IN THE SUPREME COURT OF FLORIDA

Case No: SC10-1892
Lower Tribunal No(s): 5D09-1761,
06-CA-1003,
06-CA-8702

EARTH TRADES, INC. and FIRST SEALORD SURETY, INC.,

Petitioners,

T&G CORPORATION d/b/a T&G CONSTRUCTORS, et al.,

Respondent.

PETITIONERS' REPLY BRIEF ON THE MERITS

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PREFACE

EARTH TRADES, INC. will be referred to in this brief as "Subcontractor". FIRST SEALORD SURETY, INC. will be referred to in this brief as "Surety". FIRST SEALORD and EARTH TRADES will be collectively referred to as "Petitioners". T&G CORPORATION d/b/a T&G CONSTRUCTORS, will be referred to in this Brief as "General Contractor" or "Respondent".

The Record on Appeal is referred to as "R.___."

The Record on Appeal of the Fifth District Court of Appeal is referred to as "5th R. ___."

The Trial Transcript is referred to as "T.___."

The Appendix is referred to as "App. ___."

The Petitioners' Initial Brief on the Merits is referred to as "Petr.'s Br. ___."

The Respondent's Answer Brief is referred to as "Resp't Br. ___."

The Petitioners' Reply Brief is referred to as "Petr.'s Reply Br. ___."

The Decision of the Fifth District Court of Appeal in *Earth Trades, Inc. v. T&G Corporation*, 42 So.3d 929 (Fla. 5th DCA 2010), is referred to as "Decision".

Unless otherwise specified, the terms of art set forth in Petitioners' Initial Brief on the Merits are used herein, and are to be given the same effect and meaning as set forth therein.

DISAGREEMENT WITH GENERAL CONTRACTOR'S STATEMENT OF FACTS

Surprisingly, instead of concentrating on the main issue before this Court, the General Contractor has deemed it necessary to ignore the long standing rule that this Court is required to infer all facts in the light most favorable to the non-moving party and instead attempts to assail the Subcontractor and Surety with the inclusion of facts that appear nowhere in the record.

The General Contractor avers throughout its Answer Brief (without any record citation) that the Subcontractor and Surety misrepresented to the General Contractor that Subcontractor was licensed. (Resp't Br. 10, 14, 15, 21, 22) In fact, there exists no record evidence that either the Subcontractor or Surety made any representations to the General Contractor. The only basis for this allegation is a passing reference to the Surety's website, in which certain portions of the website dated March 14, 2008 were filed with the trial court. The General Contractor certainly cannot contend that its viewing a website in 2008 is relevant to a contract signed in 2004, or that anything on this website in 2008 constitutes misrepresentations in 2004 and 2005.

The General Contractor's allegation that "the Subcontractor and Surety represented that the Subcontractor held an underground utility license and would be qualified to pull the necessary underground utility permits" (Resp't Br. 15) and that "the Subcontractor maintained a website indicating it was licensed to perform

underground utilities work" (Resp't Br. 21) have no record citation and are unsupported by the record. Neither the Subcontractor nor Surety ever misrepresented the Subcontractor's licensing status to the General Contractor. There is no record evidence that the Surety was involved in the retention of Subcontractor by General Contractor, or that the Surety's issuance of the Bonds induced the General Contractor to enter into the Contract with Subcontractor.

The General Contractor's allegation that the Subcontractor abandoned the job after the contaminated fill was discovered and never returned (Resp't Br. 5, 15), and that it was "faced with the portion of the underground utility work which required the permit to be pulled and no one to pull it" (Resp't Br. 17, 22), are similarly unsupported by the record. The foregoing improper citation to facts not supported by the record is simply the General Contractor's attempt to present their basis for the Subcontractor's termination. To the extent that the General Contractor alleges that an Owner risks a project being "red tagged" (Resp't Br. 22), there is no record evidence that a permit was required for the Subcontractor's work.

