

1979

Glade Faatz v. Warren L. Forsythe and Ameriwest : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLADE FAATZ,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	No. 16379
	:	
WARREN L. FORSYTHE and	:	
AMERIWEST,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF UTAH
HONORABLE DON V. TIBBS, JUDGE

K. L. McIFF
Attorney for Defendant-Appellant
151 North Main Street
Richfield, Utah 84701

TEX R. OLSEN
Attorney for Plaintiff-Respondent
76 South Main Street
Richfield, Utah 84701

FILED

SEP 11 1979

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Plaintiff-Respondent,	:	
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	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF UTAH
HONORABLE DON V. TIBBS, JUDGE

STATEMENT OF KIND OF CASE

This is a case where a homeowner brought suit against a contractor for the added cost of installing an on-the-job fireplace in a pre-built home and for the cost of installing a gravel driveway.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Don V. Tibbs, Judge of the Sixth Judicial District Court, sitting without a jury. The Judge found in favor of the Plaintiff and against the Defendant and awarded Plaintiff judgment in the sum of \$1638.66 together with costs, some \$755.25 of which related to a fireplace in dispute.

RELIEF SOUGHT ON APPEAL

The Defendant seeks a reversal of the judgment of the lower court only as it relates to the award of \$755.25 for the fireplace in question and requests that as to the same the Court enter judgment of no cause of action.

STATEMENT OF FACTS

On June 9, 1977 Plaintiff and Defendant entered into a construction contract (see Plaintiff's Exhibit #2 attached) under the terms of which Defendant was to furnish a modular home built by Intermountain Percision-Bilt-Homes, (I.P.B.H.) a Weber County based firm. The Contract incorporated I.P.B.H. Plan #577-77 special for Plaintiff (See Plaintiff's Exhibit #3 attached). The contract provided for a pre-fab fireplace in the living room.

On June 17, 1977 Plaintiff met with I.P.B.H. representatives at Defendant's office in Salina, Utah (Tr. 51, 88, 99, 102). Plaintiff was advised that the construction of his home would be delayed by the inclusion of the fireplace (Tr. 27). As a result of this meeting, a change order was issued providing for the deletion of the fireplace (See Defendant's Exhibit #7 attached). The change order was not prepared or signed by either Plaintiff or Defendant (Tr. 102), but resulted in a modification in the plans. The modified plans reflect deletion of the fireplace (See Defendant's Exhibit #14, attached). These plans were presented by Defendant to Plaintiff on July 27, 1977, and were approved and signed by Plaintiff and his wife. Defendant passed on to Plaintiff the \$1000 credit he received from I.P.B.H. as a

result of the fireplace being deleted.

Plaintiff and Defendant both testified that other than the original contract, their only agreement in relation to the fireplace was the one arrived at on June 17, 1977 and which resulted in the modified plan approved by Plaintiff and his wife some few weeks later. The Plaintiff testified as follows:

Q As I understand, the only agreement you claim you reached with Mr. Forsythe specifically relating to the fireplace other than the initial deal was when you had your meeting over in Salina?

A Yes.

Q And that was followed up with the change order and followed up by the corrected plans which you signed?

A This is correct.

Q And never, after that, did you ever enter into any agreement with him in relation to that fireplace?

A. No.

. . . (Tr. 57)

The Defendant's testimony was in accord:

A . . . We agreed to delete the fireplace and that we would give them the allowance that Intermountain Precision Bilt allowed us. I agreed to refund whatever Intermountain refunded to us, and I advised

them at the time it would probably only buy their brick, that they would wind up paying their own labor. . . .

Q Do you ever recall any discussion with Faatzes in which you undertook to do anything in relation to the fireplace after it had been deleted?

A No. I agreed to delete it and refund the money and that was it. . . .

Q Do you ever recall any discussion after you signed this on July 27th that this deletion was ever discussed?

A No. . . .

Q Do you ever recall any discussion where it was indicated that you were responsible for it?

A No.

. . . (Tr. 87, 89 and 92)

Though the fireplace had been deleted from the agreement between the parties, Plaintiff declined to seek concurrence of the Veterans' Administration, who had agreed to finance the home (Tr. 65), and accordingly completion of the fireplace by Plaintiff remained essential.

