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L. Keith Lignell et al v. Clifford M. Berg et al : Abstract of Record

Utah Supreme Court

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Joseph S. Knowlton; Attorney for Plaintiff and Cross-Respondent;
Callister, Skeene & Nebeker; Attorneys for Defendant-Respondent;
Wilford A. Beesley; Attorney for Defendant-Respondent;
Earl S. Tanner & Associates; Attorneys for Plaintiffs-Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL, MARIAN H.
LIGNELL, his wife, BURTON M.
TODD and PHYLLIS W. TODD,
his wife,

Plaintiffs and
Appellants,

v.

Case No. 15001

CLIFFORD M. BERG and
WILLIAM R. BERG, a partner-
ship, d/b/a BERG BROTHERS
CONSTRUCTION COMPANY, and
FRANK C. BERG, an indiv-
idual, a joint venture, d/b/a
BERG CONSTRUCTION COMPANY,
and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a cor-
poration,

Defendants and
Respondents.

ABSTRACT OF RECORD

EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen
Suite 101
345 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-
Appellants

Wilford A. Beesley
15 East 400 South
Salt Lake City, Utah 84111
Attorney for Defendant-
Respondent Berg Brothers
Construction Company

CALLISTER, GREENE & NEBEKER
Richard H. Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendant-
Respondent Fidelity and
Deposit Company of Maryland

FILED

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Richard H. Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Defendant-
Respondent Fidelity and
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FIDELITY DEPOSIT COMPANY OF		
MARYLAND, a corporation,	*	
Defendants and	*	
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	*	

HENDRIK COPINGA

Mr. Coppinga was one of the partners in Western Drywall, the drywall subcontractor on the Incline Terrace. Western became involved in the project in the fall of 1972. In the summer Lignell had called Coppinga and told him he was unhappy with the drywaller on the project. Coppinga agreed to take a look at it and if it was okay with his partner they would accept the job (T. 171).

Western ultimately accepted the job but Coppinga admitted that the drywalling was not completed until late

September, 1973. He blamed this, in large measure, upon the electrician (T. 174-175, 177, 191). Coppinga identified Exhibit 15 as being the subcontract for drywall application on the project. The agreement was not signed until August 9, 1973, near the end of the project. At that time, Coppinga testified, he found it difficult to locate Berg to get his signature on the document (T. 291). Coppinga also wanted Lignell to sign the subcontract on behalf of the owners but Lignell declined to do so (T. 292).

CLARON BAILEY

Claron Bailey was a materialman who supplied the sheetrock to Western. Bailey testified that Western owed him \$42,653.68 for labor, material or payroll advanced for the Incline Terrace. Bailey testified that that was the same sum that appeared on Exhibit 15, the subcontract between Berg Brothers Construction and Western.

Counsel for Berg Brothers and surety stipulated that the amount represented by Exhibit 15, \$42,653.68, was due and owing under the subcontract (T. 261-262).

BRENT GREENWOOD

Brent Greenwood was the other partner in Western Drywall. Greenwood stated that as late as August, 1973, they did not have a written agreement for the drywall application on the project. Greenwood testified, however, that they had an oral agreement with Berg (T. 267). In

August Lignell, Berg, Copinga, Greenwood and Mr. Knowlton met on the project to discuss the drywall problem. At that time Greenwood told Berg their bill came to \$93,000.00. When Lignell heard that he objected to Berg about the price (T. 268).

Greenwood admitted on cross-examination that at that meeting they agreed to have the drywalling completed by September 15th, but they did not do so. Further, Greenwood acknowledged that he knew that the owners expected good work (T. 277).

E. KEITH LIGNELL

Lignell was called in the drywall portion of the consolidated case and was identified as the partner having the primary responsibility for the construction of the Incline Terrace Apartments project (T. 64). Lignell testified that in the course of construction of the project he became aware of defects in the quality of the drywall and notified the contractor about these defects in the latter part of 1972 (T. 65-66).

The contractor's draw requests came in a variety of different forms. Berg would list the subcontractors and anybody else that he felt had money coming and would submit the list to Lignell. Lignell would then make up a formal draw request for the insurance company, submit it to the architect and to the contractor and then he and Todd would sign it. It would then be submitted to the

insurance company which in turn submitted it to its home office in Los Angeles. Then the money would be sent to the owners (T. 68-69).

The owners had a construction account for the project at Zions Bank (Ex. 6). Lignell testified that all of that money did not go to Berg. Specifically such costs as title policy, recording fees, service fees, credit reports, commitment fees and broker's fees were paid out of that account (T. 88).

Lignell stated that the documents which he understood to constitute the entirety of the written agreement between the owners and the contractor were Exhibits 9, 10 and 11 (T. 111). Lignell further testified with regard to Exhibit 6 that \$250,000.00 of the money reflected in that exhibit was for the sale and the lease back of the property (T. 115).

In his opinion, Lignell stated, the workmanship in relationship to the drywall was inferior (T. 120). Lignell testified with relation to Apartment 508-A that the day it was sprayed with wall spray by the drywallers it had a vomitous smell which persisted to the day of trial (T. 122-123).

CLIFFORD M. BERG

Berg was identified as the managing partner of the contractor on the Incline Terrace project (T. 156-157). Berg characterized the sheetrocking as being

"average" (T. 161) and testified that both Gary Simmons and Gary Curtis, who were painters on the job, complained to him about the quality of the work (T. 163). Berg testified that he was familiar with Paragraph 11.4 of the construction contract and that he knew that the contract required work of good quality (T. 164).

Berg was called to testify in the electrical portion of the case. He testified that he approved many of the change orders submitted by the electricians. Berg acknowledged, however, that many of them contained no price when he signed them.

Berg admitted that at the inception of the negotiations between him and Lignell that there was a discussion concerning the method of payment on the project. Lignell wanted to handle the money and Berg agreed (T. 663).

Berg stated that he never really did any work on the project until February of 1972. Thus, Berg acknowledged, he was late starting (T. 664). (Berg later testified that as an accommodation for being late in starting that he allowed tenants to move into the buildings before they were actually completed (T. 2241-2245)). Berg testified that when Murray left the job he called up Bateman Electric and asked him if he would like to take it over, which he did. Berg acknowledged that Bateman was merely finishing up the electrical work that had to be done on the project (T. 680). Berg stated that

in his opinion Murray had a lot of work to do at the time it left the project (T. 680).

Berg testified that he first came in contact with Mr. Comstock in December of 1971 when he requested that he bid the project. Berg stated that he gave Comstock a set of plans to which the specifications were attached (T. 682). Berg further testified that after August 31, 1973, he was concerned about the progress that was being made on the electrical portion of the project (T. 688). Berg was concerned about the electrician getting the job done so that the project could be finished. Berg understood, he testified, that the owners were concerned about the permanent financing of the project and that it might be in jeopardy because of the delay in finishing the buildings (T. 689-690).

Berg agreed that the dismissal of Murray came after extensive discussions that had started clear back in August of 1973 about the project getting finished, and admitted that he had been given deadlines to have the work completed that had not been met. After the deadlines were not met there was another round of discussions attempting to resolve the electrical problem (T. 695-696). Berg further testified that he knew that under the contract he had to have change orders approved in writing (T. 702).

E. KEITH LIGNELL

Lignell was also called to testify by the electricians. He stated that he was familiar with some of the change orders but he was not familiar with others (T. 711). Lignell stated that most of the change orders were given to him by Berg and although he didn't sign any of the electrical change orders he did approve some of them (T. 714-716). Lignell testified that at the time Murray was asked to leave the job there was a lot of electrical work remaining to be done and that there was no way that it could be done within the required time frame because Murray was not making a concerted effort on the project (T. 733).

With relation to the change orders, Lignell testified that he was unable to identify the ones which he had approved because they were all null and void per the letter of Mr. Comstock on December 18, 1972 (Ex. 35, T. 739).

Lignell further testified that the change orders came to him in such a confused state that it was impossible for him to make an intelligent decision on any of them. The change orders, he stated, came to him piecemeal. Sometimes Berg would hand him a bunch on the job, sometimes he would go down to Lignell's office and bring two or three that were duplicates. There were some that had no costs and some that were not priced out. In addition to that, Lignell testified, the electrician sent a letter

saying that everything they sent was null and void. Because of that, he stated, it was impossible to make an intelligent decision on what change orders he should sign or whether the architect or the contractor should sign (T. 819-820).

Lignell stated that he usually relied upon Berg's judgment with respect to draw requests but that the time came when he felt he could no longer rely on him. Comstock, he testified, was one of the factors that brought him to that realization (T. 760-761).

Lignell testified that the \$1,950,000.00 appearing on the bank ledger sheet was actually a combination of \$1.7 million in loans and \$250,000.00 from the sale of the property (Ex's. 101, 102, T. 761). Lignell further testified that there was a deadline with Travelers Insurance Company, the permanent lender, of November 1, 1973. They had to have the project completed by that time or face the possibility of losing it (T. 766). For this reason, Lignell explained, he was concerned about the completion of the project and sent several letters to the contractor in an attempt to get the project completed (T. 767).

Lignell testified that a copy of the letter from Comstock to Berg (Ex. 35) was given to him (T. 769). The first paragraph of that letter stated that all change orders that had not been accepted were null and void. Lignell further testified that after he received that

letter he accepted Comstock's statement on its face. Thereafter, he asked Berg whether there were any different or additional items or claims being made by Comstock. Berg told him, he testified, that all the change orders to date were included in the letter (T. 770). Lignell testified that he sought a clarification of those change orders that related to work that had been completed prior to December 18, 1972. In response to that request he received Exhibit 100. Lignell then reviewed Exhibit 100 and testified that certain changes identified on that exhibit had been agreed to by him, that other changes requested there were either not authorized or the work had not been done (T. 772-779).

In relation to the amount of electrical work remaining to be done, Lignell testified that in September of 1973 he observed that some of the conduit had been placed in the panels but that very little of the wiring had been done in the apartments.

Lignell testified that an agreement was reached with the contractor regarding the construction of the additional units (T. 788), which he understood included all of the electrical extras as well as all of the other work on the additional units (T. 793-794).

WILFORD K. COMSTOCK

Mr. Comstock was the president of Comstock Electric and the general superintendent of Murray Electric, a

non-union company owned by his wife. He had been a master electrician for eight years. Mr. Comstock was contacted by Berg to bid on the project and received a set of plans, identified as Exhibit 19, which, Mr. Comstock acknowledged, contained a set of specifications (T. 310). Comstock's original bid to Berg was \$171,000.00, with an alternate substitute on fixtures and panels he was able to lower the price to \$121,000.00. Berg told him that this was too high and that he couldn't accept it. Thereafter they met and went over the plans and Comstock submitted a second bid for \$107,000.00 (T. 312).

On January 20, 1972, a contract was entered into between Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company and Frank C. Berg, an individual, a joint venture, d/b/a BERG CONSTRUCTION COMPANY, and Comstock Electric, Inc., of Utah (Ex. 20). Mr. Comstock variously testified that the billing rate for the company was \$13.00 per hour (T. 343), \$14.00 per hour (T. 352) and \$12.00 per hour (T. 400). Mr. Comstock testified concerning certain electrical extras being charged by the company to the contractor. Mr. Comstock readily admitted that he had generated several duplicate copies of the same orders (T. 337, 345, 351, 361, 364, 366, 381-A, 384, 388, 388, 417, 419, 420, 422, 424, 486, 488, 490, 493-497). Further, he stated, the change orders were routinely

submitted to Berg (T. 328, 345, 351, 354-356, 360, 361, 363, 379, 381-A, 388). With relation to the various change orders Comstock acknowledged on several occasions that he did not know precisely what was charged to the contractor for extra items (T. 363, 368, 369, 377, 380, 386, 488, 492, 498, 499, 528, 551, 570, 935-112, 935-24), and admitted that many items of work evidenced by the change orders were not, in fact, done by Comstock (T. 486, 494, 557-559). Mr. Comstock acknowledged that when he left the job in January of 1973 no labor had been performed in Building A (T. 530).

Mr. Comstock acknowledged that if an item appears on the specifications then the subcontractor is obliged to do it. Within the industry, he stated, if an item is listed in either (the plans or the specs) it is considered as being on both (T. 509).

Although Mr. Comstock submitted an extra for the wiring of the hood fans to the ranges, he admitted that he was aware of the hood fans when his bid was prepared and that that item was listed on his bid sheet (T. 510).

Mr. Comstock testified that some of the change orders related to work that was solely for the benefit of the contractors (T. 357-358), was to repair wiring damaged by other subcontractors (T. 427) or may have been occasioned by the actions of other subcontractors (T. 404).

On December 18, 1972, Comstock sent a letter to Berg (Ex. 35) stating that all prior change orders were

void (T. 441). Thereafter, in February of 1973 a meeting was held at the company offices between himself, his wife, Lignell and Berg to discuss the changes on the Incline Terrace project (T. 442-443).

Although the subcontract agreement between Comstock and the joint venture provided that the subcontractor would furnish a labor and material payment bond (Ex. 20, Paragraph 7), Mr. Comstock testified that he did not know there was a bond required on the project. He further testified that when he found out there was, he treated it as an extra and billed the contractor \$1,100.00 for that item (T. 447).¹ Comstock admitted that on March 3, 1973, some two months after the company ceased to do any more work on the Incline Terrace project, a summary of change orders and credits was sent to Berg (Ex's. 39, 41, 42). Mr. Comstock testified that his company pulled off of the Incline project on January 5, 1973.

