STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

BROWNSTONE ENTERPRISES, INC., an Idaho Corporation,
Plaintiff,
vs.
GERALD WHITEHEAD and TERRI WHITEHEAD, husband and wife; SHADOW MOUNTAIN; 84 LUMBER, a corporation doing business in the State of Idaho; FEDERAL CONSTRUCTORS CORP., BRAD KLINGE; DOES 1-100.
Defendants.

Case No. **CV 2010 1444**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Attorneys:
for the Plaintiff/Counterclaim Defendant: Muriel M. Burke
for the Defendant/Counterclaim Plaintiff: Steven C. Wetzel

I. PROCEDURAL HISTORY AND BACKGROUND.

On February 19, 2010, plaintiff Brownstone Enterprises, Inc. (Brownstone), a licensed and registered Idaho contractor, filed its Complaint against defendants Dee O. Whitehead and Jane Doe Whitehead (husband and wife) and Brad Klinge (Klinge), who were doing business as Shadow Mountain, an unlicensed, unregistered business entity. Complaint, pp. 1-2, ¶¶ 1-6. Brownstone states it entered into a contract to build a home for Garrett and Sheryl Silva on July 17, 2009. Brownstone then contracted with Mr. Whitehead (later corrected by plaintiffs from "Dee. O. Whitehead" to "Jerold Whitehead" in the Amended Complaint, and corrected again by plaintiffs to "Gerold Whitehead" in the Second Amended Complaint, although it appears to be spelled

"Gerald", given the Affidavit of Gerald Whitehead filed July 13, 2010) to engage Whitehead, Klinge and Shadow Mountain as subcontractors in that construction project. Brownstone alleges that following completion of construction, subcontractors hired by defendants filed liens against the property because of defendants' (Whitehead/Klinge/Shadow Mountain) failure to pay the subcontractors in violation of the agreement between the parties. Brownstone also alleged the defendants utilized the "Brownstone" name to obtain credit for material, supplies, and/or services without Brownstone's authority. *Id.,* pp. 2-6, ¶¶ 7-35. Brownstone's Amended Complaint, filed March 16, 2010, lists nine causes of action: (1) breach of contract; (2) fraud/misrepresentation; (3) identity theft; (4) trade name violation; (5) conversion of personal property; (6) unjust enrichment; (7) unfair trade practices and violation of the Consumer Protection Act; (8) (enumerated the "second" seventh cause of action) quiet title; and (9) (enumerated "eighth" cause of action) breach of a rental contract (only as to Whitehead). *Id.,* pp. 6-11, ¶¶ 38-69.

A Default Order, Order Quieting Title, and Judgment were entered against defendant 84 Lumber on April 27, 2010. An application for default and affidavit in support thereof, against defendant Federal Contractors Corporation were filed by Brownstone on May 4, 2010. No further action has been taken on these matters.

On May 11, 2010, defendants Gerald and Terri Whitehead and Brad Klinge d/b/a Shadow Mountain filed their Answer and Counterclaim and Demand for Jury Trial. In their Counterclaim these defendants allege: (1) Brownstone breached its contract and defendants are entitled to specific performance; (2) Brownstone breached its contract and defendants are alternatively entitled to money damages; (3) quasi-contract and unjust enrichment; (4) implied-in-fact contract; (5) promissory estoppel; and (6) breach

of fiduciary duty. Answer and Counterclaim, pp. 7-12, ¶¶ 41-73. Brownstone answered the Counterclaim on June 18, 2010.

On June 30, 2010, Brownstone filed its motion for summary judgment and memorandum and affidavits in support thereof against Whiteheads, Klinge and Shadow Mountain, alleging these defendants' counterclaims must be dismissed as a matter of law because: (1) violation of the Idaho Contractor Registration Act, I.C. § 54-5201 *et seq.* precludes their counterclaims, and (2) collateral estoppel applies as a result of the filing and subsequent releasing of the mechanic's/materialmen's lien in this matter. Whiteheads and Klinge d/b/a Shadow Mountain filed their memorandum in opposition to the motion for summary judgment and affidavit in opposition to the motion on July 13, 2010. Brownstone replied to defendants' opposition to the motion for summary judgment on July 20, 2010. On July 27, 2010, this Court heard oral argument on plaintiffs' motion for summary judgment.

