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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MW ERECTORS, INC., Plaintiff and Appellant, v. NIEDERHAUSER ORNAMENTAL AND METAL WORKS COMPANY, INC., et al., Defendants and Respondents.	G030681, G030825 (Super. Ct. No. 01CC00661) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed and remanded.

Pine & Pine, Norman Pine, Beverly Tillett Pine; Gibbs, Giden, Locher & Turner and Richard J. Wittbrodt for Plaintiff and Appellant.

Arter & Hadden, William S. Davis, Jack W. Fleming; Lord, Bissell & Brook, William S. Davis; Musick Peeler & Garrett and Jack W. Fleming for Defendants and Respondents.

* * *

In this case, a subcontractor on a large commercial project has suffered the consequences of its failure to complete the application process and obtain the requisite contractor's license(s) before signing two separate contracts. The subcontractor's work was terminated before the projects were completed and without the subcontractor having obtained full payment of amounts it claims are due under the contracts. When the subcontractor filed its lawsuit seeking compensation, it was met with a successful motion for summary judgment, based on its noncompliance with the licensing requirements. The subcontractor asserts the trial court erred in granting the motion, because it had substantially complied with the applicable licensing requirements by obtaining a Class C-51 license before the completion of the first contract and before undertaking work pursuant to the second contract.

In reviewing the ruling on the first contract, we explore the application of Business & Professions Code section 7031 in the context where a contractor is not licensed on the day it undertakes performance of a contract, but becomes licensed before completion of the work. We also address whether, under such circumstances, the contract is illegal and void. We conclude that, in the situation described, the statutory provision permits the contractor to recover compensation for the acts performed while licensed and, that being the case, the contract is neither illegal nor void. As applied to this case, section 7031 does not bar the subcontractor from seeking compensation for all acts performed under the first contract while the subcontractor was licensed. Therefore, summary judgment with respect to the first contract was improper.

With respect to the second contract, the parties agree the subcontractor held the Class C-51 license during the entire period of performance. Therefore, as long as the Class C-51 license was the proper license with respect to the work to be performed under that contract, Business & Professions Code section 7031 presents no bar to the recovery of compensation and the contract is not void.

The defendants claim that a Class C-23 license was required for the performance of the work under the second contract and that the subcontractor did not hold the requisite license at any time during the performance of that contract. This is a matter we do not decide. Suffice it to say, the subcontractor raised a triable issue of material fact as to whether the Class C-51 license was sufficient for the work performed under the second contract. Therefore, summary judgment was improper as to that contract as well.

We reverse the summary judgment and remand the case for further proceedings consistent with this opinion. In addition, we reverse the order awarding attorney fees.

I

FACTS

Turner Construction Company (Turner), as general contractor, hired Niederhauser Metal Works Company, Inc. (Niederhauser)[1] to perform certain "miscellaneous metals work" and "ornamental metals work" on Disney's Grand Californian Hotel. Niederhauser, in turn, subcontracted to MW Erectors, Inc. (MW) to perform certain work. Niederhauser and MW entered into a contract dated October 11, 1999, pursuant to which MW agreed to perform structural steel work. On November 12, 1999, Niederhauser and MW entered into a second contract, for the performance of certain ornamental metals work on the project.

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[1] We observe inconsistencies in the record concerning the full and complete name of Niederhauser. It is variously referred to as: (a) Niederhauser Metal Works Company, Inc.; (b) Niederhauser Ornamental & Metal Works Company, Inc.; (c) Niederhauser Ornamental and Metal Works Co., Inc., dba Niederhauser Metal Works Co., Inc.; and (d) other similar names. However, it seems apparent that the parties have in all events intended to refer to one and the same corporation, whatever its proper legal name. We will simply refer to the corporation hereinafter as "Niederhauser."

MW began the structural steel work on or before December 3, 1999. It did not obtain its Class C-51 structural steel contractor license until December 21, 1999. (See Cal. Code Regs., tit. 16, § 832.51 [Class C-51 license explained].) It never held a Class C-23 ornamental metal contractor license while performing work under either contract. (See Cal. Code Regs., tit. 16, § 832.23 [Class C-23 license explained].)

MW filed a complaint against Niederhauser, Fidelity and Guaranty Insurance Company, and United States Fidelity and Guaranty Company.[2] MW alleged that Niederhauser had terminated its work under each of the contracts, without cause, on or about August 28, 2000. It requested $955,552.89 for miscellaneous metals work and $366,694 for ornamental metals work, as amounts purportedly owing under the two contracts. MW included the two bonding companies in the suit in an effort to collect on the payment bonds with respect to the two contracts.[3]

The defendants filed a motion for summary judgment. They asserted simply that MW did not have a Class C-51 license when it began the structural steel work and never had a Class C-23 license when performing the ornamental metals work and that MW was therefore precluded by Business and Professions Code section 7031 from seeking compensation for work performed under those two contracts. The motion was granted and summary judgment was entered thereafter. MW appeals from the summary judgment and from the subsequently entered order awarding attorney fees.

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[2] Niederhauser, Fidelity and Guaranty Insurance Company, and United States Fidelity and Guaranty Company are all respondents on appeal and they have jointly filed a respondents' brief. For ease of reference, we will refer to them collectively as "Niederhauser" when describing their arguments.