On cross-examination Mr. Comstock admitted that he was aware of the language in the subcontract requiring him to build according to the plans and specifications (T. 511). On April 26, 1973, Mr. Comstock testified, he submitted Exhibit 51 to Berg indicating thereon that the balance due to Comstock Electric was \$7,412.04. Mr. Comstock further testified that no work was done by Comstock Electric after January 5, 1973. Further, he admitted, that alot of the

¹This charge was apparently passed on to the owners.

change orders were added to the contract price prior to the time that the work was actually done and that all of the work wasn't done by the time that Comstock left the project (T. 557). Mr. Comstock further admitted that several change orders that had been submitted by him were not accepted because the price was too high; however, those changes appeared on the October 2, 1972, account summary (Ex. 39, T. 557-558).

JOYCE COMSTOCK

Joyce Comstock was the president of Murray Electrical Services. She was also the wife of Wilford K. Comstock. Mrs. Comstock testified that her company, Murray Electrical Services, came onto the project in March of 1973 to complete the electrical work. Mrs. Comstock further testified that it was her company policy that they would not do any work if they did not have a signed change order. In February, Mrs. Comstock testified, there was a meeting between Berg, Lignell and Mr. and Mrs. Comstock to decide what change orders were authorized on the project (T. 586). As a result of the meeting, it was decided that Murray would finish all the authorized changes, then complete the project (T. 588). On March 1, 1973, a contract was signed between the Murray Electric and Cliff and Bill Berg (Ex. 57). Mrs. Comstock stated that Murray did the rough wiring in the B and A buildings and then proceeded on the change orders that had been agreed upon in the meeting (T. 590). Mrs. Comstock identified several change orders for Murray re-

lating to the work on the Incline Terrace project. She testified that Murray pulled off the job on October 5, 1973 (T. 616). In its billings, she testified that she gave the contractor a credit for \$1,100.00 for work that was not done (T. 606).

JAMES LAWRENCE

James Lawrence was identified as the electrical foreman on the Incline Terrace project for Comstock Electric. Lawrence stated that he was on the project until Comstock left in January of 1973. Mr. Lawrence testified that some electrical work was done in Building B but that he did not remember doing any work in Building A (T. 911). Mr. Lawrence stated that usually the electric^{al} equipment is installed by the electricians not by the heating craft and that if he had read the plans and the specifications he would have expected to install the range hoods, even though he wouldn't have had to furnish them (T. 915). Mr. Lawrence identified the spec sheet on Exhibit 19 and testified that it was his belief that that was the exact page that he had in his possession (T. 913, 916). Although Mr. Comstock had testified that he had to wire the air conditioners twice, Mr. Lawrence stated that he didn't remember having to pull the wires. He stated that normally he would have remembered if he had had to pull the wire out of the building and then rerun it (T. 920).

WILFORD K. COMSTOCK

Wilford K. Comstock was recalled and testified that

Exhibit 111 was either the set of plans that he made the takeoff from or one that was similar to it (T. 935-5). Although he had earlier testified that he had received a page of specifications with the plans (T. 310), Mr. Comstock then changed his testimony and maintained that he did not receive any specifications (T. 935-6). He reluctantly acknowledged, however, that at his deposition he had testified that he prepared his bid off of the spec sheet (T. 935-20, 935-21).² Comstock also admitted that prior to the time that he submitted the bid the architect had told him about the range hoods (T. 935-17).

CLIFFORD M. BERG

Berg testified that he had extensive construction experience and had built several small apartment houses in the area. Some of these apartment projects had been built in conjunction with his older brother (T. 1005-1006). Berg indicated that he had been engaged as a contractor in a partnership with his younger brother, Bill, under the name and style of Berg Brothers Construction Company for about 12 years (T. 1006). Berg admitted that it was he who took the copies of the plans, Exhibit 120, to the City for the issuance of a building permit and placed the date he did so around October 13, 1971 (T. 1007). Berg acknowledged that the city inspectors made certain notations upon the plans and that he observed those markings on about October

²The Comstock bid also makes reference to the "spec. sheet" (Ex. 43, p. 6).

20th when he went back in to get a permit; at that time he was told that certain additional items, including wet and dry standpipes, stairs to the roof and enclosed stairways, would have to be added to the project to meet the City's requirements (T. 1009). Berg further testified that by October 22, 1971, he had fully examined the plans and discussed the required changes with City personnel. Berg stated that he knew that he had to comply with the comments on the plans and planned to do so (T. 1011-1013, 1018). Berg admitted signing the construction contract (Ex. 9) and identified Exhibit 10 as being the construction agreement that was referred to in the contract (T. 1014-1015). Berg admitted that he signed Exhibit 11 (the addendum) (T. 1016). Berg testified that the construction contract was prepared by Barry Ingham, the bonding company's representative, and was given to Berg for his signature. Berg believed that he signed it around February of 1972 and that the date of November 16, 1971, was placed on the document because that was the date of the first draft that he signed (T. 1016-1017). Berg stated he was not sure when the addendum was signed but thought it was shortly after April 9, 1973 (T. 1018).

Berg stated that he gave a price of \$1,455,000.00 to the owners before he got the building permit from the City (T. 1019). Prior to November 16, 1971, when Berg signed the first draft of the contract he did not change

that price (T. 1019). The project was modified in 1973 by adding 22 units. Additional plans were generated reflecting the additional units. Berg initially could not recall whether or not he took Exhibit 121, the second set of plans, to the City (T. 1029), but later admitted that he had done so (T. 2717). Berg stated that there are two additional apartments that were built in the body of Building B. These two apartments, however, were included within ^{the} 22 additional units that he built as an extra (T. 1032). When the addendum was signed, however, Berg acknowledged that many of the requirements discussed previously with the city had been included in the new set of plans. Berg testified that by November of 1972, five months before the addendum was signed, he had in his possession a copy of the Exhibit 121, the revised set of plans, including the additional¹ units (T. 1052, 1057).

Berg stated that he transmitted to Lignell a document which constituted his breakout of pricing with respect to the Incline Terrace Apartments (Ex. 127). The document showed a total cost of \$1,398,636.00; Berg maintained, however, that this was merely his "worksheet" but he did admit that he arrived at the figure of \$1,398.856.00 by adding up the sum of the components on all three pages of the Exhibit (T. 1058, 1066). The price for the project quoted to Lignell was \$1,455,000.00; that figure was found on Exhibit 127. Berg deducted the \$1,398.636.00 from the

\$1,455,000.00 and came up with a sum of \$56,364.00 which he identified as being the profit that he thought he would make from the project (T. 1067).

Berg testified that the electrical bid that he received was \$107,000.00 although the original bid identified in Exhibit 127 was \$117,000.00. With relation to his contract with Lignell, Berg understood that anything that was saved could be kept, but that if he went over the amount of the contract that he would be stuck with that (T. 1068, 1069). The bid sheet also included items for carports, shear walls and elevators (T. 1069). Berg admitted that the breakdown showed the items and the areas in which he expected to sustain costs and stated that laying out the components and then pricing them was the only way that he knew how to figure a job and that is what he did on this particular project (T. 1069-1070).

Berg testified that he was familiar with the requirements of obtaining a bond in the contracting business and that he knew that his bonding capacity was insufficient to handle the project. Although Berg stated that he did not know that a bond was required when he first bid the project after he found that it was required he still wanted to keep the job (T. 1074-1075). Berg initially denied having any kind of a discussion among his brothers regarding a joint venture agreement and stated that he did not know what a joint venture was until he had a meeting with Barry Ingham

the bonding company representative. Similarly, Berg denied ever seeing the joint venture agreement and testified that as best he could remember it was never submitted to him (T. 1076). Berg admitted, however, that he did see the language on the construction contract (Ex. 9) referring to a joint venture prior to its execution, and further admitted that the performance and labor material payments bonds (Ex. 18) name the joint venture as one of the parties thereto (T. 1076). Berg admitted that at his deposition he had testified that while no joint venture had been formed in writing, there was an oral agreement and there had been a discussion with his brothers concerning that matter (T. 1080). Berg later testified at the trial, however, that in fact he may have signed the joint venture agreement (T. 2632). Berg acknowledged that he had sworn under oath that a joint venture existed and that he was its authorized agent and that he could possibly have signed some other sworn statements that he was the managing partner of the joint venture (T. 1084). Berg testified that he never disclaimed the existence of the joint venture to either Lignell or Todd (T. 1085). Further, Berg acknowledged that the contracts with various subcontractors were originally drawn in the name of Berg Brothers Construction Company, the partnership, that thereafter the names on the contracts were changed to reflect the name of the joint venture and that he signed those changed subcontract agreements (T. 1087-1088).

Although the construction contract (Ex. 9) provided that the project must be free of liens or claims which could become liens, Berg admitted that when the project was turned over to Lignell and Todd there were liens on the project and there were other unpaid bills that could become liens (T. 1093). Berg admitted that although the owners were behind in their payments at one time that they came back after re-financing and caught up on everyone's claims. At no time did Berg make any claim against the owners that they were in breach of their contract, he took the money that was due, went back to work and continued to work under the contract without interruption and without any claim that the contract had been breached (T. 1093).

Berg testified that in the fall of 1972 that Lignell told him that he wanted to add a floor to the A and B buildings. In response to that, around December of 1972 Berg prepared a list of extras, Exhibit 105, and gave it to Lignell. They thereafter discussed the contents of that document (T. 1110). Besides providing the information to Lignell, Berg testified that he wanted to define and delineate the extras so that he could tell how much was due the contractor (T. 1113). Berg acknowledged that at the time that Exhibit 105 was prepared it represented every category of extra that he remembered. The total claimed for extras was \$304,000.00. Berg maintained at the trial, however, that he did not consider the list to be complete although

he admitted that it was fairly accurate and that if he had thought there were other sums owed by the owners that at the time he would have put them on the list (T. 1120). At the time Berg gave the addendum to the owners he admitted that he did not tell Lignell in substance or effect that he had any objections with the price of the addendum, \$1,759,003.00 (T. 1210). Berg stated that he knew and expected the owners to rely on the addendum (Ex. 11) and that Berg himself expected to rely on it.

Berg also identified Exhibit 128 as being a recap of the job after the addition of the 22 units. It was made, Berg stated, with the intention of finding out where he was going on the project and it represented his original accounting sheet. Berg maintained, however, that he relied mainly on Lignell's figures to come up with the figures on Exhibit 128. Berg admitted with relation to Exhibit 128 that he intended to list all of the extras on that exhibit (T. 1130), and that although some of the items on Exhibit 128 were left blank, on November 1, 1973, another list (Ex. 130) was presented to Lignell which filled in many of the "holes" on Exhibit 128 (T. 1148).

Berg admitted that it was indicated on the first set of plans, Exhibit 120, that curb and gutter were to be constructed along Fuller Avenue and a drain installed to 10th East as per the requirements of the Salt Lake City engineer. Berg further identified Exhibit 136 as being the city

engineer's plans relating to Fuller Avenue (T. 1156-1157).

Berg acknowledged that by October 20, 1971, which was at least 26 days before he signed the construction agreement, he knew that they were going to have to install standpipes on the project (T. 1163). Berg admitted that the bath fans were required by Exhibit 120, nevertheless, he listed them as one of the extras. Berg further admitted that Nutone range hoods were listed on the specifications and that they were part of the contract (T. 1164).

Berg acknowledged that he had a conversation with Lignell regarding the construction of the project and that it was agreed to get Building C done first so that it could be rented while Buildings B and A were being built. The original completion date for the whole project was November 16, 1972 (T. 1172-1173). Berg first testified that the target date for completion of the C building was two months (T. 1173), but later stated that it was to have been completed by June or July, 1972 (T. 2241-2245).

With relation to the subject of drywall, Berg testified that the architect indicated to him that some of the drywall work was inferior and that it ought to be brought up to standard (T. 1201). Berg acknowledged, however, that in his opinion the drywall was "average" (T. 161).

E. KEITH LIGNELL

Lignell's first contract with Berg regarding the Incline Terrace project was in February of 1971. There were

many discussions in that area of time in an attempt to determine the feasibility of building a project on the site selected. The commencement of construction of the Incline project was dependant upon Berg obtaining a bond and completing another apartment he was constructing. Berg gave to Lignell a copy of an estimate he had done on the other apartment project, and they used that figure as the general basis for their discussions thereafter (T. 1231-1233).

The owners decided to go ahead with the project and proceeded to obtain their financing. The financing was obtained from Pacific Mutual Life Insurance Company. As part of the condition of the acceptance of the loan, the owners were allowed to draw out on the front end of the project the costs that they had sustained up to that point, plus an organizational fee. That total amount approximated \$175,000.00. The amount of the loan was \$1,345,000.00 (T. 1236).

Plans were being generated along the way and by April of 1971 the architect delivered a set of plans which was essentially complete (Ex. 120, T. 1237). Lignell received a bid from Berg for the original 125 units (Ex's. 127 and 139) in approximately September of 1971 (T. 1239). The bid price at that time was \$1,369,000.00. Thereafter, Berg and Lignell met in Lignell's office where they added some additional items that brought the total cost up to \$1,398,636.00. Berg thereupon drew up the figure of \$1,455,000.00. Under-

neath it he wrote \$1,398,636.00 and subtracted the difference leaving \$56,364.00, which he indicated to Lignell was the profit in the job. At that time Lignell and Berg discussed the requirements of bonding on the project. They had had previous discussions regarding this subject and Lignell testified that from the very beginning it was made clear to Berg that the project would have to be bonded (T. 1242-1243). The construction contract was ultimately signed by Lignell on behalf of himself, Todd and their wives. He did not prepare the document but testified that he believed it was prepared either by the bonding company, Fidelity and Deposit Company of Maryland, or by the insurance company (the lender). It was signed after the November 16th date it bears.

