

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE FOURTH APPELLATE DISTRICT  
DIVISION THREE

The Spartan Associates, Inc. a )  
California Corporation )  
Plaintiff ) Court of Appeal No. G055075  
)  
vs. )  
) ( Superior Court No. 30-2015-00805807)  
)  
Gary Humphreys, an individual; )  
Karen Humphreys, an individual; )  
Defendants/Cross-Complainants )  
and Respondents )  
)  
vs. )  
)  
Adam Bereki, an individual, et al )  
Cross-Defendant and Appellant, )  
\_\_\_\_\_ )

**RESPONDENT' S BRIEF**

Appeal from a Judgment of the  
Orange County Superior Court  
Honorable David Chaffee, Judge

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rule of Ct. 8.208)

Bereki v. Humphreys  
App. Case No. G055075

Other than the parties to this appeal, the Respondents know of no entities or persons who have a financial interest in the outcome of these proceedings, or who Respondents reasonably believe the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: Feb. 1, 2018



William Bissell, Attorney for  
Respondents, Gary Humphreys  
& Karen Humphreys

## I.

### INTRODUCTION

This action arises out of a home remodel project which began in April of 2012 on two units of a three unit condominium located in the Lido Isle community of Newport Beach, California. The project consisted of combining what at the time, were two separate small adjoining units into a single unit. The respondents Gary Humphreys and Karen Humphreys (the Humphreys) were the husband and wife owners of the two units and appellant Adam Bereki (Mr. Bereki) was the contractor with whom the Humphreys contracted to perform the work.

From the beginning, work on the project did not progress smoothly and was shut down on at least two separate occasions by the City of Newport Beach for lack of having the required building permits for the work that was being performed. In August of 2013, a year and a half into the project, with the work once again at a city ordered standstill and the project far from completed, the Humphreys terminated Mr. Bereki and hired another contractor to finish their project.

This action was initiated by The Spartan Associates, Inc. (Spartan), a corporation wholly owned by Mr. Bereki and the alleged general contractor on the project, to recover from the Humphreys amounts Spartan claimed it was owed on an open book account and for work, labor and/or materials provided to the project.

The Humphreys cross-complained against Mr. Bereki, for disgorgement under California Business & Professions Code §7031(b) of the compensation paid by them; against Mr. Bereki

and Spartan for damages for negligence and fraud and against the sureties on Spartan's contractor's license bonds for recovery on the bonds. The basis of the cross-complaint was the alleged unlicensed status of Mr. Bereki at the time the work was performed, negligence on the part of Mr. Bereki in the manner in which he performed the work and fraud in surreptitiously charging the Humphreys over \$100,000 for personal expenses and other items which the Humphreys alleged were not chargeable to them under their agreement with Mr. Bereki.

On motion of the Humphreys, which was unopposed, and was heard by the Trial Court on March 24, 2017, the first cause of action of the amended cross-complaint, for disgorgement of compensation paid, was ordered severed, to be tried separate from and prior to the remaining causes set forth in that pleading. The trial on the severed first cause of action of the amended cross-complaint commenced on March 27, 2017 and concluded on March 28, 2017. At the conclusion of the presentation of evidence which consisted of both the testimony of witnesses and the introduction of documents, the Trial Court found that Mr. Bereki was the party who had contracted with the Humphreys, that the work performed by and under Mr. Bereki required that he possess a license issued by the California State Contractor's License Board and that at no time, either at the time the contract was entered into or when the work was performed, did Mr. Bereki possess such a license. The Trial Court ruled that the Humphreys were the prevailing party on the first cause of action of the amended cross-complaint and as such were entitled to recover from Mr. Bereki all compensation paid by the Humphreys during Mr. Bereki's involvement on the project.

Attempting to comprehend and distill the many, and varied arguments raised by Mr. Bereki in his opening brief, it appears that the gist of his position can be found in the brief's conclusion where he contends the Trial Court committed reversible error in applying section 7031 of the Business and Professions Code to him and ordering disgorgement of the compensation paid by the Humphreys.

