IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

TAYLOR MORRISON SERVICES, INC., f/k/a MORRISON HOMES, INC., a foreign profit corporation,

Appellant,

Case No. 1D14-2663

vs.

CAROL ECOS and SUSAN BESSING,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT IN
AND FOR DUVAL COUNTY, FLORIDA

APPELLANT'S AMENDED REPLY BRIEF

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INTRODUCTION

In their Answer Brief, Appellees Carol Ecos and Susan Bessing continue to do what they did in the trial court—ignore the plain language of Florida's unlicensed contracting statutes. As shown in the Initial Brief, those statutes provide that a business entity is licensed if it has a qualifying agent for the scope of the work to be performed on the effective date of the construction contract. IB 16-20.

Unable to refute that Taylor Morrison was licensed under this statutory test and therefore liable for only actual (but not treble) damages, Ecos and Bessing again urge that additional licensing requirements not found in the statutes should be imposed. They argue that even if a construction company has a qualifying agent on the effective date of the contract, that company is still "unlicensed" and subject to treble damages, the voiding of its contract, and attorneys' fees unless that same qualifying agent also (1) gets the building permit and (2) directly supervises construction at all times. Under Ecos and Bessing's theory, a construction company can suddenly become *un*licensed at any time during a project if it fails to meet all permitting or supervision requirements, or fails to adhere to any of Chapter 489's other provisions for licensed contractors.

Ecco and Bessing's strained construction conflicts with the plain language of the statutes. In addition to adding new requirements, it completely ignores section 489.128(1)(c), Florida Statutes (2003). That section states that a contractor is

unlicensed *only if* the contractor is unlicensed *on the date of the contract*. Ecos and Bessing never cite that provision, presumably because it is dispositive of this appeal. Taylor Morrison was indisputably licensed on the contract date.

As explained in the Initial Brief, the new licensing requirements Ecos and Bessing want to impose are also utterly unworkable. Because of the number of licensed contractors in Florida and the demand for affordable housing, it is often impossible for the qualifying agent who gets a permit to personally and directly supervise all construction. Ecos and Bessing's newly-minted requirements could transform virtually any construction defect case into an unlicensed contracting case in which a plaintiff could win treble damages and attorneys' fees based on almost any problem during construction. This is inconsistent with Florida law, which already provides expansive protections for homeowners. It is also detrimental to Florida's construction industry and in turn, to the state as a whole.

ARGUMENT

I. Taylor Morrison was a licensed contractor under the plain language of the statutes.

A. Ecos and Bessing ignore the critical portions of the statutes that unambiguously mandate when and how licensure is determined.

The sole issue on appeal is whether Taylor Morrison is liable not just for the compensatory damages it has already paid Ecos and Bessing, but also for the penalties of treble damages and attorneys' fees that the legislature has reserved for

unlicensed contractors. Those penalties are governed by sections 489.128 and 768.0425, Florida Statutes (2003).

Under section 768.0425(2), one who contracts for construction is entitled to "three times the actual compensatory damages" sustained due to a contractor's negligence or misfeasance, as well as attorneys' fees and costs, if the contractor is not "certified as a contractor by the state." Because the statutory treble damages are punitive, the language of section 768.0425 must be narrowly construed. Home Constr. Mgmt., LLC v. Comet, Inc., 125 So. 3d 221, 222 (Fla. 4th DCA 2013).

Ecos and Bessing never argued before the trial court—and the trial court never found—that Taylor Morrison was not "certified as a contractor by the state." That is not surprising, as the evidence undisputedly showed Taylor Morrison *was* certified. See § 489.119(2), Fla. Stat. (2003) (providing procedure for business organization to obtain certificate of authority)[1]; R27:5260 (affidavit showing Taylor Morrison was issued a certificate as of January 17, 2002). Under section 768.0425(2), Ecos and Bessing were not entitled to treble damages.

