

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

SOUTHEASTERN CONCRETE CONSTRUCTORS, LLC,

Appellant,

v.

WESTERN SURETY COMPANY,

Appellee.

No. 2D20-2475

June 23, 2021

Appeal from the Circuit Court for Hillsborough County; Cheryl K. Thomas, Judge.

Sean A. Mickley and Douglas W. Ackerman of Kirwin Norris, P.A., Orlando, for Appellant.

Christian L. Cutillo and Megan S. Reynolds of Vezina, Lawrence & Piscitelli, P.A., Tallahassee, for Appellee.

SMITH, Judge.

Southeastern Concrete Constructors, LLC, appeals the nonfinal order granting the motion to dismiss and transfer venue

filed by Western Surety Company and transferring the case to Levy County, Florida. Because Southeastern Concrete filed suit on the performance and payment bond, which contains no venue selection clause, the trial court erred in transferring venue based upon a venue selection clause contained in a separate, unincorporated subcontract.¹ We reverse the order transferring the case to Levy County and remand for further proceedings in Hillsborough County.

D.A.B. Constructors, Inc. (General Contractor), entered into a contract with the Florida Department of Transportation (FDOT) related to a construction project in Hillsborough County. Pursuant to section 337.18, Florida Statutes (2019), the General Contractor obtained a performance and payment bond (Bond) from Western Surety. The performance aspect of the Bond guarantees to FDOT that the prime contract will be fully performed, while the payment aspect of the Bond guarantees that subcontractors, suppliers, and others will be paid for the work, materials, and labor they furnish to

¹ Our opinion is limited to the issue framed by the parties regarding whether the trial court erred in applying the venue selection clause of the subcontract, and so our analysis does not reach whether venue was proper in Hillsborough County.

the project. *See Bond, Black's Law Dictionary* (11th ed. 2019) (defining the terms "performance bond" and "payment bond" and indicating that the two are often issued together). The Bond is silent as to venue for any action brought under its terms.

The General Contractor then entered into a subcontract with Southeastern Concrete to furnish certain labor, equipment, and materials to the project (Subcontract). Payment for performance under this Subcontract was due to Southeastern Concrete by the General Contractor under its terms, and Western Surety acted only as the surety under the terms of the Bond related to the payment aspect of it for any amount owed to Southeastern Concrete in the event of a default by the General Contractor. The Subcontract includes the following venue clause:

The Subcontract shall be governed by the law of the State of Florida. Any suit relating to the Subcontract, or the performance of Prime or Subcontractor shall be commenced in the state court of competent jurisdiction in Levy County, Florida, and shall remain there until its conclusion.

Integral to the action it brought in Hillsborough County under the Bond, Southeastern Concrete alleges that the General Contractor failed to pay it for the work it performed under the

Subcontract. As a result of the General Contractor's nonpayment, Southeastern Concrete filed a single-count complaint against Western Surety in Hillsborough County, seeking payment under the Bond. Southeastern Concrete attached copies of the Bond and the Subcontract to the complaint. However, Southeastern Concrete did not join the General Contractor as a party or allege any count or otherwise seek damages under its Subcontract with it.

Western Surety filed a motion to dismiss and transfer venue, asserting that the venue selection clause in the Subcontract required the trial court to transfer this case to Levy County. The trial court agreed and granted Western Surety's motion transferring venue to Levy County under the terms of the Subcontract. The order transferring venue turns on a question of law, and therefore, this court's standard of review is *de novo*. *See Tobin v. A&F Eng'g*, 979 So. 2d 967, 968 (Fla. 3d DCA 2008).

In the instant case, Southeastern Concrete filed a single-count complaint against Western Surety—the surety—pursuant to the Bond without also naming the General Contractor, as is permitted under section 337.18. *See* § 337.18(1)(b) ("A claimant has a right of action against the contractor and surety for the amount due him or

her, including unpaid finance charges due under the claimant's contract."); *see also* § 337.18(1)(d) (providing that the action may be brought "against the contractor or the surety." (emphasis added)). Southeastern Concrete's right to bring an action against Western Surety was not waivable, *see* § 337.18(1)(d), but section 337.18 is silent as to where such action can or should be brought. *Cf.* § 255.05(1)(e), Fla. Stat. (2019) (rendering unenforceable any provision in a public building construction bond "which restricts the venue of any proceeding relating to such bond").