On February 8, 1978, after an inspection of the premises, the Veterans' Administration inspector made the following entry in his Compliance Inspection Report:

"There appears to be friction between the builder and veteran. Veteran says all work yet to be finished, has been deducted from contract price and that he (the veteran) accepted the responsibility to finish all items listed above as per plans."

One of the items listed was the fireplace (Defendants' Exhibit #12, Attached).

Plaintiff thereafter completed the fireplace at a cost of \$1755.25. Plaintiff's loan was closed on August 14, 1978. The brief notes (Defendants' Exhibit #9, Attached) prepared by the Bank's officer at that time reveal that plaintiff was given the same credit on the fireplace deletion that Defendant had received from I.P.B.H. At no time did plaintiff advise Defendant that he held him responsible for the extra fireplace cost. The following appears in Plaintiff's testimony.

Q Even at the time of closing when AmeriWest was fully paid, you made no demand on Warren Forsythe for any work or made no claims against him at that time; did you?

A This is correct.

Q And so far as you know, as far as you're concerned, you made no demand on him whatsoever until some months later you filed this lawsuit?

A This is correct. . . .

. . . (Tr. 53)

Defendant was served with summons in the instant lawsuit on November 1, 1978.

ARGUMENT

THE COURT ERRED IN FAILING TO ENFORCE
THE TERMS OF THE WRITTEN AGREEMENT
BETWEEN THE PARTIES.

I.

The original agreement between the parties, dated June 9, 1977, consisted of a document entitled "Construction Contract" which incorporated a specific set of plans. The plans called for a fireplace. On June 17, 1977 a discussion was held between the parties and I.P.B.H. The discussion resulted in a modification of the plans and hence the contract. The modification was clear and unambiguous. The fireplace was deleted. Plaintiff and his wife signed the modified plan under the words "APPROVED BY".

The applicable rule of law is as stated in 17A
C.J.S. Contracts §381:

A written contract merges all prior and contemporaneous negotiations on the subject; and such a contract also merges all prior oral contracts, together with and including antecedent correspondence and prior written memoranda. @ page 445

This Court has cited the foregoing section of
C.J.S. with approval. For example in National Surety Corp.
v. Christiansen Brothers, Inc., 29 Utah 2d 460, 511 P.2d
731, citing C.J.S., it made reference to the

. . . well-established rule: that where parties engage in negotiations concerning a transaction, pursuant to which they enter into a written contract, it is presumed that all matters relating to the subject are merged in and constitute

a complete integration of their agreement.
@ page 463

The corollary of the above rule, relating to evidence, is equally well established and is supported by a number of Utah cases cited in C.J.S. Typical of the Utah cases is Erickson v. Bastian et al., 98 Utah 587, 102 P.2d 310, in which the Court stated:

We have the written contract. The express terms may not be changed or nullified by parol testimony, nor may such parol testimony antecedent to the reduction of the agreement to writing be considered when the language of the agreement is clear, unquestioned and unambiguous.

Contrary to objections, the Court allowed Plaintiff to attempt to undermine the written agreement (See e.g. the dialogue at Tr. 30-33). The Court erred in failing to rule that as a matter of law the negotiations and understandings arrived at on June 17 were merged into the modified plans approved and executed by Plaintiff and his wife on July 27. Such plans were an integral part of the contract between the parties and the amendment thereto left no doubt that the fireplace had been deleted.

II.

If there were any admissible evidence to support the proposition that the Defendant retained the burden of completing the fireplace after its official deletion from the plans, the Plaintiff's claim for the additional cost (\$755.25) would still fail under the express terms of the

parties' contract. The contract provided:

All future change orders will be added
to cost by dealer.

and


It is mutually agreed that should there
be any alterations in the above contract
owner agrees to pay to Contractor any
costs incurred by change.

