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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LEHIGH, INC.,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Defendant and Respondent.

B245411

(Los Angeles County
Super. Ct. No. BS123756)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Gibbs, Giden, Locher, Turner & Senet, Marion T. Hack; Benedon & Serlin, Douglas G. Benedon and Wendy S. Albers for Plaintiff and Appellant.

Ronald W. Beals, Chief Counsel, Jerald M. Montoya, Deputy Chief Counsel, and Mark A. Berkebile for Defendant and Respondent.

A contractor who performed work for the California Department of Transportation (CalTrans) pursuant to a contract initiated arbitration against CalTrans seeking to obtain additional compensation. The arbitrator found the contractor could not obtain additional funds because (1) the contractor's license had been suspended during the project, (2) the contractor had not substantially complied with the Business and Professions Code¹ provisions requiring maintenance of proper licensure as a prerequisite to a claim for additional compensation, and (3) the contractor had not acted reasonably and in good faith to maintain its license. The contractor filed a petition in the superior court to vacate the arbitration award. The superior court agreed with the arbitrator, and this timely appeal followed. Because substantial evidence supports the superior court judgment, we affirm.

BACKGROUND

1. Arbitration of Lehigh's claim against CalTrans

In June of 2000, plaintiff Lehigh, Inc. (Lehigh) entered into a construction contract with CalTrans to widen a highway bridge. During Lehigh's work on the project, its license was suspended for a period of 35 days for failure to satisfy a judgment in favor of a third party, Farshad Feizbakhsh.

After the project was completed, Lehigh initiated arbitration against CalTrans, alleging it was owed an additional \$10 million for cost overruns caused by CalTrans's errors. CalTrans moved to dismiss the proceeding on the ground Lehigh had not been properly licensed at all times during the performance of the contract, as required by section 7031, subdivision (a). Lehigh opposed dismissal on the theory it had substantially complied with the licensing requirement pursuant to section 7031, subdivision (e). The arbitrator conducted an evidentiary hearing and concluded Lehigh had not been properly licensed throughout the period of performance and had not

¹ Undesignated statutory references are to the Business and Professions Code.

substantially complied with the licensing requirement. Accordingly, the arbitrator awarded Lehigh nothing.

Lehigh filed a petition in superior court to vacate the award. The court denied the petition and Lehigh appealed. In our prior decision in this case (*Lehigh, Inc. v. California Department of Transportation* (June 29, 2011, B225781) [nonpub. opn.]), we concluded the superior court had applied the incorrect standard of review and remanded for the court to review the licensing issue de novo.

2. Evidentiary hearing in trial court after remand

On remand, the trial court conducted an evidentiary hearing on the licensing issue. Larry Clough and Fred Houriani (Houriani) testified at the hearing and provided declarations considered by the court. Numerous exhibits also were admitted.

Clough was Lehigh's long-time attorney. Houriani is the vice-president of Lehigh and was the chief financial officer, secretary, and office manager of M&M Trading Corporation (M&M), which shared the fictitious business name of "Lehigh Construction Company" with Lehigh. Houriani was responsible for ensuring Lehigh and M&M complied with all state requirements, including licensing. He also oversaw litigation against both companies, including the action by Feizbakhsh. Fred Houriani's brother, Merdad Houriani, was responsible for all the hands-on construction aspects for all the projects of Lehigh and M&M. Merdad Houriani was the person who qualified Lehigh and M&M for their contractors' licenses. (§ 7025.) The licenses of Lehigh and M&M were "associated" so that suspension of Lehigh's license resulted in the automatic suspension of M&M's license as well.

Feizbakhsh obtained a judgment against "Lehigh Construction" on July 26, 1999. On the recommendation of Clough, who had represented M&M and Lehigh in the Feizbakhsh case and in about five prior cases, Lehigh appealed the Feizbakhsh judgment. Clough advised Houriani the judgment need not be paid while the appeal was pending. Clough filed the notice of appeal, but failed to designate a record or seek relief from default in response to the "Clerk's Notice of Default re Appeal" mailed to his office on October 27, 1999. Clough testified he did not see the notice of default. On November

10, 1999, he was admitted to a hospital and thereafter “was unable to do almost any legal work for a period of approximately three months.”