[3] Niederhauser filed a cross-complaint against Turner Construction Company, Walt Disney Imagineering Research & Development, Inc., and Walt Disney World Co. It ultimately dismissed the cross-complaint.

II

DISCUSSION

A. Summary Judgment Review

On review of a summary judgment, we "examine the record de novo and independently determine whether [the] decision is correct. [Citation.]" (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1149.) In undertaking our independent review of the evidence submitted, we apply "'the same three-step process required of the trial court: First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his [or her] favor on a cause of action . . . or defense (Code Civ. Proc., § 437c, subd. (a)) — a plaintiff 'contend[ing] . . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit' (*ibid.*). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id.*, § 437c, subd. (c)) — that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations] — and that the 'moving party is entitled to a judgment as a matter of law' (Code Civ. Proc., § 437c, subd. (c))." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his [or her] 'burden of showing that a cause of action has no merit if' he [or she] 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a

complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' (Code Civ. Proc., § 437c, subd. (*o*)(2).)"[4] (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.)

B. Pleadings

(1) Amended complaint

In the first amended complaint, MW asserted causes of action for breach of contract, reasonable value of services, quasi-contract, promissory estoppel, and payment bond. Each cause of action was predicated on the assertion that MW had not been paid for its work on the hotel.

(2) Motion for summary judgment

In bringing its motion for summary judgment, Niederhauser sought to establish a complete defense to each cause of action, by citation to Business and Professions Code section 7031.[5] Subdivision (a) generally prohibits a contractor from maintaining an action to recover "compensation for the performance of any act or contract where a license is required . . . without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract . . . ."

Niederhauser supported its motion with its separate statement of undisputed material facts showing that MW undertook work on the structural steel work contract before it obtained its Class C-51 structural steel license and that it never obtained a Class C-23 ornamental metals license while working on the ornamental metals work contract. Based on this information, Niederhauser argued in essence that MW was not licensed "at

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[4] See now Code of Civil Procedure section 437c, subdivision (p)(2).

[5] All further statutory references are to the Business & Professions Code, unless otherwise specifically noted.

all times" during the performance of the structural steel work contract, and was never properly licensed during the performance of the ornamental metals work contract. Therefore, it contended it had shown a complete defense, under section 7031, subdivision (a), to a suit seeking compensation for performance of the work under either contract.

(3) Opposition to motion

In responding to Niederhauser's separate statement of undisputed facts, MW admitted that it began the structural steel work on or before December 3, 1999, but did not obtain its Class C-51 license until December 21, 1999. It also admitted that during the time it performed work on the hotel, it never obtained a Class C-23 license.

However, in its opposition to the motion, MW endeavored to raise two triable issues of fact with respect to Niederhauser's section 7031 defense. MW asserted that: (1) it had substantially complied with the requirements of section 7031; and (2) no Class C-23 license was required for the performance of the ornamental metals work contract. It also argued that Niederhauser was barred by the doctrine of judicial estoppel from contending that MW was unlicensed.

With respect to the substantial compliance argument, MW asked the court to focus on the qualifications and activities of Donald Parks, Jr., the sole owner and president of MW. Parks was the responsible managing officer of MW for the purpose of qualifying it for a Class C-51 license and was also the responsible managing officer of Metal-Weld Specialties Inc., of which he was president and 90 percent owner. He had previously qualified the latter company for a Class C-51 license. In his declaration in support of opposition to the summary judgment motion, Parks declared that he had applied for a Class C-51 license for MW in August 1999. He further declared that he had been informed in November 1999 that he had succeeded in qualifying MW for the license and that all that was needed for issuance of the license was proof of workers compensation insurance. In addition, he stated that he had directed his insurance broker to supply the necessary proof of insurance and then believed he had done all he could to

comply with the requirements of the Contractors State License Board (Board). This evidence, MW argued, showed substantial compliance with section 7031.

With respect to the requirement of a Class C-23 license, MW cited certain evidence which we will discuss in detail below.

(4) Reply to opposition

Niederhauser, in reply to MW's opposition, argued that the judicial doctrine of substantial compliance had been abrogated by statute, as provided in former subdivision (d) of section 7031.[6] However, Niederhauser also noted that the subdivision provided one, and only one, situation in which the substantial compliance doctrine would be permitted to apply. Niederhauser asserted that the particular situation was not present in this matter and that MW had not satisfied the statutory requirements for the application of the substantial compliance doctrine. In addition, Niederhauser maintained that the law was clear that a Class C-23 license was required for the performance of the ornamental metals work contract.

We will address the section 7031 issues and the Class C-23 license issues in turn.

C. Business & Professions Code Section 7031

(1) Structural steel work contract

Whether MW is entitled to compensation for the performance of any of the structural steel work is determined by a careful examination of the language of section 7031. "In construing this statute, we must '"ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to

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[6] "Effective January 1, 2002, subdivision (d) was relabeled subdivision (e), without any substantive change. (Stats. 2001, ch. 226, § 1; Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600.)" (*Slatkin v. White* (2002) 102 Cal.App.4th 963, 968-969, fn. 4.) We shall refer to the subdivision in question as subdivision (e) hereinafter.

the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . .' [Citation.]" (*Warmington Old Town Associates v. Tustin Unified School Dist.* (2002) 101 Cal.App.4th 840, 851.)