These allegations are even more specious when considered with the fact that the General Contractor does not even refute that it swore, under oath, to the Owner that the Subcontractor completed $256,000.00 of the $265,000.00 Subcontract, which was 97% of the work. (R. 1735-1736) (T. 59, 69) (Petr.'s Br. 3) The

General Contractor was paid for the amounts submitted in the aforementioned draw, but failed to remit payment to the Subcontractor. (T. 59, 69) The Subcontractor was owed $182,500.00 for this Hialeah Project and $100,000.00 from the prior Jacksonville Project, but the General Contractor refused payment. (T. 181-182) As a result, the Subcontractor discontinued its performance of the Hialeah Project and was terminated by the General Contractor (T. 181-182).

The General Contractor also makes unsupported assertions in an attempt to convince this Court that it did not have knowledge of the Subcontractor's lack of license. While this sort of argument is unnecessary as the Subcontractor's affidavit is taken in the light most favorable to the Subcontractor, it is improper to allege these unsupported facts in the Answer Brief. For example, the General Contractor's assertion that the Jacksonville Project "did not require a license and was demolition," (Resp't Br. 7) is unsupported by the record.

The Subcontractor unequivocally testified via Affidavit that it had informed the General Contractor it was unlicensed on several occasions all of which occurred prior to Subcontractor entering into any agreements with the General Contractor. (R. 743-745) The General Contractor does not contest that on December 15, 200, four months after the parties entered into the Jacksonville Project contract (R. 1-7, 86-109), its representative provided a letter of recommendation to the licensing board when the Subcontractor's representative

applied for a license (R. 640) (App.1), and that the Subcontractor met with the General Contractor's President and again notified General Contractor of the fact that it was not licensed. (R. 743-745) **One day later**, on December 16, 2004, the General Contractor entered into a Contract with Subcontractor. (5th R. B) The Surety, however, did not provide the respective Payment and Performance Bond until February 14, 2005, almost two (2) months after the Contract was entered into and work commenced on the Hialeah Project. (R. 1298-1299) (T. 175) The General Contractor merely recites to one terse out-of-context excerpt from Subcontractor's Affidavit in an effort to circumvent the fact that it had knowledge of Subcontractor's licensure status.

The General Contractor's Statement of Facts is inaccurate, and fails to include the proper citation to the record in an apparent effort to underscore its intentional retention of an unlicensed contractor. This attempt to shift the blame is totally irrelevant to this case, and is not the purpose of providing a statement of facts in an Answer Brief. The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor, but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute. *See Sabawi v. Carpentier*, 767 So.2d 585, 586 (Fla. 5th DCA 2000). When a party attempts to fortify the record on appeal by matters outside of the record, it is evidence of weakness of position, and has a tendency to obscure the

presentation of matters which might have merit. *Cohen v. Cohen*, 30 So.2d 307, 309 (Fla. 1947).

SUMMARY OF THE ARGUMENT

The issue on appeal is whether a General Contractor can recover the equivalent of a default judgment against a Subcontractor and its Surety despite the General Contractor's knowledge of the Subcontractor not being licensed.

The General Contractor's Statement of Facts is inaccurate, ignores the long standing rule that this Court is required to infer all facts in the light most favorable to the non-moving party and fails to include the proper citations to the record in an apparent effort to underscore its intentional retention of an unlicensed contractor. This attempt to shift the blame is totally irrelevant to this case, and is not the purpose of providing a statement of facts in an Answer Brief.

A general contractor's knowledge that the subcontractor was not licensed creates a defense on behalf of an unlicensed subcontractor and its surety as to a general contractor's claims. The 2003 amendment to Florida Statute § 489.128 does not change this analysis; since the amendment was based mainly on concerns that non-licensure of one subcontractor could invalidate an entire prime contract, and did not affect the defense of "*in pari delicto*." A plain reading of the amendment to Florida Statute § 489.128 requires that the fact that one party is unlicensed does not automatically void a contract as to any other parties, as only

the unlicensed party cannot enforce its contract rights. Moreover a surety cannot rescind its bond obligation solely because its principal is unlicensed. However, there is no clear, express change to abolish the common law defense of "*in pari delicto*" to the same extent as other defenses.

