

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2016-CP-21-1230

Harvey R. Campbell, Jr., d/b/a Metal
Construction and Roofing,Appellant,

vs.

Lee Lyerly and Ellen Marie Stone Lyerly, Respondents.

FINAL BRIEF OF RESPONDENTS

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QUESTION PRESENTED

DID THE TRIAL COURT PROPERLY APPLY SOUTH CAROLINA CODE SECTION 40-59-30(B) BY DISMISSING APPELLANT'S CLAIM FOR MONIES DUE UNDER A CONSTRUCTION CONTRACT WHERE THE APPELLANT WAS NOT LICENSED WHEN THE CONTRACT WAS EXECUTED OR DURING THE TIME IN WHICH THE WORK COMPLETED?

STATEMENT OF THE CASE

Respondents, Lee Lyerly and Ellen Marie Stone Lyerly, are husband and wife and reside at 5010 North Old Georgetown Road, Coward, South Carolina. They sought to install a metal roof on their home and contracted with Harvey R. Campbell, Jr., d/b/a Metal Construction and Roofing to do so for \$23,000.00. The contract was entered July 24, 2014. A \$6,000.00 deposit was paid on the same date. R.p. 22. The work began on or about November 3, 2014, and was complete that same month but the Respondents allege multiple deficiencies with the construction of the roof. Allegedly the deficiencies are so grave that the entire metal roof must be removed and replaced. Based upon the estimates received, the cost to replace and properly repair the alleged damages caused by the Appellant is \$38,500.00. No further monies beyond the deposit were paid by the Respondents. The Appellant first sought to file a Mechanic's Lien under his father's business, Burch Roofing, Co., Inc., on February 20, 2015. R.pp. 11-14. Thereafter a Summons and Complaint was filed on May 17, 2016, naming the proper parties. The Complaint alleges causes of action based in contract and quantum merit. R.pp. 6-10.

The Respondents answered, moved to dismiss under South Carolina Code Section 40-59-30 and filed Counterclaims for breach of contract, negligence and unfair trade practices. R.pp. 15-21.

The Respondents' Motion to Dismiss was heard by the Honorable William H. Seals, Jr., Circuit Court Judge, on September 13, 2016. Judge Seals granted the Respondents' Motion to Dismiss by Order filed on October 12, 2016. R.pp. 1-3. Appellant timely appealed the decision.

ARGUMENT

THE TRIAL JUDGE PROPERLY APPLIED SOUTH CAROLINA CODE SECTION 40-59-30(B) AND DISMISSED APPELLANT'S COMPLAINT FOR BREACH OF CONTRACT AND QUANTUM MERUIT SINCE THE APPELLANT FAILED TO POSSESS A BUILDERS LICENSE BEFORE ENTERING THE ROOF REPLACEMENT CONTRACT AND DURING THE CONSTRUCTION ACTIVITY.

The statutory and case law on this issue is clear and unequivocal. The South Carolina Homebuilders Act was adopted by the General Assembly in 1974 in Act 897 and created the South Carolina Residential Home Builders Commission to regulate residential home builders to ensure safe homes would be built and "to protect the home-buying public from inexperienced and financially irresponsible builders." Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977) Gregory, J. dissenting. See Watson v. Harmon, 280 S.C. 214, 312 S.E.2d 8 (Ct. App. 1984).

The Residential Home Builders Act was codified in the Code of Laws at Section 40-59-130 and declares:

Any residential builder or residential specialty who undertakes or attempts to undertake the business of residential building or residential specialty contracting without first having procured a valid license or registered with the commission as required in Section 40-59-50 which has neither expired or been revoked, or who knowingly presents to, or files with, the commission false information for the purpose of obtaining a license or becoming registered is guilty of a misdemeanor and, upon conviction, must be fined not less than one hundred dollars or imprisoned for not less than thirty days.