Lignell acknowledged that he and Berg had a discussion concerning the financing of the project and that it was decided that the draws would be prepared and presented to Lignell and that Lignell would make the disbursements. Berg was in agreement with this method of payment. Because of the method of financing of this project, the chit system, which Berg and Lignell had used on a previous project, was not feasible (T. 1250-1251).

Prior to the time the contract was signed there was a discussion between Lignell and Berg relating to the completion of the project. It was agreed that Building C was to be completed first then the contractor would move in a normal

sequence through Buildings B and A (T. 1263). This procedure had been utilized before on their previous project and it had worked out very nicely.

Lignell relied upon the bonds (Ex. 18) related to the project. He advised Pacific Mutual that the bonds had, in fact, been issued (T. 1266).

In May of 1973 Lignell and Todd acquired some additional land adjacent to the project. This precipitated the addition of the 22 units because there would now be sufficient parking to meet the city's requirements (T. 1267).

Though construction of the project was to have commenced in November of 1971, it had not done so. By February of 1972 the contractor had not done much more than getting the footings and foundations in place. Lignell had a discussion with Berg concerning the progress of the building and Berg stated to him that he was a little apprehensive because he was unsure of himself on the job. Thereafter, Lignell became most concerned about the project and was in almost daily contact with Berg (T. 1268-1270).

When the additional 22 units were added to the project it was agreed that the completion date would be extended to July 15, 1973 (T. 1271). This extension of time was included in the addendum to the construction contract (T. 1272). The project, however, was not completed by the July 15th deadline; on that date Lignell informed Berg that the contract was in default (T. 1274, 1284). Later on Lignell

notified the contractor in writing that it was in default (Ex. 87, T. 1275). After the 15th of July, Lignell was on the project almost daily conferring with Berg and discussing with him the progress of the job, since the loan commitment with the insurance company was due to expire on November 1, 1973 (T. 1283).

The project was never officially turned over to the owners; however, Lignell testified that the owners came into possession of the project because the contractor was not diligently prosecuting the work (T. 1285-1286). Lignell testified that there were many, many occasions when the owners stopped by the project when Berg was not there. In September or October, 1973, Lignell recalled one occasion where the owners located Berg working on another project. They were upset that no one was finishing the building. Berg agreed to come back on the project and get it completed but he failed to do so (T. 1285-1289). Lignell testified that he was concerned about the expiration of the loan commitment and the increase in interest rates at that time, therefore he became personally involved in the completion of the project (T. 1290). Because of the failure of the contractor to complete the project timely, Lignell felt obligated to become involved in its completion so he assumed an active role of checking with Berg and with the subcontractors concerning progress (T. 1293). From July 15, 1973, on Lignell was on the project almost daily. He

would go there on his noon hour and after work. Particularly during the months of September and October Lignell noticed that the contractor was not present on the job (T. 1294). During the month of November it was almost impossible to locate Berg. Because of this problem, Lignell wrote a letter on November 14, 1973 (Ex. 143), reciting the fact that the carpenters lacked direction, the painter didn't know what to do, that he and Todd had been on the project at various times and that no one was there (T. 1299). Berg made no response to that letter (T. 1300).

In the latter part of October or early November, Lignell hired Memmott and Grow painting contractors (T. 1304) and Gary Simmons (T. 1306) to correct the drywall defects and bring the project up to the contract standards. Lignell testified that he is able to observe areas of work on the project that did not meet the contract standard, specifically the drywall work, electrical and concrete work, asphalt and the painting (T. 1319).

Lignell admitted that in 1972 he told Berg that Harry Nichols, the drywaller, would have to be replaced if he could not provide a large and adequate crew to get the job done (T. 1320). Mr. Nichols was replaced by Berg.³ Berg replaced Mr. Nichols with Western Drywall who finished out the project.

Although Lignell admitted that he was not an

³At that time Mr. Nichols had completed only thirty-two units in the C building, although the completion date for the entire project was less than two months away (T. 2746-2747).

expert drywaller, he maintained that he was able to observe what had been done on the project with relation to the work done by Western. He observed globs of spray on the ceilings and walls where it should have been a fine spray, sanding of walls that was done in such a way as to make it look like someone had painted black streaks along them, areas above the door casings that were missed, areas in the walls that were cut out far in excess of what was necessary, thereby causing the electrician to make an extra charge for oversize plates. In addition, there was sour mud applied in one apartment. Further, Lignell testified that there were areas throughout the project where the corners were not brought in at right angles and where spray or mud was globbed into the corners (T. 1323-1330).

Lignell testified that he observed Mr. Coppinga spraying the walls and ceilings in the project. In late August, 1973, he noticed a nauseous or vomitous smell throughout the area in Building A. The smell remained up to the time that the apartment was gutted and the wallboard was torn out (T. 1332-1334, 1492-1493).

In November of 1973 Lignell and Todd met Claron Bailey on the job site and discussed the nature and quality of the drywall work. During the conversation Mr. Bailey admitted that he could have prevented the defective work from happening if he had known about it. The conversation then evolved into what to do about the quality of the work (T. 1336-1337, 1641).

In relation to the other defects in the project, Lignell testified that there were places where the window wells had pulled away from the foundation allowing water from rain storms and sprinkling to seep in which caused damage to the carpets and the drapes, that the cement was flaking off and that the asphalt in various areas of the parking lot was uneven, rough and filled with potholes (T. 1339-1341). Lignell testified that he observed the condition of the apartments beginning in September of 1972. Throughout the course of the construction he observed large amounts of plaster in the bathtubs, paint and plaster spray on the windows and the kitchen sinks, scuff marks on the painted walls and surfaces, formica tops that were chipped and broken and damaged drywalled. These conditions existed in all three buildings (T. 1347-1349).

Lignell indicated that he gave the drawing by the City Engineering Department relating to the work to be done on Fuller Avenue (Ex. 136) to Berg and that, in addition, Berg was present when there were discussions with city personnel and others regarding that work (T. 1352).

In October or November of 1971, Lignell requested that Berg furnish to him a document so that a contract for the building of the Incline Terrace Apartments could be signed. Lignell testified that what was received was a portion of Exhibit 127 and a portion of Exhibit 139, and that the price for the project was \$1,455,000.00, which he agreed to pay (T. 1358).

Lignell further testified that in the period of December of 1972 to February of 1973 he made an effort to ascertain the total amount of extras claimed by the contractor. He had several discussions relating to that subject with Berg and requested that he be provided with a full list of those extras. In response to this request Lignell received from Berg Exhibit 128. In relation to that exhibit Lignell testified that the figures listed for extras came up to the sum of \$304,003.00, which was the figure that was used in the addendum to arrive at the final price (T. 1359).⁴ Lignell further testified that it was his understanding that he was agreeing to pay the contractor the sum shown for the items listed on Exhibit 128, but that there were several items there that were unpriced at that time. In relation to the unpriced items, Lignell on December 1, 1973, received Exhibit 130 wherein several of the items that were not priced on the earlier exhibit were priced. Lignell testified that the sums charged for these items were acceptable to him. The sums dealt primarily with the recreation rooms in two of the building, certain retaining walls and curb, gutter and sidewalks (T. 1360-1364).

On January 13, 1974, Lignell, Todd and Berg had a meeting at Berg's residence to resolve some of their dif-

⁴Berg admitted that the exhibit was prepared by him and was in his handwriting but he claimed that the document was merely a "worksheet."

ferences relating to the project. Prior to the meeting Lignell had received a figure of \$5,850.00 for the additional carports from Berg, although at the meeting Berg claimed that there was some \$30,000.00 additional for the carports that he had forgotten (T. 1365). Lignell and Todd objected to this but offered to pay a total \$15,000.00 for the additional carports. Berg countered with the sum of \$18,500.00, but the meeting adjourned with no agreement concerning the extras for carports (T. 1366). The following day there was a discussion on the building site concerning the charge for the extra carports. At that meeting Berg accepted the owners' offer of \$15,000.00 (T. 1369). Thereafter the owners paid that additional amount (T. 1370).

Lignell testified that most of the items appearing on Exhibit 130 were extra charges that were properly chargeable to the owners (T. 1410). That exhibit was not entirely in Berg's hand; part of it was written by Lignell as he attempted to search his mind concerning additional extras that weren't on the list (T. 1410).

Lignell stated that a portion of the charge for concrete cutting was necessitated by changes requested by the owners. Some of the concrete cutting, however, was a result of the contractor failing to put forms in when the foundations were poured (T. 1415-1416). Lignell testified that there were \$56,276.00 of extras in addition to the addendum and that the total contract should come to \$1,815,279.00 (T. 1417).

Lignell testified, however, that there were some items that were included in the list of extras and in the addendum that were not performed by Berg. These included \$5,000.00 for medicine cabinets and mirrors, a firewall running through the cross section of the B building, \$15,000.00 for the storage areas in Buildings B and C, \$5,000.00 for cleaning the apartments on behalf of the contractor, the retaining wall on the east side of the building, damage to the asphalt areas, tile in the bathroom showers, finish grading, fence and the sour mud in the apartment which required the owners to eventually complete gut the apartment, replace the wallboard and all the contents (T. 1417-1447, Ex. 207).

Lignell declared that the designation of the contractor as being a joint venture was on the construction contract when he signed it. Lignell further testified that the decision to go forward with the project was influenced by the wording on the contract. The existence of the bonds was a factor in the decision to go forward with refinancing the project and the addition of the 22 units (T. 1455-1456). Travelers Insurance Company, the new lender required a bond on the project. Lignell sent them a copy of the existing bond. Some \$2,900.00 was paid by the owners to the surety for the additional premium occasioned by the increase in the contract price.

Lignell testified that the normal procedure for per

of funds other than to Berg Construction Company was for Berg to make a submission which was transmitted to the insurance company. Checks were then made up according to Berg's instruction and those checks were given to Berg for distribution. There were occasions, Lignell testified, when the checks were handled other ways. Occasionally Berg would call up and would say to send a check directly to a subcontractor which Lignell would do (T. 1461). Lignell identified Exhibits 149 and 150⁵ as being a summary of the payments by the owners attributable to the contractor (T. 1460-1493).

On cross-examination Lignell testified that he first contemplated adding the extra 22 units on July 24, 1972. After that date it was necessary to have some kind of an addendum to the contract because he needed to know how much the additional 22 units would cost. By the time that they got to the planning stage with the architect and with the city inspector on the additions, the remaining financial negotiations did not take too much time (T. 1503-1504). Lignell stated that on the list of extras that Berg submitted to him only 20 additional apartments were included. Lignell recognized this mistake and increased the number from 20 to 22 and the amount therefor from \$183,000.00 to \$201,000.00. The important thing, Lignell testified, was the \$304,000.00

⁵Exhibits 153 and 154 are identical except for a change in the heading.

price (T. 1505, 1612).

Lignell admitted that the original contract with Berg was for \$1,455,000.00, but that they agreed that it was going to go on a contract of \$1,351,000.00. The reason for the lower figure on the contract was because that was the only way that the project could have been built (T. 1506). Lignell further acknowledged that the first contract that was submitted to Pacific Mutual Life Insurance Company was for \$1,110,000.00. The owners, Lignell testified, were required to furnish carpet, drapes, landscaping, pool and appliances. Lignell reiterated that he was authorized to draw \$175,000.00 out of the front end of the project and that he put about \$300,000.00 back into the project (T. 1510). Lignell testified that he and Berg discussed the terms of the printed contract and that both he and Berg were aware of its terms (T. 1551).

Lignell testified that the majority of the electrical extras were included in the \$304,000.00 addendum. There was an additional \$22,186.00 indicated by Berg in Exhibit 128. Lignell, however, was not aware of the details regarding the electrical extras but relied upon Berg. Lignell did not know what arrangement Berg had with his subcontractors (T. 1612-1616). Lignell maintained that the electricians had been vastly overpaid. Comstock and Murray were paid a total of \$131,500.00. It cost the owners, he testified, \$40,000.00 to complete the electrical work (T. 1626).

Lignell testified that as of the 9th of September, 1973, none of the electrical wires had been pulled in Building B, none of the panels on the outside of the building had been attached to either Buildings A or B and none of the appliances in Building A had been hooked up. In addition, the electrical and heating and air conditioning systems had not been connected in either Building A or B. Some conduit had been placed in Building A but that was not complete, many of the panels had not been placed and practically none of the fixtures or outlets had been done in the building (T. 1629-1630). Lignell testified that it was his understanding that the price quoted to him by Berg for doing the additional 22 units included the electrical work (T. 1637).

With relation to the subject carpots, Lignell testified that the figure for additional carpots was \$5,850.00. From the time that Berg wrote the original bid and handed it to Lignell until Berg wrote Exhibit 105, he did not at anytime say that he had additional carpots coming to him other than for the thirteen. Between the time that Exhibit 105 was prepared and Exhibit 128 was prepared, Lignell testified that there was a question whether there was going to be 13 or 17 carpots. That question had not been resolved (T. 1646-1647).

Lignell further testified that he had a discussion with Mr. Tom James of Pacific Mutual Insurance Company (the lender) relating to the subject of drawing money on the front

end of the project that the procedures that he employed did not depart in any way from the understanding that he had with Pacific Mutual and that Pacific Mutual did not raise any objections that he was overdrawing his account. Further, Ligon testified that he returned the funds from the project that he had already drawn plus more (T. 1648-1649).

