

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DONALD and KARLA DINE,

Appellants,

v

File No. 08-26725-AV
HON. PHILIP E. RODGERS, JR.

TIMOTHY BANNEN,

Appellee.

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DECISION AND ORDER ON APPEAL

This is an appeal from the judgment of the 86th District Court following a bench trial on July 9, 2008. The District Court found no cause for action on Donald and Karla Dine's (hereinafter "Dine" will be used to refer to Donald Dine only) breach of contract action, found in favor of the Dines on Timothy Bannen's ("Bannen") counterclaim for breach of contract for nonpayment, and entered a money judgment in favor of Bannen on his counterclaim for money paid for additional labor. The Dines filed this appeal.

The parties waived oral argument. The Court now issues this written decision and order and, for the reasons stated herein, affirms in part and reverses in part.

Factual Background

The Dines were constructing a home on their property and hired Bannen to assist them with the framing. It is undisputed that Bannen was not a licensed residential builder under Michigan's Occupational Code, MCL 339.2401, *et seq.* At trial, both parties testified that

Bannen was hired for his personal labor only. The parties' written contract, prepared by Bannen, provided as follows:

This contract is to supply my labor only for the rough framing of a 2 story single family dwelling. Extra labor to be supplied by homeowner. The responsibilities the framing contractor agrees to, is to include, rough framing per supplied engineered drawing, install windows, and to see project through framing inspection process. Homeowner agrees to supply all materials, including any and all framing materials, hangers, nails, misc. installation materials (silicone, shims, etc.) Framing contractor is not responsible for any material to complete building process.

* * *

Agreed price for framing project is \$8000.00. \$4000.00 to begin project, \$4,000.00 upon framing inspection.

During the course of the construction, there were many problems including delays and material waste. Bannen eventually left the job unfinished. The Dines sued Bannen for breach of contract, alleging that he failed to complete the rough framing, install the windows, and complete the project through the framing inspection process. They claimed that it cost them \$17,000 for a contractor to finish the job and \$2,500 to replace wasted materials.

Bannen filed a counterclaim for the \$2,000 he had not been paid under the contract and for approximately \$5,000 that he spent to hire additional labor that he claimed he hired with Dine's permission, expecting to be reimbursed when Dine received another advance on his construction loan.

Standard of Review

This Court reviews findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.*

Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed *de novo*. Appellate courts review *de novo* the. *PT Today, Inc v Comm'r of Office of Financial and Ins*, 270 Mich App 110, 126; 715 NW2d 398 (2006); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

Issues involving the interpretation of statutes or court rules are also reviewed de novo as questions of law. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). The primary goal of statutory interpretation is to give effect to the Legislature's intent and, if statutory language is unambiguous, it is to be applied as written. See *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

Breach of Contract

At the trial, Dine testified that he hired Bannen in February of 2007 to provide “knowledge and labor” (T 20) because he was the “leader of a framing crew” from a framing company. (T 18). “[H]e’s just supposed to be providing his labor to frame a house.” (T 50). Dine testified that Bannen told him “a reasonable time frame for him to complete his labor” was “six to eight weeks.” (T 22). He also testified that there were delays and wasted materials (T 22-34) and “extra lumber” (T 42) “because of work that Mr. Bannen didn’t do right” (T 41). Dine denied any knowledge of Bannen hiring additional labor. (T 51). After Bannen stopped working on the house in July, Dine hired a contractor, Joel Guy, to complete the job. (T 35). It cost him \$19,500 to replace the wasted materials and complete the house. (T 43). Dine testified on cross examination that, before he hired Bannen, he received bids for doing the framing that ranged from \$24,000 to \$40,000. (T 45).

Dine’s brother testified regarding problems with the construction and work that had to be redone. Joel Guy testified about the work that had to be fixed or repaired in order to continue the construction and about materials that had been wasted. (T 67 - 79). On cross examination he testified that he would have bid \$25,000 to do this framing job. (T 83).