Because the Trial Court's actions were necessary, proper and in accordance with the law, Respondents request that the Trial Court's judgement be affirmed.

## II.

### STATEMENT OF THE CASE

The chronology of this case relevant to the pending appeal of the Trial Court's judgment is as follows:

On August 21, 2015 The Spartan Associates Inc. filed its complaint in this matter against the Humphreys alleging the common counts of goods sold and services rendered and open book account, [Clerks Transcript -Vol. 1-Pg. 49-52]. The Clerks Transcript is hereafter referred to as "CT".

On October 13, 2015 the Humphreys filed their answer to the complaint generally denying the material allegations of that pleading and alleging twenty separate affirmative defenses [CT- Vol. 1 Pg. 64-72]. At the same time, the Humphreys filed their cross-complaint in the action against Adam Bereki, The Spartan Associates, Inc. and Suretec Insurance Company alleging causes of action for negligence, fraud, alter ego, penalty for violation of Business & Professions Code §7160 and recovery against contractor's license bond [CT- Vol. 1- Pg. 73-93].

On November 16, 2015 The Spartan Associates, Inc. and Mr. Bereki filed their joint answer to the Humphreys cross-complaint, generally denying all of the material allegations in that pleading and alleging twenty separate affirmative defenses [CT- Vol. 1 Pg. 99-105].

On December 14, 2016, a substitution of attorney was filed in the matter whereby attorney J. Scott Russo, who had been representing both The Spartan Associates, Inc. and Mr. Bereki, substituted out as Mr. Bereki's attorney and remained as attorney of record for The Spartan Associates, Inc. Mr. Bereki at that point undertook his own representation. [CT- Vol. 3- Pg 738]

On February 2, 2016, the Humphreys filed an amendment to their cross-complaint naming Old Republic Surety Company to reflect the true name of the cross-defendant sued under the fictitious name Roe 16 as a cross-defendant in the Humphreys cause of action for recovery against contractor's license bond. [CT- Vol. 1- Pg. 206-207].

By motion filed on December 5, 2016 [CT- Vol. 3 – Pg. 704-736] the Humphreys sought leave of the Trial Court to amend their cross-complaint to add an additional cause of action against Mr. Bereki for disgorgement of funds pursuant to Business & Professions Code §7130. The motion for leave to amend was unopposed and the Trial Court, at the hearing on the motion held on January 6, 2017, granted the Humphreys leave to file their amended cross-complaint [CT- Vol. 3- Pg742-743]. The amended cross-complaint was filed on January 6, 2017 [CT- Vol. 3- Pg. 744-764] and was responded to jointly by The Spartan Associates, Inc. and Mr. Bereki on February 10, 2017, again by way of a general denial and the reassertion of the same previously plead affirmative defenses [CT- Vol. 3- Pg. 822-829].

On motion of the Humphreys, which was unopposed, and heard by the Trial Court on March 24, 2017, the first cause of action of the amended cross-complaint, for disgorgement of

compensation paid, was ordered severed, to be tried separate from and prior to the remaining causes set forth in that pleading [CT- Vol. 4- Pg. 904-905].

The trial on the amended cross-complaint's severed first cause of action for disgorgement commenced on March 27, 2017 in Department C-20 of the Orange County Superior Court before the Honorable David Chaffee, all parties being present and having waived a jury [CT-Vol. 4 -Pg. 929-931], and was concluded on March 28, 2017 [CT- Vol. 4 – Pg. 950-952]. At the conclusion of the presentation of evidence consisting of both the testimony of witnesses and the introduction of documentary evidence, and after argument of counsel, the Trial Court ruled as follows:

*“Having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, the Court finds and determines that Mr. Adam Bereki is the contractor and he does not possess contractor’s license. The Court finds judgment for the Cross Complainants Gary and Karen Humphreys (First Cause of Action, for disgorgement of funds paid) and against cross-defendant Adam Bereki.”* [CT- Vol. 4-Pg 950-951].