Section 7031, subdivision (a) provides: "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 . . . ."

Niederhauser claims that subdivision (a) answers our question on its face, contending that subdivision bars suit by any contractor who cannot plead and prove it was licensed at all times during the performance of the contract, and MW has admitted that it was unlicensed when it undertook work on the structural steel work contract. We cannot agree with Niederhauser's argument, because it overlooks certain key words in the statute. We must avoid a construction of the statute that makes some words surplusage. (*Warmington Old Town Associates v. Tustin Unified School Dist., supra,* 101 Cal.App.4th at p. 851.)

Subdivision (a) provides that a contractor may not maintain an action seeking compensation "for the performance of any *act* or contract" which requires a license unless he or she alleges having been duly licensed "at all times during the performance of that *act* or contract . . . ." (Italics added.) The statute very simply does not state that compensation may be sought only for completed *contracts* where the contractor was licensed start to finish. Rather, the statute permits contractors to seek compensation for any *act* if he or she alleges having been duly licensed during the performance of the *act*. The plain meaning of the words would indicate that the act in

question, the one for which a license is required, is the same act for which compensation is sought. (See *Slatkin v. White, supra,* 102 Cal.App.4th at p. 970 [court gives effect to plain meaning of statute when words of statute are clear and unambiguous].**)**

In other words, as long as the contractor alleges he or she was duly licensed during the entire period of time he or she performed acts for which compensation is sought, his or her suit is not necessarily barred just because the license was not in place when work on the contract was initially undertaken. No compensation is available for that initial period of time during which the contractor was not duly licensed, but as long as the contractor was thereafter licensed for the entire period of time during which acts were performed for which compensation is sought, compensation is available for those particular acts.

The validity of this construction is underscored by a reading of section 7031, subdivision (e), on which the parties focus much of their argument. Subdivision (e) provides in pertinent part: "The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state. However, the 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, and (3) did not know or reasonably should not have known that he or she was not duly licensed. . . ."

The first sentence of subdivision (e) provides that the substantial compliance doctrine shall not be applied if the contractor has *never* been licensed in the state. That sentence, standing alone, does not bar application of the doctrine as to contractors who have become licensed at some time during the performance of a contract. However, the second sentence of subdivision (e) sets forth three specific criteria that must

be met in order for the doctrine to apply. The first of these three criteria is the most telling. It requires the contractor to have "been duly licensed . . . prior to the performance of the *act* or contract . . . ." (Italics added.) Again, the language is in the disjunctive, requiring the contractor to have been duly licensed before performing either the *act* or the contract, for which compensation is sought. So, in order for the doctrine of substantial compliance to apply, the contractor must have been duly licensed before performing the act for which compensation is sought, and must have satisfied the remaining two criteria established in subdivision (e) as well.

We need not address those two criteria in this particular case, however, because they are not relevant to the matter before us. Niederhauser based its motion for summary judgment on MW's purported failure to comply with section 7031, subdivision (a). We need only look at one legal issue, the interpretation of subdivision (a), and stop there.

In this opinion, we discuss subdivision (e), pertaining to substantial compliance, simply to point out that both that subdivision and subdivision (a) are consistent with respect to the contractor's initial licensing requirement. The contractor must have been licensed for the first time before undertaking the acts for which he or she seeks compensation. That does not mean that the contractor is unable to recover any monies due and owing under a contract if he or she had never been licensed before the date that work under the under the contract was initially undertaken. It just means that he or she can only recover for the acts performed while licensed, unless the substantial compliance doctrine applies to permit him or her to recover, in addition, for acts performed during any period of time when his or her license may have lapsed during the course of the project. The contractor cannot recover for those acts performed under the contract but before the contractor had obtained his or her license for the first time.

We observe that this interpretation may seem at odds with certain cases decided in years gone by. For example, in *Owens v. Haslett* (1950) 98 Cal.App.2d 829,

the trial court denied recovery to a contractor who was not licensed when he entered into the contract or when he commenced work, even though he obtained his license before the work was completed. However, the party who had hired the contractor was the only one who appealed — the contractor did not. Therefore, whether the contractor should have received compensation for some portion of the work was not at issue on appeal and the appellate court's comments thereon are dicta.

An even earlier case of interest is *Holm v. Bramwell* (1937) 20 Cal.App.2d 332. There, the property owner hired a general contractor to construct certain buildings, and agreed to pay him cost plus 10 percent. The general contractor subcontracted a portion of the work to an individual who was not licensed on signing the subcontract. The court did not permit the general contractor to recover from the property owner the money the general contractor had paid to the subcontractor, because the subcontractor was unlicensed at the time the subcontract was signed. The court based its decision in part on section 12 of the Contractors' License Law as then in effect. The relevant portion of that statute provided: "'No person engaged in the business or acting in the capacity of a contractor [or subcontractor] . . . shall bring or maintain any action in any court of this state for the collection of compensation for the performance of any act for which a license is required by this act, without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose.'" (*Id.* at p. 336.)