The terms of the Bond are also silent as to where such action can or should be brought. Western Surety argues venue is proper in Levy County, relying on the venue selection clause of the Subcontract to supplement the terms of the Bond and citing *Insurance Co. of North America v. Jetstar Development*, 515 So. 2d 272, 273 (Fla. 4th DCA 1987), in support. In *Jetstar*, subcontractor Jetstar brought an action for breach of the subcontract against the contractor and an action against the surety on the bond. The surety moved to transfer venue based upon the venue provision in the subcontract. The subcontract between Jetstar and the contractor contained the following venue provision:

In the event of suit by the Contractor or its surety against the Sub-contractor or its surety or those with whom he deals on behalf of this agreement, or suit by the Sub-contractor or its surety or those with whom he deals on behalf of this agreement, against the Contractor or its surety, then the venue of such suit shall be in Sarasota County, Florida, and the Sub-contractor hereby waives for itself, its surety or those with whom he deals on behalf of this agreement whatever rights it may have in the selection of venue.

Id. at 273 (emphasis added). In reversing the trial court's order denying the surety's motion to transfer venue, the Fourth District held that Jetstar expressly agreed to venue in Sarasota County in any suit brought against either the contractor or the surety. *Id.*

The facts in *Jetstar* are not analogous to this case. Foremost, Southeastern Concrete brought a one-count complaint against Western Surety under the terms of the Bond whereas Jetstar, in addition to bringing suit against the surety under the bond, brought suit against the contractor for breach of the subcontract. The General Contractor is not a party to the complaint in this case, nor does the complaint bring any counts related to breach of the Subcontract. And while Southeastern Concrete agreed to venue in Levy County in a suit with the contractor relating to the Subcontract, there is no express language in the venue selection

clause of the Subcontract mentioning either the surety or the Bond. Thus, Southeastern Concrete did not agree that any action on the Bond would also be brought in Levy County.

The Bond is a separate and distinct instrument guaranteeing payment for the work, materials, and labor performed under the Subcontract by Southeastern Concrete in the event the General Contractor fails to pay. *See OBS Co. v. Pace Constr. Corp.*, 558 So. 2d 404, 408 (Fla. 1990) ("The payment bond is a separate agreement, and any inability to proceed against the general contractor does not necessarily prevent recovery against the sureties under the bond."). Moreover, Western Surety, as a party to the Bond, agreed to guaranty payment to subcontractors, like Southeastern Concrete, without a venue selection clause, which is consistent with the absence of any language in the Subcontract including the Bond or the surety. We decline to interpret the plain language of the Subcontract or the Bond in such a way that requires us to rewrite both those instruments. *See Watts v. Goetz*, 311 So. 3d 253, 259 (Fla. 2d DCA 2020) (explaining it is not the court's role to rewrite the terms of a contract).

Section 337.18(d) specifically provides that the subcontractor may bring an action under the bond against the contractor or the surety. Southeastern Concrete chose the latter and brought a single-count complaint pursuant to the statutory Bond solely against Western Surety. Because Southeastern Concrete brought suit under the Bond, not the Subcontract, it follows that Western Surety's motion to transfer venue based upon the venue selection clause of the Subcontract should have been denied. *See Cason v. Fla. Favorite Fertilizer, Inc.*, 547 So. 2d 703, 705 (Fla. 2d DCA 1989) (explaining the venue provision in the stock purchase agreement between the parties does not control venue in any litigation other than that which arises out of the stock purchase agreement and cannot control in a suit arising out of the employment agreements, which do not contain venue provisions; the employment agreements are entirely separate from the stock purchase agreement); *Travelers Cas. & Ins. Co. v. Cmty. Asphalt Corp.*, 221 So. 3d 742, 744 (Fla. 3d DCA 2017) ("Because the [s]ubcontractor's cause of action is based on the surety bond, the venue selection clause in the subcontract will control the cause of action only if it is read into the surety bond."); *Miller & Solomon Gen. Contractors v. Brennan's Glass Co.*,

837 So. 2d 1182, 1183 (Fla. 4th DCA 2003) ("The venue provision in the subcontract, here, does not apply to the claim on the bond."); *Chapman v. Sovran Constr. Co.*, 709 So. 2d 616, 616 (Fla. 5th DCA 1998) (holding that although the subcontract contained a choice of venue provision, that provision did not apply to a separate agreement guaranteeing performance under the subcontract where the separate guaranty did not specify choice of venue); *Hastings v. Gen. Elec. Credit Auto Lease, Inc.*, 434 So. 2d 1020, 1020 (Fla. 5th DCA 1983) ("Because this action is on the guaranty agreement and not on the automobile leasing agreement and there is no contract provision relating to venue on the guaranty agreement, the general venue statute, section 47.011, Florida Statutes (1981), applies.").

In the absence of any venue selection clause in the Bond or language otherwise incorporating the terms of the venue selection clause of the Subcontract into the Bond, in this action brought by Southeastern Concrete against Western Surety pursuant to the Bond under section 337.18(1)(b), the trial court's order granting the motion to transfer venue was error. Accordingly, we reverse the order transferring the case to Levy County and remand for further proceedings in Hillsborough County.

Reversed and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.

Opinion subject to revision prior to official publication.