
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMBER RIDGE, INC.,

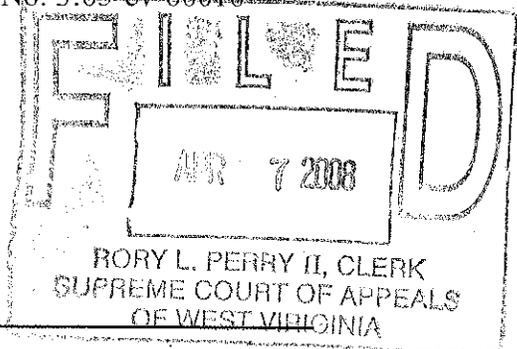
Petitioner (Plaintiff below),

v.

HUNT COUNTRY ASPHALT &
PAVING, LLC,
AND JEFFREY D. GREENBERG,

Respondents (Defendants below).

Docket No. 33877
Certified Question
From the United States District Court for the
Northern District of West Virginia
(Martinsburg Division)
Civil Action No. 3:05-cv-00016
(Bailey, J.)



**TIMBER RIDGE, INC.'S BRIEF ON THE CERTIFIED
QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

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I. KIND OF PROCEEDING AND NATURE OF THE RULING OF DISTRICT COURT

This matter comes before this Court on an Order entered by the United States District Court for the Northern District of West Virginia (Order, Doc. 107.), certifying two unresolved questions of West Virginia law: (1) Whether a contractor who does not have a West Virginia contractor's license may utilize the courts to maintain a claim or counterclaim against the property owner; and (2) Whether a landowner's knowledge of the contractor's unlicensed status estops the landowner from raising the contractor's unlicensed status. The District Court answered both of those certified questions in the negative. (Order, Doc. 107.) This Court entered an Order accepting review of the certified questions from the District Court and docketing the matter for resolution.

II. STATEMENT OF FACTS RELEVANT TO THE CERTIFIED QUESTIONS

Timber Ridge, Inc. (hereinafter "Timber Ridge") is a West Virginia corporation that operates a camp for youths and adults in Hampshire County, West Virginia. (Amend. Compl. ¶1, Doc. 55). Hunt Country Asphalt & Paving, LLC (hereinafter "Hunt Country") and Jeffrey D. Greenberg (hereinafter "Greenberg") submitted a proposed contract to Timber Ridge to provide materials and labor for various improvements to be made at the Hampshire County facility, with the total contract price being approximately \$100,000.00. (Amend. Compl., Doc. 55). Timber Ridge, Greenberg and Hunt Country entered into a contract, with modifications, on or about September 23, 2003. (Amend. Compl. ¶9, Doc. 55.) At the time the contract was executed by the parties, and at all times during which Hunt Country and Greenberg (collectively "Defendants") performed work at Timber Ridge's Hampshire County camp, the Defendants never had a West Virginia contractor's license. (Exh. D to Memo. in Support of Plaintiff's Mot.

Sum. Jud., Doc. 75.) Further, the Defendants have never obtained a West Virginia contractor's license. (Exh. E to Memo. in Support of Plaintiff's Mot. Sum. Jud., Doc. 75.)

Timber Ridge filed this action against Hunt Country and Greenberg on January 26, 2005, in the Circuit Court of Hampshire County, West Virginia, alleging breach of contract, breach of warranty, and negligence. (Order, Doc. 107.) Hunt Country and Greenberg removed the matter to the United States District Court for the Northern District of West Virginia. (Order, Doc. 107.) Timber Ridge filed an Amended Complaint on or about January 18, 2007, asserting claims of breach of contract, breach of warranty, negligence, and fraud in the inducement. (Amend. Compl., Doc. 55) In its Amended Answer, Hunt Country and Greenberg filed a Counterclaim, alleging that Timber Ridge breached the contract and seeking \$80,000 in damages. (Amend. Ans., Doc. 58.)