Before the trial court, all of Ecos and Bessing's arguments centered on section 489.128. Section 489.128(1)(a) defines unlicensed contracting and penalizes unlicensed contractors by rendering their contracts unenforceable. It

[1] This statute was amended in 2009 to shift the responsibility for obtaining the certificate from the business organization to the individual. See ch. 2009-195, § 31, Laws of Fla.

states that a business organization is unlicensed if it does not have "a primary or secondary qualifying agent in accordance with this part concerning the scope of the work to be performed under the contract." And section 489.128(1)(c) states the determinative date for assessing a contractor's licensing status: A contractor is unlicensed "*only if*" it was unlicensed on the effective date of the contract. § 489.128(1)(c) (emphasis added).

As discussed in the Initial Brief, section 489.128 (much like section 768.0425(2)) provides a bright-line rule. If a business organization has a qualifying agent certified to perform the work on the date of the contract, it is licensed. It is liable for compensatory damages but it is not penalized as an unlicensed contractor. The legislature unambiguously emphasized this was its intent when it used the words "only if" in section 489.128(1)(c). The date of the contract—which was stipulated in this case—is the only date that matters.

That the legislature meant what the plain language of the statute says is also confirmed by the legislative history of section 489.128. In 2003—the year before the contract in this case was entered into—section 489.128 was amended. The legislature stated that one reason it was amending section 489.128 was to "clarify[] the . . . timing of the licensure for purposes of determining the enforceability of a construction contract." 2003 Fla. Sess. Law Serv. Ch. 2003-257 (H.B. 1277).

Prior to the 2003 amendment, section 489.128 stated that construction

contracts were unenforceable if they were "performed in full or in part by any contractor who fails to obtain or maintain a license in accordance with this part." § 489.128(1), Fla. Stat. (2000). The 2003 amendment removed that language:

> 489.128. Contracts **entered into ~~performed~~by** unlicensed contractors unenforceable
>
> **(1)** As a matter of public policy, contracts entered into on or after October 1, 1990**, ~~and performed in full or in part~~** by **an unlicensed** ~~any~~ contractor **~~who fails to obtain or maintain a license in accordance with this part~~** shall be unenforceable in law or in equity **by the unlicensed contractor**.

2003 Fla. Sess. Law Serv. Ch. 2003-257 (H.B. 1277). The same amendment added subsections 489.128(1)(a), which makes licensing of a business organization contingent on having a qualifying agent, and 489.128(1)(c), which states that a contractor is unlicensed "only if" it is unlicensed on the contract date.

As noted, Ecos and Bessing scrupulously refrain from mentioning section 489.128(1)(c) or the critical role the contract date plays in the statutory scheme. And Ecos and Bessing do not argue Taylor Morrison did not have a qualifying agent on the contract date, because it did. R27:5260. So rather than directly challenge the contract-date rule, Ecos and Bessing try to avoid the issue by pushing the contract date back six days from the stipulated date of February 13, 2004, to February 7, 2004. AB 4. With that, Ecos and Bessing argue that Douglas Guy, the certified and licensed contractor responsible for the construction of their home,

was not listed as a qualifying agent for Taylor Morrison by the Department of Business and Professional Regulation (DBPR) until February 9, 2004—two days after the new contract date Ecos and Bessing invented. R27:5260.

Ecos and Bessing's manipulation of the contract date to fit their theory fails for several reasons. First, the parties entered into a binding stipulation before trial that set the date of the contract as February 13, 2004. R24:4848; Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1, 4 (Fla. 1971) (stipulations are binding on parties and court). Second, the contract states it "is not valid unless signed by" an "authorized representative" of Taylor Morrison. R26:5243. The authorized representative, Mr. Guy, signed the contract on the stipulated date, February 13. R26:5239. And third, even if the contract date were February 7, DBPR records show that Taylor Morrison had at least two qualifying agents other than Mr. Guy who were licensed for residential construction on that date. R27:5260.

The undisputed facts show Taylor Morrison had multiple qualifying agents—including Mr. Guy—licensed to perform residential construction on February 13, 2004, the contract date. Taylor Morrison was a licensed contractor.

B. Ecos and Bessing's argument that Taylor Morrison was subject to treble damages under section 768.0425 because it was not "certified" was never argued below and is defeated by the undisputed facts.

