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IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MAUREEN HAY, et al.,
Appellants,

v.

AAA FRAMING CORPORATION, et al.,
Respondents.

APPELLANTS' REPLY TO BQF, ABSI, S&S AND AAA

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INTRODUCTION

Appellants' brief will not address attorney fees as they are not recoverable in this forum and it will also not address equitable indemnity as Appellants do not believe it is a cognizable claim under Washington law. Further, this brief shall not address contractual indemnity as it had not accrued at the time of the appeal.

FACTS AND ARGUMENTS

The respondents did not submit a scintilla of evidence that they did not frame the homes, install the windows, or install T1-11 siding on the sides and rear of the homes. CP 1699-1700; 1913-1921; 1499-1503; 1745-1751; 1808 – 1960; & 1688-1695. Rather, they all admit they performed the work, yet without any factual or legal support they argue the master contract did not apply to the project, they had no obligation to build the project to the applicable building codes, and they were not responsible for supervision, although the contract clearly puts all these responsibilities on the respondents. The simple fact is all the respondents admit to performing the work and this fact alone should have precluded the trial Court from granting the respondents' motions for summary judgment.

Mr. Tollen was only able to locate the S&S and ABSI contracts. CP 1913-1921 and 1499-1503. The ABSI contract specifically dictated that the

master contract applied to all projects it worked on for Highmark. The contract reading,

ITEM 1 Master Agreement: The parties hereto agree that from time to time from the date hereof until this Agreement is terminated that Contractor will contract with Subcontractor for the furnishings of materials and/or the performance of various work on projects being constructed by Contractor. The parties further agree that this Agreement shall be the master agreement between them and as such shall control the rights, privileges, duties and responsibilities between them, which arise out of Subcontractor furnishing any materials for and/or performing any work on Contractor's construction projects.

(CP 1913, Pg.1 Item 1)

The contract also required ABSI to follow all plans and applicable building codes reading,

ITEM 3. SCOPE OF WORK AND PRICE: Subcontractor agrees to perform, supply and finish in a thorough and workmanlike manner, in compliance with all applicable national, state and local building codes and regulations...

It shall be the Subcontractor's responsibility to perform field measurements, verify dimensions on drawings, be informed of all applicable building codes, and to obtain the appropriate inspections and certifications.

Subcontractor shall submit in writing all proposed substitutions or variation from the plans, specification, and/or scope of work. Before proceeding, the Contractor must authorize any and all substitutions or variations in writing

(CP 1913, pg. 1 Item 3)(Emphasis added)

S&S' contract also dictated the master subcontract applied to all projects. The contract reading:

1. GENERAL PROVISIONS

1.1 Contractor wishes to utilize the services of Service Provider to provide services to Contractor and/or property owners ("Owner") introduced by Contractor. Based upon the nature of the services provided by Service Provider, it is anticipated that it will be impractical to enter into a separate agreement for services each time Contractor desires to use Service Provider.

1.2 Contractor requires that Service Provider meet certain terms and conditions before Contractor uses Service Provider's services. These terms and conditions are set forth in this agreement.

1.3 In order to expedite the use of Service Provider's services each time they are needed, the parties agree to enter into and comply with this Master Service Agreement prior to any actual services being performed. It is the intent of the parties that these terms and conditions apply to any provision of services by Service Provider regardless of whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of this contract.

1.4 This Master Service Agreement shall be in full force and effect from the date of signing unless canceled in writing by either party with thirty days' notice. The cancellation of this agreement shall not negate any term or condition, such as the indemnity or insurance requirements.

(CP 1499, Pg. 1)

The S&S contract also required it to perform its work free from defects. (CP 2272)

3. WARRANTY AND REPRESENTATIONS

The Service Provider represents and warrants that all materials, labor and/or systems furnished by the Service Provider in connection with the construction of all work performed shall be free of *defect* for a period of one year for workmanship and systems for two years.

(CP 1500, Sec. 3)

Although Highmark could only locate 2 of the 4 Respondents' contracts, it was Highmark's standard policy to enter into master contracts with each contractor, covering each and every project the contractor worked on, and then to enter into individual pricing agreements per home. (CP 1649-1700; 1485-1486; & 1908-1911) Mr. Tollen testifying that:

Highmark always enters into written contracts with subcontractors who perform work on Highmark projects. Highmark's subcontracts contain provisions requiring the subcontractor to defend and indemnify Highmark, make Highmark an additional insured, and require the subcontractor to give a warranty for its work.

CP 1913-1921 and 1499-1503

Mr. Tollen further testified once the Master contract was entered and the lumber was delivered for a particular house(s), he would contact a contractor and agree on a price, then the contractor would frame and side the house.