As is evident, the statutory provision at issue in *Holm v. Bramwell, supra,* 20 Cal.App.2d 332 did not include the language of current section 7031, upon which the case before us turns. The *Holm* court did not address what it meant to require a contractor to allege that he or she was licensed "at all times during the performance of [the] act or contract." Therefore, the case is inapposite. Moreover, under the statutory provision at issue in *Holm*, the cause of action in question might have arisen upon signing of the contract, and if so, a license would have been required at that time. (See *Vitek, Inc.*

v. Alvarado Ice Palace, Inc. (1973) 34 Cal.App.3d 586, 591, fn. 5.) The concerns are different under current section 7031, subdivision (a).

Our construction of section 7031 is supported by the policy underlying that provision. As the Supreme Court stated in *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995, "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.] [¶] Section 7031 advances this purpose by withholding judicial aid from those who seek compensation for unlicensed contract work. The obvious statutory intent is to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay." The court continued: "The protective purposes of the licensing law cannot be satisfied in full measure unless the 'continuing competence and responsibility' of those engaged in the work for which compensation is sought have been officially examined and favorably resolved. [Citation.]" (*Id.* at p. 996.)

Here, MW's qualifications for licensure were officially examined and the issue of qualification was favorably resolved in the issuance of a Class C-51 license. The licensing requirements having been met, Niederhauser was assured that MW had the requisite qualifications to undertake work for which a Class C-51 license was required. That being the case, there is no reason why MW should be denied compensation for the acts performed during the period of time in which it was licensed. In keeping with the statutory intent of discouraging persons who have failed to comply with the licensing law from providing unlicensed services for pay, however, MW is properly denied compensation for acts performed during the period of time before it had acquired its license.

Niederhauser, as the moving defendant, did not show that section 7031 provided a complete defense to MW's causes of action based on the structural steel work contract and thus did not meet its burden of showing that those causes of action had no merit. (See Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.) Therefore, the burden did not shift to MW as the plaintiff to show that a triable issue of material fact exists as to Niederhauser's defense and it was error to grant summary judgment with respect to the causes of action pertaining to the structural steel work contract. (See Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.)

(2) Ornamental metals work contract

Where the ornamental metals work contract is concerned, the section 7031 issue is not the date in time when the license was obtained, but whether the correct license was ever obtained at all. In its motion, Niederhauser claimed that section 7031, subdivision (a) barred compensation for work under the ornamental metals work contract because MW *never* held a Class C-23 license during the performance of the work. In response, MW asserted that it already held the appropriate license, a Class C-51 license, before undertaking work on the ornamental metals work contract. As we shall show, MW succeeded in raising a triable issue of material fact as to whether it held the proper license.

D. Class C-23 License Requirement

In the first amended complaint, MW stated that, under the second contract it signed, it agreed to supply "all labor to erect certain ornamental metal materials for the Project which were listed and identified" in the attached exhibit B and thereafter referred to that contract as "the 'ornamental metals contract'." Exhibit B to the first amended complaint was a copy of the Niederhauser proposal presented to Turner. The work to be performed thereunder was described under the following topic headings: (1) "ornamental

steel rails @ first level & balconies;" (2) "exterior ornamental aluminum rails at balconies;" (3) "ornamental steel rails at interior atrium area;" (4) "aluminum top cap at owners wood rails;" (5) "bronze rails at exterior site locations;" and (6) "site fence and gates." (Capitalization omitted.)

At first blush, it would appear a significant amount of the work was of the ornamental metals nature, due to the specific references to "ornamental" rails. However, in its opposition to the summary judgment motion, MW emphasized the structural and safety nature of the rails, not their ornamental aspect. It offered the Parks declaration in support of its position. According to Parks, the scope of work for the ornamental metals work contract was "essentially steel balcony railings." He further declared that this work was of "traditional [Class] C-51 scope."

Parks further explained: "The use of the word 'ornamental' in context of this project is a misnomer. These balcony rails are welded steel and are functionally no different that [*sic*] any other balcony or hand rail to hospitals, schools, industrial plants, commercial buildings, walkways and landscape improvements without any ornamental value. These balcony rails are critical life safety parts of the structure, and must withstand prescribed loads and forces as required by the Uniform Building Codes and engineering. Even if a [Class] C-23 license may in some instances be authorized to install such balcony rails that does not negate the fact that a [Class] C-51 license is also able to fabricate and install these components." In addition, he pointed out that "the specialty classifications do not specifically reference what license is required to fabricate metal stairs and landings, both of which require rails by the Uniform Building codes."[7]

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[7] The specialty classifications Parks mentioned are contained in California Code of Regulations, title 16, sections 832.23 and 832.51, respectively. With respect to the contractor holding a Class C-23 license, section 832.23 provides: "An ornamental metals contractor assembles, casts, cuts, shapes, stamps, forges, welds, fabricates and installs, sheet, rolled and cast, brass, bronze, copper, cast iron, wrought iron, monel metal, stainless steel, steel, and/or any other metal for the architectural treatment and ornamental

Parks also provided other information to demonstrate that a Class C-23 license could not be required for the performance of the ornamental metals work contract. He declared that the replacement contractor Niederhauser hired to complete the contract, Western Construction Specialties, only held only a Class C-51 license.[8]

Not surprisingly, at the hearing on the summary judgment motion, the trial court stated repeatedly that it was concerned there might be a triable issue of material fact with respect to the issue of whether the Class C-23 license was required for the ornamental metals work contract. In an effort to decide whether there was a triable issue or not, the court invited the parties to provide additional evidence.