. . . (See Plaintiff's Exhibit #2 Attached)

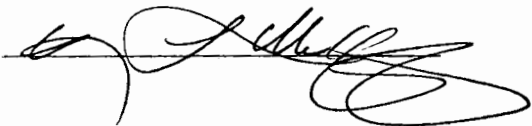
The change is indisputable. Plaintiff was to have
received a pre-fab fireplace supplied by I.P.B.H. built in
as part of the modular unit. The cost therefor was \$1000,
which cost was built into the contract price. In order to
facilitate an earlier delivery, Plaintiff requested a change.
That change ultimately cost \$755.25; the cost of building a
fireplace on the site exceeding the cost of the I.P.B.H.
pre-fab fully installed unit by that amount.

Under the clear, concise, unequivocal and unambiguous
terms of the parties' written agreement, Plaintiff was
responsible for this added cost and the Court erred in
failing to so rule as a matter of law. The net effect of
the Court's ruling was to give to Plaintiff that for which
he had not bargained, and at the direct expense of the
Defendant, who had not requested the change and was not
responsible therefor.

Respectfully submitted,

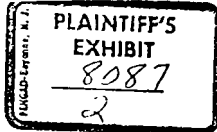

K. L. McIff
Attorney for Appellant

Served 2 copies of the foregoing brief upon Plaintiff's attorney, Tex R. Olsen, by delivery to his office this 30th day of August, 1979.

A handwritten signature in black ink, appearing to be "J. M. [unclear]", written over a horizontal line.

Construction Contract

Ameriwest -- State License No. B 4



Owner's Name Glade Fantz

Phone 526-7725

Owner's Address Mayfield, Utah

City

Address Mayfield, Utah

City

State of

Bk

Pg

Described as Lot Tract

I, the owners of the above-mentioned premises, hereby contract with and authorize you as Contractor, to furnish all necessary materials, labor and workmanship, to install, construct and place the improvements according to the following specifications, and terms for the total sum of Materials and labor to cost \$

Down payment \$ 4,350.00 Balance of \$ 39,150.00 to be financed for V.A. months. Monthly installments

of each, payable on day of each month until paid in full

I.P.B.M. Plan #577-77 Special for Glade Fantz. Delivery and Set.

All on site work as per plans and specifications, and as follows:

Basement with low foundation and window wells

Pony walls and rough for future bath in basement only

Gravel drive and parking slab and septic tank

Change order #1 & 2 included.

This bid does not include lot, water hookup, building permit, or points

All future change orders will be added to cost by dealer

Allowance will be made to owner for work done by his approved sub-contractor.

All work will be done to V.A. specifications.

signed X *Stable* June 1977
 signed X *June* 1977
 signed X *June* 1977

3-11
 1977
 June 1977

Construction Contract

Ameriwest -- State License No. 014



Owner's Name Glade Paeatz

Phone 526-7725

Owner's Address Mayfield, Utah

City

Job Address Mayfield, Utah

City

Site of

St.

Pg.

Described as Lot

Tract

We the owners of the above mentioned premises, hereby contract with and authorize you as Contractor, to furnish all necessary materials, labor and workmanship, to install, construct and place the improvements according to the following specifications, and terms for the total sum of Materials and labor to cost \$

Down payment \$ 4,350.00 Balance of \$ 39,150.00 to be financed for V.A. months. Monthly installments

of \$ each, payable on

day of each month until paid in full

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All on site work as per plans and specifications, and as follows:

Basement with low foundation and window wells

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Gravel drive and parking slab and septic tank

Change order #1 & 2 included.

This bid does not include lot, water hookup, building permit, or points

All future change orders will be added to cost by dealer

Allowance will be made to owner for work done by his approved sub-contractor.