Because licensing statutes are intended to protect the general public from persons who are not qualified to render a professional service rather than to protect those who are qualified to render such professional service, an unlicensed member of a profession or trade has been permitted recovery for services rendered to a licensed member of the same profession or trade who are dealing at arm's length with each other. Since the General Contractor and Subcontractor were in the same profession, the Subcontractor should have been allowed to pursue recovery for its services.

The Decision's affirmance of the Trial Court's erroneous construction of Florida Statute § 489.128 completely precluded the Surety's right to its contractual defenses, leaving it with the equivalent of a default judgment against it. This conflicts with the traditional rule in Florida that a surety cannot be called on to perform, or pay damages for the non-performance of an illegal contract.

If this Court were to affirm the Decision, it could encourage a general contractor to knowingly contract with unlicensed subcontractors, receive compensation from the owner for the subcontractor's work, then refuse to pay the

subcontractor and recover a default judgment against the subcontractor and its surety. A surety's loss of these vested rights to defend these claims could expose the surety industry to abuse by obligees who could secure contracts with unlicensed contractors to take advantage of a surety's obligations and its lack of defenses to a bond claim. This sort of application cannot be harmonized with decades of public policy and would unconstitutionally restrict a subcontractor and a surety's right of access to the courts, without a legitimate reason for doing so.

ARGUMENT

I.
THE FIFTH DISTRICT'S INTERPRETATION OF FLORIDA STATUTE § 489.128 IMPROPERLY PRECLUDES AN UNLICENSED CONTRACTOR FROM ENFORCING OR DEFENDING A BREACH OF CONTRACT CLAIM UNDER ANY CIRCUMSTANCES

A. "*In Pari Delicto*" Still Applies To Florida Statute §489.128

The General Contractor cannot contradict the fact that the legislative intent for the 2003 amendment to Florida Statute § 489.128 was based on concerns from decisions that appeared to expand the penalties for non-licensure of a subcontractor to the unenforceability of an entire prime contract.

In *John B. Goodman Limited Partnership, et al. v. THF Construction Inc., f/k/a Kvaerner Construction Inc.*, No. 8:01-cv-02406-T-26 (M.D.Fla. December 18, 2001), the court held that if a subcontractor who performed work on a project was not licensed, then the prime contract would be determined to be unenforceable

because the contract was being performed in part by an unlicensed contractor. In *Kvaerner Cons., Inc. v. American Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003), the court held that a claim against an unlicensed subcontractor's surety failed because the underlying contract was unenforceable as to all parties.

Florida Statute § 489.128 was amended because of the concern that its ultimate effect could be to render every primary construction contract unenforceable when an unlicensed subcontractor, not a party to that primary contract, performed any work on the construction project, no matter how minimal. One unlicensed subcontractor could have potentially halted entire construction projects and nullified entire general construction contracts the moment it was learned or suspected that an unlicensed subcontractor was performing work on the project. If the existence of one unlicensed subcontractor had the effect of rendering unenforceable the entire prime contract, then the construction industry could be thrown into turmoil.

As a result, a plain reading of the amendment to Florida Statute § 489.128 requires that the fact that one party is unlicensed does not automatically void a contract as to any other parties, as only the unlicensed party cannot enforce its contract rights. Moreover a surety cannot rescind its bond obligation solely because its principal is unlicensed. The amendment completely addressed the concerns raised above.

However, the Fifth District agreed with the General Contractor and went one step further, finding that the common law defense of "*in pari delicto*" was abolished as to both the unlicensed party and its surety. However, the "*in pari delicto*" defense was not even an issue in *John B. Goodman Limited Partnership, et al. v. THF Construction Inc., f/k/a Kvaerner Construction Inc.*, and was not the basis for concern in the holding from *Kvaerner Cons., Inc. v. American Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003). Allowing the "*in pari delicto*" defense does not violate this legislative intent described above as it does not invalidate an entire contract, but only as to the parties that had knowledge of the non-licensure.

Strictly construing Florida Statute § 489.128, there is no clear, express change to abolish the common law defense of "*in pari delicto"* to the same extent as other defenses. Nor is the statute so repugnant to the common law that the two cannot coexist. Under this statute, the fact that a subcontractor is unlicensed does not automatically void a contract as to any other parties, and a surety cannot rescind its bond obligation solely because its principal is unlicensed. However, if there are any defenses, including "*in pari delicto*", these defenses can be asserted.

