

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No.: 2011196386

Mark F. Teseniar and Nan M. Teseniar, on
Behalf of themselves and others similarly
Situated, and Twelve Oaks at Fenwick
Property Owners Association, Inc., Respondents,

v.

Professional Plastering & Stucco, Inc., Maria
Arias, and Miquel Rosales..... Defendants,

Of whom,
Professional Plastering & Stucco, Inc. are
the,..... Appellants,

Professional Plastering & Stucco, Inc.,..... Third-Party
Plaintiffs,

v.

Maria Arias, Miquel Rosales, and APS
Enterprises Unlimited, Inc.,..... Third Party
Plaintiffs,

FINAL RESPONSE BREIF OF RESPONDENT APS ENTERPRISES UNLIMITED

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STATEMENT OF ISSUE ON APPEAL

- I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT APS'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO S.C. CODE ANN. § 40-11-270 AND § 40-11-370.**

STATEMENT OF THE CASE

This appeal stems from alleged construction defects at the Twelve Oaks at Fenwick Plantation condominiums located on Johns Island, South Carolina. The buildings, (hereinafter referred to as the Fenwick project), were originally constructed as apartments and completed in 2002. In 2006, they were converted into condominiums, and sold as such. On or about January 4, 2008, Respondents Mark R. and Nan M. Teseniar, on behalf of themselves and others similarly situated, filed suit against the developers alleging design and construction defects and damages related to the buildings. The suit was later amended to include numerous other parties including Summit Contractors, the general contractor, the architect and various subcontractors related to both original construction and repairs conducted during the conversion to condominiums. Likewise, on March 28, 2008 the Twelve Oaks at Fenwick Plantation Property Owners Association, (“the POA”), filed a separate lawsuit alleging damages to the commonly owned areas as a result of design and construction defects. The suits by Tesenair and the POA were consolidated by court order on October 10, 2008. (Hereinafter the Tesenair and Fenwick POA respondents are referred to collectively as “Homeowner Respondents”).

Both Appellant Professional Plastering, (“hereinafter Professional Plastering”), and Respondent APS Enterprises Unlimited, Inc., (hereinafter “APS”), were both named as direct defendants in the law suit. Professional Plastering was a stucco subcontractor based out of Florida, hired by the general contractor to performed stucco work during original construction as well as to conduct stucco repairs during the period when the apartments were being converted to condominiums. APS, on the other hand, was a sub-subcontractor hired by Professional Plastering during the conversion period to perform stucco repairs in the breezeways of the buildings.

On April 1, 2010, Professional Plastering filed a cross-claim against APS. Likewise, on May 20, 2010, APS filed a third party complaint against C&N Stucco and Plastering Inc, also a Florida corporation who also performed stucco repairs in the breezeways. ROA

On April 15, 2011, APS filed a motion for summary judgment as to Professional Plastering's cross claims based on the fact that Professional Plastering was not a licensed contractor in the state of South Carolina and therefore, was prevented by S.C. Code Ann. 40-11-370(c) from bringing any action at law or in equity¹. Following oral argument, on April 15, 2011, the circuit court issued an order granting APS's motion for summary judgment².

Prior to the May 9, 2011 start of trial of this case, APS settled with the Homeowner Respondents in exchange for payment of \$100,000. At the time of trial Professional Plastering was the only remaining defendant. The notice of dismissal of the Respondent Homeowners' claims against APS was filed with the circuit court on August 8, 2011.

On July 22, 2011, Professional Plastering filed a notice of appeal as to various trial issues, and as to the circuit court's order granting APS's motion for summary judgment on Professional Plastering's cross-claims. This appeal followed.

¹ C&N Stucco also filed a motion for summary judgment as to APS third party complaint based on the same reasoning.

² The circuit court also granted third-party defendant C&N Stucco's motion for summary judgment as to APS's claims based on the same reasoning. Out of an abundance of caution, APs filed a Rule 59 motion to alter or amend, which is still pending.