Bannen testified at the trial that when he met with Dine, Dine represented that he and his brother had “ample experience” and “wanted to build the house themselves. (T 90-91). Bannen agreed that he would help and he took three weeks off from work to “get things moving.” (T 90). He anticipated that he would spend about 200 to 250 hours on the project. (T 92). He agreed to provide his labor for \$8,000. He further testified that he ultimately spent “between 7 and 800 hours on site” doing a \$40,000 project. (T 92; 108). He testified that there were delays and materials were wasted because of poor quality drawings (T 92-97) and problems with the trusses (T 97-98). In addition, he testified that Dine misrepresented the level of his and his brother’s expertise and ability (T 99-102). He testified that he discussed hiring

additional labor with Dine and that Dine agreed that more laborers were needed. Because Dine did not have any money right then, he agreed that Bannen could hire them and he would pay Bannen back out of a later draw. (T 101-103, 107). Bannen testified that he was paid a total of \$6,000 and that he paid the additional laborers between \$5,000 and \$5,500. (T 108). Bannen testified that, in June before he stopped working on the house, he discussed with Dine when he was leaving. He agreed to two more weeks, but ended up spending four and a half more weeks on the job. (T 105). Eventually he stopped working on the house - admittedly, before the framing inspection was completed.

Matt Nelson testified at the trial that he was hired and paid by Bannen to help on the Dine house. He testified that he heard about delays because of the trusses and he had first hand knowledge of delays because of inadequate drawings that “set back that project immensely.” (T 129). He also testified that he introduced himself to Dine on the job and that Dine “might have helped lift a couple logs. I never saw him pound a nail, never saw him carry a board. . .” (T130).

Mrs. Bannen testified at the trial that Karla Dine told her in late May or early June that “they were very impressed with Tim’s work and she would highly recommend him.” (T 134).

Based on the evidence, the District Court found that Bannen was not going to frame the house himself for only \$8,000 because the witnesses testified that reasonable bids for the job would be between \$25,000 and \$40,000. Instead, the Court believed that he was going to help Dine and whoever else was going to do the framing. The Court recognized that there were “a whole lot of problems,” but found that “Mr. Bannen apparently knows what he’s doing” and “didn’t get the help he needed to do the job.” (T 144). “He did walk off the job before it was done but the time was way longer than what was anticipated.” “I’m not going to require that he be paid the other 2,000. He obviously didn’t finish it.” (T 144). The Court also found as follows:

But there are a lot of issues here that were - - had to be repaired. I don’t know who caused the damages. I think if Mr. Bannen had gotten the help that he anticipated, this would have - - and the plans were correct and there were no mistakes with the trusses and whatever, I think it would have been - - everybody would have been happy.” (T 144-145).

Because the evidence showed there were problems but the evidence also showed that Mr. Bannen “did a very good job” and did not get the help that he needed, the Court did not “hold

Mr. Bannen responsible by a preponderance of the evidence for the damages,” and ruled that “on the initial complaint there’s no cause of action.” (T 144-145).

The findings of the District Court were not clearly erroneous. The testimony was conflicting, but there was ample evidence to support the District Court’s findings. The District Court Judge listened to and assessed the credibility of the witnesses. Based on our review of the transcript, we are not convinced that a mistake has been committed. The District Court’s conclusion that on the initial complaint there’s no cause of action should be and hereby is affirmed.

Counterclaim

In his counterclaim, Bannen sought to recover the rest of what he was owed under the contract as well as the amount he paid additional laborers to help with the project. Each of these will be addressed separately.

I. Breach of Contract

Bannen sought to recover the \$2000 that he was still owed, under the contract. The District Court found that “[Bannen] did walk off the job before it was done . . .” and held “I’m not going to require that he be paid the other 2,000. He obviously didn’t finish [the job].” (T 144). The District Court reached the correct result, but for the wrong reason.¹

Dine argues on appeal that Bannen should have been precluded from maintaining his counterclaim because he was not licensed as required by the Section 24 of the Michigan Occupational Code, MCL 339.2401, *et seq.*, commonly referred to as the residential builder’s licensing act.

