

2001

Joseph M. Quagliana, Paula L. Quagliana v.
Exquisite Home Builders, Inc., Allan Krucken-Berg,
Gary Margetts, KM Design : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JOSEPH M. QUAGLIANA and
PAULA L. QUAGLIANA,

Plaintiffs and Appellants,

vs.

EXQUISITE HOME BUILDERS,
INC., and ALLAN KRUCKEN-
BERG, GARY MARGETTS, d-b-a
KM DESIGN,

Defendants and Respondents.

Case No.
13723

BRIEF OF RESPONDENT
EXQUISITE HOME BUILDERS, INC.

Appeal from the Judgment of the Third Judicial District Court
of Salt Lake County, State of Utah
Honorable Bryant H. Croft, Judge

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH M. QUAGLIANA and
PAULA L. QUAGLIANA,

Plaintiffs and Appellants,

vs.

EXQUISITE HOME BUILDERS,
INC., and ALLAN KRUCKEN-
BERG, GARY MARGETTS, d-b-a
KM DESIGN,

Defendants and Respondents.

Case No.
13723

BRIEF OF RESPONDENT EXQUISITE HOME BUILDERS, INC.

NATURE OF THE CASE

This is an action upon two separate contracts by property owners against a building contractor and designers or draftsman wherein the building contractor and the designers both counterclaimed against the property owners.

DISPOSITION IN LOWER COURT

This action was tried to the court sitting without a jury. Judgment was entered for the contractor in the amount of \$1,577.73, together with attorney's fees of \$1,182.00, and for the designers in the amount of \$500.00.

RELIEF SOUGHT ON APPEAL

Defendant Exquisite Home Builders, Inc., seeks an affirmation of its judgment against plaintiffs.

STATEMENT OF FACTS

Defendant Exquisite Home Builders, Inc. (hereinafter referred to as Exquisite) disagrees, in material part, to the Statement of Facts submitted by plaintiffs.

Sometime during the early part of the year 1971, Dr. and Mrs. Quagliana (plaintiffs and appellants) considered the prospect of building a home (R. 164). For this purpose the plaintiffs elected to use house plans which had previously been used by Mrs. Quagliana's father (R. 164). Since those plans were inadequate (R. 350) and since the plaintiff desired to change those plans (R. 165), defendant Margetts of KM Design was contacted (R. 165).

At the time KM Design was contacted, the plaintiffs had not yet found or purchased a lot upon which

the house was to be constructed (R. 166). The Quagliana insisted that any lot provide a view of the valley from the back of the house (R. 167), and this requirement was conveyed to Mr. Margetts (R. 346). The services of KM Design were contracted for the purpose of drawing a complete set of plans (R. 167, 334). During his meetings with Dr. Quagliana, Margetts referred the names of general contractors engaged in home construction, including the name of defendant Exquisite Home Builders, Inc. (R. 167).

The Quaglianas immediately commenced a search for a lot upon which to construct the home (R. 167). At about this same time, Dr. Quagliana contacted Philip Marstella, an employee of Exquisite (R. 167). Since Marstella was also a licensed real estate broker (R. 278), he brought to Dr. Quagliana's attention a lot which was for sale and looked at other lots which were found by Dr. Quagliana (R. 279). Dr. Quagliana found the subject lot at 2965 Sherwood Drive and Marstella similarly took a look at that lot (R. 279). At that time Dr. Quagliana had no plans in his possession (R. 279) and did not own the particular lot on Sherwood Drive (R. 279). At that time the lot was not for sale and Dr. Quagliana did not know who owned it (R. 168).

Similarly, Margetts visited the subject lot in the company of Dr. Quagliana (R. 335). At the time Margetts and Dr. Quagliana visited the subject lot, work was underway in drawing the plans (R. 336). On that

occasion Margetts walked on the lot and showed Dr. Quagliana approximately how the house, and particularly the back of the house where the windows were located, would sit in relation to the lot (R. 346). At this time Margetts and Dr. Quagliana had in their possession the floor plan of Mrs. Quagliana's father (R. 346). Dr. Quagliana specifically inquired concerning the view and was told by Mr. Margetts that "there would be a view" (R. 346). Margetts also expressed his opinion that the lot "was a good lot" (R. 336). Before the lot was purchased by the Quaglianas, Margetts drew at least a preliminary plot plan to see if the house would fit on the lot (R. 187, 359).

The Quaglianas were successful in purchasing the property on Sherwood Drive (R. 170). KM Design then continued the drafting of a complete set of plans, including a plot plan showing the location of the house on the property (R. 170). In the process of drafting the plot plan, Margetts consulted Salt Lake City with respect to the setbacks (R. 288, 340, 352, 356), but did not consult with the St. Mary's Hills Architectural Supervising Committee (R. 352). Mr. Margetts also checked the plot plan to see that it had been drawn as represented to Dr. Quagliana when on the subject lot (R. 347), and the house was finally plotted as earlier described by Margetts to Dr. Quagliana that it would be (R. 348). The entire set of plans was completed and delivered to Dr. Quagliana in July, 1971 (R. 337, 338, Ex. 1-P). Those plans showed a 20-foot setback

between the garage and the front property line (R. 186, Ex. 1-P).

On October 7, 1971, a building contract was entered into between plaintiffs and defendant Exquisite (R. 280, Ex. 2-P). This building contract resulted from the submission of a bid by Exquisite (R. 280). In turn, the plans and specifications (Ex. 1-P) having been delivered by Dr. Quagliana (R. 279), were utilized in computing the bid (R. 280).

The general building contract (Ex. 2-P) was drawn by Prudential Federal Savings as a requisite to its loan of money to plaintiffs (R. 254). Exquisite took no part in drafting the contract, did not request of Prudential Federal Savings that it draft the contract, and did not have any relationship with Prudential Federal Savings regarding draftsmanship (R. 254, 281).