The Trial Court, after an offer of proof by plaintiff’s counsel on plaintiff’s complaint, further found judgment for the Humphreys on the complaint of The Spartan Associates, Inc. [CT- Vol. 4- Pg. 950-951]

With the Trial Court having ruled in their favor on both the complaint and the first cause of action of the amended cross-complaint, and pursuant to an oral stipulation of the parties placed on the record, the Humphreys dismissed the remaining causes of action in their cross-action, without prejudice and subject to a stipulated waiver of the statute of limitations should it

become necessary to re-file an action on the dismissed causes of action [CT- Vol. 4 – Pg. 950-951].

Judgment on the complaint and on the amended cross-complaint was entered by the Trial Court on April 20, 2017 [CT- Vol. 4- Pg. 1005-1006], and notice of entry of judgment was served by the Humphreys on The Spartan Associates, Inc. and on all cross-defendants including Appellant on April 24, 2017 [CT-Vol. 4- Pg. 1017-1021].

On June 13, 2017 appellant Adam Bereki filed his notice of appeal from the judgment of the court [CT- Vol. 4- Pg. 1074] and notice thereof was given by the clerk of the Trial Court on the same date [CT- Vol. 4- Pg. 1075].

On June 30, 2017, Mr. Bereki filed his Appellant’s Notice Designating Record on Appeal designating the Trial Court’s file in this action in its entirety to comprise the Clerk’s Transcript on appeal and electing to proceed without a reporter’s transcript [CT- Vol. 4 – Pg. 1127-1135].

On December 13, 2017, Mr. Bereki filed a motion to augment the Record on Appeal by adding to the previously filed Clerk’s Transcript, an additional 382 pages of post-trial filings in the Trial Court [CT- Vol. 4- Pg. 1151-1533] and the Reporter’s Transcript of the trial of this matter on March 27 and March 28, 2017. The Reporter’s Transcript is hereafter referred to as “RT”.

On January 3, 2018 the Court of Appeal ruled on Appellant’s motion to augment the record by granting the motion as it pertained to the inclusion of the Reporter’s Transcript of the trial proceedings and denying the motion as it pertained to the attempt to include in the Clerk’s Transcript the 385 pages of post-trial proceedings.

### III.

#### STATEMENT OF APPEALABILITY

To the extent this appeal is from the judgment of the Orange County Superior Court entered in this matter, it is authorized by the Code of Civil Procedure Section 904.1 subdivision (a) (1). As to other matters, such as post trial proceedings, which Appellant has attempted to include in this appeal, no notice of appeal of such has been filed [CT Vol 4 -Pg. 1074] and therefore such matters are not an appropriate subject of this appeal.

### IV.

#### ARGUMENT

#### 1. NO FALSE OR MISLEADING STATEMENT WAS MADE TO THE TRIAL COURT

##### A. New Issues Generally Will Not Be Considered

Appellate courts generally will not consider new issues or theories of law that a party raises for the first time on appeal. Bikkina v. Mahadevan (2015) 241 Cal. App. 4th 70, 92–93. To do so would unfairly deprive the trial court and the opposing parties of their opportunity to decide the issue, Bermudez v. Ciolek (2015) 237 Cal. App. 4th 1311, 1323. When a case is on appeal the parties are bound to the evidence produced in the trial court, and parties opposing or responding to the appeal cannot fairly be expected to disprove factual contentions that were not presented at trial, Strasberg v. Odessey Group, Inc. (1996) 51 Cal. App. 4<sup>th</sup> 906, 920. Both Mr. Bereki and the attorney for The Spartan Associates sat through the trial of this matter and both had the opportunity to cross-examine the Humphreys regarding any statement made by them in any prior pleadings or papers filed with the court. The Humphreys would have then had the opportunity to give their testimony on such examination and the Trial Court would have had the

opportunity to weigh any conflicting evidence or testimony. Neither Mr. Bereki nor counsel for the Spartan Associates however chose to bring up or question the Humphreys regarding their motion for summary judgment. To allow Mr. Bereki to raise these issues for the first time now would unfairly deprive the trial court and the Humphreys of the opportunity to address the issue and offer evidence to refute Mr. Bereki's claim.

