

2001

Kent W. Holman and Alfred G. Kesler, dba Golden
Spike Reality and Construction v. Blair W.
Sorenson and Marjean Sorensen : Unknown

Utah Supreme Court

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Lake City, Ut
Attorney for

IN THE SUPREME COURT OF THE
STATE OF UTAH

KENT W. HOLMAN and
ALFRED G. KESSLER, dba
GOLDEN SPIKE REALTY AND
CONSTRUCTION,

plaintiffs-Respondents,

vs.

BLAIR W. SORENSON and
MARJEAN SORENSON,

Defendants-Appellants.

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Case No. 14305

SUPPLEMENTAL ABSTRACT OF RECORD

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IN THE SUPREME COURT OF THE
STATE OF UTAH

KENT W. HOLMAN and
ALFRED G. KESSLER, dba
GOLDEN SPIKE REALTY AND
CONSTRUCTION,

Plaintiffs-Respondents,

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BLAIR W. SORENSON and
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SUPPLEMENTAL ABSTRACT OF RECORD

Respondents had not received, from the Appellants, at the time of the preparation of Respondents' Brief, an Abstract of the Record. Anticipating that such an Abstract is yet to be furnished, plaintiffs have excerpted only those portions of the Record which most directly support the Trial Court's Findings. The Respondents' Abstract includes all of the testimony of the Plaintiff, Kent Wesley Holman, with the exception of the cross-examination on rebuttal, the testimony of Rosslin Jackson Nichol and Alfred George Kessler, and the Plaintiffs cross-examination of the Defendant, Mr. Blair W. Sorenson. The testimony excerpted by the plaintiffs comprise 282 pages of a total record of 442 pages. It is anticipated that the remainder of the

Record, primarily Appellants' Case-in-Chief, will be abstracted by Appellants, and that this Abstract may be supplemented insofar as Appellant determines such supplementation necessary.

PLAINTIFF'S CASE-IN-CHIEF

KENT WESLEY HOLMAN

Mr. Holman, who had been a contractor "full time" for 3 years, testified that Golden Spike Realty and Construction was a partnership between himself and Alfred G. Kessler, and that as between the partners he, Mr. Holman, handled the administrative details. (R. 3)

Mr. Sorenson, the Defendant, came on a job at Green Street that was being constructed by the partnership and talked first to Mr. Kessler (R. 4) and later to Mr. Holman. He inquired about a bid for a fourplex on the same street, for which he then had no plans or specifications. (R. 5) Several months later, plans and specifications (Exhibit P-5) were developed by a Mr. William Hargreaves, who acted as both architect and engineer. The contractor had no participation in the development of the plans. (R. 6)

The first discussions concerning the plans and specifications did not include a basement plan and the first rough estimate of the cost to build was given by the contractor without reference to a basement. As a consequence of the initial discussions, the parties signed an

Earnest Money Receipt and Offer to Purchase, Exhibit P-1.

(R. 8) The contract price was \$55,000.00. Some extra things, not included in the original plans, were estimated, including a full basement and the demolition of a building on the property. (R. 9,10) At the time of the execution of Exhibit P-1, there were still no basement plans. The Earnest Money was executed first, because at the time, the Defendant Mr. Sorenson, had no loan commitment. On April 23, 1973, the parties, because of increasing costs, increased the price for the project by \$1,000.00 to \$56,000.00 by a letter agreement, Exhibit P-2. (R. 11)

On about June 15, 1973, Mr. Sorenson obtained financing. On May 8, 1973, the parties signed a Construction Agreement, Exhibit P-3, and then, subsequently, a Supplement to General Building Contract, Exhibit P-4. (R. 13) In entering into the arrangements of Exhibits P-3 and P-4, the Plaintiffs relied upon the plans and specifications, and bid on the plans as then extant, knowing, however, that there would be a basement. Later, a supplement to Exhibit P-5, a basement plan, was prepared by Mr. Hargreaves. (R. 15)

Construction commenced on July 27, 1973. The contractor arranged to sub-contract demolition. The sub-contractor, Doug Norton, agreed to demolish the building without charge, for the salvage. The contractor testified that it was "pretty much standard" that, in the absence of exclusions, the demolition contractor obtains the salvage. (R. 16) The contractor estimated \$350.00 for tree

removal, allowing the sub-contractor nothing for demolition. Several days before bank approval of the loan, the contractor found several women removing items from the premises with Mrs. Sorenson's approval. They were told that the items were a part of the salvage and to take nothing other than what they already had. In response to the request, the plaintiffs received a letter from the Defendants first attorney, Mr. F. Briton McConkie, directing them to cease proceeding with the project, Construction Contract notwithstanding, since Mrs. Sorenson, contrary to her husband's prior representations, was the owner and the Contract was entered into without her consent. The letter, Exhibit P-6, threatened a lawsuit if construction continued. (R. 18,19) The plaintiffs had been clearly told before the arrival of Mr. McConkie's letter, by Mr. Sorenson, both in writing (See Exhibit P-3) and verbally, that Mr. Sorenson owned the property in fee simple. (R. 19)

Rather, Mr. Holman said, than get in a "hassle" with the Sorensens' attorney, he permitted the removal of the furnace and, he thought, of plumbing and light fixtures and other items of a similar nature as well. Mr. Norton, without the salvage, refused to proceed on the demolition, another sub-contractor was hired and the contractors costs were increased by an unanticipated \$340.00. (R. 20)

The Contract, Exhibit P-3, envisioned a completion time of November 30, 1973, or of approximately 6 months from the date construction commenced. The supplement, Exhibit

P-4, said 190 days. Construction was to commence within 30 days from the time the contractor received notice everything was ready. "Everything" included notice that the bank loan had been approved and recorded, that the plans were finalized, received by the contractor and approved for construction by the municipal authorities. (R. 21) It also referred to the establishment of a loan in process account in the lender's office.

