St. Mary's Law Journal

Volume 6 | Number 1 Article 14

3-1-1974

Owner in Texas Not Precluded from Providing Additional Security.

Margaret McCracken

were allowed to board. Granados then deduced that an explanation given about the money exchange was false. He withdrew Palazzo's luggage from the aircraft, searched it, and discovered marijuana. If the court had been inclined to approve a checked luggage search, there was probably sufficient suspicious activity on the part of the defendant to justify the inspection of his luggage.[48] Instead, the court was convinced that after searches of the suspects failed to reveal any weapons, "no anti-skyjacking necessity remained that would authorize the search of the luggage . . . no longer in the possession or under the control of the suspects."[49]

The legitimate government interest of protecting all of us from the havoc that a single armed person can wreak aboard an airliner cannot be minimized. But neither can the dangers of unnecessary government intrusion into private affairs be minimized. If the decision in *United States* v. *Cyzewski*[50] is to be limited to its facts, as *United States v. Palazzo*[51] indicates, then perhaps the anti-hijacking measures will not be placed so directly at odds with the values inherent in the fourth amendment.

Robert M. Spurlock

MECHANIC'S LIENS—Contractor's Bonds—Owner In Texas Not Precluded From Providing Additional Security

Johnson Service Co. v. Transamerica Ins. Co.,
485 F.2d 164 (5th Cir. 1973).

The federal government contracted with Penner-Ring Construction Company to build a post office building on government land which had been conveyed by quitclaim deed to Penner-Ring and which was to be leased back to the government upon completion of the project. Because of the lease-back agreement, the payment bond that Penner-Ring acquired was not subject to the Miller Act which generally governs in federally sponsored public work, however, the government nevertheless required the posting of the

48. Cited as factors distinguishing *Cyzewski* from *Palazzo* were the facts that Herbert and Cyzewski had used false names on their tickets, that their luggage was removed from the airplane only after they claimed their identification papers were inside, and that the bags were searched only after Herbert had reached into his bag, possibly to grasp a weapon. *Id.* at 946.

49. *Id.* at 946.

50. 484 F.2d 509 (5th Cir. 1973).

51. 488 F.2d 942 (5th Cir. 1974).

bond on the Miller Act form.[1] Penner-Ring, now the owner of the property upon which the construction was to take place, also furnished a performance and completion bond pursuant to Article 5472d, Texas Revised Civil Statutes, which insures payment of mechanics and materialmen contributing to the completion of the project, thereby protecting the owner's property from liens.

When a major subcontractor under Penner-Ring defaulted, the appellee, Johnson Service Company, who had contracted with the defaulting party, sued the surety on the Texas bond and recovered a portion of its contribution. The appellee then sued Transamerica Insurance Company, the surety on the federal bond, to recover for the remainder of its contribution not compensated for under the Texas bond. Transamerica contended that the Texas bond was the sole remedy available to the appellee and that there existed no right of recovery on the federal bond. The Federal District Court for the Southern District of Texas rejected that interpretation of the Texas law,[2] and Transamerica Insurance Company appealed. Held—*Affirmed.* When a bond has been furnished according to Article 5472d of the Texas Revised Civil Statutes, Texas law does not preclude an action against non-statutory security that the owner might provide.[3]

As early as 1839, Texas law has sought to give assurance that mechanics and materialmen contributing improvements to property would receive reimbursement for their services.[4] The constitutional mechanic's lien protects improvers in privity of contract with the owner;[5] the statutory mechanic's lien provides similar protection for improvers despite lack of privity with the owner.[6] Unfortunately, the earlier statutory lien has been the subject

1. Contractors for federally sponsored projects are required to provide performance and payment bonds pursuant to the Miller Act, 40 U.S.C. §§ 270a-270e (1970).

2. Johnson Serv. Co. v. Transamerica Ins. Co., 349 F. Supp. 1220, 1226 (S.D. Tex. 1972), *aff'd*, 485 F.2d 164 (5th Cir. 1973).

