

65616-3

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COURT OF APPEALS DIVISION I,
THE STATE OF WASHINGTON

Blue Diamond Group, Corp., a
New York Corporation,
Appellant,

versus

WEA Southcenter, L.L.C., a
Delaware Corporation
Respondent

Appeal No.
65616-3-1

KCSC No.
0237541-2

SEA

BRIEF OF APPELLANT

SUBMITTED BY:

WOLFE LAW GROUP, LLC

Scott G. Wolfe, Jr (WSBA #39026)

93 S. Jackson St, #77275

Seattle, WA 98101-2818

P: (206) 801-1600

F: (866) 761-8934

www.wolfelaw.com

Attorneys for Appellant

Blue Diamond Group, Corp.

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Assignments of Error

1. The trial court erred in granting WEA Southcenter's Motion for Summary Judgment on May 8, 2009, ruling that Blue Diamond Group was required to register as a contractor and therefore without rights to pursue its lien.
2. The trial court erred in awarding attorneys fees to Southcenter under RCW § 60.04.181(3).

Issues Pertaining to Assignments of Error

1. Whether RCW §18.27 requires registration of "construction managers" who are hired by the owner to act as the owner's representative and advisor?
2. Whether RCW § 60.04.181(3) provides Southcenter the ability to recover attorneys fees for prevailing on their motion?

Statement of the Case

In July 2008, work was on-going at the construction of Southcenter Mall's new addition, owned by Southcenter. *CP* at 229,

¶ 2. “Kudo Beans”¹ was leasing space from Southcenter and had begun construction of a kiosk within the mall’s food court. *CP* at 236, ¶ 54-56; *see also CP* at 241. To complete this construction and manage the construction expenses, Kudo Beans hired Woodburn Construction Co. (“Woodburn”), a general contractor. *CP* at 297, ¶7. Kudo Beans additionally retained Blue Diamond Group, Corp. (“Blue Diamond”) to act as its Construction Manager. *CP* at 297, ¶4.

Blue Diamond did not become the general contractor or take the place of Woodburn. *CP* at 297, ¶5, 7. Blue Diamond was not responsible for the “means and methods” of construction, nor did it perform any physical labor or work at the project. *CP* at 297, ¶6, 8. Instead, Blue Diamond offered “construction management services,” working with Kudo Beans and Southcenter to manage the progress and goals of the project. *CP* at 297, ¶6, 8-10.

The trial court granted Southcenter’s motion for summary judgment and awarded it attorneys’ fees, holding that “construction managers” are regulated contractors as a matter of

¹ Kudo Beans, Inc., Kudo Beans Franchising, Inc. and KB Seattle 1 are all referred to herein as “Kudo Beans.” These entities and their principals were the other defendants in Blue Diamond’s trial action.

law. Whether a construction manager is a regulated contractor is a matter of first impression for this Court. Blue Diamond argues that construction managers are not, as a matter of law, required to be licensed contractors.

Argument

I. Standard of Review

Summary judgment rulings are reviewed de novo. *Seybold v. Neu*, 105 Wn.App. 666, 675, 19 P.3d 1068 (2001). When reviewing an order granting summary judgment, an appellate court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Kahnn v. Salerno*, 90 Wn.App. 110, 117, 951 P.2d 321 (1998). Summary judgment is appropriate only if the record before the court shows that there is no genuine issue as to any material fact and the nonmoving party is entitled to judgment as a matter of law. CR 56(c), *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

II. Material Facts Are In Dispute As To Whether Blue Diamond Is A “Contractor”

Determination of whether someone is a “Contractor” for the purposes of RCW § 18.27.010(1) is a question of fact.

Craftmaster Restaurant Supply Co. v. Cavallini, 11 Wn.App. 500, 503 (Wash. Ct. App. 1974). Washington courts are to look at the work actually performed by the party to determine whether the party is or is not a regulated contractor. *Norris Industries v. Halverson-Mason Constructors*, 529 P.2d 1113, 1118 (1974).

Therefore, the trial court’s decision that Blue Diamond was required to register as a contractor must be based upon the scope of Blue Diamond’s work that is undisputed, all of which are contained within its affidavit submitted at the trial level,² CP 297-98, providing as follows:

² Southcenter argued at the trial level that Blue Diamond’s contract was applicable because it labeled Blue Diamond as a “Constructor” and stated it provided “consulting services.” CP at 313. Despite the language used in any applicable contracts, Washington courts are to look at the work actually performed to determine whether a party is or is not a regulated contractor. In *Norris Indus. v. Halverson-Mason Constructors*, for example, it was found that a materialman claiming a lien was exempt from the contractor’s registration act, even though the materialman inappropriately entitled himself a “subcontractor” when giving notice of the lien. 529 P.2d 1113, 1118 (1974).

Southcenter also points to Blue Diamond’s complaint at ¶15 (CP at 313 for Southcenter argument, CP at 179 for Complaint). Southcenter claims Blue Diamond “alleges it was paid for ‘management of the worksite.’”

- (i) Blue Diamond provided Kudo Beans with advice as to the management of the construction project and actively managed the project for the owner. ¶6
- (ii) Blue Diamond did not directly contract with subcontractors, tradesman or material suppliers. ¶8
- (iii) No employees or contractors from Blue Diamond Group completed any physical work at the project. ¶19
- (iv) Blue Diamond was hired to act as construction manager and did not act as general contractor. ¶4-5
- (v) Blue Diamond...managed the construction of the franchise and provided advances of credit and cash for use on the project. ¶9
- (vi) Blue Diamond did not install carpet, floor coverings, erect scaffolding, install or repair roofing, install or repair siding, perform tree removal services, attach any structure to the ground, or install any cabinetry. ¶10

The question before this Court today is whether, as a matter of law, the above-enumerated services require registration as a contractor under §18.27. More generally, does §18.27 require

First, management of the *worksite* is not the same as management of the *work*. More appropriate, however, is that the quotation of the Complaint's ¶15 does not create an undisputed fact that Blue Diamond even "managed the worksite." Instead, this paragraph of the Complaint merely refers to terminology within the contract.

The complaint itself reads: "Plaintiff stated that it was willing to perform the necessary oversight work on the Property on a time and materials basis, pursuant to a written Contract, expressly stating the rate for labor and management of the worksite..."

registration of “construction managers” who are hired by the owner to act as the owner’s representative and advisor?

This appears to be a matter of first impression in Washington. Appellant contends that the lower court improperly analyzed §18.27, the term “Contractor” and its applicability to Blue Diamond.

A. Construing the term “Contractor” within §18.27.010(1)

The term “Contractor” is defined by § 18.27.010(1) as follows:

“Contractor” includes any person, firm, corporation or other entity who or which, in the pursuit of an independent business **undertakes to, or offers to undertake, or submits a bid to, construction, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof...** “Contractor” also includes a consultant acting as a general contractor.³

It seems apparent that Blue Diamond, based on the undisputed facts, did not undertake, offer to undertake or submit a bid to do any of the items enumerated in § 18.27.010(1).

³ This excerpt contains the language Blue Diamond contends is relevant. Full text of §18.27.010 is attached as Ex 1. **Emphasis in excerpt is ours.**

Southcenter's argument relies on the statute's final sentence, contending that Blue Diamond is a "consultant acting as a general contractor."

Determination of whether Blue Diamond is a "consultant" acting as a "general contractor" requires review of §18.27.010(5), the definition of a General Contractor:

"General contractor" means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor also includes one who superintends, or consults on, in whole or in part, works falling within the definition of a contractor.

The determinative issue here is whether the language "one who superintends, or consults on" works is broad enough to transform construction managers, merely hired as advisors and representatives of the Owner, into regulated contractors.

While this question presents a matter of first impression for this Court, it is not the first time this Division has considered the meaning of the term "general contractor" within §18.27.010. In *Shingledecker v. Roofmaster Prods.*, this Division quoted WRD 93-4 issued by the Department of Labor and Industries within footnote 11 of the case's opinion. 93 Wn.App. 867, 872 (1999). Therein, the

court stated that “the terms ‘general contractor’ and ‘builder’ are synonymous,” and that Labor and Industries incorporates “the long-held policy of ‘innate supervisory authority’ in defining general contractors.” *Id.*

The terms “general contractor” and “builder” are not only synonymous pursuant to the court’s above interpretation, they are also synonymous in common parlance. Certainly, however, common parlance does not similarly treat the terms “general contractor” and “construction manager.” Neither, in fact, does Washington statutes mentioning a construction management role.

RCW §39.10, titled “Alternative Public Works Contracting Procedures,” creates the ability for certain public works to proceed under a “general contractor/construction manager” arrangement. As defined by §39.10.210(6), this means “a firm with which a public body has selected and negotiated a maximum allowable construction cost to provide services during the design phase and to act as construction manager *and* general contractor during the construction phase.” *Emphasis ours.*

Through this alternative public work procedure and definition, the Washington legislature has recognized a distinction

between a construction manager, and a general contractor, allowing the two separate roles to be combined into one party on qualifying public projects.⁴

In common parlance and in Washington statutes, the glaring difference between a general contractor and a construction manager is that general contractors manage the means and methods of the work itself, while construction managers act as a representative to the owner to help owners manage its own responsibilities and details on a project.⁵

⁴ What type of work would a construction manager do? Consider RCW § 39.04.220(2) explaining that “general contractor/construction manager means a firm...to provide services that may include life-cycle cost design considerations, value engineering, scheduling, cost estimating, constructability, alternative construction options for cost savings, and sequencing of work, and to act as the construction manager and general contractor during the construction phase.” Note the legislature does not reference any actual work performed by construction managers, or the letting of contracts, oversight of the means and methods of construction, and the like. These services are all in-office services that focus on the big picture for the owner – the project – as opposed to the actual work.

⁵ See the definition of a construction manager by the Construction Management Association of America:

Construction Management is a professional service that applies effective management techniques to the planning, design, and construction of a project from inception to completion for the purpose of controlling time, cost and quality.

Construction Management is a discipline and management system specifically created to promote the successful execution of capital projects for owners. These projects can be highly complex. Few owners maintain the staff resources necessary to pay close, continuing attention to every detail – yet these details can “make or break” a project. http://cmaanet.org/faq#construction_

Certainly, Southcenter does not contend that the owner requires registration. Nor does Southcenter contend that employees of the owner must register with Labor and Industries to photograph the work, monitor the success of the work's schedule, manage the financing and finances of the project, or perform similar duties that relate to the project. A construction manager is a third-party manager to do precisely this: "promote the successful execution of capital projects for owner."⁶

In fact, to reiterate the distinction between a general contractor and a construction manager, on the project at controversy in this matter a separate entity – Woodburn - was hired to act as general contractor in this project. At all times, Woodburn remained so engaged.

Blue Diamond's work was completely unrelated to the work that would normally be performed by a general contractor. Blue Diamond did not hire subcontractors or "superintend" their work. As the construction manager, Blue Diamond simply acted as the owner's representative, providing advice about the construction

⁶ *Id.*

process, performing accounting and compliance services, and overseeing the *project* – not the *work*.

B. Persuasive Authority That Construction Managers Are Not Regulated Contractors

Whether a construction manager is a regulated contractor is a matter of first impression in Washington. However, as construction management services grow in popularity, this precise question is arising in courts across the country.

California – *The Fifth Day, LLC v. James Bolotin*

Recently, the 2nd Appellate District of California considered this issue in *The Fifth Day, LLC v. James P. Bolotin*, 172 Cal. App 4th 939 (Cal. App. 2d. Dist. 2009), Ex 2.

In *Fifth Day*, the California appeals court construed a code provision substantially similar to §18.27.010,⁷ holding that it *does not* encompass and require registration of construction managers.

⁷ Section 7026 defines “contractor” as “any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, ... whether or not the

Similar to the circumstances in *Fifth Day*, it is undisputed that Blue Diamond neither contracted with the Owner to perform any of the “work” listed in the definition of a contractor, nor actually performed any of those activities. Indeed, like in *Fifth Day*, a general contractor was hired by the owner to perform and supervise the work on the project, and to hire subcontractors who performed the construction services. Also similar to the facts in *Fifth Day*, Blue Diamond had no responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract for the performance of such work.

California’s court of appeals rejected the contention that the term “contractor” included persons who perform construction management services.⁸ In doing so, the California court underlined

performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. ‘Contractor’ includes subcontractor and specialty contractor.” *The Fifth Day LLC* at 947.

Section 7057 defines “general building contractor” as “a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.” *Id.* at 948, emphasis ours.

⁸ “Defendants nevertheless argued below, and now on appeal, that sections ‘7026 and 7057, and the holdings of the California Supreme Court, make it quite clear that a person or entity that provides supervision and/or management services for

that there is a clear and obvious distinction in the construction industry between “general contractors” and “construction managers.” The distinction exists in Washington as well.

The California appeals Court pointed to secondary and persuasive authority for its conclusion, citing a construction law treatise stating that “California law does not regulate construction management,” and pointing to legislation in the state titled “Construction Management Sponsorship Act of 1991” as evidence that the legislature has given some consideration whether the roles of general contractor and construction manager are indistinguishable.

Similar persuasive and secondary authority exists here in Washington.

RCW § 39.10.340 *et seq.* establishes a “General Contractor / Construction Manager” (GC/CM) procedure for select public works under the chapter establishing alternative public works contracting procedures. The GC/CM statutes demonstrate that the Washington legislature has given some consideration to the role of

any construction project, must be licensed as a ‘general building contractor,’ so as to ‘protect the public from dishonesty and incompetence in the administration of the contracting business.’ Defendants’ position is untenable.” *Fifth Day* at 947.

a “construction manager,” and considers the role independent enough from the general contractor to require a separate engagement.

Moreover, the Washington Licensing Application from the Department of Labor and Industries lists 61 different “areas” under which a person or entity can become licensed, but there is no selection for a party who is only going to provide the owner with construction management services.⁹

California also commented on construction management education programs in the state to illustrate that the classification is distinct from other professionals involved in the construction trade.¹⁰ In this state, the University of Washington has a

⁹ Washington Licensing Application at CP 302-308. Washington courts should give great weight to the interpretation given by the agency that is charged with the statute’s administration. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 228 (2006). See also, the quoting of WRD-94.3 within *Shingledecker*, *supra*, issued by L&I and discussing the definition of the term general contractor.

In Southcenter’s Reply Memorandum at the trial level, their fn4, CP 312, argues that review of the Labor & Industries Form is not useful to the court or appellants because the form lists “general contractor,” which is “an option that fits Blue Diamond’s consulting and oversight work.” This underscores the disagreement between the parties, as Blue Diamond contends that “construction manager” and “general contractor” are not interchangeable, and that the two descriptions identify separate professions, and separate duties.

¹⁰ *Fifth Day*, fn 6 at 951. “That construction management is an established job classification distinct from other professionals involved in the construction trade is revealed by a simple Google search of “construction management degree”: UCLA Extension and UC Berkeley Extension each offer a certificate program in

construction management degree and a department of construction management.¹¹ Central Washington University has similar offerings.¹² Construction Management even has its own national association, the CMAA (Construction Management Association of America).¹³

The court in *Fifth Day* also noted that the defendants had not directed the court to any cases which discuss, much less hold, that a construction manager must be licensed under the state's Contractors' License Law. Like the defendant in the California action, Southcenter cannot make a similar demonstration.

North Carolina – Signature Development, LLC v. Sandler Commercial at Union, LLC

Just this November, the Court of Appeals of North Carolina decided this issue in *Signature Development, L.L.C. v. Sandler Commercial at Union, L.L.C.*, 2010 N.C. App. LEXIS 2010 (N.C. Ct. App. Nov. 2, 2010), Ex 3.

construction management; a number of undergraduate institutions award bachelor degrees with a major in construction management; and Georgetown University awards a post baccalaureate degree, master of professional studies in real estate, with a focus on construction management.”

¹¹ <http://depts.washington.edu/cmweb/>

¹² <http://www.cwu.edu/~iet/programs/cmgt/cmgt.html>

¹³ <http://cmaanet.org/>

The North Carolina court considered statutory definitions of “general contractor” similar to the statutes in *Fifth Day* and in the RCW, specifically defining a general contractor as “any person or firm or corporation who...undertakes to superintend or manage...the construction of any building, highway, public utilities, grading or any improvement or structure.”

The North Carolina appeals court reversed a trial court’s ruling that the construction manager was a “general contractor” requiring a license.

North Carolina case law requires courts to “determine the extent of [the party’s] control over the entire project” to decide if they are a general contractor. *Signature Development* at 13.

Considering this and the complaint in that controversy in the light most favorable to the construction management company, the court concluded that Signature did not “perform the work of a general contractor in the construction of the Project, but [acted] as [the owner’s] agent in the day-to-day management of the Project.”

Like the circumstances in *Signature Development*, Blue Diamond did not perform the work of a general contractor at the Southcenter mall addition.

Mississippi Offers Quality Definition for Construction Manager in Puckett v. Gordon

In a 2009 Mississippi Court of Appeals decision, the court in *Puckett v. Gordon* determined that a roofing contractor was not a construction manager, providing an interesting assortment of legal opinions on the term “construction manager” in its opinion.

16 So.3d 764, 769 (Miss. Ct. App. 2009). Ex 4. The court explains:

[The Mississippi Supreme Court] has defined a general contractor as “the party to a building contract who is charged with the total construction and who enters into sub-contracts for such work as electrical, plumbing and the like.” *Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc.*, 589 So.2d...[1245], 1247,48 (Miss. 1991)(quoting Black’s Law Dictionary 349 & 621 (5th ed. 1983)). The term “construction manager” has not yet been defined in Mississippi. Other courts have defined the term, however, finding that “[a] general contractor and construction manager are separate and distinct titles with different responsibilities and different relationships to the parties to a construction project.” *R&A Constr. Corp. v. Queens Boulevard Extended Care Facility Corp.*, 290 A.D.2d 548, 549, 736 N.Y.S. 423 (N.Y. App. Div. 2002). See also *Baum v. Ciminelli-Cowper Co.*, 300 A.D.2d 1028, 1029, 755 N.Y.S.2d 138, 139-40 (N.Y. App. Div. 2002)(the existence of a distinction between “general contractor” and “construction manager” is a question of fact for trial on the merits). While “there is no single, widely accepted definition of construction management,” *Sagamore Group, Inc. v. Comm’r of Transp.*, 29 Conn. App. 292, 614 A.2d 1255, 1259 (Conn. Ct. App. 1992), the Plaintiffs cite the distinction drawn between a general contractor and a construction

manager by the Rhode Island Supreme Court in *Brogno v. W&J Associates, Ltd.*, 698 A.2d 191, 194 (R.I. 1997). The *Brogno* [c]ourt found that “the [construction manager] acts as a mere agent for a project’s owner and...engages ‘trade contractors’ in his principal’s name to perform most or all of the actual work.” *Id.* (quoting *Bethlehem Rebar Indus., Inc. v. Fid. & Deposit Co.*, 582 A.2d 442 (R.I. 1990)). See also *Sagamore Group*, 614 A.2d at 1259 (“Today...[a construction manager] is more commonly a group, a company, or a partnership with two paramount characteristics: construction know-how and management ability.”). On the other hand, a general contractor “is in the chain of liability and...hires ‘subcontractors’ in his own name to perform the work.” *Brogno*, 698 A.2d at 194 (quoting *Bethlehem Rebar*, 582 A.2d at 442).