The plaintiffs never received written notice as envisioned by the Contract, and made inquiries concerning the matters themselves. (R. 22)

Mr. Sorenson was obliged, contractually, to secure a building permit, and the contractor to pay for it. The task, however, fell to Mr. Holman. The plans, prepared by Mr. Hargreaves, without Plaintiffs consultation, were not initially approved and were returned to the engineer for correction. They were finally approved on about July 6, 1973, (R. 24) nearly two months after the Construction Agreement was signed. After the 2 month delay on the plans, construction commenced on July 27. (R. 25)

When the excavation began, for the basement added by Mr. Sorenson and his architect and engineer, Mr. Hargreaves, it was determined that there was a water table problem. The project, at the request of Mr. Hargreaves, was abandoned for a week, to see if it would dry out. (R. 25) The plans presented to the contractor specified that the soil conditions were clay. No soil tests were made by the engineer,

whose responsibility such tests clearly were. (R. 26)

Upon discovering water, Mr. Holman recommended that the basement, which was not in the project's original conception, be abandoned. Mr. Hargreaves, he said, concurred. (R. 27) Mr. Sorenson, however, wished to retain the basement. Retaining walls, raising the footings and backfill were required to implement the construction of a basement in the face of the water problem. (R. 28) None of these items were envisioned by the original plans. The building had to be, because of the water problem, raised substantially above grade. (R. 29)

Railroad ties were considered for the retaining walls to save costs. (R. 30) Mr. Holman gave an oral bid of \$10.00 per linear foot for the construction of concrete retaining walls and backfill. The bid was not accepted and Mr. Sorenson undertook the responsibility for the retaining walls, obtaining railroad ties. Mr. Holman cautioned him to check with the City to insure that the retaining walls met its requirements. (R. 31) The construction of the retaining walls became, by Contract, the responsibility of Mr. Sorenson, who was to sub-contract the work out. (R. 32)

On September 1, 1973, the parties entered into the Letter Agreement, Exhibit P-8. (R. 33) The Plaintiffs agreed to waterproof the basement, to add asphalt emulsion on the outside of the foundation and to do those things provided in paragraph 3 of Exhibit P-8, for the price assigned. Mr. Sorenson agreed to comply with the City Ordinances

respecting a building raised above grade (R. 34) and to assume responsibility for the costs of the retaining walls and, Mr. Holman said, of backfill. The additional charges for the contractor's additional work were to be paid when the work was completed. The work was completed in September 1973, and the Plaintiffs were never paid for it. (R. 35,36)

Other changes in the basement, beyond what was originally bid, were included and priced in Exhibit P-8, and payable when complete. The work was completed as agreed but the contractor was never paid. (R. 36,37)

The Defendant's plot plan had specific dimensions for the setback from the sidewalk. When inspected, the construction was too close, requiring the building to be moved back and the shortening of the mansard. Paragraph 6 of Exhibit P-8 concerned this problem. (R. 37,38)

The foundation followed the plans and specifications prepared by Mr. Hargreaves at Mr. Sorenson's express instructions. Faulty plans resulted in the forms being placed incorrectly in violation of City requirements. (R. 38,39) A survey was ordered to determine, specifically, the requisite setback. The footings, which were both dug and poured pursuant to the plans, were in the wrong place. New footings were dug, new concrete was layed and additional rebar installed. (R. 39)

Mr. Sorenson, abandoning railroad ties, sub-contracted for concrete retaining walls. The railroad ties

could not be used and while they were at the site, they were an impediment to construction. (R. 40,41)

The construction of the concrete retaining walls by Mr. Sorenson's sub-contractor went poorly. The footings were initially misplaced, the rebar was misplaced, the footings were not properly covered and were frozen. (R. 41) Some of the rebar was left out altogether, the wall subsequently cracked and deadmen, or supports, were installed to stabilize the wall. (R. 42)

Mr. Sorenson subsequently denied that he was responsible for placing backfill behind his retaining walls. That became a source of dispute. Mr. Holman thought the retaining walls too small. (R. 43) The raised foundation caused a problem with the City.

Mr. Holman testified that the retaining walls needed to be done quickly so that the backfill could settle before concrete was poured on top of it. The work was not completed by Mr. Sorenson until January of 1974, some eight months after the parties entered into the Construction Agreement, Exhibit P-3. The failure to complete the retaining walls delayed the project. It was not, Mr. Holman said, advisable to pour flat concrete work in the winter on frozen and expanded ground. The contractor's work could not then be done until spring. January of 1974 was very cold. (R. 45, 46)

Before the retaining walls were erected, the City issued a stop order (R. 46) because the stairs coming off

the front of the building, modified as it was because of the water table problem, went too far into the side yard in violation of the City Ordinance. The stop order was in effect for two or three days and was released at the instance of Mr. Hargreaves. (R. 47,48) A variance had to be obtained for the retaining walls, which were higher than the Code permitted them to be. Additional plans were required to obtain the variance. Public notice had to be given in the paper and the matter had to be presented by the Board of Adjustment. Mr. Holman believed the petition was granted on a second hearing and never saw the plans and specifications which accompanied Mr. Sorenson's request for the variance. (R. 48)