The contract (Ex. 2-P) contained a clause incorporating therein the plans and specifications (Ex. 1-P).

Construction commenced shortly after the contract was signed (R. 172). Marstella of Exquisite obtained a building permit for the construction of the house at 2965 Sherwood Drive on October 14, 1971 (R. 281, Ex. 7-DE). At the time of obtaining the building permit, Marstella submitted a copy of the plans as drawn by KM Design and as furnished by plaintiffs to Salt Lake City (R. 281). At the time of issuing the building permit, a representative of Salt Lake City crossed out the

reference to 20 feet and inserted the word "average" (R. 298). A change of all setbacks to "average" is common practice for Salt Lake City (R. 300).

On approximately October 14, 1971, Marstella of Exquisite met on the construction site with personnel of Gardner Engineering and delivered to them a copy of the plot plan as drawn by KM Design (R. 282). Personnel of Gardner Engineering then staked out the lot, and this they did in accordance to the plot plan drawn by KM Design (R. 282). Excavation was commenced by Terry Fuller Excavating shortly after October 14, 1975 (R. 283), and this excavation was completed according to the original plot plan (R. 317).

Several days later, after Exquisite had started framing and excavating for the footings themselves (R. 283), Dr. Quagliana visited the construction site (R. 172, 283). Dr. Quagliana immediately became concerned that the house was not oriented exactly the way Margetts mentioned it would be with the back of the home facing the valley (R. 172). Dr. Quagliana expressed his concern as to the orientation of the house to Mr. Marstella who was at the job site (R. 172, 283). Dr. Quagliana next called KM Design and told Margetts that he didn't like the way the house was sitting on the lot (R. 351). Within a day or two (R. 351), Margetts and Kruckenberg visited the excavation and could see nothing wrong with the house as positioned on the property at that point (R. 348). Marstella also called Margetts and advised that Dr. Quagliana didn't

like the position of the house on the lot (R. 351). Margetts declined to draw a new plot plan since he had not been paid for his work (R. 351). Ultimately, Dr. Quagliana directed Marstella to rotate the home so that the back of it would face the valley (R. 184). In arriving at this decision, Dr. Quagliana had discussed the need for a space for the possible addition of a swimming pool and also the possibility of an immediate change in the floor plan (R. 283). Dr. Quagliana also advised Mr. Marstella of his intention to pay for the additional work in altering the orientation of the home (R. 284). A new plot plan was drawn by Gardner Engineering showing a 20-foot setback on the garage corner (R. 284, Ex. 5-P). Although there was conflict in the testimony, Dr. Quagliana testified that Margetts of KM Design approved the new plot and even voiced some enthusiasm for it (R. 174, 175). As before, the new plot plan was submitted to Salt Lake City (R. 284).

The lot was re-staked by Gardner Engineering (R. 284) and was re-excavated by Terry Fuller Excavating (R. 285). The second excavation was completed in accordance with the second plot plan (R. 186). The footings were poured on November 12, 1971, and the foundation was poured on December 7, 1971 (R. 285). Both the footings and the forms for the foundation were inspected and approved by Salt Lake City, the latter inspection occurring on December 6, 1971 (R. 286, Ex. 6-DE).

During the course of construction, Dr. Quagliana

received a call from some person living in the area who advised him that the plans had never been reviewed by the St. Mary's Hills Architectural Supervising Committee (R. 175). Dr. Quagliana immediately requested of Mr. Marstella that he submit the plans to Mr. Elmer Davis of the committee (R. 176, 286). This request came from Dr. Quagliana at about the same time the foundations were poured (R. 287). Marstella delivered a set of plans as requested, and thereafter received a letter from the St. Mary's Hills Architectural Supervising Committee (R. 287, Ex. 12-P). That letter advised that the plans did not conform to certain restrictive covenants in three respects: The roof pitch, which was 4 to 12, could not exceed $3\frac{1}{2}$ to 12; a topographic plan was required; and the setback of 20 feet from the front property line to the garage was less than the minimum of 30-feet (Ex. 12-P).

Subsequent to the letter from the St. Mary's Hills Architectural Supervising Committee, Marstella and Southam of Exquisite met Dr. Quagliana at the University of Utah Hospital (R. 288). At that meeting Dr. Quagliana expressed his growing dissatisfaction with the neighbors and neighborhood and expressed his belief that KM Design had checked out the items of which the architectural committee was complaining (R. 289). At that meeting Dr. Quagliana expressed his intention to speak personally to the members of the St. Mary's Hills Architectural Supervising Committee (R. 288).

On January 3, 1972, Dr. Quagliana instructed officers of Prudential Federal Savings that they should not disburse any further funds to Exquisite or its sub-contractors (R. 189, 256, Ex. 13-DE). (Under the general building contract, Exhibit 2-P, progress payments were to be made upon application of the contractor in order to finance the construction of the dwelling house.) When Exquisite called Prudential for an inspection preparatory to sending in a draw, they were advised that a hold had been placed on all funds and that it would be useless to request a draw (R. 289, 330).