### **B. Standard of Review**

Determining whether statements made during trial were misleading is a factual determination to which the substantial evidence standard is applied. Under this standard great deference is given either to the trier of fact and will generally affirm a factual conclusion made by the trier of fact so long as it is supported by substantial evidence in the record, Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920,925.

### **C. The Record Proves Appellant's Argument to be False**

If the Court were nonetheless inclined to take Mr. Bereki's argument of false and misleading statements made at trial under consideration, the record puts a lie to that argument. Mr. Bereki argues that facts asserted by the Humphreys in their motion for summary judgment filed in this matter [CT -Vol. 1- Pg. 231-300] contradict facts to which they testified at trial and as a consequence a fraud was perpetrated on the court. Specifically, Mr. Bereki claims that the Humphreys asserted in their motion that they had contracted with The Spartan Associates, Inc. while testifying at trial that they had contracted with Mr. Bereki individually. In so arguing, Mr. Bereki misrepresents to this Court what in fact the Humphreys stated in their motion.

As opposed to Mr. Bereki's representation that the Humphreys, in their motion for summary judgment, acknowledged that they had contracted with The Spartan Associates and not Adam Bereki, the moving papers filed by the Humphreys actually state:

*"In April of 2012, my wife and I entered into an oral agreement with Adam Bereki for remodeling work to be performed by Mr. Bereki on our 436 Via Lido Nord Newport Beach condominium unit. Although I was initially under the impression that our agreement was with Mr. Bereki individually, we were later requested by Mr. Bereki to make our checks for progress payments payable to the The Spartan Associates, Inc."* Declaration of Gary Humphreys [CT - Vol.1 – Pg. 251 Line 15 -19]

*"In April of 2012, my husband and I entered into an oral agreement with Adam Bereki for remodeling work to be performed by Mr. Bereki on our 436 Via Lido Nord Newport Beach condominium unit. Although I was initially under the impression that our agreement was with Mr. Bereki individually, we were later requested by Mr. Bereki to make our checks for progress payments payable to the The Spartan Associates, Inc."* Declaration of Karen Humphreys [CT - Vol.1 – Pg. 273 Line 15 -19].

Clearly, the above declarations of fact of the Humphreys in support of their motion for summary judgment are consistent with the position adopted and the testimony given by the Humphreys at trial to the effect that they believed they were contracting with Mr. Bereki and his partner individually to perform the work on their condominium [RT-Vol-1-Pg 33, L-18 to Pg. 34, L- 2] [RT-Vol-1 – Pg. 84, L6-8].

## **2. THE TRIAL COURT'S APPLICATION OF BUSINESS & PROFESSIONS CODE §7031 TO THE FACTS OF THIS CASE WAS CORRECT.**

### **A. Appellant has Waived His Right to Attack the Judgment on Constitutional Grounds.**

Mr. Bereki attacks the both the validity and the trial court's application of Business & Professions Code §7031 in this matter, on various misapplied legal grounds, relying primarily on

foreign and inapplicable authority. In doing so, Mr. Bereki is again raising issues for the first time on appeal that were neither brought up nor mentioned at the time of trial. Taking this issue under consideration at this stage would unfairly deprive the trial court and the Humphreys of the opportunity to address the issue and offer evidence to refute Mr. Bereki's claim and under the authority of Bikkina v. Mahadevan Supra at 241 Cal. App. 4th pg. 92–93 and Bermudez v. Ciolek Supra at 237 Cal. App. 4th 1323 this Court should decline to undertake the consideration of this issue.

Further, as a general rule, as with most other issues, a constitutional issue in a civil case must be raised at the earliest opportunity or it will be deemed waived. Needelman v. DeWolf Realty Co., Inc. (2015) 239 Cal. App. 4th 750, 763. As the court stated in, People v. Harrison (2013) 57 Cal. 4th 1211, 1229 “*No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.*”

Beyond the policy of fairness expressed in Bikkina v. Mahadevan Supra and Bermudez v. Ciolek Supra, Mr. Bereki's failure to have raised, at the trial of this matter, the issues he now argues concerning the validity and application of Business & Professions Code §7031 amounts to a waiver of those issues.