The variance took somewhere around three weeks to obtain and, again, delayed the contractor in certain phases of his work. The variance was related to the retaining walls and ultimately to the water table problem, for which Mr. Sorenson was fully responsible. (Exhibit P-8, paragraph 2) Had construction commenced, conventionally, according to the original plans, no variance would have been required. (R. 49)

The funds for the project were deposited in a loan in process account at American Savings but they were short of being adequate to meet the contract price by \$6,000.00. (R. 49,50) Mr. Holman called the differential to Mr. Sorenson's attention at a meeting at the lenders office. The Contract provided for progress payments. (R. 50)

The differential amount, despite the requirement of the Contract, was never deposited as required in the loan in process account. Mr. Sorenson agreed, Mr. Holman testified, at the lenders, that the differential would be deposited in the loan in process account. Failure to deposit the money as required by the Contracts, Exhibits P-3 and P-4, and as promised verbally, resulted in diminished draws when the progress payments were made. (R. 51,52) In addition to the diminished draws caused by the fact the full contract price was not on deposit as required, the lenders right to deduct its costs at periodic points, further diminished the plaintiffs progress draws. (R. 52) The items for the lender were construction interest, prepayment of taxes, insurance, service charges and the like. Mr. Sorenson was also responsible for the lenders charges. (R. 53)

During construction there were times when the lender, American Savings, acting on Mr. Sorenson's instructions, refused to permit the plaintiffs to make their draws. On the occasion of the second draw, Mr. Sorenson held up an eight thousand dollar draw because of some pitmarks on the basement floor caused by the leakage from a rainstorm. The cost of the repairs for the floor was approximately \$260.00 and the draw did not involve the concrete at all, but rather, lumber and materials required to bring the building up to the square. (R. 54)

Exhibit P-7, a letter dated October 26, 1973, had to do with the draw that was withheld and was prepared by

Mr. Holman. (R. 55) The letter made demand for the deposit in the loan in process account of the full amount contractually required. Mr. Holman testified that he knew that the money was never deposited in the loan in process account. The Exhibit, P-7, also made reference to other breaches by the Defendants of the Contracts between the parties. (R. 56)

There were, Mr. Holman said, other problems with Mr. Sorenson. These are discussed on page 57. Mr. Sorenson continually called Mr. Holman on the telephone with complaints about the work and its progress. On "many" occasions, Mr. Holman said, he was on the phone with Mr. Sorenson till midnight. (R. 58) Many delays on the project, Mr. Holman testified, were caused by Mr. Sorenson's conduct or by matters for which he was otherwise responsible. They included the delay in getting the loan from American Savings approved, the delay in getting the plans approved and a building permit, (R. 60) a week lost in connection with the water table problem, that is in letting the site dry out, rearrangements for a larger backhoe to cope with the water, the error in respect to the location of the original footings (R. 61), the survey with respect to the setback, the preparation and erection of new footings and the stop work order. (R. 63)

Mr. Sorenson, who was to install the carpeting, arranged with a sub-contractor who put down a tack strip and pad, but no carpet for two and one-half weeks thereafter. (R. 63) Five days were lost as a result of

Mr. Sorenson's holding up the second draw. There were days with the Defendants' attorney and with the State Contractors Board to discuss the problems. There was also a failure to notify when the financial arrangements were concluded so that construction could commence. (R. 65) The delays are discussed on the record from page 60 to page 65.

In addition to Mr. Sorenson's delays, there were some damage from a windstorm, (R. 62) some severe inclement weather (R. 63) and some nine holidays. (R. 63)

Mr. Sorenson, in view of the problems between the parties, initiated some contacts with the State Contractor's Office. (R. 65) The discussions there, one involving Mr. Holman and two involving Mr. Sorenson, concerned the delays in construction and the responsibility for the disputed backfill on the retaining walls.

Mr. Holman agreed to abide by the State Contractor's recommendation, to the binding arbitration of that office. (R. 66) Mr. Sorenson, who involved the State Contractor, refused to be bound by his decision. (R. 67)

Mr. Holman testified he did not recommend Mr. Hargreaves to Mr. Sorenson, although he was familiar with the engineer. (R. 69) The Plaintiffs attempted to keep the City informed of their progress and requested inspections, periodically. (R. 70) Mr. Holman was personally present on a number of those occasions. (R. 70,71) There were no difficulties with the City's inspections other than as

previously testified. Mr. Hargreaves also made on-site inspections. (R. 71)

Mr. Holman was concerned, when Mr. Sorenson did not deposit all of the funds required by the Contract to be deposited in the loan in process account, that there would not be adequate funding to pay for the completed project. (R. 72)

If the project had been completed, according to plan, the Plaintiffs would have realized a profit of \$4,000.00, a very modest profit on a project of the kind envisioned. It became apparent to the Plaintiffs, as the work progressed, that there would be no profit on the job. Mr. Sorenson was apprised of the narrow margin of profit. (R. 73) Mr. Holman, and the engineer Hargreaves, told Mr. Sorenson, that the Plaintiffs bid was, from his point of view, a "very, very good" one.