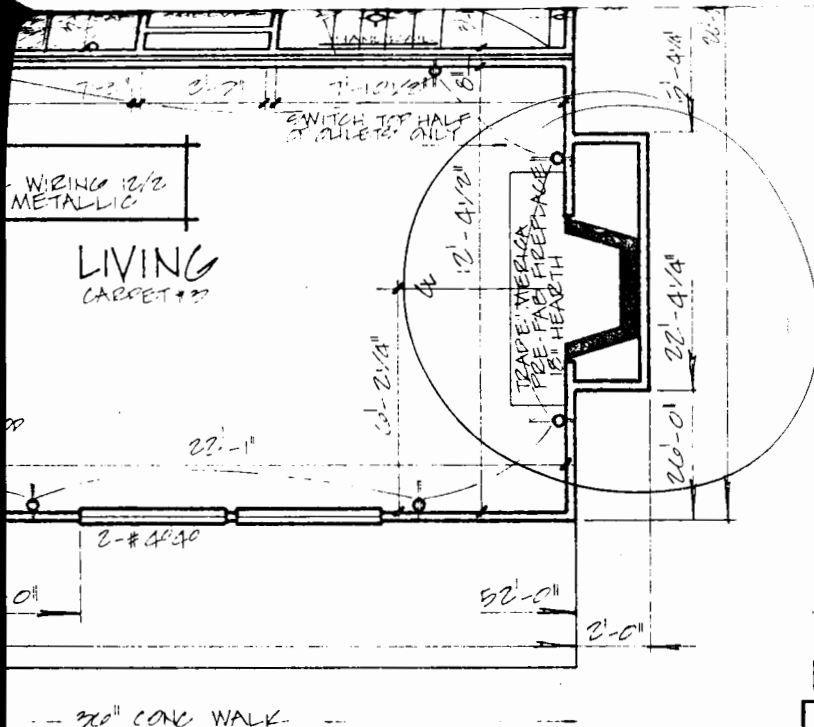
All work will be done to V.A. specifications.

This contract shall become binding upon acceptance thereof by Contractor and shall not be for sale or use in any sense to the word. However, upon acceptance of same by Contractor, it shall be subject to the terms and conditions hereinafter stated and shall be subject to the terms and conditions of the contract price as its stipulated

Contractor shall not be binding on Contractor unless properly accepted by the Contractor, by an officer or member of Contractor's firm, and is not subject to cancellation except by the written consent of all parties hereto. Full acceptance of this contract by Contractor is contingent upon his securing loan for amount of owner. If loan is hereby applied for, it shall be subject to the terms and conditions of the contract price as its stipulated

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PER BOS 3/8 3/4 ADD BATH BENT EST-11

APPROVED BY

THURMAN

WIFE

THURMAN

1971

1971

1971

Y:	DATE	ITEM

- ☐ FHA
☐ FHL
☒ VA
☐ CONL

PLAN

CONSTRUCTION

NOTED

NOTED

EST-11 ECOTONIAN

AMERIWEST

MR & MRS CLADE FAATZ

MAYFIELD, UTAH

INTERMOUNTAIN PRECISION-BILT HOMES

RD. 1 HWY. 89-91, PLEASANT VIEW, UTAH 84404
 PHONE (801) 782-8090 - S.L.C. (801) 532-8080

6-21 CI GE ORDER NO. 13
 DATE 6-17-77 IPBH # 96-77

HOME OWNER <u>Hub Feltz</u>	
BLDG. SITE ADDRESS _____	
CITY _____	STATE _____
PHONE _____	ZIP _____

FOLLOWING CHANGE IS TO BE MADE TO THE ORIGINAL SALES CONTRACT DATED _____
 IS SUBJECT TO THE SAME TERMS AND CONDITIONS.

DESCRIPTION OF CHANGE	DEDUCT	ADD
POOR (4) MACRAMÉ HOOKS		20 ⁰⁰
FOLDING SPINNER DOOR FS 47		60 ⁰⁰
NOTE: FIREPLACE - ^{HEAVY} ONLY (FACING 3 FIREPLACES) 1000 ⁰⁰		
BY SETTER		
SEE BLACKWOOD HEATER IN HALL - CAN NOT IN - MUST BE LEFT		
WASH KIT & UTIL. LINES TO #90000		
SEE MAIN BATH. LINES TO #90000		
WASHWATER.	SEE #2 - 5/41	
WIDE UTILITY CABINETS	EXCLUDED IN BASIC PRICE	

