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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1790**

API Electric Company,
Appellant,

vs.

North American Specialty Insurance Company,
Respondent

**Filed May 29, 2012
Affirmed
Chutich, Judge**

St. Louis County District Court
File No. 69DU-CV-10-2757

John G. Patterson, Sten-Erik Hoidal, Fredrikson & Byron, P.A., Minneapolis, Minnesota
(for appellant)

Daniel R. Gregerson, David H. Gregerson, Matthew J. Nelson, Gregerson, Rosow,
Johnson & Nilan, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Chutich, Judge; and Crippen,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CHUTICH, Judge

In an appeal from summary judgment, appellant API Electric Company (API) argues that its notice of claim on a payment bond issued by respondent North American Specialty Insurance Company (North American) was timely under the terms of the bond itself, although not timely under the 120-day time limit set forth in Minn. Stat. § 574.31 (2008). Because the terms of the statute govern where the payment bond does not contain express language expanding the time within which notice of claim can be filed, we affirm.

FACTS

General contractor Construction Services of Duluth, Inc. (Construction Services) retained API as an electrical subcontractor for work on a public waste water facility construction project in Alborn Township. As required by the contractual terms and Minnesota law, Construction Services obtained a payment bond from North American to ensure payment of persons furnishing labor and materials on the project.

API completed its work on the project on July 13, 2009, but Construction Services failed to pay API all of the amounts due. API gave North American notice of claim under the payment bond on November 17, 2009. Because API gave its notice more than 120 days after completing work on the project, North American denied the claim as untimely under Minn. Stat. § 574.31, subd. 2(a).

API sued North American, contending that its notice was timely under the payment bond and seeking judgment of \$23,738.03, the amount still owed it. Upon

cross-motions for summary judgment, the district court granted summary judgment for North American. This appeal followed.

D E C I S I O N

“On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law.” *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). When the facts are not in dispute, we review the district court’s application of the law de novo. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 630 (Minn. 2007). The parties agree that no disputed factual issues exist; API only challenges the district court’s application of the law as to whether the terms of the statute or the payment bond govern the timeliness of API’s notice of claim.

The Public Contractors’ Performance and Payment Bond Act (the Act) requires general contractors on public works projects to obtain a payment bond for the benefit of persons furnishing labor and materials, including subcontractors, on such projects. Minn. Stat. § 574.26, subd. 2 (2008). The Alborn Township project is a public works project encompassed by the Act.

The Act sets forth a notice requirement for claims arising under a payment bond and a clear timeframe in which to provide such notice:

In the event of a claim on a payment bond by a person furnishing labor and materials, no action shall be maintained on the payment bond unless, within 120 days after completion, delivery, or provision by the person of its last item of labor and materials, for the public work, the person serves written notice of claim under the payment bond personally or by certified mail upon the surety that issued the

bond and the contractor on whose behalf the bond was issued at their address as stated in the bond specifying the nature and amount of the claim and the date the claimant furnished its last item of labor and materials for the public work.

Id. § 574.31, subd. 2(a). To maintain an action on a statutory bond, a claimant must strictly comply with the statutory notice requirements. *Spetz & Berg, Inc. v. Luckie Constr. Co., Inc.*, 353 N.W.2d 233, 235 (Minn. App. 1984), *review denied* (Minn. Nov. 9, 1984).

API acknowledges that it did not give North American notice of claim until 127 days after completing work on the project, but argues that the payment bond itself does not contain any time limit within which the notice of claim must be filed. It contends, therefore, that the bond trumps the statute and that its notice was timely under the bond.

The relevant provisions of the payment bond provide:

4. The Surety shall have no obligation to Claimants under this bond until

4.1 Claimants who are employed by or have a direct contract with the Contractor have given notice to the Surety . . . and sent a copy, or notice thereof, to the Owner, stating [sic] that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.

....

13. When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is, that this Bond shall be construed as a statutory bond and not as a common law bond.