The purpose of the residential builder’s licensing law, MCL 339.2401, *et seq.*, is to protect homeowners. The policy of protecting the owner is reflected in the language adopted to express the scope of the disqualification on maintenance of suit which results from building without a license. *Beznos v Borisoff*, 339 Mich 12; 62 NW2d 461 (1954); 44 ALR2d 740. MCL 339.2412(1) provides:

¹ This issue was raised by Dine before the District Court in both a motion for summary disposition and at trial. The District Court denied the motion for summary disposition and did not address the issue after the trial.

A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

Thus, a non-licensed builder may not maintain an action to recover “compensation for the performance of any act or contract for which a license is required.” Accordingly, a non-licensed builder may not recover for his own performance.

The question presented here is whether Bannen was a “residential builder”?

MCL 339.2401(a) provides as follows:

“Residential builder” means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person’s own use and occupancy on the person’s property.

Bannen contracted with Dine to construct a residential structure for a fixed sum, price or fee of \$8,000. Therefore, by definition, he was a “residential builder.” As such, he was required to be licensed.

Bannen contends that he was not required to be licensed because he was hired to provide his “personal labor only” and, therefore, does not meet the definition of a residential builder. This argument is untenable because Bannen contracted to construct a residential structure for a fixed sum, price or fee of \$8,000 which fits the definition of a residential builder. MCL 339.2401(a). The contract did not provide that he would be paid “wages for personal labor only.”² Thus, Bannen had to be licensed. See, *Schmidt v Warren*, 65 Mich App 322; 237 NW2d 309 (1975).

² “Wages” means money paid or to be paid on an hourly or daily basis by an owner, lessor, or occupant of a residential structure or combination residential and commercial structure as consideration for the performance of personal labor on the

Since Bannen was not licensed, MCL 339.2412(1) precludes him from bringing or maintaining an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required. This statutory bar against an unlicensed builder maintaining an action for compensation on a residential construction contract extends to counterclaims as well as complaints. *H.A. Smith Lumber & Hardware Co v Decina*, 258 Mich App 419; 670 NW2d 729 (2003), vacated in part, appeal denied in part 471 Mich 925; 689 NW2d 227, on remand, 265 Mich App 380; 695 NW2d 347.

Therefore, Bannen could not recover the balance due under the contract. The basis for the District Court's ruling was wrong but the ruling itself was correct and, therefore, should be and is affirmed.

II. Additional Labor

Bannen also sought to recover the amounts he paid for additional labor that he hired. The written contract between the parties provided: "Extra labor to be supplied by homeowner." Bannen testified, however, that he had an oral agreement with Dine that he would hire and pay additional laborers and Dine would reimburse him out of his next construction loan advance. Dine denied any knowledge of Bannen hiring additional laborers.

The District Court found there was an oral agreement between Dine and Bannen for Bannen to hire additional laborers based on the testimony of Matt Nelson, who testified he was one of those extra laborers, and that Dine knew he was there working on the job. Based on the only evidence introduced of how much the additional workers were paid, the Court found Bannen was entitled to recover a total of \$4,386.

The question presented here is whether the District Court erred because Bannen, who was not a licensed residential builder, could not, as a matter of law, recover the amount he paid for the additional labor. Or, was Bannen's oral agreement with Dine to hire the additional labor a separate agreement for which he did not have to have a license and for which he could recover?

structure by a person who does not perform or promise to perform the labor for any other fixed sum, price, fee, percentage, valuable consideration, or other compensation and who does not furnish or agree to furnish the material or supplies required to be used in the performance of the labor or an act defined in subdivision (a) or (b). [MCL 339.2401(e).]