On January 4, 1972, Marstella and Southam of Exquisite and Dr. Quagliana met with Dr. Quagliana's attorney (R. 178, 290, 317). At that meeting Mr. Southam (President of Exquisite) indicated his willingness to proceed with construction as directed by Dr. Quagliana and to stand the expense of tearing out the foundation and starting over again (R. 318). Several proposals or alternatives were discussed (R. 180, 290, 318). Among those alternatives was a proposal to reduce the size of the garage, a proposal to tear out the total construction and start over again with the mirror image of the same floor plan, and a proposal to purchase the lot and partially completed structure for the purpose of re-selling on speculation (R. 180, 290, 318). (The testimony was that the original floor plan would physically fit upon the subject lot with a 30-foot setback, but that the view would have been similar to that of the original plot plan (R. 319, 291)). The meeting

concluded when Dr. Quagliana or his attorney advised that the proposals would be considered and that Exquisite would be advised of Dr. Quagliana's wishes (R. 293, 320). Nothing was then heard from Dr. Quagliana or his attorney until about February 23, 1972 (R. 293, 321). By letter of that date, Dr. Quagliana advised Exquisite of the price he would accept for sale of the lot and partially completed home (Ex. 15-DE). After some investigation, it was determined by Exquisite that it would not be feasible to purchase the lot and foundation at the price asked by Dr. Quagliana (R. 294, 321). Thereafter, Dr. Quagliana was advised by Marstella that his asking price made it more feasible to tear out the foundation and relocate the house (R. 295, Ex. 3-DE). At that time Mr. Marstella advised Dr. Quagliana, through his attorney, that Exquisite stood ready to tear out the foundation and relocate the house (R. 295, Ex. 3-DE).

While awaiting direction from Dr. Quagliana as to where he wanted the home located or what modifications he desired in the floor plan, Exquisite proceeded with plans for removal of the foundation (R. 321). During this same general time period, Southam of Exquisite contacted Terry Fuller of Terry Fuller Excavating and discussed with him the method to be used in removing the foundation and disposing of the concrete (R. 321, 326). Specifically, Southam asked Fuller if he would locate a place where the broken concrete could be dumped (R. 321, 326). Fuller proceeded with this investigation and found a place in North Salt Lake

where the broken concrete could be dumped (R. 326).

Exquisite received no further communication from Dr. Quagliana indicating his wishes with respect to the location of the home (R. 295, 321). However, Exquisite did receive from plaintiffs through their attorney a letter dated March 9, 1972 (Ex. 16-DE). By that letter, Exquisite was advised that the Quaglianas did not wish to proceed further with construction of the home and considered themselves excused from further performance under the contract of October 7, 1971 (Ex. 16-DE). In response to that letter, Exquisite addressed a letter of March 15, 1972, to the Quagliana's attorney reminding him that Exquisite had, at all times, remained ready, willing and able to tear out the foundation and relocate the house as directed by Dr. Quagliana (Ex. 3-DE).

Prudential Federal Savings advanced the sum of \$2,069.79 to Exquisite and its subcontractors to cover the cost of construction (R. 328). The further sum of \$1,577.73 was paid to various subcontractors by Exquisite but was not reimbursed by plaintiffs or Prudential (R. 330).

The Quaglianas sold the subject lot to Gale and Joyce Smith on December 13, 1972, for the sum of \$23,750.00 (R. 266). The Smiths planned to and did utilize the excavation and most of the foundation in constructing a home (R. 266, 267). The subject lot had been purchased by the Quaglianas for \$20,485.00 (R. 266).

ARGUMENT

POINT I

THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND THE COURT MADE FINDINGS OF FACT ON ALL MATERIAL ISSUES IN COMPLIANCE WITH RULE 52 OF THE RULES OF CIVIL PROCEDURE.

This is a case at law. That being so, it is not the duty of the Supreme Court to weigh evidence, and any substantial evidence will support the Findings and Judgment. *Osborn v. Peters*, 69 Utah 391, 255 Pac. 435 (1927); and *Cannon v. Wright*, No. 13746, Feb. 13, 1975. In *Parrish v. Tahtaras*, 7 Utah 2d 87, 318 P. 2d 642, 644 (1957), this Court held that it should merely review the evidence to ascertain whether the record showed some competent evidence. This Court further stated that the evidence should be viewed in a light most favorable to the Findings:

“Since the court made findings and entered judgment based thereon, it is our duty to review the evidence in a light most favorable to the findings. In reciting the facts, therefore, we state them as found by the trial court so long as the record shows some competent evidence from which such findings could derive.”

Such a review of evidence will show that the Findings of the court are supported by substantial evidence

and that Findings were made on all material issues. Complaint is made on appeal that Finding No. 17 (R. 18) and Finding No. 31 (R. 20) are not supported by the evidence.

Finding No. 17 relates to the modification of the original plot plan by rotating the home so as to provide a direct view of the Salt Lake Valley. The record reveals that Dr. Quagliana became unhappy with the orientation of the house after viewing the open excavation (R. 172). Dr. Quagliana brought this dissatisfaction to the attention of KM Design and Exquisite (R. 172, 351), and directed that the house be rotated so that the back of it would face the valley (R. 184). In so directing, Dr. Quagliana advised Exquisite of his intention to pay for the additional work in altering the orientation of the home (R. 284). Exquisite acceded to the wishes of Dr. Quagliana and the result was a modification of the original plan to which the parties agreed (R. 186, 200). As a portion of the evidence supporting Finding No. 17, the Record shows the following exchange (R. 184):

“Q. Whose idea was it to modify the original plot plan?

A. As in the final plans?

Q. Yes, the original plot plan drawn by KM. Whose idea was it to modify it?

A. Mine. It was my idea.

Q. Did you direct Mr. Marstella as to—precisely

as to where that house should be positioned?

A. Not in detail. Only in generalities, in that I thought it should be turned so that the back of it could face the valley."

