Rehearing Granted in Part and Overruled in Part; Reversed and Remanded and Majority and Concurring Opinion on Rehearing filed September 14, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-01209-CV

———————————

RAMEX CONSTRUCTION CO., BUFETE INDUSTRIAL INFRAESTRUCTURA, S.A. DE C.V. AND SEABOARD SURETY CO.,
Appellants/Cross-Appellees

V.

TAMCON SERVICES INC. AND STANDARD CEMENT MATERIALS INC.,
Appellees/Cross-Appellants

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 95-57410

O P I N I O N ON M O T I O N F O R R E H E A R I N G

This is a breach of contract action involving Ramex, a general contractor; Tamcon, a subcontractor; Standard, a supplier of materials; and Seaboard, Ramex's surety. In our original opinion we reversed and remanded a jury verdict in favor of Tamcon and Standard.

Tamcon moved for rehearing, contending that certain evidence established waiver as a matter of law. Tamcon concedes that the evidence supporting this point was not in the appellate record, so it was attached as an exhibit to its motion for rehearing. However, we may not consider exhibits or appendices attached to briefs or motions that are not part of the appellate record. *Till v. Thomas*, 10 S.W.3d 730, 734 (Tex. App.–Houston [1st Dist.] 1999, no pet.); *America Online Inc. v. Williams*, 958 S.W.2d 268, 275 (Tex. App.–Houston [14th Dist.] 1998, no pet.). We overrule Tamcon's motion for rehearing.

STANDARD'S MOTION FOR REHEARING

Standard Cement also moved for rehearing. It argues that the case we relied upon in our original opinion, *Wright Way Constr. Co. v. Harlingen Mall*, 799 S.W.2d 416 (Tex. App.–Corpus Christi 1990, writ denied) is distinguishable from the present case. We agree.

The *Wright Way* case involved a warranty claim against the contractor (and his surety) over the quality of work performed by the contractor. Here, the claim is against a contractor's surety for monies due on materials supplied.

It is not disputed that Standard provided materials used on the project and that Standard has not been paid for those materials. Therefore we agree that Standard's recovery is dependent upon whether Standard perfected its claim in accordance with the statutory requirements. It does not depend on the outcome of a dispute between a contractor and subcontractor.

Because a subcontractor or supplier may not place a lien against a public building, the legislature passed what has become known as the McGregor Act, which requires contractors to secure a bond to ensure payment. *See Feather-Lite Building Materials Corp. v. Constructors Unlimited*, 714 S.W.2d 68, 69 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.). In order to recover under this system, a supplier must mail to the contractor and his surety notice of claim. TEX. GOV'T CODE ANN. § 2253.041 (Vernon Pamph. 2000). This notice must be accompanies by a sworn statement of account which sets forth that the amount claimed is just and correct, and that all just and lawful offsets known to the affiant have been allowed. *Id*. If a written contract does not govern the relationship between the supplier and the contractor, the notices must also show for whom the material was supplied, the date of

performance or delivery, a reasonable identification and the amount due. TEX. GOV'T CODE ANN. § 2253.043 (Vernon Pamph. 2000). Additionally, the claim must include copies of documents, invoices or orders that reasonably identify the project. *Id.*

Because the Act is remedial in nature,"it is to be given the most comprehensive and liberal construction possible." *Feather-Lite*, 714 S.W.2d at 69; *see also City of Mason v. West Texas Util. Co.*, 150 Tex. 18, 237 S.W.2d 273, 280 (1951)). Numerous cases have held that the Act's notice requirements are satisfied by substantial compliance. *Id*. (quoting *Williams v. William S. Baker, Inc.*, 568 S.W.2d 725, 730 (Tex.Civ.App.--Texarkana 1978, writ ref'd n.r.e.); *see also United States Fidelity & Guaranty Co. v. Parker Bros. & Co.*, 437 S.W.2d 880 (Tex.Civ.App. Houston 1st Dist. 1969, writ ref'd n. r. e.); *Lesikar Construction Company v. Acoustex, Inc.*, 509 S.W.2d 877 (Tex.Civ.App. Fort Worth 1974, writ ref'd n. r. e.); *Citadel Construction Co. v. Smith,* 483 S.W.2d 283 (Tex.Civ.App. Austin 1972, writ ref'd n. r. e.).

The jury was asked whether Standard had perfected its claim under the statutory requirements. The jury found that it had. Our review of the record shows that Standard substantially complied with the statutory requirements. We will not disturb this jury's findings on this issue.

Standard's motion for rehearing is granted and we affirm the trial court's judgment in favor of Standard against Seaboard Surety Company.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed September 14, 2000.
Panel consists of Justices Sears, Evans, and Hutson-Dunn.*
Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Frank Evans, and D. Camille Hutson-Dunn sitting by assignment.

Rehearing Granted in Part and Overruled in Part; Reversed and Remanded and Majority and Concurring Opinion on Rehearing filed September 14, 2000.

In The

Fourteenth Court of Appeals

———————

NO. 14-97-01209-CV

———————

RAMEX CONSTRUCTION CO., BUFETE INDUSTRIAL INFRAESTRUCTURA, S.A. DE C.V. AND SEABOARD SURETY CO.,
Appellants/Cross-Appellees

V.

TAMCON SERVICES INC. AND STANDARD CEMENT MATERIALS INC.,
Appellees/Cross-Appellants

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 95-57410

C O N C U R R I N G O P I N I O N O N M O T I O N F O R R E H E A R I N G

Although I agree with my fellow justices that Tamcon's claim should be remanded for a new trial because Tamcon's recovery was unsupported by its pleadings, I write separately to elaborate on the error which requires this result.

Tamcon argues in its motion for rehearing that the complained-of error was harmless

because the question of waiver was submitted as an instruction. An error in jury instructions, Tamcon argues, cannot be grounds for reversal. There are two problems with this argument. First, the jury should have been submitted a *question*, along with an instruction, on waiver. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC § 101.21 (1998) and comment; PJC § 101.24. Tamcon cannot contend that an omitted jury question cannot be grounds for reversal.

Second, the supreme court has recently found that an erroneous jury charge is subject to reversal unless the intermediate appellate court is satisfied that "properly submitted theories constituted the basis of the jury's verdict." *Crown Life Ins. Co. v. Casteel*, 2000 WL 72142, 43 Tex. Sup. Ct. J. 348, 354 (Tex. Jan. 29, 2000)(on reh'g); *see also Borneman v. Steak & Ale of Texas*, 2000 WL 351202, 43 Tex. Sup. Ct. J. 593, 594 (Tex. April 8, 2000)(jury charge which permitted jury to find liability on erroneous ground requires reversal). We cannot find that Ramex's waiver was a properly submitted theory, because it was unsupported by pleadings and because Ramex objected to its trial by consent.

This charge was so inadequate as to invite error. Ramex *did* plead and bring forward proof of waiver on Tamcon's part. This charge permitted the jury to take an instruction meant to be applied against Tamcon and use it in Tamcon's favor. I would therefore find, consonant with *Casteel*, that this jury charge was reversible error.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed September 14, 2000.
Panel consists of Justices Sears, Evans, and Hutson-Dunn.*
Publish — TEX. R. APP. P. 47.3(b).

*Senior Justices Ross A. Sears, Frank Evans, and D. Camille Hutson-Dunn sitting by assignment