On July 13, 2010, Brownstone moved for leave to amend the First Amended Complaint and submitted a proposed Second Amended Complaint with the motion. The purpose of this motion was to add Randy Cardwell as a plaintiff and to correct the spelling of Gerald Whitehead's name. Motion to Amend First Amended Complaint, p. 2. Plaintiffs also seek to "fully articulate a [breach of rental contract] cause of action that had been started in the First Amended Complaint, but had not been finished." *Id.* Plaintiffs argued no prejudice would result to defendant Whitehead "because he was made aware of the claim in the First Amended Complaint." *Id.* The reason listed by Brownstone for seeking to add Randy Cardwell as a plaintiff is that it was he who entered into the written contract, not Brownstone. *Id.* Defendants did not reply to the motion for leave to amend. At oral argument, counsel for these remaining defendants

(Whiteheads/Klinge and Shadow Mountain) had no objection to plaintiff's Motion to Amend First Amended Complaint. Accordingly, that motion was granted on the record on July 27, 2010. Brownstone was given until July 30, 2010, to file its Second Amended Complaint. On July 28, 2010, Brownstone timely filed such.

Also at that July 27, 2010, hearing, this matter was scheduled for ten-day trial beginning February 22, 2010. Thus, the scheduling conference scheduled for August 4, 2010, is vacated.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

III. ANALYSIS.

A. Violation of the Idaho Contractor Registration Act.

Brownstone first argues the claims brought by defendants in their May 11, 2010,

Answer and Counterclaim should be dismissed because "Defendants have not complied with the statutory code regarding registration as contractors". Memorandum of Facts and Points of Authorities, p. 4. Brownstone argues defendants held themselves out as contractors within the meaning of the Contractor Registration Act (CRA), but that no defendant had properly registered under the CRA. *Id.,* pp. 6-7. Brownstone argues:

> To bring a cause of action regarding such a construction contract, the Defendants were required to *allege* that they were a duly registered contractor under the statute. Idaho Code § 54-5217(b). Defendants Answer and Counterclaim do not allege **any** facts to support an allegation that they registered under Idaho Code § 54-5201 et seq.

Id., p. 7.

In response, defendants Gerald and Terri Whitehead and Brad Klinge d/b/a Shadow Mountain point to "a number of genuine issues of material fact that prohibit the Court from even considering whether Brownstone is entitled to a judgment as a matter of law." Memorandum in Opposition to Motion for Summary Judgment, pp. 3-4. The issues of material fact raised by defendants include, *inter alia*: whether and when the certification of registration of Shadow Mountain took place; Randy Cardwell (the individual who entered into the written contract with defendants, presumably on behalf of Brownstone)'s credibility and whether he and Brownstone are separate entities; who actually entered into the contract for work on the Silva home; whether Brownstone knew Klinge d/b/a Shadow Mountain had not been certified as a registered contractor at the time his services were requested; and whether construction was completed on the Silva home prior to February 9, 2010. *Id.* Defendants point out for the Court that Randy Cardwell "is not a building contractor", and he hired the defendants to "manage and construct a home for him." *Id.,* p. 6. "Shadow Mountain, being a reputable contractor from the State of Montana, took the appropriate, albeit somewhat tardy, actions to

obtain registration in the State of Idaho." *Id.* Defendants argue Shadow Mountain made application for certification and "was a vested registered contractor; the exact time of vesting is a factual issue."

Brownstone responds the CRA became effective on January 1, 2006, and "when you are not a registered contractor a claim cannot be brought for labor done or materials furnished prior to being registered." Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 6, citing *Parkwest Homes, LLC v. Julie Barnson, Mortgage Electronic Registration Systems, Inc.,* Docket No. 36246-2009 (Idaho Supreme Court June 25, 2010). Brownstone argues there is no evidence in the record before the Court to demonstrate defendants "disputed that the work performed or services provided by the Defendants were completed prior to February 9, 2010." *Id.,* p. 3.

The CRA came about because of the legislature's finding that it is in the public interest to provide a mechanism to remove from practice any practitioners of construction who are incompetent, dishonest, or unprincipled. I.C. § 54-5202. The Act makes it unlawful for a contractor to engage any other contractor who is required to be registered unless satisfactory proof of such registration has been furnished. I.C. § 54-5204(2). The Act precludes any person not properly registered under the CRA (and not exempt under the provisions of I.C. § 54-5205, which are inapplicable under the given facts) from placing a lien on real property. I.C. § 54-5208. The Act also precludes any person not properly registered from "bring[ing] or maintain[ing] any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and providing that he was a duly registered contractor, or that he was otherwise exempt as provided for in this

chapter, at all times during the performances of such act or contract." I.C. § 54-5217(2). Here, the facts before the Court indicate that no dispute exists regarding defendants' role as contractors within the meaning of the CRA. A contractor is defined as:

> (a) any person who in any capacity undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to, or does himself or by or through others, perform construction; or
> (b) a construction manger who performs construction management services.

I.C. § 5203(4)(a) and (b). Construction is defined as:

> ..the performance of building, altering, repairing, adding to, subtracting from, improving, reconstructing, moving, excavating, wrecking or demolishing any building, highway, road, bridge, or other structure, project, development or improvement to real property, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith.

