

AUG 10 2011

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NV-10-1483-KwJuH  
) )  
6 FRENCH QUARTER, INC., ) Bk. No. 07-51126-GWZ  
) )  
7 Debtor. )  
) )  
8 ) )  
BEAR AIR MECHANICAL, INC., )  
9 ) )  
Appellant, )  
10 ) )  
v. ) **M E M O R A N D U M**<sup>1</sup>  
) )  
11 EUGENE C. CANEPA, )  
) )  
12 Appellee. )  
13 ) )

Argued and Submitted on July 21, 2011  
at Las Vegas, Nevada

Filed - August 10, 2011

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: Martin G. Crowley, Esq. of American Legal Services  
argued for Appellant Bear Air Mechanical, Inc.;  
and John J. Gezelin, Esq., argued for Appellee  
Eugene C. Canepa.

Before: KWAN<sup>2</sup>, HOLLOWELL, and JURY, Bankruptcy Judges.

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<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, see Fed. R. App. P. 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> The Hon. Robert N. Kwan, Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal arises from the bankruptcy court's order  
2 disallowing the claim of Bear Air Mechanical, Inc., in its  
3 entirety. For the reasons stated herein, we AFFIRM the order of  
4 the bankruptcy court.

5 I. FACTS

6 The debtor, French Quarter, Inc., filed a Chapter 11  
7 petition on August 3, 2007.<sup>3</sup> The debtor owns and operates The  
8 Men's Club in Las Vegas, Nevada.

9 On October 15, 2007, Bear Air Mechanical, Inc., filed proof  
10 of claim #34-1, alleging an unsecured nonpriority claim of  
11 \$52,936.78 for work performed on the installation and service of  
12 refrigeration and HVAC systems at The Men's Club between  
13 September and December of 2006. The proof of claim was supported  
14 by five invoices that were simultaneously issued by Bear Air on  
15 January 28, 2007.

16 Eugene C. Canepa, a creditor and principal of the debtor,  
17 filed a motion to disallow Bear Air's claim.<sup>4</sup> Without stating  
18 specific facts, the motion generally argued that Bear Air's claim  
19 must be disallowed because its work was "substandard," it had  
20 billed for services it did not perform, and its accounting was

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21  
22 <sup>3</sup> Unless specified otherwise, all chapter and section  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
24 all "Rule" references are to the Federal Rules of Bankruptcy  
25 Procedure, Rules 1001-9037.

26 <sup>4</sup> It is peculiar that Canepa, rather than the debtor,  
27 objected to Bear Air's claim. We recognize that the bankruptcy  
28 court explicitly held that "Canepa has standing as a creditor and  
party in interest to object to Bear Air's Claim." Findings of  
Fact and Conclusions of Law at 2. Bear Air did not raise the  
issue of Canepa's standing on appeal, and accordingly we state no  
opinion on whether the bankruptcy court erred in this regard.

1 "overstated."

2 Bear Air opposed the motion but did not present any evidence  
3 to substantiate the quality of its work or its billing methods.  
4 In a reply Canepa argued for the first time that Bear Air was  
5 estopped by Nevada Revised Statute ("NRS") 624.320 from seeking  
6 payment on its claim because it did not hold a contractor's  
7 license at the time the work was performed.

8 Because the issue of the effect of NRS 624.320 was raised  
9 for the first time in the reply, the bankruptcy court continued  
10 the hearing on the motion for an evidentiary hearing and allowed  
11 Bear Air an opportunity to file a supplemental memorandum of  
12 points and authorities.

13 At the continued hearing, the court heard testimony from  
14 Canepa and Darrell Barker, the principal of Bear Air. Barker  
15 testified that Bear Air was not a licensed contractor and could  
16 not post a bond at any time that it performed work for the  
17 debtor. However, Barker also testified that he had informed  
18 Canepa that Bear Air was unlicensed. Canepa testified to the  
19 contrary and stated that he did not learn Bear Air was unlicensed  
20 until after the contract was terminated in December 2006. Canepa  
21 further testified that Bear Air's work was substandard, and that  
22 the debtor was forced to make repairs at a cost of \$16,000.

23 On July 20, 2010, the bankruptcy court entered its findings  
24 of fact and conclusions of law. The court explicitly held that  
25 because Bear Air "did not comply with NRS 624.320 and NRS  
26 [624.270], it is not entitled to enforce its Claim against the  
27 Debtor." Findings of Fact and Conclusions of Law at 3. The  
28 court also held that Bear Air's billing statements were

1 overstated by \$16,000. Bear Air appealed.