Finding No. 31 is concerned with proposals made by Exquisite after the 30-foot setback requirement had been discovered and with the readiness and willingness of Exquisite to remedy the problem at its own expense. Three parties, Dr. Quagliana, Marstella and Southam, testified concerning the proposals or alternatives discussed on January 4, 1972 (R. 179, 290, 318). This testimony clearly shows that Exquisite remained ready, willing and able, at its own expense, to tear out the foundation and start construction anew. The Record reveals that Exquisite made arrangements with Terry Fuller Excavating to tear out the concrete and remove the same to North Salt Lake (R. 321, 326). The record will show that Exquisite had a preference for the alternative of purchasing the lot and foundation and, after completing the home, selling on the speculative market. This alternative would have presented the prospect of enhanced profits to Exquisite. However, the price asked by Dr. Quagliana was so excessive that it was not feasible to purchase the lot on speculation (R. 294, 321). Marstella advised plaintiffs that their asking price was excessive and that Exquisite would tear out the foundation and relocate the home (R. 295, Ex. 3-DE). However, Exquisite could not proceed until the plaintiffs advised where they wanted the house

located or in what respect they wanted the floor plan to be changed. That information was never forthcoming from the plaintiffs (R. 295, 321). The transcript reveals the following testimony from Glade Southam, president of Exquisite (R. 318, 319):

“Q. Do you recall any proposals being made by either Dr. Quagliana or Exquisite Homes on that occasion?

A. Yes. One proposal was tearing out the foundation and flopping the house plan over. Another proposal was to cut the garage off on an angle and to get the 30-foot setback. Another one was to cut the garage off straight across and the other was taking—purchasing the lot from the doctor and we continue the house ourself.

Q. And who made those proposals?

A. Exquisite Homes did. We did.

Q. Did you personally make those proposals?

A. Yes.

.

Q. (By Mr. Harrison) Did you advise Dr. Quagliana that you were willing to take the expense of tearing out the foundation and starting over?

MR. ROE: That is leading and I object.

THE COURT: Yeah, a little bit but overrule. He may answer.

THE WITNESS: At the meeting on January 4th, it was indicated that we would stand the cost of whichever way we went, of tearing out the foundation or cutting the garage off or what method we did go."

Plaintiffs also complain of Finding No. 33, but admit that it is supported by some evidence. Evidence in support of that Finding clearly appears on page 295 of the Record and in Exhibit 3-DE. Plaintiffs' concern seems to have arisen in retrospect by its own failure to counter the testimony of defendants' two witnesses. During the course of plaintiffs' rebuttal case, an objection was raised by the attorney for KM Design on the basis that the questioning of the plaintiff was repetitious. In fact, Dr. Quagliana had previously, during plaintiffs' case in chief, been questioned concerning these same facts (R. 180, 181, 182, 198). The Record will show that substantially the same question was put to Dr. Quagliana during the presentation of the plaintiffs' case in chief (R. 182). Following certain comments on the evidence, plaintiffs' counsel voluntarily elected not to pursue that line of questioning. Plaintiffs' counsel clearly had an opportunity to put further questions to his witness, but elected not to do so. The reluctance of counsel to pursue that line of questioning is understandable, since he himself was a participant (R. 163, 294). Plaintiffs' counsel was reluctant to proceed in depth into those facts since to do so would have required that counsel take the witness stand and withdraw from the argument of the case. And the

Court had previously instructed counsel as to the consequences of his taking the witness stand (R. 163).

Finally, error is claimed with regard to a comparison of the actual setback with that of the Salt Lake City Zoning Ordinances and the restrictive covenants of the subdivision. The evidence will not support a finding that the ordinances of Salt Lake City were violated. The Record will disclose that Salt Lake City did place a stop work order upon the project, but this was done at the instance of the St. Mary's Hills Architectural Supervising Committee. In any event, work had already stopped since the 30-foot setback requirement of the St. Mary's Hills Subdivision had become known. With respect to the 30-foot setback requirement of the subdivision, Exquisite never contested the facts which showed a violation of that requirement.

The Court did make Findings that the foundation was constructed with a 20-foot setback between the garage and the front property line and that the St. Mary's Hills Architectural Supervising Committee required a 30-foot setback. Findings No. 13 and 14 indicate that the lot was originally staked and excavated with a 20-foot setback. Finding No. 27 states that the re-staking conformed to the amended plot plan as drawn but not as amended by the word "average". Similarly, Finding No. 24 indicates that the excavation was accomplished in accordance with the amended plot plan. Finding No. 26 expressly states that the foundation was constructed with a "20-foot setback". Finding No. 27

expressly states that the St. Mary's Hills Architectural Supervising Committee "required a 30-foot front setback". Finally, Finding No. 28 states that approval was never received from the St. Mary's Hill Architectural Supervising Committee.

In any event, the Finding requested by plaintiffs is properly categorized as a conclusion of law. The Findings of the Court clearly show that the foundation was constructed with a 20-foot setback and that the subdivision requirements were for a 30-foot setback. Whether this is a violation, which it obviously is, requires the application of principles of law.

POINT II

AS A MATTER OF CONTRACT INTERPRETATION, EXQUISITE HOME BUILDERS, INC. COMPLIED WITH THE GENERAL BUILDING CONTRACT AND THE PLANS AND SPECIFICATIONS INCORPORATED THEREIN.

The plans and specifications (Ex. 1-P) were made a part of the contract by the reference contained in paragraph No. 1 of the General Building Contract (Ex. 2-P). The plans, in turn, consisted of eight detailed drawings and a plot plan (Ex. 1-P). Specifically, the General Building Contract stated that the dwelling house should be constructed "... in strict ac-

cordance with this contract, the plans and specifications hereunto attached and made a part hereof and identified by the signatures of the parties hereto and in strict compliance with all applicable laws, ordinances and other governmental regulations affecting such construction." (Ex. 2-P).