MW provided the testimony of Robert Berrigan, an attorney retired from the staff of the Board. He was with the Board for 11 years and reviewed license classifications for 9 of those years. Before testifying in this matter, Berrigan both reviewed the specifications for the ornamental metals work contract and visited the site. He testified that a contractor with a Class C-23 ornamental metals license could perform the work described in the ornamental metals work contract. However, Berrigan also

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decoration of structures. This classification does not include the work of a sheet metal contractor."

As for the authorization of a structural steel contractor, California Code of Regulations, title 16, section 832.51 provides: "A structural steel contractor fabricates and erects structural steel shapes and plates, of any profile, perimeter or cross section, that are or may be used as structural members for buildings and structures, including the riveting, welding, rigging, and metal roofing systems necessary to perform this work."

[8] We have found no evidence in the record corroborating the assertion that Western Construction Specialties was the replacement contractor, and we observe that Niederhauser makes no comment on this point. However, the record does contain a copy of a Board Certification of Records showing that Western Construction Specialties, Inc. held a Class C-51 license from January 1, 1999 through the date of the certification — December 13, 2001. Were it true that Niederhauser hired a contractor with only a Class C-51 license to complete the project, it would belie the assertion that a Class C-23 license was required, either that or show a pattern on Niederhauser's part of hiring improperly licensed contractors, perhaps deliberately.

testified that a Class C-51 license was a "superior" license and that, for the most part, a Class C-51 license could do "all the work that a [Class] C-23 [could] do . . . as long as it has taken place on the structure."

Berrigan further stated that, "in [his] judgment, the balcony rails form the structural integrity of the building, which makes it perform as a building. Therefore, a [Class] C-51 contractor is perfectly qualified to do it." He stated more specifically that a contractor with a Class C-51 license could perform ornamental metal work if it was part of the structure. He also said that balcony rails such as the ones in this project could be considered "structural members" within the meaning of the Class C-51 license classification.

Niederhauser provided the deposition testimony of Edward A. Backstrom. He testified that, in his opinion, the appropriate license for the ornamental metals work contract was a Class C-23 license.

The testimony of Parks and Berrigan was sufficient to raise a triable issue of material fact as to whether a Class C-51 license was appropriate for the performance of the ornamental metals work contract. Therefore, there was a triable issue of material fact as to whether MW was properly licensed at all times during the performance of the ornamental metals work contract and whether section 7031, subdivision (a) precluded MW's suit. The trial court erred in granting summary judgment with respect to the ornamental metals work contract. The matter must be reversed and remanded for a determination of whether the Class C-51 license was sufficient.

E. Judicial Estoppel

In its memorandum of points and authorities in opposition to the motion for summary judgment, MW also stated that Niederhauser was "judicially estopped to contend that MW was an unlicensed subcontractor." On appeal, MW explains that Niederhauser had filed a cross-complaint against Turner and filed a mechanic's lien

against the property, based on the work that MW had performed. This, MW contends, was tantamount to an implied claim on Niederhauser's part that MW was duly licensed.

MW fails to successfully demonstrate that the doctrine of judicial estoppel should apply. "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary. [Citation.]" (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.) "The party invoking judicial estoppel must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that the position was adopted by the first tribunal in some manner such as by rendering a favorable judgment. [Citation.]" (*Ibid.*)

In this case, even if the filing of either the cross-complaint or a mechanic's lien could be regarded as the taking of an inconsistent position, inasmuch as Niederhauser dismissed the cross-complaint, we do not see how the trial court adopted Niederhauser's "inconsistent position" so as to prejudice MW. Therefore, the second prong of the test was not satisfied. We decline to apply the doctrine.

F. Illegality of Contract

(1) Niederhauser's Argument

In its memorandum of points and authorities in support of its motion for summary judgment, Niederhauser cited the case of *Owens v. Haslett, supra,* 98 Cal.App.2d 829. As we have previously noted, the *Owens* court stated, although in dictum, that the contractor who was unlicensed upon signing the contract, but obtained his license before completing the work, was properly denied recovery under section 7031. (*Id.* at p. 832.) It also addressed the issue of illegality of contract, because the party who had hired the contractor was pressing a contract-based cross-complaint and had appealed.

The court held that both the contractor and the hiring party "were parties to an illegal contract and, as a general rule, to which there are exceptions, a party to an illegal contract can neither recover damages nor, by rescinding, recover the performance that he has rendered, or its value." (*Id*. at p. 833.) It affirmed the judgment denying the hiring party any relief on her cross-complaint, because she had failed to "bring herself within the exception permitting recovery to a party to an illegal contract who is not *in pari delicto.*" (*Id.* at p. 836.)

In reaching its decision, the court in *Owens v. Haslett, supra,* 98 Cal.App.2d 829 cited the language from *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 607 wherein the Supreme Court stated: "' . . . It has been repeatedly declared in this state that "a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract" [citing cases]; and that "whenever the illegality appears, . . . the disclosure is fatal to the case." [Citing cases.]'" (*Owens v. Haslett, supra,* 98 Cal.App.2d at p. 833.)