The General Contractor's argument that the "*in pari delicto*" defense was used in conjunction with the earlier version of Florida Statute § 489.128 only to pursue an "equitable remedy" makes no sense. The previous version of Florida

Statute § 489.128 provided that contracts entered into by an unlicensed contractor were unenforceable in law or in equity. However, the "*in pari delicto*" defense was still applicable. Contrary to the General Contractor's assertion, parties have used this defense even though they could not proceed in equity.

The General Contractor's attempt to distinguish the conflict created by the Decision is unavailing. In *Austin Bldg. Co. v. Rago, Ltd.*, 63 So. 3d 31, 35 n.2 (Fla. 3d DCA 2011), the court specifically cited *Castro v. Sangles*, 637 So. 2d 989 (Fla. 3d DCA 1994) with approval and held that the "*in pari delicto*" defense precluded summary judgment on a general contractor's claims against the subcontractor and its surety for damages arising out of the subcontractor's allegedly defective work on the project. It is hard to imagine a case more in conflict with the Decision, as the results are polar opposites.

Similarly, in *Boatwright Const., LLC v. Tarr*, 958 So.2d 1071 (Fla. 5th DCA 2007), the court was aware that Florida Statute § 489.128 was amended in 2003 as this amendment was cited therein. *See Boatwright*, at 1074 n.3. Even though the contract at issue in *Boatwright* was signed in 2000, the 2003 amendment was retroactive, meaning that it applied to any action in effect at the time of the amendment. The court specifically determined that there was a question of whether the owner could bring an action against the unlicensed party based on its knowledge of its non-licensure, citing *Castro v. Sangles*, 637 So.2d 989 (Fla. 3d

DCA 1994) with approval. *See Boatwright*, at 1074-75. If the court had determined that the "*in pari delicto*" defense did not apply post 2003, it would not have been included in this holding.

B. Florida Statue § 489.128 As Interpreted Opens The Door For Abuse

Instead of acknowledging that the Decision could potentially encourage unscrupulous general contractors and owners to select subcontractors with licensing difficulties, the General Contractor makes numerous allegations against the Subcontractor and Surety that are not supported by the record, and instead alleges that the result urged by the Surety would encourage sureties to bond unlicensed principals so it would never have to pay a claim. Such a result is untenable, as the "*in pari delicto*" defense would only apply if the Surety had no knowledge that the principal was unlicensed.

The General Contractor's continued attempts to prove it had no knowledge of the licensing issues misses the point of this appeal. This issue should have been determined by the trier of fact, not by summary judgment. The attempt to argue this issue before this Court is improper.

C. Florida Statute § 489.128 Should Not Apply to Members of the Same Profession

The General Contractor also fails to acknowledge that the policy behind Florida Statute § 489.128—to protect the public from shoddy workmanship—does not apply where the unlicensed party is a subcontractor hired by a general

contractor. Instead, the General Contractor attempts to factually nitpick case law that stands for the proposition that an unlicensed member of a profession or trade has been permitted recovery for services rendered to a licensed member of the same profession or trade, and argues that a general contractor is not in the same profession as a subcontractor who performs underground utility work. The General Contractor's response contradicts well settled law that licensing statutes are intended to protect the general public from persons who are not qualified to render a professional service rather than to protect those who are qualified to render such professional service. Since the General Contractor and Subcontractor were in the same profession, and not members of the "general public," the Subcontractor should have been allowed to pursue recovery for its services.

The General Contractor incorrectly asserts that the aforementioned argument has been waived; however, the Subcontractor and Surety have argued at the trial court level, at the appellate level and in their Petition before this Court that, while it is the public policy of this state that Florida Statute § 489.128 was created and amended to assist homeowners, it is doubtful that this statute was intended to benefit general contractors in contract disputes with subcontractors. (Petr.'s Br. 21) (Petr.'s Reply Br. 2, 7.)

