

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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|------------------------------------|---|-------------------------|
| BAY VIEW ELECTRIC, LLC, |) | No. 67644-0-1 |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | |
| |) | |
| STRUCTURAL CONCRETE, INC., |) | |
| a Washington corporation; DAVID A. |) | |
| FLAKE, as an officer of STRUCTURAL |) | |
| CONCRETE, INC., DAVID FLAKE |) | |
| CONSTRUCTION, DAVID A. FLAKE, |) | UNPUBLISHED OPINION |
| as the principal of DAVID FLAKE |) | |
| CONSTRUCTION, and DAVID A. |) | |
| FLAKE, individually, and MARCIA |) | |
| FLAKE, as her interest may appear, |) | FILED: October 15, 2012 |
| |) | |
| Appellants. |) | |
| |) | |

Ellington, J. — Structural Concrete appeals a trial court order enforcing a settlement agreement between it and Bay View Electric. Structural Concrete claims the agreement is not supported by consideration and is thus void. We disagree and affirm.

BACKGROUND

Bay View Electric is an electrical contractor. Bay View billed \$113,626.92 for work performed under a subcontract from July 2008 to February 2009. When Structural Concrete failed to pay the invoice, Bay View sued.

Structural Concrete refused to arbitrate as required by the contract.¹ After Bay

View moved to compel arbitration, Structural Concrete agreed, and the trial court entered a stipulated order. Mediation resulted in an agreement in which Structural Concrete agreed to pay Bay View \$100,000 within 60 days, upon which “the Snohomish County Superior Court action will be dismissed with prejudice and without costs.”² In the event of nonpayment, the parties agreed “to a stipulated judgment in favor of Plaintiff . . . in the amount of \$113,626.19, plus accrued interest at the rate of 12% per annum.”³

In a letter dated a month after the agreement was signed, Structural Concrete asserted the agreement was unenforceable for lack of consideration. According to Structural Concrete, Bay View was precluded from filing its lawsuit in the first instance under RCW 19.28.081 because Bay View did not hold a valid license as an electrical contractor, and Bay View’s promise to dismiss the action therefore did not constitute valid consideration.⁴

Bay View moved to enforce the agreement. The trial court granted the motion and entered judgment in the amount agreed upon in the settlement. Structural Concrete appeals.

DISCUSSION

¹ Paragraph 20 of the contract reads, “In case contractor and subcontractor fail to agree in relation to any matters under this contract, these matters shall be referred to a board of arbitration.” Clerk’s Papers at 129.

² Clerk’s Papers at 88.

³ Id.

⁴ The letter states, “[W]e have learned there is a failure of consideration by Bayview for the settlement.” Clerk’s Papers at 89.

Because it is similar to a summary judgment proceeding, we review a decision to enforce a settlement agreement de novo.⁵ If the nonmoving party raises a genuine issue of material fact regarding the terms or existence of the agreement, or an applicable defense to enforcement, then the trial court must hold an evidentiary hearing to resolve the disputed issues.⁶

Structural Concrete reprises the argument it made below, *i.e.*, that because Bay View was out of compliance with the electrical licensing laws, it was not legally entitled to maintain its lawsuit against Structural Concrete, rendering meaningless its promise to dismiss the lawsuit in return for Structural Concrete's payment.⁷ Because there is no genuine issue regarding whether Bay View was licensed during the relevant period, we disagree.

Any person or organization engaged in certain electrical work in Washington must have an electrical contractor license issued by the Department of Labor and Industries.⁸ Additionally, each applicant for an electrical contractor's license must

⁵ Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911 (2000) ("We hold that the applicable standard of review is de novo because the evidence before the trial court consisted entirely of affidavits and the proceeding is similar to a summary judgment proceeding."); Lavigne v. Green, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

⁶ Brinkerhoff, 99 Wn. App. at 697.

⁷ "Settlement agreements are governed by general principles of contract law," Saben v. Skagit County, 136 Wn. App. 869, 876, 152 P.3d 1034 (2006), and must be supported by consideration, Keystone Land & Development Co. v. Xerox Corp., 152 Wn.2d 171, 178, 94 P.3d 945 (2004).

⁸ RCW 19.28.041; RCW 19.28.006(5). An "electrical contractor" performs the work of "installing or maintaining wires or equipment that convey electrical current." RCW 19.28.006(8).

designate a master electrician or administrator.⁹ The master electrician or administrator is a full-time supervisory employee.¹⁰ No person may concurrently serve as the master electrician for more than one contractor.¹¹

An electrical contractor may file a lawsuit pertaining to that work only if licensed.

RCW 19.28.081 states:

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

Under the same statute, municipalities may not issue permits for electrical work to anyone without an electrical contractor's license.

Chapter 19.28 RCW also provides for circumstances affecting the continued validity of an electrical contractor license. All electrical contractor licenses expire after 24 months.¹² If the relationship between a master electrician or administrator and an electrical contractor ends, the electrical contractor license is "void" after 90 days, unless another master electrician is qualified by the board.¹³ Once void, however,

⁹ RCW 19.28.061.

¹⁰ RCW 19.28.061.

¹¹ RCW 19.28.061.

¹² RCW 19.28.041(1).