KEITH ELLERTSON

Keith Ellertson, the president of Title Insurance Agency in Utah, testified that his organization was involved in insuring the position of the permanent lender, Travelers Insurance Company. In this regard, the Title Insurance Agency issued checks to various subcontractors in order to pay all sums owed on the project and prepared certain affidavits for the signature of Berg Construction which were executed by Mr. Berg (T. 1662). The affidavits identified by Ellertson, Exhibits 162 and 163, indicated that Mr. Berg was a partner in a joint venture called Berg Construction Company. Ellertson further testified that before Title Insurance Agency could insure the Travelers loan they had to be certain that all the bills were paid. Therefore, they approached Mr. Berg for a list of the outstanding obligations. The list presented by Mr. Berg did not contain any claims for Berg Construction Company. The affidavit was prepared prior to the disbursement of funds, Mr. Ellertson testified, and without it the funds could not have been disbursed (T. 1666-1667). The document relating to the release of claims by the joint

venture, Exhibit 163, was signed by William Berg, Frank C. Berg and Clifford M. Berg (T. 1670) and was relied upon by Title Insurance Agency. Mr. Ellertson further testified that of the outstanding obligations listed by Berg, one claim, that of Western Drywall, was not paid or released by the checks and that at the time of closing, the Incline Terrace project was not in such condition that an ALTA policy of insurance could be issued without exception to mechanics and material-man's liens (T. 1673). The money required to clear the project, Mr. Ellertson testified, was provided by Lignell and Todd. Neither Frank, William or Cliff Berg posted any funds to cover the Western Drywall lien on the premises and but for the posting of funds by Lignell and Todd the project could not have been closed and a title policy could not have been issued (T. 1676).

On cross-examination Ellertson testified that Pacific Mutual sent him a lump sum payment with instructions to deposit the money in the account of Todd and Lignell. After that he had no idea what happened to any of the funds (T. 1678).

DWAYNE LIDDELL

Mr. Liddell is a certified public accountant with the firm of Main La Frantz. Mr. Liddell after reviewing the financial records relating to the Incline Terrace Apartments prepared Exhibits 149, 150, 153 and 154, which records were a summary of the documents he reviewed. Mr. Liddell testified that his exhibits did not include all of the owners'

expenditures on the project but only those that were attributable to the contractor. Those items outside of the construction contract, such as swimming pool, carpets, drapery, demolition, etc., were excluded from the exhibits (T. 1712-1713, 1722, 1729). Mr. Liddell testified that the payments by the owners were, in the most part, made pursuant to a draw request prepared by Berg (T. 1714).

On cross-examination Liddell testified that when he began working on the project a year ago he was told by Lignell to review all the documents independently for an accounting of the disbursements that were made on the Incline Terrace project and to eliminate any items that were solely the

responsibility of Lignell or Todd (T. 1722). Further Mr. Liddell testified that the method of payment on the project was for an invoice to be submitted from the subcontractor to Berg who then submitted a draw request to Lignell. Lignell then paid the amount of the draw request (T. 1730-1731). Mr. Liddell acknowledged that some payments were, in fact, less than the amount of the draw request (T. 1732).

The documents, Exhibits 149, 150, 153 and 154, Liddell testified on redirect examination, did not show what was done for the work done on the Incline project but simply showed what was paid on that project by the owners as it related to the contractor (T. 1741).

On recross-examination, Liddell admitted that the

owners had withdrawn funds from the project (T. 1762). He stated, however, that they had also deposited money into the account for the project from their own funds and from other sources. Liddell stated that the maximum amount that the owners had out at any one time was \$182,921.20 (T. 1785-1787). Liddell stated, however, that all of the funds that were withdrawn by the owners were returned to that account plus an additional amount beyond that in the sum of \$211,313.82 so that the owners put back everything that had been drawn out of the account plus an additional \$211,000.00 (T. 1800).

KENNETH WEAVER

Mr. Weaver was the foreman on the Incline Terrace project for Murray Electrical. Mr. Weaver clarified the meaning of Exhibit 116, which he stated had been written by him. That document contained the notation that as of October 5, 1973, there were only six apartments that had not been wired. Mr. Weaver testified that he meant by that that there were only six apartments that did not have the rough wire pulled into the apartments. He did not know how many apartments had to be finished but there could have been as many as 40. The responsibility for finishing was taken away from him but in order to be finished the apartments had to be plugged and switched and the appliances had to be installed. The services to the apartments were his responsibility but they had not been done.

Mr. Weaver further testified that as of October 5, 1973, at 4:30 p.m., quitting time, the following work remained to be done: connecting the service at the meter base, which required the bringing of the wires to the electrical gutter and to the meter base and connecting them into the main breaker; elevators, neither of the elevators in the A or B buildings were wired; there was an apartment on the 5th floor in Building B that had to have the services run to it, they couldn't do it because the conduit was open somewhere between the floors and they would have to tear the floors and the ceiling out; the air conditioning in Building A was not wired or hooked up; there were some problems with furnaces; they had not even started on the exterior lighting; and, not all of the panels had been hooked up to the apartments (T. 1753-1755).

Mr. Weaver further testified that he was called on to do repair work in the C building. All of the tickets referred to in Exhibit 58 were for errors in wiring. They should have been done by the contractor that originally did the wiring. Mr. Weaver further testified that at no time was Murray Electrical delayed in the progress of its work by the lack of appliances (T. 935-88 to 935-90, 1756-1757).

On cross-examination Mr. Weaver stated that in his

experience the rough wiring is approximately 40% of the work for an apartment and it takes longer to hook up the wires than it does to pull them through the pipe. Mr. Weaver reiterated that as of quitting time on October 5th, that six apartments still had to be rough wired but that did not mean that that was all that was needed to complete the electrical work left to be done on the project (T. 1759).

LYNN BATEMAN

Mr. Bateman was a master electrician who came onto the project in October of 1973 to complete the work that had not been done by Murray Electric (T. 935-48, 1803). Mr. Bateman indicated that when he came onto the project he received a set of plans from Berg. In detailing the work that he did Bateman stated that there were a great number of appliances that he hooked up. He had to hook up air conditioners including the junction boxes and disconnects, furnaces were hooked up in both buildings, he had to run the power to them, had to pull the wiring for a great number of kitchens for the appliances, had to do the finish wiring on many apartments, had to replace the services to the breaker boxes, had to install the breakers in the panels, had to change the breakers in the air conditioners in Building C, had to install plugs and switches in the buildings, had to hook up the main disconnect, had to pull wires from the outside transformer to each apartment (this required three wires for each apartment), had to then check out the system,

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had to install the three-phase power for the elevator in Building A, had to pull the wire for the service into the elevator itself since when they arrived the elevators were not hooked up and did not work, had to do the exterior lighting including the running of the lines, installation of the fixtures, installation of time clocks, had to do complete conduit work in the storage areas and in the recreation rooms and had to run the services to those areas. Further, Mr. Bateman testified that the storage areas in building A and B had to have conduit run to them and had to have the wire placed inside the conduit. The exit lights had to be installed in those buildings and the doorbells had to be installed.

Bateman testified that when they began to check out the service in Building B they found that it did not come into the exterior of the building. They found that they were one service short. They finally discovered that there was a pipe that was left half way from the apartment to the exterior of the building that was not completed. They had to tear the floor up to get the pipe across and down to where it had to go (T. 1803-1812). Bateman testified further that they had to check out each unit in Building B and in Building A and had to test each apartment individually to see if there were any bad plugs or switches in the unit. Some rough wiring also remained to be done when they came on the project (T. 1813-1814).

Mr. Bateman testified that he was required to do a lot of work repairing defective items (T. 935-75 to 935-76). In addition, he recalled that the wiring in the kitchen area was not done in accordance with the electrical code and the inspector from Salt Lake City requested that the wire be pulled out. Specifically Bateman testified that their predecessors on the project had used aluminum wire that could only accommodate some 15 amps while the kitchen required 20 amps. In addition there was some conduit that had more wires in it than was proper based upon the National Electrical Code (T. 1814-1815).

Bateman testified that the sum of \$40,317.80 had been paid to him by the owners for his portion of the electrical work on the project (T. 1817).

On cross-examination Bateman testified that he received a set of plans from Berg and that they were the plans that were on the project. Bateman did the work under a verbal agreement with Lignell (T. 1823, 1825). On cross-examination Bateman further acknowledged that although there was some lost time because they were not familiar with the problems of the project that it was not true that it took them substantially longer to finish the project than it would have Murray (T. 1830-1831).

JAY MEMMOTT

Mr. Memmott was a licensed painter who had been in the painting business for over 30 years. His painter's

license, he testified, covered painting, wall covering and perfa-taping which included drywall finishing. Mr. Memmott had been contacted by Lignell to examine the drywalling in the Incline Terrace project in the fall of 1973. Mr. Memmott testified that his examination showed that in his opinion the drywalling job was of very poor quality. The texturing was inconsistent; it was light and delicate in some spots and globby and heavy in other spots (T. 1842). The butt joints on the sheetrock were very prevalent. Memmott explained that this meant that they were out of plane and not flush with the rest of the wall. Memmott further testified that the edges of the perfa-tape had been sanded with too coarse of sandpaper, causing the nap to be raised, which created a problem when the paint was applied to the nap. Memmott detailed the work that he did in attempting to alleviate the streaking in the apartments. This included hand sanding the roughness in the sheetrock and patching and repainting (T. 1851). His charges, \$1,359.50, were paid by the owners (Ex. 149).

On cross-examination Memmott reiterated that the drywalling work done on the Incline Terrace project was not of good quality. He testified that it was poor to mediocre (T. 1853). The perfa-taping was roughed up by sandpaper and that visually created shadows on the wall; where there was a seam the shadows appeared to be dark streaks (T. 1854).

On cross-examination Mr. Memmott testified that on

the apartments that he worked on he felt that attempts had been made to alleviate the problem but because of the texturing globs on the wall it was difficult if not impossible to alleviate it at 100% (T. 1855).

Memmott testified that although he only repainted four apartments, those selected did not vary in any material respect from the other apartments that he observed in the project (T. 1863). On recross-examination, Memmott maintained that even absent the streaks in the wall his characterization of the job would not have changed. He was of the opinion, he stated, that it was, in fact, a poor quality job. This did not relate only to the fact that the streaks were there but also to the fact that the taping itself and the texture were of poor quality (T. 1865).

GARY SIMMONS

Gary Simmons was a licensed painter who had been in the business for approximately 16 years. His license covered the application of paint, walltex, wall covering and drywall finishing. Mr. Simmons was the painter who did the majority of the work on the Incline Terrace apartments. Simmons testified that he first became familiar with the Incline Terrace project in the spring of 1972 when he entered into an agreement with Berg for the painting of the units in Building C (T. 1868). Mr. Simmons testified that he was present on the project approximately 95% of the time (T. 1869). At no time was he ever provided with any schedule of instruction

from Berg. As soon as the sheetrockers left an apartment he would go in and do the painting. He would determine what needed to be done by visual inspection of the project himself but at no time did he receive any indication from Berg that he should paint any particular unit as opposed to any other unit. There never was any critical patch schedule on the job, Simmons testified, and although Berg was present on the job a great deal of the time he was also absent a great deal of the time (T. 1870). Simmons further testified that there arose occasions when he needed to find Berg but that he was unable to do so. He would look for him throughout the project, phone him at home, phone him at his supplier or go down to the Arctic Circle, which was located a few blocks away from the project where Berg often went to use the telephone. From July, 1973, on until the completion of the project, Simmons testified that it became very difficult to locate Berg (T. 1871).

Simmons observed that on some portions of the project there was only one coat of drywall mud put over the perfa-tape. The normal standard in the area, Mr. Simmons testified, was three coats of mud over the tape. He also observed that the perfa-tape had been heavily sanded, that as a result it showed a shadow as you looked down the joints (T. 1872-1873). Around the electrical outlets the holes were cut too big and they were not taped, so that when the outlet cover was put on there was a gap around the switch

and the lightbox. Mr. Simmons observed that at times the spray coating on the walls was very thin and that at other times it was very heavy with globs, due to being improperly mixed. Simmons stated that he had discussions with the people operating the spraying machines relating to the quality of the work but that it did no good. Thereafter Simmons went to Berg, discussed the problems with him but that did not seem to do any good either (T. 1875). Simmons testified that he complained consistently throughout the project to Berg to see if something couldn't be done to correct the flaws but that nothing was done. He also complained to the drywallers (T. 1876-1879). Simmons stated that in order to paint the units it was necessary for him to scrape off some of the globs of mud on the sheetrock (T. 1880). In addition, the person who installed the formica countertops got glue all over the walls which required him to sand the glue off or pick it off as best he could and then repaint the walls (T. 1885-1886).

Simmons testified that there were gaps of up to a half inch in the sheetrock in the bathrooms, the towel racks were hung improperly on the wall; they had to be removed and he had to repair the walls. Some of the doors were hung so that when they opened they would knock off the lightbulbs. These had to be removed and placed in another area. He would then repair those holes. Much of the repair work was done by him after the project was closed (T. 1894).

Simmons stated in relation to the repair work that

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he had done after the project had been closed by the contractor that there were walls that had to be repainted in the kitchen that had been nicked by unknown people, in some of the living rooms 2 x 4 cedar strips had been removed and these areas had to be touched up. The area around the electrical outlets had to be repaired and some of the sheetrock did not meet the aluminum on the window returns. These gaps had to be caulked.

With relation to the streaks in the walls, Simmons stated that he had to scrape the walls down, sand them, repaint them with a brush and roller. In some apartments the electrical wire was installed after the apartments had been painted; there was a lubricant on the wire that would get on the walls that could not be scraped or sanded off. Those walls had to be repainted. Round holes were cut for square doorbells by the drywaller. Simmons repaired these (T. 1896-1899). Simmons testified that he discussed the problems with Mr. Coppinga throughout the project but that nothing was done.

Mr. Simmons testified that he was present on the day that Apartment 508-A was sprayed with texture. He detected a terrible odor coming from the upper floor and went up personally to identify the odor and find out what it was that smelled. He could see Mr. Coppinga by the spray machine he testified, and Mr. Coppinga was spraying texture. He had a conversation at the time with Mr. Coppinga:

"A. I asked him what was going on, what that terrible smell was.