Quoting *Aladdin Construction Co. v. John Hancock Life Insurance Co.*, 914 So.2d 169 (Miss. 2005).

C. Conclusion

Whether Blue Diamond was required to register with Labor & Industries is a question of fact, and the courts must look to the work actually performed by the company in making the determination. The undisputed facts in this case do not reveal that Blue Diamond was undisputedly required to register as a contractor, because “construction managers” are not regulated contractors as a matter of law.

III. Blue Diamond's Lien Rights Should Be Upheld

If Blue Diamond was required to register as a contractor, its lien rights are dead in the water.¹⁴ However, if this Court finds there are issues of material fact as to whether registration was required, it must necessarily move onto Southcenter's argument that the lien is invalid to affect Southcenter's ownership interest in the property since Blue Diamond contracted with a tenant (Kudo Beans) and not the property owner (Southcenter).¹⁵

Citing *Bunn v. Bates*, Southcenter argued to the trial court that a lien attaches to the owner's underlying property interest "only if the lease requires the tenant to make specific

¹⁴ We should say that the lien rights are largely dead in the water. Blue Diamond does contend that its lien claims are severable. In *Harbor Millwork v. Achttien*, the parties disputed whether the plaintiff required a construction license. The court refused to grant summary judgment in that case because it was unclear factually as to which work would have required registration and which work would not require registration, and held that the plaintiff would be "entitled to foreclose his lien with reference to such portions of the items that the trial court determines are exempted from the contractor's registration act." 6 Wn.App. 808, 816 (Wash. Ct. App. 1972).

Accordingly, Blue Diamond contends that there are at least genuine issues of material facts as to whether all of the work performed by Blue Diamond required registration.

¹⁵ Not addressed in this brief is Southcenter's argument at the trial level that Blue Diamond did not even do work for the tenant, since its construction management did not name "KB Seattle 1," the formal tenant. However, it is Blue Diamond's position that KB Franchising, Inc., Kudo Beans, Inc. and KB Seattle 1 acted as one in the same. Blue Diamond "considered itself to have contracted with all three entities, and took direction collectively from all three entities." CP at 297, ¶ 3.

improvements for the landlord's benefit." 31 Wn.2d 315, 319, 196 P.2d 741 (1948) CP at 252. "The test is whether the [tenant], under the terms of the contract, has a privilege merely, or is obligated to construct improvements." *Miles v. Bunn*, 173 Wash. 303, 305, 22 P.2d 985. CP at 252.

While Southcenter discusses Washington precedent on this subject at length, it does not provide any information, evidence, statements, declarations or affidavits to the trial court to demonstrate that the lease at controversy did not require the improvements, and only permitted them.

In fact, the contrary appears to be true.

Attached to Southcenter's Motion for Summary Judgment are photographs of the coffee kiosk at issue in this case. CP at 82-84. This was the construction of a kiosk type structure within a shopping mall's food court. An empty space within a large food court was designated by Southcenter as the space where the kiosk was to be constructed in accordance with plans and specifications set forth within the lease agreement itself. CP 19, CP 28-29, 61-79.¹⁶

¹⁶ Article X of the lease requiring improvements to the premises be "substantially as set forth in" the exhibits to the lease, tying the start date of the lease to the completion of construction, and other provisions making it clear that

Southcenter had an enormous role in the placement of the kiosk, the features of the kiosk, and required that the kiosk be built according to a certain timeline and certain standards.¹⁷

The circumstances in this action are more consistent with the circumstances in *Marley v. General Fire Equip. Co.*, than the case law cited by Southcenter in their trial brief. 17 Wn.App. 480, 563 P.2d 1316. In *Marley*, a tenant was required to make repairs to a building to meet fire and wire codes, and to maintain and operate a group home, the requirements rendering the tenant an agent of the property owner. Likewise, in *Seattle Lighting Fixture Co. v. Broadway Cent. Mkt., Inc.*, the court held that where a lease provides that the lessee “must erect a building on the property, such provision makes the lessee the statutory agent of the owner.” 156 Wash. 189, 196 (Wash. 1930).

the tenant was to construct a specific type of kiosk within the mall’s food court space.

¹⁷ CP 9-11, 19, 28-29, 61-79, as discussed immediately *supra*.

IV. Trial Court Erred in Awarding Attorneys' Fees

The trial court awarded Southcenter attorneys' fees pursuant to its request for the same under RCW 60.04.181(3), which provides:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

A. Statute Inapplicable Here To Award Attorneys' Fees

The reliance on §60.04.181(3) to award Southcenter attorneys' fees in this action is misplaced.

The statute is titled "Rank of Lien – Application of Proceeds – Attorneys' fees," and applies when a party prevails in an action to foreclose a lien. Here, however, Southcenter did not prevail in the lien foreclosure action. Southcenter was dismissed from the case pursuant to the contractor's registration statute.

This precise issue came before the court in *Frank v. Fischer*, where the Washington Supreme Court refused to award attorneys fees pursuant to §60.04.181(3) because “the basis for the resolution of this case is the contractors registration statute, *not* the lien foreclosure statute.” 108 Wn.2d 468, 477 (Wash. 1987), *emphasis in original*.

Like the facts in *Fischer*, Southcenter sought dismissal from the litigation based on the contractor’s registration statute. Therefore, it did not prevail in the foreclosure action, but prevailed in a motion authorized by the contractor’s registration statute.

B. Applying §60.04.181 To These Circumstances Contradicts Attorneys Fees Provision of §60.04.081

RCW §60.04.081, commonly referred to as the frivolous lien statute, renders the award of attorneys’ fees *mandatory* when one party challenges the validity of a mechanic lien.

Pursuant to the statute, a party challenging a lien is awarded fees if the lien is considered frivolous. If the lien is not frivolous, however, the claimant is entitled to fees. Under §60.04.081, a claimant is entitled to its attorneys’ fees even if the lien is found invalid. *Williams v. Athletic Field, Inc.*, 155 Wn.App.

434 (Wash. Ct. App. 2010). This is primarily because “every frivolous lien is invalid...[but] not every invalid lien is frivolous.” *Intermountain Elec. Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn.App. 384, 394 (2003).

§60.04.081 is relevant to this case since Southcenter’s Motion for Summary Judgment is much more like a frivolous lien challenge than it is an “action on foreclosure of the lien.”

Allowing Southcenter to use §60.04.181(3) to recover attorneys’ fees under this circumstance would circumvent the public policy rationale behind §60.04.081, as litigants could then challenge liens within summary judgment motions in a foreclosure action and avoid the mandatory award of attorneys fees to the claimant on non-frivolous liens.

Blue Diamond contends that the summary judgment motion was, in fact, a motion under §60.04.081, and that regardless of whether a construction manager must be registered, the lien is not frivolous because it presents a matter of first impression to this court; and accordingly, attorneys’ fees should be awarded to Blue Diamond.

C. Alternatively, Trial Court Abused Discretion in Awarding Fees

RCW §60.04.181(3) does not require the court to award attorneys' fees to the prevailing party, as the award of such fees under the statute is a matter of discretion. *Walsh Servs. v. Feek*, 45 Wn.2d 289 (Wash. 1954).

Considering that Southcenter was dismissed from the case pursuant to the contractor registration act and not by prevailing in a lien foreclosure action, that the issue at controversy is a matter of first impression, that the lien was not frivolous, and the relationship between §60.04.181(3) and §60.04.081, the trial court abused its discretion in awarding attorneys fees to Southcenter.

Conclusion

Whether a party is required to register with Labor & Industries is a question of fact, and courts must look to the work actually performed by the company in making the determination. The undisputed facts in this case do not reveal that Blue Diamond was undisputedly required to register as a contractor, because

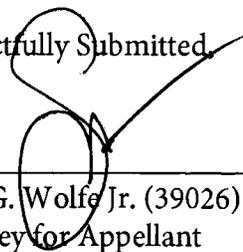
“construction managers” are not regulated contractors as a matter of law.

Since a “construction manager” is different than a “general contractor,” and does not necessarily require registration, the trial court’s decision to dismiss Southcenter from the action and invalidate Blue Diamond’s lien should be reversed.

Alternatively, the award of attorneys’ fees was improper under RCW §60.04.181(3) because the statute does not apply to Southcenter’s motion, or the award of attorneys’ fees is an abuse of the trial court’s discretion.

Dated: November 17, 2010

Respectfully Submitted,



Scott G. Wolfe Jr. (39026)
Attorney for Appellant



1 of 1 DOCUMENT

ANNOTATED REVISED CODE OF WASHINGTON
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** Statutes current through the 2009 legislation effective through 7/1/2009 **
*** Annotations current through May 5, 2009 ***

TITLE 18. BUSINESSES AND PROFESSIONS
CHAPTER 18.27. REGISTRATION OF CONTRACTORS

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 18.27.010 (2009)

§ 18.27.010. Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Contractor" includes any person, firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter. "Contractor" also includes a consultant acting as a general contractor. "Contractor" also includes any person, firm, corporation, or other entity covered by this subsection, whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned.

(2) "Department" means the department of labor and industries.

(3) "Director" means the director of the department of labor and industries or designated representative employed by the department.

(4) "Filing" means delivery of a document that is required to be filed with an agency to a place designated by the agency.

(5) "General contractor" means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor also includes one who

superintends, or consults on, in whole or in part, work falling within the definition of a contractor.

(6) "Notice of infraction" means a form used by the department to notify contractors that an infraction under this chapter has been filed against them.

(7) "Partnership" means a business formed under Title 25 RCW.

(8) "Registration cancellation" means a written notice from the department that a contractor's action is in violation of this chapter and that the contractor's registration has been revoked.

(9) "Registration suspension" means either an automatic suspension as provided in this chapter, or a written notice from the department that a contractor's action is a violation of this chapter and that the contractor's registration has been suspended for a specified time, or until the contractor shows evidence of compliance with this chapter.

(10) "Residential homeowner" means an individual person or persons owning or leasing real property:

(a) Upon which one single-family residence is to be built and in which the owner or lessee intends to reside upon completion of any construction; or

(b) Upon which there is a single-family residence to which improvements are to be made and in which the owner or lessee intends to reside upon completion of any construction.

(11) "Service," except as otherwise provided in *RCW 18.27.225* and *18.27.370*, means posting in the United States mail, properly addressed, postage prepaid, return receipt requested, or personal service. Service by mail is complete upon deposit in the United States mail to the last known address provided to the department.

(12) "Specialty contractor" means a contractor whose operations do not fall within the definition of "general contractor". A specialty contractor may only subcontract work that is incidental to the specialty contractor's work.

(13) "Substantial completion" means the same as "substantial completion of construction" in *RCW 4.16.310*.

(14) "Unregistered contractor" means a person, firm, corporation, or other entity doing work as a contractor without being registered in compliance with this chapter. "Unregistered contractor" includes contractors whose registration is expired, revoked, or suspended. "Unregistered contractor" does not include a contractor who has maintained a valid bond and the insurance or assigned account required by *RCW 18.27.050*, and whose registration has lapsed for thirty or fewer days.

(15) "Unsatisfied final judgment" means a judgment or final tax warrant that has not been satisfied either through payment, court approved settlement, discharge in bankruptcy, or assignment under *RCW 19.72.070*.

(16) "Verification" means the receipt and duplication by the city, town, or county of a contractor registration card that is current on its face, checking the department's contractor registration database, or calling the department to confirm that the contractor is registered.

HISTORY: 2007 c 436 § 1; 2001 c 159 § 1; 1997 c 314 § 2; 1993 c 454 § 2; 1973 1st ex.s. c 153 § 1; 1972 ex.s. c 118 § 1; 1967 c 126 § 5; 1963 c 77 § 1.

NOTES: FINDING -- 1993 C 454: "The legislature finds that unregistered contractors are a serious threat to the general public and are costing the state millions of dollars each year in lost revenue. To assist in solving this problem, the department of labor and industries and the department of revenue should coordinate and communicate with each other to identify unregistered contractors." [1993 c 454 § 1.]

EFFECTIVE DATE -- 1963 C 77: "This act shall take effect August 1, 1963." [1963 c 77 § 12.]



1 of 50 DOCUMENTS



Positive

As of: Nov 17, 2010

**THE FIFTH DAY, LLC, Plaintiff and Appellant, v. JAMES P. BOLOTIN et al.,
Defendants and Respondents.**

B201556

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FIVE**

172 Cal. App. 4th 939; 91 Cal. Rptr. 3d 633; 2009 Cal. App. LEXIS 441

March 27, 2009, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Review Extended *The Fifth Day, LLC v. Bolotin (James P.)*, 2009 Cal. LEXIS 5754 (Cal., June 18, 2009) Review denied by *Fifth Day v. James P. Bolotin*, 2009 Cal. LEXIS 6892 (Cal., July 15, 2009)

PRIOR HISTORY: [***1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. KC047712, Robert A. Dukes, Judge.

DISPOSITION: Reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A limited liability company (LLC) sued defendants, a property owner and its principals, for compensation alleged to be due for services rendered by the LLC pursuant to a development management agreement. The trial court granted summary judgment in favor of defendants. The trial court concluded that the LLC was

acting as a general building contractor and therefore was required to hold a contractor's license pursuant to *Bus. & Prof. Code*, § 7026; because the LLC had no such license, the trial court determined that the LLC was barred by *Bus. & Prof. Code*, § 7031, *subd. (a)*, from maintaining this action. (Superior Court of Los Angeles County, No. KC047712, Robert A. Dukes, Judge.)

The Court of Appeal reversed the judgment. The court concluded that the LLC was not a contractor within the meaning of *Bus. & Prof. Code*, § 7026, and that the LLC's claims were therefore not barred by *Bus. & Prof. Code*, § 7031, *subd. (a)*. The LLC had no responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract for the performance of such work. The LLC neither contracted with the owner to perform any of the activities listed in the statutory definition of a contractor, nor performed any of those activities. Indeed, the owner entered into a construction contract with a licensed general contractor to perform and or supervise all construction on the project. In no way did the parties' agreement contemplate that the LLC was to perform construction services, or assume the

general contractor's responsibilities under the construction contract. (Opinion by Armstrong, Acting P. J., with Kriegler, J., concurring. Dissenting opinion by Mosk, J. (see p. 980).) [*940]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) **Statutes § 21--Construction--Legislative Intent.**--The court's primary duty when interpreting a statute is to determine and effectuate the Legislature's intent. To that end, the court's first task is to examine the words of the statute, giving them a commonsense meaning. If the language is clear and unambiguous, the inquiry ends. However, a statute's language must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.

(2) **Building and Construction Contracts § 7--Contractors--License Requirement.**--A "contractor"--a term synonymous with "builder" according to *Bus. & Prof. Code*, § 7026--is required to hold one of three categories of contractor's license: Class A (general engineering contractor), class B (general building contractor), or class C (covering specialty licenses) (*Bus. & Prof. Code*, §§ 7055-7058).

(3) **Building and Construction Contracts § 7--Contractor's License--Development Management Agreement--Construction Services.**--Although a limited liability company (LLC) did not have a contractor's license, its claims against a property owner and its principals for services rendered by the LLC pursuant to a development management agreement were not barred by *Bus. & Prof. Code*, § 7031, *subd. (a)*, where the LLC was not a contractor within the meaning of *Bus. & Prof. Code*, § 7026, and the LLC neither contracted with the owner to perform any of the activities listed in the statutory definition of a contractor, nor performed any of those activities. Indeed, the owner entered into a construction contract with a licensed general contractor to perform and or supervise all construction on the project. In no way did the parties' agreement contemplate that the LLC was to perform construction services, or assume the general contractor's responsibilities under the construction contract.

[*Cal. Forms of Pleading and Practice* (2009) ch. 104, *Building Contracts*, § 104.72; 1 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Contracts*, § 488.]

(4) **Building and Construction Contracts § 2--Definitions--Contractor--Construction Management Services.**--The Legislature has not defined the term "contractor" to include persons who perform construction management services. [*941]

COUNSEL: Varner & Brandt and Keith A. Kelly for Plaintiff and Appellant.

Richard E. Blasco, Inc., and Richard E. Blasco for Defendants and Respondents.

JUDGES: Opinion by Armstrong, Acting P. J., with Kriegler, J., concurring. Dissenting opinion by Mosk, J.

OPINION BY: Armstrong

OPINION

[**634] **ARMSTRONG, Acting P. J.**--Plaintiff and appellant The Fifth Day, LLC (Plaintiff), entered into an agreement with Industrial Real Estate Development Company (Owner) to provide certain "industrial real estate development and construction project management" services with respect to real property located in Chino, California. Plaintiff sued Owner and its principals, Pacific Allied Industrial Corporation and James P. Bolotin (together referred to as Defendants), for compensation alleged to be due for services rendered by Plaintiff.

The trial court granted summary judgment in favor of Defendants on the ground that Plaintiff was acting as a general building contractor and therefore was required to hold a license pursuant to *Business and Professions Code* 1 section 7026; [**635] because it had no such license, it was barred by *section 7031, subdivision (a)*, [***2] from maintaining this action. On appeal, Plaintiff contends that (1) it was not a contractor within the meaning of *section 7026*; (2) it was exempt from the license requirement because it was an owner of the property or a partner of Owner; and (3) even if some of the services it rendered required a contractor's license, it nevertheless could be compensated for other services that did not require a license. We determine that Plaintiff was not a contractor within the meaning of the licensing statute, and its claims are therefore not barred by *section 7031, subdivision (a)*. Consequently, we reverse the judgment.

1 All statutory references are to the Business and

Professions Code unless stated otherwise.

3 In his declaration, Knox refers to PCI as "Principal Capital Management."

FACTUAL AND PROCEDURAL SUMMARY

In 1999, Defendants owned 12.3 acres of land (the Property) in Chino, California, adjacent to land owned by Chino Industrial Commons, LLC (CIC). Plaintiff's managing member was Kevin Knox. At Knox's urging, Defendants and CIC agreed to develop their properties jointly.² To that end, the Property was divided into three parcels designated lots Nos. 19, 20 and [*942] 21. CIC entered into 52-year ground leases on the three lots. The ground lease for lot No. 20 required CIC to [***3] construct a 55,000-square-foot building on the lot. Once the building was completed, CIC was to assign its interest in lot No. 20 back to Defendants, and Defendants were to convey to CIC a fee simple interest in lots Nos. 19 and 21. No rent was payable by CIC under the ground leases for the first two years, but rent was payable thereafter.