The appeal in the Feizbakhsh case was dismissed in February of 2000. Houriani and Clough denied knowledge of the dismissal. Houriani had not inquired about the status of the appeal because he knew from prior experience that an appeal could take a year or two and Clough had always kept Houriani informed of significant matters during litigation. Houriani expected him to do the same regarding the Feizbakhsh appeal and was unaware Clough had experienced health issues. Houriani knew that if the appeal were unsuccessful, Lehigh would have to pay the judgment or face suspension of its license.

On January 19, 2001,² Houriani received a “Notice of License Suspension for Associated License” dated January 16 from the Contractors State License Board (CSLB) notifying Lehigh that its license had been suspended on January 9 for failure to satisfy the judgment in the Feizbakhsh case. Houriani immediately phoned Clough, who was surprised because he thought the appeal was still pending. Houriani testified he told Clough, “[W]hatever we have to do to take care of this matter right away, please do so.” He further testified he asked Clough “to get this matter resolved immediately, so he was going to talk to the other side[’s] counsel to get it resolved.” Houriani’s declaration stated he instructed Clough “to waste no time and resolve the issue as soon as possible with opposing counsel, indicating that I would be available to drive a check over to opposing counsel’s office and get the proper paperwork completed in order to speed up the process.” Clough said he would check the status of the appeal and talk to counsel for Feizbakhsh. “[I]mmediately,” or the “next day,” Clough went to the courthouse to check the status of the appeal and discovered it had been dismissed.

On January 22, Clough left a phone message for Attorney David Bernstein, who had represented Feizbakhsh in the case, but Clough did not succeed in speaking to

² Undesignated date references are to 2001.

Bernstein until January 29. Clough offered “to resolve the judgment by payment of the same amount [Feizbakhsh] had agreed to take to resolve the case immediately following the trial.” This amount was less than the amount of the judgment. Bernstein said he would have to consult Feizbakhsh. One week later Clough phoned Bernstein, who said he had not yet heard from Feizbakhsh. In the late afternoon of February 8, Clough received a fax communicating Feizbakhsh’s willingness to settle for an amount less than the judgment if it was paid by February 9. Clough immediately prepared a release and satisfaction of judgment form and faxed it to Houriani with instructions to take the form and payment to Bernstein’s office the next day. On February 9, Houriani took a cashier’s check and the satisfaction of judgment form to Bernstein’s office and sent the CSLB “evidence of the same that day.” The CSLB reinstated Lehigh’s license on February 13.

Between January 19 and the settlement, Houriani phoned Clough “virtually every day—often multiple times each day—inquiring about the status of the satisfaction of the judgment.” Houriani denied he had been negotiating to pay less than the amount of the judgment and denied he knew Clough had asked Feizbakhsh to settle for a lower amount. He testified Clough “said they called him and asked him for a lesser amount.” Clough testified Houriani did not tell him to try to negotiate to pay less than the judgment, and Bernstein did not offer to settle for less. Clough was just following his standard practice when representing defendants of asking whether he could ““get less than the judgment.”” Clough told Houriani he was waiting to hear from Bernstein, but not that he was waiting to hear about acceptance of an offer to settle for less than the amount of the judgment.

CalTrans presented evidence of several other suspensions of the licenses of M&M and Lehigh due to unpaid judgments. Marsha Hirsch obtained an \$8,000 arbitration award against M&M in April of 1991. M&M did not pay, requiring Hirsch to petition the superior court to confirm the award. M&M still did not pay, requiring Hirsch to contact the CSLB. In June of 1993, the CSLB notified M&M it must submit proof the judgment had been satisfied or discharged by September 21, 1993. On September 20, 1993, counsel for M&M negotiated a settlement allowing it to pay Hirsch just \$6,000, two and

one-half years after the award. The CSLB suspended M&M's license on September 21, 1993, and reinstated it the next day after receiving proof the judgment had been satisfied.

Shoreline Trucking Company obtained a \$689 judgment against M&M in June of 1994. When M&M paid \$300, Shoreline sought help from the CSLB, which suspended the licenses of both M&M and Lehigh on January 26, 1996. The CSLB notified them of the suspension on February 14, 1996. M&M paid the remainder of the judgment and the licenses were reinstated on February 15, 1996, almost two years after the judgment.

Robertsons obtained a judgment for \$688.79 against Lehigh in May of 1997. It notified the CSLB, which suspended the licenses of both M&M and Lehigh on March 5, 1998. The CSLB notified M&M and Lehigh of the suspension on March 11, 1998. The licenses were reinstated March 20, 1998, after Lehigh paid the judgment, ten months after it was entered.