A residential builder who does not have a license or residential specialty contractor who is not registered as required may not bring any action either at law or in equity to enforce the provisions of any contract for residential building or residential specialty contracting which he entered into in violation of this chapter. Whenever it appears to the

commission that any residential builder or residential specialty contract has violated, or is about to violate, the provisions of this chapter, the commission may in its own name petition an administrative law judge as provided under Article 5 of Chapter 23 of Title 1 to issue a temporary restraining order enjoining the violations of this chapter, pending a full hearing to determine where or not the injunction must be made permanent.

Five appellate court cases have applied this statute to similar fact situations. The first was Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977) Gregory, J. dissenting. In Henderson, the builder sought to recover the balance due under the construction contract. The homeowner denied payment based upon construction defects, and the fact the builder failed to procure a license. The Court granted Summary Judgment to the homeowner but the Court of Appeals reversed. This case is distinguished on the grounds that although the contractor had not yet procured a license, the contract was entered and home built during the time in which the contractor was grandfathered from the licensing requirement. Specifically, the contract to build the home was made February 1975 and was completed shortly thereafter. The newly adopted Residential Home Builders Act provided those engaged in home construction prior to July 1, 1974 had one year from that date to become licensed.

In Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978), the Supreme Court refused to enforce a contract entered into in violation of the Residential Home Builders Act. At the time the contract for the construction of the home was made the contractor was unlicensed. Although the builder obtained a license just prior to the completion of the construction, he was precluded from enforcing the contract since he entered into the contract without first having obtained the license. The Court specifically stated:

South Carolina Code Section 40-59-130 provides, in part, that "(n)o residential home builder who does not have the license required herein may bring any action either at law or in equity to enforce the provisions of any contract for residential home building which he entered into in violation of this chapter."

As a general rule, when a statute is plain and unambiguous, it should be applied literally because the legislative design is unmistakable. Martin v. Ellisor, 266 S.C. 377, 223 S.E.2d 415 (1976).

It is our opinion that Section 40-59-130 is clear and unambiguous. Any builder who violates the chapter by entering into a contract for home construction without obtaining the required license simply cannot enforce the contract.

The appellant relies on language found in Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977), the only prior case which has construed this chapter, to support his contention that suit on a contract entered into in violation of the chapter is precluded only until a license is obtained. The language relied upon by appellant is dicta. Unlike the present case, the builder in Henderson was not in violation of the chapter when he entered into the contract he subsequently sought to enforce. The facts in Henderson are clearly distinguishable from the present case.

Having entered into the contract with the respondents without first having obtained a license, the appellant is precluded from prosecuting this action. The judgment of the lower court is affirmed.

The Court again refused to enforce a contract entered into in violation of the Residential Home Builders Act in Roberta, Inc. v. Trust, 274 S.C. 53, 260 S.E.2d 818 (1979). In an attempt to distinguish his case from the Duckworth, the contractor did not seek to recover for his labor, profits and overhead but simply to recover amounts paid to third-parties for labor and materials furnished in performance of the contract. The Court barred the unlicensed contractor from recovery and held:

Section 40-59-70 requires residential home builders to obtain a license in order to do business in this State; and Code Section 40-59-130 provides, in part, that "no residential home builder who does not have the license required herein may bring any action either at law or in equity to enforce the provisions of any contract for residential home building which he entered into in violation of this chapter."

We held in Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978), in accordance with the foregoing statutes, that any builder who violates the Code provisions by entering into a contract for home construction without obtaining the required license cannot enforce the contract.

Appellant, conceding that the statute which prohibits an unlicensed builder from enforcing the contract bars any action for services rendered by it, either on the theory of contract, quantum meruit, or unjust enrichment, contends that the statute should not be so construed as to bar recovery by an unlicensed builder for amounts paid to third parties for labor and materials used in construction, at least, to the extent that the landowner was benefited. In other words, appellant argues that the statute should be construed to prevent any benefit or profit to the unlicensed builder, but should not bar recovery for labor and materials used in the construction from which the unlicensed builder received no [274 S.C. 55] profit and from which the landowner received a benefit. We find no basis in the statute for this construction.