DEFENDANT'S EXHIBIT #7

PAID AS FOLLOWS	TOTALS	1000 ⁰⁰	80 ⁰⁰
		80 ⁰⁰	
	NET CHANGE	920 ⁰⁰	:
	SALES TAX		
	TOTAL	920 ⁰⁰	GREATER

DATE _____ DATE _____
 INTERMOUNTAIN PRECISION-BILT HOMES, INC.
 SIGNED & RETURNED SEE CORRECTED PLAN DATED 6-21-77
 3 COPIES MAILED 6-21-77

1352 || BCS. 3BR 3/4 ADD BATH BKMT. 577-77

APPROVED BY: Glenn Faust
HUSBAND
WIFE: Jara Faust

7/27/77
DATE
3/25/77
DATE
DATE

DATE	ITEM
222-77	ADD/KORREK HOLDS - DELETE FIREARMS

Sponsored by the S.J. Quinney Law Firm

- | | |
|-------------------------------------|-------|
| <input type="checkbox"/> | FHA |
| <input type="checkbox"/> | FHL |
| <input checked="" type="checkbox"/> | VA |
| <input type="checkbox"/> | CONV. |
| <input type="checkbox"/> | CASH |

PLAN
CONTRACTOR
JOB NO.
ADDRESS:

577-77 BOSTONIAN
* AMERIWEST
MR & MRS GLADE FAATZ
MAYFIELD UTAH

VETERANS ADMINISTRATION
COMPLIANCE INSPECTION
REPORT

CASE NO.

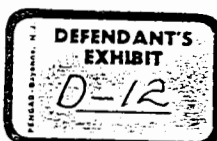
82743

PROPERTY IDENTIFICATION (Include L and H blocks)

1/2 mile West on Christlanberg Road, Mayfield, Utah 84643
Section 29, Township 19 South, Range 2, West

LEGAL DESCRIPTION OF LAND (Complete mailing address)

Valley Central Bank
Main & Center Streets
Richfield, Utah 84701



Ameriwest
P.O. Box 211
Salina, Utah 84654

NAME AND ADDRESS OF VETERAN

Glen Elmo Vattz (Vattz)
P.O. Box 41
Mayfield, Utah 84643

SECTION OF ON-SITE BUILDING IMPROVEMENTS WAS MADE AT INSPECTION STAGE (CHECK ONE)

- ☐ EXCAVATION COMPLETE AND READY FOR FOOTINGS AND FOUNDATIONS. ☐ FOUNDATION WALLS COMPLETE AND READY FOR BUILDING.
- ☐ BUILDING EXTERIOR OR STRUCTURAL MEMBERS OF BUILDING AND FOUNDATION OF HEATING, PLUMBING, AND ELECTRICAL WORK IN PLACE AND VISIBLE (Individual systems may be completed in stages and ready for building in stages).
- ☒ ALL DWELLING CONSTRUCTION, INSTALLATION OF EQUIPMENT, UTILITY CONNECTIONS, AND ANY SPECIFIED ACCESSORY WORK, INCLUDING GRADING, DRAINAGE PROVISIONS, LANDSCAPING, WALKS, DRIVEWAYS, STEPS, OR RETAINING WALLS REPORTED IN THE REPORT AS COMPLETE IN ACCORDANCE WITH THE CONDITIONS OF THE CERTIFICATE OF REASONABLE VALUE.

REMARKS

☐

REMARKS

☐

WHAT CONSTRUCTION AT THIS INSPECTION

1. EVIDENCE OF NON-COMPLIANCE OBSERVED. ☐ C. NON-COMPLIANCE BUILDER WILL COMPLY WITHOUT DELAY. ☒ E. DWELLING HABITABLE BUT COMPLETION OF CERTAIN IMPROVEMENTS WILL BE DELAYED BY CONDITIONS BEYOND CONTROL. IF LENDER HAS DEFINITIVE EVIDENCE OF GUARANTEE BEFORE COMPLETION OF THESE ITEMS, VA FORM 26-1847 MUST BE SUBMITTED. (Check appropriate box.)

2. SUBSTITUTIONS OR DEVIATIONS. ☐ D. NON-COMPLIANCE BUILDER DOES NOT INTEND TO COMPLY. ☐ LENDER'S CERTIFICATION OF COMPLETION ACCEPTABLE. ☐ INSPECTION BY VA COMPLETED. INSPECTION REQUIRED.