Q. What was his response?

A. He said, well, he just sprayed a unit. And I said well, what with? And he said just mud. I said is it rotten or something, and he said well, it smells--and it smells. And then I walked out of the apartment down to the bottom floor and out to the machine and smelled the machine that he was spraying out of and it smelled.

Q. All right. Are you saying that the smell that you smelled in the machine was the same smell that you smelled in Apartment 508-A?

A. Yes, it was.

Q. At that time did you make any other observations concerning the action of Mr. Coppinga?

A. Yes, I did.

Q. Can you tell me what you observed?

A. Took his shirt off and threw it away. It had texture mud on it." (T. 1908-1909)

Simmons further testified that he had subsequent conversations with Mr. Coppinga in the building about a week later.

The smell had not gone away at that time but Coppinga said that it should and that it would be alright for Simmons to paint it. Based upon that conversation Simmons went ahead and painted the apartment.

In January of 1974 Simmons wrote a letter to Claron Bailey, Exhibit 79, wherein he indicated to Mr. Bailey that he was attempting to bring the drywall work up to standard. Simmons testified that he received no response from Bailey relating to that letter (T. 1911).

Simmons stated that he had numerous conversations with Berg relating to the drywalling on the project (T. 1921). These occurred during 1972 and 1973. The general subject was his complaint to Berg about the quality of the sheetrock. In the fall of 1973 Simmons testified that there was a meeting between Berg and Coppinga, the architect, Lignell and Simmons relating to the sheetrocking quality. They walked through the project and observed the various apartments. Subsequent to that time Mr. Simmons told Berg he would be responsible for the touchups to the walls but not for the repairs. After the meeting the sheetrocker went through the buildings and applied sheetrocking mud in some of the areas and tried to cover up some of the bad places. Simmons told Berg he would not repaint those walls. Berg told Simmons he would not pay for them either. Simmons told Berg he would go through the units, do the repairs and backcharge the responsible party. Simmons recalled a two inch power line running from the C building to the A building that went right through the walls. The wall had been sheetrocked and painted with the cord in it (T. 1924).

Simmons stated that he had numerous conversations with Coppinga regarding the spray texture in the project (T. 1925). Coppinga told him that he had borrowed a spray unit from another man because his unit had broken down. Coppinga stated that he was not familiar with the new unit.

On cross-examination Simmons admitted that although

the normal procedure is to paint near the end of a job that in this particular case he painted the casings and the base before the woodwork was done (T. 1927). Simmons testified that the painting was done after the casing and bases were installed but before the cabinets were in place. Simmons further stated that he did not bill anyone for the touchup work that he did. He maintained, however, that his bill for the corrective work (Ex. 178) related to work over and above normal touchup (T. 1933). On further cross-examination Simmons stated that while there were some slow payments that he was not sure whether the responsibility for that was of Lignell or Berg but that he was concerned about getting his draws and seeing that his men were paid (T. 1935-1936). Simmons testified that he also had problems with the first drywaller on the project, Harry Nichols, that he provided him with lightbulbs so that he could see in the dark corners and so that he could apply a proper finish on the drywall (T. 1953).

Simmons, on redirect examination, testified that it was his recollection that approximately 40% of his payments were received on time (T. 1980); however, when Mr. Simmons examined the contractor's draw requests and the checks that he received he acknowledged that many of the checks were received within a few days after the draw request was submitted and that almost all of them were received within a period of 30 days (T. 1990-1993).

LYNN BATEMAN

On cross-examination Mr. Bateman admitted that some of the charges that he made on finishing the Incline Terrace project, which charges were passed on to and paid by Lignell were probably improper. However, Mr. Bateman testified that the total of these questionable items amounted to only about \$700.00 (T. 2069-2070).

In order to complete the project within the time frames required, Bateman testified, his men worked on their regular jobs during the day and would work on the Incline Terrace at night. Much of the time that they billed on the Incline was at their overtime rate (T. 2061-2062).

Bateman testified that in most instances the work he did had been started by someone else and that they merely completed what had already been started. For instance, Mr. Bateman testified, there was rough work done and they would go ahead and finish it and put the fixtures on it. Although there was some question concerning the ability of the men employed by Bateman, he testified that those that worked for him on the project were competent and worked as hard and efficient as his regular workers (T. 2070).

Bateman described the fall of 1973 as being "boom times" and stated that there was more work than they could handle.

With relation to the status report submitted by Coms:
(Ex. 65) Bateman stated that there was no question that those

items listed there needed to be done but they were not all the items that were required to complete the project (T. 2072). Although Bateman was challenged on the wage scale he paid his workers on the Incline Terrace apartments, he testified that it was the same or similar to charges that he was making for the same or similar work on other projects in the area at that time and that in his opinion the payments were fair and reasonable (T. 2077).

TAYLOR BIESINGER

Taylor Biesinger was president of Act Construction Company. He did much of the concrete work on the Incline Terrace project. Mr. Biesinger testified that he had done some work at the Incline Terrace apartments in June relating to areas that were not part of construction contract. In August of 1973 Biesinger testified that Lignell called him up and asked him to come up again and to do the curb, gutter and sidewalk work (T. 2080). Biesinger identified Exhibit 136 as being the plan furnished by Salt Lake City for the curb, gutter and sidewalk on Fuller Avenue. Biesinger testified he did all the curb, gutter and sidewalk on Fuller Avenue, some 238.69 feet, together with the curb, gutter and sidewalk at the end of that street and drainage structures as required by the City. In addition, Mr. Biesinger testified, his company put in the curb, gutter and sidewalk on 4th South, did some grading and started to plaster the foundation walls. For this work Biesinger was paid approx-

imately \$12,000.00 by the owners (T. 2080-2082). The adverse of frost in November of 1973 prevented Biesinger from completing the plastering of the foundations. That work was completed by Biesinger through a subcontractor in the spring of 1974 and included in his charges to the owners.

Biesinger testified that while he was in the process of doing the curb and gutter on Fuller Avenue Berg asked him if he would pour one of the concrete slabs in the back where they parked the cars. It already had been formed by Berg. This was done at Berg's request.

Biesinger further testified that he had a conversation with Berg when he arrived on the project to do the curb, gutter and sidewalk on Fuller Avenue. At that time Berg approached him and wanted to know what he was doing. Biesinger told him that he was putting in the curb, gutter and sidewalk. Berg mentioned that he had someone else lined up for that job, turned around and walked away.

Mr. Biesinger looked at the plans for the project (Ex. 120) and identified a retaining wall on the east side of the building that had not been constructed by the contractor. Biesinger stated that the value of that retaining wall was about \$3,300.00 (T. 2088), and that the wall was not on the project as of three days prior to the trial when he checked the site (T. 2102). With relation to the curb and gutter on Fuller Avenue, Biesinger testified that the plans, Exhibit 120, state that it is to be constructed as per the

requirements of the City Engineer and that attached to the plans are some notes from the City that indicate that the curb and gutter will be installed by the contractor and that it will be designed by the City.

EARL BROWN

Mr. Brown was the manager of the Salt Lake City office of Fidelity and Deposit Company of Maryland, the bonding company. The bonds on the Incline Terrace project were issued through his office and signed by him (T. 2125). Mr. Brown testified that he was familiar with the addendum that the bonding company had requested that all change orders be put in writing. The addendum was prepared at the instance and request of the bonding company. He was aware of the contents of the addendum from the time that he got it and raised no issue that it was insufficient (T. 2130-2131). Mr. Brown indicated that he thought that the addendum was furnished to him by Mr. Barry Ingham (T. 2132).

BARRY INGHAM

Mr. Ingham was identified as an associate of the insurance agency of Corroon and Black, which had assisted Cliff Berg in obtaining bonds on other projects and helped in obtaining the bond on the Incline Terrace. Mr. Ingham stated that he first became aware of the Incline Terrace project through conversations with Cliff Berg who told him that he was negotiating to build a multi-unit apartment house with Lignell and Todd (T. 2134). There came a time, Ingham testified, when he and Berg had a discussion

regarding Berg's ability to bond for a job the size of the Incline Terrace. At that time a joint venture was discussed as an alternative for obtaining a bond but Mr. Ingham was not sure who it was that first suggested using the joint venture as an alternative (T. 2135-2136). Ingham testified that a joint venture agreement was drafted by his office and that he discussed it with Berg. Thereafter it was given to Berg for execution (T. 2137-2138). Ingham stated that he gave the original of the joint venture agreement to Cliff Berg and had a discussion with him as to whether it was to be executed. The purpose was to have it signed by Cliff, William and Frank Berg to enter into a joint venture and to clarify the terms of the joint venture agreement (T. 2138-2139).

Ingham admitted that the construction contract (Ex. 9) was prepared by his office. It was not prepared at the request of Lignell (T. 2145). Ingham testified that he had previously received a standard form contract from Lignell, the parties on that agreement were Todd, Lignell and Cliff Berg. The bonding company required that the contract be rewritten with the name of Lignell's and Todd's wives and also to state that the contract was going to Cliff and Bill, a partnership, along with Frank Berg, doing business in the capacity of a joint venture, Berg Construction Company. Mr. Ingham testified "That was what was represented to our office." (T. 2146-2147) The bonding company, Fidelity

and Deposit Company of Maryland, had required that this

change be made. As a result of surety's request Ingham prepared Exhibit 9 which was either delivered to Berg or Berg picked it up from the office. Ingham further testified that the price on the second contract had been changed; the second contract was for \$1,351,755.00. Ingham stated that he was not sure where he got the second figure. It could have come from Lignell, Pacific Mutual Insurance Company or Berg. Ingham further testified that in his file he had a document in Berg's handwriting stating that the price of the project was to be \$1,351,755.00 and that it was given to him by Berg (Ex. 198, T. 2148).

In April of 1974 Ingham sent a letter to Berg concerning an additional premium for the bond overrun of \$2,009.02. The amount of the contract overrun was stated as \$446,414.00 and the total contract price as being \$1,798,169.00. Mr. Ingham testified that there was no complaint or response from Berg disavowing the amount that he had used in calculating the premium. He also sent a copy of the invoice for the additional premium to the owners and received a check back from them for \$2,009.02.

On cross-examination Ingham acknowledged that he first contract he had received from Lignell and Berg showed the figure of \$1,110,750.00. Ingham further stated that the reviewed the construction loan agreement between the owners and Pacific Mutual and that in preparing the second contract he copied the provisions relating to progress payments that were contained in the first contract (T. 2161-2162).

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GRACE SCHOPPE

Mrs. Schoppe identified herself as being the manager of the Incline Terrace Apartments. She moved there on July 22, 1972, to watch over things and see how construction was progressing. She had been acquainted with Berg for approximately 8 years and had gotten to know him when he built the Shaughnessy Apartments, a small apartment complex, where she also the general manager. She also moved in early there to oversee the construction. Mrs. Schoppe testified that in July that when she moved to the Incline Terrace that Building C was mostly a shell. The project was under construction from the time she arrived until 1974. Mrs. Schoppe testified that from her observations there was a lot of confusion and a lot of problems relating to Berg's method of scheduling the subcontractors (T. 2184-2185). In fact, Mrs. Schoppe testified that she had many discussions with Berg concerning the quality of the work that was being done at the Incline Terrace Apartments. She recalled one particular conversation with Mr. Berg regarding quality where she indicated to Berg that if her father were able to see the kind of work that was being done he would turn over in his grave. Berg responded to her that his father was also a terrific builder and that he would not be pleased either (T. 2191). Later on in Building B Mrs. Schoppe told Berg that the sheetrocking and also the carpentry work was very poor. Berg agreed (T. 2191-2192). Mrs. Schoppe testified that whenever she

would see Berg she would complain about various things that were not right. Some of the items were corrected after she discussed them with Cliff, some of the items were not, but, she stated, even those that were corrected were done so after much hassling and follow through on her part. Mrs. Schoppe would work up punch lists and place them on the doors of the apartments indicating the work that the various subcontractors were supposed to do (T. 2192). The debris in the apartments were not cleaned up so Mrs. Schoppe had to hire people to carry out the debris, clean the bathtubs, wash the windows and get the apartments vacuumed. Large gobs of sheet-rock mud had to be chiseled off the floors, paint had to be scraped off the windows and plaster off the bathtubs. She had to clean glue off the cabinets and clean the appliances and, in addition to that, Mrs. Schoppe testified that there were "dead" outlets (T. 2193-2194).

In response to a question on voir dire, Mrs. Schoppe testified that it was Berg who told her to go ahead and clean up the apartments (T. 2197).

Mrs. Schoppe testified that she cleaned all 147 units in the complex and in addition to that the halls, storage rooms, and the furnace rooms. She and her helpers had to load boxes of debris and haul them out; she asked Berg for some help in lifting the heavy boxes. Sometimes this was done and sometimes it was not (T. 2199).

Mrs. Schoppe particularly remember^d Apartment 508-A.

According to her testimony sometime around March or April of 1973 she smelled a terrible smell and "thought someone had been sick" (T. 2203). In an attempt to alleviate the smell Mrs. Schoppe purchased what she called a "cherry bomb" which is a "bomb" the fire departments use to eliminate the odor of smoke. She used these in the apartment and this corrected the problem for a short time but then the smell would come back. She employed a firm to come up and do a professional bomb job and this removed the odor temporarily. She then purchased some air wicks and used, she said, "case after case" but that didn't help. Mrs. Schoppe tried other things such as scattering kitty litter in the furnace rooms and hanging air wick deodorizers in the halls but nothing seemed to help. When she moved from the Incline the apartment smelled the same as it did before (T. 2203-2205).