The recovery sought in this action is for work and material contracted to be furnished by appellant in the construction of respondent's house. The fact that the work and materials, for which recovery is sought, were furnished by appellant through third parties does not render the bar of the statute any less applicable. Regardless of the language used to state the theory of attempted recovery, the undisputed fact remains that appellant brings this action to enforce payment under the contract to build a residence for respondent. Since appellant was an unlicensed builder, it cannot "bring an action" to enforce the provisions of the building contract, including one to recover, as here, for amounts paid by it to third parties in the performance of the contract. This is the scope of the plain language of the statute. We have no authority to change it.

Though the primary issue in Columbia Pools, Inc v. Moon, 284 S.C. 145, 325 S.E.2d 540 (1985) was whether the contractor was a residential home builder, the Supreme Court upheld the decision of the trial court which dismissed the suit of the unlicensed builder seeking to recover payment for its construction of a pool under South Carolina Code Section 40-59-130.

The most recent published case on this subject is Wagner v. Graham, 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988). Here the contractor sought to recover monies from the homeowner following completion of the homeowner's residence. The contractor did not

have a license as required by Section 40-59-10, *et seq.* After quoting Section 40-59-130, the Court articulated:

It is submitted that the Homeowner should not be given the benefit of the statute because she knew that the Contractor did not have a license. In pursuit of reversal, counsel for the Contractor argues general propositions of estoppel law with which we have no quarrel. The law of estoppel is simply inapplicable to the facts of this case. Assuming, without so deciding, that it might be found by the preponderance of the evidence that the Homeowner was at the time of the agreement aware of the fact that the Contractor did not have a license, it would be of no comfort to the Contractor. The statute, as enacted by the Legislature, is for the benefit of the public. Watson v. Harmon, 280 S.C. 214, 312 S.E.2d 8 (1984). If one might avoid the impact of the statute by applying the law of estoppel, one could, by a similar reasoning, avoid the act by agreement between the Contractor and Homeowner. Clearly this would not be allowed.

The intent of the Legislature to protect the public by requiring home builders to be licensed is emphasized by that portion of the statute quoted above which makes a violation of the act a criminal offense. Construction of this statute has been before our appellate courts on several occasions. *See, Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977); Watson v. Harmon, *supra*; Roberta, Inc. v. Trust, 274 S.C. 53, 260 S.E.2d 818 (1979); Columbia Pools, Inc. v. Moon, 284 S.C. 145, 325 S.E.2d 540 (1985); and Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978). The Court has consistently honored the statute even though the result in some of the cases appears to be drastic.

The Legislature subsequently amended Section 40-59-130 in 2002 and codified the statute at Section 40-59-30 which requires:

SECTION 40-59-30. License requirement; enforcement of contracts; restraining orders.

(A) A person or firm who engages or offers to engage in the business of residential building or residential specialty contracting without first having procured a license from the commission, which has not expired or been revoked, suspended, or restricted or who knowingly presents to, or files with, the commission false information for the purpose of obtaining a license is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars or more than ten thousand dollars or imprisoned for not less than thirty days, or both.

(B) A person or firm who has not first procured a license may not bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

(C) If it appears to the commission that a person or firm has violated, or is about to violate, a provision of this chapter, the commission may in its own name petition an administrative law judge, as provided under Article 5 of Chapter 23 of Title 1, to issue a temporary restraining order enjoining the violation of this chapter, pending a full hearing to determine whether or not the injunction must be made permanent.

The Legislature amended the statute in 2009 to its current form:

SECTION 40-59-30. License requirement; enforcement of contracts, restraining orders.

(A) A person or firm who engages or offers to engage in the business of residential building or residential specialty contracting without first having registered with the commission or procured a license from the commission, which has not expired or been revoked, suspended, or restricted or who knowingly presents to, or files with, the commission false information for the purpose of obtaining a license or registering with the commission is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars or more than ten thousand dollars or imprisoned for not less than thirty days, or both.

(B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

(C) Pursuant to Article 5, Chapter 23, Title 1, the commission may petition an administrative law judge to issue a temporary restraining order enjoining a violation of this chapter, pending a full hearing to determine whether the injunction must be made permanent.