### **B. Standard of Review**

In the event the Court determines that the issue of the validity and application of Business & Professions Code §7031 by the trial court in this matter has not been waived by Mr. Bereki's failure to raise the issue at trial and is appropriate for its review in this matter, determining whether Business & Professions Code §7031 was a constitutionally valid law is a matter for de

novo review. Determining whether there was a sufficient showing made at trial for the trial court to base its judgment on that code section is a factual determination to which the substantial evidence standard is applied, requiring that deference be given to the trial court and the factual conclusions made by the trier of fact so long as they are supported by substantial evidence in the record, Nestle v. City of Santa Monica Supra at 6 Cal. 3d 925.

**C. Business & Professions Code §7031 (b) is an Appropriate and Valid Exercise of the State's Police Powers.**

The U.S. Constitution, Amend. X reads as follows: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*" These are referred to as the states police powers. The police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people Keystone Bituminous Coal Ass'n v. DeBenedictis (1987) 480 U.S. 470, 503. In the civil context, the police power is the power of sovereignty or power to govern, i.e., the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare, Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 878 (superseded by statute on other grounds).

The validity of Business & Professions Code §7031 (b) as a proper exercise of the State's inherent police power to regulate the contracting industry for the benefit of the public, has been upheld by the California Supreme Court in Hydrotech Systems, Ltd. v. Oasis Waterpark, 52 Cal. 3d 988, 995 (1991) in which it was held;

*"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 this state. [Citations Omitted].”*

The 2001 amendment to Business and Professions Code §7031 (b) adding the “sword” element to subsection (b) of the statute was addressed by this Court’s District One in Alatriste v. Cesar’s Exterior Designs, Inc. (2010, 4th Dist.) 183 Cal App 4th 656, 665-666 in which the Court stated;

*“ .In 2001, the Legislature amended section 7031 to add a sword remedy to the hiring party’s litigation arsenal. This sword remedy, contained in section 7031(b), currently reads: ‘Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.’ By adding this remedy, the Legislature sought to further section 7031(a)’s policy of deterring violations of licensing requirements by ‘allow[ing] persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work...This measure is intended to clearly state that those using the services of unlicensed contractors are entitled to bring an action for recovery of compensation paid...*

*7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered...”*

#### **D. The Elements of the Action**

The elements of an action for disgorgement of compensation paid, brought under Business & Professions Code §7031 are:

1. A person engaged in the business or acting in the capacity of a contractor performing a contract where a license is required - Business & Professions Code §7031 (a);
2. Failure by that person to be duly licensed at all times during the performance of that contract - Business & Professions Code §7031 (a); and
3. Compensation paid to the contractor by the person utilizing the contractor's services - Business & Professions Code §7031 (b).

#### **E. Evidence Supporting Judgment.**

Each of the elements of a claim for disgorgement under Business & Professions Code §7031 were established at trial.

##### **1. Appellant was Acting in the Capacity of a Contractor in Both Contracting to Perform and in Performing the Work on the Respondent's Condominium Unit.**

Business & Professions Code §7026 defines "Contractor" for the purpose of division 3, chapter 9 of the code as "... *any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building... other structure, project, development or improvement, or to do any part thereof...*"

Business & Professions Code §7025(b) defines "Person", as the term is used in division 3, chapter 9 of the code, as including "*an individual, a firm, partnership, corporation, limited liability company, association or other organization, or any combination thereof.*"

Despite Mr. Bereki's contorted and strained argument to the contrary, there is simply no rational or logical basis for the proposition that Business & Professions Code §7031 does not apply to individuals.

