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No. 676440

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Structural Concrete, Inc., et.al.,

Appellants,

v.

Bay View Electric, LLC,

Respondent.

2012 FEB 14 AM 10:41

~~COURT OF APPEALS DIV I
STATE OF WASHINGTON~~
FILED

REPLY BRIEF OF APPELLANTS

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None.

Appellants (“Flake”) reply to Respondent (“Bay View”) as follows:

I. SYNOPSIS OF REPLY ARGUMENT

Bay View’s Response recognizes this case hinges on whether the court has subject matter jurisdiction. Namely, if there is no subject matter jurisdiction, there is no cause of action. Dismissal of the action was Bay View’s stated consideration for the Settlement Agreement. Simply put, if subject matter jurisdiction is lacking, Bay View provided no consideration for the Settlement Agreement. If there is no consideration, the Settlement Agreement is void.

Bay View’s effort to avoid this jurisdictional difficulty consists of three arguments advanced in its Response: 1) a de facto summary judgment occurred when the judgment at issue was entered; 2) subject matter jurisdiction is proper because private enforcement of electrical contractor statutes is not allowed; and 3) Flake waived its right to contest subject matter jurisdiction.

However, Bay View’s legal arguments are not supported by authority and its factual arguments, specifically its waiver argument, also lack support.

II. ADDITIONAL FACTS

The parties do not dispute the Settlement Agreement at issue was signed on March 30, 2011 (“Settlement Agreement”). CP 88. It is also undisputed the Settlement Agreement states Bay View’s sole consideration was dismissal of the lawsuit between the parties. *Id.* In its Response, Bay View concedes that settlement agreements are to be construed as contracts. Bay View’s brief claims its alleged performance of the construction work is the consideration for the Settlement Agreement¹; however, there is no factual support for that claim and Bay View cites none. Bay View’s agreement to dismiss the action is the only consideration stated. CP 88.

A month after the Settlement Agreement was signed, Flake notified Bay View of the jurisdictional defect in its action; namely, without jurisdiction there was no valid court action which, in turn, meant there was no consideration. CP 89-90. Flake reiterated this a second time the following month. CP 93. Flake then pursued discovery to prove the lack of jurisdiction. CP 94.

¹ Respondent’s Brief, pp. 8 & 16.

On June 14, 2011 (two and a half months after the Settlement Agreement was signed) Bay View received a certificate from the Department of Labor & Industries (“L&I”) stating Bay View’s license was valid during the time it attempted to perform the underlying construction contract (the “Records Review Certificate”). CP 99. However, the Records Review Certificate states it was based only on a review of L&I’s records. Id.

The Records Review Certificate (CP 99) appears to be partially based on the July 30, 2007 alleged Assignment of Administrator Certificate (“Assignment Form”) signed by Blake Van Fleet (“Van Fleet”). CP 71 & CP 35:11-12. Van Fleet was deposed by Flake on July 1, 2011. CP 24. At his deposition, Van Fleet admitted he was never employed by Bay View. CP 35:24-36:4. He also admitted he was not an owner of Bay View. CP 37:5-6. In fact, Van Fleet admitted he worked full time at the Tesoro Refinery for the past eleven years. CP 29:16-21. Finally, he admitted Bay View’s owner paid him a monetary “gift” of \$500 for signing the Assignment Form. CP 37:18-23. By its terms, the validity of the Assignment Form was conditioned on Van Fleet and Bay View complying with Ch. 19.28 RCW. CP 71.

Procedurally, Flake, a pro se litigant when answering, asserted lack of subject matter jurisdiction as an affirmative defense. CP 118. Bay View moved for enforcement of the Settlement Agreement on June 27, 2011. CP 79-100. In that motion it relied on L&I's Records Review Certificate to prove compliance with the electrical contractor statutes. CP 81:6-8 & 99. Flake filed briefing arguing against enforcement of the Settlement Agreement on the basis that the lack of subject matter jurisdiction meant there was no consideration. CP 15-62 & CP 63-78. Flake's briefing included the Van Fleet deposition transcript. CP 23-56.