I.C. § 5203(3). Defendants concede they "appeared competent in the field of construction, appeared to be honest and principled in the completion of the task, and have the right to be paid for the services." Memorandum in Opposition to Motion for Summary Judgment, p. 5.

The role of each party involved in the instant action remains unclear. Whether defendant Gerald Whitehead was a partner in Brownstone remains a disputed questions of fact. Affidavit of Brad Klinge, p. 2, ¶ 3. And, although Gerald Whitehead has worked for Shadow Mountain in the past, defendants argue:

> …on the Silva home, Gerald Whitehead initially only acted as a partner of Brownstone. Later, Randy Cardwell attempted to force Gerald Whitehead to be paid as a Shadow Mountain employee.

Id., p. 4, ¶ 12. Randy Cardwell states in his Second Affidavit he and his wife own all shares of Brownstone "to the best of my recollection." Second Affidavit of Randy Cardwell, p. 2, ¶ 8. Cardwell also states Gerald Whitehead and he agreed Whitehead would perform some subcontracting work on the Silva home under the Shadow

Mountain, which Whitehead told Cardwell "was licensed and registered." *Id.,* ¶ 7. Whitehead himself states he and Randy Cardwell formed a partnership named Brownstone Homes, a subsidiary of Brownstone Enterprises, Inc., to build homes and "use Brownstone Enterprises' contractor registration". Affidavit of Gerald Whitehead, p. 2, ¶ ¶ 2-3. Much of the confusion in this matter is the result of plaintiffs' Complaint, in which their counsel identifies "Plaintiff Brownstone Enterprises Inc. (hereinafter "Brownstone Homes") is an Idaho Corporation doing business in the State of Idaho and also does business under the trade name Brownstone Homes." Verified Complaint and Demand for Jury Trial, p. 1, ¶ 1.

However, it is undisputed that Shadow Mountain was not registered pursuant to the CRA until March 9, 2010. Affidavit of Brad Klinge, p. 3, ¶ 8. Klinge states application was made on February 8, 2010. *Id.,* ¶ 6. As such, under I.C. §§ 54-5217, defendants are precluded from bringing any action arising out of their performances of contracts or acts which require registration, at least up to that point in time. I.C § 54-5217(2). But, as argued by these defendants, Brownstone likewise acted unlawfully in failing to secure "satisfactory proof" of Shadow Mountain's registration prior to engaging Shadow Mountain as a contractor. I.C § 54-5204(2). As such, Brownstone is not entitled to judgment as a matter of law on this issue. Additionally, since it is unclear at this juncture whether Shadow Mountain was a subcontractor of Brownstone, whether Gerald Whitehead acted on behalf of Brownstone or on behalf of Shadow Mountain [Brownstone provides no authority for its contention that Whitehead violated the statute of frauds by arguing he owns a portion of Brownstone and I.C. § 9-505 does not require such agreement to be in writing. *See* Plaintiff's Reply Memorandum, p. 4.], and given the possibility that the confusing relationship between the parties may have brought

Shadow Mountain within Brownstone's registration, all these features result in Brownstone not being entitled to summary judgment at this juncture.

B. Collateral Estoppel Based on the Materialmen's/Mecahnics Lien.

Brownstone next alleges defendants' claims should fail because collateral estoppel and/or equitable estoppel would bar re-litigation of defendants' claims raised in their lien application and subsequent release of lien. Memorandum of Facts and Points of Authorities in Support of Plaintiff's Motion for Summary Judgment, pp. 9-12. Brownstone argues the "lien statute provides for a statutory scheme to litigate the issues." *Id.,* p. 10. Brownstone argues: "…Defendants should be estopped from bringing any of the numerous claims they have brought against the Plaintiffs as they are identical to the ones in this case, they had the opportunity to fully litigate this matter under the mechanics lien process, the Defendants released the lien fully and finally which was a final judgment on the claim, and all of the Defendants have admitted to being party and privity with Shadow Mountain." *Id.,* p. 11.

Defendants respond plaintiff's legal argument is "fraught with error." Memorandum in Opposition to Motion for Summary Judgment, p. 8. According to defendants, there was no earlier case within the meaning of case law on collateral estoppel and the lien was released only because of issues surrounding Shadow Mountain's CRA registration, not that any debt had been fully satisfied. *Id.*; Affidavit of Brad Klinge, pp. 3-4, ¶¶ 9-10; Affidavit of J.T. Jacobsen, p. 3, ¶ 6. To this, plaintiff responds the Court cannot look to parol evidence unless the contract at issue is deemed ambiguous. Reply Memorandum in Support of Motion for Summary Judgment, p. 7.

