

**SURETY'S DISCHARGE IN GEORGIA FOR FAILURE
OF OBLIGEE TO SUE PRINCIPAL
WITHIN THREE MONTHS**

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SOUTHERN SURETY AND FIDELITY CLAIMS CONFERENCE
Thursday, April 18, 1991

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FACTUAL BACKGROUND

Building Supply, Inc. asserts a significant claim against a payment bond issued by DoRight Surety on behalf of No-Pay General Contractor for materials incorporated into the bonded project. Prior to the claim, Building Supply attempted to collect the debt directly from No-Pay, all to no avail. Consequently, Building Supply decides that the easy route is to submit a claim under the payment bond, thereby effectively shifting the problem of collection to DoRight.

On a second project, DoRight Surety has issued a performance bond to Stubborn Subcontractor, who is to perform certain electrical work. The obligee on the bond is Always-Correct General Contractor. As often occurs between obstinate and righteous parties, a dispute arises and Stubborn walks off the job, never to return. Consequently, Always-Correct declares Stubborn in default and submits a claim to DoRight under the performance bond.

The above claims have been assigned to Joe Surety, a new bond claims specialist with DoRight. Both files contain a note from Joe Surety's boss; resolve these files quickly and involve the principals at the outset, as both principals' continued existence is somewhat questionable. Joe realizes that resolving bond claims can be quite a lengthy process, especially if litigation is commenced sometime down the road. Is there anything Joe can do to move along the claims, protect the surety, involve the principal, and, most importantly, impress his new boss?

I. IN GENERAL

In Georgia, O.C.G.A. §10-7-24 (1933) provides a mechanism by which a surety can compel a creditor to sue the principal by giving the creditor notice. The provisions of O.C.G.A. §10-7-24 are very simple and straightforward, and provide in pertinent part:

Any surety . . . at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, . . . to proceed to collect the debt from the principal or any of the several principals liable therefore; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the . . . surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged. No notice which does not state the county in which the principal resides shall be considered a compliance with the requirements of this Code section.

Under this Code section, the surety is required only to give a creditor (1) written notice to proceed to collect the debt from the principal and (2) to state the county in which the principal resides; thereafter, if the principal is within the jurisdiction of the state, and if the creditor fails to commence an action within three months following such notice, the surety will be discharged from its obligations under the bond. Fricks v. J. R. Watkins Co., 88 Ga. App. 276, 76 S.E.2d 518 (1953), rev'd on other grounds, 210 Ga. 83, 78 S.E.2d 2 (1953).

A. Jurisdiction

In order for a surety to utilize O.C.G.A. §10-7-24 and the remedy therein, the principal must be subject to the jurisdiction of Georgia Courts at the time suit is commenced by the creditor. The question now arises as to what is "jurisdiction", and how is it determined?

"Jurisdiction" under this Code Section is a direct reference to a Court's ability to exercise its judicial powers over a party. In order for personal jurisdiction over a party to be established, that party must have basic minimum contacts with the State of Georgia. One of two situations arise when looking at a personal jurisdiction question; either the party is a "resident" or a "non-resident" of Georgia at the time a lawsuit is commenced. We will now look at both scenarios and the establishment of jurisdiction under both.

First, Georgia law provides that the jurisdiction of Georgia Courts extend to all parties within its territory, whether as citizens or as temporary sojourners. Thus, a "presence" in Georgia at the time suit is served subjects that party to the jurisdiction of State Courts. Consequently, a Georgia resident is deemed to have a "presence" in Georgia. Moreover, a corporation which is incorporated in Georgia has a "presence" in Georgia. Finally, a party who is temporarily within the boundaries of Georgia at the time suit is served is deemed to have a "presence" in Georgia. In short, if a party has a "presence" in Georgia at the time a lawsuit is served, and that

party has basic minimum contacts with the State, personal jurisdiction is satisfied.

Under our factual background, assume No-Pay General Contractor is a company owned by Mr. No-Pay, a resident of Georgia. Because Mr. No-Pay resides in Georgia, he is deemed to have a presence in that state and is subject to the jurisdiction of Georgia Courts. On the other hand, if No-Pay General Contractors is a corporation incorporated in Georgia, No-Pay is deemed present in Georgia and also subject to Georgia Court jurisdiction.

The second scenario involves the situation where suit is sought to be served upon a person or corporation who is a non-resident. Under that scenario, resort to the Georgia Long Arm Statute, O.C.G.A. §9-10-91, is necessary. This statute is used to establish jurisdiction over parties who are either a non-resident at the time the cause of action arose or a resident at that time, but a non-resident at the time a Complaint is sought to be served.

In order to utilize the Georgia Long Arm Statute, it is necessary that a claim for relief arise from one of the following acts: (1) transacts any business in the State of Georgia; (2) commits any tortious act or omission within the State of Georgia; (3) causes a tortious injury in the State of Georgia by an act or omission outside of the State if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or

services rendered in the State; or (4) owns, uses, or possesses real property in the State of Georgia.