I. DISCUSSION

A. Assignment of errors relating to ABSI

1. Highmark's master contract with ABSI applied to the homes at the Valley Haven project

ABSI's entire brief is premised on the false contention the master contract does not apply to Valley Haven. This position is absurd and completely contradictory to the plain language of the agreement. ABSI's contract applied to all projects reading,

The parties hereto agree that from time to time from the date hereof until this Agreement is terminated that Contractor will contract with Subcontractor for the furnishings of materials and/or the performance of *various work on projects being constructed by Contractor*. The parties further agree that this Agreement shall be the master agreement between them and as such shall control the rights, privileges, duties and responsibilities between them, which arise out of Subcontractor furnishing any materials for and/or performing any work on Contractor's construction projects.

(CP 1913, pg. 1 Item 1) (Emphasis added)

ABSI attempts to argue that the contract does not apply to Valley Haven as it is not identified. However, there is no limitation to certain projects within the Contract as it is unambiguous in that it applies to any and all projects ABSI worked on. The Court should rule as a matter of law the master contract applied to ABSI and its work at Valley Haven.

2. ABSI had a contractual obligation to build the project in compliance with the 2009 building codes and breached its obligations to Highmark

The master contract entered into by Highmark and ABSI clearly required ABSI to follow applicable building codes. The contract reading,

Subcontractor agrees to perform, supply and finish in a thorough and workmanlike manner, in compliance with all applicable national, state and local building codes and regulations and to the reasonable satisfaction.

According to RCW 19.27.020 to “promote the health, safety, and welfare” of homeowners, contractors are required to meet “the minimum standards and requirements for construction....” Contractors are required to follow the applicable building codes, RCW 19.27.020 (1) and RCW 19.27.031. In this case the applicable code was the 2009 Residential Building Code and Respondents failed to comply with the code. (CP 422-504).

3. ABSI knew what its scope of work was as it performed the work

ABSI’s contention that since there was no written agreement identifying (a) the exact scope of work to be performed (ex. Weather resistive barrier, specific ... (b) a list of plans, specifications, or installation..” ABSI positron it had no duty to build the project in compliance with the applicable codes is feckless. As it is required under the law and the plans for the project.

First, the master contract says ABSI had an obligation to build it in compliance with the applicable building codes and the plans which identified the residential building code. Further, Mr. Tollen testified ABSI had an obligation to build it to the applicable codes. ABSI cherry-picks Mr. Tollen's testimony to support its contention that Highmark was responsible for code compliance. However, the contract is clear and Mr. Tollen testified Highmark couldn't be everywhere on the site and Highmark relied upon the contractors to do their jobs correctly as they were the experts. (CP 1697 Pg. 54-55 Lns. 14- 5.)(CP 1698 Pg 57-58 Lns. 23-5.)

What is even more telling is ABSI's failure to supply any competing testimony on behalf of itself. Clearly, Appellants met their burden by submitting testimony on behalf of Highmark; where is the ABSI testimony? It is non-existent and therefore the Appellants should prevail.

Second, Pursuant to RCW 19.27.031 ABSI was required, without deviation, to ensure its construction work complied in all respects with the building codes in effect, i.e., 2009 International Residential Code and Uniform Building Code. The notes corresponding to 19.27.031 state "(2) It is in the state's interest and consistent with the state Building Code act to have in effect provisions regulating the construction of single and multiple-family residences.... (4) The legislature finds that Building Codes are an integral component of affordable housing...." *Id.*

Last but not least, Washington law allows the Court to infer and imply certain essential terms of the contract, including a promise the construction was free of defects requiring costly repairs. In addition to the reasonable conclusion purchasers of new construction rely upon their builder/seller to, at a minimum, follow Washington laws, Washington common law also identifies this requirement. In *Eastlake Const. Co. v. Hess*, 102 Wash.2d 30, 51 (1984) the Supreme Court confirmed that when a contractor submits a bid, “he is, in effect, representing that he will perform that job in a workmanlike manner[.]”).

ABSI’s argument it has no obligation to build the homes to the plans and specifications approved by the city and in compliance with RCW 19.27 is not only nonsensical - it attempts to set a dangerous precedent which will endanger homes and the families that live therein and thus should be rejected by the Court.

4. ABSI cannot rely on the completion and acceptance doctrine

Although it admits in its briefing that the completion and acceptance doctrine has been “abrogated” it still argues for its application in the matter. Obviously, its use in this matter would not only be legally improper but factually, as contractually it was ABSI’s obligation to supervise its work and make sure it was code complaint. Under ABSI’s theory, Washington

would not need a statute of limitation or statute of repose as once the work was completed and paid for, correct or incorrect, there would be no claims. The Court should reject ABSI's attempt to end run Washington law and prevent any owner or contractor from pursuing litigation if the work had been paid for.

5. ABSI has a duty to defend Highmark and breached its obligation

Although ABSI correctly asserts the order on code violations is not regarding a home it constructed, it incorrectly argues that the order did not trigger its duty to defend. The order triggers the duty to defend as the homes constructed by ABSI had the same exact defects. Therefore, liability was a certainty and ABSI should have picked up the tender.

