrase "contractor contracting with the owner" with the phrase "prime contractor in contractual privity with the remote contractor."

Before the amendment in 2007, our Supreme Court explained that "[t]he purpose of T.C.A. § 66-11-145 is to provide owners and general contractors with sufficient notice that a subcontractor has not been paid." *Vulcan Materials Co. v. Gamble Constr. Co., Inc.*, 56 S.W.3d 571, 575 (Tenn. 2001). This was important because it allowed the owner and general contractor an opportunity to address an alleged problem of nonpayment by a subcontractor that the owner and general contractor may not otherwise have known about when the subcontractor did not deal directly with the general contractor, as here. *See CMT, Inc. v. West End Church of Christ*, No. 03A01-9511-CH-00383, 1996 WL 64003, at *1-2 (Tenn. Ct. App. Feb. 15, 1996). There is no reason to believe this purpose, which was articulated before the 2007 amendment, is any less important now, after the 2007 amendment. As construction projects become larger and more complex, both the owner and prime contractor ultimately in charge of the project need to be informed when a remote contractor has a lien claim based on nonpayment so they can resolve the claim before litigation is instituted and the entire project is jeopardized. The purpose of the statute would not be fulfilled if Diaz were required only to notify the owner and Sunago. Sunago, presumably, is aware of Diaz's claim of nonpayment. The prime contractor, B&G, however, is not necessarily aware of Diaz's claim without the proper notification. As the entity in charge of the overall project in which both Sunago and Diaz are participating, B&G should be given the opportunity to resolve Diaz's claim of nonpayment by Sunago.

A large project may have more than one general contractor in charge of different aspects of the project. There might be a general contractor in charge of the electrical work, a general contractor in charge of the plumbing, and a general contractor in charge of the building foundation, among others. Each of these general contractors would be a "prime contractor," because each would be in direct privity of contract with the owner or the owner's agent. Each prime contractor, in turn, might enter into contracts with subcontractors and laborers to perform different aspects of the project. Each subcontractor and laborer would be a "remote contractor" because each would have a contract with one other than the owner. In this scenario, if a remote contractor working on the plumbing aspect of a project claimed he was owed for services and intended to claim a lien, the language of Tenn. Code Ann. § 66-11-145(a) could be interpreted to require that remote contractor to give notice of nonpayment to the owner of the project and to the prime contractor in charge of the plumbing. It would not make sense for the remote contractor working on the plumbing to give notice of nonpayment to the prime contractor in charge of the electrical work, or any prime contractor other than the one in charge of plumbing. This is because the remote contractor would not have a relationship with any prime contractor other than the one

upstream of him, which would be the prime contractor in charge of plumbing. Thus, the remote contractor in our example could be said to have "contractual privity" with the prime contractor in charge of plumbing.

Diaz is correct that it was in privity of contract with Sunago, but Diaz is incorrect in suggesting that Tenn. Code Ann. § 66-11-145(a) required it to provide Sunago with a notice of nonpayment. This is because Sunago is not a prime contractor, and the statute requires that notice be provided to the prime contractor in privity of contract with the remote contractor. The only prime contractor that could fit that definition is B&G, and Diaz admits that it did not serve notice of nonpayment on B&G. We agree with Diaz that the language "in contractual privity with the remote contractor" is not a model of clarity. However, we must provide an interpretation of the language used in the statute, and we believe the only reasonable interpretation is that the legislature intended remote contractors to give notice to the prime contractor upstream from them, which is B&G here. *See Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012) (observing that courts are to consider statutory language in the context of the overall statute and presume the legislature intended to give each word meaning).

C. Substantial Compliance

The final argument Diaz makes is that, even if we find it was required to serve notice of nonpayment upon B&G, we should conclude Diaz substantially complied with the notice requirements by notifying the IDB and Sunago of its claim for nonpayment. Prior to 2007, the courts "uniformly held that strict compliance with the mechanics' and materialmen's lien statutes [was] required in order to establish a subcontractor's lien against the owner." *Potter's Home Ctr., Inc. v. Tucker*, No. 03A01-9710-CH-00467, 1998 WL 229423, at *2 (Tenn. Ct. App. May 1, 1998). In 2007, however, a new section was added to Title 66, Chapter 11 of the Tennessee Code, requiring only substantial compliance with the requirements of the chapter.[5]

Tennessee Code Annotated section 66-11-148 has been interpreted as a directive to

[5]Tennessee Code Annotated section 66-11-148 provides:

> (a) This chapter is to be construed and applied liberally to secure the beneficial results, intents, and purposes of the chapter.
> (b) Substantial compliance with this chapter is sufficient for the validity of liens arising under this chapter and to give jurisdiction to the court to enforce the liens.
> (c) Any document required or permitted to be served, recorded or filed by this chapter that substantially satisfies the applicable requirements of this chapter is effective even if it has nonprejudicial errors or omissions.

"look to substance over form." *Tri Am Constr., Inc. v. J & V Dev., Inc.*, 415 S.W.3d 242, 245 (Tenn. Ct. App. 2011). In *Tri Am Construction*, Tri Am filed a complaint to enforce a lien. *Id*. at 243. One of the defendants moved to dismiss the complaint due to procedural defects, including Tri Am's failure to file its complaint under oath; failure to join a successor trustee on the deed of trust in a timely manner; failure to have an attachment issued; and failure to include a proper acknowledgment on its notice of lien. *Id*. at 243, 247. Both the trial court and the Court of Appeals determined that liberally construing the lien statute meant that Tri Am should be able to amend its complaint to cure the procedural defects of its lien enforcement action. *Id.* at 247-48. There were no allegations that Tri Am had failed to notify a party of its nonpayment, as here.

Diaz argues that we should conclude it substantially complied with the mechanics' lien statute because B&G and the other defendants have not shown they were prejudiced by Diaz's failure to notify B&G of Diaz's claim of nonpayment. Diaz does not explain why it believes the defendants have a burden to show they were prejudiced by Diaz's failure to notify B&G of its claim, and we find the statute does not place such a burden of proof on B&G or the other defendants. Unlike the situation in *Tri Am*, which was a procedural defect in the suit, Diaz's failure to comply with the statute was substantive. Notification of the proper parties goes right to the heart of the purpose of Tenn. Code Ann. § 66-11-145, which is to give the owner and prime contractor an opportunity to resolve payment issues in a timely fashion. Construing and applying Chapter 11 of Title 66 liberally, we conclude Diaz did not substantially comply with the notice requirements. Accordingly, we affirm the trial court's decision to dismiss Diaz's lien claims against the IDB, B&G, and Allegheny.

CONCLUSION

The trial court's judgment is affirmed in all respects. Costs of appeal shall be taxed to the appellant, Diaz Construction, for which execution shall issue, if necessary.

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ANDY D. BENNETT, JUDGE

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