Under our fact scenario, assume that Stubborn Subcontractor is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in Greenville, South Carolina. Additionally assume that Stubborn's only appearances in Georgia were to execute the subcontract with Always-Correct General Contractor, in addition to the one day it worked on the project prior to walking off. Is Stubborn subject to the Courts of Georgia? Under the Long-Arm Statute, jurisdiction could be established by virtue of the fact that Stubborn did transact business in Georgia, albeit a minimal amount.

In summary, if the principal is a resident of the State of Georgia at the time suit is commenced, Georgia Courts may exercise personal jurisdiction over that party. On the other hand, if the principal is a non-resident at the time service of a complaint is sought to be served, then qualification under the Long Arm Statute is necessary in order to establish jurisdiction.

B. Application

O.C.G.A. §10-7-24 does not affect either the nature, obligation, construction or validity of the contract of surety, but solely goes to the remedy itself. Sally v. Bank of Union, 150 Ga. 281, 103 S.E. 460 (1920), Overstreet v. W. T. Rawleigh Co., Inc., 75 Ga. App. 483, 43 S.E.2d 774 (1947); Fricks, 88 Ga. App. at 279, 280. Moreover, O.C.G.A. §10-7-24 is similar to a

statute of limitations; such statute operates to extinguish a remedy, and not a right, and is therefore in the nature of a limitation of actions. Vanzant, Jones & Co. v. Arnold, Hamilton & Johnson, 31 Ga. 210 (1860); Sally, 150 Ga. at 281; Overstreet, 75 Ga. App. at 488; Fricks, supra; Hearn v. Citizens & Southern National Bank, 154 Ga. App. 686, 269 S.E.2d 486 (1980), cert. denied. The purpose of O.C.G.A. §10-7-24 is to accord a surety a mechanism to compel creditors to sue the principal debtor upon accrual of a creditor's cause of action. A.J. Kellos Construction Co. v. Balboa Insurance Company, 661 F.2d 402 (5th Cir.1981); See, W.T. Rawleigh Co. v. Overstreet, 84 Ga. App. 21, 65 S.E.2d 50 (1951).

Georgia courts have found that compensated as well as uncompensated sureties are governed by the provisions of this Section. A. J. Kellos, 661 F.2d at 403; Morrison Assurance Co. v. Preston Carroll Co. Inc., 254 Ga. 608, 331 S.E.2d 520 (1985), U.S. cert. denied, 474 U.S. 1060, 106 Sup.Ct. 805 (1986); Balboa Insurance Company v. A. J. Kellos Construction Co., 247 Ga. 393, 276 S.E.2d 599 (1981).

One important exception to O.C.G.A. §10-7-24 is its inapplicability to claims under a statutory bond. Hobbs v. Taylor, 11 Ga. App. 579, 75 S.E. 906 (1912). A statutory bond, as that term indicates, is a bond which is required by Georgia law. Statutory bonds include criminal appeal bonds under O.C.G.A. §17-6-1, guardian and ward bonds under O.C.G.A. §§29-4-1, et al, and, most importantly, payment and performance

bonds on public projects issued in accordance with the Georgia Little Miller Act, O.C.G.A. §13-10-1. Play Systems, Inc. v. American Druggists Insurance Company, 176 Ga. App. 372, 336 S.E.2d 308 (1985). Consequently, if a bond is one required by statute, then the remedies within O.C.G.A. §10-7-24 are not available.

II. SUFFICIENCY OF NOTICE

O.C.G.A. §10-7-24 is in direct derogation of common law and must therefore be strictly construed. Howard v. Brown, 3 Ga. 523 (1847); Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330 (1957). In other words, failure of the surety to comply with all the requirements of the statute will bar the surety from exercising the rights granted thereunder. Attached as Exhibits "A" and "B" are suggested letters to be used by DoRight Surety in our hypothetical which notify and demand Building Supply, Inc. and Always-Correct General Contractor to commence actions on the debts against each principal. These letters comply with the requirements of O.C.G.A. §10-7-24.

Notice pursuant to this statute may be given at any time after the debt on which the surety is liable becomes due; even after suit against the surety has been initiated by the creditor. Sally, 150 Ga. at 281. The notice need not notify the creditor that unless he proceed against the principal that the benefits of O.C.G.A. §10-7-24 will be claimed by the surety; however, the notice must be a positive demand to sue by the surety and not a mere request. Bethune v. Dozier, 10 Ga. 235

(1851); Denson v. Miller, 33 Ga. 275 (1862).

Additionally, the notice must state the county of the plaintiff's residence; solely naming the city of the principal's residence will not suffice. See, e.g., Ware v. City Bank, 59 Ga. 840 (1877); Seckinger v. Exchange Bank, 38 Ga. App. 66, 145 S.E. 94 (1928). In this regard, it is important to note that many counties in Georgia have a city namesake. Therefore, it is best to indicate the county in the notice as "Macon County, Georgia" as opposed to "Macon, Georgia."