3. Jhonson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 169 (5th Cir. 1973).

4. The first lien law in Texas was enacted in 1839 by Mirabeau B. Lamar, President of Texas. 2 H. GAMMEL, LAWS OF TEXAS 66 (1846). The original state constitution also provided for a mechanic's lien, TEX. CONST. art. 12, § 47 (1869), with the present constitutional mechanic's lien provided in Article 16, Section 37 of the Texas Constitution.

5. TEX. CONST. art. 16, § 37. Only mechanics, materialmen, and artisans who are original contractors may recover under the constitutional lien. Fidelity & Deposit Co. v. Felker, 469 S.W.2d 389, 390 (Tex. Sup. 1971). These original contractors are not entitled to assert statutory liens, or recover under the bonds provided by article 5472d. Fidelity & Deposit Co. v. Felker, 469 S.W.2d 389, 393 (Tex. Sup. 1971); Trinity Universal Ins. Co. v. Barlite, Inc., 435 S.W.2d 849, 853 (Tex. Sup. 1968). Nor does a constitutional mechanic's lien exist in favor of moneylenders. West v. First Baptist Church, 123 Tex. 388, 406, 71 S.W.2d 1090, 1099 (1934).

6. *See generally* TEX. REV. CIV. STAT. ANN. arts. 5452-5472d (Supp. 1974). The only requirement is that materialmen or mechanics work under a valid contract. The improver's right to recover is not dependent upon the relationship between the owner and the contractors. Campbell Bros., Inc. v. General Elec. Supply Co., 383 S.W.2d

of a myriad of diverse and conflicting court decisions. As noted by the Texas Legislature:

> The fact the existing Statutes governing mechanics and materialmen liens are antiquated, vague, and ambiguous, and have been the subject of numerous conflicting court decisions resulting in the *loss of liens through technicalities*, creates an emergency and an imperative public necessity.[7]

Pursuant to this observation, the legislature, in 1961, sought to standardize and clarify the procedures for perfecting mechanic's liens by creating what is popularly known as the Hardeman Act.[8] The underlying purpose of the Hardeman Act has been construed as an attempt to increase the measure of protection afforded laborers and materialmen involved in construction projects,[9] as has long been required in Texas public work projects.[10] To accomplish this purpose, the Act extends to those working under contract with original contractors or subcontractors the right to assert liens,[11] and to impound funds due the original contractor in the hands of the owner,[12] and provides under article 5472d for the posting of a bond to insure their payment.

The bond provided for by article 5472d allows an owner to require his prime contractor to post a bond in an amount not less than the sum of

---

61, 63 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.). Nor do the labor and materials have to be supplied to the original contractor, or even at his direct request. Johnston v. Felker, 459 S.W.2d 923, 929 (Tex. Civ. App.—Beaumont 1970), *aff'd in part*, 469 S.W.2d 389 (Tex. Sup. 1971).

7. This is the emergency clause, as quoted in Hayek v. Western Steel Co., 478 S.W.2d 786, 792 (Tex. Sup. 1972) (court's emphasis).

8. TEX. REV. CIV. STAT. ANN. arts. 5452-5472d (Supp. 1974).

9. Hayek v. Western Steel Co., 478 S.W.2d 786, 792 (Tex. Sup. 1972); University Sav. & Loan Ass'n v. Security Lumber Co., 423 S.W.2d 287, 296 (Tex. Sup. 1967); Trane Co. v. Wortham, 428 S.W.2d 417, 419 (Tex. Civ. App.—Houston [1st Dist.] 1968), *writ ref'd n.r.e.*, 432 S.W.2d 520 (Tex. Sup. 1968); Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691, 692 (Tex. Civ. App.—San Antonio 1967,writ ref'd n.r.e.).