2 From the record, it appears that only the Property, which was owned by Defendants, is at issue in this case.

CIC failed to construct the building on lot No. 20 during the first two years of the lease term, and rent began to accrue under the ground leases at a rate of 5 cents per square foot, or approximately \$ 24,000 per month. In February 2001, rather than pay the rent, CIC assigned the three ground leases--along with its obligation to construct the building--to Plaintiff. The development plan for the Property was changed to a seven-building commercial office park. Lot No. 20 was redesignated as lots Nos. 1 and 2, and lots Nos. 19 and 21 were redesignated as lots Nos. 3 through 7. Plaintiff undertook to construct two buildings totaling 55,000 square feet on lots Nos. 1 and 2 (formerly lot No. 20) in return for a fee simple interest in lots Nos. 3 through 7 (formerly lots Nos. 19 and 21). Plaintiff [***4] was responsible for financing the construction.

By early 2003, Plaintiff had not constructed the buildings and owed Defendants \$ 465,000 in back rent. Plaintiff negotiated with PCI³ to obtain financing for the construction. Under the agreement contemplated between Plaintiff and PCI, Plaintiff would assign the ground leases to PCI. PCI would finance the construction of the seven buildings, pay Defendants the accrued back rent, and pay Plaintiff \$ 100,000. Plaintiff was to receive a "Project Incentive Fee" based on a 25 percent share of the profits from the sale of the development.

Defendants refused to consent to the assignment of the ground leases contemplated in the PCI deal, and proposed instead to finance the construction on terms similar to the PCI deal, including reassignment of the ground leases back to Defendants. [**636] Defendants proposed to increase Plaintiff's Project Incentive Fee to 34 percent of the profits. Knox stated in his declaration that Plaintiff "reluctantly" accepted Defendants' proposal because of the increased Project Incentive Fee.

This agreement is memorialized in a document dated May [***5] 5, 2003, between Plaintiff and Owner entitled "Development Management Agreement For the Construction of The Campus at CIC" (the DMA). Owner is referred to as the "Owner" and Plaintiff as the "Development Manager." [*943]

The DMA recites that Owner wishes to undertake the development of the entire property. To do so, "Owner desires to have Professional Development and Construction Management Services to assist the Owner" Plaintiff was "experienced in industrial real estate development and construction project management and is willing to provide to Owner these services."

Plaintiff was to be paid a fixed development fee of \$ 100,000 as a nonrefundable advance against a Project Incentive Fee of 34 percent of a defined "Project Value." The DMA provided, "The Owner agrees that for purposes of this agreement, any and all lease rents accrued are included in the value of the Land Contribution and that the leases for Lots 19, 20 and 21 previously entered into are to be terminated as and by those Lease Terminations attached as Exhibit ____."

The DMA specified that Plaintiff was to perform the following duties "as Owner may specifically and expressly direct":

--To "identify critical and high priority [***6] matters and promptly report the same to Owner," and with respect to matters "requiring any immediate action" to "make recommendations for a short-term contingency plan to minimize Owner's exposure to loss or damage."

--To provide "advice or opinions with respect to the development of an overall strategic plan for the management and administration of the Project."

--To "coordinate and direct" the activities of design professionals hired by Plaintiff.

--To obtain building and special permits, "except for permits required to be obtained directly by the various contractors."

--To provide advice or opinions with respect to (1) "developing the budget for construction costs" and "controlling the overall budget for the Project," and (2) "Owner's efforts to keep the Project moving forward" on budget and on time.

--To update the budget regularly, including a comparison between anticipated and actual expenses.

--To "provide cost and performance evaluations of alternative materials and systems" [*944]

--To provide a project development schedule setting forth Plaintiff's "good faith estimate of how long the regulatory and construction phases of the Project will last."

--To hold and document regularly [***7] scheduled preconstruction meetings with Owner to "update the Owner, discuss issues, plan strategies to meet objectives and solve problems."

--To provide "opinions or advice on administrative and management matters that relate to the coordination of work among and between the Contractors, Subcontractors, Disbursement Agent, Owner and the Design Professional(s)."

[**637] --To assist the general contractor in "developing bidders' interest in the Project, establish bidding schedules and assist the Owner in preparing construction contract document packages."

--To assist the general contractor in the subcontractor bidding process and to ensure that the general contractor performs its duties with respect to bids from subcontractors and material suppliers.

--To receive and review required certificates of insurance from the design professionals and contractors.

--To "use commercially reasonable efforts to achieve satisfactory performance from each of the Contractors and Subcontractors."

--To conduct daily "on-site inspections and reviews" during construction, and to attend and report to Owner on "all on-site Project status meetings"

--To provide to Owner summaries of and to document all change proposals [***8] and change orders.

--To "ensure that the contract documents contain all necessary independent testing and inspection" and to "regularly review the testing and inspection reports"

--To report to Owner monthly "regarding the status of all or part of the Project."

--To review with Owner monthly a draw request package, including approved applications for payment. [*945]

--To maintain the financial books and records for the project.

--To report cash disbursements related to the project.

-- To maintain contact information for the project team.

--To "coordinate the completion and correction of the work" and to "assist the Design Professional(s) in conducting substantial final inspections."

In addition, Plaintiff warranted and represented that (1) it was "experienced, competent and qualified to perform the work contemplated by" the DMA; (2) it had and would maintain "sufficient facilities, expertise, staff, assets and other resources to perform its duties"; (3) it held and would hold "all licenses, permits or other certifications necessary to perform its duties"; and (4) Owner would "have full knowledge and involvement in the Project."

In January 2004, Owner entered into a construction contract (the [***9] Contractor Agreement) with Fullmer Construction, pursuant to which Fullmer agreed to complete specified work, including the construction of seven concrete tilt-up buildings on the Property, for a fee of nearly \$ 4.9 million. Knox, Plaintiff's principal, was designated in the Contractor Agreement as the Owner's representative. As such, Knox represented the Owner with respect to "all aspects of the [Contractor] Agreement and the execution and performance of the Work including, without limitation, the authority to give

approvals and consents and the authority to execute Prime Contract Change Orders less than [\$ 25,000] and provide directions to Contractor."

Plaintiff performed the services required of it under the DMA. Construction was completed, and certificates of occupancy for the project issued in December 2004.

Plaintiff alleged that, between December 2004 and March 2005, Owner sold three of the buildings. According to Knox, Owner paid Plaintiff in excess of \$ 785,000 in Project Incentive Fees. Plaintiff alleged that Owner subsequently sold or leased the remaining four buildings, but refused to pay [**638] Plaintiff the additional Project Incentive Fees earned under the DMA. Plaintiff alleged [***10] that as a result, Defendants owe Plaintiff approximately \$ 1.8 million in additional Project Incentive Fees.

Plaintiff sued Defendants for breach of contract and on common counts for money had and received and for services rendered. The trial court sustained Defendants' demurrers to the original complaint with leave to amend on the ground that Plaintiff failed to allege that it was a licensed contractor and was therefore barred from bringing suit by *section 7031*. Plaintiff thereafter filed a [*946] first amended complaint that (1) omitted the common count for services rendered, (2) recast Plaintiff's cause of action for breach of contract to allege the breach of a partnership agreement, and (3) sought the additional remedies of rescission and restitution. Defendants again demurred on the ground that *section 7031* barred Plaintiff's suit. This time, the trial court overruled the demurrer, concluding that Plaintiff had alleged facts that, if true, avoided the *section 7031* bar.

Defendants subsequently moved for summary judgment on the sole ground that *section 7031* barred Plaintiff's suit. The trial court granted the motion, concluding that the undisputed facts established that Plaintiff was a contractor [***11] within the meaning of *section 7026*; because Plaintiff was not licensed, its action was barred by *section 7031*. The trial court entered judgment in favor of Defendants. ⁴ Plaintiff timely appealed.

4 Because the summary judgment did not resolve Owner's cross-complaint against Plaintiff alleging the latter's breach of the DMA, the judgment did not name Owner. We therefore dismissed Plaintiff's appeal with respect to

Owner.

STANDARD OF REVIEW

On an appeal from a grant of summary judgment, we examine the record de novo to determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 [107 Cal. Rptr. 2d 617, 23 P.3d 1143]; *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1245-1246 [82 Cal. Rptr. 3d 440].) We view the evidence in a light favorable to, and resolve any evidentiary doubts or ambiguities in favor of, the nonmoving party. (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at pp. 768-769.) The moving party bears the burden to demonstrate "that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [107 Cal. Rptr. 2d 841, 24 P.3d 493], *fn. omitted*.) If the moving party makes a *prima facie* showing, the [***12] burden shifts to the party opposing summary judgment "to make [its own] *prima facie* showing of the existence of a triable issue of material fact." (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*, *fn. omitted*.)

(1) Contract interpretation on undisputed facts is a question of law that we review de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866 [44 Cal. Rptr. 767, 402 P.2d 839]; *Employers Mutual Casualty Co. v. [*947] Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 347 [86 Cal. Rptr. 3d 383].) Statutory interpretation also is a question of law that we review de novo. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal. Rptr. 2d 531, 828 P.2d 672].) "Our primary duty when interpreting a statute is to "determine and [**639] effectuate" the Legislature's intent. [Citation.] To that end, our first task is to examine the words of the statute, giving them a commonsense meaning. [Citation.] If the language is clear and unambiguous, the inquiry ends. [Citation.] However, a statute's language must be construed in context, and provisions relating to the same subject matter must be [***13] harmonized to the extent possible. [Citation.]" (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 326 [86 Cal. Rptr. 3d 350, 197 P.3d 164], *fn. omitted*.)

DISCUSSION

Although Plaintiff advances a number of arguments to support its position that its lack of licensure does not preclude it from suing for compensation earned under the terms of the DMA, the central question presented in this appeal is whether an entity which provides construction management services to a private owner developing commercial real property is required to be licensed pursuant to the Contractors' State License Law. The licensing law itself does not identify construction managers as workers requiring licensure. Defendants nevertheless argued below, and now on appeal, that sections "7026 and 7057, and the holdings of the California Supreme Court, make it quite clear that a person or entity that provides supervision and/or management services for any construction project, must be licensed as a 'general building contractor,' so as to 'protect the public from dishonesty and incompetence in the administration of the contracting business.'" Defendants' position is untenable.

(2) A "contractor"--a term "synonymous with 'builder'" according to *section 7026*--is required [***14] to hold one of three categories of contractor's license: Class A (general engineering contractor), class B (general building contractor), or class C (covering "specialty" licenses). (§§ 7055-7058.) *Section 7026* defines "contractor" as "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, ... whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. 'Contractor' includes subcontractor and specialty contractor." [*948]

A review of Plaintiff's duties under the DMA reveals that it was to assist, on behalf of the Owner, in coordinating the activities of the various workers to enable them to complete their assigned tasks in an organized and efficient manner, on time and on budget; to maintain [***15] records such as insurance certificates, as well as the financial books and records for the project; to keep the Owner apprised of the status of the project; to be the on-site "point person" to respond to issues as they arose; and generally to act as the Owner's agent with

respect to the various parties connected with the development of the project. Plaintiff had no responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract for the performance of such work.

(3) It is undisputed that Plaintiff neither contracted with Owner to perform any of the activities listed in *section 7026's* definition of a contractor, nor performed any of those activities. Indeed, Owner entered into a construction contract with Fullmer Construction, a licensed general contractor, to perform and/or supervise all [**640] construction on the project, and Fullmer Construction hired all of the subcontractors who performed construction services with respect to the project. In no way did the DMA contemplate that Plaintiff was to perform construction services, or assume the general contractor's responsibilities under the construction contract.

Defendants rely on *section 7057* [***16] to argue that construction management services such as those set forth in the DMA may not be performed without a general contractor's license. That statute defines a "general building contractor" as "a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or *superintend the whole or any part thereof.*" (§ 7057, *subd. (a)*, italics added.) From the foregoing definition, Defendants argue, "It is clear ... that the performance of any specific trade or craft in connection with the construction of a structure ... is not required for a person or entity to be engaged in the business of performing the function of a 'general building contractor.' The statute itself ... includes in the definition of a 'general building contractor'[] any person or entity that superintends the whole or any part of a structure being built." This is a misstatement of the law. *Section 7057* provides that any *contractor* who engages in the listed activities [***17] is a general building contractor, not that any "person" or "entity" that does so comes within the definition. If Plaintiff is not a contractor (because it does not perform the activities listed in *section 7026* which defines a contractor), it is, by definition, not a general contractor. [*949]

In addition to *sections 7026* and *7057*, Defendants

rely on two California Supreme Court cases to support their argument that construction managers are required to be licensed: *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141 [308 P.2d 713] and *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988 [277 Cal. Rptr. 517, 803 P.2d 370]. Neither of these cases may reasonably be read to create a new category of workers requiring licensure under the Contractors' State License Law.

In *Lewis & Queen v. N. M. Ball Sons*, *supra*, 48 Cal.2d 141, the plaintiff entered into an agreement for "the removal of concrete, application of water, excavation, overhaul, and compacting of original ground" in connection with the construction of the Hollywood Parkway. (*Id.* at p. 145.) The Supreme Court found that "plaintiff actually undertook to and did in fact 'construct a highway' for defendant, and thereby acted as a contractor within the meaning of section 7026 ... ," "and that because it had done so without [***18] the license required by section 7028, it was barred by section 7031 from maintaining any action for compensation." (*Id.* at pp. 147, 146.) In *Hydrotech Systems, Ltd. v. Oasis Waterpark*, *supra*, 52 Cal.3d 988, the plaintiff, a foreign manufacturer of water park equipment, contracted to construct a wave-making attraction at a California venue. The Supreme Court "granted review to decide two questions. The first is whether section 7031 permits an unlicensed nonresident to sue upon an 'isolated transaction' in California where 'exceptional circumstances' exist, even though there was no substantial compliance with California's licensing law. The second--an issue of potentially broad importance--is whether section 7031 bars an unlicensed contractor's *fraud* action against the person for whom the work was done." (*Id.* at p. 992, original italics.) This simple recitation of the facts of these cases makes abundantly clear that they are in no way analogous to the situation before us, and have nothing [***641] whatsoever to say about the licensure of construction managers. In short, Defendants have directed us to no California cases which discuss, much less hold, that a construction manager must be [***19] licensed under the Contractors' State License Law.⁵

⁵ While clearly not persuasive authority for our conclusion, we note that at least one treatise on California construction law definitively states California Licensure Law does not regulate construction management on private works.

(Acret et al., Cal. Construction Contracts, Defects, and Litigation (Cont.Ed.Bar 2008) § 2.19, p. 95.) This statement is supported by dicta in *Dorsk v. Spivack* (1951) 107 Cal.App.2d 206, 209 [236 P.2d 840] ["So far as statutory law is concerned, there is no provision of the Business and Professions Code which requires a mere supervisor or superintendent of building construction to be licensed"].)

We note as well that the Legislature provided that construction managers on public works projects must be licensed architects, engineers or general contractors. (*Gov. Code*, § 4525, *subd.* (e).) The Legislature determined that licensure was required for public works projects, and so enacted a statute to that effect; the fact that a similar statute applicable to privately owned real [*950] estate development projects was not enacted strongly suggests that the Legislature determined that licensure of construction managers was not [***20] necessary in that arena.

(4) In short, the Legislature has not defined the term "contractor" to include persons who perform construction management services such as those set forth in the DMA. 6 It is within the sole purview of the Legislature to determine whether private construction project managers should be licensed. To this end, the Legislature is empowered to conduct public hearings on the merits of such licensure, to solicit the views of the various players in the building industry who would be affected by such a requirement, and to amend the licensing law if it concludes that the public interest would be better served by such a revision. Unless and until the Legislature does so, its failure to expressly address the issue must be the last word.

6 That the Legislature has given *some* consideration to the subject is evident from the enactment of the Construction Management Education Sponsorship Act of 1991, *section 7139 et seq.* That construction management is an established job classification distinct from other professionals involved in the construction trade is revealed by a simple Google search of "construction management degree": UCLA Extension and UC Berkeley Extension each offer [***21] a certificate program in construction management; a number of undergraduate institutions award bachelor degrees with a major

in construction management; and Georgetown University awards a postbaccalaureate degree, master of professional studies in real estate, with a focus on construction management.

DISPOSITION

The judgment is reversed. Plaintiff is to recover its costs on appeal.

Kriegler, J., concurred.

DISSENT BY: Mosk

DISSENT

MOSK, J., Dissenting.--I respectfully dissent.

This case is one of first impression. The issue is whether a person who acts as a construction manager but who performs many of the services of a general building contractor can avoid the contractor license requirement of *Business and Professions Code section 7028*.¹

¹ All statutory references are to the Business and Professions Code unless stated otherwise.

The legal principles involved in this case can have significant effects. The Contractors' State License Law is intended to prevent unqualified and unscrupulous contractors from preying on people. Now, those unqualified, unscrupulous and unlicensed contractors have a loophole in the license requirement that will facilitate [**642] their illicit or incompetent activities--they need merely call [***22] themselves "construction managers" rather than "contractors" and, regardless of the services they perform, the licensing requirement will not apply. The Legislature did not intend such a result. [*951]

The Contractors' State License Law defines a "contractor" subject to the license requirement by the nature of the services performed, not by job title. (§ 7026.) When, as in this case, a construction manager undertakes to perform some of the services of a general contractor, then that construction manager must be a licensed contractor. I would affirm the judgment.²

² This case comes up on a summary judgment. The majority opinion does not foreclose defendant from establishing at trial that plaintiff actually performed services in such a manner that a

contractor's license was required.

INTRODUCTION

The majority opinion accurately sets forth the facts. In summary, plaintiff and appellant The Fifth Day, LLC (plaintiff), entered into a development management agreement (the DMA) with Industrial Real Estate Development Company (IRED) to provide certain "industrial real estate development and construction project management" services with respect to real property located in Chino, California (the Property). [***23] Plaintiff sued IRED and its principals, Pacific Allied Industrial Corporation (Pacific Allied) and James P. Bolotin, for compensation alleged to be due for services rendered by plaintiff.³

³ Plaintiff alleged in its first amended complaint that James P. Bolotin, Pacific Allied, and IRED were the alter egos of one another. As defendants are related, for convenience I refer to them individually and collectively as Bolotin.

The trial court granted summary judgment in favor of Bolotin on the ground that plaintiff was acting as a contractor required to hold a professional license pursuant to *sections 7026 and 7028*. Because plaintiff had no such license, it was barred by *section 7031, subdivision (a)* from maintaining this action. On appeal, plaintiff contends that (1) plaintiff was not a contractor within the meaning of *section 7026*; (2) plaintiff was exempt from the license requirement because it was an owner of the Property or a partner of IRED; and (3) even if some of the services plaintiff rendered required a contractor's license, plaintiff nevertheless could be compensated for other services that did not require a license.