## 2 II. JURISDICTION

3 The bankruptcy court had jurisdiction over this  
4 proceeding under 28 U.S.C. §§ 157(b)(2)(B) and 1334. We have  
5 jurisdiction under 28 U.S.C. § 158.

## 6 III. Issues

7 1. Whether the bankruptcy court erred in determining that  
8 the claim must be disallowed in its entirety because Bear Air did  
9 not hold a contractor's license and was not bonded as required by  
10 Nevada law.

11 2. Whether the bankruptcy court erred in determining that  
12 Bear Air's work was substandard and its claim (if allowed) was  
13 overstated by \$16,000.

## 14 IV. Standards of Review

15 The Bankruptcy Appellate Panel reviews de novo a bankruptcy  
16 court's conclusions of law, including its interpretations of  
17 state law. Hopkins v. Cerchione (In re Cerchione), 414 B.R. 540,  
18 545 (9th Cir. BAP 2009).

19 Findings of fact are reviewed for clear error. Fed. R.  
20 Bankr. P. 8013. Whether a proof of claim's prima facie validity  
21 has been rebutted is a question of fact reviewed for clear error.  
22 See Garner v. Shier (In re Garner), 246 B.R. 617, 619 (9th Cir.  
23 BAP 2000).

## 24 V. Discussion

25 A. Bear Air Cannot Maintain a Claim for Payment Because It Was  
26 Not a Licensed Contractor.

27 There is no dispute that Bear Air did not hold a  
28 contractor's license and was not bonded. Citing the doctrines of

1 unjust enrichment and estoppel, Bear Air argues that it should be  
2 excepted from the statutory requirements because Canepa had  
3 notice at the time the work was performed that Bear Air was not  
4 in compliance with the statutes. However, the case law has  
5 recognized only two narrow exceptions—one legal and one  
6 equitable—to the licensing requirements. Because Bear Air does  
7 not meet either exception, it cannot state a claim for payment  
8 against the debtor in law or equity. Therefore, we affirm the  
9 bankruptcy court.

10 1. Nevada's Licensing Statutes.

11 Section 502(b)(1) provides that a claim must be disallowed  
12 to the extent it is unenforceable under applicable law. Here,  
13 the applicable state law is NRS 624.320, which states:

14 No person, firm, copartnership, corporation,  
15 association or other organization, or any  
16 combination of any thereof, engaged in the  
17 business or acting in the capacity of a  
18 contractor shall bring or maintain any action  
19 in the courts of this State for the  
20 collection of compensation for the  
21 performance of any act or contract for which  
22 a license is required by this chapter without  
23 alleging and proving that such person, firm,  
24 copartnership, corporation, association or  
25 other organization, or any combination of any  
26 thereof, was a duly licensed contractor at  
27 all times during the performance of such act  
28 or contract and when the job was bid.

22 An applicant cannot obtain a contractor's license unless and  
23 until it posts a surety bond or cash deposit with the Nevada  
24 State Contractors' Board. NRS 624.270.

25 "The primary purpose of Nevada's licensing statutes is to  
26 protect the public against both faulty construction and financial  
27 irresponsibility." Interstate Commercial Bldg. Services, Inc. v.  
28 Bank of Am. Nat'l Trust and Sav. Ass'n, 23 F.Supp.2d 1166, 1173

1 (D. Nev. 1998) (quoting MGM Grand Hotel v. Imperial Glass Co.,  
2 533 F.2d 486, 489 (9th Cir. 1976)). For this reason, courts have  
3 only recognized a few narrow exceptions to the licensing  
4 requirements. See id. at 1173-75.

5 An unlicensed contractor can maintain a legal claim on the  
6 contract only if it substantially complied with the licensing  
7 statutes. Interstate Commercial Bldg. Services, 23 F.Supp.2d at  
8 1173. For example, in Day v. West Coast Holdings, Inc., 101 Nev.  
9 260, 265 (1985), the contractor was not in strict compliance with  
10 NRS 624.320 because it had not obtained a specialty landscaping  
11 license prior to commencing the work. Nonetheless, the Nevada  
12 Supreme Court held that the contractor had "substantially  
13 complied" because it held a general contractor's license, its  
14 application for a specialty license was pending, the defendant  
15 had full knowledge of the contractor's noncompliance, the job had  
16 been completed to the defendant's satisfaction and benefit, and  
17 the defendant would otherwise be unjustly enriched. Id.; see  
18 also Nev. Equities, Inc. v. Willard Pease Drilling Co., 84 Nev.  
19 300, 303 (1968) (stating that a licensed well-driller, though it  
20 did not hold a specialty license, had substantially complied with  
21 the licensing statutes).