There was ample uncontroverted evidence, both testimony and documentary, at trial establishing that the work undertaken by Mr. Bereki for the Humphreys involved alteration, repair and improvement of their condominium unit. **Exhibit 303**, the April 5, 2012 emails between Mr. Bereki and the Humphreys describes the scope of the project at the time the agreement was entered into. [RT- Vol-1-Pg 33, L-18 to Pg. 34, L- 2]; [RT- Vol-1-Pg 82, L-6 to Pg. 83, L-19]. Mr. Bereki's own testimony establishes that the work involved in the Humphreys project fell within the scope of Business & Professions Code §7026 [RT- Vol-1-Pg 113, L-5-22] [RT-Vol-1-Pg 141, L-8-16], [RT-Vol-1-Pg 146. L-1-10].

Without citing to anything in the record to support it, Mr. Bereki argues that the trial court erred in finding that it was he and not Spartan Associates, Inc. who contracted with the Humphreys and therefore wrongfully applied the disgorgement provision of Business & Professions Code §7031 to him personally. In making this assertion Mr. Bereki ignores the nearly overwhelming evidence which came in at trial on that issue and which supported the trial court's finding that the contract in issue was entered into between the Humphreys and Mr. Bereki individually. [RT-Vol-2-Pg. 28, L-8-13].

Examples of the evidence in support of the trial court's finding are:

Both Mr. and Mrs Humphreys testified that they believed (based on **Exhibit 303**) that they were hiring Mr. Bereki and his partner to perform the work described in the exhibit- [RT-Vol-1-Pg. 33, L-18 to Pg 34, L- 2], [RT-Vol-1-Pg. 84, L-3- 8];

Before the April 5, 2012 agreement, **Exhibit 303**, was entered into, Mr. Bereki never mentioned The Spartan Associates, Inc. to the Humphreys and the Humphreys had never heard of The Spartan Associates, Inc. [RT-Vol-1—Pg. 39, L-13-23], [RT-Vol-1-Pg. 84, L-3- 8].

There is no mention of The Spartan Associates, Inc. in the April 5, 2012 agreement between the parties **Exhibit 303** [RT-Vol-1-Pg. 39, L-24-26];

Mr. Bereki initially requested that the Humphreys checks in payment for the work on the project be made payable to him personally **Exhibit 305** [RT Vol-1- Pg. 41, L-11 to Pg. 42, L- 2].

The Humphreys first heard of Spartan Associates only after several months into the project when Mr. Bereki asked that they start making payments to Spartan Associates [RT-Vol-1- Pg. 42, L-7-25], [RT-Vol-I-Pg. 85, L-25 to PG 86. L-17].

The Humphreys were never presented with any proposal or contract from The Spartan Associates [RT-Vol-1-Pg 86, L- 18-21.]

Job correspondence from Mr. Bereki to the Humphreys, was without exception, sent on his personal email account even though The Spartan Associates had its own email account [RT-Vol-1- Pg. 110, L- 9-18].

Mr, Bereki paid job costs and expenses from his personal account [RT-Vol-1-Pg 122, L-12 to Pg. 123, L-6] **Exhibit 355**.

In contrast to the above, there is virtually nothing in the record other than Mr. Bereki's unsubstantiated testimony that it was the Spartan Associates and not he that entered into the April 5, 2012 agreement with the Humphreys.

**2. Appellant was Unlicensed Both at the Time He Contracted with the Respondents and at the Time He Performed Work Under that Contract.**

That Mr. Bereki was not licensed either at the time the April 5, 2012 agreement with the Humphreys was entered into or at the time he performed work on the project is evidenced by his own express admission of lack of holding a license. [RT-Pg. 123, L-7-14]. Although admitting that he had no license issued to him in his name, Mr. Bereki argues that because he was allegedly the qualifying individual for The Spartan Associates contractor's license (an alleged fact not established at trial) his failure to hold a license in his own name is a matter of no harm no foul. This argument finds no support however in Business & Professions Code §7028.5, which holds *"It is unlawful for a person who is or has been a partner, officer, director, manager, responsible managing employee, responsible managing member, responsible managing manager, or responsible managing officer of, or an individual who is listed in the personnel of record of, a licensed partnership, corporation, limited liability company, firm, association or other organization to individually engage in the business or individually act in the capacity of a contractor within this state without having a license in good standing to so engage or act."*

**3. Compensation was Paid to Appellant by the Respondents.**

The Humphreys paid Mr. Bereki a total of \$848,000.00 for the work he ostensibly performed on their project. **Exhibit 32-4to17**, [RT-Pg. 85, L-7-21], [RT-Pg. 89, L-20 to Pg. 90, L-26], [Appellants Opening Brief Pg. 22].

