

Opinion filed April 6, 2000 Withdrawn; Reversed and Remanded and Corrected Opinion filed April 20, 2000.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 Appelles**

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 R R E C T E D O P I N I O N

This is a breach of contract action involving a general contractor, subcontractor, supplier and surety. All parties appeal. Because the jury's verdict was based on a ground unsupported by the pleadings, we reverse and remand.

Ramex Construction (the lead partner of a joint venture which included Bufete Industrial) was general contractor on a City of Houston sewer project. Tamcon Services signed two contracts with Ramex to refurbish manholes and install new ones at the ends of existing sewer lines. Because of unanticipated difficulties in finding the ends of the manholes, Tamcon fell behind schedule and was eventually terminated. Tamcon argued Ramex caused and aggravated the problem because it refused to pay in a timely fashion, even after Ramex was paid by the city for work completed by Tamcon. Ramex argued Tamcon was terminated because it could not do the work it contracted to do. Meanwhile, Standard Cement Materials, which supplied Tamcon with the special concrete used in the manholes, sought payment from Seaboard Surety Co., the surety on the project. *See* TEX. GOV'T CODE ANN. § 2253.021 (Vernon Pamph. 2000).

Tamcon's and Standard's Second Amended Original Petition alleged Ramex breached the subcontract by failing to make timely payments to Tamcon and by failing to grant extensions in the schedule for unanticipated conditions. The suit also asserted causes of action for quantum meruit, quantum valebant and unjust enrichment, and under Texas's prompt-pay provisions, TEX. GOV'T CODE ANN. § 2251.022 (Vernon Pamph. 2000) and surety provisions, TEX. GOV'T CODE ANN. § 2253 (Vernon Pamph. 2000). Finally, the suit sought consequential damages equal to the value of Tamcon Inc., which had to cease doing business due to Ramex's refusal to pay for work performed by Tamcon.

The jury was asked the following questions on liability:

QUESTION 1

Did Tamcon or Ramex/Bufete fail to comply with the Subcontracts?

Failure to comply by one party is excused by the other party's previous failure to comply with a material obligation of the same agreement.

Failure to comply by one party is excused by waiver of the other party. A waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Answer "Yes" or "No" as to each of the following:

Subcontract 56 YES Ramex/Bufete
 NO Tamcon

Subcontract 49 YES Ramex/Bufete
 NO Tamcon

If your answer is "Yes" as to Ramex/Bufete in any part of Question 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION 2

What some of money, if any, paid now in cash, would fairly and reasonably compensate Tamcon for its damages resulting from such conduct?

Consider the following elements of damages, if any, and none other. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Do not include in your answer any amount that you find Plaintiff could have avoided by the exercise of reasonable care.

- a. Invoices for work.
- b. Unpaid retainage.
- c. payment for thrust blockwork, and
- d. Value of Tamcon as of July 18, 1995.

Answer in dollars and cents for damages, if any.

Answer: 175,884.86

The jury also found that Standard had properly perfected its lien and was entitled to payment from the bond. The trial court entered judgment on the jury's verdict for \$175,884.86 plus attorney's fees of \$51,273 for Tamcon and ordered payment to Standard Cement of \$60,884.25 from Seaboard, along with \$41,273 in attorney's fees.

In eight points of error Ramex and Seaboard contend: (1) that Tamcon breached the subcontract as a matter of law; (2) that the jury's verdict was against the great weight of the evidence; (3) that Ramex did not breach the agreement as a matter of law, or that any breach was excused or waived by Tamcon's prior breach; (4) that the jury's finding that Ramex breached was against the great weight of the evidence; (5) that the claim was poorly presented to the jury; (6) that the trial court erred in asking the jury about the value of Tamcon as an element of damages; (7) that the trial court erred in not offsetting damage awards against amounts owed; and (8) that Standard Cement did not properly perfect its claim. In its cross-petition Tamcon argues the trial court erred in not permitting Steve Tamez, the principle shareholder of Tamcon, to testify as to the value of his company.

It is undisputed that Tamcon did not complete its subcontract; indeed, Tamcon concedes that the work performed was not done in a timely manner because of the difficulty in locating the ends of sewer lines. Moreover, the contract stipulated that Tamcon's timely performance was essential to the contract.

Generally, a party who is in default of a contract cannot maintain a suit for its breach. *Joseph v. PPG Industries*, 674 S.W.2d 862, 867 (Tex. App.—Austin 1984, writ ref'd n.r.e.). However, breach of contract may be waived. *See, e.g., Chilton Ins. v. Pate & Pate Enter.*, 930 S.W.2d 877, 888 (Tex. App.—San Antonio 1996, writ denied) and cases cited therein. Tamcon argues Ramex waived its right to timely performance as a matter of law.¹ However, Tamcon did not plead waiver. Even if the issue of waiver was tried by consent, Tamcon was obligated to amend its pleadings to support the waiver issue prior to its submission to the jury. TEX. R. CIV. P. 67; *Bedgood v. Madalin*, 600 S.W.2d 773, 775-

¹ The pages cited by Tamcon's counsel at oral argument are missing from our record. This is not surprising; the original clerk's record was lost in the court below and we are reviewing a stipulated record reconstructed from the files of the attorneys involved in the case.

776 (Tex. 1980). Because Tamcon's recovery was impliedly based on a ground that it did not plead, we must reverse the judgment and remand the cause for a new trial.

Additionally, because a surety's liability is derivative of the principal's liability, the judgment in favor of Standard Cement must also be reversed and remanded. *Wright Way Const. v. Harlingen Mall Co.*, 799 S.W.2d 415, 426 (Tex. App.—Corpus Christi 1990, writ denied) (citing *Hamilton v. Prescott*, 73 Tex. 565, 11 S.W. 548 (1889)).

Tamcon brings a cross-point arguing that it was error for the trial court to exclude the testimony of Steve Tamez, the owner of Tamcon, on the value of Tamcon as a going concern. We agree.

The owner of real property may testify to its market value, even if he could not qualify to testify about the value of like property belonging to someone else. *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984). The owner of a business is likewise permitted to testify as to its value, if he have a basis of knowledge of the value of the business. *Burford Oil Co. v. Wadley*, 41 S.W.2d 689, 694 (Tex. Civ. App.—El Paso 1931, writ ref'd); *LaPrade v. LaPrade*, 784 S.W.2d 490, 493 (Tex. App.—Fort Worth 1990, writ). Ramex attempts to distinguish this situation by arguing that Steve Tamez is not the sole proprietor of the business, but merely a stockholder of a closely held business. We disagree. Tamez testified that he held an accounting degree; that he had worked for the company from its inception until its liquidation, except for a yearlong period while he was earning his degree; that he was familiar with the accounts receivable and the company's books; and that he was the person who oversaw liquidation of the company's assets when it shut down. We think Tamez showed a basis of knowledge of the value of Tamex, and that this was testimony which would be helpful in guiding a jury in answering the question of the value of Tamcon. We therefore find the trial court erred in not permitting this testimony. We sustain Tamcon's cross-point.

The judgment of the trial court is reversed and the cause remanded for a new trial consistent with this opinion.

/S/ Ross A. Sears
 Justice

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Justices Sears, Evans, and Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

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