

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

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SC Court of Appeals

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. is the Appellant.

Professional Plastering & Stucco, Inc., Appellant

v.

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

Of whom APS Unlimited, Inc. is Respondent.

**APPELLANT'S FINAL REPLY BRIEF TO
BRIEF OF RESPONDENT APS ENTERPRISES UNLIMITED, INC.**

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT APS' MOTION FOR SUMMARY JUDGMENT AS TO PROFESSIONAL PLASTERING'S CROSS CLAIMS.

APS contends that the language of the statute provides that an unlicensed contractor may not bring an action at law or in equity, and therefore Professional Plastering could not maintain an action against APS. This is not correct. Under the clear and unambiguous language of the statute, Professional Plastering was not required to obtain a license. S.C. Code Ann. § 40-11-370(c).

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). “Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.” *Id.* “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.*

S.C. Code Ann. § 40-11-370(c) provides, “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.” Professional Plastering was not required to hold a license under the statute therefore they should not be prohibited from bringing an action to enforce a contract.

Under S.C. Code Ann. § 40-11-270, “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.” S.C. Code Ann. § 40-11-270. Summit was the general contractor for the Project, and Professional Plastering properly worked under them and was not required to hold a license. APS does not dispute that Summit was the licensed general contractor for the Fenwick project. (Respondent’s Initial Brief p. 11). APS also agrees that Summit was authorized to hire unlicensed subcontractors such as Professional Plastering, and Professional Plastering would not be required to become licensed to perform work on the Project. (Respondent’s Initial Brief p. 11). However, APS argues that Professional Plastering became a general contractor when it hired APS as its subcontractor. This argument is without merit.

Pursuant to S.C. Code Ann. § 40-11-30, a person or entity acting as a general contractor is required to obtain a license if the work to be performed is of greater value than \$5,000. S.C. Code Ann. § 40-11-30. The statute defines general contractor as “an entity which performs or supervises or offers to perform or supervise general construction.” S.C. Code Ann. § 40-11-20(9). Professional Plastering does not satisfy this definition. Professional Plastering did not provide supervision of the work performed by APS. APS was hired by Professional Plastering to perform repairs to the stucco at the breezeways at the Project. (R. p. 227.) They were hired as labor only. Professional Plastering was not responsible for supervising the work performed by APS. In her deposition, Tacy McGinty, the project manager for Summit, testified as follows:

Q. Okay. Now, in the fax that you wrote you have that the installation of flashing under the Magna Wall stucco and paper backed lath at the breezeway bottom edges will be the responsibility of Summit Contractors, Inc., correct?

A. Correct.

Q. And then you go on to state that you are requesting the use of labor only from your company, Professional Plastering, correct?

A. Correct.

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.

(R. p. 245, line 17 - p. 246, line 11).

Summit, the general contractor, was responsible for the supervision of the repairs at the breezeways not Professional Plastering. APS argues that McGinty's testimony does not show that Summit was responsible for APS' work. Professional Plastering does not agree. Her testimony does not limit Summit's supervision of the work at the breezeways to Professional Plastering. The supervision would encompass APS as well because Summit was requesting labor only. (R. p. 245, line 23 - p. 246, line 1). Additionally, APS' argument regarding supervision highlights Professional Plastering's contention that summary judgment is inappropriate. The issue of whether or not Summit provided supervision is a question of material fact to be decided by the jury, making summary judgment inappropriate. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991); (R. p. 1601, line 25 - p. 1602, line 6).

Under the statute, the term subcontractor includes both those hired by the general contractor and the subcontractors hired by the subcontractors. S.C. Code Ann. § 40-11-20(22) defines subcontractor as an "entity who contracts to perform construction services for a prime contractor or another subcontractor." S.C. Code Ann. § 40-11-20(22). Therefore, Professional Plastering would not fall under the definition of general contractor. They would still fall under subcontractor. *See* S.C. Code Ann. § 40-11-

20(22). Under a clear reading of the statute, Professional Plastering was not required to have a license in order to maintain its claims against APS.

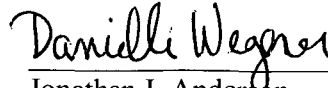
In short, Professional Plastering is not within the class to whom the prohibition of S.C. Code Ann. § 40-11-370(c) applies and the order granting summary judgment should be reversed.

Additionally, the initial brief of APS fails to address the issue of whether the non-contractual claims brought by Professional Plastering against APS should be dismissed. Therefore, APS waives any objection to this issue. *First Union National Bank v. FCVS Comms.*, 321 S.C. 496, 469 S.E2d 619 (Ct. App. 1997)(*reversed on other grounds* 328 S.C. 290)(appellate court may treat a failure to respond as a confession that the appellant's position is correct.)

CONCLUSION

For the reasons set forth above and those set forth in Professional Plastering's Initial Brief which are incorporated herein by reference, the Order of the trial court granting APS summary judgment should be reversed.

Respectfully submitted,



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February 8, 2013

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CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief of Appellant to Brief of Respondent APS Enterprises Unlimited, Inc. complies with Rule 211(b).

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