STATEMENT OF THE FACTS

APS settled with the Respondent Homeowners and was not involved in the trial of this matter. Its response brief and involvement in this appeal is limited solely to the issue regarding whether the circuit court judge properly granted APS summary judgment as to Professional Plastering's cross claims based on S.C. Code Ann. § 40-11-270, and 40-11-370.

As stated above, Professional Plastering was a stucco contractor hired by the general contractor responsible for the project, to perform stucco work during the original construction and stucco repairs during the conversion period of the Fenwick condominiums. (R.pp,126-198; R.p.1598, lines 13-25). APS was then hired by Professional Plastering as its subcontractor to perform limited stucco repairs in the breezeways of the buildings during the conversion period. (R.p.1598, lines 13-25).

In response to the lawsuit filed by the Homeowner Respondents, Professional Plastering asserted cross claims against APS relating to the work Professional Plastering had hired APS to perform. (R.pp. 210-216). During the course of the litigation, APS filed a motion for summary as to Professional Plastering's cross claims. (R.pp.223-225).

APS's argument is two-fold, beginning with the basic premise that South Carolina Code Ann. § 40-11-5 et al, governs the profession and occupation of contractors. First, pursuant to the Code, specifically, Section 40-11-270(c), as an unlicensed contractor in the State of South Carolina, Professional Plastering was not authorized to use unlicensed subcontractors to perform work. R.p.1600, lines 1-7). Second, as an unlicensed contractor, pursuant to S.C. Code Ann. § 40-11-370, Professional Plastering "may not bring an action either at law or in equity to enforce the provision of a contract." (R.p.1600, lines 1-7).

Following oral argument, Judge Harrington, granted APS's motion for summary judgment. In doing so, she correctly rejected Professional's Plastering's argument that because it was not the general contractor for the overall project, it was not subject to the licensing requirements of this State when hiring subcontractors to perform work.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT APS'S MOTION FOR SUMMARY JUDGMENT AS TO PROFESSIONAL PLASTERING'S CROSS CLAIMS.

A. Standard of Review

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the circuit court under Rule 56, SCRPC. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Pringle v. SLR, Inc.*, 382 S.C. 397, 403 (S.C. Ct. App. 2009). Rule 56(c), SCRPC. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

However, the issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (S.C. 2007) citing *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."). As such, the Court is "free to decide a question of law with no particular deference to the circuit court."
Id.

In this case, there is no issue of material fact that Professional Plastering was not a licensed contractor in the State of South Carolina. Moreover, the plain and unambiguous language of the statute provides that unlicensed contractors may not bring an action at law or in equity. As such, Judge Harrington properly ruled that Professional Plastering, as an unlicensed contractor, could not maintain a cause of action against APS based on S.C. Code Ann. § 40-11-20 *et seq.*

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Catawba Indian Tribe, supra* at 525-526, 642 S.E.2d at 754.

South Carolina Code Ann. § 40-11-20 *et al.*, governs the profession and occupation of contractors. At the onset of the chapter, in creating the South Carolina Contractor's licensing Board to oversee the administration of the chapter, the code states,

The purpose of this board is to protect the health, safety and welfare of the public through the regulation of businesses and individuals who identify, assess, and provide contract work to individuals or other legal entities through the administration and enforcement of this chapter and any regulation promulgated under this chapter

As such, in our state, [n]o 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 chapter³. S.C. Code § 40-11-30 (2011). “General Contractor is defined as “an entity which performs or supervises or offers to perform or supervise general construction.” S.C. Code Ann. § 40-11-20(9). “General construction is further defined as “the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving or improvement of any kind to real property.”

In furtherance of this mission of “protect[ing] the health, safety and welfare of the public,” the code specifically provides that only licensed contractors in the State may hire unlicensed subcontractors. Section § 40-11-270(c), states,

Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s license group and license classification or sub classification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the license.

As the code states, the reasoning for allowing the use of these unlicensed contractors is because “[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the license.” *Id.*

A contractor who chooses not to become licensed in this state, proceeds at its own peril. S.C. Code Ann. § 40-11-370(C), specifically, unambiguously states, “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.”