Timber Ridge filed a Motion for Summary Judgment on the Defendants' counterclaim. (Mot. for Sum. Jud., Docs. 74, 75.) Timber Ridge asserted that the Defendants should not be permitted to pursue their counterclaim because they did not have a West Virginia contractor's license when they entered into the contract with Timber Ridge or while they performed work pursuant to and under such contract. (Memo. in Support of Mot. for Sum. Jud., Doc. 75.) The United States District Court deferred ruling on Timber Ridge's Motion for Summary Judgment and certified the above-referenced issues to this Honorable Court for a decision. (Order, Doc. 107.)

III. CERTIFIED QUESTIONS OF LAW TO BE ANSWERED

A. Whether a contractor who does not have a West Virginia contractor's license may utilize the courts to maintain a claim or counterclaim against the property owner.

District Court's Answer: No.

B. Whether a landowner's knowledge of the contractor's unlicensed status estops the landowner from raising the contractor's unlicensed status.

District Court's Answer: No.

IV. DISCUSSION OF LAW

A. STANDARD OF REVIEW

The standard of review applied by this Court "in addressing legal issues presented by a certified question from a federal district or appellate court" is *de novo*. Syl. Pt. 1, T. Weston Inc. v. Mineral Cty., 219 W. Va. 564, 638 S.E.2d 167 (2006), citing Syl. Pt. 1, Light v. Allstate Insurance Co., 203 W. Va. 27, 506 S.E.2d 64 (1998).

B. CONTRACTORS WHO DO NOT HAVE A WEST VIRGINIA CONTRACTOR'S LICENSE AT THE TIME OF CONTRACTING OR AT THE TIME OF PERFORMANCE SHOULD BE PROHIBITED FROM BRINGING OR MAINTAINING AN ACTION AGAINST THE PROPERTY OWNER.

The first question before this Court is whether an unlicensed contractor should be estopped from asserting a claim or counterclaim against a property owner. The West Virginia Contractor Licensing Act, W. Va. Code § 21-11-1 *et seq.* (hereinafter "Contractor Licensing Act"), sets forth the licensing requirements for those persons who wish to perform contracting work in the State of West Virginia. The Contractor Licensing Act precludes any person from

engaging "...in any act as a contractor, as defined in this article, unless such person holds a license issued under the provisions of this article. No firm, partnership, corporation, association, or other entity shall engage in contracting in this state unless an officer thereof holds a license issued pursuant to this article." W. VA. CODE §21-11-6(a).¹ A contractor is defined as "a person who in the capacity for compensation ... undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish, any building, highway, road, railroad, structure or excavation associated with a project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures in connection therewith, where the cost of the undertaking is one thousand dollars or more." W. VA. CODE §21-11-3(c). The Contractor Licensing Act identifies its purpose and policy as follows:

It is hereby declared to be the policy of the state of West Virginia that all persons desiring to perform contracting work in this state be duly licensed to ensure capable and skilled craftsmanship utilized in construction projects in this state, both public and private, fair bidding practices between competing contractors through uniform compliance with the laws of this state, and protection of the public from unfair, unsafe, and unscrupulous bidding and construction practices.

W. VA. CODE §21-11-2.

The Contractor Licensing Act does not explicitly address whether an unlicensed contractor is prohibited from asserting a claim against the other contracting party.

Although this Court has not had the opportunity to address this issue, the majority of courts have held that an unlicensed contractor cannot bring or maintain an action on a

¹ The statute was amended in 2007, deleting "On or after the first day of October, on thousand nine hundred ninety-one" and inserting "or submit a bid to perform work as a contractor" in the first sentence. There were also minor stylistic changes made. The language cited in the text of the brief was in full force and effect in 2003 at the time the parties entered into the contract.