Furthermore, proper notice given by one surety is sufficient to include all obligated sureties as if each had issued notice to the creditor. Jones v. Whitehead, 4 Ga. 397 (1848).

Finally, the notice itself must be in writing, as an oral notice will not suffice. Johnson v. Longley, 142 Ga. 814, 83 S.E. 952 (1914); Timmons v. Butler, Stevens & Co., 138 Ga. 69, 74 S.E. 784 (1912). There are certain exceptions to the insufficiency of oral notice, such as where a creditor's actions may waive the written requirement, and where the surety can show a reliance upon such waiver and a loss incurred therefrom. See, e.g., Gettis v. Gormley, 49 Ga. App. 339, 175 S.E. 393 (1934); Smith v. Morris Fertilizer Company, 18 Ga. App. 217, 89 S.E. 174 (1916).

III. SUIT BY CREDITOR

After proper notice is given to the creditor pursuant to O.C.G.A. §10-7-24, and if the plaintiff is within the jurisdiction of the state, failure of the creditor to commence an

action within three months after receipt of such notice will discharge the surety from its obligations.

Georgia court decisions have found that commencement of a suit within the three month period requires not only the filing of the lawsuit with the court, but additionally mandates that service be perfected upon the principal within that time period. Southeastern Fidelity Insurance Co. v. Tesler, 159 Ga. App. 60, 282 S.E.2d 703 (1981). Moreover, the filing of a lawsuit in the county other than the county of the principal's residence does not constitute the commencement of a suit under O.C.G.A. §10-7-24. Overstreet, 75 Ga. App. at 488; Southeastern, 159 Ga. App. at 62.

IV. CONCLUSION

O.C.G.A. §10-7-24 provides a valuable weapon in the surety's arsenal to compel a creditor to sue the principal debtor upon accrual of the creditor's cause of action.

In our hypothetical, it is obvious that Joe Surety's boss is somewhat concerned over No-Pay General Contractor's and Stubborn Subcontractor's continued existence. Assuming a long delay before initiation of legal proceedings in regard to each claim, Joe's boss realizes that DoRight Surety may suffer great prejudice as a result thereof. For example, it is possible that each principal may subsequently file bankruptcy, or worse yet, each principal's business may be defunct or in disarray, employees terminated, and valuable records difficult to locate or even destroyed.

Consequently, the necessity for a provision to allow a surety to expedite initiation of legal proceedings against the principal debtor is clearly apparent. O.C.G.A. §10-7-24 provides that mechanism.

April 18, 1991

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Mr. John Doe
Building Supply, Inc.
1234 Construction Place
Smalltown, Georgia 12345

RE: Project :
Contractor :
Surety :
Claimant :

Dear Mr. Doe:

As you well know, Building Supply, Inc. has asserted and continues to assert a claim under the payment bond issued by DoRight Surety on behalf of No-Pay General Contractors, as principal. The amount of this claim is \$50,000.00

Demand is made herein that Building Supply, Inc. immediately proceed to collect the debt of \$50,000.00, in addition to any other debt that Building Supply, Inc. believes is owing from No-Pay General Contractors. Accordingly, Building Supply, Inc. has three months within which to commence an action against No-Pay General Contractor. Your failure to do so will release DoRight Surety from any and all obligations under the payment bond for the debts of No-Pay now due.

As of this date, No-Pay General Contractors is a resident of Macon County, Georgia, and jurisdiction may be found therein. [If principal resides outside Georgia, additional facts are necessary to establish jurisdiction under the Georgia Long Arm Statute, O.C.G.A. §9-10-91.]

With kind regards.

Very truly yours,

Joe Surety

JS/lmb

EXHIBIT "A"

April 18, 1991

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Mr. John Doe
Always-Correct General Contractors
1234 Building Place
Smalltown, Georgia 12345

RE: Project :
Contractor :
Surety :
Claimant :

Dear Mr. Doe:

As you well know, Stubborn Subcontractor has been declared in default by Always-Correct General Contractors. Consequently, Always-Correct has submitted a claim under the performance bond issued by DoRight Surety on behalf of Stubborn, as principal, and in favor of Always-Correct, as obligee.

Demand is made herein that Always-Correct proceed to initiate proceedings against Stubborn Subcontractor immediately for the debt due and owing. Accordingly, Always-Correct has three months in which to commence an action against Stubborn Subcontractors. Your failure to do so will release DoRight Surety from any and all obligations now due under the performance bond issued for the benefit of Always-Correct.

As of this date, Stubborn Subcontractor is a resident of Macon County, Georgia, and jurisdiction may be found therein. [If principal resides outside Georgia, additional facts are necessary to establish jurisdiction under the Georgia Long Arm Statute, O.C.G.A. §9-10-91].

With kind regards.

Very truly yours,

Joe Surety

JS/lmb

EXHIBIT "B"