

Beck Engineering, P.C. v. Vermont Wild Hotel, Inc., Docket No. 371-8-06 Wmcv (Wesley, J., Feb. 20, 2007)

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**STATE OF VERMONT  
WINDHAM COUNTY, SS.**

**BECK ENGINEERING, P.C.,  
Plaintiff,**

v.

**WINDHAM SUPERIOR COURT  
DOCKET NO. NO. 371-8-06Wmcv**

**VERMONT WILD HOTEL, INC.,  
Defendant.**

**ORDER ON MOTION FOR ATTACHMENT**

After an evidentiary hearing on November 22, 2006, this Court granted Plaintiff's Motion for Writ of Attachment based on its conclusion that Plaintiff was likely to prevail on its action to recover more than \$20,000.00 in outstanding bills for professional engineering services and associated costs. In the course of the hearing, Defendant did not raise any significant challenge to Plaintiff's evidence demonstrating the services it claimed fell within the scope of the parties' contract. Rather, based on a legal memorandum filed on the day of the attachment hearing, Defendant maintained that Plaintiff would be unable to prevail because its principal, Mathew Beck, was not properly licensed, and thus the drawings he supplied were allegedly worthless for their intended purposes as a matter of law. Although the Court assessed the weight of the evidence in favor of Plaintiff's request for an attachment, and approved its issuance at the close

of the hearing, the Court reserved the legal issue raised by Defendant for further review. Defendant now seeks reconsideration of the attachment based on the claim of improper accreditation, and each party has filed two memoranda addressing the issue. After further review of these arguments and authorities, the Court **AFFIRMS** its approval of the attachment, concluding that Defendant's position as to the legal insufficiency of Beck's certification is unconvincing.

Licensing standards for professional engineers are set out in Chapter 20 of Title 26, which authorizes the Board of Professional Engineering to "adopt rules necessary for the performance its duties, including: (1) A list of recognized engineering specialties". 26 V.S.A. §1172. At §1182, the legislature has established specific criteria for issuing licenses and specialty certification. However, nothing the statutory scheme enumerates or defines relevant specialties. Rule 1.7 of the Rules Relating to the Profession [of Engineering] promulgated by the Board currently lists twenty two subjects of specialization for which examinations are offered and specialty licenses issued. Among these are civil/structural, structural I, and structural, part II. Although Rule 1.7 states, "[a] professional engineer licensed by the Board must practice within his or her specialty and area of competence," the Rule neither establishes clear criteria to distinguish between specialties, nor any specification of the permitted scope of practice within each. As Plaintiff observes, this lack of clarity has not been addressed by either the reported decisions of the Board, or the Vermont Supreme Court. See, *In re Reilly*, Decision on Respondent's Motion to Dismiss, Docket No. No. PE 07-0503 (April 22, 2004), p. 3 ("Mr. Reilly's claim that the work in question falls within the realm of both mechanical and electrical engineering presents matters for factual determination by the Board at a contested hearing. The

validity of this defense is not determined by this Decision.”); cf. *In re Schreib*, Stipulation and Consent Order, Docket No. No. PE05-1104(July 17, 2006)(reciting without discussion a *stipulated* fact that licensing within specialty of mechanical engineering does not authorize engineer to design septic systems).

Defendant complains that Beck’s license for civil engineering does not qualify him to perform structural engineering. Except for its citation to the rule described above, Defendant offers no other legal basis to support its claim that civil engineering does not encompass structural engineering, or that the professional services at issue here are wholly encompassed by a specialty engineering classification. As suggested in the preceding paragraph, the underdeveloped nature of the statutory and regulatory scheme afford scant logical support for Defendant’s assertion that Plaintiff acted in a “fraudulent” manner by holding himself out as qualified to render the services at issue here. Indeed, the Court questions whether Defendant could demonstrate a sufficiently clear regulatory standard against which the claim of practicing beyond the scope of a licensed specialty could be measured in this case. Even assuming that lack of the appropriate specialty license can be raised in whole or in part as a defense to a suit for an engineering fee, whether Plaintiff’s services fell within the ambit of a specialty is bound up in a state of facts yet to be developed. In this regard, Plaintiff relies on the affidavit of James Olson, who has been licensed as a civil engineer in Vermont since 1974 and has practiced since that time on a part-time basis while holding a faculty position in the Civil Engineering Department at the University of Vermont from 1969 until his retirement in 2003. Mr. Olson also has experience proctoring and writing sample problems for engineering licensing exams. In his professional

opinion, Mr. Olson states that the specialty of civil engineering includes structural analysis and design work of the type performed by Plaintiff. Thus, even assuming the scope of applicable certification remains in the case, Plaintiff has demonstrated a likelihood of success on the merits.

Finally, as to whether practicing without a specialty license is a sufficient affirmative defense to a claim for breach of contract, the Court concurs in Plaintiff's reliance on *Howard v. Usiak*, 172 Vt. 227, 233-34 (2001) (architect's failure to obtain license was not a basis for refund of his fee where licensing statute did not speak to fee disputes), and *Gallagher v. Leary*, 164 Vt. 633, 634 (1996) ( "the Legislature has established a licensing procedure and a penalty for violation of that procedure, in order to protect the public from unqualified practitioners. We see no reason to read into the statute an additional penalty not established by the Legislature").

For the reasons discussed, Defendant's request for reconsideration is **DENIED**, and the reasoning and rationale for the grant of the attachment is **AFFIRMED**.

Dated at Newfane, Vermont, this \_\_\_\_ day of \_\_\_\_\_, 2007.

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John P. Wesley  
Superior Court Judge