¹³ RCW 19.28.061.

revocation or suspension of a license is not automatic. RCW 19.28.341 sets forth specific procedures the department must follow to revoke or suspend a license in cases of noncompliance.¹⁴

Here, there is no genuine issue of material fact regarding whether Bay View held a valid license during the period of time it worked for Structural Concrete. Along with its motion to dismiss, Bay View submitted evidence that it was licensed, including a letter from James Reynolds, the electrical licensing supervisor at the Department of Labor and Industries. Reynolds certified that Bay View was an active general electrical contractor holding an active license. His letter listed the effective date of the license as August 12, 2005 and the expiration date as August 13, 2011 (with a one-day lapse in licensing that occurred between August 12 and August 13, 2007). Based on this evidence, Bay View was licensed when it performed work for Structural Concrete from July 15, 2008 to February 27, 2009. Additionally, Bay View submitted evidence that it received a permit from the City of Everett for the Structural Concrete project. Everett could not have issued this permit had Bay View been unlicensed.

Structural Concrete attempts to counter this evidence with evidence that Bay

¹⁴ “The department has the power, in case of serious noncompliance with the provisions of this chapter, to revoke or suspend for such a period as it determines, any electrical or telecommunications contractor license . . . issued under this chapter. The department shall notify the holder of the license . . . of the revocation or suspension using a method by which the mailing can be tracked or the delivery can be confirmed. A revocation or suspension is effective twenty days after the holder receives the notice. Any revocation or suspension is subject to review by an appeal to the board. The filing of an appeal stays the effect of a revocation or suspension until the board makes its decision. The appeal shall be filed within twenty days after notice of the revocation or suspension is given.” RCW 19.28.341.

View's license was void while it worked on the project. It relies on the deposition testimony of Blake VanFleet and a document designating VanFleet as Bay View's electrical administrator between July 30, 2007 and April 15, 2009. In deposition, VanFleet testified that even though he agreed to be designated as Bay View's electrical administrator, he was never employed by Bay View and had in fact worked as an electrician at Tesoro Refinery for the past several years.

Structural Concrete's evidence, however, does not satisfy its burden of production. Even taken in the most favorable light, it demonstrates only that Bay View's license might have been void while it performed electrical work for Structural Concrete.¹⁵ RCW 19.28.081, however, prohibits legal action by those whose licenses have been revoked, suspended or expired.¹⁶ There is no evidence in the record that Bay View's license was expired or that the Department of Labor and Industries had taken any of the statutory steps necessary to revoke or suspend the license during the relevant time period.

Structural Concrete claims that Bay View did not allege and prove that it held a valid license when it filed its lawsuit, as required by RCW 19.28.081, but the record does not support this contention either. Bay View's complaint clearly alleges that it is a

¹⁵ In a motion to enforce a settlement agreement, the court must view the evidence in the light most favorable to the nonmoving party and "determine whether reasonable minds could reach but one conclusion." In re Marriage of Ferree, 71 Wn. App. 35, 44, 856 P.2d 706 (1993).

¹⁶ Structural Concrete asserts that "'revoke' is synonymous with 'void,'" Appellant's Br. at 8 n.1, but the two do not have the same dictionary meaning, nor are they equated in the statute.

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business engaged in electrical contracting and lists its Washington State license number. Structural Concrete fails to demonstrate that the statute requires more.

Even if Bay View was unlicensed at the time it worked on the project, Structural Concrete's appeal would still be unsuccessful. First, Structural Concrete has not cited a single case to support its argument. Without such support, we are unconvinced that a settlement agreement is void for lack of consideration simply because the defendant later discovered that there might have been a defense to the underlying lawsuit. Additionally, Structural Concrete did not raise the issue until after the settlement agreement had been signed—it neither asserted it in its answer to the complaint nor brought it to the arbitrator's attention.¹⁷ Finally, there is also no indication that Structural Concrete's defense would have been successful or that the trial court would have permitted amended pleadings.

Bay View performed work for Structural Concrete and sued when it was not paid for those services. Structural Concrete raised no question about Bay View's entitlement to sue and entered into a formal agreement to settle the dispute. While Structural Concrete may in hindsight wish it had raised the issue earlier, its hindsight does not render the settlement agreement unenforceable.

¹⁷ In reply, Structural Concrete contends that RCW 19.28.081 concerns the subject matter jurisdiction of the court and that its failure to contest Bay View's lawsuit under RCW 19.28.081 did not constitute waiver because his answer asserted that the court lacked subject matter jurisdiction. A defendant that preserves a defense in his or her answer does not waive it. Callfas v. Dep't of Const. & Land Use, 129 Wn. App. 579, 589, 120 P.3d 110 (2005). But the statute is not jurisdictional. Rather, it simply identifies who may initiate certain lawsuits. See Hendrick's Elec., Inc. v. Plumley, 18 Wn. App. 440, 441-42, 569 P.2d 73 (1977) ("In order to encourage compliance with the licensing requirements of the act, one of its provisions denies access to the courts for persons required to be licensed but who are not licensed."). Also, we do not generally consider arguments made for the first time in reply. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Structural Concrete seeks attorney fees and costs under RCW 4.84.015, RAP 18.1, and RAP 14.2. Because Structural Concrete does not prevail, we deny the request.

Affirmed.

Edenfor, J.

WE CONCUR:

Appelwick, J.

Cox, J.