10. TEX. REV. CIV. STAT. ANN. art. 5160 § a (1971). This act, popularly known as the MacGregor Act, was designed to protect laborers and materialmen who would not otherwise be able to enforce a claim for their services, since no liens can be enforced against public property. Allis-Chalmers Mfg. Co. v. Curtis Elec. Co., 259 S.W.2d 918, 921 (Tex. Civ. App.—Austin 1953, *rev'd on other grounds*, 153 Tex. 118, 264 S.W.2d 700 (1954).

The Act provides that performance and payment bonds in the amount of the contract price are required to be furnished by the prime contractor where the formal contract for public improvements exceeds $2,000. If claims remain unpaid after 60 days, the claimant may sue the principal and surety, provided he notifies them within 90 days after the tenth day of the month following the last delivery.

11. TEX. REV. CIV. STAT. ANN. art. 5472d, § 1 (Supp. 1974).

12. TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1974) permits an owner to retain 10 percent of the contract price due the prime contractor for 30 days after the work is completed to pay laborers and materialmen who remain unpaid. The court in Hayek v. Western Steel Co., 478 S.W.2d 786, 793-94 (Tex. Sup. 1972) interpreted this to mean 10 percent of the contract price for the entire project; however, in 1973 the Texas Legislature amended article 5452 to provide for 10 percent retainage of each original contract. TEX. REV. CIV. STAT. ANN. art. 5452, § 2(d) (Supp. 1974).

the original contract to insure payment of those working under him.[13] To recover under the bond, the claimant must show that he has furnished labor or material for the completion of the project pursuant to a valid contract with the prime contractor or with one of the prime contractor's subcontractors.[14] The claimant must follow the statutory procedures for perfecting a lien against the owner's property[15] or comply with the statutory notification requirements to assert his claim.[16]

Once the bond has been posted, the owner's property cannot be encumbered by a lien. Section 7 of article 5472d provides:

> In all cases where bonds have been filed in accordance with this Article, no suits shall be filed against the owner nor against his property . . . and the owner shall be relieved of all obligations under Article 5454, 5463 and 5469 hereof. If the valid claims against a bond are in excess of the penal sum of the bond, each claimant shall be entitled to share pro rata in such penal sum.

The legislature recognized that owners improving their property are in a precarious position, for they may be liable for improvements they never contemplated in the original contract.[17] Although the purpose of the entire Hardeman Act is to provide security for the mechanics and materialmen involved in private construction projects, section 7 of article 5472d is specifically designed to protect the owner and his property as well.[18]

---

13. TEX. REV. CIV. STAT. ANN. art. 5472d, § 1 (Supp. 1974). The bond is executed by the original contractor as principal and a corporate surety authorized to do business in the State of Texas. *Id.* § 1.

14. *See* TEX. REV. CIV. STAT. ANN. art. 5452, § 2(f), *and* art. 5472d, § 1 (Supp. 1974).

15. TEX. REV. CIV. STAT. ANN. art. 5472d, § 4 (Supp. 1974). The procedures for perfection of a lien against the owner's property are outlined in article 5453. *See* Anderson v. Clayton, 494 S.W.2d 650, 651 (Tex. Civ. App.—Dallas 1973, no writ).

16. TEX. REV. CIV. STAT. ANN. art. 5472d, § 4(a) (Supp. 1974). The claimant must give to the original contractor all notices applicable under article 5453, section 2, and may give to the surety all notices required to be given the owner. Should the claimant fail to perfect a lien according to article 5453, section 4(a), or give appropriate notices, he has no claim against the bond or the owner's property. Anderson v. Clayton, 494 S.W.2d 650, 651 (Tex. Civ. App.—Dallas 1973, no writ); Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691, 693 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

It is not a simple procedure to give satisfactory notice. The notice is insufficient if it does not contain the statutory language of article 5453, section 2b(2), for the owner must be notified that he would be personally liable and his property subject to a lien unless the claimant is paid. Even though the bond precludes the imposition of a lien on the property, the notice must nevertheless comply with the statutory language. Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691, 695 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); Texas & N. Ry. v. Logwood, 401 S.W.2d 886, 890 (Tex. Civ. App.—Texarkana 1966, no writ).