Mrs. Schoppe testified that as they went through and cleaned the apartments she found various things wrong with them. Specifically, she mentioned electrical wires hanging out of the walls, holes in the walls, holes in the sheetrock caused by the electrical conduit, fans in the baths that didn't work, cabinets that were in bad shape and that had not been properly caulked. In one apartment the range had never been wired or hooked up. (T. 2206). She observed dish washers that were not hooked up electrically, garbage disposals that were not wired, dead outlets, wires in apartments that had been pulled through but had not been

covered with plates (T. 2206-2210). Although Harry Nichols, the first drywaller, was Mrs. Schoppe's nephew, she nevertheless testified that he was on the job infrequently; "He would be there one day and the next day he wouldn't be there," she testified (T. 2208, 2228).

Mrs. Schoppe testified that she had numerous conversations with Berg concerning the quality of construction. She particularly remembered ^{ed} one that dealt with the baseboards in the C building which Mrs. Schoppe testified "looked like a snake." Mrs. Schoppe also remembered that at various times the plywood on the buildings fell off (T. 2211).

With relation to Berg's presence on the job Mrs. Schoppe testified that from August of 1973 on it became hard to find Berg on the job. Mrs. Schoppe indicated that she would go try to locate Berg in the mornings to tell him things that needed to be done and invariably he was not there. Sometimes his brother, Bill, would be there and sometimes he would not (T. 2212-2213).

On cross-examination, Mrs. Schoppe acknowledged that although Cliff Berg requested that she clean the apartment ^{she} submitted her bill to Lignell and that Lignell paid her (T. 2216). Mrs. Schoppe further acknowledged that although Berg had apparently hired some people to do this type of cleaning that they didn't do it. Mrs. Schoppe testified that she would often call Berg at his home in the evenings because she couldn't get him on the job during the day. She stated that she called him at home because there were things

that needed to be done and she could not find him during the day (T. 2238).

CLIFFORD M. BERG

Although people began to occupy the premises in October when Building C was not yet complete, Berg stated that he had no objection to the tenants moving in because it was an accommodation with the fact that he was late in the delivery of the project to the owners (T. 2241-2245).

E. KEITH LIGNELL

Lignell was recalled as a witness and testified concerning some of the additional expenditures that the owners had made to bring the project up to standard (T. 2245-2256, Ex. 207). Lignell further testified that he discussed the Incline Terrace project in January or February of 1971 with Berg. After that date they had repeated discussions concerning the project; there were discussions as to whether or not the project had to be bonded and Lignell told Berg that it would require a bond. Lignell understood that when the bid was received in November of 1971 that the price, \$1,455,000.00, included the bond (T. 2255).

Lignell stated that he had no knowledge when the subcontractors may have presented draw requests to Berg. The first thing that he would have had any notice would be when Berg would present the draw request to him. After Lignell received a draw request, he testified, his office

acted upon it immediately. They prepared the draw request for the examination of the architect and the contractor and submitted it to the insurance company. There was a minimum of 10 days to two weeks by the time it arrived in Lignell's office before the money could actually be made available. Sometimes it would take longer (T. 2259, 2266).

On cross-examination Lignell stated that he and Berg discussed the bonds again when he saw the sum of \$7,500.00 listed on Berg's bid sheet (Ex. 127).

On redirect examination, Lignell testified that with respect to the bid of \$1,455,000.00, he was never advised by Berg as to whether the prices he listed were actual costs or whether there was some profit built into them. Lignell understood that there were no other costs of any kind borne by the contractor other than those listed on the price list. He understood that that was the total price for the entire package. Lignell testified that he was concerned with the total price, not with the individual components (T. 2300).

HENDRIK COPINGA

On direct examination Hendrik Coppinga testified that he had sprayed sour mud at the Incline Terrace apartment but that he could not remember the unit numbers. He thought it was on the 5th floor and that he had sprayed four units. Coppinga stated that he had sprayed sour mud before but he had never had a problem with it stinking after it had dried (T. 2328).

On cross-examination, however, Mr. Coppinga indicated

that he did have a problem with the mud smelling up the Incline Terrace project. Mr. Coppinga testified as follows:

"Q. You did have a problem with the stinking up at the Incline Terrace, didn't you?

A. Yes. We did.

Q. And in spite of the fact that you knew that that was sour you went ahead and sprayed it on the walls, isn't that correct?

A. Correct.

Q. And it stunk up the place, didn't it?

A. It had an odor to it, yes.

Q. It had quite an odor to it, didn't it?

A. It was sour.

Q. They could smell it all throughout the whole building, couldn't they?

A. I don't know about throughout the whole building but it was sour.

Q. Didn't the subcontractor come up to you right after you finished spraying and ask you what in the world was going on?

A. A few came up and asked me what the smell was, yes.

Q. You told them you had sprayed sour mud on the walls?

A. Sour mud, yes.

Q. Have you been back there, Mr. Coppinga, in the last few months to see if it still smells?

A. Yes. I have.

Q. And when was that?

A. In the spring of this year.

Q. You went back up there, and did it still smell?

A. Yes. It smelled." (T. 2328-2329)

CLIFFORD M. BERG

Mr. Berg testified that after Murray Electric was dismissed from the job upon Lignell's instance that he, Berg, contacted Bateman Electric. Mr. Bateman came up to the job and walked around with Berg to see what needed to be done. Berg testified that it was "pretty obvious" what had to be done. Lignell came up on to the project and was introduced to Bateman by Berg. Thereafter, Berg testified, he did not have anything to do with Bateman (T. 2452).

Mr. Berg testified that he installed many extras into the project and presented an Exhibit, 210, listing those extras. Berg generally testified that with relation to those extras he had conversations with Lignell at various times and places but testified that he could not remember precisely when they took place and that no one else was present at the discussions. Berg admitted that he did not have anything in writing signed by the owners relating to any of the changes that he claimed at the time of trial (T. 2453, 2469-2537).

Berg maintained that in arriving at his bid for the additional 22 units he divided his original bids by the original number of units (125) to come up with his price per unit (T. 2456-2559).

With relation to the subject of bath fans, Berg testified that the sheet metal subcontractor indicated to

him and to Lignell in February of 1972 that he had made a mistake in his bid and that he had not included the bath fans in it. Berg stated that at that time Lignell agreed to pay an extra \$3,600.00 for the bath fans and signed a written change order for it (T. 2463-2464). Berg claimed that after he had worked on the bids for the job that in September or October of 1971 Lignell told him that the job had to be bonded.⁶ Berg testified that he knew that he couldn't get a bond for that kind of money so he talked to the bonding company. The bonding company wanted him to go in with a bigger contractor; Berg didn't want to do that, but he thought maybe he could get his brother to go in with him on it (T. 2465-2466). Berg testified that he told Lignell that he didn't have anything included in his bid for the bond and that he indicated to Lignell that he didn't know what the cost would be but the usual rate was 3/4 to 1 of the cost. Berg stated that he never established a cost for the bond. He went directly to the bonding company, they mailed the bill to the owners and it was paid by them (T. 2467).

With relation to the first drywaller, Harry Nicholas Berg testified that Lignell was not satisfied with Mr. Nicholas and wanted him to be replaced by somebody else. They had a meeting in the summer of 1972 in Building C. Berg testified

⁶Exhibit 256, the application of Clifford and William Berg to surety for a bond on the Incline project was dated July 27, 1971.

that he told Lignell that he thought Nichols had a sufficient number of men on the job and was doing just fine but that Lignell insisted that Nichols be fired. Thereafter there was another meeting held in Lignell's office with Berg, Lignell and Nichols. Lignell again requested that Nichols be fired from the job (T. 2503-2505). Berg stated that it took a couple of weeks of figuring to arrive at the amount that was due to Nichols. Berg claimed that at the time Nichols was dismissed he indicated to Lignell that it was going to cost more money to have someone finish the job. Berg acknowledged, however, on cross-examination that when Harry Nichols left the project in September or October of 1972, only 32 apartments had been completed by him. Berg further acknowledged that the completion date for the project was November 16, 1972, that the rest of the project remained to be drywalled and that the drywall is the first thing to follow the rough electrical in the sequence of events⁷ (T. 2745-2747, Ex. 226).

On the 9th day of August of 1973 Copinga, Berg and Lignell met on the job to discuss the drywalling problems. At that time Berg signed an agreement with Copinga. When that document was presented to Lignell he refused to sign it and indicated to Berg that he thought that Berg had left himself wide open. At that meeting Berg admitted that it

⁷ That meant that there were 93 apartments that remained to be drywalled plus the halls and recreation rooms, etc., with only two months remaining before the project was to be completed.

was the first time that Lignell was apprised of the higher figures for the sheetrock (T. 2507-2509).

With reference to the charge for electrical extras, Berg stated that the figure on the exhibit, \$40,069.01, was the figure that Comstock and Murray came up with during the litigation (T. 2516). He admitted that he had never discussed or billed that figure to the owners and had not had an opportunity to "compute that figure out" (T. 2516). Berg testified that that figure was exclusive of the amount of \$18,000.00 and \$8,933.00 for other extras. Berg further stated that the other reason that he put the figure of \$40,069.01 on Exhibit 210 was because "that is the amount of money that Murray Electric and Comstock Electric are charging."

Berg acknowledged that the list of extras was intended to be extras to Exhibit 9, the written contract between the owners and the joint venture. Berg further admitted that he was the managing partner for the joint venture as follows:

"Q. All right then. With respect to that, well, let me put it this way, the contract, Exhibit 9-D, states it is between E. Keith Lignell, Marian H. Lignell, Burton M. Todd and Phyllis W. Todd, the owner, and Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company, and Frank C. Berg, an individual, a joint venture, d/b/a Berg Construction Company.

Now with respect to that joint venture, you were the managing person involved, were you not?

A. Yes. I was." (T. 2544)

Berg acknowledged that there was a set of specifications on the plans from which he prepared the bid and that although he was making a charge for linoleum in the laundry room on Exhibit 210, that the plans (Ex. 120, sheet 21 of 38), showed vinyl in the laundry rooms for the building. Some of the extras, Berg testified, he did not bill to Lignell (T. 2521, 2529, 2579). Others, Berg testified, he did not discuss with Lignell before the work was done. He was not instructed to do them, he stated, but they were done anyway (T. 2615). With relation to the charge for extra tile appearing on the exhibits, Berg testified that he did not understand what that charge was. All he knew was that he was being charged an extra \$4,000.00 from the subcontractor, therefore, he passed that charge on to the owners (T. 2617-2618).⁸

After detailing his list of extras (T. 2622) Berg testified that Lignell was entitled to a credit for certain items that had not been done. Specifically, a wood fence, storage areas that were eliminated and a retaining wall. Although Biesinger had testified that the value of the retaining wall was \$3,300.00, Berg gave the owners a credit for only \$1,000.00 due, he said, to the difference in prices that he charges versus those charged by Mr. Biesinger (T. 2622). Although Berg testified that the total anticipated profit in the project was some \$56,000.00 (which amounted to some

⁸This charge was subsequently deleted from the exhibit.

3.8 percent), Berg then claimed a markup on the work of selected subcontractors amounting to 10% for profit and 5% for overhead, which came to some \$12,000.00 (T. 2625-2626).

Berg testified that he discussed the joint venture agreement with Mr. Barry Ingham at the bonding company of offices at about the time he was ready to sign the contract on the job. Later on, Mr. Ingham gave Mr. Berg a copy of the joint venture agreement. Mr. Berg testified that when he received the joint venture agreement he discussed numerous other things with Mr. Ingham but that they really didn't spend much time with the agreement (T. 2631-2632). Berg further testified that it was his belief that he signed the joint venture agreement although he was not sure of that fact. Berg stated that he was going to pay his brother, Frank, \$7,500.00 for going in with him on the bond if the job was profitable. Berg testified that the money was never paid but that his brother did sign the bond application (T. 2632-2633).

Berg denied that the asphalt on the project was defective or that it had been damaged (T. 2633-2635). Berg further maintained that he had employed three students to clean the apartments (T. 2636).

With relation to the draw requests Berg testified that he would make them out on a piece of paper, would give to Lignell's secretary and that that sheet of paper handed

to the owners or their representative was the draw request; that was the only writing that he prepared. This constituted the request to the owners for payment (T. 2640-2641). Lignell would then prepare request on the form required by Pacific Mutual and submit it to Berg for his signature.

On cross-examination Berg testified that he read the contract and the addendum before he signed them. Berg agreed that the joint venture referred to in the contract and in the bond was the getting together for only one project and that he had a single project in mind (T. 2660).

Berg acknowledged that he was aware that the requirements of the project required a certain amount of financial stability on his part; that he knew that money would be withheld by the owners and that it wouldn't be available until the end of the project. He understood that he would send the billings to Lignell after he got a bill from the laborers, materialmen, etc., and that he would have to be able to support a month's expenditures if needed. Berg understood that that was what Lignell was talking about when he said that he had to have confirmation of Berg's ability to carry his end of the financing (T. 2661-2663). Berg further acknowledged that the price for the additional 22 units was included in the addendum; that the purpose of the addendum was to have a writing upon which the owners and the contractor could rely. Berg stated that the bonding

company told him that they would have to have something in writing to cover the additional work (T. 2666). Berg then made the calculations necessary to price out what was done and wrote them down and gave it to Lignell (T. 2667). Berg further testified that with relation to the extras for the recreation room in Building B that he quoted Lignell a price of \$8,000.00 for that room and that included everything in the recreation room except for the heating. Berg admitted, however, that the plans from the very beginning had shown that there was a furnace planned for the recreation room but that Berg had told the furnace man not to include the cost of it in his bid because he did not know what was going to be there (T. 2672).