construction contract, even where the relevant licensing statutes for contractors do not contain any express provisions relating to the enforceability of contracts of unlicensed contractors. See Cooper v. Johnston, 219 So.2d 392, 283 Ala. 565 (Ala. 1969); Jackson v. Holder, 496 A.2d 746 (D.C. 1985); Paddock v. Glennon, 203 N.E.2d 421, 32 Ill.2d 51 (Ill. 1964); Harry Berenter, Inc. v. Berman, 265 A.2d 759, 258 Md. 290 (Md. 1970); Silver v. A.O.C. Corp., 187 N.W.2d 532, 31 Mich. App. 147 (1971); Richards Conditioning Corp. v. Oleet, 236 N.E.2d 639, 21 N.Y.2d 895 (N.Y. 1968); Bryan Builders Supply v. Midyette, 162 S.E.2d 507, 274 N.C. 264 (N.C. 1968); Gene Taylor & Sons Plumbing Co. v. Corondolet Realty Trust, 611 S.W.2d 572 (Tenn. 1981); Mosley v. Johnson, 453 P.2d 149, 22 Utah 2d 348 (Utah 1969). But see Warren v. Bill Ray Construction Co., Inc., 269 So.2d 25 (Fla. App. 1972); Nevada Equities, Inc. v. Willard Pease Drilling Co., 440 P.2d 122, 84 Nev. 300 (1968). In so holding, these courts found that the contractor licensing statutes were enacted for the protection of the public and that allowing an unlicensed contractor to use the courts to recover damages would defeat the purpose of the licensing statutes and would not deter unlicensed contractors from working within the state. See, e.g., Cooper 219 So.2d 392, 283 Ala. 565.

In Cooper v. Johnston, 219 So.2d 392, 283 Ala. 565 (Ala. 1969), the Alabama Supreme Court held that an unlicensed contractor could not bring an action to enforce or recover on a contract even though the licensing statute did not contain an express provision barring such actions by unlicensed contractors. The court determined that the licensing statute governing contractors was enacted for regulation and protection of the public rather than for revenue purposes, and that to permit recovery on such contracts by the unlicensed contractor would defeat the purpose of the statute. Id.

In Bryan Builders Supply v. Midyette, 162 S.E.2d 507, 274 N.C. 264 (N.C. 1968), the Supreme Court of North Carolina likewise held that an unlicensed contractor could not maintain an action for breach of contract against the homeowner. Although the licensing statute did not expressly bar actions by the unlicensed contractor on the contract, the court found that such a restriction could be inferred because the statute was a police protection measure designed to protect the public. The court explicitly declined to pronounce the contract "void," however, reasoning that such contracts are not totally without legal effect since the innocent homeowner may maintain an action against an unlicensed contractor for breach thereof. Id. at 511, 270.

In Jackson v. Holder, 495 A.2d 746 (D.C. 1985), the Court of Appeals for the District of Columbia reversed an award to an unlicensed plumber, holding that he was not entitled to enforce a contract even though the statute did not expressly provide that such contract was unenforceable. In doing so, the court recognized that "a contract made in violation of a licensing statute that is designed to protect the public will usually be considered void and unenforceable." Id., (citing Highpoint Townhouses, Inc. v. Rapp, 423 A.2d 932, 935 (1980) (internal quotations omitted)).

The Maryland Supreme Court is in accord. In Harry Berenter, Inc. v. Berman, 265 A.2d 759, 258 Md. 290 (Md. 1970), the Court held that

if a statute requiring a license for conducting a trade, business or profession is regulatory in nature for the protection of the public, rather than merely to raise revenue, an unlicensed person will not be given the assistance of the courts in enforcing contracts within the provisions of the regulatory statute because such enforcement is against public policy. In Snodgrass v. Immler, 232 Md. 416, 194 A.2d 103 (1963) – which we consider to be controlling in the present case – the plaintiff, an architect, sought to recover architectural fees for services rendered by him, even though he was not licensed as an architect as required by Code (1957), Art. 43, §§551 and 516. Like the Home Improvement Law involved in the instant case, the Code provisions requiring architects to be licensed

provided for criminal sanctions, but was silent in regard to civil consequences following from the failure to obtain a license.

Harry Berenter, Inc. at 761, 293.

The Court found that the “Maryland Home Improvement Law” was regulatory in nature and was enacted for the protection of the public, not merely as a revenue measure, quoting language in the statute explicitly providing “for the protection of the people of this state.” Therefore, the mechanics’ lien filed by the plaintiff corporation could not be enforced as the corporation did not possess a home improvement license at the time the parties entered into the contract. Id.