Although no published opinions have applied the latest revision to the statute, Stolf Construction, LLC v. Sweetgrass Home Builder, LLC, Unpublished Opinion No. 2013-UP-375 (Ct. App. 2013) concluded since “Stolf did not have a residential builder’s license at the time the contract was executed, ... the trial court properly found Stolf

lacked standing to bring this action” seeking to collect sums alleged due under the contract.

The Appellant argues the verbage of the current statute allows a contractor to enforce the terms of a building contact when his license is obtained after entering into a contract in violation of the law and after completing the work for which recovery is sought simply if he simply obtains a license before filing a lawsuit.

All of the versions of the statute and precedent require the contractor to posses a license at the time the contract was entered in order to enforce the contract. The original version of the statute stated:

A residential builder who does not have a license or residential specialty contractor who is not registered as required may not bring any action either at law or in equity to enforce the provisions of any contract for residential building or residential specialty contracting **which he entered into in violation of this chapter.** (Emphasis added).

The 2002 applicable provisions stated:

A person or firm who has not first procured a license may not bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting **which the person or firm entered into in violation of this chapter.** (Emphasis added).

The current language of Section 40-59-30(b) provides:

Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting **which the person or firm entered into in violation of this chapter.** (Emphasis added).

Although tacitly admitted, the Appellant has obviously failed to comply with the licensing requirements of the Act. R.p. 29. Therefore a brief review of the licensing

requirements promulgated would be efficacious. South Carolina Code Section 40-11-30 announces the general licensing requirement for contractors:

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

Additionally, South Carolina Code Section 59-40-220 provides:

(A) All residential builders must be licensed, and all residential specialty contractors must be registered, by the commission for a period established by the commission in regulation.

A residential specialty contractor is distinguished from a residential home builder only in scope of the work he or she may perform work. A residential builder has a license to perform most all aspects of trades in residential building and can accept work whose cost exceeds \$5,000.00. On the other hand a residential specialty contractor's work is limited to less than \$5,000.00 with limited exceptions. Section 40-59-220(7) is instructive:

"Residential specialty contractor" means an independent contractor who is not a licensed residential builder, who contracts with a licensed residential builder, general contractor, or individual property owner to do construction work, repairs, improvement, or reimprovement which requires special skills and involves the use of specialized construction trades or craft, when the undertakings exceed two hundred dollars and are not regulated by the provisions of Chapter 11. Residential specialty contracting includes the following areas of contracting and other areas as the commission may recognize by regulation:

- (a) plumbers;
- (b) electricians;
- (c) heating and air conditioning installers and repairers;
- (d) vinyl and aluminum siding installers;
- (e) insulation installers;
- (f) roofers;
- (g) floor covering installers;
- (h) masons;

- (i) dry wall installers;
- (j) carpenters;
- (k) stucco installers;
- (l) painters/wall paperers.

When a residential specialty contractor performs work within one of the three areas in which he has been approved, if the work exceeds \$5,000.00, the “residential specialty contractor shall obtain an executed bond with a surety in an amount approved by the commission and shall furnish a signed original to the commission....” S.C. Code Section 40-59-240(D).

It is undisputable that at the time the contract for the work at the Respondents’ home was made, the Appellant was not licensed and he had not been licensed for more than five years. R.p. 23. Although the Appellant did obtain a license until approximately three months after the work was complete, the statute provides no exceptions for the Appellant’s failing to obtain a license. Further, the intent of the statute to protect the public from inexperienced and financially irresponsible builders would be defeated if the Court adopted the Appellant’s arguments. In this particular case, the Residential Builders Commission had no jurisdiction to require the Appellant to return to the Respondents’ home to perform the work to code requirements or in accordance with industry standards since not licensed.