The Plaintiffs were low bidders among others who had bid. (R. 74)

Mr. Sorenson admitted to Mr. Holman having dealt directly with the Plaintiffs sub-contractors. The dealings were objectionable to the Plaintiffs. (R. 75) Mr. Sorenson, Mr. Holman testified, ordered a higher grade of shingles than called for on the plans from Wasatch Roofing, one of the sub-contractors, without consulting with the Plaintiffs. When told, the direct order of such materials was subject to a change order, the purchase was cancelled. (R. 76)

The air conditioning was misconceived on the plans, violated the Building Code and delayed the sheetrocking. A discussion of the problem was contained on pages 77 and 78.

Mr. Sorenson ordered more expensive plumbing, directly from the plumber, and extra cabinets from the cabinetmaker. Changes in the kitchen plan were arbitrarily ordered by the Defendant Sorenson without consultation, without the contractors consent or knowledge. (R. 78)

The Plaintiffs were dismissed from the project by the Defendants, formally by means of a letter from Mr. Sorenson's record attorney, Mr. Hollis Hunt, on May 30, 1974, (R. 78) Exhibit P-10. When the letter was received, the Plaintiffs were on the job rehanging and adjusting doors, possibly a day and a half removed from completion of everything they would physically do on the job. There was one or two days work left for sub-contractors. (R. 80)

Exhibits P-12 and P-13 were change orders on the project.

In connection with the analysis of damages, Mr. Holman, the Plaintiff, utilized a Damage Recapitulation, Exhibit P-11, which was admitted as illustrative of his testimony. The testimony supporting the Exhibit begins on page 82 and continues on through page 102.

Item (1) under Extras involved changes commissioned in writing. See Schedule A to Exhibit P-11. Item (2), Schedule B to Exhibit P-11, involved changes made by Mr. Sorenson without consent. (R. 84) Item (3), Schedule C

to Exhibit P-11, concerned extras and changes Mr. Sorenson requested and agreed to sign change orders for and which he, then, later refused to sign or pay for. (R. 85) Item 4, for which there was no attached Schedule, concerned expenses incurred by reason of the inadequacies of Mr. Sorenson's plot plan, from which the Plaintiffs were obliged to build. (R. 86)

A complete discussion of the Schedules supporting the Extras on the Damage Recapitulation, Items 1, 2, 3 and 4 of Exhibit P-11, is contained in pages 86 through 99.

Mr. Holman's testimony concerning the Contract credits to the Defendant Sorenson (owner) and the reasonable cost of the completion of the project, begins on page 99 and continues through 102.

Mr. Holman testified that the partnership had expended, for material costs alone on the project, \$41,427.31. (R. 102,103) For labor costs, the figure was \$8,635.00. Other bills, which had not been paid, amounted to roughly \$7,000.00. (R. 103,104)

Ten percent profit, with an additional four to five percent for overhead was, Mr. Holman testified, a reasonable rate of profit for the job.

The unpaid bills, the Plaintiff testified, were unpaid because the money required to pay them had not been disbursed by Mr. Sorenson. (R. 104) The result adversely affected Golden Spike Realty's credit reputation, impaired

the partnerships ability to do business and put the new, young company on a cash basis on other jobs.

CROSS-EXAMINATION

KENT WESLEY HOLMAN

Mr. Holman, on cross, testified that he received the plans for the basement "quite some time" after he signed the Contract and the Supplemental Contract, Exhibits P-3 and P-4. (R. 107) Everything, including the work Mr. Sorenson was to do, was to conform with the Code. (R. 108,109) It was not unusual, he said, for a wife not to sign a Contract. (R. 110)

The Sorenson's, Mr. Holman said, did not tell him they desired to remove flowers and shrubs from the property until they had told the plaintiffs to handle the demolition on the building and entered into a Contract for him to do so. (R. 113) The letter from attorney McConkie requesting that construction cease because Mr. Sorenson did not own the property, came after the Contracts were signed but before the demolition.

Sometime after Mr. Holman talked with the bank to confirm that the documents had been recorded, Mr. Sorenson, whose responsibility it was, gave the okay to get started on the project. (R. 116) The City's permit for demolition preceded its approval of the construction plans. The hole was dug and work, other than demolition, commenced the day the building permit was issued. (R. 117)

It was unusual to have, the witness said, a water table problem. The Sorenson job was the first and only such problem experienced by the Plaintiffs partnership. The risk of such a problem was not calculated into the Contract.

(R. 122) The builder had no concern about a potential water problem and nothing about the property gave him any forewarning. (R. 123,124) The changes to be made by the Plaintiffs as a result of the water table problem were specified in the September 1, 1973, Agreement, Exhibit P-8. All other changes necessitated by the water were the responsibility of the Defendant Sorenson. The delay caused by the water table was approximately two weeks. (R. 124,125)

The water problem required extra reinforcing steel. (R. 126) Beyond the terms of the September 1 Agreement, Mr. Sorenson was to do the other work required by the water problem, like a sub-contractor or the builder. (R. 128) Mr. Sorenson got his own sub-contractor for the retaining walls. The Plaintiffs never saw a bid on that part of the job.