I would hold that the construction management services described [***24] in the contract were those of a contractor that required a license. I also conclude that because plaintiff did not raise in the trial court its contention that it was exempt from the license requirements, it forfeited that issue. Even if plaintiff had not forfeited that issue, it failed to submit evidence sufficient to raise triable issues with respect to its claimed exemption. Finally, I [*952] conclude that plaintiff is not entitled to partial compensation for any work performed under the contract that did not require a license. A contractor performing services under an integrated contract that provides for substantial services

requiring a license may not recover partial compensation for other contract services for which no license is required and which are not separable from the services requiring a license.

DISCUSSION

A. The Contractors' State License Law

1. The Section 7028 License Requirement and the Section 7031 Litigation Bar

Section 7028 makes it unlawful to engage in the business of or to act in the [**643] capacity of a contractor without a license. (See *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 147 [308 P.2d 713].) "To protect the public, the Contractors' State License Law [§ 7000 *et seq.*] [***25] imposes strict and harsh penalties for a contractor's failure to maintain proper licensure. Among other things, the [Contractors' State License Law] states a general rule that, regardless of the merits of the claim, a contractor may not maintain any action, legal or equitable, to recover compensation for 'the performance of any act or contract' unless he or she was duly licensed 'at all times during the performance of that act or contract.' (§ 7031, *subd.* (a) ... , italics added.)" ⁴ (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 418 [30 Cal. Rptr. 3d 755, 115 P.3d 41], *fn. omitted* (*MW Erectors*)). *Section 7031* thus "bars a person from suing to recover compensation for any work he or she did under an agreement for services requiring a contractor's license unless proper licensure was in place at all times during such contractual performance." (*MW Erectors, supra*, 36 Cal.4th at p. 419.)

4 *Section 7031, subdivision (a)* provides in relevant part, "[N]o person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance [***26] of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person"

Section 7031 "reflects a strong public policy, which favors protecting the public from unscrupulous and

incompetent contractors. According to our Supreme Court, 'The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and [*953] construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.]' [Citations.]" (*WSS Industrial Construction, Inc. v. Great West Contractors, Inc.* (2008) 162 Cal.App.4th 581, 587 [76 Cal. Rptr. 3d 8].) "'Because of the strength and clarity of this policy,' the Supreme Court has observed, 'section 7031 applies despite injustice to the unlicensed contractor. "Section 7031 represents a legislative determination that the importance [***27] of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] ..." [Citations.]' [Citation.]" (*Id. at p. 589.*) "Thus, an unlicensed contractor cannot recover either for the agreed contract price or for the reasonable value of labor and materials. [Citations.] The statutory prohibition operates even where the person for whom the work was performed knew the contractor was unlicensed." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 997 [277 Cal. Rptr. 517, 803 P.2d 370] (*Hydrotech*)).

2. Definition of "Contractor"

Section 7026 specifies those required to have a contractor's license. That provision defines a "contractor" to be "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, [**644] construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development [***28] or improvement, or to do any part thereof, ... whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. 'Contractor' includes subcontractor and specialty contractor. ..."

"*Section 7026* plainly states that both the person who

provides construction services himself and one who does so 'through others' qualifies as a 'contractor.' The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract. [Citations.] Indeed, if this were not the rule, the requirement that general contractors be licensed would be completely superfluous." (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 941 [29 Cal. Rptr. 2d 669] (*Vallejo Development*)). [*954]

Section 7026.1, subdivision (b) states that the term "contractor" "includes" a "consultant to an owner-builder ... who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building ... or part thereof." Section 7057, subdivision (a) [***29] defines a "general building contractor" to be "a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons ... , requiring in its construction the use of at least two unrelated building trades or crafts, or to do *or superintend* the whole or any part thereof." (Italics added.)

B. Whether Plaintiff Was a Contractor

It is undisputed that plaintiff was not licensed as a contractor. The issue in this case is whether, pursuant to section 7031, subdivision (a), plaintiff "act[ed] in the capacity of a contractor" under the DMA--that is, whether the services plaintiff undertook to provide were such that plaintiff was required to hold a contractor's license. As I discuss, under the DMA, plaintiff acted in the capacity of a contractor by undertaking to perform such services as the coordination of work and the supervision of other licensed construction professionals, and therefore was required to hold a contractor's license under the Contractors' State License Law.

1. Plaintiff Undertook to Act as a Construction Manager, Not as a Mere "Advisor"

Plaintiff contends that its role under the DMA [***30] was that of a mere "advisor" that provided "basic consulting services to the Owners to ensure the timely completion of the project." That assertion is inconsistent with the plain terms of the DMA. Plaintiff's essential role under the DMA was as a construction manager with extensive responsibilities.

As the DMA recites, plaintiff was engaged because IRED "desire[d] to have Professional Development and *Construction Management Services* to assist the Owner" in completing the project. (Italics added.) The DMA further recited that plaintiff was "experienced in industrial real estate development and *construction project management* and is willing to provide to Owner *these services*." (Italics added.)

The specific duties assigned to plaintiff support that characterization. Although "the duties and responsibilities of a construction manager vary greatly from contract [*645] to contract" (5 Bruner & O'Connor on Construction Law (May 2008) § 16:15 (Bruner & O'Connor)), "[t]here is a limited number of services required to be performed on a construction project." (*Ibid.*) As a result, "the construction manager will perform the services typically undertaken by another participant to the construction process. [***31] The array of services [*955] usually available for the construction manager to perform are the nondesign functions of the architect and engineer and the nonconstruction activities of the general contractor. It is not uncommon to encounter construction managers performing such customary design professional services as cost estimating and contract administration. Nor is it unusual for construction managers to perform such customary general contractor functions as coordination and scheduling of the work." (*Ibid.*) As described by an authority, one form agreement prepared by the Construction Management Association of America provides that "the construction manager assists the owner in selecting the design professional and in preparing the contract between the owner and the design professional, prepares a master schedule and a budget, prequalifies bidders, conducts prebid conferences, participates in the bid opening, advises as to the acceptance or rejection of bids, provides a management team to provide contract administration as an agent of the owner, reviews requests for information, shop drawings and other submittals, conducts project meetings, prepares requests for proposals for change order [***32] work, reviews and adjusts payment application, and prepares and signs certificates for payment." (Acret, Cal. Construction Law Manual (6th ed. 2008) § 4:28, p. 285; see also *Gov. Code*, § 4529.5 [mandating that construction project managers on public works projects "have expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis,

claims review and negotiation, and general management and administration of a construction project"). Plaintiff's services under the DMA included many that are frequently provided by construction managers. Plaintiff was not a mere "advisor."

2. Plaintiff Was Not the Owner's Employee

Plaintiff argues that a construction manager acting as an owner's agent does not need a contractor's license. Plaintiff relies on a 1974 Attorney General opinion (57 Ops. Cal. Atty. Gen. 421 (1974)) and the decision in *Dorsk v. Spivack* (1951) 107 Cal. App. 2d 206 [236 P.2d 840]. Those authorities do not support plaintiff's position. Section 7044 exempts from the license requirement owners who, themselves or through employees who receive wages as their sole compensation, perform construction [***33] work on their own property. (§ 7044, subds. (a), (b).) Based on that exemption, the authorities relied upon by plaintiff conclude that an owner's employee who receives wages as his or her sole compensation may supervise construction on an owner's behalf without a license. (*Dorsk v. Spivack*, *supra*, 107 Cal. App. 2d at pp. 208-209 [substantial evidence supported trial court's finding that the plaintiff "was a supervising employee rather than a general contractor"]; see also Bruner & O'Connor, *supra*, § 16:15 [under California law, construction supervisor who is employee of owner is not required to be licensed]; 1 State-by-State Guide to Architect, Engineer, and Contractor Licensing (Walker et al. edits. 1999) § 7.56, p. 250 (Walker).) The brief opinion by the [*956] Attorney General suggests that if the construction manager is an employee, no contractor's license is required and that supervision of construction alone, without [**646] having drawn plans and designs, does not require an architect's license. (57 Ops. Cal. Atty. Gen., *supra*, at p. 421; see *Wenke v. Hitchcock* (1972) 6 Cal. 3d 746, 751-752 [100 Cal. Rptr. 290, 493 P.2d 1154] [opinion of Attorney General not controlling, although accorded great respect].) Plaintiff does not argue [***34] it was IRED's employee but as discussed, *post*, contends it was IRED's partner. In any event, there is no evidence to support the conclusion that IRED and plaintiff were in an employment relationship. (See *Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal. App. 4th 1099, 1105 [83 Cal. Rptr. 3d 393] [construction inspector not employee]; see also *Fillmore v. Irvine* (1983) 146 Cal. App. 3d 649, 658-659 [194 Cal. Rptr. 319] [Lab. Code, § 2750.5, which creates presumption of employment relationship for worker hired

to perform contractor work, does not apply in determining whether unlicensed contractor is barred from recovering compensation by § 7031].) The authorities plaintiff relies upon have no application to independent contractors.

3. Section 7026.1 Does Not Limit the Circumstances in Which Consultants to Owner-builders Must Be Licensed

Plaintiff asserts that, pursuant to section 7026.1, a consultant to an owner-builder must be licensed *only* if it "undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building ... , or part thereof." (§ 7026.1, subd. (b).) Plaintiff argues that because it never submitted a bid or undertook to "construct" anything, it was not required [***35] to hold a contractor's license.

Section 7026.1, subdivision (b), however, does not designate the "only" circumstance in which a consultant to an owner-builder must hold a contractor's license. Section 7026.1 provides, "The term 'contractor' includes all of the following: [§] ... [§] (b) Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any building or home improvement project, or part thereof." (Italics added.) The Legislature's use of the term "includes" indicates that the circumstances set forth in section 7026.1 are not intended to be exclusive, but are meant to provide circumstances coming within the broader definition of "contractor" set forth in section 7026--that is, "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve ... any building ... parking facility, ... excavation or other structure, project, development or improvement, [***36] or to do any part [*957] thereof" Section 7026.1 is not limited to a "consultant to an owner-builder." If it were, and read as plaintiff suggests, the broader definition of "contractor" in section 7026 would be rendered meaningless. Accordingly, I conclude that a nonemployee consultant to an owner-builder must hold a contractor's license if the consultant falls within the definition of "contractor" in section 7026, which includes--but is not limited to--the specific circumstance set forth in section 7026.1, subdivision (b).

4. Construction Managers Who Undertake to Provide Contractor Services Must Be Licensed

The Contractors' State License Law does not expressly address the licensing of construction managers on private construction [**647] projects.⁵ As one authority notes, whether a construction manager must be licensed under California law "depends on how [the construction manager's duties] are defined." (Walker, *supra*, § 7.56, p. 250.) Some duties frequently performed by construction managers fall within the purview of architects or engineers rather than contractors. (See Bruner & O'Connor, *supra*, § 16:15; Walker, *supra*, § 7.56, pp. 249-250.) The question in this case is whether the particular [***37] services plaintiff agreed to provide in the DMA were such that plaintiff was acting in the capacity of a "contractor" as defined by *section 7026*.

5 As discussed, *post*, California law requires licensing of persons providing construction management services with respect to public works projects.

As noted above, *section 7026* defines a "contractor" to include a person who "undertakes to or offers to undertake to, or purports to have the capacity to undertake to, ... by or through others, construct ... any building." *Section 7026.1, subdivision (b)*, specifies that this definition includes a "consultant to an owner-builder ... who or which undertakes, offers to undertake, [or] purports to have the capacity to undertake ... to construct any building" *Section 7057, subdivision (a)* defines a general contractor to include a contractor who "superintend[s]" the construction of "any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts"

A construction manager who undertakes on behalf of an owner-builder to perform [***38] work within the purview of these provisions--including tasks involving the supervision and coordination of the work of contractors or other licensed construction professionals--is a contractor within the meaning of *section 7026*. As one commentator has stated, by undertaking duties typically performed by other licensed construction professionals, a construction manager "undertakes to, and purports to have the capacity to undertake to, [*958] perform construction work, often as a 'consultant to an owner-builder.'" (Acret, California

Construction Law Manual, *supra*, § 4:28, p. 286; see also Acret et al., Cal. Construction Contracts, Defects, and Litigation (Cont.Ed.Bar. 2008) § 2.19, p. 95 ["A construction manager must have a contractor's license under *Bus & P C §7026.1(b)*, which defines 'contractor' to include a 'consultant to an owner-builder.'"])

The analogous decision in *Vallejo Development, supra*, 24 Cal.App.4th 929, supports this application of the Contractors' State License Law. In that case, a real estate developer (VDC) sold six parcels of land zoned for residential use to six "merchant builders." As part of the purchase agreements, VDC agreed to provide the labor and materials required to make [***39] certain infrastructure improvements to the land, such as grading and the installation of sewers, required by the City of Vallejo. (24 Cal.App.4th at pp. 935-936.) VDC alleged that it provided such labor and materials through "licensed third-party contractors." (*Id.* at p. 936.) VDC later sued some of the merchant builders to foreclose on mechanic's liens and for the reasonable value of its services in providing the infrastructure improvements. The trial court concluded that VDC was barred from pursuing its action by *section 7031*. (24 Cal.App.4th at p. 937.)

The Court of Appeal affirmed. (*Vallejo Development, supra*, 24 Cal.App.4th at p. 947.) The court rejected the argument that VDC was not a "contractor" because it had [**648] subcontracted with licensed contractors to provide the labor and materials. (*Id.* at p. 941.) The court observed, "[T]here is no substantive difference between VDC's claim that it merely intended to administer or supervise the work of licensed contractors, and other situations in which unlicensed parties have argued that they should be allowed to recover on their contracts by virtue of their having subcontracted out the work to be performed by licensed contractors. The Legislature's [***40] conclusion is precisely the opposite: It is improper for an unlicensed person to develop property for public sale even if licensed contractors work under the unlicensed person." (*Id.* at p. 943.)

Further, requiring licensing of construction managers who undertake to supervise the work of other licensed construction professionals is consistent with the purposes of the Contractors' State License Law. "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide

building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.] [¶] *Section 7031* advances this purpose by withholding judicial aid from those who seek compensation for unlicensed [*959] contract work. The obvious statutory intent is to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay." (*Hydrotech, supra*, 52 Cal.3d at p. 995.) "The protective purposes of the licensing [***41] law cannot be satisfied in full measure unless the 'continuing competence and responsibility' of those engaged in the work for which compensation is sought have been officially examined and favorably resolved." (*Id.* at p. 996.)

That these policy considerations apply to construction managers has been recognized by the California Legislature. The Government Code provides that all persons who provide "[c]onstruction project management" services on public works projects must be licensed architects, engineers or general contractors (*Gov. Code*, § 4525, *subd. (e)*) who have demonstrated "expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project" (*Gov. Code*, § 4529.5; see generally 78 *Ops.Cal.Atty.Gen.* 48 (1995) [state and local agencies may not contract with unlicensed construction managers]). Similarly, legislatures in other states have passed licensing requirements for construction managers working in both the public and private sectors.⁶ (See generally Bruner & O'Connor, *supra*, [***42] § 16:15.) Although California law does not expressly provide that construction managers are included within the definition of "contractor" under *section 7026*, these other laws evince a recognition that the services performed by construction managers often include those that contractors typically perform.

⁶ Idaho, for example, has enacted a separate licensing scheme for construction managers who work on public works projects. (*Idaho Code Ann.* § 54-4503 *et seq.*) In South Carolina, a construction manager must be a licensed

contractor, engineer or architect. (*S.C. Code Ann.* § 40-11-320.) A Nevada licensing statute expressly includes construction managers in the definition of "contractor." (*Nev. Rev. Stat.* § 624.020(4).)

[**649] The fact that the Legislature provided that "construction project management" services on public works projects are those services provided by a "licensed architect, registered engineer, or licensed general contractor" (*Gov. Code*, § 4525, *subd. (e)*) does not imply that construction managers on private projects need *not* be licensed contractors. It only means that those who "meet the requirements of *Section 4529.5* for management and supervision of work performed on state construction [***43] projects" must hold one of those licenses. (*Gov. Code*, § 4525, *subd. (e)*.) That provision does not purport to define the requirements for a contractor's license, which requirements are set forth in *section 7026*. Otherwise, a person simply designated as a construction manager on a private project could perform duties of a contractor defined in *section 7026*, and yet avoid the licensing requirement. To read *Government Code sections 4525 and 4529.5* as modifying by implication *section 7026 of the Business and Professions Code* would create an absurd result. (See *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 [64 Cal. Rptr. 3d 661, 165 P.3d 462] [statutes should be interpreted to avoid absurd, impractical or arbitrary results].) Whether a license is required depends on the particular services performed by the construction manager.

The Legislature's enactment of the *Construction Management Education Sponsorship Act of 1991* (CMESA; § 7139 *et seq.*) supports my conclusion that the Contractors' State License Law encompasses construction managers who provide contractor services. In enacting the CMESA, the Legislature found and declared that "[t]here is a demand and increasing need for construction management [***44] education programs ... that prepare graduates for the management of construction operations and companies regulated by the Contractors' State License Law and enforced by the Contractors' State License Board." (§ 7139.1, *subd. (a)*, italics added.) The Legislature further stated, "It is the intent of the Legislature that by enabling contractors to designate a portion of their licensure fee and providing a format for contractors to contribute funds to construction management education, this article will receive broad

based industry support. In addition, this article *allows the contractor to demonstrate the importance of construction management education*. This assistance will enable greater development of construction management curricula and will improve the overall quality of construction *by providing construction management training to California licensed contractors and their current and future management personnel.*" (§ 7139.1, *subd. (c)*, italics added.) The CMESA creates a Construction Management Education Account "as a separate account in the *Contractors' License Fund*" to fund construction management education programs (§ 7139.2, *subd. (a)*, italics added), and requires the Contractors' [***45] State License Board to "allow a contractor to make a contribution to [that fund] at the time of the contractor license fee payment." (§ 7139.2, *subd. (b)*, italics added.) The program's advisory committee is comprised almost entirely of representatives from professional associations of licensed contractors. (§ 7139.3, *subd. (c)*.) Finally, the Legislature declared its intent that programs under the CMESA are to be funded "only from the Contractors' License Fund" (§ 7139.10.) The assumption pervading every provision of the CMESA is that it is a program funded by licensed contractors for the purpose of training licensed contractors in construction project management. These provisions suggest that construction managers perform services requiring a contractor's license. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 [**650] Cal. Rptr. 3d 390, 74 P.3d 166] ["[E]very statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect."].) [*961]

Plaintiff contracted in the DMA to provide a number of services that fell within the definition of a contractor required to have a license. Plaintiff undertook, for example, to "coordinate and direct" the activities of the architect [***46] and engineering design professionals; to provide "opinions or advice on administrative and management matters that relate to the coordination of work among and between the Contractors, Subcontractors, Disbursement Agent, Owner and the Design Professional(s)"; to "coordinate the completion and correction of the work"; and to "assist the Design Professional(s) in conducting substantial final inspections." The coordination of work among various design professionals, contractors and subcontractors is work that is typically performed by a licensed contractor and involves the expertise possessed by a licensed

contractor. (See *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044 [36 Cal. Rptr. 3d 532] [plaintiff was contractor subject to licensing when complaint alleged that plaintiff provided various services on project and the contract specified that the work included drawing plans and "coordination of the architect, electrical engineers, mechanical engineers and structural engineers".])