There is no dispute that Professional Plastering is not a licensed South Carolina Contractor. As such, the plain, unambiguous language of S.C. Code Ann. § 40-11-370(C), prevents Professional Plastering from asserting cross claims against APS.

³ There has been no dispute that the stucco repair work was not in excess of \$5,000.

Professional Plastering takes the position that S.C. Code Ann. § 40-11-370(C), is not applicable. Professional Plastering contends that it was not the general contractor for the Fenwick project; therefore, it was not required to obtain a license in the State of South Carolina. In essence, Professional Plastering argues that it had no duty or responsibility to oversee its own subcontractor, and that Summit had assumed that duty.

Summit was the general contractor for the Fenwick project and was licensed in the State of South Carolina pursuant to S.C. Code Ann. § 40-11-5 et seq. Pursuant to Section §40-11-270, as a “licensee,” Summit was authorized to hire unlicensed subcontractors such as Professional Plastering. Under this scenario, Professional Plastering would not be required to become licensed in South Carolina to perform work on the project. Summit as the license holder and entity with the contractual relationship with Professional Plastering would be responsible for the work.

However, when Professional Plastering made the decision to hire its own subcontractor to perform the stucco repairs and entered into a contract with APS, its role expanded to that of “general contractor” defined by the code. *See* S.C. Code Ann. § 40-11-20(8) and (9). In this situation, Professional Plastering was required to become licensed not only to hire an unlicensed contractor, (such as APS), but also to avail itself of the privilege of utilizing the South Carolina court system to enforce any contracts in which it entered. Professional Plastering cannot shield itself from the licensing requirements of this State, and its responsibility to oversee its subcontractor by relying on the license of Summit, an entity that has no contractual relationship with APS.

In support of its argument that Summit had accepted responsibility for overseeing APS’s work, Professional Plastering cites to testimony of Tacy McGinty, that “Summit agreed

to provide material supervision for work done at the breezeway and to accept responsibility of obtaining engineering approval for the work.” (Appellant’s final brief, p.48).

However, a full reading the testimony, reveals that Summit’s responsibility only extended to Professional Plastering.

Q. And that Summit will supply all material, supervision, and will be responsible for obtaining all engineering approval of the underlying flashing system; is that correct?

A. Correct.

Q. And then Professional Plastering will install under Summit Contractors, Inc. direction and is not liable for this flashing or the installation of this flashing, correct?

A. Correct.

(R.pp.239-246).

There is no evidence to support the argument that Summit Contractor’s agreed to relieve Professional Plastering of the duty and responsibility to supervise its subcontractors. Rather, McGinty’s testimony merely demonstrates that Summit was supervising Professional Plastering, the entity which it had a contractual relationship to do the work.

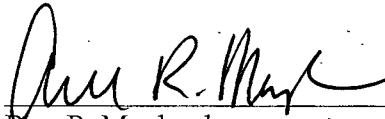
CONCLUSION

The clear and unambiguous language of S.C. Code Ann. § 40-11-270 and § 40-11-370(C), prevents Professional Plastering, an unlicensed contractor, from maintaining is cross claims against APS. Professional Plastering’s argument that it was not required to obtain a license under the Code ignores the Code’s plain and clear definition of the term “general contractor.” It also fails to acknowledge that its role in the Fenwick project was not limited to that of a subcontractor hired by the general contractor, but rather Professional Plastering’s role expanded when it made the decision to contract with and hire a subcontractor to perform work at

its direction. At this point, Professional Plastering, was required by S.C. Code Ann. § 40-11-5 et al, to obtain a South Carolina license.

The circuit court properly granted APS's motion for summary judgment as to Professional Cross claims, and accordingly the order should be affirmed.

Respectfully Submitted,



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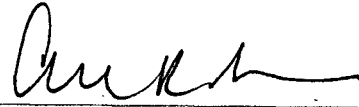
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Certificate of Counsel

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

February 18, 2013



Amanda R. Maybank