The presentation of certain of contractor's claims for extra work done, for which the Defendants were obligated, was delayed because there was no closing. (R. 129,130)

The witness testified that the railroad ties, which were at first to be used for the retaining walls, made it so that materials could not be dumped on the back end of the property by truck. A cat was required to remedy this problem. (R. 132) Mr. Holman was not at the scene

when the faulty concrete retaining walls were poured, or when the steel re-bar was incorrectly emplaced. (R. 134) The sub-contractor who did the work was not controlled by the plaintiffs. The wall cracked when the area was back-filled. Because the retaining wall was not completed by Mr. Sorenson until January, the concrete flatwork, patio, stairs and sidewalks, could not, because of the frozen ground, be poured. (R. 136)

The footings for the retaining walls froze because Mr. Sorenson's sub-contractor did not take adequate precautions to cover them. The stop order delayed work three days. (R. 138)

Because of the failure of the Defendant to deposit, as required, the funds, the Plaintiffs draws were short, the first one on September 26, 1973, by \$400.00. (R. 139,140) Every draw was computed on the basis of a \$50,000.00 loan rather than on the purchase price, \$56,000.00, of the building. (R. 141,142) The letter, Exhibit P-7, was a demand on the Defendant Sorenson for the deposit of the funds that were short. It was dated October 26, 1975, (R. 142) after the Defendant Sorenson stopped payment on the second draw. (R. 145)

A list of the causes of delays suffered by the Plaintiffs is contained in the question of defense counsel on page 149. Mr. Holman testified that in the partnership, although both partners worked on the job, he assumed administrative responsibilities and Mr. Kessler assumed

responsibility for the on-site construction. (R. 149,150)
The delays on the job affected both the partners.

Mr. Holman testified that Mr. Hargreaves, Mr. Sorenson's engineer and architect, had done some work for him. The partners made specific requests for payment for extras. (R. 151)

The plaintiff denied that Mr. Sorenson could effectuate changes with sub-contractors without plaintiffs consent. The witness did not originally consent to the installation of dishwashers. Later, for an increase in the price, he agreed to changes with dishwashers, ranges and cabinets, quoting Mr. Sorenson the price. (R. 154,155)

Mr. Holman did not instruct a sub-contractor not to install the toilets, but did at one time tell the plumbing sub-contractor to check with him before installing them, because Mr. Sorenson had not paid for extras, they were down to a closing and the plaintiffs wanted some assurance they were going to be paid. (R. 155)

The plaintiffs were on the job when they received Mr. Hunt's letter and had been for a number of days to a week previously. The crews had only to rehang doors and install hardware when the letter was received. (R. 156)
The blacktop was not done. (R. 157)

On pages 157 through 166, the Defendants counsel interrogated Mr. Holman on the details of Exhibit P-11, the Damage Recapitulation. There was discussion of a number of changes requested by Mr. Sorenson, of the times and places

such items were requested, of the names of the suppliers and profit margin.

REDIRECT EXAMINATION

KENT WESLEY HOLMAN

The rough estimate cost done for Mr. Sorenson on the basement, before formal plans were prepared, mentioned three single stud walls and drywall by owner. Mr. Holman had discussions with Mr. Sorenson about the backfilling problem before the concrete retaining wall cracked. (R. 167) Mr. Sorenson was told that the contractor, in connection with the backfilling, would assume no responsibility for the wall because of the way the rebar was placed and the cat operator did the same. The wall cracked with the weight of the machine that was doing the backfilling. (R. 168)

The witness testified that the delays on the job were mostly caused by acts of God, inaccurate plans or the conduct of Mr. Sorenson. (R. 169) Advance approval was not given by the Plaintiffs to various changes, for example, those involving the dishwashers and ranges. They were an accomplished fact, the changes, before the Plaintiffs had a chance to object. The toilets involved additional costs. (R. 170) Mr. Sorenson agreed to pay for the additional costs but later refused to do so. (R. 171)

After recross, pages 171 and 172, the Plaintiff, Mr. Holman, on redirect, identified Exhibits P-15, P-11

and P-16, all of which were admitted in evidence. (R. 176)
P-15 preceded the Earnest Money by two or three days. The
lis pendens, proof of publication and notice of lien, were
also made a part of the record. (R. 177)

DIRECT EXAMINATION

ROSSLIN JACKSON NICHOL

Mr. Nichol, a self-employed plumbing contractor,
was acquainted with the Plaintiffs and with the Defendant,
Mr. Sorenson. He was a plumbing sub-contractor on the
Sorenson project. The witness was aware of the Plaintiffs
dismissal from the job and had, at the time of the dis-
missal, been paid to finish the job. At the time, however,
there were still some items, for example toilets, to be
installed.

A problem arose with respect to the toilets which
under the original agreement were to be American Standard of
a particular type. (R. 178,179) The toilets were finally
installed at the direction of the owner, Mr. Sorenson. The
witness had discussion with Mr. Sorenson about the avail-
ability of the appliances, over, he thought, the telephone.
They discussed installation. The Defendant Sorenson was
advised that it would, in view of a shortage, take approxi-
mately five days to get American Standard appliances.
(R. 180)

Mr. Sorenson agreed on an alternative brand at a
cost, for eight toilets, of \$4.50 per unit, or approximately

\$36.00 over the original agreed price, and the Defendant Sorenson agreed to pay the witness the difference. At the time of trial, Mr. Nichol, had not yet been paid.

Mr. Nichol testified that when he called Mr. Sorenson about the failure to pay the difference as agreed, he was told,

"Well, that was your contract to put those toilets in and I don't feel I am responsible." (R. 181)

Mr. Nichol was unequivocal, however, that Mr. Sorenson had agreed to pay the extra price and that later, as with the plaintiffs, he refused to pay. (R. 182)

Mr. Nichol was paid for the "literal installation" of the dishwashers, but not for the permits. About a week and a half before the trial, or in early 1975, Mr. Sorenson, Mr. Nichol said, "mailed me a check for the permits."