Plaintiff also undertook to perform services directly related to the construction process. Plaintiff agreed to obtain building and special permits; to "provide cost and performance evaluations of alternative [***47] materials and systems ..."; to assist the general contractor in "developing bidders' interest in the Project, establish bidding schedules and assist the Owner in preparing construction contract document packages"; to ensure that the general contractor was performing its duties with respect to bids from subcontractors and material suppliers; to conduct daily "on-site inspections and reviews" during construction; and perhaps most significantly, to "use commercially reasonable efforts to achieve satisfactory performance from each of the Contractors and Subcontractors." Plaintiff thus undertook to perform construction services that brought it within the definition of a "contractor" in *section 7026*.⁷

7 That a person performs some services that might be labeled construction management services does not necessarily mean that the person must hold a contractor's license. This case concerns the services specified in the DMA. Also, a person who, as an independent contractor, assists an owner in connection with a construction project does not necessarily require a license. Whether a license is required depends upon the duties that person undertakes to perform.

That IRED also engaged Fullmer [***48] to provide general contractor services on the project is of no relevance. *Section 7057, subdivision (a)* defines a "general building contractor" to be "a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons ... , requiring in its construction the use of at least two unrelated building trades or crafts, or to do *or superintend the whole or any part thereof*." (Italics added.) There is no proscription in *section 7057* against having multiple parties on a project who [*962] each perform some general contractor

services. For example, here plaintiff did, *inter alia*, "superintend" a part of the construction project. As explained above, there is a limited variety of tasks to be performed on a construction site; the parties are free to allocate those tasks among the participants in the construction process by private agreement. [*651] If a construction manager, as plaintiff, undertakes various contractor services, he or she must have a valid contractor's license, regardless of whether another general contractor has been engaged. Again, whether plaintiff acted in the capacity of a contractor [***49] is determined by the services that *plaintiff* undertook to perform.

C. Exemptions from the Contractors' State License Law

Plaintiff argues that, even if the services it provided under the DMA otherwise would require a contractor's license, plaintiff was exempted from that requirement. Plaintiff asserts that (1) because there is no evidence that ground leases held by plaintiff with respect to the Property were terminated as required by the DMA, plaintiff was an owner of the Property and was thus an owner-builder exempt from the licensing requirement under *section 7044, subdivision (b)*; and (2) the DMA created a partnership between plaintiff and Bolotin. Plaintiff, however, did not raise these issues with the trial court in connection with the summary judgment proceeding, and has therefore forfeited them.⁸ "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore [forfeited] the right to do so on appeal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 [95 Cal. Rptr. 2d 113]; see *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [77 Cal. Rptr. 3d 695].)

⁸ "Although [***50] the loss of the right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a 'waiver,' the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture,' because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the "intentional relinquishment or abandonment of a known right." [Citations.] (*In re S.B.* (2004)

32 Cal.4th 1287, 1293, *fn. 2* [13 Cal. Rptr. 3d 786, 90 P.3d 746].)

Even had plaintiff raised these issues, the record does not support plaintiff's position. Plaintiff grounds its argument that it was an exempt owner-builder under *section 7044, subdivision (b)* on the assertion that the DMA states that the ground leases were to terminate by the parties executing certain documents to be attached as exhibits to the DMA. Plaintiff argues that there is no evidence that the termination documents were ever executed, and reasons that there is at least a triable issue whether plaintiff is still an owner of the Property. In contrast, Bolotin argues that the DMA itself provided for the termination of the ground leases, notwithstanding its recitation that formal [*963] termination documents were to be signed. [***51] I agree with Bolotin. It was a basic premise of the parties' agreement that plaintiff was to give up its rights (and be relieved of its substantial obligations) under the ground leases. Plaintiff alleged in its first amended complaint that "Plaintiff was required to (and eventually did, in fact) assign the Leases to Defendants." That is an allegation of fact that constitutes a judicial admission. (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324 [53 Cal. Rptr. 3d 494].) Moreover, plaintiff's principal, Kevin Knox, declared in opposition to the summary judgment motion that the DMA was intended to "cancel all interest in the three ground leases for the Bolotin Property." There is no indication that the parties treated the ground leases as continuing after execution of the DMA.

With respect to plaintiff's partnership argument, the DMA is not reasonably susceptible of the interpretation that the parties [*652] intended to create a partnership. (See *Corp. Code*, § 16101, *subd. (9)* [partnership is "an association of two or more persons to carry on as coowners [of] a business for profit"]; *Corp. Code*, § 16202, *subd. (a)*; *Rev. & Tax. Code*, § 17008 [person is partner who "owns a capital interest in a partnership"]; *Chambers v. Kay* (2002) 29 Cal.4th 142, 151 [126 Cal. Rptr. 2d 536, 56 P.3d 645] [***52] ["Generally, a partnership connotes co-ownership in partnership property, with a sharing in the profits and losses of a continuing business."].) Although plaintiff's project incentive fee was to be determined as a percentage of the net profits generated by the development, the DMA is unambiguous that the fee was compensation for services.⁹ (See *Corp. Code*, § 16202, *subd. (c)(3)(B)* [sharing of profits not presumed to be partnership if received "[i]n

payment for services as an independent contractor"]; *Spier v. Lang* (1935) 4 Cal.2d 711, 716 [53 P.2d 138] [sharing of profits does not create partnership when "no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation"])

9 Plaintiff has not contended that any of the compensation payable under the DMA was for anything other than services performed thereunder, such as for the assignment of the ground leases.

D. Compensation for Some Services Not Requiring a License

Plaintiff argues that, even if some services under the DMA required it to have a contractor's license, others did not. Plaintiff asserts that it is entitled to compensation for those services for which no [***53] license was required. When, as here, however, services are rendered pursuant to a single integrated agreement, § 7031 bars an unlicensed contractor from recovery for any services rendered under that contract, even if no license was required for [*964] some of the services rendered. (§ 7031, *subd.* (a) [barring action "for the collection of compensation for the performance of any act or contract where a license is required" (italics added)]; *Banis Restaurant Design, Inc. v. Serrano*, *supra*, 134 Cal.App.4th at p. 1047; see *Vallejo Development*, *supra*, 24 Cal.App.4th at p. 944; see also *MW Erectors*, *supra*, 36 Cal.4th at p. 426 [§ 7031 "impose[s] a stiff all-or-nothing penalty for unlicensed work by specifying that a contractor is barred from *all* recovery for such an 'act or contract' if unlicensed at any time while performing it"]; *Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 855 [79 Cal. Rptr. 3d 603].)

Plaintiff's reliance on *Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496 [193 Cal. Rptr. 377], for the contrary proposition is misplaced. That case, which arose on demurrer, held that, accepting the plaintiff's allegations as true and drawing all inferences most favorably to the plaintiff, [***54] the contract upon which the plaintiff sued could "reasonably be interpreted to require [the

plaintiff] to perform work for which no license was required," even though "the form of the contract indicates the likelihood that some, perhaps minimal, services requiring a license may be performed under it." (*Id.* at p. 501.) The court did *not* hold that an unlicensed contractor barred by *section 7031* from recovering under a contract for services requiring a license could nevertheless sue to recover partial compensation for other services rendered under the same contract that did not require a license. Such a holding would be inconsistent with the language of *section 7031* and the authorities cited above, including the [**653] Supreme Court's later decision in *MW Erectors*, *supra*, 36 Cal.4th 412. Moreover, here, the services for which a license was required were not minimal and cannot effectively be separated from other services for purposes of compensation.¹⁰

10 As noted in footnote 9, *ante*, plaintiff has not suggested part of his compensation could be allocated to something other than services.

CONCLUSION

I recognize, as did the Supreme Court in *MW Erectors*, *supra*, 36 Cal.4th at p. 418, that the Contractors' [***55] State License Law "imposes strict and harsh penalties for a contractor's failure to maintain proper licensure." The broad application of the licensing laws are critical to maintain integrity in the building industry. I do not suggest that, aside from not being licensed, plaintiff's conduct was inappropriate. But many incur the burdens to comply with licensing responsibilities. To allow plaintiff to escape those licensing responsibilities is not only poor public policy but unfair to those who comply [*965] with the law. Plaintiff warranted and represented in the DMA that it held "all licenses ... necessary to perform its duties." Plaintiff failed to take precautions to make sure it held the proper license. As a consequence, it is subject to the "strict and harsh penalties" that result from the judgment. I would affirm the judgment.

Respondents' petition for review by the Supreme Court was denied July 15, 2009, S172698. George, C. J., did not participate therein.



2 of 50 DOCUMENTS

**SIGNATURE DEVELOPMENT, LLC, Plaintiff, v. SANDLER COMMERCIAL AT
UNION, L.L.C., Defendant[].**

NO. COA09-646

COURT OF APPEALS OF NORTH CAROLINA

2010 N.C. App. LEXIS 2010

**November 18, 2009, Heard in the Court of Appeals
November 2, 2010, Filed**

NOTICE:

PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.

PRIOR HISTORY: [*1]

Union County. No. 08 CVS 2835.

DISPOSITION: REVERSED IN PART, AFFIRMED IN PART, and REMANDED in part.

COUNSEL: Rayburn Cooper & Durham, P.A., by James B. Gatehouse, David S. Melin, and Daniel J. Finegan, for Plaintiff-Appellant.

Johnston, Allison & Hord, P.A., by Gary J. Welch and Daniel A. Merlin, for Defendant-Appellee.

Troutman Sanders, LLP, by Gavin B. Parsons and D. Kyle Deak, for Applicant-Appellee Wells Fargo Bank, National Association.

Horack Talley Pharr & Lowndes, P.A., by John W. Bowers, for The National Association of Industrial and Office Properties, NC Chapter, Amicus Curiae.

JUDGES: STEPHENS, Judge. Judges McGEE and

STEELMAN concur.

OPINION BY: STEPHENS

OPINION

Appeal by Plaintiff from order entered 28 January 2009 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 18 November 2009.

STEPHENS, Judge.

The paramount issue is whether the trial court erred in partially granting Defendant's motion to dismiss based on the general contractor licensing law. For the reasons stated herein, we reverse the order of the trial court.

1. Procedural History and Factual Allegations

On 28 January 2005, Plaintiff Signature Development, LLC ("Plaintiff," "Signature," or "Project Manager") and Defendant Sandler [*2] Commercial at Union, L.L.C. ("Defendant," "Sandler," or "Owner") entered into a Development Management Agreement ("Agreement") concerning the development of Sandler's sixteen acres of property in Union County, North Carolina ("Property") into a retail complex ("Project"). The Project, to be known as Cureton Town Center, was to be completed in three phases, with the initial phase

consisting of the development of a grocery store parcel and four outparcels ("Initial Phase").

Under the Agreement, Sandler, designated as "Owner," engaged Signature as "Project Manager" for the Initial Phase. As Project Manager, Signature "either directly or through subcontractors, employees or agents approved in writing by Owner, shall act as Owner's agent in the management, construction management, development, marketing and leasing coordination of the Project." The Agreement further provides that as Project Manager, Signature shall perform all project management services "subject to the general direction, control and approval of Owner[.]" In exchange for Signature's project management services, the Agreement provides that Sandler pay Signature certain fees, including an Initial Development Fee, a Base Development [*3] Fee, a Leasing Fee, a Sales Fee, and a Participation Fee.

According to Signature, it has satisfied its obligations under the Agreement and the Project is now over 95% leased, with Harris Teeter as its anchor tenant and ground leases to Sun Trust and First Charter. Sandler has paid Signature the Base Development Fee, Leasing Fees, and Sales Fees.¹ However, Sandler has failed to pay Signature the Participation Fee, which Signature estimates to be not less than \$ 2,338,806.

1 The Initial Development Fee of \$ 47,725 was to be paid to Signature "[c]ontemporaneously with the execution of [the] Agreement[.]" Signature does not allege in its complaint that this fee has not been paid.

On 8 August 2008, pursuant to *Chapter 44A of the North Carolina General Statutes*, Signature filed in Union County Superior Court a claim of lien on the Property to secure the \$ 2,338,806 debt allegedly owed to Signature by Sandler. On 12 August 2008, Signature filed a complaint against Sandler seeking, *inter alia*: damages for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, fraud, negligent misrepresentation, and unfair and deceptive trade practices; an order for prejudgment [*4] attachment pursuant to *N.C. Gen. Stat. § 1-440.1, et seq.*; an accounting and the imposition of a constructive trust; and perfection of its 8 August 2008 claim of lien.

On 28 August 2008, Signature procured an order of attachment in the amount of \$ 2,338,806 against the Property. Also on that date, Signature filed a notice of *lis*

pendens with regard to the Property.

On 3 September 2008, Signature caused to be issued summonses of garnishee and notices of levy upon individuals and entities believed to be in possession of Sandler's property, primarily retail tenants in the Cureton Town Center, and banks, including Applicant-Appellee Wells Fargo Bank, National Association ("Wells Fargo").

2

2 Beginning in December 2005, Wells Fargo took a series of deeds of trust from Sandler which were secured by the Property. By virtue of those deeds of trust, Wells Fargo has over 12 million dollars invested in the Property.

On 25 September 2008, Wells Fargo filed an Application to Dissolve and/or Modify Order of Attachment ("Application") seeking, *inter alia*, dissolution or modification of the 28 August 2008 order of attachment. Wells Fargo alleged that it had first and second priority lien rights to the [*5] rent payments from the tenants of Cureton Town Center and that Signature was interfering with Wells Fargo's rights in those monies by means of the order of attachment and garnishment summonses.

On 7 October 2008, Sandler filed a motion to dismiss pursuant to *Rule 12(b)(6)*. Sandler alleged that Signature's complaint, with the attached Agreement, revealed that Signature was a "general contractor" under *N.C. Gen. Stat. § 87-1*, that the trial court "may take judicial notice that Signature is not a licensed general contractor," and that under North Carolina law, unlicensed general contractors are barred from recovering monies from a property owner "on any claim[.]" Thus, Sandler moved the trial court to dismiss all Signature's claims, dissolve the order of attachment and release the garnishees, cancel the claim of lien, and order any funds paid into the court by virtue of the order of attachment to be given to Sandler immediately.

Wells Fargo's Application and Sandler's Motion to Dismiss were heard on 27 October 2008. By order entered 28 January 2009, the trial court partially granted Sandler's motion to dismiss, struck Signature's claim of lien, and dissolved the order of attachment. The trial [*6] court further ordered Signature to provide an accounting of all amounts received by virtue of the order of attachment and to forward such receipts to Wells Fargo.

From the trial court's order, Signature appeals.³

³ On 25 February 2009, the trial court entered an order staying execution of the 28 January 2009 order pending this appeal.

II. Discussion

A. Grounds for Appellate Review

As a threshold issue, we must determine whether the trial court's order in this case is immediately appealable. An order which does not dispose of all claims as to all parties in an action is interlocutory. *Cunningham v. Brown*, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981). Ordinarily, there is no right of appeal from an interlocutory order. *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 170, 517 S.E.2d 151, 153 (1999). However, an interlocutory order may be immediately appealed "(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Id.* at 171, 517 S.E.2d at 153 [*7] (citations and quotation marks omitted).

When an appeal is from an order that is final as to one party, but not all, and the trial court has certified the matter under Rule 54(b), this Court must review the issue. *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340, 634 S.E.2d 548, 552, disc. review denied and appeal dismissed, 361 N.C. 167, 639 S.E.2d 650 (2006). However, when an appeal is from an order which is not final as to any party (e.g., one which disposes of some but not all claims against a party), "the trial court's determination that there is 'no just reason for delay' of appeal, while accorded deference, cannot bind the appellate courts[.]" *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999) (internal citation omitted).

In this case, the trial court certified that the order partially granting Sandler's motion to dismiss was a "final judgment as to one or more of Plaintiff's claims, and that there is no just reason for delay, and that it therefore constitutes a final judgment pursuant to Rule 54(b)." However, because the order on appeal disposes of some but not all claims against Sandler, the trial court's Rule 54(b) [*8] certification is not binding on this Court, and

we must determine whether a substantial right would be affected absent immediate appeal of the interlocutory order.

The "substantial right" test for appealability of interlocutory orders is that "the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Generally, we must determine if a substantial right is affected "by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In this case, the trial court found that "as an unlicensed contractor Plaintiff Signature cannot sue for monies owed under provisions 3(a) and (b) of the Development Management Agreement, that it appears that the compensation for these construction/development obligations is described in paragraph 4(a) and (b) of the Agreement, and that Defendant's Motion to Dismiss those claims should be allowed." The trial [*9] court further found that "accordingly, the lien placed on the [P]roperty by Plaintiff should be stricken and the related attachment order dissolved" The same factual issues are involved in the claims based on provisions 3(a), 3(b), 4(a), and 4(b) of the Agreement which were dismissed and in Signature's claims based on the remaining provisions of the Agreement. If the present appeal is not immediately heard, it is possible that different juries could reach different results thereby rendering inconsistent verdicts on the same factual issues. As the right to avoid the possibility of two trials on the same issues is a substantial right, *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982), the partial grant of Sandler's motion to dismiss affects a substantial right which would be prejudiced if this action was not immediately appealable. Accordingly, we will reach the merits of this appeal.

B. Motion to Dismiss

Signature argues that the trial court erred in partially granting Sandler's motion to dismiss based on the trial court's finding that Signature was an unlicensed general contractor. We agree.

1. Standard of Review

A motion to dismiss under *N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)* [*10] for failure to state a claim upon which relief may be granted tests the legal sufficiency of the complaint. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). In ruling on the motion, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). Dismissal is proper "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face that some fact essential to plaintiff's claim is missing; and (3) when some fact disclosed in the complaint defeats the plaintiff's claim." *Schloss Outdoor Advertising Co. v. Charlotte*, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980). Moreover, "[w]hen the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, . . . the motion will be granted and the action dismissed." *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985). "A complaint should not be dismissed for failure to state a claim unless [*11] it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Leonard v. Pugh*, 86 N.C. App. 207, 209, 356 S.E.2d 812, 814 (1987). On appeal of a trial court's ruling on a 12(b)(6) motion to dismiss, our Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation and quotation marks omitted).

2. Propriety of the Trial Court's Order as to Signature

A "general contractor" is defined by *N.C. Gen. Stat. § 87-1* as

any person or firm or corporation who for a fixed price, commission, fee, or wage, . . . undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand

dollars (\$ 30,000) or more[.]

N.C. Gen. Stat. § 87-1 (2009). One who undertakes a project as a general contractor [*12] in North Carolina is required to comply with the licensing requirements set forth in *N.C. Gen. Stat. § 87-10*. That statute requires

an examination, either oral or written, of all applicants for license to ascertain, for the classification of license for which the applicant has applied: (i) the ability of the applicant to make a practical application of the applicant's knowledge of the profession of contracting; (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code, knowledge of estimating costs, construction, ethics, and other similar matters pertaining to the contracting business; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction, and liens[.]