On appeal, Niederhauser again cites *Owens v. Haslett, supra,* 98 Cal.App.2d 829, together with *Loving & Evans v. Blick, supra,* 33 Cal.2d 603, *Gatti v. Highland Park Builders, Inc.* (1946**)** 27 Cal.2d 687, and other early cases. (See, e.g., *General Ins. Co. v. Superior Court* (1972) 26 Cal.App.3d 176; *Holm v. Bramwell, supra,* 20 Cal.App.2d 332.) It is against this backdrop of early cases that Niederhauser argues both contracts were void ab initio because MW was unlicensed when it signed them. Niederhauser concludes that because the contracts are void, they are unenforceable and it is unnecessary to analyze section 7031 at all. Not so. As we shall show, under current law, the two contracts are not void just because MW was unlicensed on the date of signing.

(2) Supreme Court Cases: Gatti, Loving & Evans, and Lewis & Queen

We begin our analysis with a discussion of *Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d 687. That case highlighted the interplay between section 7031 and the void-for-illegality doctrine.

In *Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d 687, an individual who held a contractor's license entered into an agreement to provide carpenter labor on certain residential projects. The contractor's foreman was also individually licensed. A few months after the contract was signed, the hiring party agreed that the contractor and his foreman should perform the work on a partnership or joint venture basis. A license was subsequently issued in the names of the contractor, the foreman and a third party, but no license was issued in the names of the contractor and the foreman exclusively, either as partners or as joint venturers. The hiring party sought to avoid payment because the contractor and the foreman had failed to obtain a partnership license in their two names.

As the court in *Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d 687 observed, "[s]ection 7029 provide[d] that it [was] unlawful for two or more licensees holding separate licenses to act jointly in the capacity of a contractor without first having secured an additional or joint license." (*Id.* at p. 689.) Since the contractor and the foreman did not have an additional or joint license in their two names alone, an issue arose as to their compliance with section 7031. The difficulty was in alleging that they were duly licensed at all times during the performance of the act or contract.

The hiring party asserted that the contract was void for illegality, because of the apparent violation of the licensing requirements. The court rejected the argument on the facts before it, having concluded that the contractor and the foreman had substantially complied with the statutory requirements. In reaching this conclusion, the court stated: "If defendant is allowed to defeat plaintiffs' legitimate claim on this technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional*

joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." (*Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d at p. 690.)

The case before us, as distinguished from *Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d 687, does not rest on the doctrine of substantial compliance, as we have explained above. However, *Gatti* is nonetheless of significance in addressing this case. The court in *Gatti* showed that the void-for-illegality doctrine would not necessarily be applied in every instance in which there was a technical noncompliance with the statutory licensing requirements. It cautioned against permitting a defendant to avoid a legitimate claim on a technical ground and underscored the importance of the administrative review of a contractor's qualifications in fulfilling the goal of protecting the public.

In the case before us, of course, MW claims to have performed nearly $1 million in structural steel work for which it has not been compensated. Niederhauser seeks to avoid payment of 100 percent of that amount because MW had not yet received its license when the work was initially undertaken, even though MW was licensed when it performed the bulk of the work and current section 7031 permits recovery for the work MW performed while it was licensed. In our view, denying recovery in this instance is not within the spirit of *Gatti.*

Our analysis does not end there, however. As indicated above, the Supreme Court in *Loving & Evans v. Blick, supra,* 33 Cal.2d at page 607 used strong language about the void-for-illegality doctrine. In that case, a partnership was unlicensed at the time of contracting, and only one of the two partners was then licensed. Neither the partnership nor the second partner obtained a license before the performance of the contract was completed. The court addressed whether the partnership operated in

violation of the law. (*Id.* at p. 606.) In order to answer this question, the court reviewed various Business & Professions Code licensing requirements, including those set forth in section 7031. The court ultimately held that the partnership had violated the applicable statutes regulating the contracting business and that the contract was illegal and void. (*Id.* at pp. 607-608.)

In reaching this decision, the court discussed the case of *Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d 687, in which it had applied the substantial compliance doctrine. The court in *Loving & Evans v. Blick, supra,* 33 Cal.2d 603 indicated that the situation in *Gatti* was distinguishable from the one before it. In *Gatti*, both the contractor and the foreman were individually licensed at the time the contract was signed and remained licensed after they undertook performance of the work as a partnership or joint venture. In *Loving & Evans*, however, one of the partners was unlicensed during the entire period of performance of the contract. The *Loving & Evans* court said: "Thus, it is apparent that the licensing regulations enacted 'for the safety and protection of the public,' by prohibiting inexperienced persons from engaging in contracting work, were at no time here material permitted to function in determining the qualifications of [the unlicensed partner] therefor. Such disregard of the public policy underlying the state's licensing requirements cannot be correlated with the rationale governing the Gatti . . . case[] . . . .' [Citation.]" (*Loving & Evans v. Blick, supra,* 33 Cal.2d at p. 609.) By so stating, the court emphasized the importance of the administrative review of each individual partner's qualifications. Had the qualifications of both partners been reviewed and approved in *Loving & Evans*, the answer might have been different, as it was in *Gatti.*

The *Loving & Evans* court also stated that in the matter before it, the partnership, on reversal, would be permitted to "present to the trial court any matters which they may claim will show a substantial compliance with the licensing requirements so as to avoid the charge of illegality with respect to the contract in question." (*Loving &*

Evans v. Blick, supra, 33 Cal.2d at p. 615.) The court thus implied that, just as in *Gatti v. Highland Park Builders, Inc., supra,* 27 Cal.2d 687, a contract would not necessarily be held void for illegality due to an apparent violation of the applicable licensing requirements, if those requirements could be deemed satisfied through the doctrine of substantial compliance.