17. The improver need only work pursuant to a valid contract with a subcontractor, so the owner may be liable for labor and materials supplied without his knowledge. Johnston v. Felker, 459 S.W.2d 923, (Tex. Civ. App.—Beaumont 1970), *aff'd in part*, 469 S.W.2d 389 (Tex. Sup. 1971).

18. Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691, 692-93 (Tex. Civ. App.

Although section 7 is not the only means by which an owner might protect himself and his property against claims resulting from construction, it offers the most comprehensive scheme of security. In lieu of requiring his prime contractor to post a bond, the owner may determine for himself, in advance of payment to the original contractor, that the prime contractor has paid all laborers and materialmen,[19] or he may retain 10 percent of the funds due the original contractor during the progress of the work and for 30 days thereafter.[20] The bonding procedure, however, offers several advantages over these latter two alternatives. Primarily, the posting of the bond *specifically* avails the owner protection of his property from a lien.[21] The advantages of such certainty are readily apparent: the land is not subject to seizure or sale, and is therefore more alienable. Additionally, the owner is not personally liable for claims under other provisions of the Hardeman Act.[22] When the original contract is recorded with the filing of the bond, the statutes provide for a shorter time in which to file claims, thus necessitating a more rapid settlement of claims.[23] Finally, section 7 limits the owner's liability to the original contract price. Should claims exceed the penal sum of the bond, which is equal to the original contract price, the claimants must share pro rata in that sum, for they have no action against the owner for the excess.

Despite these advantages, the owner must bear the cost of any surety bonds if in fact his contractors are able to obtain such bonds.[24] In addition, the surety bond option completely protects the owner and his property only if all the prime contractors obtain bonds. Nevertheless, the advantages of bonding by far outweigh the disadvantages, and bonding appears to be the

---

—San Antonio 1967, writ ref'd n.r.e.); Campbell Bros., Inc. v. General Elec. Supply Co., 383 S.W.2d 61, 63 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.). *See also* Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 167-68 (5th Cir. 1973).

19. Hayek v. Western Steel Co., 478 S.W.2d 786, 795 (Tex. Sup. 1972). Unfortunately for mechanics and materialmen, however, their contracts with the contractor often call for payment after the contractor is paid by the owner.

20. TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1974). The owner's right to retain funds due the contractor under this statute arises only upon receiving notice by laborers or materialmen that they have not been paid by the contractor.

21. TEX. REV. CIV. STAT. ANN. art. 5472d, § 7 (Supp. 1974).

22. *Id.* § 7.

23. Original contractors, who are not covered by the bond, have 120 days after the accrual of indebtedness in which to file claims, whereas subcontractors, including laborers and materialmen, have 90 days in which to file claims, according to article 5453, section 1. *See* Texas & N. Ry. v. Logwood, 401 S.W.2d 886, 887-88 (Tex. Civ. App.—Texarkana 1966, no writ).

24. Rates may vary according to the cost of construction, as determined by the Texas State Insurance Board. TEX. INS. CODE ANN. art. 5.15 (1963). Surety bonds are not necessarily easy to obtain. A surety will usually consider a contractor's character, capacity, and capability in determining if he will issue a bond. The surety also considers reputation and financial capacity of the owner. PRACTISING LAW INSTITUTE, REAL ESTATE CONSTRUCTION § 6.9 (J. McCord ed. 1968).

most adequate statutory remedy available to insure both owners and improvers.[25]

Although providing a payment bond pursuant to article 5472d shields the owner from liability imposed by other articles of the Hardeman Act, the question as to whether or not the bond precludes the subcontractors from recovery from another source outside of the statute, such as an additional bond, was one of first impression for the court in *Johnson Service Co. v. Transamerica Ins. Co.*[26] The Court of Appeals for the Fifth Circuit, construing Texas law, held that the Hardeman Act Bond is not the only source of compensation available to subcontractors.[27] The court in the instant case was careful to consider the spirit of Texas law and to follow the state court interpretations of the Hardeman Act.