Like the statutes in the jurisdictions cited above, the West Virginia Contractor Licensing Act, which mandates the licensure of those persons performing contracting work in this State, is a police protection statute designed to protect the public from fraud, poor workmanship, unsafe and unscrupulous practices; and to ensure uniform compliance with the laws and regulations in the State of West Virginia. In accord with the majority of other jurisdictions with similar licensing statutes, the West Virginia Contractor Licensing Act should not be applied so as to allow unlicensed contractors in West Virginia to maintain an action for recovery on any work contracted for or performed while they are not licensed. See W. VA. CODE §21-11-2. A repudiation of the widely-recognized principle that unlicensed contractors have no right of recovery would thwart the fundamental purpose underlying the licensing statute, while a confirmation of this principle in accordance with the purpose of the licensing statute will deter unlicensed persons from performing work in West Virginia.

Greenberg admitted in his deposition testimony that he did not possess a West Virginia contractor’s license at the time of entering into the contract with Timber Ridge nor at any time since then, in violation of the West Virginia Contractor Licensing Act. (Exh. D to Memo. in Support of Plaintiff’s Mot. Sum. Jud., Doc. 75.) Yet, the Defendants seek to recover damages for breach of contract despite their clear violation of the West Virginia Contractor

Licensing Act. To permit the Defendants to maintain such an action would nullify the licensing statute and its purpose to protect the vital interests of the public. Accordingly, this Honorable Court should answer the first certified question from the United States District Court for the Northern District of West Virginia in the negative and find as a matter of law that a contractor who does not have a West Virginia contractor's license may not utilize the courts to maintain a claim or counterclaim against the property owner.

C. A LANDOWNER'S KNOWLEDGE OF A CONTRACTOR'S UNLICENSED STATUS DOES NOT ESTOP THE LANDOWNER FROM RAISING THE CONTRACTOR'S UNLICENSED STATUS AS A DEFENSE TO ANY ACTION BROUGHT OR MAINTAINED BY SUCH UNLICENSED CONTRACTOR.

The second certified question as to whether the landowner's knowledge of the contractor's unlicensed status estops the landowner from raising such unlicensed status as a defense to any claim brought by the contractor should also be answered in the negative. While Timber Ridge denies that it had any knowledge of the Defendants' unlicensed status, for the purposes of this argument, such knowledge should not estop a property owner or other contracting party from asserting the contractor's unlicensed status as a bar to any claim brought by the contractor.

As noted by the District Court in its Order certifying these questions to this Court (Order, Doc. 107), the courts that have addressed this issue have uniformly held that an unlicensed contractor may not maintain an action against the landowner even in situations where the landowner was aware of the contractor's unlicensed status at the time of contracting. In so finding, the courts have found that that the licensing statute, and the public policy behind it, would be frustrated if the unlicensed contractor could assert a claim.

The Alabama Supreme Court, in Cooper, 283 Ala. 565, 219 So.2d 392, rejected the unlicensed contractor's contention that the landowners were estopped from asserting the regulatory licensing statute as a defense in an civil action brought by the contractor although the landowner knew that the contractor was not licensed and even though the landowner benefited from the transaction. The court found that the contractor's contention was without merit as the "...transactions were illegal and violative of public policy. Vitality cannot be injected into an illegal transaction by way of estoppel." Id. at 569, 396.

The New Mexico Supreme Court also rejected an unlicensed contractor's contention that the landowner's knowledge of his unlicensed status estopped the landowner from asserting such a defense. Mascarnas v. Jaramillo, 806 P.2d 59, 63, 111 N.M. 410, 414 (N. M. 1991). The Court found that

As a matter of public policy, an unlicensed contractor may not retain payments made pursuant to a contract which requires him to perform in violation of the Construction Industries Licensing Act. This is true even if, as here, the consumer has knowledge that the contractor is unlicensed. The public policy behind the licensing requirement of the Act is so strong that the element of consumer knowledge is of no consequence in our decision.