We consider the teachings of *Loving & Evans v. Blick, supra,* 33 Cal.2d 603 in the case before us. As a technical point, MW was not licensed on the date it signed the contracts. Yet before undertaking the performance of any acts for which it may be permitted to seek compensation, based on our analysis of section 7031, it had received that license, at least with respect to the structural steel work contract. Therefore, it satisfied the requirements of section 7031 with respect to any work for which it may receive compensation. Viewed in that light, there is no violation of the section 7031 statutory licensing requirements. Moreover, the underlying purpose of those requirements is satisfied because the Board had had the opportunity to pass upon MW's qualifications, had approved them, and had issued a license to MW by the time MW commenced the performance of work for which it may be compensated. The statutory goal of protecting the public from unlicensed contractors was, to that material extent, fulfilled. Therefore, we see the decision in *Loving & Evans* as no bar to MW's recovery of compensation to the extent permitted by section 7031.

Loving & Evans v. Blick, supra, 33 Cal.2d 603 was not the last case in which the Supreme Court addressed the Business & Professions Code licensing requirements. It discussed them again in *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, a case factually similar to *Loving & Evans*. There, it held that section 7031 barred an unlicensed subcontractor from recovery under a construction contract when the subcontractor was unlicensed throughout the entire period of performance. In response to the subcontractor's argument that justice required the general contractor to turn over the payment it had received attributable to the subcontractor's labor, the court stated: "One

answer to this contention is that, even in the absence of a provision such as section 7031, the courts generally will not enforce an illegal bargain . . . ." (*Id.* at p. 150.)

However, the court continued: "In some cases, on the other hand, the statute making the conduct illegal, in providing for a fine or administrative discipline excludes by implication the additional penalty involved in holding the illegal contract unenforceable; or effective deterrence is best realized by enforcing the plaintiff's claim rather than leaving the defendant in possession of the benefit; or the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality. In each such case, how the aims of policy can best be achieved depends on the kind of illegality and the particular facts involved. [Citations.] But we are not free to weigh these considerations in the present case. Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state. [Citation.]" (*Lewis & Queen v. N. M. Ball Sons, supra,* 48 Cal.2d at p. 151.)

The court thereupon rejected the subcontractor's unjust enrichment argument, having concluded that section 7031 barred recovery. In so doing, the court implied that when a contractor violated section 7031, the provisions of that section itself, not the void-for-illegality doctrine, would determine the outcome. In the case before us, of course, the provisions of section 7031, as we have already explained, do not bar total recovery under the structural steel work contract. This is because MW, unlike the subcontractor in *Lewis & Queen v. N. M. Ball Sons, supra,* 48 Cal.2d 141, was licensed while performing most of the work under that contract. Whether or not the provisions of section 7031 bar recovery under the ornamental metals work contract is a matter for the trial court's resolution, upon determining whether the Class C-23 license was adequate.

(3) Vitek, Inc.

A most elucidating case, *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586, followed *Lewis & Queen v. N. M. Ball Sons, supra,* 48 Cal.2d 141, albeit some years later. In *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586, the general contractor had an expired license when, on a Friday, it executed the contract for the construction of an ice skating rink. The following Monday, its licensed was renewed and it commenced work under the contract. There was no question but that all of the work was performed while the license was in effect. The court concluded at the outset that section 7031 had been satisfied. It therefore focused its attention on whether the contract was illegal and unenforceable because the contractor was unlicensed when the contract was executed. The court observed: "Many of the cases . . . have stated a contract executed by an unlicensed person in violation of the law is illegal and void. We are convinced, however, that sort of broad statement is improper where the Legislature itself has defined the sanctions." (*Id.* at p. 591; footnote omitted.)

The court further explained: "Undoubtedly, the general rule in this state is that when it appears there is a violation of a regulating statute, the prescribed penalty is the equivalent of an express prohibition and a contract made contrary to its terms is void even though the statute does not pronounce the fact. [Citations.] The rule is not without exception, however, and before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition or a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers meant a contract in contravention of it should be void. [Citations.]" (*Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 591-592.)

The *Vitek* court observed that the Legislature had made it a misdemeanor for a person to act as a contractor without having a license (§ 7028) and had barred recovery for compensation under a contract unless the contractor was licensed "at all times" during performance (§ 7031, subd. (a)). (*Vitek, Inc. v. Alvarado Ice Palace, Inc.,*

supra, 34 Cal.App.3d at pp. 591, 594.) The *Vitek* court continued: "By this action, the Legislature has defined the perimeter of its sanctions. Section 7031 denies all recovery for performance unless the contractor had a license at all times *during performance*; if the Legislature had in mind that the contract was void, it could have acknowledged the fact by omitting the words 'during the performance . . .' or said 'while so acting.'" (*Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d at p. 594.) The court concluded: "Possession of a license on the date of execution was not a matter of concern to the Legislature in its design for public protection as far as civil remedies are concerned. [Citation.]" (*Ibid*.)