The General Building Contract was executed by plaintiffs and Exquisite subsequent to the purchase of the subject lot on Sherwood Drive (R. 199). Similarly, the plans were drawn by KM Design prior to the execution of the contract (R. 337, Ex. 2-P). In drawing those plans, KM Design had shown, on the plot plan, the position of the structure in relationship to the property lines by the use of four separate dimensions (Ex. 1-P). In drawing that plot plan, KM Design assumed the responsibility for the location of the home and attempted to satisfy that obligation by contacting officials of Salt Lake City (R. 288, 340, 352, 356). However, KM Design did not check on restrictive covenants (R. 352). Upon cross examination, Mr. Margetts of KM Design admitted that he felt some obligation to contact Salt Lake City with regard to the setback requirements but that he did not contact any subdivision committee because he thought the plot plan was satisfactory (R. 356):

"Q. Mr. Margetts, I understand that you checked the setback requirements of this particular house and lot with Salt Lake City; is that correct?

A. Yes.

Q. And why did you check that setback requirement with Salt Lake City?

A. That is the first thing we do on a house, to find out how big a house you can put on it. You certainly don't want to design a house and find out it is too big for the property. It is just standard procedure in our office. That is one of the first things you do.

Q. Did you feel some obligation to check those setback requirements?

A. No, I didn't because I thought we were plenty fine with the 20 and 30, in my conversation with the City.

Q. But you felt some obligation to contact Salt Lake City?

A. Yes, I contacted them.

Both Dr. Quagliana and Marstella of Exquisite testified that they relied upon the plans and specifications drawn by KM Design (R. 186, 279). Specifically, Marstella testified that he used the plans and specifications (Ex. 1-P) in making a bid (R. 279, 280). The plans and specifications were furnished to Exquisite by plaintiffs (R. 279).

This Court has previously held that when a contract refers to plans and specifications, the same are incorporated into and become a part of the contract. In *Utah Lumber Co. v. James*, 25 Utah 434, 71 Pac. 986, 987 (1903), this Court held that plans, specifications

and detailed drawings which were referred to in the contract “. . . became a part of the contract, equally binding as the proposal itself.”

In this particular case, the plot plan, and consequently the contract, required that the house be located with a 20-foot setback between the garage and the front property line (Ex. 1-P). Dr. Quagliana admitted that the initial excavation was made in accordance with the original plot plan as drawn by KM Design and that the subsequent excavation was made in accordance with the modified plot plan (R. 185, 186):

“Q. Was the initial excavation made in accordance with the original plot plan designed by K.M.?

A. Yes, it was.

Q. And the subsequent excavation was done in accordance to your instructions; is that correct?

A. Well, it was done in accordance with a decision made by all three of us. It was not—I did not say, “This is the way it will be and this is the way I want you to do it.” We decided to make a change with the approval of Mr. Marstella and Mr. Margetts and myself.

Q. It was your idea to make that change?

A. Yes, it was.

However, the plans and specifications, and particularly the plot plan, turned out to be defective. The testimony adequately established the requirement of a 30-

foot setback as imposed by the St. Mary's Hills Architectural Supervising Committee (R. 241).

Numerous cases can be found for the proposition that a construction contractor who has followed plans and specifications furnished by the owner, and which have proved to be defective, will not be responsible for the loss which results. In *Bradford Builders, Inc. v. Sears, Roebuck and Co.*, 270 F.2d 649 (5th Cir. 1959), the fencing subcontractor was furnished a plot plan by the general contractor. That plot plan showed the *location* where a fence was to be installed. The fencing subcontractor installed the fence *at the location* shown on the plot plan. The Court there held that since the subcontractor was bound to build according to plans and specifications, the subcontractor would not be held responsible for the consequences of defects in those plans and specifications. In *Kelly v. Bank Building and Equipment Corp. of America*, 453 F. 2d 774 (10th Cir. 1972), the building owner brought suit against the contractor for improper installation of a curtain wall. The trial court there found that the design of the curtain wall was deficient and that the curtain wall had been installed pursuant to the plans and specifications. In affirming for the contractor the Tenth Circuit Court of Appeals held that the owner's architect impliedly warranted the sufficiency of the overall construction plan and that this warranty was paramount and controlling over any guarantee of completion by the contractor. In *Puget Sound National Bank of Tacoma v. C. B. Lauch Const. Co.*, 73 Idaho 68, 245

P. 2d 800, 805 (1952), the painting was shown by FHA to be unsatisfactory. However, the evidence sustained a finding that the painting had been accomplished in conformity with plans and specifications which had been incorporated into the contract by reference. In affirming for the painting contractor the Idaho Supreme Court stated:

“A contractor is required to follow the plans and specifications and when he does so, he cannot be held to guarantee that the work performed as required by his contract will be free from defects, or withstand the action of the elements, or that the completed job will accomplish the purpose intended. He is only responsible for improper workmanship or other faults, or defects resulting from his failure to perform.”

The leading case in this respect is *United States v. Spearin*, 248 U.S. 132, 137, 63 L. Ed. 166, 39 S. Ct. 59 (1918). In that case Spearin contracted to build a dry dock at the Brooklyn Naval Yard in accordance with plans and specifications which had been prepared by the government. Other contract provisions required the contractor to examine the site for the purpose of ascertaining the actual conditions, to check the plans, dimensions and elevations, and to stand responsible for the work until completion. The site was intersected by a 6-foot brick sewer which was required to be relocated. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material, and location of the sewer section to be substituted. All the prescribed requirements were

fully complied with by Spearin. Speaking through Justice Brandeis, the United States Supreme Court affirmed for the contractor:

“... But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.”

The rule announced by these cases, that the owner is responsible for defects in plans and specifications, has become well settled in practically every American jurisdiction. 13 Am. Jur 2d, *Building and Construction Contracts*, Sec .28.

The *Spearin* case suggests that the plans and specifications, being more specific, must control over more general language. This would appear to be a specific application of the standard given in Restatement, Con-

tracts, Section 236 (c), and adopted in *Waterway Terminals Co. v. P.S. Lord Mechanical Contractors*, 242 Oregon 1, 406 P. 2d 556, 13 A.L.R. 3d 1 (1965). Those authorities indicate that a specific provision will ordinarily qualify the meaning of a more general provision.

