The Unlicensed Contractor

Challengers Do Not Sleep On Your Rights Or They Can Be Waived

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Cases have been published and articles have been written warning that unlicensed contractors, even those who performed perfectly and have not been paid, cannot enforce their rights under contract law, lien law, or in equity pursuant to Fla. Stat. §489.128 (2024). This applies not only to the contractor but also to business entities.[1] However, the mechanics for bringing a licensure challenge after a contractor has initiated a lawsuit against the owner has not been the focus of much literature, and a belated discovery that a contractor is unlicensed may bar presentation of such evidence in court.

Why do we have this law? Fla. Stat. §489.128 (2024), a bright line rule, invalidates contracts[2] not executed by a licensed contractor as against public policy. The legislative history of the statute suggests protection was deemed necessary to address the problems consumers and the public face due to shoddy work caused by unlicensed, unqualified, and incompetent contractors.[3] Pursuant to the statute, damages for such activity are left to the trial court or the jury to determine. Some in the construction industry suggest the law is too broad because it unfairly penalizes the licensed contractor who is tardy in renewing his or her license and is, therefore, technically unlicensed at the time of entering into the contract.[4] This contractor does not have lien rights, bond rights or any rights under the purported "contract," and the infirmity cannot be fixed retroactively. Others say the law does not go far enough because an unlicensed contractor who gets "caught" should be subject to treble damages, regardless of whether the unlicensed contractor was negligent in performing the work,[5] or should be required to disgorge all fees.

Can anyone enforce the contract entered into by an unlicensed contractor? While the unlicensed contractor cannot enforce its rights under the contract, the opposing party is entitled to get the benefit of the contract and can enforce its rights against the unlicensed contractor.[6] Likewise, if the non-offending party makes a claim on the unlicensed contractor's bond, the surety is entitled to assert defenses to the opposing party's claims, but the surety cannot assert a defense that the bond contract is unenforceable because the contractor was not licensed.[7]

Seems like a slam-dunk for the non-offending party against the contractor, but how does that party inform the court of the licensure issue? The Fifth District Court of Appeals, in *Vacation Beach, Inc. v. Charles Boyd Const.*, Inc.[8] held that, "contracts transgressing public policy, including contracts sought to be enforced by an unlicensed contractor in violation of the [Fla. Stat. § 489.128] are considered to be illegal."[9] The courts in Florida, and other jurisdictions across the country, use the terms "illegal" and "unenforceable" interchangeably.[10] Accordingly, for a defendant to properly raise the licensure issue, the defendant must plead that the contract entered into is illegal or unenforceable as an affirmative defense.

Can the licensure issue be waived? Although the Florida Supreme Court and the courts of appeals have not ruled in the context of licensure, the Florida Supreme Court, in *Rotemi Realty, Inc. v. Act Realty Co., Inc.*[11], has recognized that the "defense of illegality must be pleaded" particularly when a "contract is valid on its face."[12] Florida courts of appeals have also squarely held that illegality or unenforceability of a contract is an affirmative defense which must be pled by a defending party; otherwise, the affirmative defense is waived as a matter of law.[13] Faced with a similar question of law, unenforceability of a broker's contract where a real estate license was required, jurisdictions such as Alabama, Maryland, Virginia, and the District of Columbia, all ruled that unenforceability or illegality of contract based on a licensure issue must be pled as an affirmative defense or the defense is waived.[14]

Are construction contracts valid on their face? For over a century, construction practitioners have considered construction contracts, especially those on AIA forms, to be the industry standard in documenting owner/contractor and contractor/subcontractor relationships.[15] In the last twenty years a newer set of forms, ConsensusDocs, have also gained common application.[16] There is even case law that refers to the AIA contracts as the industry standard.[17] Accordingly, a court may deem the form contract valid on its face and fail to raise a missed affirmative defense *sua sponte*.

Do the amendments to Florida Rules of Civil Procedure impact late discovery of a licensure issue? The right to challenge a contractor's status can be lost, especially in light of the new rules of civil procedure. Per the new rules, deadlines

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in a case management order ("CMO"), which include motions to amend, must be strictly enforced, unless changed by court order. Parties may submit an agreed order to extend a deadline if the extension does not affect the ability to comply with the remaining dates in the CMO. If extending a single deadline may affect a subsequent deadline in the CMO, the parties must seek an amendment of the CMO, rather than submit a motion for extension of an individual deadline.[18] Since licensing information about contractors and companies qualified by contractors is public information and readily available, a court may not be easily persuaded that delayed discovery of licensure information constitutes discovery of "new" information, but rather indicative of a lack of diligence by the non-offending party.

Where can licensing information be found? Licensing information is available online[19] and through the Department of Business and Professional Regulation ("DBPR"). One can verify a license, or lack thereof, by searching: (1) the name of the contractor, (2) the name of the entity or (3) the license number — as a check for validity or current status.

In short, construction litigators should have a bright neon blinking sign, or at the very least a sticky note taped to the side of the computer screen, reminding them to check the DBPR's website for licensure status at intake of any contract dispute matter. For those on the transactional side of the practice — they too should invest in this blinking sign. All the hard work of negotiating the arduous indemnity provision will be for naught if your client is not properly licensed.