Though they never did so in the trial court, Ecos and Bessing now claim that Taylor Morrison was unlicensed and subject to treble damages under section

768.0425(2) because it was not "certified." Ecos and Bessing assert that the only relevant inquiry under section 768.0425 was "whether or not [Taylor Morrison] was 'certified as a contractor by the state.'" They then proclaim "the trial court properly found [Taylor Morrison] was not" certified. AB 31. In truth, Ecos and Bessing *never asserted* that Taylor Morrison was not certified as a contractor. And the trial court made no such finding. R26:5238. It never even mentioned certification in the final judgment. R26:5238-38.

Ecos and Bessing's newfound reliance on section 768.0425(2) supports reversal, not affirmance. Section 768.0425(2) provides for treble damages and attorneys' fees only if the contractor is not "*certified* as a contractor by the state" (emphasis added). In 2004, when the Ecos and Bessing contract was signed and their home constructed, section 489.119(2) provided that a "business organization must apply for a certificate of authority through a qualifying agent."[2] Taylor Morrison presented evidence that it complied with this requirement and was therefore certified at all relevant times. R27:5260 (affidavit averring that Taylor Morrison was "issued [a] qualified business certificate" on January 17, 2002, which expired on August 31, 2011). Ecos and Bessing never disputed that evidence or argued that Taylor Morrison was not certified. The unrefuted evidence

[2] As noted, this statute was amended in 2009. See ch. 2009-195, § 31, Laws of Fla.

shows it was. There is no statutory basis to award Ecos and Bessing treble damages or attorneys' fees under section 768.0425(2).

C. Ecos and Bessing's argument that Taylor Morrison was unlicensed under section 489.128 hinges on facts involving permitting and supervision that are irrelevant to the licensing requirements in that section.

The argument Ecos and Bessing actually made to the trial court—and the one the trial court adopted—was that Taylor Morrison was unlicensed under section 489.128. Because it defeats their argument, Ecos and Bessing attempt to sidestep the controlling provision in section 489.128(c) that holds that licensure is determined on the contract date. They rely instead on the part of section 489.128(1)(a) that states a business organization is unlicensed if it does not have a qualifying agent "in accordance with this part." Ecos and Bessing argue that a business cannot have a qualifying agent "in accordance with this part" unless the qualifying agent "meet[s] all of the requirements of sections 489.101-.146, which constitutes 'Part I' of chapter 489" at all phases of the construction project. AB 20. Stacking these premises, Ecos and Bessing conclude that any contractor whose qualifying agent does not personally obtain the building permit, directly supervise and manage the construction, and comply with all other provisions in these sections is unlicensed (or more accurately, becomes unlicensed), *even if* that contractor was licensed on the date of the contract. AB 20-24.

Ecos and Bessing's convoluted argument is not the law. Part I of chapter 489 covers many aspects of contracting, some of which are ministerial. For example, section 489.124 requires a certificate holder to notify DBPR of his or her current address and phone number. Ecos and Bessing cannot credibly argue that a qualified contractor who forgets to notify DBPR of a change in address suddenly becomes unlicensed. But that result is precisely what their argument permits.

To make their theory more palatable, Ecos and Bessing have picked, cafeteria-style, those requirements of part I (i.e., supervision and permitting) that fit their argument. But Ecos and Bessing's argument remains fatally flawed because to reach their conclusion, one must consider events that occurred *after* the contract date. This cannot be squared with the legislature's clear declaration that the *only* date that matters for licensure is the contract date.

To divert attention from the plain language and mandate of the statutes, Ecos and Bessing focus on irrelevancies and exaggerations. For example, they argue that Marie Lisa Steiner's signature was "forged," and that Ms. Steiner "swore" that she did not sign the application. AB 6. To make this argument, Ecos and Bessing must rely on Ms. Steiner's pre-trial affidavit and ignore her contrary testimony at trial. At trial, Ms. Steiner admitted that she signed blank permit applications before they were completed (an industry standard), and the signature could be hers. R33:450-55.