With relation to plans, Berg stated that the plans that he bid from were similar to Exhibit 120 but they were not the exact same plans. Berg acknowledged that he had the plans that were submitted to the City (Ex. 120) in hand and analyzed them before he priced the building to the owners. Berg also acknowledged that he had at least two rolls of the plans that were Exhibit 120 and that he may have received more. He took two of them to the City, saw the red lining and discussed it with the City personnel. The plans were taken by Berg to the City on or about October 13, 1971. Berg admitted that he received back one copy of the plans with all the stamps and red markings on it and that Exhibit 120 was the only set of plans that he took to the City before the project was started. Berg

acknowledged that after discussing the comments that were penciled in by Mr. Dick on the plans he signed the affidavits on the first page of the exhibit wherein he stated that the building permit would be issued based upon the promise that all of the requirements of the Uniform Building Code would be met. Berg stated that he signed the affidavit and expected to be bound by it (T. 2674-2677).

Berg testified that the contract price of \$1,450,000.00 was quoted to Lignell probably the last part of October (T. 2677) and that after he quoted the price to Lignell the contract was signed but that there was no change in the price between October and November 16th. Berg admitted that he had previously testified that before he quoted the price he had made numerous worksheets trying to figure out what his costs would be because he wanted to see if the price was right. He satisfied himself that the price was in fact correct and the written agreement was signed on November 16th (T. 2678).

Berg admitted that the bath fans were included on all of the sets of plans but he contended that he did not include them in the bid (T. 2680). He acknowledged that on a previous document (Ex. 219) he had written down bonds in discussing the Incline project with Lignell (T. 2683) and that the figure he had written down for bonds was \$8,000.00. Berg then admitted that he knew that the job had to be bonded (T. 2684). Berg maintained, however, that

he quoted the price to Lignell before he had received a set of plans (T. 2687), but when quizzed concerning the requirements for the number of parking stalls at the apartments Berg stated, "I never. I didn't think that was any of my concern; all I was doing was figuring the plan." (T. 2689). Berg further acknowledged that the plans called for 125 apartments and 127 parking spaces and that he knew that he had to have a stall or carport for every car (T. 2691-2692). Berg maintained, however, that his original bid to the owner only accounted for 53 carports (T. 2693).

With relation to draw requests Berg acknowledged that probably the first request he submitted to Lignell was in April of 1972 and that prior to that time he had received periodic billings from various suppliers or subcontractors (T. 2695). Berg could not tell exactly when many of his draw requests were submitted but he thought that they were submitted in the first part of a month relating to bills for the previous month (T. 2695-2697, 2708). Berg acknowledged that he did not withhold 10% on his bills to the owners but that they were billed the exact amount that was billed by the subcontractors so that if any withholding were to be done it would have to be done by the owners (T. 2698). Berg acknowledged also that he did not have any invoices to substantiate the draw requests. Most of the figures contained on the draw requests, he testified, were a result of telephone or other conversations with the sub-

contractors. Berg admitted that he did not require any supporting vouchers or other documents before passing on the claims of the subcontractors to the owners (T. 2704-2705). No draw requests were submitted by Berg between October of 1972 and February of 1973 (T. 2708-2709).

With relation to the charge in Exhibit 210 of \$8,933.00 for telephone, Berg admitted that he didn't know whether the correct figure was \$8,933.00 or \$2,933.00 (T. 2708-2709). Berg stated that he believed that the correct figure, whichever it is, came off an electrician's invoice (T. 2711).⁹ Berg acknowledged that he gave his brother, Frank, the estimates and cost breakdowns on the project and from them Frank prepared an account book (Ex. 225, T. 2712-2713). That book was the only regular book of account that the contractor had on the project (T. 2714).

Berg acknowledged that Exhibits 120 and 121 were the only sets of plans that he took to the City for permits (T. 2717).

Near the end of the project Lignell asked Berg for a final list of extras before the loan was settled, and for an accounting. In response to that request, Berg prepared a two page list. Berg identified Exhibit 222 as being in his handwriting but denied that it was the list of extras prepared in response to the owners' request. Berg maintained that there was another list somewhere but failed to produce it at the trial and further testified that he did not know

⁹The invoice, Exhibit 22-D, was for \$2,933.50.

of any other list of extras that was furnished by him in writing to the owners around the period of time that Lignell made the request (T. 2722, 2724). Berg acknowledged that there were many items which were being charged as an extra to the owners at the time of the trial that had not been discussed with Lignell until the commencement of litigation (T. 2730-2736).

Although Berg originally denied it (T. 2681) he ultimately admitted that when the original bid was prepared he used the Whitney Apartments, which was a small apartment building he was building at the time, as a means of comparison for the Incline (T. 2737). Berg also acknowledged that some of the items for which an extra was claimed did in fact appear on the original cost breakdown or the original bid to Lignell (T. 2737-2738), and that some of the "Extras" appeared in different amounts on different documents. On Exhibit 128 in his own hand Berg had written that the shear walls for the other floors (plural) was \$2,000.00; the total amount shown there was \$15,000.00. Nevertheless, Berg claimed that he was entitled to an additional \$4,000.00 (not \$2,000.00) for the shear walls, although he admitted that the original bid for that item was \$13,000.00 (T. 2737-2741). Additional items that were new were acknowledged by Berg (T. 2741, 2742).

With relation to his extra charge for the curb and gutter on Fuller Avenue, Berg admitted that there was a no-

tation on the plans that the curb and gutter had to be added. Berg further admitted that it was on the plans dated September 16th that were delivered by him in October to the City; nevertheless, Berg maintained that he was entitled to an extra charge for the item (T. 2759). Berg acknowledged that he had a set of plans that he worked from but he didn't know, he said, which set it was (T. 2763). He agreed that it would have had to have been either Exhibit 120 or 121 (T. 2764).

Although Berg maintained that the testimony of Mr. Biesinger was in error and that he, Berg, had actually done much of the cement work through his subcontractor, Don Valerio, he could not produce invoices from Valerio to cover that work. Berg maintained that Valerio would come up to him and tell him orally that he needed some money and that Berg would pay him in cash (T. 2778).

Berg reaffirmed that in his opinion the drywall was of average quality and admitted that Mr. Simmons had complained to him regularly during the course of the job that he was having him do work that he considered to be the drywallers' responsibility (T. 2799).

DALE RIDD

Mr. Ridd was examined out of order. He was identified as the owner of Standard Builders Supply, one of the suppliers on the job. Mr. Ridd testified concerning the account of Berg Construction on the Incline Terrace project

(T. 2801). Ridd stated that he had a special arrangement with Berg to work within a profit margin of between 10 and 15%. Ridd testified that he received his payments in the most part directly from Lignell but that the first few checks he got from Berg. Ridd testified that he had "frequent" discussions with Lignell concerning payment (T. 2807). He did admit, however, that he had no knowledge as to when Berg submitted the draw request to the owners and that he did not know whether any delay in payment may have been due to the fact that Berg did not submit the draw requests on time (T. 2809). Ridd further testified that he could not swear that every item contained in the balances quoted to Lignell related only to the Incline Terrace project¹⁰ (T. 2812). Ridd testified concerning the outstanding balances on the invoices from the period of time from January of 1972 and thereafter (T. 2813-2825). For the most part Ridd indicated that there was an outstanding balance on the Berg Construction account.

On cross-examination Mr. Ridd reviewed the invoices and acknowledged that many of the invoices did not apply to the Incline Terrace project (T. 2834-2841, 2847-2848, 2856, 2859, 2860-2862). Further, Ridd acknowledged that on the contractor's April draw request his company was listed thereon for \$17,300.00 and that his records indicated that on April 11 they were paid the sum of \$17,300.00. The May request was \$23,310.00 and they received \$22,610.00 on May

¹⁰Numerous items for other jobs were charged to the Incline Terrace account, including shingles for Berg's house.

8th. In June \$7,937.39 was requested; that sum was received, Mr. Ridd testified, on June 9th. In July of 1972 Berg requested \$4,920.00 and they were paid \$4,920.00 on July 19th. In August the sum of \$37,890.00 was requested. In September the amount of \$37,890.00 was received, Mr. Ridd stated. Mr. Ridd then clarified his testimony and indicated that there were apparently two August draws--one for \$11,548.28 which was received by him on August 16. The August draw was received by him in September. Mr. Ridd acknowledged that through September they had received every draw request month by month as it was requested from the owners by Berg (T. 2871). On February 28, 1973, Berg requested \$45,000.00 for Standard Builders. Mr. Ridd testified that they received that sum on March 2nd, some two days later. In April Berg requested \$39,468.00. That sum was received, Mr. Ridd testified, on April 16, 1973. Further, in May Berg requested \$10,956.78 and that sum was received by Standard Builders in May (T. 2878).

Mr. Ridd testified that during the years of 1972 and 1973 there was a great change in lumber prices and lumber went up between 30 to 40%, perhaps even more.

CLIFFORD M. BERG

The cross-examination of Clifford M. Berg continued. Berg testified with regard to the charges for electrical extras, \$40,069.01, that he arrived at that figure because "that is the amount of money that the Comstocks are charging

in this litigation, so I've taken the figures that have come out through this trial." Further Mr. Berg testified:

"Q. Asking you where you got that precise, exact figure?

A. Well, we got it through the Court proceedings.

Q. You added it up yourself?

A. No.

Q. Where did you get it?

A. Well, between my attorneys and the CPA and so on, that's the figures that we came up with.

Q. Do you know what specific items are included in that figure, Mr. Berg?

A. No, I think you'll have to ask Mr. Hatch." (T. 2901)

Berg further stated that part of the charge for electrical extras related to the additional 22 units but he did not know how much. He stated, "You'll have to get that through the electrician." (T. 2902). Berg did not know how much of the figure related to the elevators, the hood fans, the recreational rooms, etc. (T. 2903). Berg admitted that \$875.00 was charged for the electrical work in the additional 22 apartments and that it was his understanding that they would function electrically after they were built. The owners were going to get an apartment that was wired and ready to live in and could be lived in, he testified (T. 2903). Berg further acknowledged that the original bid received from Comstock for the additional 22 units was \$1,075.00 but that that figure was rejected because it was too high (T. 2903-2904). In its

place Murray Electric gave a bid of \$875.00 and that figure was accepted. Berg testified that he did not think it was an extra to have the current run to the extra 22 units but that he would have to look and see what Comstock charged him. Berg further testified that he was not familiar with the list of extras from Comstock. (T. 2905).

Berg was referred to numerous invoices relating to alleged extras, some of which covered the same work three or four times and contained different prices, Berg responded that he did not know which, if any, of the invoices were charged and what prices were being charged. He stated that he would "have to get that straightened out with the electrician" (T. 2905-2942). In response to specific questions regarding the makeup of the charges for electrical extras, Berg responded that he didn't know (T. 2907); he would have to get an itemized list from the electrician (T. 2908). Berg admitted that he took the figures from the electrician and that he was relying upon him (T. 2909, 2924).

Berg stated that although the electrician had made an extra charge to him for the air conditioning feeds, that these were not an extra charge to the owners (T. 2907). Over the night recess Berg conceded that he had attempted to determine the contents of the electrical extras by talking with his accountant and to the electrician (T. 2916). However, his testimony continued to indicate that he did not know what the charges were for.

With relation to the extension of air conditioner feed, an item that Berg testified the day before was not an extra (T. 2907), Berg when presented with a ticket from the electricians charging for that item, stated that he did not know what the charge was and didn't know whether it was in the figure for extras (T. 2916-2917).

Berg testified repeatedly that he was merely taking the charges from the electrician. When duplicate tickets were presented to him he did not know which ticket he was including in the extras figure or for how much (T. 2906, 2918, 2927-2928, 2942). Counsel for the electrician stipulated that there were many duplicate tickets (T. 2918), but Berg could not identify which, if any, or if all of the duplicate tickets were included in the charge for electrical extras and if so at what price (T. 2918-2919); he stated, however, that if there were duplicate charges included in the figures that would be an error that would have to be rectified (T. 2919, 2923).

Berg admitted that he was making an additional charge for wiring the hood fans relating to the 22 additional units although he was aware of the fact that the hood fans had to be wired prior to the time that he submitted his bid to the owners for those additional units (T. 2922). Although Berg acknowledged that there were two separate tickets purporting to charge for wiring the hood fans, he did not know whether both of the tickets were included in the "extra" charge (T. 2923).

Berg admitted that it was his understanding that the charges made for the elevator would have given the owners a functional elevator at that price but then stated that he didn't think that the price included the wiring. Berg acknowledged that for the price he bid for the elevator the owners were going to get an elevator that went up and down when they pushed the buttons, and that in order for it to do so it had to be wired. Berg further admitted that he didn't tell the owners that the price they were paying for the additional elevator did not include wiring. The first time Berg discussed the additional elevator with Lignell was in August or September of 1972 (T. 2925); however, Berg identified a change order relating to the additional elevator submitted by the electrician dated June 15, 1972. He thought it was part of the charge for additional wiring, although he admitted that it was dated some two to three months prior to the time that he first discussed the additional elevator with Lignell.

Berg's testimony regarding the electrical extras was best summed up by him when he testified:

"Q. Your testimony is you do not know whether they are in the \$40,000 or not?

A. No. I never signed it.

Q. You don't know whether 84570, add power feed for elevator in Building A is included in there or not?

A. I simply would have to get an itemized list from the electrician to know what has been charged.

- A. Not my figure. The figures that we took from the electrician during the course of this litigation. You are asking me things I am unable to tell you about.
- Q. Your testimony is that the \$40,000 figure is not your figure? It's somebody else's figure?
- A. No, it's the figure that came out during this litigation.
- Q. It's somebody else's figure, not yours?
- A. I think it was brought out during the testimony of the electrician, yeah.
- Q. So it's someone else's figure?
- A. Well, you know that as well as I do." (T. 2931-4)

Berg's counsel then stipulated that the figures that they were charging were those that had been charged to them by the electrician.