In this particular case, the plot plan showed precisely where the building was to fit upon the lot. This was accomplished by giving four dimensions from various points on the structure to various points on the property lines (Ex. 1-P). It is not conceivable that the position of that home could have been given more specifically. Any other location would have changed those dimensions and completely nullified the entire plot plan.

The plaintiffs in this case have complained as to this defendant's interpretation of the contract and as to the position where the foundation was ultimately constructed. However, the plaintiffs have never indicated where their interpretation of the contract would place the structure. The undisputed testimony in this case was that the house would physically fit on the subject lot with appropriate 30-foot setbacks (R. 291, 319). However, the satisfaction of two 30-foot setback requirements would have oriented the house so that a direct view of the Salt Lake Valley would not have been presented (R. 292). The Record is replete with references to the view as being very important to the plaintiffs (R. 185, 188, 283). Even after Exquisite

agreed to tear out the foundation and start construction anew, at its own expense, the plaintiffs never could or did decide where the home should be positioned upon the lot.

This Court has, on many occasions, adopted the rule of construction that the proper interpretation of a contract is the interpretation placed upon it by the parties through their acts and conduct. *Roberts v. Tuttle*, 36 Utah 614, 105 Pac. 916 (1909); *Trucker Sales Corp. v. Potter*, 104 Utah 1, 137 P. 2d 370 (1943); and *Hardinge Co. v. Eimco Corp.*, 1 Utah 2d 320, 266 P.2d 494 (1954). It is interesting to note in this respect what Dr. Quagliana stated regarding the contractual right of Exquisite to position the home otherwise than as shown on the plot plan:

“Q. (By Mr. Harrison) Was Exquisite Home Builders at liberty to alter the position of that home as shown on the original plot plan?

A. No. This question had never arisen. (R. 197)

This Court has decided many cases under the rule of interpretation that a contract must be construed most strongly against the party responsible for the draftsmanship. *Wingets, Inc. v. Bitters*, 28 Utah 2d 231, 500 P. 2d 1007 (1972); *Seal v. Tayco, Inc.*, 16 Utah 2d 323, 400 P. 2d 503 (1965); *Guinand v. Walton*, 22 Utah 2d 196, 450 P. 2d 467 (1969); *Skousen v. Smith*, 27 Utah 2d 169, 493 P. 2d 1003 (1972); *Penn Stor Mining Co. v. Lyman*, 64 Utah 343, 231 Pac. 107 (1924); and

Mifflin v. Shiki, 77 Utah 190, 293 Pac. 1 (1930).

The record clearly shows that the subject contract was drawn by an agent of plaintiffs (R. 254, 281).

POINT III

AGREEMENT OF THE PARTIES UPON A SECOND PLOT PLAN RESULTED IN A MODIFIED CONTRACT WHICH SUPERSEDED THE FIRST TO THE EXTENT OF ANY INCONSISTENCIES.

The general building contract contained a paragraph requiring any changes in the terms of the contract or the plans and specifications to be in writing (Ex. 2-P). This Court has held on several occasions that the parties to a written contract may modify, waive or make new terms notwithstanding such language. *Davis v. Payne & Day, Inc.*, 10 Utah 2d 53, 348 P. 2d 337 (1960); *Wilson v. Gardner*, 10 Utah 2d 89, 348 P. 2d 931 (1960); *Calhoun v. Universal Credit Co.*, 106 Utah 166, 146 P. 2d 284 (1944); *Rhodes v. Clute*, 17 Utah 137, 53 Pac. 990 (1898); and *PLC Landscape Construction v. Piccadilly Fish 'N Chips, Inc.*, 28 Utah 2d 350, 502 P.2d 562 (1972).

These expressions of the Utah Supreme Court are consistent with the general rule as found in 17A C.J.S., *Contracts*, Section 377 (c), and 13 Am. Jur.2d, *Build-*

ing and Construction Contracts, Section 24. The latter states the rule this way:

“Although stipulations in building or construction contracts requiring written orders or agreements for extra work or alterations are valid and binding so long as they remain in effect, it is equally well settled that they may be avoided by the parties to the contract. The courts have adopted various theories of avoidance, which may be classified as those of independent contract, modification or rescission, waiver, and estoppel.

“A waiver of such stipulation by the owner is the theory on which it is most frequently avoided. Among the acts or conduct amounting to waiver are the owner’s knowledge of, agreement to, or acquiescence in, such extra work, a course of dealing which repeatedly disregards such stipulation, and a promise to pay for extra work, orally requested by the owner and performed in reliance on that promise.”

The evidence in this case clearly shows that Dr. Quagliana, after becoming dissatisfied with the view, originated the idea to modify the original plot plan (R. 184). Dr. Quagliana then directed Mr. Marstella to position the home “so that the back of it could face the valley” (R. 184). At that time Dr. Quagliana advised Exquisite that he would pay for the contract change (R. 284). Dr. Quagliana himself testified that the second excavation was done “. . . in accordance with a decision made by all three of us . . .” (R. 186). Dr. Quagliana expressly stated that the original plan and

specifications, which were a part of the contract, had been modified (R. 200):

“Q. But you modified those original plans and specifications, did you not?

A. Yes.”

As noted, Dr. Quagliana directed Exquisite to rotate the house so that the back of it could face the valley (R. 184). This is clearly inconsistent with the language of the general building contract (Ex. 2-P) which authorized the contractor to locate the building upon the site. In fact, Dr. Quagliana specifically testified that Exquisite was not at liberty to alter the position of the home (R. 197). This direction to locate the home so that the back of it could face the valley is clearly inconsistent with the positioning of that home so that the back of it would face the mountains and neighboring houses. This latter view was the only one available if the 30-foot set back requirement was to be met (R. 292, 320).

