

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

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Dec 11 2020

SC Court of Appeals

Circuit Case No. 2018-CP-10-00262

Appellate Case 2020-000921

MARSH WATERPROOFING, INC.

Respondent,

v.

STEEPLE DORCHESTER, LTD. and
HAMILTON MANAGEMENT SERVICES COMPANY, INC.

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS STEEPLE DORCHESTER, LTD. and
HAMILTON MANAGEMENT SERVICES COMPANY, INC.

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I. The Respondent was a “general contractor” as explicitly defined in S.C. Code Ann. § 40-11-20 and was, thus, required to hold a contractor’s license.

The Appellant’s position remains steadfast that Marsh should not have been able to recover in this suit due to the restrictions as set forth in S.C. Code Ann. §40-11-370(c). (the “licensing statute”) The licensing statute holds that:

“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.”
S.C. Code Ann. § 40-11-370

The Respondent, in its brief, makes two arguments which attempt to exclude its structural repairs from Chapter 11 of Title 40. The first argument suggests that the Respondent was not required to be licensed because it did not actually make any repairs to the Church’s Chicken restaurant located on Dorchester Road in North Charleston, South Carolina. (“Project”) The second argument suggests that Respondent does not fall within the licensing scheme of S.C. Code Ann. § 40-11-5 et seq. because Marsh Waterproofing, Inc. (“Marsh”) was not the Project’s “general contractor.”

Respondent argues that it did not make repairs at the Project. If it did make repairs, however, Respondent tries to argue that the repairs were not structural in nature. This argument flies in the face of logic, as well as the record which includes the structural report and recommendations of Davis Patrikios Criswell, Incorporated, the engineering firm that was contacted to provide a visual observation of the crawl space / basement to identify observed structural deficiencies in the building's ground floor slab structural system.

“The observed structural condition indicates that failure of the floor system is imminent. Although already evident in some areas, any additional localized failure of the floor system could result in catastrophic collapse of the entire structure. We recommend that Church’s Chicken provide immediate continuous structural support of the floor decking and beams in order to protect both life safety and Church's capital assets. We recommend this store location be repaired immediately.” (Eng. Rep. P. 4)

This is the same report that Tim Marsh, principal of Marsh Contracting, testified to have relied upon when injecting structural foam beneath the Project's weakened subfloor crawlspace.

“Based on the visual observation and condition of the load bearing structural members, we recommend that immediate structural support be provided for all structural members in the crawlspace. This would include all perimeter beams, joists beams, girder beams, metal decking and bare concrete areas. It is critical that full continuous support be provided to the structural members in the crawlspace.”
(Eng. Rep. P. 5)

Respondent's assertion that it made no repairs or modifications to the existing structural elements of the building is not plausible under these circumstances. Tim Marsh acknowledged the engineer's role as specifying the repairs made by Marsh. Marsh also acknowledged that the repairs were first prompted by Church's due to a 2016 tragedy in Texas, Marsh's home state, where three Church's employees were horribly maimed because of the kitchen subfloor collapsing at a restaurant during hours of operation.

The South Carolina LLR Contractors Licensing Board has also found that the repairs performed by Respondent was structural in nature. *See In the Matter of Marsh Waterproofing Inc, Case No. 2017-354* (“Contractors Licensing Board Action”). The Order in the Contractors Licensing Board Action concluded that Marsh's scope of work was structural in nature and required a general contractor's license pursuant to S.C. Code Ann §§ 40-11-20(8) and 40-11-410(1) (1976, as amended) violated S.C. Code Ann. § 40-11-110(A)(5). (LLR Order p. 5.) Furthermore, the Contractor's Licensing Board held that Marsh engaged in contracting work in South Carolina when not properly licensed. *Id.* The Order determined that Marsh violated S.C. Code Ann. § 40-11-110(A)(5) by performing structural repairs without possessing a license.

Davis Patrick Criswell specified repairs that it deemed to be necessary to avoid a catastrophic structural failure. The Contractors Licensing Board further held that the work performed by Marsh was structural in nature. Despite this overwhelming evidence suggesting the

character of the work at the Project, the Respondent would still argue that it was not required to have a license due to its unsubstantiated argument that it “made absolutely no repairs or modifications to the existing structural elements of the building.”

The Respondent is motivated to classify its work at the Project as anything other than a “repair” because it wishes to pretend it was not acting as a “general contractor” at the Project.) In order to be considered a “general contractor” and, thus, subject to licensing requirements, one must be performing “general construction”, which is “the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property.” S.C. Code Ann. § 40-11-20(8)

In their Brief, Respondents incorrectly argue they would have to “build a structure, or replace a building or structure, or repair a building or structure” for the licensing statute to apply. See (Brief of Respondents P. 6) This is a mischaracterization of S.C. Code Ann. 40-11-20(8) which requires a license for the replacement, repair, *or improvement of any kind to real property*. Considering the evidence presented at trial, the Respondent’s suggestion that it was not engaged in the repair of the Project is a hopeful one at best. To suggest that the Respondent made no *improvements of any kind* to real property is an implausible departure from reality.

The Respondent’s arguments regarding the nature of the repairs made at the Project are a disingenuous attempt to exempt Marsh Contracting from the requirements of the licensing statute. These arguments are not supported by any evidence and are directly contradicted by the holding of the S.C. Contractors Licensing Board.

CONCLUSION

The Respondent’s Reply Brief asserts additional arguments which only serve to muddy the water and distract from the fact that Marsh Contracting, Inc. was an unlicensed contractor and, as

such, may not bring an action either at law or in equity to enforce the provisions of a contract.” S.C. Code Ann. § 40-11-370 The Appellants certainly hope that this Court will see that the LLR did not, in fact, reach the same conclusion as the trial court. “The hearing officer finds that Respondent violated S.C. Code Ann. § 40-11-110 (A)(5) in that Respondent engaged in contracting work in South Carolina when not properly licensed or supervised by a licensee licensed in the required license group and classification. Appellants have addressed this fully in their Appellate Brief. Despite the LLR’s finding of mitigating circumstances, at no point has the LLR found that Respondent either a) was in possession of a license or b) was exempt from the licensure requirement.

The Respondent’s argument that Appellant did not rely on the existence of a license is disputed by the Appellants. It should be noted, however, that the absence of reliance has never been a substitution for a valid license or an excuse for non-compliance.

The Respondent’s attempt to show that it did not supervise or direct personnel at the Project is an attempt to substitute the laymen’s definition of a “general contractor” with the legal definition. The legal definition is clearly articulated in S.C. Code Ann. § 40-11-20(8) and S.C. Code Ann. § 40-11-20(9). Marsh Waterproofing was a “general contractor” at the Project because it engaged in “general contracting” and that is all that should be considered.

The findings of the trial judge constitute errors of law and should, therefore, be overturned.

Respectfully submitted,

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PROOF OF SERVICE

I, C. Clay Olson, on behalf of Appellants, Steeple Dorchester, Ltd. and Hamilton Management Services Company, Inc., hereby certify that a copy of *Appellant's Initial Reply Brief and Designation Of Matters To Be Included In The Record On Appeal*, was sent to all counsel of record on December 10, 2020, via counsel's designated AIS E-Mail address at ALacour@clawsonandstaubes.com.

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