III. REPLY ARGUMENT

A. Standard of Review—De Novo.

A party may challenge subject matter jurisdiction at any time, and a judgment entered by a court lacking subject matter jurisdiction is void. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Com'n*, 151 Wn. App. 788, 801, 214 P.3d 938 (2009). Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *Dougherty v. Dept. of Labor & Industries for State of Washington*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003).

Bay View's brief questions which standard of review is applicable; because resolution of this appeal turns on the existence of subject matter jurisdiction the de novo standard applies. Similarly, whether consideration exists to support a contract is a question of law. Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 195, 840 P.2d 851 (1992).

As correctly urged by Bay View, the Court should review the trial court's actions as it would an appeal of summary judgment under CR 56 standards.

B. Summary Judgment Standards.

Under the summary judgment standards the responding party is entitled to have all reasonable inferences drawn in its favor. Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 587, 943 P.2d 350 (1997). Evidence, such as deposition testimony and affidavits, submitted on behalf of the non-moving party must be taken as true for summary judgment purposes. Senate Republican Campaign Committee. v. Public Disclosure Com'n. of State of Wash., 133 Wn.2d 229, 245, 943 P.2d 1358 (1997). Summary judgment should be denied unless, based on the evidence, reasonable minds can come to but one conclusion. Ruffer v. St.

Francis Cabrini Hosp. of Seattle, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). The burden was on the moving party, in this case Bay View, to establish that in light of all the evidence, with all reasonable inferences resolved in Flake's favor, no genuine issues of fact exist about the validity of Bay View's license (*see Ochsner v. Board of Trustees of Washington Community College District No. 17*, 61 Wn. App. 772, 775-776, 881 P.2d 985 (1991)) such that as a matter of law it was entitled to judgment. CR 56.

As argued below, the trial court failed to properly apply the CR 56 standards.

C. The Statute at Issue, RCW 19.28.081, is One of Subject Matter Jurisdiction.

The statute at issue, RCW 19.28.081 contains a subject matter jurisdiction provision. It reads:

No person, firm or corporation engaging in, conducting or carrying on the business of installing wires or equipment to convey electric current, or installing apparatus to be operated by said current, shall be entitled to commence or maintain any suit or action in any court of this state pertaining to any such work or business, without alleging and proving that such person, firm or corporation held, at the time of commencing and performing such work, an unexpired, unrevoked and unsuspended license issued

under the provisions of this chapter; and no city or town requiring by ordinance or regulation a permit for inspection or installation of such electrical work, shall issue such permit to any person, firm or corporation not holding such license.

Emphasis added.

This statute concerns subject matter jurisdiction. *Hendrick's Elec., Inc. v. Plumley*, 18 Wn. App. 440, 441-442, 569 P.2d 73 (1977). The *Hendrick's* court construed RCW 19.28.190, the predecessor statute to RCW 19.28.081, which contained the same operative text. That court stated that "Licensing statutes are in derogation of the common law and must be strictly construed." *Id.* at 442 (citing *Kilthau v. Covelli*, 17 Wn. App. 460, 463, 563 P.2d 1305 (1977)). The *Hendrick's* court determined the statute ". . . denies access to the courts for persons and firms required to be licensed but who are not licensed." *Id.* at 441-442.

By its terms RCW 19.28.081 requires the following:

- 1) Allege at the time of commencing suit the contractor held, at the time of commencing and performing its work, an unexpired, unrevoked and unsuspended license issued under Ch. 19.28 RCW;
- and,

2) In order to maintain its action, prove the contractor held, at the time of commencing and performing its work, an unexpired, unrevoked and unsuspended license issued under Ch. 19.28 RCW.