The remedial nature of the statutes pertaining to mechanic's and materialmen's liens has prompted their liberal construction by the courts.[28] One reason for such an interpretation is that the labor and materials which improvers contribute have little value to them once the materials have been furnished, however, the installation or construction has served to increase the value of the owner's property.[29] Additionally, the consideration of who can best absorb the loss is examined in cases dealing with a contractor's payment bond, with the courts tending to favor an unpaid subcontractor over a corporation which has underwritten a bond for a profit.[30] The court in

25. Most states have mandatory public bonding statutes, and many have private bonding statutes. In addition to such laws, several states have allowed an owner to avoid liability arising from claims of improvers by posting a notice of nonresponsibility on the property. ALAS. STAT. § 34.35.065 (1962); CAL. CIV. CODE § 3094 (Deering 1972); MINN. STAT. ANN. § 514.06 (1947); NEV. REV. STAT. § 108.234 (1967); N.J. REV. STAT. § 2A:44-78, 80 (Supp. 1968). Although an effective remedy for the owner, the notice of nonresponsibility offers no solution to the laborer or materialman whose services have already been rendered.

Michigan and West Virginia allow the owner to require a sworn, itemized account from his contractor that he has paid all improvers, and thereby avoid liability to the improvers. MICH. STAT. ANN. § 26.284 (1970); W. VA. CODE ANN. § 38-2-19, 20 (1966).

The bonding provisions of two states offer an interesting contrast to those of Texas. Utah makes bonding mandatory on any contract exceeding $500 for private works. UTAH CODE ANN. § 14-2-1 (1953). Colorado, on the other hand, has a specific provision which is opposite in effect to that of Texas' article 5472d, section 7. This provision states that the posting of the bond does not bar any other remedy available to the improver. COLO. REV. STAT. ANN. § 86-3-24 (1963).

26. Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164 (5th Cir. 1973).

27. *Id.* at 169-70.

28. *Id.* at 168; Hayek v. Western Steel Co., 478 S.W.2d 786, 795 (Tex. Sup. 1972); University Sav. & Loan Ass'n v. Security Lumber Co., 423 S.W.2d 287, 294 (Tex. Sup. 1967); Trane Co. v. Wortham, 428 S.W.2d 417, 419 (Tex. Civ. App.—Houston [1st Dist.], *writ ref'd*, 432 S.W.2d 520 (Tex. Sup. 1968).

29. Hayek v. Western Steel Co., 478 S.W.2d 786, 795 (Tex. Sup. 1972).

30. *See, e.g.*, Aetna Cas. & Surety Co. v. Hawn Lumber Co., 62 S.W.2d 329, 332 (Tex. Civ. App.—Dallas 1933), *modified on other grounds*, 128 Tex. 296, 97 S.W.2d 460 (1936).

Johnson likewise emphasized the tradition of liberal interpretation in its construction of section 7, recognizing that the purpose of the Hardeman Act is to extend protection afforded the improver under old mechanic's lien statutes, not to limit such protection.[31] The old statute had no provision which limited the owner's liability under a payment bond, so the Transamerica bond would have unquestionably been liable for payment of the improvers prior to 1961. The court would have been in error had it denied a protection available under the old law, which was not specifically excluded under the new law.[32] The court in *Johnson* noted that the legislature drew a distinction between suits brought against the individual and suits brought against the bond.[33] Article 5472d, section 4, outlines the procedures necessary for perfecting a claim against the bond, whereas section 7 specifically refers to suits filed against the owner. The distinction was originally drawn in *Barlite, Inc. v. Trinity Universal Ins. Co.*,[34] where the court declared that article 5472d, section 7 "constitutes claimant's only statutory security—replacing the lien claim on the property."[35] This case labels Hardeman bonds as statutory security, implying the existence of non-statutory security; a distinction used by the court in *Johnson* to determine that the Transamerica bond was non-statutory security.[36] The court further noted that in the Texas Supreme Court decision in *Trinity Universal Ins. Co. v. Barlite, Inc.*,[37] article 5472d, section 7 was construed to provide "only for immunity against liens covering the *owner's* property."[38] The immunity granted by virtue of section 7 is not extended to any other area. A ban on statutory suits against the owner's property, therefore, should not include a ban on suits against additional bonds which the owner in his foresight may have chosen to provide.[39]

