Illinois Supreme Court Holds That Oral Contracts Not Necessarily Unenforceable Pursuant to Home Repair and Remodeling Act, But Why Risk It?

By Michael P. Tomlinson

September 24, 2010 – Illinois contractors who are owed money pursuant to oral contracts with their customers may be breathing a bit easier today. The Illinois Supreme Court held yesterday in *K. Miller Construction Company, Inc. v. Joseph J. McGinnis et al.*, No. 109156, 2010 WL 3704993, at *1 (Ill. Sept. 23, 2010),[1] that the Illinois Home Repair and Remodeling Act (815 ILCS 513/15 (West 2010) (the "Act") does not preclude contractors from trying to enforce oral contracts for home repair or remodeling work for over $1,000. This decision reversed the appellate court's decision that such oral contracts were unenforceable because they violated the Act's requirement that "[p]rior to initiating home repair or remodeling work for over $1,000, a person engaged in the business of home repair or remodeling shall furnish to the customer for signature a written contract or work order." *Id*. at *3. The Court's decision also has the added effect of allowing contractors to maintain an action to foreclose their mechanic's liens pursuant to such oral contracts.

The Court reasoned that its decision was in accord with the July 2010 amendment to the Act, an amendment that the Court described as one that "clarified that the General Assembly did not intend for violations of the writing requirement under the Act to render oral contracts unenforceable." *Id*. at *8. Until the amendment and the Court's decision yesterday interpreting it, Illinois appellate courts were divided about the effect a violation of the Act had on the claims a contractor could pursue.[2] *Id.* at *9. The Court also found that "Public Act 96-1023 was meant to clarify the previous law and make clear that a violation of the Act does not render oral contracts unenforceable or relief in *quantum meruit* unavailable, and that, instead, the remedy for the violation of the Act lies elsewhere." *Id.* The Court cited to legislative history regarding the amendment to the Act, in which Senator Wilhelmi stated one of the reasons for the amendment was to make clear that "unless there [are] actual damages, a consumer cannot get out of paying the balance due to a home repair and remodeling company by using these two technical provisions in the Act of requiring a pamphlet to be given and requiring a written contract before work on the project." *Id.* (quoting 96th Ill. Gen. Assem., Senate Proceedings, Mar. 9, 2010, at 68 (statements of Senator Wilhelmi)). If a customer has suffered actual damages, then the customer may bring a cause of action under Section 10a of the Illinois Consumer Fraud and Deceptive Business Practices Act, (815 ILCS 505/10a (West 2010). 815 ILCS 513/30 (West 2010).

Of course, the fact that a contractor can pursue a claim based on an oral contract is not the same as being able to prevail on that claim. Nothing in the Court's opinion guarantees that all oral contracts will

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[1] Also *available at* http://www.state.il.us/court/Opinions/SupremeCourt/2010/September/109156.pdf. The opinion has not yet been released for publication in the permanent reporters and as such, remains subject to revision or withdrawal.

[2] The amendment actually changed the wording of §30 of the Act entirely. Section 30 now provides that "[a]ny person who suffers actual damage as a result of a violation of this Act may bring an action pursuant to Section 10a of the Consumer Fraud and Deceptive Business Practices Act." Pub. Act 96-1023, eff. July 12, 2010.

be enforceable. Rather, the Court states only that a contractor is not precluded by the Act from *trying* to enforce an oral contract.

The bottom line: **Put it in writing and make sure to comply with the Act's other requirements.** Contractors simply should not risk having their oral contracts deemed unenforceable when compliance with the Act is relatively simple and far less costly than litigating the issue of whether an oral contract exists and if so, what terms make up the contract. The parties in *K. Miller Construction* had not even begun to get into the evidence regarding the terms of the oral contract, although its existence seemed to be undisputed. The case now heads back down to the Circuit Court to begin the litigation and costly discovery to determine whether and to what extent the parties had an enforceable oral contract. Often, the terms of oral contracts come down to "he said, she said," which is not a place any contractor wants to be in with hundreds of thousands of dollars on the line.

If you have any questions regarding how to comply with the Act, contact Michael P. Tomlinson at Tomlinson Law Office, P.C. Mr. Tomlinson can help you prepare compliance packets for your business and if you are involved in litigation, then he can ensure that your rights are protected. For more information, call (312) 726-8770 or e-mail mtomlinson@tomlinson-law.com.