Mr. Bereki, while conceding that the compensation was paid, argues that a portion of that compensation were checks from Mr. Humphreys corporation and that therefore the Humphreys had no standing to pursue recovery of those payments. The trial court in its findings held: *"So the evidence shows here the payments that were made through Humphreys & Associates*

*Incorporated's bank account were essentially debited against Mr. Humphrey's compensation, effectively making the payments directly from Mr. Humphreys...*" [RT-Vol-2-Pg, 24 to Pg. 21, L-2]

The evidence to which the trial court was referring above is the testimony given by Mr. Humphreys to the effect that all payments made to Mr. Bereki on Humphreys & Associates, Inc. checks were debited against his compensation and was nothing more than an accommodation to him by his employer for times when Mr. Bereki stated that he needed a payment to keep the job moving and Mr. Humphreys was physically unavailable to make the payment personally. [ RT-Vol-1-Pg, 158, L-16 to Pg. 162, L- 15]. There was no evidence or testimony which controverted Mr. Humphreys testimony in this regard.

And lastly on this point, Mr. Bereki argues that he should be entitled to a credit for or offset against any disgorgement, the value of any materials or equipment he provided to the Humphreys. This argument however was put to rest in Alatriste v. Cesar's Exterior Designs, Inc. Supra 183 Cal App 4<sup>th</sup> at 672 in which the Court citing White v. Cridlebaugh (2009) 178 Cal.App.4th 506, 517 held "*...the authorization of recovery of 'all compensation paid to the unlicensed contractor for performance of any act or contract' [citation] means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided.'* (citation) The court reasoned that this 'interpretation ... is consistent with the usual meaning of the word 'all,' which signifies the whole number and does not admit of an exception or exclusion not specified. [Citation.] In short, 'all compensation paid' does not mean all compensation less reductions for offsets."

### **3. APPELLANT HAS FAILED TO PERFECT RIGHTS TO APPEAL MATTER OCCURRING POST JUDGMENT.**

Included in Mr. Bereki's opening brief are arguments to overturn the results of a number of various and sundry post trial proceedings he had filed in the trial court. Specifically, Mr. Bereki seeks to compel different results to the trial court's ruling on his post-trial Writ of Error, Demand for Bill of Particulars, Motion to Compel Bill of Particulars and Request for Statement of Decision. [AOB- Pg. 59]. Mr. Bereki has however failed identify in his notice of appeal [CT - Vol-4 Pg. 1074] any of the above post judgment orders as being the subject of his appeal. California Rule of Court 8.100 (a) (2) provides that the notice of appeal "*...is sufficient if it identifies the particular judgment or order being appealed.*" The notice submitted by Mr. Bereki makes no such identification and therefore is insufficient as to the post judgment matters Mr. Bereki now seeks to have determined.

### **4. THE TRIAL COURT HAD BOTH THE REQUISITE SUBJECT MATTER AND PERSONAL JURISDICTION TO RENDER JUDGMENT IN THIS MATTER.**

The one exception to the bar prohibiting Mr. Bereki from raising, in this appeal, post judgment orders not identified in his notice of appeal, is the question of the trial court's jurisdiction over the matter. While lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 520 there is simply no basis in fact which in any supports Mr. Bereki's claim of lack of jurisdiction.