The CSLB also warned M&M in May and September of 1998 and March and April of 1999 its license would be suspended for failure to pay judgments against it in two other cases. The CSLB suspended M&M's license for nonpayment of judgments in December of 2001, November of 2002, and August of 2003. For technical reasons, Lehigh's license was not suspended on those occasions.

3. Trial court's decision and judgment

The trial court determined Lehigh did not act reasonably and in good faith to maintain its license: Houriani knew failure to pay the Feizbakhsh judgment after dismissal of the appeal would result in suspension of Lehigh's license and he could not abdicate his duty to keep Lehigh's license active to Attorney Clough. The court stated, "In ignoring the appeal for fifteen months, Houriani failed to act reasonably to maintain Lehigh's license."

The court also noted, "This is not a case where the contractor, through no fault of his own, became unlicensed. From 1993 to 2003, Lehigh routinely played with fire, delaying the payment of outstanding judgments until its license was suspended, then paying the judgments to get its license reinstated. [Citation.] These were not the actions of a contractor acting in good faith to maintain proper licensure. On the contrary, Lehigh

routinely permitted its license to be suspended, presumably to save money by not paying the judgments against it. At best, Lehigh's conduct was reckless. At worst, it was a cynical effort to avoid paying lawful judgments."

The trial court further concluded Lehigh did not act promptly and in good faith to reinstate its license after learning of its suspension. The court observed Houriani did not instruct Clough to pay the judgment after learning of the suspension, but rather told Clough to "take care of this matter right away." Clough "took care" of it by commencing negotiations to pay less than the full amount of the judgment instead of simply delivering a check. These negotiations postponed payment by 21 days. There was no evidence that Houriani told Clough during this period "to promptly pay the judgment, which would have resulted in the speedy reinstatement of Lehigh's license. The inference is unavoidable that Clough sought to reduce the amount of the judgment Lehigh would have to pay to get its license reinstated at Houriani's direction or at least with his approval. These actions do not satisfy the requirement that Lehigh act promptly and in good faith to reinstate its license."

Based on these conclusions, the trial court found Lehigh did not substantially comply with the licensure requirements and could not pursue its claim against CalTrans for additional compensation. The court entered judgment in favor of CalTrans.

DISCUSSION

1. The requirement of a license to maintain an action for compensation

Section 7031, subdivision (a) provides, in pertinent part: "Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person"

Section 7031, subdivision (e) establishes an exception to subdivision (a): "[T]he court may determine that there has been substantial compliance with licensure

requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, (3) did not know or reasonably should not have known that he or she was not duly licensed when performance of the act or contract commenced, and (4) acted promptly and in good faith to reinstate his or her license upon learning it was invalid.”

The parties, the arbitrator, and the trial court assumed the current version of section 7031, which was amended in 2003 and became effective in 2004, applies to this controversy. In fact, the applicable provision is the version of the statute in effect at the time the parties entered into their contract (2000) and performed under the contract (2000–2003). (*Pacific Caisson & Shoring, Inc. v. Bernards Bros. Inc.* (2011) 198 Cal.App.4th 681, 694 (*Pacific Caisson*).) That version of section 7031, subdivision (e) did not contain the fourth requirement (acting promptly and in good faith to reinstate the license) found in the current version of the statute. (§ 7031, former subd. (e), as amended by Stats. 2001, ch. 226, § 1; § 7031, former subd. (d), as amended by Stats. 1994, ch. 550, § 1.)

Nonetheless, the Legislature expressly declared the 2003 amendments as declaratory of existing law (Stats. 2003, ch. 289, § 2), and the California Supreme Court has recognized they are. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 434; *Pacific Caisson, supra*, 198 Cal.App.4th at pp. 694–695.) Accordingly, Lehigh’s promptness and good faith, or lack thereof, in reinstating its license after learning of the suspension are factors that may be considered in determining whether Lehigh can find refuge in the exception for substantial compliance created by section 7031, subdivision (e).

“When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure shall be on the licensee.” (§ 7031, subd. (d).)