It is a well established principle of law that a second agreement will govern over inconsistent terms of an earlier contract between the same parties. Restatement, Contracts, Section 408. That principle was adopted by this Court in the case of *Mawhinney v. Jensen*, 120 Utah 142, 232 P.2d 769 (1951). A general statement of that principle is found in 17A C.J.S., *Contracts*, Section 379:

“An agreement, when changed by the mutual consent of the parties, becomes a new agreement,

which takes the place of the old and determines the rights of the parties thereto. In such case, the agreement between the parties consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged, in other words, a contract may be abrogated in part and stand as to the residue and *the new contract supersedes the first to the extent that the two will be unable to stand together.*" (Italics added)

Principles of contract modifications are clearly applicable to building and construction contracts where the modification sometimes results from express or implied waiver.

"The foregoing rules, as to alteration or modification of contracts by mutual consent, have been applied to building and construction contracts. Thus the contractor and the owner may, by subsequent agreement, modify the original contract and authorize or require deviations and departures therefrom; and the new agreement either expressly or impliedly may waive any right either would otherwise have had; . . ." 17A C.J.S., *Contracts*, Section 373(b)

These principles have found application in the case of *Driver-Miller Plumbing, Inc. v. Fromm*, 72 N. M. 117, 381 P. 2d 53 (1963). That case involved a suit brought by a heating subcontractor against the owner-general contractor of a home. The owner-general contractor defended on the basis that the heating system failed to heat satisfactorily. The evidence there showed that the owner-general contractor obtained the

specifications and gave them to the heating subcontractor. Also, the owner-general contractor gave the heating subcontractor directions with reference to deviations from the specifications. On the basis of those facts, the Court stated its holding on page 54:

"The court found, and the finding is amply supported by adequate proof under the most stringent requirements, that the installation was made by plaintiff in accordance with instructions from Melvin B. Fromm, the general contractor, and with his knowledge and acquiescence. Accordingly, no complaint can be made that plaintiff failed to comply strictly with the original specifications."

POINT IV

PLAINTIFFS WRONGFULLY RESCINDED THE CONTRACT WHILE EXQUISITE HOME BUILDERS, INC., REMAINED READY, WILLING AND ABLE TO COMPLETE THE CONTRACT WITHIN THE TIME PROVIDED.

The plaintiffs' letter of March 9, 1972, terminating the right of Exquisite to proceed under the contract (Ex. 16-DE) and plaintiffs' Complaint (R. 141) were both predicated upon a total breach by failure to situate the home in accordance with building restrictions and inability to complete the home within the time contemplated by the contract. The contract did require

completion of the dwelling within 180 days from the date of commencement (Ex.-2P). Commencement was not required until ten days after funds were deposited with Prudential Federal Savings in the construction trust fund account (Ex. 2-P). Mr. Roof of Prudential Federal Savings testified that funds were deposited into the construction trust fund account on November 26, 1971 (R. 250, 253). The elapse of 180 days would have placed the completion date on approximately April 26, 1972. However, the general building contract, in paragraph No. 5, provided an extension of time for changes and unusual delays beyond the control of the contractor, and the Record discloses that the rotation of the home and poor weather, alone, caused a five week delay (Ex. 3-DE). Furthermore, the contract, paragraph number 6, provided a penalty for delay of \$12.92 per day as liquidated damages.

It should require no citation of authority to establish that an owner cannot anticipate the default of the contractor and, on that basis, terminate the contract. This is particularly so, when the contract provides for liquidated damages in the event of a delay in completion. 13 Am. Jur. 2d, *Building and Construction Contracts*, Section 47. The plaintiffs' sole remedy for failure to complete the contract within the time specified was the collection or retention of liquidated damages under the contract at the rate of \$12.92 per day; the plaintiffs cannot anticipatorily repudiate the contract for failing to complete the home within the time con-

templated by the contract when at least 47 days remain before completion is required.

Our facts are similar in this respect to those in the oft-cited case of *Brady v. Oliver*, 125 Tenn. 595, 147 S.W. 1135 (1911). That case similarly involved a construction contract where the owner anticipated a failure to perform at a time prior to the time set for completion. The court there contrasted that case with those where the contractor had abandoned the contract or had renounced the contract and refused to proceed under it. The Court there held that the disability could not be anticipated. Such a factual situation would seem to be within the scope of the rule announced in *Retatement, Contracts, Section 323*. It should be noted, however, that that section is premised upon a defective performance. Explanatory comment (c), page 487, reads as follows:

“Frequently a period of time is allowed by a contract within which a party thereto may perform a promise. In such a case tender of defective performance does not necessarily show that if the tender is refused, correct performance will not be rendered within the period allowed by the contract. Even if performance must be on a particular day, it may be possible to remedy a defective tender made on that day. . . .”

The testimony in this case clearly shows that Exquisite remained ready, willing and able to tear out the foundation and relocate the house at its own expense. This willingness to proceed with construction was com-

municated to plaintiffs on at least four separate occasions (R. 294, 295, 318, Ex. 3-DE). Exquisite even proceeded to the point of contacting a contractor who would remove the foundation (R. 321), and locating a place in North Salt Lake where the broken concrete could be dumped (R. 326). However, Exquisite could not proceed further until the plaintiffs advised where they wanted the house located or in what respect they wanted the floor plan to be changed. The concrete foundation could not be removed since some alternatives involving a modification of the floor plan contemplated utilizing a portion of the foundation. However, plaintiffs never authorized Exquisite to continue with the construction or advised as to the desired position for the home (R. 295, 321). The Record is absolutely devoid of any indication that Exquisite was unwilling or unable to continue the construction.