Berg acknowledged, however, that there were some charges made by the electrician directly to them that should not be passed on to the owners. Berg stated that he did not know whether these were included within the figure for electrical extermination or not (T. 2935-2936).

Berg, when asked about specific items such as duplicate receptacles, breakers and exit lights, stated that he did not know how much was being charged for them until he got an itemization from the electrician. In exasperation Berg blurted out, "There must be 200 of these. I certainly couldn't quote each one" (T. 2938-2939).

Berg was shown several tickets that all appeared to be a charge for the exit lights; he stated that he believed

that the total he charged was \$35.00 for each one and admitted that the ticket charging \$425.00 must be in error as must the ticket charging \$320.00. Berg admitted that he did not know how many exit lights there were in the building (T. 2939). When Mr. Berg was pressed about whether or not certain tickets were included in his charge he testified:

"A. Still going through the same thing. I said I would have to have an accounting from the electrician and you're asking me about some of these billings that can only be explained by him.

Q. So you don't know?

A. I think that's correct, yes." (T. 2942)

Berg acknowledged that although the charge for wiring the additional 22 units would be an extra to him from the electrician that that would not be an extra charge to the owners; that was included in the price for the additional 22 units (T. 2942-2943). Although Berg admitted that the original plans contained wiring to the recreation room in Building C (T. 2936-2937, 2949), Berg stated that they were making a charge for running the electrical wiring to that room.

On redirect examination Berg testified that they took the electrician's original bid, added to it a charge for the telephone and for the electrical wiring and then took the difference between that and the total bill that the electrician submitted to come up with their figure of \$40,069.01

(T. 2950-2951).
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MARK HATCH

Mr. Hatch was identified as a certified public accountant. He was employed by Berg for purposes of the litigation. Hatch testified that he had reviewed Berg's bank statements, checks, the various files of payroll records, some documents and work papers on the Incline Terrace Apartments and invoices and statements received from suppliers. Mr. Hatch testified that Exhibit 234 was a statement of the amounts that Berg admitted were properly charged or attributable to the contract. Hatch acknowledged that in spite of the fact that the manager of Olympus Glass had testified that all payments deposited to the Incline Terrace account went to the benefit of Berg that he nevertheless disregarded that statement and only agreed to a sum for glass that was less than the amount that had actually been paid by the owners (T. 3011-3012). Hatch testified that the total of agreed charges was \$1,779,529.64 (T. 3020, Ex. 234).

Hatch then testified that he had made a comparison with the checks of Pacific Mutual Insurance Company, Exhibit 152, and the bank ledger, Exhibit 6, and that the exhibit he prepared as a result thereof (Ex. 235) was a listing of all checks that were paid out by Incline which were chargeable to the "Incline project." Hatch testified that his exhibit included payments for only those items that were chargeable to the construction contract and then only up to the amount that was determined by him, in spite of the fact that sums

Insurance Company was \$1,700,000.00, although in his exhibit the figure of \$1,950,000.00 was used (T. 3091). Hatch acknowledged that the \$250,000.00 difference was money obtained by the owners from the sale of the property on which the project was built. Hatch first testified that \$1.7 million was all the money that was borrowed by the owners, but acknowledged that his exhibit showed \$1,879,000 (T. 3096). He did not know where the extra \$179,000.00 came from (T. 3093). Although Hatch admitted that he had testified that his exhibit did not include any "soft costs" he agreed that there were many interest charges by Zions Bank that it paid to itself rather than disbursed to the owners which were included in his exhibit as disbursements to the owners (T. 3098-3100). Hatch further agreed that broker's fees and other such charges appeared on his exhibit as disbursements to the owners although those funds were never received by them (T. 3102-3104). On a closer examination of the documents, Hatch testified that \$205,000.00 of the \$1,700,000.00 total was actually withheld by the Travelers Insurance Company pending completion of the project (T. 3104-3105).¹³ Hatch acknowledged that he did not consider all of the information that he was presented on cross-examination when he prepared his exhibit and that had he done so the exhibit would have been different.

¹³Lignell testified that the remaining \$205,000.00 was not disbursed until July 30, 1974, almost a year after the period of time Hatch's exhibit purported to cover.

Hatch admitted, it had never even been billed to the contractor (T. 3127-3128). Mr. Hatch also prepared a visual count part of Exhibit 235 which was Exhibit 251.

Although Hatch testified that Lignell was slow in making payments to the contractor, on cross-examination he viewed the draw requests submitted by it and compared them with the checks paid by Lignell and concluded that in almost all instances the draw requests were, in fact, paid timely and in the approximate sum requested by Berg (T. 3158-3174). Mr. Hatch further acknowledged that no draw request was submitted by Berg for the months of November and December of 1972 or January of 1973.

ROBERT FROME

The testimony of Mr. Frome was taken out of the presence of the jury. Mr. Frome identified himself as the administrator of the Utah State Department of Contractors; he had held that position for two years. Mr. Frome produced the files from his office relating to the Bergs. Frome testified that he examined the records concerning the licensing of the partnership of Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company. They were licensed in 1969 and 1970 but that license lapsed on April 30, 1970; thereafter, an application for renewal of that license was received and it was renewed. That license lapsed again, however, on April 30, 1971 (Ex. 241). The license of the partnership had a bid limit of \$250,000 (T. 3045-3046). Frome testified that there was not a renewal

or reinstatement of that license in the records of the State of Utah. There was no application for renewal of the license of the partnership of Berg Brothers Construction Company in the years 1971, 1972 or 1973. In 1974, Mr. Frome testified, a license was issued to the partnership as a result of an application filed by it (Ex. 242). That license was issued on July 29, 1974, had a maximum bid limit of \$100,000.00 and had a different license number than had previously been issued. Mr. Frome testified that the lapsed license had not been renewed, but that a new license had, in fact, been issued (T. 3047, 3053).

Mr. Frome testified that he did not have a license in any of his files relating to the joint venture, Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company, and Frank C. Berg, an individual, a joint venture, d/b/a Berg Construction Company.¹⁴ Counsel for Berg stipulated that there was, in fact, no license issued to the joint venture at any time (T. 3048). Berg's counsel further stipulated that Berg did not have a Utah Contractor's license as an individual at anytime in the years 1971, 1972 or 1973 (T. 3049).

FRANK BERG

Frank Berg identified himself as being the older brother of Cliff Berg. Frank Berg admitted that he had signed

¹⁴Mr. Frome testified that there was a valid individual contractor's license in the name of Berg Construction Company issued for Frank C. Berg; that it went back to 1940 and that it was current at the time of trial (T. 3050).

an indemnity agreement to assist Cliff in getting a bond. He claimed, however, that he had not signed the joint venture agreement (T. 3181). Frank Berg admitted that his signature appeared on the document dated February 4, 1974, relating to the joint venture (T. 3181, Ex. 165).

On cross-examination, he admitted that when he signed the indemnification agreement for the bonding company he did not know whether it was filled out or not, "he just didn't look." He knew, however, that the bonding company would rely upon it and that he signed it for the purpose of causing the bonding company to issue the bond on the Incline Terrace Apartments. He also knew, he testified, that the bond would run to the owners (T. 3183). Frank Berg admitted that he signed Exhibit 165 in February, 1974; that he knew that the Title Insurance Agency would rely upon that document and disburse funds and that, in fact, they did disburse the funds. He expected a reliance to be made and knowing that he signed the document (T. 3185). Frank Berg identified Exhibit 255, the account book, as being prepared by him. He stated that Cliff gave him a list of the bids and proposals of the subcontractors on the project and that he put them in the book (T. 3186).

WILLIAM R. BERG

Mr. Berg admitted that he signed the indemnification agreement to the bonding company.

CLIFFORD M. BERG

Mr. Clifford M. Berg admitted on cross-examination that

in 1974 he made a representation under oath that the total amount he claimed was due on the project was some \$66,000.00 (T. 3206).

MARVIN J. CHRISTIANSEN

Marvin J. Christiansen was called as a rebuttal witness by the owners. Mr. Christiansen identified himself as the vice president of Christiansen Brothers, a general contractor. His primary function was to make cost estimates from plans and specifications. Mr. Christiansen reviewed the plans and specifications on the Incline Terrace project and testified concerning the value of certain items that had been omitted in the construction of the project. His testimony was summarized in Exhibit 257 (T. 3208-3234).

NORMAN HALL

Mr. Hall identified himself as being the electrical inspector for the city of Salt Lake and he had been so employed for 23 years. Mr. Hall testified that under the 1971 National Electrical Code the installation of aluminum wire in the kitchens was improper (T. 3246).

E. KEITH LIGNELL

Mr. Lignell was recalled as a witness and testified that he paid the workmen directly for some of the remodeling work that the owners were being charged \$2,000.00 for on Exhibit 210 (T. 3259-3260). Lignell further testified that on October 11, 1972, he had a conversation with Berg wherein he inquired of Berg concerning the sheetrocking. He

was told by Berg at that time that the bid was the same; he made a notation to that effect on a memo (Ex. 221, T. 3265-3268). Lignell further identified Exhibit 222 as being the document he received from Berg setting forth the claimed extras as of January 13, 1974 (T. 3269-3274). Lignell stated that on November 1, 1973, Berg quote to him a price for fire label doors of \$490.00 but that in January of 1974 Berg quoted to him a price of \$3,700.00. At the trial the owners were being charged \$7,900.00 for those doors. Lignell stated that after commencement of the litigation was the first time he ever heard of many of the extras being requested, specifically concrete cutting, extra drywall, electrical extras, widening the footings, linoleum area separation walls, level the parking lot, the claim for tile, the 15% markup on subcontractors, the charge for the bonds and cinder block walls (T. 3276-3283). Lignell also testified that the figure claimed for extras relating to shear walls was doubled at the time of the trial (T. 3284). Lignell reiterated that the bath fans were shown on Exhibits 111, 120 and 121.

Lignell testified that he did have a discussion with Berg concerning the number of parking spaces that were required. He told Berg that planning and zoning required a minimum of 125 on the project. Lignell and Berg discussed, he testified where the parking places were to be located. Lignell testified that the only way the land could be used for an

adequate number of parking stalls was to build an over and under type arrangement. It was physically impossible to get the number of required cars on the property without going to an over and under arrangement and he and Berg discussed that (T. 3287-3288). Lignell testified that he personally observed Mr. Biesinger doing part of the curb, gutter and sidewalk that's embraced within the \$8,000.00 figure that the contractor was claiming (T. 3291).

Lignell further testified that the first bid he received from Berg relating to the recreation room was for \$3,000.00 in December of 1972. After the plans were drawn up by the architect and distributed to Berg, Berg reviewed the plans and gave Lignell a bid of \$8,000.00. At that time there was no discussion that in addition there would be another charge for the furnace (T. 3292-3294). Lignell testified that the plans as originally presented were 95% accurate from that day until the final completed plans and that there was a little change other than changes in those units converted from storage areas (T. 3295). Lignell testified that he did not tell Berg to ignore the recreation room when he submitted the original bid (T. 3299).

With relation to the financing of the project Lignell stated that he never saw the checks, that they were deposited directly to an account. Part of the funds indicated on the Zions ledger (\$1,950,000.00) were provided

from sources other than borrowing from Travelers. They negotiated with the Prospect Company to buy the land for \$250,000.00 and then they leased it back; therefore of the \$1,950,000.00, \$250,000.00 related to selling the land. After that, they no longer owned the land but were merely leasing it. (T. 3300). Further, Lignell testified, \$205,000.00 was held back from the Travelers disbursement. \$5,000.00 was disbursed after they met the requirements in Building C relating to fire walls, the other \$200,000.00 was disbursed in July of 1974 after they achieved the required rental level. Further, Lignell stated that the owners did not draw out the entire construction moneys as reflected in Mr. Hatch's exhibit (Ex. 251, T. 3304).

Lignell testified that he examined the plans (Ex. 120, 121, 111) relating to items that had been described by Mr. Christiansen, mainly closet, walls, doors, windows, seats, shelving and rods and that there were 111 structures required in the plans that were omitted by the contractor (T. 3305). The total amount of these items, Lignell stated came to \$44,522.00 (T. 3310-3313). Lignell further stated that he had no idea that they were being charged for materials used on other projects until he heard about it in court (T. 3313-3314).

On cross-examination Lignell reiterated that the first time he became aware of the contract price between Western Drywall and Berg was in August of 1973 (T. 3318-3319).

Lignell testified that he thought that many of the items had

been traded off but that when Berg submitted extra charges for some things that had been done Lignell felt it appropriate to charge for the things that the owners thought had been traded (T. 3325-3326).

Lignell testified that in August of 1973 he had a discussion with Berg concerning the fire doors in the apartments. This was prompted by a visit with Lignell by Mr. Hoskins, the architect for the insurance company. Mr. Hoskins informed Mr. Lignell that the fire doors and separation walls did not conform to the code. Lignell testified that he discussed this with Berg and Berg said that he was aware of it but that the building inspector had told him it was not necessary, that he could use doors of a lesser type. Lignell told Berg that if he took it upon himself to make that change it would be his responsibility. Berg changed the doors to conform to the regulations. The fire doors that were put in, Lignell testified, were the ones that were required by the specifications. The reason they were put in was because the insurance company insisted upon it as a requirement for the completion and acceptance of the building. It was also required by the fire code (T. 3358-3360).

Respectfully submitted,

EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen

Attorneys for Plaintiffs,
Lignell and Todd