B. Assignment of errors relating to S&S

1. Highmark's master contract with S&S applied to the homes at the Valley Haven project

The master contract entered into between Highmark and S&S clearly applied to this project as it states:

1. GENERAL PROVISIONS

1.1 Contractor wishes to utilize the services of Service Provider to provide services to Contractor and/or property owners ("Owner") introduced by Contractor. ***Based upon the nature of the services provided by Service Provider, it is anticipated that it will be impractical to enter into a separate agreement for services each time Contractor desires to use Service Provider.***

1.2 Contractor requires that Service Provider meet certain terms and conditions before Contractor uses Service Provider's services. These terms and conditions are set forth in this agreement.

1.3 In order to expedite the use of Service Provider's services each time they are needed, the parties agree to enter into and comply with this Master Service Agreement prior to any actual services being performed. It is the intent of the parties that these terms and conditions apply to any provision of services by Service Provider regardless of whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of this contract.

(CP 1611) (Emphasis added)

The clear and unambiguous language dictates the master contract applied to the Valley Haven project and the trial Court erred.

2. S&S had a contractual obligation to build the project in compliance with the 2009 Building Codes and breached its obligations to Highmark

Please see section A.3 above and arguments contained therein for this section.

3. S&S had a contractual obligation to purchase insurance and it breached its obligations to Highmark

S&S breached its obligation to procure insurance as it was specifically required to procure insurance that "shall be of sufficient scope and duration to ensure coverage of the Service Provider and Contractor for liability related to any manifestation date within the applicable statute of

limitations and/or repose *which pertain to any work performed* by or on behalf the contractor in relation to the project.” (CP 1612 ¶ 2.4) S&S’ insurance carrier specifically states in its denial letter that the insurance does not cover the work performed. Therefore, S&S breached its contract.

4. S&S has a duty to defend and indemnify Highmark and breached its obligation

Please see section A.5 above and arguments contained therein for this section.

C. Assignment of errors relating to BQF

Mr. Tollen expressly states that “...I remember there was a contract with Best Quality Framing #1, LLC....” and that it had defense and indemnity provisions, a warranty, and a requirement that Best Quality name Highmark as an additional insured. March 14 Decl. Tollen, para. 4. . (CP 1649-1700; 1485-1486; & 1908-1911)

Further, Mr. Tollen testified at his deposition BQF had worked for years and “I guarantee Jose (BQF) had a contract with us....” for years. (CP 1700 Pg 117 Lns 18-20) Under Washington law “the burden of proving the existence of a contract is on the party asserting its existence. *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957). Clearly, Appellants met their burden. Where is the declaration from BQF saying there wasn’t a master contract? There isn’t one and without any contradictory testimony or evidence the trial court erred granting BQF’s motion for summary

judgment. The Court should grant Appellants appeal and let a jury determine the terms of the contract.

D. Assignment of errors relating to AAA

1. AAA failed to meet its burden to show it did not enter into a master subcontract

To rebut Mr. Tollen's testimony, AAA produced the cleverly drafted declaration of Mr. Isidro Garcia. However, Mr. Garcia does not testify that there wasn't a master subcontract but rather "no written contract between AAA and Highmark for this labor." This is clever as everyone knows there wasn't a project specific contract for any Highmark projects. Rather, there was a master contract and the labor pricing was often done via a conversation or even a text but that does not change the fact the work was still covered under the terms of the master subcontract. The agreement reads:

ITEM 1. MASTER AGREEMENT: The parties hereto agree that from time to time from the date hereof until this Agreement is terminated that Contractor will contract with Subcontractor for the furnishings of materials and/or the performance of various work on projects being constructed by Contractor. **The parties further agree that this Agreement shall be the master agreement between them and as such shall control the rights, privileges, duties and responsibilities between them,** which arise out of Subcontractor furnishing any materials for and/or performing any work on Contractor's construction projects.

AAA does not dispute nor could it that it performed work on the project. (CP 1808-1860) A jury could easily determine from Mr. Tollen's

testimony that AAA entered and agreed to the terms in the master contract. The Court should deny AAA's motion and let a jury decide what the terms of the contract were.

CONCLUSION

The trial Court erred when it granted BQF, ABSI, S&S and AAA's motions for summary judgment as there are obviously issues of fact. This Court should reverse the trial Court and remand the issue(s) back to the trial Court for a jury to decide.

RESPECTFULLY SUBMITTED this 13th day of November, 2017.



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CERTIFICATE OF SERVICE

I, Todd K. Skoglund, certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 and not a party to the within entitled case. I am a partner at the law firm of Casey & Skoglund PLLC, whose address is 130 Nickerson Street, Suite 210, Seattle, WA, 98109.

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DATED this 13th day of November, 2017 at Seattle, Washington.

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