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Andrew Foti *focuses his practice in all aspects of construction law and litigation. He represents contractors, subcontractors, architects, engineers, and property owners in private development and public construction projects. Andrew also has experience with matters involving the construction of hotels, commercial buildings, shopping centers, industrial facilities, transportation structures, apartments, airports, educational institutions, and more.*

His transactional practice entails the drafting and negotiation of contracts and project management agreements. His dispute resolution practice includes mediation, arbitration and litigation in federal and state courts, as well as before administrative agencies.

Endnotes

1 See Fla. Stat. §489.128(1)(a)(2024) ("A business organization is unlicensed if the business organization 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.").

2 Beyond the scope of this article is an analysis of whether portions of a contract pertaining to work that may be performed without a license can be severed (and therefore enforceable) from those portions that must be performed by a licensed contractor and are therefore unenforceable without a license. Based on the principles of severability, viable arguments exist to bifurcate certain portions of a contract that do not require a license and allow affirmative and defensive claims by the otherwise unlicensed contractor. See *Incident365 Florida, LLC v. Ocean Pointe V Condo. Ass'n, Inc.*, 3D22-2239, 2024 WL 4364213 (Fla. 3d DCA Oct. 2, 2024); see also *Full Circle Dairy, LLC v. McKinney*, 467 F. Supp. 2d 1343 (M.D. Fla. 2006) (where work can be attributable to licensed and unlicensed work, a court can order the trier-of-fact to separate unlicensed and licensed work to award damages).

3 See e.g. *Kvaerner Const., Inc. v. Am. Safety Cas. Ins. Co.*, 847 So. 2d 534, 536 (Fla. 5th DCA 2003); *Poole & Kent Co. v. Gusi Erickson Const. Co.*, 759 So. 2d 2, 5 (Fla. 2d DCA 1999).

4 See Fla. Stat. §489.128 (1)(c)(2024) ("For purposes of this section, a contractor shall be considered unlicensed 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. If the contract does not establish such a date, the contractor shall be considered unlicensed only if the contractor was unlicensed on the first date upon which the contractor provided labor, services, or materials under the contract.").

5 Currently, the law requires proof of negligence in order to recover treble damages. See Fla. Stat. §768.0425(2)(2024) ("In any action against a contractor for injuries sustained resulting from the contractor's negligence, malfeasance, or misfeasance, the consumer shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorney's fees if the contractor is neither certified as a contractor by the state nor licensed as a contractor pursuant to the laws of the municipality or county within which she or he is conducting business.").

6 See Fla. Stat. § 489.128 (3) (2024) ("This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section shall not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section".)

7 See endnote 5.

8 *Vacation Beach, Inc. v. Charles Boyd Const.*, Inc., 906 So. 2d 374 (Fla. 5th DCA 2005).

9 *Id.* at 377.

10 See 11 Fla. Jur 2d Contracts § 119 (noting that courts consider unenforceable contracts under § 489.128, Florida Statutes, "to be illegal"); *Promontory Enters., Inc. v. S. Eng'g & Contracting, Inc.*, 864 So. 2d 479, 485 (Fla. 5th DCA 2004) (same)).

11 *Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So. 2d 1181 (Fla. 2005).

12 *Id.* at 1185 n.1.

13 See *Rauch, Weaver, Norfleet, Kurtz & Co., Inc. v. AJP Pine Island Warehouses, Inc.*, 313 So. 3d 625, 629 (Fla. 4th DCA 2021) (noting that "illegality of an agreement is an affirmative defense" which is waived unless pleaded); *Miami Elecs. Ctr., Inc. v. Saporta*, 597 So. 2d 903, 904 (Fla. 3d DCA 1992) ("[D]efendants did not plead illegality as an affirmative defense, and the issue was not tried below by consent; accordingly, the defendants have waived this defense.")

14 *Gen. S. Indus., Inc. v. Shub*, 300 F. App'x 723, 726 (11th Cir. 2008) (citing *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 788 (4th Cir.1987) (discussing similar real estate broker licensure requirements from Virginia, Maryland, and the District of Columbia in terms of "affirmative defense[s] of illegality.")).

15 For 120 years, the AIA has defined the relationships and terms in design and construction projects through its AIA Contract Documents. With nearly 200 forms and contracts that have been prepared by owners, contractors, attorneys, architects, and engineers from around the United States, these documents have been finely tuned and embraced by the industry, to the point that they are now widely recognized as the industry standard. See http://aiapv.org/AIA_Contract_Documents_-_The_Industry_Standard.

16 See 8 Fla. Prac., Constr. Law Manual § 7:1 (2023-2024 ed.) (stating that some of the widely used published form contract documents are AIA forms and ConsensusDocs).

17 See e.g. *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 652, 228 A.3d 736, 748 (2020); *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 726 (Tex. App. 2015); *Elwyn v. DeLuca*, 2012 PA Super 136, 48 A.3d 457, 459 (2012).

18 See Fla. R. Civ. P. 1.300 (d)(3).

19 DBPR's website can be accessed through http://www.myfloridalicense.com.