3. AND DESCRIBED AS FOLLOWS

Windows, doors, general construction appears to be good. Appliances, carpets, cabinet work, fixtures, plumbing fixtures, smoke detector & humidistat, porches as per plan. Permits, carpet cert., & tree purchase evidence enclosed.

Items in question: (1) Fireplace construction postponed until Spring-change to brick construction pre-fab indicated in plans. (2) Disposal indicated in plans is standard to this model was deleted-builder says by veteran, veteran indicates it was never discussed but appears to be any issue. (3) Paint on exterior ends of building to be completed by factory (standard procedure) when weather permits. (4) Screen doors to be installed 2-11-78.

Indicating memo note except for "E" item.
Typed from original

THIS PROPERTY WILL BE INSPECTED AT NEXT REGULAR INSPECTION ☒ REINSPECTION REQUIRED

SECTION OF OFF-SITE IMPROVEMENTS

COMPLETE THIS SECTION WHEN MAKING THIRD INSPECTION
REVEALED CONDITION ☒ A ☐ B ☐ C ☐ D ☒ AS DEFINED IN SECTION I, AND

LISTED AS FOLLOWS:

Front slab, walks, grading, tree planting-to be finished when weather permits.

There appears to be friction between builder and veteran. Veteran says all work yet to be finished, has been deducted from contract price and that he (the veteran) accepted the responsibility to finish all items listed above as per plans.

REINSPECTION REQUIRED

INSPECTION OF WORK PREVIOUSLY INSPECTED AT ☐ FIRST ☐ SECOND ☐ THIRD ☐ SPECIAL INSPECTION REVEALED CONDITION ☐ A

☐ C ☐ D ☐ E AS DEFINED IN SECTION I, AND DESCRIBED AS FOLLOWS.

ESTIMATED COST OF INCOMPLETED ON-SITE WORK AS REPORTED AT THIRD INSPECTION OR THEREAFTER UNDER CONDITION E, IN SECTION I OR 3 ABOVE.

ESTIMATED COST

PROBABLE DATE OF COMPLETION

Fireplace-(I suggest lender escrow funds)

\$ 1,500.00

just as soon as weather permits

CERTIFICATION - I certify that I have carefully inspected the above property in which I have no interest, present or prospective, and that I have reported the results of my inspection to be at variance with VA Minimum Property Requirements, approved plans and specifications, and any specific requirements for off-site improvements relating to the property inspected.

Feb. 8, 1978

(DATE)

Richard J. [Signature]
(SIGNATURE OF DESIGNATED QUALIFIED INSPECTOR)

COPIES TO LENDER Copy 2 VA LOAN DOCKET COPY must be returned to VA with VA Form 26-1829 or VA Form 26-1876.

PRE-FINAL REPORT APPROVED

☐ ALL IMPROVEMENTS ACCEPTABLY COMPLETED

☐ CERTIFICATE OF REASONABLE VALUE REVISED AS RESULT OF SUBSTITUTIONS OR DEVIATIONS USED IN SECTIONS I, 2, OR 3.

Submit 26-1847 \$20-1049 Escrow 3000

2/17/78

(DATE)

26-1839

Fritz - Ameriwest

43,500. ⁰⁰	Bad
3,400. ⁰⁰	Draw Payment
<u>40,100.⁰⁰</u>	Balance
150. ⁰⁰	Plan Dep.
<u>39,950.⁰⁰</u>	Balance
29,500. ⁰⁰	Draws
<u>10,450.⁰⁰</u>	Balance
50. ⁰⁰	Cleaning Allow.
<u>\$10,400.⁰⁰</u>	Balance
13. ⁵⁰	Bridge Freight
<u>\$10,386.⁵⁰</u>	Balance
920. ⁰⁰	Freight Allow.
<u>9,466.⁵⁰</u>	Balance
4,824. ⁰⁰	Less Amt pd to Dale Cox by Glade Fritz
<u>4,642.⁵⁰</u>	Amt due Ameriwest at closing