Mr. Nichol was cross-examined at pages 182 to 186. On redirect, Mr. Nichol again concluded that he agreed to buy the toilets from the supply house and that Mr. Sorenson agreed to pay the difference. Mr. Nichol concluded that he did what he, as the plumbing sub-contractor, had agreed to do. (R. 186)

STIPULATION

Counsel agreed, by Stipulation, that if the Plaintiffs' counsel were called to testify on the matter, that counsel would testify that on the eve of the trial, he had worked 60 hours, the reasonable value of which was \$40.00

per hour, and that an appropriate amount for the days in trial would be \$350.00 per day.

The Plaintiffs then rested.

CROSS-EXAMINATION

BLAIR W. SORENSON

Mr. Sorenson admitted that F. Briton McConkie was his attorney early in the proceedings. (R. 304) He said he never instructed Mr. McConkie that Marjean Sorenson, his wife, was the owner of the property and that he did not participate in the preparation of his attorney Mr. McConkie's early letter to Mr. Holman, Exhibit P-6. He admitted that the document was prepared, however, with his consent, knowledge and acquiescence. He said that his wife was only a part owner of the property but admitted that Mr. McConkie's letter said that she was the owner. (R. 305)

At trial, Mr. Sorenson claimed the property, contrary to Mr. McConkie's letter, was jointly owned. He admitted that he represented in the Construction Contract that he was the owner of the fee and said the letter was sent because Mrs. Sorenson did not want to enter into the Contract after he had signed "it against her--will, I should say desires." (R. 306)

The Defendant admitted he was responsible for the plans and specifications and that they were prepared by his consulting engineer, or architect, Mr. Hargreaves. (R. 306) Mr. Hargreaves received his instructions from

from Mr. Sorenson and the plan for the townhouse he requested was, when subsequently received, acceptable to him. It was delivered by him to the Plaintiffs. (R. 307) He requested a firm bid from them based on the plans and specifications he furnished. (R. 307,308) Mr. Hargreaves worked entirely and exclusively for Mr. Sorenson. (R. 308)

The Plaintiffs were not, the witness indicated, entitled to deviate from the plans. They were obligated, he admitted, to the plans and to nothing different or more than was therein specified. The witness instructed Mr. Hargreaves to draw a plan that would fit the lot. (R. 308) He thought he "probably" advised the engineer to utilize the lot to its fullest capacity, and the engineer, in fact, did so. Later, the engineer drew supplemental plans, at the Defendants request. (R. 309)

Mr. Sorenson, who would not admit that the plans used the lot too fully, admitted that when the builder attempted to set the forms to conform to the plans and specifications, that he found himself in violation of the City's requirements and that the forms, set in accordance with the plans, had to be moved. (R. 310)

The witness admitted that the initial plans did not meet with the approval of the City authorities. (R. 310,311)

Mr. Sorenson read all of the documents, Exhibits P-1, P-2, P-3, P-4 and P-8 before signing them. (R. 311, 312) He said, there was a time, before construction

commenced, when Mr. Holman handed him back the plans and said they were not approved and that he, the Defendant, whose responsibility it was, would have to take care of them.

(R. 312)

Mr. Sorenson sought out the builders to bid for his project, not vice-versa. (R. 312) He watched their other fourplex on Green Street during its construction, looking at it, he said, "once in a while" and knew something about their work. The plaintiffs were the low bidders on the Defendants project. He had gotten several bids.

(R. 313) Mr. Hargreaves, when informed of plaintiffs bid, told the Defendant that he had gotten "very favorable terms."

(R. 314)

The witness knew that resetting the forms caused some delay, as did the failure of the plans, initially, to meet the requirements of the City. (R. 314,315)

There was, Mr. Sorenson said, a differential between the amount of the loan and the contract price, (R. 315) but he denied that the progress payments were diminished by his failure to deposit the difference between the figures with the lending institution, or that he ever agreed to deposit the difference. While denying that such an understanding existed, the Defendant admitted that it was precisely such an understanding that was called to his attention by the builder, Mr. Holman, in his October 26 letter, Exhibit P-7. (R. 316,317) Mr. Holman had, he admitted, accused him as early as October 26 of breaching the Contract

by not providing for the deposit of the funds. He proceeded then to deposit some funds with American Savings, not because he had an understanding he was responsible to do so but so "there would be no hassle." (R. 317) The money was deposited after the receipt of Mr. Holman's letter. It consisted of \$1,900.00 cash, and of a pledge letter from a credit union of \$6,000.00. (R. 318) The witness had previously testified, on his deposition, that he had deposited \$7,900.00. (R. 319,320)

The \$6,000.00 was not deposited with American Savings until later, precisely when, the witness said he could not remember. The \$1,900.00 was not deposited until three or four months after construction commenced. (R. 320)

Mr. Sorenson said he did not understand that because the funds were not there the builder would draw short. (R. 320,321) He did understand, however, that there would be charges by the lender in connection with the loan, and that those charges were, primarily, his responsibility. He did not deposit funds with the lender to pay for such charges and they, of course, also had to come, with the builders draws, from the funds on deposit with American Savings, which the witness weakly said he did not know were short by \$6,000.00. (R. 321)

He did not know, he said, that the contractor drew short because the money to pay for the project was not on deposit. He did know that American Savings would reimburse itself for the Defendants expenses from the proceeds

of the loan. (R. 322) The Defendant Sorenson did not know, he said, that if he failed to make the payments as promised under the agreement that he would be in default of its terms. (R. 323)

