Developers Beware: A Contractor May Be Held to Be Duly Licensed Even If the Contractor's Qualifying Agent Does Not Approve the Permit or Supervise the Work!

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Although a general contractor's construction of a project, with inadequate supervision and a fraudulently issued permit, may get the contractor in hot water with the Construction Industry Licensing Board, it will not subject the contractor to treble damages and attorneys' fees if it is sued for negligent unlicensed construction of the project. At least that is how the First District Court of Appeal sees it. In *Taylor Morrison Services, Inc. v. Ecos*, 2015 WL 3407929 (Fla. 1st DCA May 28, 2015), a general contractor entered into a contract with two people to build a house. On the effective date of the contract, the Licensing Board listed four contractors as "qualifying agents" for the general contractor. A "qualifying agent" is a person qualified by the Licensing Board for the contractor who "has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit."[i] A contractor "is unlicensed if [the contractor] does not have a primary or secondary qualifying agent . . . concerning the scope of work to be performed under the contract," but "only if the contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein."[ii]

In *Taylor Morrison Services*, one of the general contractor's qualifying agents, Lisa Steiner, had resigned from her employment with the general contractor a few weeks before the date of the contract. Another qualifying agent maintained a contractor's license and remained employed by the general contractor throughout the project, although he apparently did not participate in the project. Several months after the contract was signed, someone applied for a building permit for the project on behalf of the general contractor. The permit application was purportedly signed by Steiner as the "licensed contractor" on the project.

When the project was completed, the house contained numerous construction defects. The homeowners sued the general contractor for negligence by an unlicensed contractor and sought three times the actual $200,000 in damages, plus attorneys' fees, under Section 768.0425, Florida Statutes.[iii] Steiner testified before the trial court that she had no involvement with the project, had not authorized the general contractor to pull the permit using her license and doubted that she had even signed the permit application. It was undisputed that Steiner did not supervise construction of the project and the trial court ultimately concluded that no licensed contractor had actually done so.

The trial court ruled that the general contractor acted as an unlicensed contractor when it built the home because (1) an unknown person obtained the building permit using Steiner's license without her permission and (2) the general contractor built the house without the supervision of the licensed contractor listed on the building permit or any other licensed contractor. The trial court reasoned the licensing statute, which makes a qualifying agent responsible for supervising construction on a project for which he or she has pulled a permit, requires a comprehensive analysis for each project. Under this analysis, if a licensed person does not actually obtain the permit for a particular project and adequately supervise the work, the contractor does not have a qualifying agent and is, therefore, not

licensed. As a result, the trial court deemed the general contractor in *Taylor Morrison Services* to be unlicensed and entered judgment for treble damages and attorneys' fees under Section 768.0425.

The *Taylor Morrison Services* appellate court reversed, reasoning that the requirement that a contractor have a qualifying agent concerning the scope of work to be performed under the contract refers to the qualifying agent's type of licensure, not to the agent's actual pulling of the permit or performance on the job. Various provisions of the licensing statute convinced the appellate court that a person can be a qualifying agent for a contractor in a "general sense," as opposed to in relation to a specific project. As a result, the *Taylor Morrison Services* court held that, to be licensed, Section 489.128 requires a contractor to have at its disposal a person who is recognized as a qualifying agent and who is licensed to perform the work, as of the effective date of the contract. Under the plain language of the statute, whether that person ultimately obtains the permit or supervises construction on the project is irrelevant to whether the contractor is licensed.[iv] Therefore, if a contractor has a satisfactory qualifying agent at the time of the contract, the contractor cannot be held liable for negligent unlicensed contracting under Section 768.0425, even if its qualifying agent fails to pull the permit and fails to supervise construction.

This case can easily be applied to the issue of unenforceability of contracts entered into by unlicensed contractors. Section 489.128 also makes contracts with unlicensed contractors unenforceable by the contractor. Unlicensed contractors cannot sue for breach of contract and do not have lien rights. Although contract enforceability was not at issue in *Taylor Morrison Services*, the same reasoning would probably apply. If a contractor has at its disposal, when it enters into a construction contract, a person who is recognized by the Licensing Board as a qualifying agent for the type of work contracted, the contractor will be able to enforce the contract. And this should be the case, even if that person does not approve the building permit or supervise the project. Thus, developers be forewarned, you will probably not be able to use the punitive measures of Section 489.128 to defeat a non-payment claim by a contractor where the contractor complies with the licensing requirements at the time you sign the contract, irrespective of whether the contractor's qualifying agent satisfactorily oversees construction.

Please address any questions with regard to the implications of the *Taylor Morrison Services* decision to the following Roetzel Construction Law attorneys.

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[i] Section 489.105, Florida Statutes.
[ii] Section 489.128, Florida Statutes.
[iii] Section 768.0425, Florida Statutes, provides that any person, who contracts for construction services with an unlicensed contractor and who sustains damages as a result of the contractor's negligence, has a claim for three times their actual damages, plus costs and attorneys' fees.
[iv] The *Taylor Morrison Services* court noted this does not insulate the contractor from sanctions by the Licensing Board for misconduct in permitting or construction supervision, such as fines, restitution and license revocation, but these reassurances certainly did not conciliate the homeowners in their cause.