As to the question of the trial court's jurisdiction over the subject matter of this case, Cal Const., Art. VI § 10 states in pertinent part "*The Supreme Court, courts of appeal, superior*

*courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.*

*Superior courts have original jurisdiction in all other causes....”*

*“The superior court is a court having jurisdiction in all civil actions and proceedings, with stated exceptions, and it is a court of general jurisdiction....”* Richardson v. Superior Court of Los Angeles County (Cal. App. 1934), 138 Cal. App. 389,391.

In that this case is not one involving matters reserved for the Supreme Court, courts of appeal or the appellate division of the superior court, the superior court was the appropriate court to adjudicate the issues raised in the matter and had jurisdiction over the subject matter of the case.

As for personal jurisdiction over Mr. Bereki, Cal Code Civ. Proc § 410.50 states “(a) *Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him as provided by Chapter 4 (commencing with Section 413.10). A general appearance by a party is equivalent to personal service of summons on such party.*”

An appearance for any purpose other than to question the jurisdiction of the court is general. Pfeiffer v. Ash (Cal. App. 1949), 92 Cal. App. 2d 102, 104. Mr. Bereki by substituting in as his own attorney in this matter in propria persona [CT-Vol 3- Pg. 738], filing his answer to the Humphrey’s cross-complaint seeking a determination of the issues [CT-Vol 3- Pg. 822-829]

and appearing at and presenting his case in defense at the trial of this matter [CT-Vol 4- Pg. 929], made a general appearance giving the trial court personal jurisdiction over him

V.

**CONCLUSION**

For the reasons set forth above it is contended that Appellant's appeal is without merit and it is therefore respectfully requested that the judgement of the Trial Court be affirmed and that Respondents be awarded their costs on appeal, the amount of which to be determined by the Trial Court upon application made after remand of this case.

Dated: February 1, 2018

Respectfully Submitted



William G. Bissell  
Attorney for Defendants/Cross-  
Complainants/Respondents Gary Humphreys and  
Karen Humphreys

### **CERTIFICATION OF LENGTH**

I, William Bissell, in compliance with Rule 8.204 (c) (1) of the California Rules of Court, do certify that according to the word count of the computer program used to prepare Respondent's Brief, Respondents Brief, exclusive of tables, is 5,536 words in length.



William G. Bissell

Attorney for Defendant/Cross-  
Complainants/Respondents

Gary Humphreys and Karen Humphreys

1  
2 CERTIFICATION OF SERVICE & FILING

3 I, William Bissell, certify:

4 I am, and at all times mentioned herein was, an active  
5 member of the State Bar of California and not a party to the  
6 within action. My business address is 14 Corporate Plaza Drive,  
7 Suite 120, Newport Beach, CA 92660.  
8

9 On February 1, 2018 I served the **Respondent's Brief**, in this  
10 matter by depositing a copy of the Brief in the United States  
11 mail in Newport Beach, Orange County, California, in a sealed  
12 envelope, with postage fully prepaid, addressed to:

13 J. Scott Russo, Esq.  
14 Russo & Duckworth LLP  
15 9090 Irvine Center Drive, 2<sup>nd</sup> Floor  
Irvine, CA 92618

16 Attorney for Plaintiff The Spartan Associates and Cross-  
17 Defendant Suretec Insurance Company

18 Carlos E. Sosa Esq.  
19 Hausman & Sosa LLP  
20 20750 Ventura Blvd  
Ste 105  
Woodland Hills, CA 91364-6646

21 Attorney for Cross-Defendant Old Republic Insurance  
Company.  
22

23 On February 1, 2018 I further served Respondent's Brief  
24 electronically on Appellant Adam Bereki by transmitting the  
25 brief to Appellant at:

26 [abereki@gmail.com](mailto:abereki@gmail.com)  
27  
28

1           On February 1, 2018 I further filed, through OneLegal, a  
2 court approved provider of electronic filing services, a copy of  
3 the brief with the clerk of the Orange County Superior Court,  
4 with instructions to deliver the brief to the Honorable David  
5 Chaffee,.

6  
7           I declare, under penalty of perjury, that the foregoing  
8 is true and correct.

9           Executed on February 1, 2018, at Newport Beach, California.

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William Bissell