1. No Statutory Allegation in Bay View's Complaint. Bay View's complaint does not contain the required statutory allegation. CP 121-124. Nowhere does the complaint allege Bay View held, at the time of commencing and performing its work, an unimpaired license. Id. The legislature's public policy is obvious: by requiring a contractor to make a specific allegation about its license in its complaint it will invite inquiry by the defendant. To his credit Mr. Flake, as a pro se defendant, asserted lack of subject matter jurisdiction as an affirmative defense. CP 118. As a matter of law, the action brought by Bay View should have been dismissed as its complaint failed to comply with statutory requirements.

2. Bay View Has the Burden of Proof to Maintain its Action. The legislature requires even more from a suing contractor. RCW 19.28.081 puts the burden on the contractor to prove it had an unimpaired license. If the contractor cannot meet that burden it cannot maintain its action. Id.

Only after Flake objected under RCW 19.28.081 did Bay View attempt to prove the validity of its license. CP 79-100. Its sole evidence from L&I was the Record Review Certificate. CP 99. By its terms that document only reflected the records in L&I's files, not the deposition testimony of Van Fleet. Van Fleet's testimony reveals Bay View misled L&I when it submitted the Assignment Form to keep its license. CP 35:24-36:4; 37:5-6; 37:18-23.

D. Trial Court's Failure to Apply CR 56 Standards Defeats Bay View's De Facto Summary Judgment Argument.

As stated above, the trial court should have followed the summary judgment standards when deciding whether to enter judgment against Flake. Bay View's Response appears to argue the same.

When Bay View sought to prove the validity of its license, Flake was entitled to contest that proof. Under the summary judgment standards, Flake's proof was entitled to be taken as true, and all reasonable inferences were to be viewed in a light most favorable to Flake.

1. Bay View's Fraud on L&I: Van Fleet as the "Straw Man" Whose License was Purchased by Bay View for a \$500 "Gift". Van Fleet admitted that he was not an owner or employee of Bay View, that he actually worked at the Tesoro Refinery, and that Bay View had purchased Van Fleet's signature on the assignment for a \$500 monetary "gift." CP 35:24-36:4; 37:5-6; 37:18-23. Under the CR 56 standards, the trial court should have found Van Fleet not to be Bay View's owner or employee and that his signature was purchased. It is reasonable to infer execution of the Assignment Form was a sham in which L&I was deceived by Bay View using Van Fleet as a proverbial "straw man²."

2. "Straw Man" Electrical Administrators are Not Allowed. RCW 19.28.061(5) requires an electrical administrator to be an owner or employee of the contractor. This statute prohibits the "straw man" transaction used by Bay View and Van Fleet to keep Bay View's license. Simply put, Van Fleet admitted he was not an owner or employee of Bay View. CP 35:24-36:4; 37:5-6. As a result, under RCW 19.28.061(1) Bay View's license became void no later than 90 days after the attempted sham assignment. Because that date was before Bay View began its alleged

² A "straw man" is an imaginary person. Oxford American Dictionary, 1980, p. 677.

work for Flake, Bay View's license was void at all times during its attempt to perform Flake's work.

Using CR 56 standards, the trial court should have accepted Van Fleet's admissions as truthful; when combined with RCW 19.28.061 and 19.28.081 those admissions should have resulted in the court finding Bay View's license was void. Under the summary judgment standards the court should have found Bay View misrepresented its credentials to L&I, failed to comply with statutory licensing pre-requisites, and was, therefore, unable to prove it had a valid license when it commenced Flake's work.

The trial court should have dismissed Bay View's action based on its failure to meet its burden to prove the validity of its license. Bay View's failure to even properly allege its status in the complaint buttresses this result.