22 Similar to the exception for a contract claim at law, an  
23 unlicensed contractor may only state a claim to recover in equity  
24 under two exceptions: where either (1) there has been substantial  
25 compliance with the statute, or (2) the weight of a four-factor  
26 test balances in the claimant's favor such that the doctrine of  
27 in pari delicto should not be applied. Interstate Commercial  
28 Bldg. Services, 23 F.Supp.2d at 1174 (citing Magill v. Lewis, 74

1 Nev. 381, 386 (1959)). The Nevada Supreme Court delineated the  
2 second equitable exception and its four-factor balancing test in  
3 Magill:

4 The rule that the courts will not lend their  
5 aid to the enforcement of an illegal  
6 agreement or one against public policy is  
7 fundamentally sound. The rule was conceived  
8 for the purposes of protecting the public and  
9 the courts from imposition. It is a rule  
10 predicated upon sound public policy. But the  
11 courts should not be so enamored with the  
12 latin phrase 'in pari delicto' that they  
13 blindly extend the rule to every case where  
14 illegality appears somewhere in the  
15 transaction. The fundamental purpose of the  
16 rule must always be kept in mind, and the  
17 realities of the situation must be  
18 considered. Where, by applying the rule, the  
19 public cannot be protected because the  
20 transaction has been completed, where no  
21 serious moral turpitude is involved, where  
22 the defendant is the one guilty of the  
23 greatest moral fault, and where to apply the  
24 rule will be to permit the defendant to be  
25 unjustly enriched at the expense of the  
26 plaintiff, the rule should not be applied.

27 74 Nev. at 386 (citation omitted). However, "[i]n cases of  
28 'blatant, substantial, and repeated' violations of Nevada law,  
neither exception will protect the equitable claims of unlicensed  
contractors." Interstate Commercial Bldg. Services, 23 F.Supp.2d  
at 1175 (quoting Loomis v. Lange Fin. Corp., 109 Nev. 1121, 1129  
(1993)).

2. Bear Air Cannot Maintain an Action at Law on the  
Contract.

First and foremost, Bear Air did not substantially comply  
with NRS 624.320 or 624.270. Barker testified that Bear Air did  
not have a contractor's license at any time during the billed  
periods. Hr'g Tr., 28:11-18, March 29, 2010 (The Court: "Well,  
the point that I see is that neither you nor Bear Air Mechanical

1 has had a license at any time?" The Witness: "Correct." The  
2 Court: "Neither you nor Bear Air Mechanical ever had a bond  
3 posted as required by statute at any time; is that correct?" The  
4 Witness: "That's correct."). Barker further testified that he  
5 did not even apply for a license until after the work was  
6 completed and invoiced. Bear Air's noncompliance is unlike that  
7 of the plaintiff in Day, where a general license had been  
8 obtained and a specialty license application was pending during  
9 the work period. Bear Air did not substantially comply with NRS  
10 624.320.

11 Bear Air argues that because Canepa knew Bear Air was not  
12 licensed, the debtor should be estopped from denying payment.  
13 Specifically, Bear Air contends that the court erred in finding  
14 that "[t]here is no evidence that either Canepa or the Debtor had  
15 notice that Bear Air was not a licensed contractor." Findings of  
16 Fact and Conclusions of Law at 2. It is true that the bankruptcy  
17 court was technically incorrect. While Canepa testified he was  
18 unaware that Bear Air was not licensed, Barker testified to the  
19 contrary that he fully disclosed Bear Air's status to Canepa  
20 before the work began. However, the court's error was harmless.  
21 See Fed. R. Bankr. P. 9005; see also Litton Loan Servicing, Inc.  
22 v. Garvida (In re Garvida), 347 B.R. 697, 704 (9th Cir. BAP 2006)  
23 ("Moreover, we do not reverse for reasons that do not affect the  
24 substantial rights of parties."). Even if Barker's testimony  
25 were accepted as true, Bear Air does not meet the substantial  
26 compliance exception. In Day, 101 Nev. at 265, the defendant's  
27 knowledge of the plaintiff's noncompliance was only one of  
28 several factors that the court considered in finding that the



1 plaintiff had substantially complied with the licensing statutes.  
2 There, as in Nevada Equities, 84 Nev. at 303, the far more  
3 significant factor was the plaintiff's mere failure to obtain a  
4 specialty license before commencing the work. Accordingly, even  
5 had Canepa or the debtor known that Bear Air was unlicensed, the  
6 substantial compliance exception could not be applied.