Ecos and Bessing also argue that Douglas Guy "did not have any responsibility for supervising any construction." AB 8-9. This assertion is not true to the record either. To make it, Ecos and Bessing pluck from context specific questions regarding whether Mr. Guy "directly" supervised the construction. AB 8-9. They ignore Mr. Guy's testimony that while he did not *directly* supervise all aspects of construction—much of which was performed by subcontractors—he did supervise Taylor Morrison's onsite employees and make weekly site visits to check the status and quality of the construction. R4:687-88, 717; R25:4990-91.

And Ecos and Bessing's contention that "direct" supervision is required is incorrect. Chapter 489 does not require a qualifying agent to "directly supervise" all construction. Instead, it requires only that he or she be *responsible* for the construction. See § 489.105(4), Fla. Stat. (2003).[3] Mr. Guy undisputedly testified he was responsible for the Ecos and Bessing home. R25:5010. That is all the statute requires.

In any event and as discussed above, Ecos and Bessing's complaints about permitting and construction problems are utterly immaterial to the question of

[3] Had the legislature intended to require "direct, onsite supervision" as Ecos and Bessing suggest, it knew how to do so. In section 489.103(7), the legislature made clear that a *homeowner* who is not licensed may act as his own contractor if he or she provides "direct, onsite supervision." Because that language is excluded from section 489.105(4), no such provision can be read into section 489.105(4). See Florida Carry, Inc. v. Univ. of N. Florida, 133 So. 3d 966, 971 (Fla. 1st DCA 2013) ("Where the legislature includes wording in one section of a statute and not in another, it is presumed to have been intentionally excluded.") (citations omitted).

whether Taylor Morrison was an unlicensed contractor in this case. Taylor Morrison was licensed, but that does not mean it could act with impunity. As the Initial Brief pointed out, the statutes provide that licensed contractors are subject to penalties and sanctions for construction violations, including restitution, fines, and license revocation. And Taylor Morrison has not been "cavalier" about the problems in this case. To the contrary, it admitted its negligence and paid Ecos and Bessing over half the purchase price of the home for repairs. R24:4848-49. But the fact that there were mistakes made in the construction process does not mean that Taylor Morrison was not a licensed contractor at the critical time, when the agreement to build the house was reached.

D. Ecos and Bessing's arguments for affirmance based on the case law and public policy are mistaken, as both support reversal.

In an effort to support their overbroad reading of Florida law, Ecos and Bessing rely on Lake Eola Builders, LLC v. Metro. at Lake Eola, LLC, 416 F. Supp. 2d 1316 (M.D. Fla. 2006), and Boatwright Construction, LLC v. Tarr, 958 So. 2d 1071 (Fla. 5th DCA 2007). That reliance is misplaced. Both cases support reversal, not affirmance.

The Lake Eola court correctly made the same point Taylor Morrison makes here—that section 489.128 "provides that the contractor's licensing status is to be assessed as of the effective date of the contract." Id. at 1319. For that reason, the Lake Eola court noted that the critical determination was "whether [the contractor]

had a primary or secondary qualifying agent in accordance with Chapter 489 as of [the contract] date." Id. Applying the Lake Eola and statutory test for licensing to the facts of this case, it cannot be disputed that Taylor Morrison was licensed. It had a primary qualifying agent on the date of the Ecos and Bessing contract.

Ecos and Bessing's reliance on the Fifth District's opinion in Boatwright also misses the mark. In Boatwright as in Lake Eola, the court recognized the critical inquiry was whether the business entity had a qualifying agent on the contract date. Because the business organization *did not even attempt* to get a qualifying agent until after that date, the Fifth District held it was unlicensed and could not enforce its construction contract. 958 So. 2d at 1072. The Fifth District discussed supervision, but only as it related to a separate contract between the business organization and the licensed contractor. Supervision (or lack thereof) was not part of the court's licensed-contractor analysis. See id. at 1073. Nor could it be under the plain language of section 489.128.

Ecos and Bessing's public policy arguments also fail. It is true that the legislature enacted chapter 489 "in the interest of the public health, safety, and welfare to regulate the construction industry." To that end, the statutes in this chapter regulate the industry in two distinct ways. First, the chapter has licensing requirements for contractors and imposes a number of obligations, prohibitions, and penalties for *licensed* contractors. See §§ 489.127, .129, Fla. Stat. (2003).