N.C. Gen. Stat. § 87-10(b) (2009). The express language of *N.C. Gen. Stat. § 87-10* indicates that it is designed to ensure competence within the construction industry. *Brady v. Fulghum*, 309 N.C. 580, 584, 308 S.E.2d 327, 330 (1983). "By requiring this examination, the legislature seeks to guarantee [*13] skill, training and ability to accomplish such construction in a safe and workmanlike fashion." *Id.* (citation and quotation marks omitted).

A general contractor's failure to procure a license constitutes a misdemeanor. *N.C. Gen. Stat. § 87-13* (2009). Furthermore, although the statute does not expressly preclude an unlicensed contractor's suit against an owner for breach of contract, the North Carolina Supreme Court held in *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968), that the contractor may not recover on the contract or in *quantum meruit* when he has ignored the protective statute. "[T]he reason for this 'bright line' 'harsh' rule is to protect the public from incompetent builders . . ." *Dellinger v. Michal*, 92 N.C. App. 744, 747, 375 S.E.2d 698, 699, *disc. review denied*, 324 N.C. 432, 379 S.E.2d 240 (1989).

In determining whether a party is a general contractor, we must "determine the extent of [the party's] control over the entire project." *Mill-Power Supply Co. v. CVM Assocs.*, 85 N.C. App. 455, 461, 355 S.E.2d 245, 249 (1987). As this Court noted in *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E.2d 710 (1977), *overruled on other grounds*, *Sample Const. Co. v. Morgan*, 311 N.C. 717, 722-23, 319 S.E.2d 607, 611 (1984),

[n]ot [*14] every person who undertakes to do construction work on a building is a general contractor, even though the cost of his undertaking exceeds \$ 30,000.00. . . . [T]he principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner with respect to a portion of the project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project.

Id. at 456, 232 S.E.2d at 712 (internal citations omitted). "Under the *Helms* 'control test,' we ordinarily look to the terms of the contract to determine the degree of control exercised by a particular contractor over the entire project." *Mill-Power Supply Co.*, 85 N.C. App. at 461, 355 S.E.2d at 249. "[A] general contractor is one with control over a construction project." *Duke Univ. v. Am. Arbitration Ass'n*, 64 N.C. App. 75, 80, 306 S.E.2d 584, 587, *disc. review denied*, 309 N.C. 819, 310 S.E.2d 349 (1983).

In *Miley v. H.C. Barrett & Assocs.*, No. COA01-720, 2002 N.C. App. LEXIS 2167 (May 21, 2002), this Court considered the terms of a contract between plaintiff ("HCB") and defendant ("Owners") to determine if HCB had acted as a general contractor. [*15] Although, as an unpublished case, *Miley* does not establish binding legal precedent, we are persuaded by this Court's reasoning in that case. See *State v. Farmer*, 158 N.C. App. 699, 705, 582 S.E.2d 352, 356 (2003) ("[A]lthough not controlling law, we are persuaded by an earlier unpublished opinion of this Court in which we addressed a similar set of circumstances . . ."). The pertinent provisions of the contract in *Miley* stated:

1. HCB agrees to supervise and co-ordinate the construction of a dwelling house for the Owners at the address

referred to in this agreement pursuant to the plans and specifications attached to this agreement with the understanding that the Owners may make any and all changes to the plans and specifications as the Owners deem appropriate from time to time.

* * * *

4. The relationship between Owners and HCB shall be that of Owners and subcontractor.

5. It is anticipated that HCB will negotiate in its own name contracts for labor and materials for the construction of the dwelling house. However, it is strictly understood that HCB is acting as agent for the Owners and that all contracts for labor, materials and supplies are entered into for and on behalf of the Owners, [*16] and it is further understood that where practical Owners may be involved in contract negotiations and that where possible, Owners will co-sign contracts along with HCB.

6. It is agreed that Owners will be responsible for all costs of construction of the dwelling, including but not limited to all costs of materials, labor, Builders Risk Insurance thru [sic] HCB's policy, Workman's Compensation Insurance as required, all losses by theft, fire or other causes and all errors or omissions during the construction of the dwelling. In the event of errors or omissions, HCB will exercise its best efforts to correct the situation through the Owner[s] subcontractor or vendor causing said error or omission.

* * * *

8. All invoices or work, labor and materials due to all contractors shall be paid by Owners when due. HCB will inspect and provide approved invoices to Owners after receipt by HCB. By the 1st day of each month following the date any

invoice is due, Owners will provide to HCB in writing their certification by specific reference thereto that all due invoices have been paid. . . .

* * * *

e) In no event shall HCB be responsible for or obligated to pay for any errors or omissions in the construction [*17] of the dwelling house and in no event shall the Owners be entitled to setoff for such errors or omissions against the fees due to HCB pursuant to the agreement.

*Id. at *10-12.* After considering the contractual provisions, this Court concluded that "HCB served as a construction manager under a pure construction management arrangement; HCB was neither a general contractor nor a builder of plaintiffs' home." *Id. at *13.* This conclusion was "reinforced by the fact that HCB acted solely as plaintiffs' agent, had no control over the manner in which the construction project was actually performed, and assumed no responsibility for costs, timeliness, or quality of the project." *Id.*

In this case, the pertinent aspects of the Agreement between Sandler and Signature are as follows:

WHEREAS, Owner desires to engage the Project Manager to provide general management, development, construction management, marketing, and leasing coordination services in connection with the Initial Phase (hereinafter in this Agreement the Initial Phase shall be referred to as the "Project"), and the Project Manager desires to provide such services on the terms and conditions set forth in this Agreement.

. . . .

1. Engagement [*18] of the Project Manager. Owner hereby engages the Project Manager as an independent contractor to provide the services described in this Agreement relating to management, development, construction, marketing and leasing coordination with

respect to the Project

. . . .

3. Services to be Performed. Owner shall provide, in a timely manner, adequate funding to cover all approved costs and expenses incurred by Project Manager in the performance of its duties hereunder. The Project Manager, either directly or through subcontractors, employees or agents approved in writing by Owner, shall act as Owner's agent in the management, construction management, development, marketing and leasing coordination of the Project. In carrying out its responsibilities pursuant to this Agreement, Project Manager shall have authority to enter into contracts on behalf of Owner . . . of . . . \$ 50,000[] or less, provided that no individual contractor or vendor shall receive more than one (1) contract with a cumulative total in excess of . . . \$ 50,000[] without Owner's prior consent; provided, however, at Project Manager's request, Owner shall timely execute any such contracts that Owner approves. Owner [*19] must approve (and will timely execute) all other contracts to be awarded for the Project. . . . The Project Manager shall, subject to the general direction, control and approval of Owner, and subject to timely payment of all applicable costs and expenses by Owner as herein described, perform the following services:

a. Planning Function. The Project Manager shall provide planning and processing services to secure all governmental and other required approval for implementation of the Project. Such services shall include, but not be limited to, the following:

i. Obtain plans and specifications . . . for the development and construction of the Project which are satisfactory to and are approved by Owner.

ii. Procurement of all . . . required

licenses, permits, bonds and/or approvals required for development and construction of the Project

iii. Coordination of geotechnical, engineering and architectural services to be performed by professional consultants to secure the necessary permits and approvals

b. Development and Construction Function. The Project Manager shall provide services for the coordination and project management of all land development and construction items related [*20] to the Project including, but not limited to, the following (provided Owner shall approve prior to engagement each architect's, engineer's and contractor's financial responsibility).

i. Pursue development and construction of the Project in accordance with the Plans and Specifications.

ii. Competitively bid and/or negotiate contracts and recommend to Owner for Owner's approval award of contracts to financially responsible architects, engineers, general contractors and others for the completion of infrastructure and construction of the Project. All contracts shall be in the name of Owner, and once approved by Owner, may be executed by the Project Manager on behalf of Owner. All contracts shall require that the architect, engineer or contractor has adequate and proper insurance with companies and in amounts satisfactory to Owner, providing insurance coverage for both Project Manager and Owner.

iii. Using approved architects, engineers and contractors, oversee and enforce completion of infrastructure within the Project and approval of infrastructure by local, county and state agencies.

iv. Using approved engineers, architects and contractors, oversee, direct

and coordinate the work of construction [*21] of the Project and installation of all utilities required for the Project.

v. Procure all lien waivers and releases of liens from any and all architects, engineers, contractors, subcontractors and material suppliers who perform labor and/or provide materials to the Project.

vi. Oversee the prompt completion of repairs required for final local, county and state inspections of the Project and obtain certificates of occupancy for the Project.

vii. Secure approval of such bonds and permits, as may be required

. . . .

xii. Instruct and monitor all agents, employees, contractors and invitees who enter the Project as to all safety requirements, and report any unsafe conditions or actions immediately to Owner.

xiii. Take commercially reasonable steps to protect the Project, including all construction, from and against loss or damage from any cause and be responsible for all parts of the construction, temporary and permanent, whether finished or not, including all materials delivered to the Project, until final completion, as determined by Owner. . . .

c. Leasing and Marketing Function. The Project Manager shall act as the Master Leasing Agent for the Project and shall coordinate leasing and [*22] marketing of the Project, including, but not limited to, the following:

i. Project Manager shall at the request of Owner devise and implement a leasing and marketing program for the Project.

ii. Project Manager shall oversee all leasing and land sales to obtain leases or sales agreements with tenants or owners

occupying 10,001 square feet or more of retail space within the Project other than within any outparcel ("Anchor Tenants") and tenants or owners occupying an outparcel at the Project ("Outparcel Tenants"). All leases and sales contracts for and with Anchor Tenants and Outparcel Tenants shall be subject to Owner's approval and shall be executed by Owner.

iii. Project Manager shall negotiate an agreement with First Colony Corporation ("First Colony") or another leasing agent approved by Owner to lease space at the Project . . . and to manage the Project once certificates of occupancy have been issued permitting the first tenant to occupy the Project. The leasing agreement with First Colony and the management agreement with First Colony shall be subject to Owner's approval, shall be executed by Owner and shall provide that Owner can terminate each agreement upon thirty (30) days prior [*23] notice

d. Property Management Function. Until such time as a management agreement has been entered into with First Colony or another management company, the Project Manager shall provide general property management services, including but not limited to, the following:

i. Periodic inspection of the Property

ii. With use of outside counsel reasonably acceptable to Owner, establish Covenants, Conditions and Restrictions and cross-easement agreements necessary for the operation of the Project. . . .

4. Compensation. For and in consideration of Project Manager's services under this Agreement, Owner agrees to pay Project Manager the following amounts:

a. Contemporaneously with the execution of this Agreement, the amount of . . . \$ 47,725.00[] (the "Initial Development Fee").

b. A fee (the "Base Development Fee") equal to . . . 2 1/2%[] of the costs incurred by Owner to develop and construct the Project subsequent to the date of execution of this Agreement, excluding from such costs the Initial Development Fee, the Base Development Fee, interest carry, financing costs and land contribution value (the "Base Project Cost"). . . .

c. Owner shall pay Project Manager a leasing fee (the [*24] "Leasing Fee") for [procuring leases to Anchor Tenants and Outparcel Tenants].

d. If an Outparcel Tenant purchases its site rather than leases its site, the Project Manager shall receive a sales fee (the "Sales Fee")

e. A fee equal to twenty percent (20%) of the net profits (the "Net Profits") realized and distributed by Owner from the sale, financing, refinancing and/or operation of the Project (the "Participation Fee").

The Agreement unambiguously vested control over the entire Project with Sandler. The Agreement further unambiguously provided that Signature's performance of its project management services was "subject to the general direction, control and approval of Owner" and that, similar to HCB, Signature was to "act as Owner's agent in the management, construction management, development, marketing and leasing coordination of the Project." By the terms of the Agreement, Sandler retained control of all costs associated with the Project, including expenses incurred by Signature. While Signature was given authority to enter into contracts for \$ 50,000 or less, subject to certain conditions, Signature did so "on behalf of Owner" and all other contracts had to be approved and [*25] executed by Sandler. Sandler also retained control over the approval of "architects, engineers, general contractors, and others" hired for the

Project. Additionally, all contracts associated with the project were to be in Sandler's name, and Sandler was to approve all plans and specifications. By the terms of the Agreement, Signature, like HCB, assumed no responsibility for costs, timeliness, or quality of the project. After considering the contractual provisions in the Agreement at issue here, we conclude that Signature was not a general contractor but, rather, served as Sandler's agent under a pure project management arrangement.

Sandler argues further, however, that the terms of the Agreement "clearly show[] that Signature [] controlled the project[.]" In support of this contention, Sandler highlights certain terms of the Agreement which outline Signature's planning, development, and construction management duties. However, Sandler fails to acknowledge that, by the express terms of the Agreement, Signature was only to "act as Owner's agent in the management, construction management, development, marketing and leasing coordination of the Project" and that Signature's performance of [*26] its project management duties was "subject to the general direction, control and approval of Owner[.]"

Sandler also argues that Signature's "responsibilities encompass the very definition of a construction manager, who when controlling a construction project, must be properly licensed[.]" and relies on *Duke Univ. v. Am. Arbitration Ass'n* for its "holding that the construction manager controlled the project and therefore was the 'general manager' of the project and needed to be licensed[.]" Sandler's argument misses the mark.

Initially, we note that while *N.C. Gen. Stat. § 87-1* requires that a "general contractor" be licensed, it does not govern license requirements of a "project manager" or a "general manager." Indeed, neither party has argued that a "project manager" or a "general manager" must be licensed according to statute. Moreover, Sandler misstates the holding in *Duke*. In *Duke*, this Court held that defendant, a contractor who contracted directly with the owner to fabricate and erect the stucco wall panel system of Duke Hospital North and to perform related lath and plastering work, was not a general contractor under *N.C. Gen. Stat. § 87-1*. This Court based its conclusion on the [*27] fact that defendant "did not undertake to build the hospital in its entirety, nor did it undertake to improve an already existing building." *Duke*, 64 N.C. App. at 78, 306 S.E.2d at 586. Furthermore,

"[d]efendant had control solely over construction of the stucco wall panel system and related lath and plastering work; it had no control over the work of other contractors nor over the construction project as a whole." *Id.* at 79, 306 S.E.2d at 586. Although this Court noted that "[d]efendant's work was subject to the approval of the construction manager" who had been hired by the owner to supervise the construction project, and that "[t]he supervision of the construction manager over each separate trade contractor was ample protection for [the owner] against the possible incompetency of any of its trade contractors[.]" *id.* at 80, 306 S.E.2d at 587, contrary to Sandler's contention, whether the manager who was hired to supervise the project had a general contractor's license was not at issue in the case.

Sandler additionally cites the following language from *Title 21, chapter 12, section .0208(a) of the North Carolina Administrative Code* in support of its contention that Signature is a general [*28] contractor:

The term "undertakes to superintend or manage" as used in [*N.C. Gen. Stat. § 87-1*] to describe a person, firm or corporation deemed to be a general contractor means that the person, firm, or corporation is responsible for superintending or managing the entire construction project, and . . . is compensated for superintending or managing the project based upon the cost of the project or the time taken to complete the project. Such person, firm, or corporation must hold a general contracting license in the classifications and limitation applicable to the construction of the project.

21 N.C. Admin. Code 12.0208(a) (2009). Sandler contends that Signature's complaint and the terms of the Agreement indicate that Signature was "responsible for superintending or managing the entire construction project." We disagree.

Consistent with prior case law and our analysis in this case, whether a "person, firm, or corporation is responsible for superintending or managing the entire construction project" is determined under "the *Helms* 'control test[.]'" *Mill-Power Supply Co.*, 85 N.C. App. at 461, 355 S.E.2d at 249. As explained supra, the terms of

the Agreement do not indicate that Signature [*29] held the requisite control over the Project to be classified as a general contractor and, instead, indicate that Signature served solely as Sandler's agent under a pure project management arrangement.

Moreover, our interpretation of *N.C. Gen. Stat.* § 87-1 and section .0208(a) under the "control test" is fully supported by a recent amendment to section .0208(a) which states:

(b) The term "undertakes to superintend or manage" described in Paragraph (a) of this Rule does not include the following:

....

(2) subject to the conditions stated within this Subparagraph and Paragraph (c), any person, firm, or corporation retained by an owner of real property as a consultant, agent, or advisor to perform development-related functions, including:

(A) assisting with site planning and design,

(B) formulating a development scheme,

(C) obtaining zoning and other entitlements,

(D) tenant selection and negotiation,

(E) interfacing and negotiating with the general contractor, engineer, architect, other construction and design professionals and other development consultants with whom the land owner separately contracts, including, negotiating contracts on the

owner's behalf, assisting with scheduling issues, [*30] ensuring that any disputes between such parties are resolved to the owner's satisfaction, and otherwise ensuring that such parties are proceeding in an efficient, coordinated manner to complete the project,

(F) providing cost estimates and budgeting,

(G) monitoring the progress of development activities performed by other parties,

(H) arranging and negotiating governmental incentives and entitlements, and

(I) selecting and sequencing sites for development.

(c) The exclusions set forth in Subparagraph (b)(2) do not apply, however, unless the following conditions are satisfied:

(1) the owner has retained a licensed general contractor or licensed general contractors to construct the entire project or to directly superintend and manage all construction work in which the person, firm or corporation has any involvement and which would otherwise require the use of a licensed general contractor, and

(2) the use of the person, firm or corporation

will not impair the general contractor's ability to communicate directly with the owner and to verify the owner's informed consent and ratification of the directions and decisions made by the person, firm or corporation to the extent that such directions [*31] or decisions affect the construction activities otherwise requiring the use of a licensed general contractor.

21 N.C. Admin. Code 12.0208 (Cumm. Supp. Aug. 2010).

This amendment became effective after the complaint in this case was filed and, thus, does not impact the outcome of this case. Nonetheless, the clear intent behind the amendment is to formalize the "control test" and to clearly exclude from the general contractor licensing requirements a party who, like Signature, contracts with the owner to perform the "development-related functions" enumerated in the amendment on a project where, as here, the owner retained a licensed general contractor to perform the general contractor role.⁴

4 We note that the project management services Signature contracted with Sandler to provide under the Agreement are strikingly similar to the "development-related functions" described in the amendment.

Taking the allegations of the complaint in the light most favorable to Signature, it appears to this Court that Sandler engaged Signature not to perform the work of a general contractor in the construction of the Project, but to act as Sandler's agent in the day-to-day management of the Project; that Signature [*32] satisfactorily completed its duties under the Agreement; and that Sandler has failed to pay Signature the Participation Fee as required by the Agreement. As this Court has noted, "[t]he licensing statutes should not be used as a shield to avoid a just obligation owed to an innocent party." *Zickgraf*

Enters., Inc. v. Yonce, 63 N.C. App. 166, 168, 303 S.E.2d 852, 852 (1983).