A final point worthy of consideration is how the Court and Legislature handles this issue on the commercial side of contracting. In W&N Construction Company, Inc. v. Williams, 322 S.C. 448, 472 S.E.2d 622 (1996) the contractor entered in a contract to perform commercial work while unlicensed. The Court observed nothing in the Code pertaining to commercial contractors “prohibits an unlicensed general contractor from bringing suit to enforce a contract entered into without a license.” That notwithstanding

the trial court held the contractor “acted illegally in entering into the contract such that it was void and unenforceable”. The Court affirmed with the following analysis:

In Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993), we recognized the general rule that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution. See also Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1941); Rountree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1913). Similarly, the Court of Appeals recently held:

It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This rule applies at both law and in equity and whether the cause of action is in contract or in tort.... Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (1993).

A number of jurisdictions adopt the view that an unlicensed contractor may not recover on a contract even though the relevant licensing statute contains no express provision relating to the enforceability of the contract. See Dougherty, Failure of Building Contractor to Procure Business or Occupational License As Affecting Enforceability of Contract or Right of Recovery for Work Done, 44 ALR 4th 271, §§ 11, 12 (1986). The rationale is that such licensing statutes protect the public and to permit unlicensed contractors to circumvent licensing requirements by payment of a small fine would defeat the legislative intent. *Id.* We concur with these authorities. Accordingly, we affirm the ruling of the master.

Also instructive is the Supreme Court’s comment in footnote 3 of the W&N Construction opinion that compares the commercial and residential industry: “Residential homebuilders are similarly prohibited from undertaking the business of home building without first obtaining a license. However, S.C. Code Ann. Section 40-59-130 (1986) specifically prohibits unlicensed home builders from bringing any action to enforce the provisions of any contract entered into without a valid license.”

Likely in response to W&N Construction, the Legislature adopted South Carolina Code Section 40-11-370 in 1998 to clarify that general contractors who undertake work without a valid license are precluded from enforcing contracts:

SECTION 40-11-370. License required to use term "licensed contractor"; engaging in construction under assumed name; enforcement of contract.

(A) It is unlawful to use the term "licensed contractor" or to perform or offer to perform general or mechanical construction without first obtaining a license as required by this chapter.

(B) It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter. "Engaging in construction" includes marketing, advertising, using site signs, and submitting contracts. This requirement does not include advertising on vehicles, which may use an abbreviated version of the license name so long as the advertising is not misleading.

(C) An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

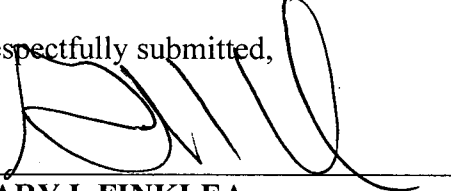
Therefore in both residential and commercial trades, a contractor must be licensed at the time of entering the contract.

CONCLUSION

For the reasons stated herein and all other grounds appearing in the record, this Court should affirm the judgment of the Circuit Court.

February 27, 2017

Respectfully submitted,



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Lee Lyerly and Ellen Marie Stone Lyerly, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.

February 27, 2017



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vs.

Lee Lyerly and Ellen Marie Stone Lyerly, Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Respondents and Certificate of Counsel on Appellant's Attorney by depositing copies of the same in the United State Mail, postage prepaid, on February 28, 2017, addressed to the following address:

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February 28, 2017

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VIA FEDEX TO:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

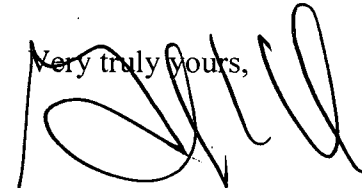
Re: Henry L. Lyerly, Jr. and
Ellen Marie Stone Lyerly
adv. Harvey Campbell, Jr.
d/b/a Metal Construction and
Roofing
Case No.: 2016-CP-21-1230
Our File No.: 16008GFDS

Dear Ms. Kitchings:

Please find enclosed original Final Brief of Respondents, Certificate of Counsel, Certificate of Service showing these were served on Appellant's counsel by mail. Also enclosed are fourteen (14) bounded copies of Final Brief of Respondents.

With kindest regards, I am

Very truly yours,



GARY I. FINKLEA

GIF/jea

Enclosures

cc: Mr. and Mrs. Henry L. Lyerly, Jr.
Louis D. Nettles, Esquire, Folkens Law Firm