In *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002), rehearing denied 467 Mich 1202; 651 NW2d 920, the landowners brought an action against an unlicensed roofing contractor to recover damages and remove a construction lien. The contractor counterclaimed to foreclose the lien and obtain equitable relief. The contractor argued that MCL 339.2412 did not prevent it from recovering the reasonable value of the labor and material it furnished to the homeowner because this was merely reimbursement and not “compensation” as that word is used in the act. Our Supreme Court held:

Because ‘compensation’ is not defined in the act and is not a term of art, we apply a dictionary definition. *Random House Webster’s College Dictionary* (1995) defines ‘compensation’ as ‘something given or received as an equivalent for services, debt, loss, injury, etc.; indemnity; reparation; payment.’

Applying that meaning of ‘compensation,’ we find that § 2412 disallows an action for the reasonable value of materials conveyed, because such an action seeks ‘payment’ or ‘something given or received as an equivalent for [a] debt’ or ‘loss.’

More recently, in the unpublished case of *Gabara v Gentry*, Docket No. 262603 (Mich App 2006), the plaintiff sought to recover compensation for his involvement in the construction of defendants’ home, other than “wages for personal labor only,” including compensation for his payments to subcontractors, for the rental of construction equipment, and for construction supplies. The Court held that the plaintiff was a residential builder for purposes of the statute and, because the plaintiff did not have a builder’s license, MCL 339.2412(1) barred his claim to recover compensation for these expenditures.

The Court in *Gabara* relied on *Stokes, supra*, saying:

... the *Stokes* Court ruled that MCL 339.2412(1) prohibited bifurcation of a contract to permit an unlicensed residential builder to recover for the components of the building contract that could be performed without holding a residential builder’s license:

Even if, normally, the contract could be bifurcated, the statute prohibits it. Section 2412 bars a suit for compensation if a license was necessary for performance of “an act or contract.” The statute requires us to look for either an act or a contract requiring a license. It does not make provision for bifurcating building contracts into separate labor and supply components. [*Id* at 667.]

Because plaintiff is an unlicensed residential building contractor and bifurcation of the contract is impermissible under the statute, plaintiff does not

have a cause of action to recover under any aspect of his agreement with defendant to oversee construction of the house.

The situation in the instant case is analogous. Bannen had a written contract with Dine to provide his personal labor for a fixed sum and a second oral agreement with Dine to provide additional labor on a reimbursement basis. These two agreements were each part of the same relationship and transaction - helping Dine to build his house. As discussed above, by definition, Bannen was a residential builder under the written contract. He was also acting as a residential builder when he hired additional labor. Therefore, Bannen was required to be licensed. Just as MCL 339.2412 bars his claim for payment for his personal labor under the written contract, it bars his claim for reimbursement for the additional labor under the oral agreement.

The District Court erred when it awarded Bannen the amount he had paid for the additional labor. This ruling must be and hereby is reversed.

Conclusion

By definition, Bannen was a residential builder and was required to have a license pursuant to the Michigan Occupational Code. Without a license, he could defend against the breach of contract action Dine brought against him, which he successfully did, but he could not maintain his counterclaim for the amount he was owed under the contract or for the amount he paid for additional labor.

Based on the evidence introduced at trial, the District Court properly held that there was no cause of action on Dine's claim for breach of contract and that ruling is affirmed. On the counterclaim, the District Court correctly concluded, even though it was for the wrong reason, that Bannen was not entitled to the rest of the money he was owed under the written contract. This ruling is also affirmed.

The District Court erred when it found that Bannen was entitled to compensation for the amount he spent hiring additional labor. By definition, Bannen was a residential builder and was required to have a license. Without a license, he was precluded from filing or maintaining his counterclaim. His counterclaim should have been dismissed. Therefore, the District Court's finding in favor of Bannen on his counterclaim is reversed.

This case is remanded to the District Court for entry of a judgment consistent with this opinion.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: S/ 11/12/08