Sandler nonetheless claims that "Signature [] is not 'innocent' by the plainest meaning of the word [because] Signature [] had the ability and opportunity to obtain a license with the North Carolina Licensing Board of General Contractors, but chose not to." Sandler further opines that "[a]lthough the consequences are harsh, they are consequences which Signature [] brought on itself by not simply obtaining a general contractor's license." We strongly disagree with Sandler's position.

As thoroughly explained, *supra*, Signature was not a general contractor on the Project and, thus, was not required to obtain a general contractor's license. Moreover, based on the record before this Court, it appears that Sandler's failure to pay Signature the Participation Fee was not the result of Signature's choice not to obtain a general [*33] contractor's license, or any incompetent work performed by Signature, but, instead, was a direct result of Sandler's having inadequate financial resources to meet its obligations under the Agreement, a condition which Signature certainly did not bring upon itself. Additionally, while Sandler was well within its rights as the owner to retain full control over the Project, Sandler may not now attempt to claim it is entitled to be "protected" from Signature by *N.C. Gen. Stat. § 87-1*, especially when the general contractor actually hired by Sandler was ample protection for Sandler against the possible incompetency of any of its contractors.

We thus conclude that under the circumstances of this case, it was inappropriate for the trial court to dismiss Signature's claims on Sandler's *Rule 12(b)(6)* motion. We reverse the trial court's order on this issue.

Sandler argues that the trial court's order, in fact, dismissed Signature's complaint "in its entirety" because payment of the Participation Fee was based on Signature's services provided pursuant to provisions 3(a) and (b) of the Agreement. However, because we conclude that the trial court erred in dismissing Signature's claims under those [*34] provisions, we need not address Sandler's argument. By way of cross-appeal, Sandler alternatively argues that the trial court erred by failing to dismiss Signature's lawsuit "in its entirety" because Signature was an unlicensed general contractor. However, because we conclude that the trial court erred in finding and concluding that Signature was an

unlicensed general contractor, and in partially dismissing Signature's claims on this basis, it necessarily follows that the trial court did not err by failing to dismiss Signature's lawsuit "in its entirety" on the basis that Signature was an unlicensed general contractor. Accordingly, we reject Sandler's argument.

C. Claim of Lien

Signature next argues that the trial court erred in striking its claim of lien against the Property. We disagree.

Pursuant to *N.C. Gen. Stat. § 44A-8*,

[a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall . . . have a right to file a claim of lien on the real property to secure payment of all debts [*35] owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2009). The primary purpose of the lien statute is "to protect laborers and materialmen who expend their labor and materials upon the buildings of others." *Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 233-34, 324 S.E.2d 626, 632 (citation and quotation marks omitted), *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). "[A] lien under [*N.C. Gen. Stat. §*] 44A-8 attaches only for 'debts owing for labor done or professional design or surveying services or material furnished.' Nothing is said about lost profit." *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., Inc.*, 78 N.C. App. 664, 667, 338 S.E.2d 135, 137 (quoting *N.C. Gen. Stat. § 44A-8*), *disc. review denied*, 316 N.C. 731, 345 S.E.2d 398 (1986).

In this case, Signature filed a claim of lien against the Property "in support of its rights to be paid for the work that it did to improve the . . . [P]roperty." The basis of Signature's claim of lien was Sandler's nonpayment of the Participation Fee under provision 4(e) of the Agreement. The Participation [*36] Fee provides for payment to Signature of 20% of the "net profits . . .

realized and distributed by [Sandler] from the sale, financing, refinancing and/or operation of the Project[.]" (Emphasis added). As a materialman's lien under *N.C. Gen. Stat. § 44A-8* attaches to property only for debts owing for labor done or professional design or surveying services or material furnished, and not for lost profits, *id.*, there was no debt owing under provision 4(e) which would support the claim of lien. Accordingly, the trial court did not err in striking Signature's claim of lien against the Property.

D. Attachment

Finally, Signature argues that the trial court erred in dissolving the order of attachment. We agree.

Pursuant to *N.C. Gen. Stat. § 1-440.1*,

[a]ttachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

N.C. Gen. Stat. § 1-440.1(a) (2009). "Attachment may be had in any action the [*37] purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money . . ." *N.C. Gen. Stat. § 1-440.2* (2009). In actions in which attachment may be had under *N.C. Gen. Stat. § 1-440.2*, an order of attachment may be issued when the defendant is

(1) A nonresident, or

(2) A foreign corporation, or

....

(5) A person or domestic corporation which, with intent to defraud his or its creditors,

a. Has removed, or is about to remove, property from this State, or

b. Has assigned,

disposed of, or secreted, or is about to assign, dispose of, or secrete [sic], property.

N.C. Gen. Stat. § 1-440.3 (2009).

In addition to the grounds for attachment specified in *N.C. Gen. Stat. § 1-440.2*,

in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a claim of lien on real property under [Chapter 44A, Article 2], without the written permission of the lien claimant or with the intent to deprive the lien claimant of his or her claim of lien on real property, the remedy of attachment of the property subject to the claim of lien on real property shall be available to the lien claimant or any other person.

N.C. Gen. Stat. § 44A-15 [*38] (2009).

In this case, Signature is seeking a monetary judgment for Sandler's alleged fraud, unjust enrichment, unfair and deceptive trade practices, and breach of contract in connection with Sandler's failure to pay Signature the Participation Fee in accordance with the Agreement. Signature applied for an order of attachment on the Property by filing an Affidavit in Attachment Proceeding. In accordance with *N.C. Gen. Stat. § 1-440.3*, the affidavit stated as grounds for attachment that Sandler is: (1) "[a] nonresident[.]" (2) "[a] foreign corporation[.]" and (3) "[a] person or domestic corporation which, with intent to defraud his/her or its creditors . . . has removed or is about to remove, property from this state . . . [and] has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete [sic], property."

The trial court found and concluded that

Plaintiff Signature cannot sue for monies owed under provisions 3(a) and (b) of the Development Management Agreement, that it appears that the compensation for

these construction/development obligations is described in paragraph 4(a) and (b) of the Agreement, and that Defendant's Motion to Dismiss those claims should be allowed. [*39]. . .

. . . [A]ccordingly, the lien placed on the [P]roperty by Plaintiff should be stricken and the *related* attachment order dissolved[.]

(Emphasis added).

As discussed *supra*, the trial court erred in dismissing Signature's claims for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, fraud, negligent misrepresentation, and unfair and deceptive trade practices based on Sandler's failure to pay the Participation Fee. However, the trial court did not err in striking Signature's claim of lien. Nonetheless, while the trial court's striking of Signature's claim of lien entered pursuant to *N.C. Gen. Stat. § 44A-8* would have mandated the dismissal of a *related* order of attachment entered pursuant to *N.C. Gen. Stat. § 44A-15*, Signature's order of attachment in this case was procured under *N.C. Gen. Stat. § 1-440.3* and, thus, was not *related* to the stricken claim of lien.

It is undisputed that Sandler is a limited liability company organized and existing under the laws of the State of Virginia. Accordingly, Sandler is a "[a] foreign corporation" under *N.C. Gen. Stat. § 1-440.3*. Furthermore, Signature's action based on Sandler's failure to pay the Participation [*40] Fee is pending. *See N.C. Gen. Stat. § 1-440.2* ("Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money . . ."). Accordingly, the trial court erred in dissolving the Order of Attachment for the reasons it stated and the trial court's order on this issue is reversed.

Wells Fargo asserts, however, that the trial court did not err in dissolving the order of attachment because, as an alternative basis, the trial court could have dissolved the order since the rent proceeds and leases are property of Wells Fargo and were never property of Signature for the purpose of attachment or levy. For the reasons stated below, we remand this issue to the trial court.

Pursuant to *N.C. Gen. Stat. § 1-440.43*,

[a]ny person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property . . . may

(1) Apply to the court to have the attachment order dissolved or modified . . . upon the same conditions and by the same methods as are available to the defendant . . .

N.C. Gen. Stat. § 1-440.43 (2009). The conditions and methods available to the defendant [*41] are as follows:

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment *shall find the facts upon which his ruling thereon is based*. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial.

N.C. Gen. Stat. § 1-440.36 (2009) (emphasis added).

In this case, Wells Fargo filed its Application pursuant to *N.C. Gen. Stat. §§ 1-440.43* and *1-440.36*. The basis for the Application was that the rent proceeds and leases were property of Wells Fargo, and, thus, were never the property of Signature [*42] for the purpose of attachment or levy. The Application, along with Sandler's Motion to Dismiss, was heard on 27 October 2008.

In the Order Partially Granting Sandler's Motion to Dismiss entered 28 January 2009, the trial court stated:

THIS CAUSE COMING ON TO BE HEARD and being heard on October 27, 2008 upon Defendant Sandler Commercial at Union, L.L.C.'S ("Sandler") Motion to Dismiss and Wells Fargo Bank's Application to Dissolve and/or Modify the Order of Attachment; and

IT APPEARING TO THE COURT, having reviewed the materials submitted and hearing argument from counsel the Court concludes that Defendant Sandler's Motion to Dismiss should be partially allowed.

The trial court thereupon found and concluded that

as an unlicensed contractor Plaintiff Signature cannot sue for monies owed under provisions 3(a) and (b) of the Development Management Agreement, that it appears that the compensation for these construction/development obligations is described in paragraph 4(a) and (b) of the Agreement, and that Defendant's Motion to Dismiss those claims should be allowed.

The trial court further found and concluded that

pursuant to this ruling, Plaintiff cannot recover for construction/development [*43] claims, that accordingly, the lien placed on the [P]roperty by Plaintiff should be stricken and the related attachment order dissolved . . .

We have held that the trial court erred in dissolving the attachment order on this basis. Furthermore, the trial court made no findings of fact pursuant to *N.C. Gen. Stat. § 1-440.36(c)* concerning the issues raised in Wells Fargo's Application.

Although Wells Fargo asserts that the order of the trial court is "unclear as to what grounds upon which it dissolved the Order of Attachment[.]" we conclude that the trial court unequivocally dissolved the Order of Attachment based on Sandler's Motion to Dismiss and did not rule on Wells Fargo's Application. Accordingly,

we remand this matter to the trial court for consideration of Wells Fargo's Application.

In sum, for the foregoing reasons, we hold as follows: (1) the trial court's order dismissing Signature's claims under provisions 3(a) and (b) of the Agreement is reversed and this matter is remanded for further proceedings on Signature's claims; (2) the trial court's order striking Signature's claim of lien is affirmed; (3) the trial court's order dissolving Signature's order of

attachment based on [*44] Sandler's motion to dismiss is reversed; (4) the matter is remanded for further proceedings on Wells Fargo's Application to dissolve/modify Signature's order of attachment.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED in part.

Judges McGEE and STEELMAN concur.



16 of 50 DOCUMENTS



Cited

As of: Nov 17, 2010

**RUSSELL PUCKETT, APPELLANT v. ROBERT N. GORDON III, D/B/A TREY
GORDON ROOFING CONTRACTOR, APPELLEE**

NO. 2008-CA-01159-COA

COURT OF APPEALS OF MISSISSIPPI

*16 So. 3d 764; 2009 Miss. App. LEXIS 535***August 18, 2009, Decided****PRIOR HISTORY:** [**1]

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 6/3/2008. TRIAL JUDGE: HON. FRANK G. VOLLOR. TRIAL COURT DISPOSITION: PLAINTIFF AWARDED DAMAGES AND ATTORNEY'S FEES FOR BREACH OF CONTRACT AND ASSAULT; PLAINTIFF ALSO AWARDED PUNITIVE DAMAGES.

DISPOSITION: AFFIRMED IN PART AND REVERSED AND RENDERED IN PART.

COUNSEL: FOR APPELLANT: THOMAS PERRY SETSER.

FOR APPELLEE: WILLIAM M. BOST JR.

JUDGES: BEFORE MYERS, P.J., IRVING AND ROBERTS, JJ. MYERS, P.J., BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. CARLTON, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. KING, C.J., CONCURS IN PART AND DISSENTS IN PART

WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J. GRIFFIS, J., NOT PARTICIPATING.

OPINION BY: IRVING**OPINION**

[*765] NATURE OF THE CASE: CONTRACT

IRVING, J., FOR THE COURT:

P1. Following a bench trial, the Warren County Court granted Robert N. Gordon III, d/b/a Trey Gordon Roofing Contractor, a judgment in the amount of \$ 28,504.90 against Russell Puckett. The judgment was comprised of \$ 17,603.65 for a breach of contract claim,¹ \$ 100 as nominal damages for an aggravated assault claim, \$ 2,500 for punitive damages, and \$ 8,301.25 in attorney's fees. Puckett appealed to the Warren County Circuit Court, which [**2] affirmed the county court's decision. Aggrieved, Puckett has appealed here and asserts: (1) that the county court should have dismissed Gordon's complain; (2) that the county court erred in finding that Gordon acted as an agent and construction manager for him, rather than as [*766] a remodeler,

contractor, or subcontractor; (3) that the county court erred in finding that he committed an assault against Gordon; (4) that the county court erred in awarding Gordon punitive damages; (5) that the county court erred in awarding Gordon attorney's fees; and (6) that the county court erred in dismissing his assault claim against Gordon.

1 Neither Gordon nor the county court identified the claim as a breach of contract claim. However, Gordon's pleading makes it clear that that is the type of claim involved.

P2. We find merit in Puckett's second issue, as we agree that the circuit court erred in affirming that portion of the county court judgment which found that Gordon acted as Puckett's agent or construction manager, rather than as his general contractor or remodeler. It necessarily follows as a corollary to this finding that the circuit court also erred in affirming that portion of the judgment awarding [**3] Gordon \$ 17,603.65 for his breach of contract claim, as the viability of the contract claim is dependent upon Gordon being found to have acted wholly as a construction manager rather than as a construction contractor or remodeler. Therefore, we reverse and render that portion of the county court judgment awarding \$ 17,603.65 in breach of contract damages and affirm the remainder of the judgment in the amount of \$ 10,901.25.

FACTS

P3. Puckett's home, Feld House, ² was damaged when a large tree fell on it during Hurricane Katrina in August 2005. Puckett, who was bedridden during this time, employed Gordon, a roofer, to repair the home. ³ Gordon prepared an estimate for the repairs, which Puckett approved, in the amount of \$ 119,300. Puckett submitted the estimate to his insurance company, which promptly paid it minus the policy deductible. Gordon submitted his first invoice to Puckett for \$ 9,128.81, and Puckett paid it without incident. However, Puckett was not as forthcoming when Gordon presented his second invoice for \$ 17,603.65. Gordon went to Puckett's home on two occasions in an attempt to collect payment, but each time Puckett refused to tender payment, resulting in Gordon initiating [**4] a lawsuit to recover (1) the amount owed on the second invoice; (2) damages for an assault against him by Puckett which, according to Gordon, occurred during one of his two attempts to collect the amount due him; (3) punitive damages; and

(4) attorney's fees. The facts surrounding the assault are discussed later in this opinion.

2 For approximately forty years, Puckett operated a business wherein he sold antiques and collectibles from his home. Feld House is over 100 years old and is listed on the National Register of Historic Places.

3 Puckett had previously done business with Gordon, as he had hired Gordon to make repairs to Feld House in March 2005.

P4. During the trial, Gordon testified that Puckett contacted him immediately after Hurricane Katrina about performing repairs to Feld House. According to Gordon, Puckett informed him that Puckett wanted Gordon to oversee the project, as Puckett was physically unable to do so. Gordon stated that he met with an insurance adjuster, obtained two estimates for removal of the tree, and placed a tarp over the tree on the roof to preclude further damage to the roof. Gordon testified that, after receiving authorization from Puckett, he hired Richard [**5] Antoine to perform the structural work. Gordon also testified that, in addition to reporting to Puckett, he maintained constant contact with Puckett's assistant, Harvey Smith.

P5. Gordon stated that when he went to visit Puckett regarding payment for the second invoice, Puckett informed him that he had not received the check from the [*767] insurance company. Gordon testified that he called the insurance company about three weeks later and learned that the check already had been sent to Puckett. According to Gordon, he then contacted Smith, who informed him that he had the check in his possession. Gordon stated that he met with Puckett shortly thereafter. Gordon recalled telling Puckett that he was aware that Puckett had not been truthful regarding the reason Puckett had given him for not making the payment, but Puckett still refused to pay.

P6. Gordon stated that he, along with Antoine, went to visit Puckett a second time regarding payment of the second invoice. He testified that when he presented the invoice to Puckett, Puckett informed him that the roof leaked after the repairs that he had made the previous March. According to Gordon, this was the first time that he learned that there were [**6] problems with the previous repairs. Gordon testified that he attempted to compromise with Puckett by suggesting that Puckett withhold \$ 6,200 (the amount that Puckett had paid him

for the March repairs) of the amount that was presently due him per the second invoice. Gordon stated that he said to Puckett, "You hold that and you pay me the money you owe me now and then when it rains a lot and you're satisfied, then you give me the rest of my money." Gordon stated that Puckett refused to accept his offer of compromise. Instead, according to Gordon, Puckett reached under his pillow, pulled out a .38 caliber handgun, pointed it "point-blank" at his face, and threatened to shoot him. Gordon testified that he left the premises immediately following this incident and did not return to finish the repairs. Gordon explained that this incident has had a negative impact on his daily life and that he has sought treatment from a psychologist.⁴

4 Karen Gordon, Gordon's wife, also testified about how this incident has affected Gordon. She stated that Gordon becomes very easily agitated and is not the person that he was prior to this incident.

P7. Antoine testified at the trial and corroborated Gordon's [**7] version of events. He also stated that when Puckett pulled the gun on Gordon, Puckett informed Gordon that he had "used a gun before and that he would use it again if he needed to."

P8. Puckett relayed a slightly different version of what transpired. According to Puckett, Gordon contacted him about serving as general contractor for the project. Puckett stated that he was reluctant to employ Gordon because he had had problems with Gordon's work on the previous project. Puckett stated that he informed Gordon "numerous times" that the roof was leaking. Despite this, Puckett testified that he hired Gordon, who represented himself as a "licensed, bonded, general contractor," to serve as his general contractor. Puckett stated that he did not find out until later that Gordon did not hold a license with the State of Mississippi when Gordon served as his general contractor.

P9. As for Gordon's responsibilities during the restoration process, Puckett testified that Gordon made the final decisions regarding the persons who would remove the tree and who would paint, plaster, and wallpaper the walls. Puckett stated that he did not meet Antoine until the "day he fired Gordon." Puckett also stated [**8] that he did not pay the second invoice presented by Gordon because he considered Gordon's expenses unreasonable. Puckett testified that he factored into his decision that the roof that Gordon had previously

repaired continued to leak. Also, Puckett testified that, two weeks before the confrontation, [*768] he told Gordon, "I'm going to wait until we have two winds accompanied by rain, and if it doesn't leak, I'll be glad to pay you."

