

Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed December 2, 2009.

Not final until disposition of timely filed motion for rehearing.

No. 3D08-2805

Lower Tribunal No. 06-262

Mutchnik, Inc. Construction,
Appellant,

vs.

Robert Dimmerman and Rochelle Dimmerman,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Jon I. Gordon,
Judge.

Adorno & Yoss, and John J. Shahady, and Thomas R. Shahady, for
appellant.

Gray Robinson, and Juan C. Martinez, for appellees.

Before RAMIREZ, C.J., and GERSTEN, and SHEPHERD, JJ.

RAMIREZ, C.J.

Mutchnik, Inc. Construction appeals the entry of an adverse final judgment,
arguing that the trial court based its decision on an affirmative defense, working

without a building permit, which had not been raised by the pleadings. We agree with Mutchnik's argument and reverse.

This case arises out of a dispute over payment for labor and construction. Mutchnik formed an oral contract with appellees Robert and Rochelle Dimmerman for construction on their Miami Beach property. Mutchnik alleged that, after performing about \$17,000 worth of work and submitting an invoice, the Dimmermans locked him out of the property and refused to pay him. Mutchnik placed a construction lien on the house and sued the Dimmermans for breach of contract and unjust enrichment. After a non-jury trial, the trial court entered its final judgment finding a valid contract, but dismissing the construction lien claim because Mutchnik had failed to obtain a work permit.¹

Upon review, we conclude that the trial court committed error when it based its judgment on issues not raised by the parties in the pleadings. See Lovett v. Lovett, 112 So. 768, 771 (Fla. 1927); Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, 986 So. 2d 1244, 1252 (Fla. 2008); Carrol & Associates, P.A. v. Galindo, 864 So. 2d 24, 28 (Fla. 3d DCA 2003); In re Estate of Hatcher, 439 So.

¹ The trial court based this decision on its interpretation of Braverman v. Van Bower, Inc., 583 So. 2d 381 (Fla. 3d DCA 1991). We do not reach the appellant's argument that the judge misapplied the case to the facts here because we reverse on other grounds.

2d 977, 980 (Fla. 3d DCA 1983). Accordingly, we reverse the trial court's decision and remand for a new trial.²

² We note that on remand, defendants, the Dimmermans, are not entitled to amend their pleadings and add the affirmative defenses they did not raise below. See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 561, 562 (Fla. 1988) (“It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings *to assert matters not previously raised* renders a mockery of the ‘finality’ concept in our system of justice.”) (emphasis in original).