E. Defeat of Bay View's "No Private Enforcement" Argument.

Bay View's Response also claims there is no right to private enforcement of L&I's licensing function. However, Bay View's argument ignores the fact it has the statutory burden to prove in court the validity of

its license under RCW 19.28.081. The fact the legislature requires a contractor to prove its right to maintain an action necessarily means the opposing party, here Flake, has the right to contest the validity of the license in court as well. Under Bay View's approach, a contractor that successfully misleads L&I would be protected from the very inquiry the public policy behind RCW 19.28.081 mandates.

If the trial court believes an administrative fact finding procedure is needed, that can be accomplished. RCW 19.28.291 envisions such an approach. It allows for the Director of L&I to look into violations of Ch 19.28 RCW and issue subpoenas. It also grants the superior court authority to enforce such subpoenas. This appears to give the trial court and L&I sufficient concurrent jurisdiction to determine the past factual status of Bay View's license.

Whether by direct factual determination in superior court under RCW 19.28.081 or via administrative action under RCW 19.28.291, it is for the trial court to determine how best to proceed in determining the validity of a license under the terms of RCW 19.28.081. Given that RCW 19.28.341, cited by Bay View, concerns present enforcement action

against a license, whereas RCW 19.28.081 speaks to past validity as part of the court's subject matter jurisdiction, the trial court likely need not defer to L&I to make such "after the fact" determination.

Bay View's argument concerning private enforcement of L&I's licensing statutes is without merit.

F. Bay View's Waiver Argument is Unsupported Factually & Legally. Finally, Bay View claims Flake waived its right to contest subject matter jurisdiction. For example, on page 14 of its Response Bay View seems to suggest Flake failed to assert CR 12(b)(6) jurisdiction defenses.

Waiver of any right, to be effective, must be knowing. *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). The person against whom waiver is claimed must have intended to relinquish his right and his actions must be inconsistent with any other intention other than to waive them. *Id.* To his credit Mr. Flake, acting pro se, asserted CR 12(b) jurisdiction defenses. CP 118. His written assertion of lack of subject matter jurisdiction as an affirmative defense defeats any waiver on his

part. Importantly, there is no written knowing waiver by Flake in the record and Bay View cites to none in its brief.

Bay View's "waiver of subject matter jurisdiction defense" is also defeated by the rule that lack of subject matter jurisdiction can be asserted at any time (*ZDI Gaming*, 151 Wn. App. at 801), and by the fact that RCW 19.28.081 bars the courts' doors to a non-licensed contractor.

Bay View's reliance on Ch. 7.04A RCW is similarly of no avail; the Settlement Agreement envisioned dismissal of the court action or entry of a court judgment. Lack of consideration for the Settlement Agreement is at issue – not whether Flake should have brought a motion in an arbitration. To deny a defense of subject matter jurisdiction to a party that did not bring such a motion in an arbitration would mean judgments could be entered in courts having no subject matter jurisdiction over the issue. Subject matter cannot be conferred by agreement, stipulation or estoppels. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). Logically, therefore, such jurisdiction cannot be conferred by inaction, including inaction once a matter is assigned to arbitration.

Bay View's waiver argument should be disregarded.

G. RAP 18.1 & 14.2: No Attorney's Fees Awardable; Only

Costs. The Contract at issue, CP 126-131, lacks an attorney fee provision. Consequently the contractual attorney fee statute, RCW 4.84.330, does not apply. No other statute or recognized ground of equity exists to grant either party an award of attorney's fees.

Only the statutory attorney's fee and other statutory costs are awardable. RCW 4.84.015 & .080, RAP 18.1 & 14.2.

IV. CONCLUSION

Flake requests the Court of Appeals:

- A. Vacate the order enforcing the alleged settlement agreement;
- B. Vacate the money judgment entered pursuant to the order enforcing the alleged settlement agreement;
- C. Dismiss Bay View's action;
- D. Award to Flake statutory attorneys fees and costs both on appeal and at the trial court level; and,
- E. Enter such other relief as deemed appropriate by the Court.

Dated this 13th day of February, 2012.

Respectfully submitted,



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