II.
THE FIFTH DISTRICT'S INTERPRETATION OF FLORIDA STATUTE § 489.128 IMPROPERLY RESTRICTS A SURETY'S VESTED RIGHT TO ASSERT DEFENSES

A. The Surety Had Separate Defenses

The traditional rule in Florida has been that a surety cannot be called on to perform, or pay damages for the non-performance of an illegal contract. *See Powell v. Beatty*, 147 So. 845 (Fla. 1933) ("Fraud, illegality or mistake, which may rescind the contract of the principal, induces the discharge of the sureties…") The General Contractor's argument that Florida Statute § 489.128 supersedes the holding in *Powell* fails for the same reason that the "*in pari delicto*" defense has not been abolished by this statute.

Fraud or misrepresentation by the principal in inducing the surety to enter into the contract will not affect the liability of the surety unless there is knowledge or participation by the creditor. Simply stated, if both the principal and oblige know that the principal is unlicensed and conceal it from the surety, the surety's liability is extinguished. It is the knowledge element in this case which created a question of fact precluding summary judgment. However, the Decision obviated this common law defense with no explanation.

The General Contractor's Answer Brief indicates that the defense of concealment on behalf of the Surety was not pled. However, there is no question that the Surety pled the "*in pari delicto*" defense. There is no difference between

"*in pari delicto*" and the surety's defense that the General Contractor had knowledge of the Subcontractor's non-licensure. *See Kvaerner*, at 539.

The General Contractor confuses the argument regarding knowledge as to indicate that if the Surety is being "defrauded" by its principal, an ethical dilemma is created. The fraud or knowledge is not on behalf of the principal, it is on behalf of the obligee, *i.e.*, the General Contractor, based on its knowledge of the Subcontractor's non-licensure and concealment from the Surety, who did not provide the Bonds till after the Subcontract was awarded.

B. The Decision's Agreement With the Trial Court's Application of the 2003 Amendment Precluded the Surety from Asserting any Contractual Defenses

The Decision's affirmance of the trial court's erroneous construction of Florida Statute § 489.128 completely precluded the Surety's right to its defenses, leaving it with the equivalent of a default judgment against it. The General Contractor's argument that the Surety and Subcontractor asserted all of its defenses at trial is incorrect. The Subcontractor and Surety asserted numerous affirmative defenses, including, but not limited to breach of contract, setoff, and that the Contract was modified. (R. 171-174, 214-230, 257-265, 472-476, 817-819) The Trial Court Order granting Summary Judgment precluded the Subcontractor and Surety from raising **any** contractual defenses (R. 878-880), foreclosing the right to assert these defenses at trial. The Subcontractor and Surety were unable to allege

(*inter alia*) that the $182,500.00 owed for work on the Hialeah Project that had been paid to the General Contractor should be considered a set off to the damage claims. Such an application restricts the Surety's access to the courts, which would be unconstitutional.

Instead of responding to this constitutional argument, the General Contractor alleges that the Surety's argument that its right to access to the courts is restricted does not apply because it had no affirmative claim. However, this Court has held that access to courts protects rights to assert claims **and defenses**. *State ex rel. Pittman v. Stanjeski*, 562 So. 2d 673, 676 (Fla. 1990). Indeed, the Decision rejects the very notion that a surety should have any affirmative defenses against a general contractor at all. It is difficult to conceive of an interpretation of a statute that more clearly violates access to courts.

CONCLUSION

In light of the foregoing, Petitioners, EARTH TRADES, INC. and FIRST SEALORD SURETY, INC., respectfully request that this Court reverse the Decision of the Fifth District Court of Appeal, find that an unlicensed subcontractor can enforce and defend its claims against a general contractor, especially when the general contractor knew of the non-licensure, allow the subcontractor's surety to defend its bond claims, and determine that the "*ín pari delicto*" defense is not barred by Florida Statute § 489.128.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed by U. S. Mail to KIMBERLY A. ASHBY, ESQ., P.O. Box 231, Orlando, FL 32802-0231, Atty for Respondent, T&G Corporation, d/b/a T&G Constructors, this 6th day of January, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that he has complied with the format requirements of the Rules of Appellate Procedure. This Reply Brief on the Merits was prepared using Times New Roman 14 point font.

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