P10. Although Puckett admitted pulling the gun on Gordon and Antoine, he stated that he did so after Gordon moved close to him, as he was sitting in bed, and threatened to break his neck. Puckett stated that he pointed the gun at Gordon and instructed him to "get [his] equipment and get off of [my] property." However, Puckett denied making threats and argued that Gordon had made numerous threatening telephone calls to him at his home.

P11. The trial judge noted that it had been two years since Gordon had made the repairs to Puckett's roof and that there had been several rains accompanied by wind during that time. The trial judge asked Puckett why he continued to withhold payment from Gordon. Puckett responded by referring back to the work that Gordon had done in [**9] March 2005, work that Puckett claimed was not satisfactory. The trial judge then asked Puckett why he did not accept Gordon's offer to withhold the \$ 6,200. Puckett responded by saying that the matter was in his attorney's hands by the time Gordon made the offer.⁵

5 Puckett made it clear that the roof did not leak following the repairs that Gordon made the second time.

P12. During rebuttal testimony, Gordon denied telling Puckett that Gordon was a licensed, bonded, and insured general contractor. Likewise, Gordon denied threatening Puckett on the day of the confrontation and making threatening telephone calls to Puckett at any time thereafter.

ANALYSIS AND DISCUSSION OF THE ISSUES

1. Dismissal of Gordon's Complaint

P13. In his first issue, Puckett contends that the trial judge should have dismissed Gordon's action as it relates to recovery of the \$ 17,603.65 because *Mississippi Code Annotated section 73-59-9(3)* (Rev. 2008) bars Gordon from recovering. *Section 73-59-9(3)* provides: "A residential builder or remodeler who does not have the license provided by this chapter may not bring any action, either at law or in equity, to enforce any contract

for residential building or remodeling or [**10] to enforce a sales contract." (Emphasis added). As stated, Puckett asserts that Gordon worked as a general contractor or remodeler, while Gordon argues that he served as Puckett's agent or construction manager.⁶

6 According to Gordon, Antoine served as the general contractor for the project.

P14. We note at the outset that the county court judge adopted the findings of fact submitted by Gordon, and the circuit court affirmed the county court's judgment and findings of fact. The law is clear in this state that "[a] trial judge's finding is entitled to the same deference as a jury and [the finding] will not be reversed unless manifestly wrong." *Miss. Dep't of Transp. v. Johnson*, 873 So. 2d 108, 111 (P8) (Miss. 2004) (quoting *Bradley v. Tishomingo County*, 810 So. 2d 600, 602-03 (P11) (Miss. 2002)). It is also clear that an appellate court can only set aside a verdict when it is the result of "prejudice, bias, or fraud, or is manifestly against the weight of credible evidence." *Id.* Nevertheless, the *Johnson* court further held that "when the trial judge is sitting as the finder of fact, and chooses to adopt in toto a party's proposed findings of fact and conclusions of law, we will conduct [**11] a de novo review of the record." *Id.* (citing *Holden v. Frasher-Holden*, 680 So. 2d 795, 798 (Miss. 1996)). Thus, we conduct a de novo review.

[*769] P15. *Mississippi Code Annotated section 73-59-1(c)* (Rev. 2008) defines a remodeler as "any corporation, partnership or individual who, for a fixed price, commission, fee, wage, or other compensation, undertakes or offers to undertake the construction, or superintending of the construction, of improvements to an existing residence when the cost of the improvements exceeds Ten Thousand Dollars (\$ 10,000.00)."

P16. Gordon does not dispute that he performed the work on Puckett's house without a license; however, he contends that, because he worked as an agent or construction manager, he was not required to hold a license. *Section 73-59-1* does not define construction manager; therefore, Puckett directs our attention to *Aladdin Construction Co. v. John Hancock Life Insurance Co.*, 914 So. 2d 169 (Miss. 2005).

P17. In *Aladdin*, John Hancock Mutual Life Insurance Company (John Hancock) entered into a contract with McMo, Inc. (McMo) to provide project management services, along with design and construction

documentation services, for a mall renovation. *Id.* at 171 [**12] (P1). McMo entered into an agreement with Aladdin Construction Company (Aladdin), wherein Aladdin served as a contractor and John Hancock served as owner. *Id.* at 172 (P2). John Hancock routed payments due to Aladdin via McMo; however, McMo did not properly tender payment to Aladdin. *Id.* Sometime thereafter, McMo filed for bankruptcy. *Id.* Aladdin filed suit against John Hancock attempting to recover on the theory that McMo acted as an agent of John Hancock. *Id.* John Hancock responded, asserting that McMo was not its agent, that McMo acted as its general contractor, and that Aladdin was estopped from seeking recovery against it because Aladdin did not timely utilize the provisions of our "stop notice statute" found at *Mississippi Code Annotated section 85-7-181* (Rev. 1999). *Id.* The Jackson County Chancery Court granted summary judgment in favor of John Hancock, finding that McMo acted as a general contractor. *Id.* at 174 (P6). The Mississippi Supreme Court reversed and remanded, finding that genuine issues of material fact existed regarding whether an agency relationship existed between John Hancock and McMo. *Id.* at 180 (P24).

P18. In reaching its decision, our supreme court recognized the [**13] difference between a general contractor and a construction manager:

[The Mississippi Supreme Court] has defined a general contractor as "the party to a building contract who is charged with the total construction and who enters into sub-contracts for such work as electrical, plumbing and the like." *Associated Dealers [Supply, Inc. v. Mississippi Roofing Supply, Inc.]*, 589 So. 2d . . . [1245.] 1247-48 [(Miss. 1991)] (quoting *Black's Law Dictionary* 349 & 621 (5th ed. 1983)). The term "construction manager" has not yet been defined in Mississippi. Other courts have defined the term, however, finding that "[a] general contractor and a construction manager are separate and distinct titles with different responsibilities and different relationships to the parties to a construction project." *R&A Constr. Corp. v. Queens Boulevard Extended Care Facility Corp.*, 290 A.D.2d 548, 549, 736 N.Y.S.2d 423 (N.Y. App. Div. 2002). See also *Baum v.*

Ciminelli-Cowper Co., 300 A.D.2d 1028, 1029, 755 N.Y.S.2d 138, 139-40 (N.Y. App. Div. 2002) (the existence of a distinction between "general contractor" and "construction manager" is a question of fact for trial on the merits). While "there is no single, widely [**14] accepted definition of construction [*770] management," *Sagamore Group, Inc. v. Comm'r of Transp.*, 29 Conn. App. 292, 614 A.2d 1255, 1259 ([Conn. Ct. App.] 1992), the Plaintiffs cite the distinction drawn between a general contractor and a construction manager by the Rhode Island Supreme Court in *Brogno v. W & J Associates, Ltd.*, 698 A.2d 191, 194 (R.I. 1997). The *Brogno* [c]ourt found that "the [construction manager] acts as a mere agent for a project's owner and . . . engages 'trade contractors' in his principal's name to perform most or all of the actual work." *Id.* (quoting *Bethlehem Rebar Indus., Inc. v. Fid. & Deposit Co.*, 582 A.2d 442 (R.I. 1990)). See also *Sagamore Group*, 614 A.2d at 1259 ("Today . . . [a construction manager] is more commonly a group, a company, or a partnership with two paramount characteristics: construction know-how and management ability."). On the other hand, a general contractor "is in the chain of liability and . . . hires 'subcontractors' in his own name to perform work." *Brogno*, 698 A.2d at 194 (quoting *Bethlehem Rebar*, 582 A.2d at 442).

Id. at 175-76 (P11).

P19. As stated, Gordon testified (1) that he met with the insurance adjuster, (2) that he obtained two [**15] estimates for removal of the tree, (3) that he temporarily preserved the roof while the house was being repaired, (4) that he did not have much contact with Puckett, (5) that he hired, fired, and paid the subcontractors, and (6) that he performed some of the repairs and maintenance on the home. Also, Gordon testified that he "dealt with everything on behalf of Mr. Puckett," including paying subcontractors out of his pocket.

P20. We find that Gordon acted as a general

contractor, not as an agent or construction manager, within the meaning of *Aladdin*. We further find that Gordon acted as a remodeler within the meaning of *Mississippi Code Annotated section 73-59-1(c)* and is barred from recovery by *section 73-59-9(3)* because he did so without a license. Accordingly, we reverse and render that portion of the circuit court's judgment affirming the county court's award of \$ 17,603.65 in damages to Gordon for breach of contract by Puckett.

2. Assault

P21. Puckett contends that the county court judge erred in finding that he had committed an assault upon Gordon. According to Puckett, it is disputed as to whether he was justified in pointing the gun at Gordon. It is well settled in this state that [**16] when presented with conflicting evidence during a bench trial, the trial judge is charged with making a determination as to the credibility of the witnesses. *In Re Estate of Grubbs v. Woods*, 753 So. 2d 1043, 1052-53 (P39) (Miss. 2000) (citing *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1265 (Miss. 1987)). The county court judge heard accounts from Puckett, Gordon, and Antoine prior to reaching his decision and found Gordon's account more credible. We cannot hold him in error for doing so. This issue lacks merit.

P22. Puckett also argues that the county court judge erred in dismissing his assault charge against Gordon. It is Puckett's contention that he pulled the gun on Gordon only after Gordon approached him and threatened to break his neck. He also contends that Gordon made threatening telephone calls to him. Puckett asserts that he is entitled to damages for assault as a result.

P23. Again, the county court judge heard testimony from Puckett, Gordon, and Antoine. Gordon and Antoine stated that Gordon did not make any threats to Puckett when they went to collect the money, and Gordon denied making any [*771] threatening calls to Puckett. Apparently, the county court judge believed Gordon [**17] and Antoine rather than Puckett. For the reasons stated above, we cannot find error with the county court judge's decision. There is no merit to this issue.

3. Punitive Damages

P24. Next, Puckett contends that punitive damages were not warranted for two reasons: Gordon did not suffer any harm and Puckett's actions were justified. In

Summers ex rel. Dawson v. St. Andrew's Episcopal School, Inc., 759 So. 2d 1203, 1215 (P52) (Miss. 2000) (citing *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 150-51, 141 So. 2d 226, 233 (1962)), the Mississippi Supreme Court stated that "[a]s a general rule, exemplary or punitive damages are 'added damages' and are in addition to the actual or compensatory damages due because of an injury or wrong." Further, it is well established that:

The award of punitive damages, along with the amount of such, are within the discretion of the trier of fact. *Fought v. Morris*, 543 So. 2d 167, 173 (Miss. 1989). "Nevertheless, the trial court, in determining if the issue should be submitted to the jury, must 'decide whether, under the totality of the circumstances and viewing the defendant's conduct in the aggregate, a reasonable, hypothetical trier of fact could have found [**18] either malice or gross neglect or reckless disregard.'" *Peoples Bank & Trust Co. v. Cermack*, 658 So. 2d 1352, 1361 (Miss. 1995) (quoting *Colonial Mortgage Co. v. Lee*, 525 So. 2d 804, 808 (Miss. 1988)).

Id. at 1215 (P53).

P25. As stated, Gordon testified that Puckett pointed the gun at his face point-blank and threatened to kill him. Also, Gordon testified that as a result of this incident, he began seeing a psychologist and that he has had trouble sleeping because he has been "obsessed about it." Based on these facts, the county court judge concluded that Puckett's actions warranted punitive damages. Our review of the record reveals that the county court judge did not abuse his discretion in awarding punitive damages to Gordon; therefore, we cannot second-guess his decision. This issue lacks merit.

4. Attorney's Fees

P26. Puckett argues that the trial judge erred in awarding attorney's fees to Gordon and contends that the award is based solely on the award of punitive damages. Our supreme court has held that "[w]hen there is no contractual provision or statutory authority providing for attorney fees, they may not be awarded as damages

unless punitive damages are also proper." *Greenlee v. Mitchell*, 607 So. 2d 97, 108 (Miss. 1992) [**19] (citing *Cent. Bank of Miss. v. Butler*, 517 So. 2d 507, 512 (Miss. 1987)). Also, it is clear in this state that the trial judge is charged with determining what is a reasonable amount of attorney's fees. *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 478 (P7) (Miss. 2002) (citing *Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 418 (Miss. 1966)). Further, the trial judge's decision will only be reversed when it is clear that there has been an abuse of discretion. *Mabus v. Mabus*, 910 So. 2d 486, 488 (P7) (Miss. 2005) (citing *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259, 269 (P32) (Miss. 1999)).

P27. We have already concluded that the county court judge did not abuse his discretion in awarding punitive damages to Gordon; thus, we likewise conclude that the county court judge did not abuse his discretion in awarding Gordon attorney's fees. There is no merit to this issue.

P28. The dissent suggests that, once we affirmed the grant of attorney's [*772] fees, it became incumbent upon us to then determine the reasonableness of the amount of attorney's fees that were awarded by the trial court even though the reasonableness of the amount of attorney's fees has not been raised as an issue either [**20] in the trial court or in the issues presented on appeal.

P29. In his brief, Puckett states the attorney's fees issue as follows: "Whether the County Court Judge erred in awarding attorney[s] fees to Trey Gordon?" We quote verbatim from his brief his entire argument in support of this issue:

There were two theories by which the Plaintiff requested attorney [sic] fees and only was [sic] supported by the County Court Judge's findings of fact. The Judge adopted the Plaintiff's proposed [sic] almost verbatim. *The judge awarded attorney [sic] fees based solely on the award of punitive damages.* The findings of fact do not support an award of attorney's fee [sic] based on an open account per § 11-53-81. Further, Trey Gordon is an individual roofer not a credit card company, banking institution, or other entity in the practice of extending

credit. Trey Gordon did not extend credit as he did not have credit to extend. He entered into an agreement to repair a home, period. Trey Gordon was paid in the normal course of business in the construction industry, paid on demand or completion of work. This was not an open account case.

*As Russell Puckett was justified in his actions in regards to the alleged [**21] assault, punitive damages were not therefore warranted. Since punitive damages were [sic] not warranted, neither are attorney [sic] fees.*

(Emphasis added).

P30. Further, in his appellate brief to the circuit court, Puckett presented verbatim the same argument that is quoted above. In his proposed findings of fact to the county court, Puckett did not challenge the grant of attorney's fees on the basis that they were excessive or on the basis that Gordon's invoice for attorney's fees was not sufficiently particularized.⁷ Had Puckett deemed the amount of the award excessive, it was incumbent upon him to make a specific objection along that line so that the trial court would have had an opportunity to consider the objection. Therefore, on these facts, we see no reason to remand the attorney's fee issue for further proceedings by the trial court. It is clear to us that the issue, as presented by Puckett on appeal, is whether this is an appropriate case for the award of attorney's fees, not whether the amount of the award is excessive or whether the invoice for attorney's fees is sufficiently particularized.

⁷ At the conclusion of the trial, the county court judge advised the parties that he [**22] was awarding \$ 8,301.25 in attorney's fees. Thereafter, Puckett's counsel asked the county court judge to make findings of fact on his ruling. The court then directed the parties to submit findings of fact and advised them that the court would "accept, reject, or modify the findings to the extent that [the court] deem[ed] fit and proper." As stated, at no point in the proceedings did Puckett challenge the amount of the award.

P31. THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT IS AFFIRMED IN

PART AND REVERSED AND RENDERED IN PART AS FOLLOWS: THE AWARD OF NOMINAL COMPENSATORY DAMAGES IN THE AMOUNT OF \$ 100, PUNITIVE DAMAGES IN THE AMOUNT OF \$ 2,500, AND ATTORNEY'S FEES IN THE AMOUNT OF \$ 8,301.25 IS AFFIRMED; THE AWARD OF \$ 17,603.65 FOR THE BREACH OF CONTRACT CLAIM IS REVERSED AND RENDERED. [*773] ALL COSTS OF THIS APPEAL ARE ASSESSED TWO-THIRDS TO THE APPELLANT AND ONE-THIRD TO THE APPELLEE.

MYERS, P.J., BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. CARLTON, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. KING, C.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J. GRIFFIS, J., NOT PARTICIPATING.

CONCUR BY: KING (In Part)

DISSENT BY: KING (In Part)

DISSENT

KING, C.J., [23] CONCURRING IN PART, DISSENTING IN PART:**

P32.I concur with the majority opinion, except as to the issue of the awarding of attorney's fees, and therefore, I write separately on that issue. The majority position on this question would seem to be succinctly set forth in the following sentence: "We have concluded that the county court judge did not abuse his discretion in awarding punitive damages to Robert Gordon; thus, we likewise conclude that the county court judge did not abuse his discretion in awarding Gordon attorney's fees." Such a statement would seem to imply that where the imposition of punitive damages is found not to be an abuse of discretion, then axiomatically any amount of attorney's fees awarded cannot be an abuse of discretion. I find myself both unable and unwilling to embrace that position.

P33. There is no argument that the court having awarded punitive damages to Gordon as the prevailing party on the assault claim was also authorized to award to him reasonable attorney's fees on that claim. *United Am. Ins. Co. v. Merrill*, 978 So. 2d 613, 636 (P117) (Miss.

2007) (finding that reasonable attorney fees are justified where the jury awards punitive damages). However, the [**24] party requesting an award of attorney's fees bears the burden of providing evidence to support the amount requested. See *Erickson v. Smith*, 909 So. 2d 1173, 1182 (P26) (Miss. Ct. App. 2005) (holding that an award of attorney's fees must be based on credible evidence). In proving his claim for attorney's fees, Gordon submitted bills from his attorney which totaled, \$ 8,301.25. These bills covered all of the matters contested between Gordon and Russell Puckett in this case. The trial court, which found for Gordon on all of the claims in this case, awarded Gordon the entire \$ 8,301.25 requested in attorney's fees. The submitted bills do not differentiate between the time and effort spent on the assault claim and the time and effort spent on the breach of contract claim. Therefore, the full attorney's bill of \$ 8,301.25 of necessity also included payment for work done in seeking payment of the \$ 17,603.65 breach of contract claim.

P34. While Gordon prevailed in the trial court on the breach of contract claim, he has not prevailed on that claim in this Court. Indeed, this Court has reversed and rendered the award of \$ 17,603.65 to Gordon for breach of contract because *Mississippi Code Annotated section*

73-59-9(3)(Rev. [**25] 2008) specifically bars his pursuit and recovery on the breach of contract claim.

P35. A party who does not prevail on an issue has no entitlement to an award of attorney's fees for the failed pursuit of that issue. *A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276, 1283 (PP22-29) (Miss. Ct. App. 2000) (finding that "the parties were entitled only to [attorney's] fees for enforcing the specific contract provisions on which they prevailed"). Gordon did not prevail upon his breach of contract claim; therefore, he was not entitled to recover the attorney's fees spent in pursuit of that failed claim. To make such [**774] an award under these circumstances is by definition an abuse of discretion.

P36. Because I believe this to be an abuse of discretion, I would affirm the decision to award attorney's fees for the work done solely on the assault claim, and exclude the cost of all work done on the breach of contract claim. To this end, I would return this case to the trial court with instructions to award attorney's fees only for the work related solely to the assault claim.

LEE, P.J., JOINS THIS OPINION.