7 Because the substantial compliance exception does not apply,  
8 Bear Air is precluded by NRS 624.320 from stating a legal claim  
9 to enforce its contract with the debtor.

10 3. Bear Air is Not Entitled to Equitable Relief.

11 Second, Bear Air cannot state a claim in equity because it  
12 does not satisfy the Magill exception. As discussed further  
13 herein, the invoices attached to the proof of claim demonstrate  
14 that Bear Air worked as a contractor on a daily basis over a  
15 four-month period. Barker did not even apply for a license until  
16 after the work was completed and invoiced. This is not a case  
17 where the unlicensed contractor's violation of NRS 624.320 is  
18 only nominal or technical; nor is this a case where, as stated in  
19 Magill, 74 Nev. at 386, the illegality merely "appears somewhere  
20 in the transaction," such that the doctrine of in pari delicto  
21 should be disregarded. Instead, like the plaintiff in Interstate  
22 Commercial Building Services, 23 F.Supp.2d at 1175, Bear Air's  
23 conduct amounts to a repeated and blatant violation of NRS  
24 624.320, and consequently the Magill balancing test cannot be  
25 applied to allow Bear Air any equitable relief.

26 4. Bear Air's Contention that NRS 624.320 Does Not Apply  
27 is Without Merit.

28 Alternatively, Bear Air argues on appeal that NRS 624.320

1 does not apply because it was not, in the language of the  
2 statute, "engaged in the business or acting in the capacity of a  
3 contractor" and the job was not a "bid" job. This argument may  
4 be dispelled for two reasons.

5 First, Bear Air raised this argument for the first time in  
6 its appeal brief. Bear Air does not assert the existence of any  
7 exceptional circumstances that would allow us to consider an  
8 issue not raised below, and the issue is therefore waived. See  
9 Concrete Equip. Co. v. Virgil Bros. Constr., Inc. (In re Virgil  
10 Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996) ("The  
11 rule is well established that an issue not raised by a party in  
12 the court below will not be considered on appeal, absent  
13 exceptional circumstances.").

14 Second, even if the argument could be considered, Bear Air's  
15 interpretation of NRS 624.320 lacks merit. Pursuant to NRS  
16 624.020(2), a contractor is defined as-

17 any person . . . who in any capacity . . .  
18 undertakes to, offers to undertake to,  
19 purports to have the capacity to undertake  
20 to, or submits a bid to, or does himself or  
21 herself by or through others, construct,  
22 alter, repair, add to, subtract from,  
23 improve, move, wreck or demolish any  
24 building, highway, road, railroad, excavation  
25 or other structure, project, development, or  
26 improvement, or to do any part thereof . . .

27 This is a broad definition. Here, the invoices attached to  
28 the proof of claim demonstrate that Bear Air installed, tested,  
and repaired HVAC systems. Bear Air fabricated condensing units,  
laid and assembled refrigeration piping and coils, and installed  
an irrigation system and electrical fixtures, among other things.  
Based on this evidence, Bear Air fits within the definition of a

1 contractor.

2 Last, Bear Air does not cite any authority, and we could not  
3 locate any authority, in which a court considered whether a job  
4 was a "bid job" as grounds to not apply NRS 624.320. The  
5 language of the statute does not state that bidding on a contract  
6 is a necessary prerequisite to its applicability. Instead, it  
7 only requires that the contractor be licensed "when the job was  
8 bid." Considering the broad definition of a contractor, and the  
9 public policy of requiring any person performing work to obtain a  
10 license, the fact that a job was procured without soliciting bids  
11 hardly seems an appropriate grounds to not apply NRS 624.320.

12 For these reasons, NRS 624.320 applied to Bear Air.

13 B. The Court's Determination that the Claim was Overstated by  
14 \$16,000.

15 As an alternative to disallowing Bear Air's claim in its  
16 entirety by operation of NRS 624.320, the bankruptcy court held  
17 that the claim was overstated by \$16,000. Because we affirm the  
18 bankruptcy court's disallowance of the claim in entirety, it is  
19 not necessary for us to consider whether the court erred in  
20 determining that the claim was overstated.

21 VI. Conclusion

22 For the reasons stated above, Bear Air is not entitled  
23 to payment on its claim. Accordingly, we AFFIRM the bankruptcy  
24 court's disallowance of Bear Air's claim in its entirety.

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