2. Standard of review

Where a trial court's ruling "rests upon a determination of disputed factual issues," we review the judgment to determine if it is supported by substantial evidence. (*Maaso v. Signer* (2012) 203 Cal.App.4th 362, 371.) "Substantial evidence includes reasonable inferences drawn from the evidence in favor of the judgment. [Citation.] An inference may be drawn from a party's failure to produce available evidence or to explain evidence or facts in the case against him." (*Ibid.*)

Whether a contractor substantially complied with the licensing requirements is a factual issue. (*Pacific Caisson, supra*, 198 Cal.App.4th at p. 694; *ICF Kaiser Engineers, Inc. v. Superior Court* (1999) 75 Cal.App.4th 226, 234, 236.) Similarly, unless the facts are undisputed and permit only one conclusion, the reasonableness of an act or omission and a party's good faith or lack thereof also are questions of fact. (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 630–631 [reasonableness]; *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1263 [good faith].)

Where, as here, the trier of fact has expressly or implicitly concluded the party with the burden of proof did not meet that burden, we apply the substantial evidence test by asking "whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

3. The evidence before the trial court did not compel a finding Lehigh acted reasonably and in good faith to maintain proper licensure

The only element of section 7031 in issue is whether Lehigh acted reasonably and in good faith to maintain its license. Whether Lehigh acted promptly and in good faith to reinstate its license after learning it had been suspended was a factor relevant to this determination.

The evidence did not compel the trial court to find Lehigh acted reasonably and in good faith to maintain its license. As the trial court explained in its statement of decision, when Houriani received the CSLB's suspension notice, he did not instruct Clough to pay the judgment, but merely to do "“whatever we have to do to take care of this matter right away.”" Houriani did not testify that by this he actually meant Clough should simply pay the judgment right away, as opposed to negotiating a settlement allowing Lehigh to pay less than the full amount of the judgment plus accrued interest. Nothing in the evidence indicated that Houriani, in his almost daily phone calls to Clough over the 21 days from January 19 to February 8, ever told Clough to pay the judgment in full or asked Clough why Lehigh was unable simply to deliver a check to Feizbakhsh's attorney to pay the judgment. Doing so might have demonstrated good faith conduct allowing Lehigh's license to be promptly reinstated. The failure of Houriani and Clough to testify that Houriani told Clough just to pay the judgment or deliver the check was a failure to provide evidence that allowed the trial court to draw inferences adverse to Lehigh. As the trial court noted, "The inference is unavoidable that Clough sought to reduce the amount of the judgment Lehigh would have to pay to get its license reinstated at Houriani's direction or at least with his approval. These actions do not satisfy the requirement that Lehigh act promptly and in good faith to reinstate its license." Thus, even if Houriani's testimony could be interpreted as directing Clough to pay the judgment immediately, the trial court apparently found that testimony not to be credible.

The evidence further showed that collectively the "associated" licenses of M&M and Lehigh—both operating under the credentials of Merdad Houriani and managed by Fred Houriani with respect to litigation and licensing—had been suspended for failure to pay judgments three times before the Feizbakhsh judgment and suspension had been threatened two other times. The trial court reasonably concluded this evidenced a pattern of attempting to avoid paying judgments or the full amount thereof. The trial court also reasonably concluded the conduct of Houriani and Clough in regard to the Feizbakhsh judgment was consistent with this pattern, reflecting an effort to avoid paying the full

amount of the judgment, and *inconsistent* with acting reasonably and in good faith to maintain proper licensure.

The potential merit of Lehigh's claims,³ potential harshness of the result, and negligence or even purported "positive misconduct" by Clough⁴ are immaterial to our analysis and the result. (§ 7031, subd. (a); *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1261.)

Because substantial evidence supports the trial court's findings, we affirm the judgment.

³ Section 7031, subdivision (a) applies "regardless of the merits of the cause of action." (Stats. 1989, ch. 368, § 1, p. 1509.)" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, *supra*, 36 Cal.4th at p. 425.)

⁴ Lehigh sought to establish the reasonableness of its reliance upon Clough with respect to its ignorance of the dismissal of the Feizbakhsh appeal by citing a line of cases permitting a party to set aside a default or dismissal on the ground it resulted from a former attorney's "positive misconduct." (See, e.g., *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892; *Daley v. County of Butte* (1964) 227 Cal.App.2d 380.) We need not consider whether this doctrine extends beyond relief from a default or dismissal because the evidence of Lehigh's own conduct after being notified of the license suspension supports the trial court's findings and the judgment.

DISPOSITION

The judgment is affirmed. Respondent California Department of Transportation is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.