Second, the chapter separately defines and more severely punishes *unlicensed* contracting—the attempt to engage in contracting without complying with licensing requirements. See § 489.128.

Nothing in chapter 489 or the policy underlying it supports what Ecos and Bessing persuaded the trial court to do here—allow any construction violation to serve as support for an after-the-fact, retroactive finding of unlicensed contracting. Even in Alles v. Dep't of Prof'l Regulation, 423 So. 2d 624 (Fla. 5th DCA 1982), a decision Ecos and Bessing quote at length, the Fifth District declined to hold that a contractor who completely failed to supervise a project was unlicensed. Instead, it followed the law and affirmed the Construction Industry Licensing Board's *revocation* of his license. Id. at 627; see also Hunt v. Dep't of Prof'l Reg., 444 So. 2d 997 (Fla. 1st DCA 1983). IB 23-24.

The unlicensed contractor ruling in this case conflicts with Florida law. The judgment should be reversed.

II. The trial court erred when it ruled that Taylor Morrison was engaged in "contracting."

After spending the first section of their answer brief discussing section 489.128, the statute that defines unlicensed contracting, Ecos and Bessing make the remarkable assertion that "[u]nlicensed contracting is not a defined term in chapter 489." AB 30. Even more puzzling, Ecos and Bessing go on to state that "[n]or is the term 'contracting' used in chapter 489." Id.

Ecos and Bessing are flat wrong. Section 489.105(6) specifically defines and gives examples of contracting. It also states what is *not* contracting:

> [T]he term "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest . . . , if the services of a qualified contractor certified or registered pursuant to the requirements of this chapter have been or will be retained for the purpose of constructing or completing such residences.

Ecos and Bessing argue that because Taylor Morrison contracted with them to sell the home and then contracted with subcontractors to build it, Taylor Morrison was a contractor. AB 34. This argument ignores the language of the statute and misses the point. Section 489.105(6) excludes from the definition of contracting the sale of finished homes on lots owned by the developer. That is what occurred here. The only requirement to come within the statute's exclusion is that the seller of the completed residence must "*retain the services* of a qualified contractor certified or registered pursuant to the requirements of this chapter" for purposes of the construction. Taylor Morrison did exactly what was required when it retained the services of Mr. Guy, a certified contractor.

Contrary to Ecos and Bessing's argument, Taylor Morrison did not have to enter into a separate construction contract with Mr. Guy, its own employee, for the exception to apply. Ecos and Bessing cite no law for this assertion. There is none. Section 489.105(6) requires only that the developer "retain" a "certified" or

"registered" contractor. That is what Taylor Morrison did. A "certified contractor" possesses "a certificate of competency issued by the department." § 489.105(8). Mr. Guy was undisputedly a certified contractor. R27:5260. It makes no difference whether he was retained by Taylor Morrison via a separate contract or as its employee.

Taylor Morrison retained Mr. Guy, a certified contractor, to construct the Ecos and Bessing home. Until the home was completed, Taylor Morrison owned the lot on which the house was built. Ecos and Bessing chose to purchase the completed home. R25:4996-97. Under the statute, Taylor Morrison did not engage in "contracting," which means it did not have to be otherwise licensed as a contractor for the purposes of selling Ecos and Bessing their completed home. The judgment should be reversed.

CONCLUSION

Undisputed evidence showed that Taylor Morrison was a licensed contractor under sections 489.128(1) and 768.0425(2). And although Taylor Morrison was licensed, it was not engaged in contracting when it sold Ecos and Bessing a completed home. The final judgment that ruled Taylor Morrison was unlicensed should be reversed.

Respectfully submitted,

s/ J. Carlton Mitchell
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2014, the Appellant's Amended Reply Brief was e-Filed with the Court's eDCA, which will send a copy to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY that Appellant's Amended Reply Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2). Appellant's Amended Reply Brief has been prepared using Times New Roman, 14-point font.

s/ J. Carlton Mitchell
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