The Hardeman Act is not the only statutory remedy which might grant a right of action against the Transamerica bond. The Texas Business and

31. Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 168-69 (5th Cir. 1973).

32. In advancing this reasoning the court in *Johnson* examined the Texas Supreme Court case of Hayek v. Western Steel Co., 478 S.W.2d 786, 795 (Tex. Sup. 1972). In that case the court had addressed itself to an owner's argument that article 5469 of the Hardeman Act should be interpreted to deny relief that had been available under the old law. The court, however, recognized the new amendments as improving the remedies offered to mechanics and materialmen, not reducing any measure of protection.

33. Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 169 (5th Cir. 1973).

34. 400 S.W.2d 405 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.). This case is an appeal from a summary judgment, which reversed the trial court's finding and remanded the cause for trial.

35. *Id.* at 407.

36. Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 169 (5th Cir. 1973).

37. 435 S.W.2d 849 (Tex. Sup. 1968).

38. *Id.* at 853 (court's emphasis).

39. Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 170 (5th Cir. 1973).

Commerce Code recognizes the existence of cosureties who share the same principal and who provide bonds for the same purpose.[40] Because Penner-Ring was the principal for both the Hardeman and Transamerica bonds, and because both bonds are furnished to insure the compensation of improvers contributing services to the same project, the two bonding companies could be considered cosureties. When a surety pays a debt under the suretyship relation, it is entitled to recoup pro rata contributions from cosureties to the extent of the penalty of either bond.[41] Under Texas law, then, the surety for the Hardeman bond could have required from its cosurety, the Transamerica Insurance Company, payment of a pro rata share of the initial judgment.

Since section 7 is a portion of article 5472d, its proper interpretation is dependent upon an accurate construction of the entire Act. The need for viewing a statute in its whole perspective was expressed in *Trinity Universal Ins. Co. v. Palmer*[42] where the court declared that when articles are

> integral parts of what is clearly a comprehensive legislative scheme, they must be construed together in such a way as to achieve the presumed legislative intent to create a consistent and sensible set of regulations. A construction which creates conflict among the various parts of the legislative plan is, if possible, to be avoided.[43]

Section 7, therefore, cannot be considered an independent and exclusive statute, and must be interpreted in light of the entire Hardeman Act.

The court in the instant case construed the effect of the literal wording of article 5472d, section 7 for the first time, basing its conclusions on the premise that section 7 was never intended to reduce the measure of protection afforded laborers and materialmen through narrow interpretations of Hardeman Act provisions. The legislature intended the Hardeman Act to overcome the loss of liens due to technicalities,[44] not to revive the very contradictions and inconsistencies it was designed to erase. The court in *Johnson* has recognized this intention in holding that specific wording and single provisions of statutes are not controlling when they serve to defeat the manifest purpose of an Act. In allowing the mechanic or materialman a right of action against a bond obviously secured to give him a remedy, the court has emphasized the spirit and purpose of the Hardeman Act, which is to extend protection afforded those who are not in a position to protect themselves.

Margaret McCracken

---

40. TEX. BUS. & COMM. CODE ANN. § 34.04(b)(2) (1968).
41. Western Indemn. Co. v. Murray, 237 S.W. 1109 (Tex. Comm'n App. 1922, jdgmt adopted).
42. 412 S.W.2d 691 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).
43. *Id.* at 695.
44. Hayek v. Western Steel Co., 478 S.W.2d 786, 792 (Tex. Sup. 1972).