In Highpoint Townhouses v. Rapp, 423 A.2d 932 (D.C. App. 1980), the District of Columbia Court of Appeals rejected the subcontractor's argument that the property owner was estopped from asserting the subcontractor's violation of the regulatory licensing law as a defense to an action filed by the unlicensed subcontractor for compensation pursuant to the contract. The Court of Appeals ruled, in part, that when a licensing law designed to protect the public is violated, the unlicensed party will not be permitted to recover even where a member of the protected class was a party to the contract. Id. "If a party could recover for work performed without a necessary license, the purposes of licensing statutes, generally speaking, would be frustrated." Id.

A New York court has also held that a homeowner's alleged knowledge of a contractor's unlicensed status does not estop the homeowner from asserting such status as a defense. In Millington v. Rapoport, 98 App. Div.2d 765, 469 N.Y.S.2d 787 (N.Y. 1983), in which the court construed a licensing statute deemed to be regulatory in nature, the court held that a party may not waive a statute enacted for the party's benefit if the waiver would contravene public policy. The court stated

Since the purpose of the regulatory scheme is to protect the homeowner against abuses and fraudulent practices by persons engaged in the home improvement business, it is well established that the lack of a license bars recovery in either contract or *quantum meruit*. Since strict compliance with the licensing statute is required, recovery is barred regardless of whether the work was performed satisfactorily or whether the failure to obtain a license was willful. The fact that the homeowner was aware of the absence of a license or even that the homeowner planned to take advantage of its absence creates no exception to the statutory requirement. If the legislative mandate can be evaded by the simple expedient of informing the homeowner of the lack of a license prior to entering upon the work, the firm public policy of expelling the unlicensed from the home improvement field would be frustrated. Just like a party may not waive a statute enacted for his benefit if such waiver contravenes public policy, estoppel may not be relied upon to reward a practice which violates public policy as prescribed by the Administrative Code.

Id. at 766, 788.

The North Carolina Court of Appeals has also held that homeowners have no authority to waive the statutory licensing requirements. Currin & Currin Const., Inc. v. Lingerfelt 582 S.E. 2d 321 (N.C. Ct. App. 2003).

The West Virginia Contractor Licensing Act, like the statutes from other jurisdictions discussed above, is a regulatory measure enacted for the protection of the public. And, like other states' contractor licensing statutes, the West Virginia statute's clear purpose of protecting the public should not be subject to waiver simply because the homeowner is aware that the contractor is violating the licensing statute. Indeed, a contrary interpretation would

effectively undermine the purpose of the West Virginia licensing statute by encouraging unlicensed contractors simply to make homeowners aware of their unlicensed status.

Therefore, this Court should answer the second certified question from the United States District Court for the Northern District of West Virginia in the negative and find that the landowner's knowledge of the contractor's unlicensed status does not estop the landowner from raising the contractor's unlicensed status as a defense to any claims asserted by the unlicensed contractor

V. PRAYER FOR RELIEF

For the reasons set forth herein, Timber Ridge respectfully requests that this Honorable Court find as a matter of law that a contractor who does not possess a West Virginia contractor's license may not utilize the courts to maintain a claim or counterclaim against a property owner, and that a property owner's knowledge of the contractor's unlicensed status does not estop the landowner from raising the contractor's unlicensed status in defense to any claim or counterclaim asserted by the contractor.

Respectfully submitted,

TIMBER RIDGE, INC.
By Counsel

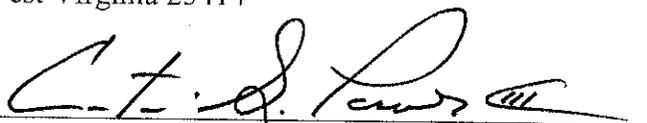


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CERTIFICATE OF SERVICE

I, Curtis G. Power, III, counsel for Timber Ridge, Inc., do hereby certify that on April 4, 2008, I have served a true and correct copy of the foregoing *Timber Ridge, Inc.'s Brief on the Certified Questions from the United States District Court for the Northern District of West Virginia* upon the below named party on the date indicated by depositing a true and correct copy of the foregoing in the United States Mail, first class postage prepaid to him at his address as follows:

J. Michael Cassell, Esquire
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A handwritten signature in black ink, appearing to read "C. G. Power III", written over a horizontal line.

Curtis G. Power, III