A survey was required early after the commencement of construction for which the Defendant was obligated to pay. At the time of trial he had still not paid for the survey. (R. 324)

The witness said he did not run soil tests and that he did not remember if Mr. Holman advised abandoning the plans for a basement, though Holman, he thought, "....may have mentioned something." (R. 324,325)

Mr. Hargreaves suggested raising the foundation because of the water table problem and the building up of the side yards. Bringing the foundation out of the ground was not called for in the original plans and specifications. The revisions occurred after the Contracts were signed, after the bid was in and after the commencement of construction on the project (R. 326) and after the contractor had made a "firm" bid. The raising of the foundation made it substantially above grade. (R. 327)

The Plaintiffs bid on the retaining walls and the backfill. The bid was more than the Defendant thought he could afford and he determined not to accept the Golden Spike bid for the retaining walls and the backfill. (R. 328) The Defendant agreed, by means of the September 1, 1973, document, to erect the retaining wall and to comply with

the City Ordinances. (R. 329) The September 1 Agreement dealt with the water table problem. There were no retaining walls and no backfill was called for by the original plans and specifications. (R. 330)

The September Agreement, Exhibit P-8, specified the performance required of Plaintiffs by virtue of the water table problem. The work of the Plaintiffs was itemized and priced. The Defendant contended that the Plaintiffs agreed to pay for the backfill. (R. 332)

There were, Mr. Sorenson said, problems with the City over the side yard. They related to an elevation drawing for steps required by the water table problem. The problem was one for the Defendant who was to comply with the Code, but who did not know, he admitted, what it required. His sub-contractor was also not aware of the requirement. (R. 335)

The witness admitted that the Plaintiffs performed "some" of the work required by paragraph 3 of Exhibit P-8. "I have had no way of knowing if--if the double coating of tar was ever put on. I am taking their word that it was," he said. (R. 336) He assumed, then, that the work required by paragraph 3 was done, many months before the project came to a halt. The price for the work was agreed to in writing. (R. 337) The Contract, Mr. Sorenson concurred, required payment when the work was completed. The witness never made any deposit to cover the additional expenditures. The work required by paragraph 5 of Exhibit P-8 was

performed by the Plaintiffs many months before the letter of dismissal from Mr. Sorenson's attorney, Mr. Hunt, and was payable at the time the walls were installed and completed. No deposit was ever made to pay for such extras and no payments, the testimony clearly indicates, were ever made, (R. 338,340) the express terms of the Contract notwithstanding.

Mr. Sorenson on pages 340 and 341 reversed his repeated assertions at the time of the taking of the deposition concerning when the basement plans were received. The bid quote from the Plaintiffs preceded, he admitted, the amended plans containing a basement addition. (R. 341,343)

The witness called American Savings and told them to withhold payments on the contractors draws (R. 347) more than once. (R. 348) He did not understand, however, that the withholding of payments and like conduct would cause delay or dislocation on the job. (R. 350)

Mr. Holman was willing to submit to the adjudication of the State Contractor, the backfill question in connection with the retaining walls. The Contracts with the contractor were initiated by the Defendant Sorenson. (R. 350)

The cement work on the retaining walls froze because it was poured in cold weather. (R. 351) The rebar, or a portion of it, was improperly placed by the Defendant's sub-contractor, and some was left out altogether. Deadmen were placed to correct the deficiencies. The wall cracked when the backfill was placed. (R. 352) The contractor, the

witness thought, might have mentioned "something" about the danger involved in backfilling under circumstances where the wall was not properly constructed. (R. 353)

Plaintiffs sub-contractor broke a window on the job, and, Mr. Holman said, damaged some scaffolds as well. (R. 353)

The retaining wall was not completed by the Defendant until January, 1974, over four months after Defendant assumed responsibility for the work. (R. 353) Poured, as it was, in freezing weather, the witness did not know if the other concrete work required by the project was delayed by his performance. The witness did not recall "right offhand" if there was any work on the project "more defective" than the retaining wall he undertook to build. It depended, he said, "on how you interpret" more defective. (R. 354)

Mr. Sorenson provided for dishwasher space not envisioned by the plans and specifications. Arrangements were made with Fashion Cabinets. (R. 357) Fashion Cabinets made the suggestion and the Defendant concurred that it was a good idea. The change included cabinets being placed in the three quarter bath which were also not on the plans. The change was made without the advance permission of the contractor, the witness not specifically remembering if it was accomplished at Fashion Cabinets on the occasion of the visit. (R. 358, 359) The witness denied, what the Plaintiff had previously testified, that numerous changes were made

at his direction, the contractor being later advised.

(R. 359)

The witness denied that he refused to sign change orders for work that he had authorized verbally. (R. 359, 360) He agreed to pay for basement doors, a verbal change, or an addition, for \$172.00, and assumed it was paid out of the draws. (R. 360) He agreed to pay for broken scaffolds, but did not do so, he said, because no demand was made on him. (R. 361)

A discussion of extras commissioned by the Defendant, or built, commences on page 359 and continues through page 364.

The witness did not complain to either plaintiff about the absence of a bond and assumed, he said, that they had one. (R. 365)

There were, the witness said, periodic inspections by City Inspectors as the work progressed. He knew of no complaints, by the Inspectors, of defective workmanship on the project, or of any delays caused by virtue of the City's failure to pass on any phase of construction. (Other than those which had to do with the redesign of the plans.) (R. 369)

REBUTTAL

KENT WESLEY HOLMAN

Mr. Holman explained certain of the claims of the Defendant, Mr. Sorenson, raised by the Accounting Summary.