Vitek, Inc. v. Alvarado Ice Palace, Inc., supra, 34 Cal.App.3d 586 squarely answers Niederhauser's question concerning whether the contracts before us are unenforceable due to illegality. They are not. Here, MW was unlicensed when it signed the contracts, as was the contractor in *Vitek* when it signed its contract. However, just as the court in *Vitek* concluded, whether the contractor was licensed on the date of signing is not determinative. Whether MW is entitled to compensation for performance of work under the contracts will be determined by the proper application of section 7031, as we have already discussed.

However, Niederhauser challenges the soundness of the decision in *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586. It claims the case is "aberrant" and "was never good law on the grounds of voidness for illegality." Niederhauser maintains that *Vitek* contradicts the Supreme Court decisions in *Lewis & Queen v. N. M. Ball Sons, supra,* 48 Cal.2d 141 and *Latipac, Inc. v. Superior Court* (1966) 64 Cal.2d 278. We disagree.

The decision in *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586, contrary to Niederhauser's assertion, is consistent with *Lewis & Queen v. N. M. Ball Sons, supra,* 48 Cal.2d 141, and in fact relies upon its analysis. (*Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d at p. 592.) The court in each case

addressed the illegality issue and in the end concluded that whether or not a contractor who is unlicensed on signing the contract is entitled to compensation is dictated by section 7031.

In *Latipac, Inc. v. Superior Court, supra,* 64 Cal.2d 278, the court held that a contractor who was licensed on the signing of the contract and for the first fifteen months after undertaking performance of the work had substantially complied with the requirements of section 7031, even though its license had expired before it completed the work. In determining whether to apply the substantial compliance doctrine, the court reviewed factors courts had utilized in the past. It focused on three factors, one of which was whether the contractor was licensed when the contract was signed.

Niederhauser stops here and argues *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586 is irreconcilable with *Latipac, Inc. v. Superior Court, supra,* 64 Cal.2d 278, because *Vitek* fails to recognize that licensure upon contract signing is "one of the elements of the substantial compliance doctrine." This argument fails for two reasons. First, the *Latipac* court emphasized that it did not undertake to determine whether the absence of any one of the three factors would preclude a finding of substantial compliance. The court specifically stated: "Since all these elements here concur, we need not determine whether any of them, singly or in more limited combination, would constitute 'substantial compliance.'" (*Id.* at p. 281.)

Second, and perhaps more importantly, we consider *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586 not for the application of the substantial compliance doctrine, but for its analysis of the issue of illegality of contract. *Latipac, Inc. v. Superior Court, supra,* 64 Cal.2d 278 did not address the question whether the void-for-illegality doctrine precludes a contractor who was unlicensed upon signing from seeking payment for any work performed under the contract, even work performed after the license was obtained. *Vitek* simply is not inconsistent with *Latipac*.

In closing, we note that *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586 was cited with approval in *Gaines v. Eastern Pacific* (1982) 136 Cal.App.3d 679, 682. There, a general contractor's cross-complaint against a subcontractor was not barred where the general contractor was unlicensed on the signing of the contract but licensed before the services were performed.[9] As stated in *Gaines*, "The [*Vitek*] court concluded that the contract itself was not illegal; the Legislature in enacting section 7031 has denied recovery for unlicensed performance, not for the unlicensed execution of a contract. [Citation.]" (*Gaines v. Eastern Pacific, supra,* 136 Cal.App.3d at p. 682.) *Vitek* is good law and provides the answer to the illegality question in this case.[10]

G. Attorney Fees

MW also argues that if this court should reverse any portion of the summary judgment, it must also reverse the award of attorney fees, because Niederhauser would no longer be the prevailing party. Niederhauser, on the other hand, notes that under Civil Code section 3260, subdivision (g), the prevailing party in an action to recover funds wrongfully withheld under a construction contract is entitled to attorney

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[9] We observe that *Gaines v. Eastern Pacific, supra,* 136 Cal.App.3d 679 incorrectly describes *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586 as a case having to do with the substantial compliance doctrine. *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1261 makes the same mistake. The *Vitek* court specifically stated that "[t]he case at issue does not rely on the concept of substantial compliance." (*Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App.3d 586, 591, fn. 5.) Rather, the holding in *Vitek* was based on the fact that the contractor was licensed at all times during the performance of the contract, so section 7031, subdivision (a) presented no bar to the collection effort and resort to the substantial compliance doctrine was unnecessary. (*Id.* at p. 590.)

[10] *Wilson v. Steele* (1989) 211 Cal.App.3d 1053, which Niederhauser also cites for the proposition that contracts by unlicensed contractors are void, is distinguishable. It does not have to do with the efforts of an unlicensed contractor to obtain compensation under section 7031, subdivision (a).

fees and costs. It argues that it was the prevailing party below and will be again on appeal. As we have shown, however, the summary judgment was erroneously granted and we hereby reverse it. Niederhauser is no longer the prevailing party and the trial court's order awarding attorney fees must be reversed as well.

IV

DISPOSITION

The summary judgment and the order awarding attorney fees are reversed. The case is remanded for further proceedings consistent with this opinion. MW shall recover its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.