There is simply no support for Brownstone's argument regarding collateral

estoppel in Idaho case law. Brownstone directs this Court to no such authority. Whether an issue is barred by collateral estoppel or issue preclusion is a question of law given free review. *Ticor Title Co. v. Stanion,* 144 Idaho 119, 122, 157 P.3d 613, 616 (2007). Collateral estoppel, as discussed by the parties, requires:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Id. Brownstone argues the defendants had an opportunity to litigate identical issues through the lien claim process; the issues all seek money damages and are identical to the lien claims; the issue was actually decided 'by the Defendants verified filing of the release of lien with the Kootenai County Recorder's Office"; a final judgment was entered " as the Defendants' released [sic] of the lien constitutes an acceptance and acknowledgement that the debt was satisfied"; and all defendants "were involved in Shadow Mountain and were in privity to each other." Memorandum of Facts and Points of Authorities in Support of Plaintiff's Motion for Summary Judgment, pp. 10-11.

The problem is the matter was not "actually decided" by the action of defendants in filing and subsequently releasing their lien. No case law in Idaho or elsewhere supports Bronwstone's contentions. In fact, the Utah Court of Appeals has stated:

> We next address Schulman's contention that because the California court ordered the release of the lis pendens and denied Winters's request for attorney fees incurred in pursuing that claim, and wrongful lien claim has already been litigated and is barred by collateral estoppel. We disagree.
>
> Collateral estoppel "does not apply to issues that merely 'could have been tried' in the prior case, but operates to [bar] issues which were actually asserted and tried in that case." …Although the California court ordered the lis pendens released, it did not specifically address Winters's contention that the lis pendens filed by Schulman was wrongful in that it

> did not comply with section 78-40-2. Also, the California court did not consider Winters's claim for damages under sections 38-9-1 to -4 for Schulman filing an allegedly wrongful lien in Utah. Thus, we conclude that Winters's wrongful lien claim was not precluded by principles of collateral estoppel. Additionally, because the issue of attorney fees, as it relates to the wrongful lien claim under sections 38-9-1 to -4, was not litigated in the California proceeding, collateral estoppel does not preclude consideration of this issue either.

Winters v. Schulman, 977 P.2d 1218, 1222 (Utah App. 1999). *Winters* involved an allegation that a lis pendens was a wrongful lien, and the trial court in *Winters* held the wrongful lien claim had become moot, but, as is relevant to the instant matter, the Utah Court of Appeals explicitly stated collateral estoppel only bars those issues actually asserted and tried in a previous case. 977 P.2d 1218, 1221. Similarly, here it cannot be said that the filing of a lien and subsequent withdrawal thereof constitutes the issue having been decided in previous litigation. Additionally, release of a lien likely does not amount to the issue having been actually decided in previous litigation or there having been a final judgment on the issue, and defendants having sought a lien, at the very least, is not an issue identical to defendants now alleging promissory estoppel or breach of a fiduciary duty, *inter alia.* Because Brownstone can point this Court to no authority for its contention that seeking and releasing a lien under I.C. § 45-501, *et seq.* amounts to an issue having been finally decided on the merits, it likely cannot be said that Brownstone is entitled to judgment as a matter of law.

Brownstone only obliquely mentions equitable estoppel in reference to an Oklahoma case on mechanics' liens. In Idaho, the doctrine of equitable estoppel requires:

> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to

his or her prejudice.

Willig v. State, Dep't of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). Quasi-estoppel, a related doctrine does not require the first or fourth elements and applies when it would be unconscionable to allow a party to assert a right inconsistent with a prior position. *Id.* Here, Brownstone has not alleged any *one* of the elements of either equitable or quasi-estoppel, let alone all the elements which would need to be not only alleged, but *proven,* in order to justify summary judgment. It is unclear how Brownstone could not have discovered the truth, that defendants were releasing the lien despite their contention that they were never paid, when material issues of fact remain regarding whether or not defendants were in fact ever paid for their services. *See* Affidavit of Gerald Whitehead, p. 3, ¶ 11; Affidavit of J.T. Jacobsen, p. 3, ¶ 6; and Second Affidavit of Randy Cardwell, p. 3, ¶ 12 and Exhibit C.

IV. CONCLUSION AND ORDER.

For the reasons stated above, a question of material fact remains as to the CRA issue raised by Brownstone, and Brownstone is not entitled to judgment as a matter of law on the issue of collateral estoppel.

IT IS HEREBY ORDERED Brownstone's Motion for Summary Judgment is DENIED.

Entered this 3rd day of August, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Muriel M. Burke	712-3123	Steven C. Wetzel	664-6741

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Jeanne Clausen, Deputy Clerk