(R. 410) The sheetrock, he said, was placed horizontal rather than vertical at the request of the Department of Planning and Zoning. There was a signed change order for the substitution of fir for rough sawed cedar. (R. 411) The Trane furnace was equivalent in performance to 82,000 BTU, by Trane's own specification sheet.

Under the Defendants claim that there was uncompleted work yet to be done according to the Contract, the witness testified that the plans called for only one storm door, the finish grading required only an additional hour with a small tractor and the Defendant Sorenson's figures for finish grade were more than the costs of the entire excavation of the building. (R. 412) The item for the window well gas meter was, he said, nothing; the claimed hole in brick around the gas line was a matter for simple caulking in connection with the final inspection. The installation of water extension on the roof was not called for by the plans, and the plaintiffs stood ready and willing to make changes and alterations, in any event. (R. 413) Splash blocks for the water drain cost \$2.00 apiece.

On Mr. Sorenson's claim that the work was done unsatisfactorily, the plaintiff indicated that although the window well was bent, it was not called for by the plans and specifications. It would, however, on request, have been replaced. The hole in the front door, the plaintiff knew nothing about and he asserted that, if there was such a hole, that it might have been caused by those who worked

under the control of the Defendant. (R. 414)

The drywall man is, customarily, expected to smooth and repair around electrical switches and plug corners. There was, the witness said, no damaged formica in the kitchen when the Plaintiffs were dismissed from the job. If there was damaged formica, he believed the damage was caused by the Defendant Sorenson's sub-contractors. (R. 415)

Mr. Sorenson was responsible for compaction of the patios under the September 1 Agreement and the deadmen for the faulty retaining walls made compaction by normal conventional means impossible. Patio steps, to have passed inspection, could not have been more than a quarter of an inch out. The plans and specifications called for only one step, not two or three as claimed. (R. 416) The width of the sidewalk was set by the City's Inspector in accordance with the Code. The witness testified he warned the Defendant that the backfill procedure would jeopardize the faulty retaining wall which, of course, did crack. (R. 417) The Plaintiffs moved the backfill dirt, when the Defendant refused, in order to complete their required work with adjacent concrete. The plumber would have repaired a pipe punctured by a nail, customarily, and was asked to do so here. He refused, however, because Mr. Sorenson had not paid his bill as agreed. The pitted concrete in the basement, as the result of a rainstorm, was repaired the day after the problem occurred. (R. 418)

The Plaintiff, Mr. Holman, then proceeded with an item by item rebuttal of the constituent elements of the Defendants claim on the Counterclaim. The further testimony, in the same vein as that just proceeding, is included on pages 419 to 424. The Plaintiffs had paid, he said, \$25.00, per unit, for cleanup on other jobs and on jobs, like this one, where there was no profit, worked with their wives to do the work themselves. (R. 420) The asserted cost for cleanup, he said, \$340.00, was unfair and unreasonable.

All of the extras, the witness testified, were

1. Ordered by Mr. Sorenson in writing,
2. Made necessary by Mr. Sorenson's conduct, that is, by his directions to others at the job-site, or,
3. By change orders made verbally with a promise that a formal change order would be signed followed by a subsequent refusal to execute the documents as agreed. (R. 424)

plaintiffs had voucher checks and lien waivers in the amount of \$41,000.00. The Contract required the plaintiffs to provide lien waivers upon final payment. At trial, as today, there has been no final payment. The lien waivers were provided to American Savings as the draws were made. (R. 425,426)

The letter of dismissal from Defendant's counsel, Mr. Hunt, did not specifically refer to the claim of defective workmanship which became a major element of the Defendants case at the trial. Mr. Sorenson did not complain, as the work progressed, of defective workmanship. (R. 426)

No list was ever presented to the plaintiffs for correction. Mr. Sorenson had carefully observed the plaintiffs work on the other Green Street fourplex, right through the finish. Of the two jobs, Mr. Holman felt the quality of the Sorenson fourplex was perhaps the best. (R. 427)

The plaintiffs were always bondable. The requirement of a bond, Mr. Holman testified, was waived by Mr. Sorenson at the time the cost breakdown sheet was presented to him and Mr. Kimball at American Savings. (R. 427)

Mr. Holman then further discussed item by item the alleged items of defective workmanship. See: Record 429 to 432.

REBUTTAL

ALFRED GEORGE KESSLER

Mr. Kessler, one of the partners in Golden Spike Realty and Construction, took the stand for the first time in rebuttal.

Mr. Kessler, dealing with matters not previously covered by Mr. Holman, began his own item by item rebuttal of the claims made by the Defendant Sorenson contained on the Accounting Summary reproduced in Appellants Brief as Appendix "C".

His technical analysis of the claims, and his comparison of the alleged items with the plans and specifications, begins on page 434 and continues through page 440.

Mr. Kessler concurred with Mr. Holman that the Defendant made no significant complaints on the job about defective workmanship, his assertions at trial and on appeal notwithstanding. (R. 440) On one occasion the Defendant had mentioned that the plywood was buckling and delaminating, but the witness never saw anything like the lists of unacceptable and unfinished work presented at the trial at any time before his dismissal from the job. (R. 440)

Mr. Kessler built the fourplex further up Green Street which sold the Defendant on the Plaintiffs work and he concluded by testifying that as between the two projects, "....Mr. Sorenson got the better job."

Respectfully submitted,

JOEL M. ALLRED
Attorney for Respondents