The Minnesota Supreme Court addressed a substantially similar issue in *Nelson Roofing & Contracting, Inc. v. C. W. Moore Co.*, (310 Minn. 140, 245 N.W.2d 866 (1976)). In that case, the limitations period to bring an action was longer in the payment bond than in the version of section 574.31 in effect at the time. *Id.* at 140, 245 N.W.2d at 867. The supreme court concluded that “the express language of the bond will prevail over inconsistent statutory provisions unless the purposes of the statute would be frustrated.” *Id.* at 144, 245 N.W.2d at 868. It held that the general purpose of Minn. Stat. § 574.31 “is to protect laborers and materialmen who perform labor or furnish material for the execution of a public work to which the mechanic’s lien statute does not apply.” *Id.* (quoting *Ceco Steel Prods. Corp. v. Tapager*, 208 Minn. 367, 370, 294 N.W. 210, 212 (1940) (discussing a substantially similar predecessor to the version of section 574.31 at issue in *Nelson Roofing*)). Because the bond provision in *Nelson Roofing* expanded the time within which an action could be commenced beyond that provided by statute, the court found that it was consistent with the purpose of the statute and therefore enforceable. *Id.*

The holding in *Nelson Roofing* requires us to determine whether the absence of a specific time limitation for giving notice in North American’s payment bond is “express language” that could prevail over the statute. We acknowledge API’s contention, raised at oral argument, that the omission of a clear time limit was intentional, and therefore express, in light of the specificity of time limits in other provisions of the bond.

For example, API points to the next provision in the bond, paragraph 4.2, which prescribes a 90-day notice period for claimants who do not have a direct contract with the

general contractor. This specific time period, API contends, shows that North American was careful to set out time limits in other provisions of the bond and that it made a conscious decision to omit a specific time limit in paragraph 4.1.

While this argument is plausible, omission of a time limit in paragraph 4.1 falls short of the *Nelson Roofing* “express language” standard that we must apply. Something is “express” when it is “[c]learly and unmistakably communicated; [or] directly stated.” *Black’s Law Dictionary* 661 (9th ed. 2009). An express provision, for example, might give the subcontractor a specific time period in which to file notice of claim, such as 180 days or one year. In this case, however, paragraph 4.1 of the bond does not “clearly and unmistakably” provide a notice period, but is simply silent on the time period within which a claimant must file notice.

We conclude that the absence of a specific time limit for giving notice of a claim is not “express language” that supersedes the statutory time in which a claimant can file notice. Moreover, given that paragraph 13 of the bond requires it to be construed in conformity with statutory requirements when conflicts arise, the indefinite notice provision in the bond cannot prevail over the more specific statutory 120-day period.

We note the similarities between the Act and the mechanics’ lien statutes that govern non-public projects. *See Wilcox Lumber Co. v. Sch. Dist. No. 268 of Otter Tail Cnty.*, 103 Minn. 43, 45, 114 N.W. 262, 263 (1907) (“The purpose of [the payment bond] statute was the protection of laborers and materialmen performing labor or furnishing material for the execution of a public work to which the mechanic’s lien statute does not apply.”). By prescribing the 120-day notice period in section 574.31, subd. 2(a), the

legislature drew a bright line identical to the required notice period under the analogous mechanics' lien statute. *See* Minn. Stat. § 514.08, subd. 1 (2010). Our conclusion in this case is consistent with caselaw that strictly construes the mechanics' lien notice period. *See David-Thomas Cos., Inc. v. Voss*, 517 N.W.2d 341, 343 (Minn. App. 1994) (“[F]ailure to file the lien statement within 120 days after completion of the work defeats the lien.”).

API gave its notice of claim more than 120 days after it finished work on the project, and therefore its claim is barred under section 574.31, subd. 2(a). While this result seems harsh, particularly when API missed the deadline by only seven days and will not get paid by the payment bond for work it completed, our conclusion is compelled by existing caselaw. The district court properly granted summary judgment for North American.

Affirmed.