Even if the performance of Exquisite was considered to be defective, the plaintiffs would have no right to repudiate the contract under the facts of this case. In order to justify rescission, the breach must go to the root of the contract. The act complained of must involve an unqualified refusal to perform and should amount to a determination not to be bound by the contract in the future. 17A C.J.S., *Contracts*, Section 422 (1). Grounds for rescission or termination of a building and construction contract is the subject of 17A C.J.S., *Contracts*, Section 422 (2):

“The builder’s fault is not a ground for rescis-

sion by the owner, where it is caused by the owner's failure to perform, or by the wrongful acts or omissions of the owner or his architect or engineer.

"It is not every partial neglect or refusal to comply with the terms of the contract by the builder which will entitle the owner to rescind, but the default must be substantial and *of such a character as indicates an intention on the part of the builder to abandon the contract*; there must be an actual default, unequivocal renunciation, or legal disability to perform on his part. . . ." (Italics added)

This Court has had occasion to require such an intention on the part of the promisor to abandon the contract before permitting termination or repudiation. In *Hoyt v. Wasatch Homes*, 1 Utah 2d 9, 261 P. 2d 927 (1953), a real estate listing agreement required that the sale be *consummated* before a commission was paid. The buyer and seller signed an earnest money receipt and offer to purchase, but at that point the seller suffered a change of mind and wilfully refused to cooperate. This Court held that, even though the agreement required a *consummated* sale and even though the sale was *not consummated*, the broker was still entitled to his commission. The Court found that the buyer remained ready, willing and able to perform and that the failure of the transaction to be consummated resulted from the arbitrary refusal of the owner to perform his part of the transaction. The Court further held that the agreement contemplated that the owner would co-

operate in good faith toward the accomplishment of the contract purpose. In *Haymore v. Levinson*, 8 Utah 2d 66, 328 P. 2d 307 (1958), the builder was obligated to complete a list of defects in the construction of a home. However, the owner would not allow the builder to proceed in correcting those defects until other items were completed. This Court held that the owner had prevented the builder from further performance and therefore could not take advantage of the failure of performance.

The case of *Parrish v. Tahtaras*, 7 Utah 2d 87, 318 P.2d 642 (1957), has a factual situation which very closely parallels the facts of this case. In that case Tahtaras engaged the services of architect Parrish to design a residence on a lot then owned. Under the terms of the agreement, the total cost of the residence could not exceed \$65,000.00, including architect's fees. The architect prepared sketches, drawing and specifications, but the bids ranged from \$73,280.00 to \$90,000.00. Tahtaras then directed the architect to make alterations in the plans, but all bids were again rejected. Tahtaras then notified the architect of his intention to abandon the project of constructing a residence. This Court held that the architect, having remained ready, willing and able to proceed with the modifications after having twice before failed, was entitled to collect for his services. On page 645, this Court stated:

“* * * The defendants abandoned by an unequivocal act the project after they had told the plaintiff to go ahead and modify the plans to come

within the cost limitations set, and while plaintiff remained ready, willing and able to proceed with such modifications for a second time, the first modification having been rebid and rejected by the defendants. In the case of abandonment by the owners of their contract with an architect, where the architect is in the process of fulfilling the conditions under his contract for services, the architect may bring an action for damages on the contract, or in the alternative, sue in quasi contract under the theory of quantum meruit. * * *

The conduct of Exquisite in remaining ready, willing and able to reconstruct the home as directed by plaintiffs, contrasts sharply with the conduct of plaintiffs. Here the plaintiffs simply had a change of mind and decided that they did not want to construct that particular plan upon that particular lot. In this respect, it must be recognized that the lot had been purchased and the plans drawn considerably prior to the contract date of October 7, 1971. Because of this change of mind, the plaintiffs simply refused to permit Exquisite to proceed with construction. On January 3, 1972, plaintiffs ordered their agent to pay no further installments of the contract price (R. 189, 256, Ex. 13-DE). Then, after great delay, the plaintiffs notified Exquisite in writing that they did not wish to proceed further with the construction and considered themselves excused from further performance. (Ex. 16-DE)

The letter of March 9, 1972, is clearly in repudi-

ation of the entire contract. Similarly, the failure to pay an installment of the contract price as provided in a building or construction contract gives the contractor the right to consider the contract at an end. 13 Am. Jur. 2d, *Building and Construction Contracts*, Section 102; and *Gabriel v. Corkum*, 183 Oregon 679, 196 P. 2d 437 (1948).

Such an abandonment by the owners of their contract with the contractor, enables the contractor to recover for damages on the contract, or in the alternative, in quasi contract under the theory of quantum meruit. Citing abundant authority, this Court held in *Parrish v. Tahtaras*, *supra*, that recovery could be had either on the contract or in quantum meruit. In this case Exquisite elected to counterclaim on the contract as amended.

CONCLUSION

Exquisite Home Builders, Inc. signed the contract with plaintiffs on October 7, 1971 — several months after the Sherwood Drive lot had been purchased and the plans drawn. The work of Exquisite conformed to the plans and specifications, and after the plans were amended its work conformed to the amended plans.

Plaintiffs have complained that the positioning of the house by Exquisite was wrong, but plaintiffs have never, in the trial or in their brief, stated where the

house should have been positioned. If the plaintiffs would have stated their desires as to the position of the home, the same would have been completed since Exquisite remained ready, willing and able to perform. The truth is that the plaintiffs suffered a change of mind and refused to cooperate with Exquisite.

The responsibility for the defective plans and specifications rests with the owners or with those designing the plans on behalf of the owners. The fact remains that the plans were drawn for the owners prior to the involvement of Exquisite, and that the plans were drawn defectively.

The judgment rendered for Exquisite Home Builders, Inc. against plaintiffs should be affirmed, and Exquisite should recover its costs on appeal, including a reasonable attorney's fee.

Respectfully submitted,

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