

1988

James Sanchez v. Little America Motel, Inc. : Brief of Respondent

Utah Supreme Court

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DOCUMENT

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BRIEF

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DOCKET NO.

880316

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES SANCHEZ,)

Plaintiff-Appellant,)

vs)

Case No. 880316

LITTLE AMERICA MOTEL, INC., a)

Utah corporation; LITTLE AMERICA)

REFINING CO., INC., a Utah)

corporation, dba LITTLE)

AMERICA HOTEL,)

Defendants,)

A Consolidation of

Case No.'s 880316

and 880378

MARTIN STERN, JR. AIA ARCHITECT)

& ASSOCIATES; OKLAND CONSTRUCTION)

CO., Utah corporation; ROCKY)

MOUNTAIN POOLS, INC., a Utah)

corporation; HIGHAM-HILTON)

MECHANICAL CONTRACTORS, INC.,)

a Utah corporation,)

Defendants-)

Respondents,)

AND JOHN DOES I through III,)

Defendants.)

LITTLE AMERICA HOTEL, INC., a)

Utah corporation,)

Crossclaimant-)

Appellant,)

vs)

OKLAND CONSTRUCTION CO.,)

a Utah corporation,)

Crossdefendant-)

Respondent.)

(Appeal from Order
Granting Summary Judgment
of Defendants

Martin Stern, Jr. AIA
Architect & Associates,
Rocky Mountain Pools,
Inc., Higham Hilton
Mechanical Contractors,

Inc. and Okland
Construction Company of the
Third Judicial District
Court in and for Salt Lake
County, State of Utah,
Honorable David S. Young)

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES SANCHEZ,)

Plaintiff-Appellant,)

vs)

Case No. 880316

LITTLE AMERICA MOTEL, INC., a)

Utah corporation; LITTLE AMERICA)

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AMERICA HOTEL,)

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MECHANICAL CONTRACTORS, INC.,)

a Utah corporation,)

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Respondents,)

AND JOHN DOES I through III,)

Defendants.)

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Utah corporation,)

Crossclaimant-)

Appellant,)

vs)

OKLAND CONSTRUCTION CO.,)

a Utah corporation,)

Crossdefendant-)

Respondent.)

(Appeal from Order
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PARTIES TO THIS PROCEEDING

This respondent adopts the statement of appellant with respect to identification of parties to this proceeding.

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**STATEMENT OF JURISDICTION AND DESCRIPTION
OF THE PROCEEDINGS BELOW**

This respondent adopts the statement contained in the appellant's brief with respect to jurisdiction and a description of the proceedings below. Unless otherwise noted, Martin Stern, Jr. AIA Architect and Associates shall be referred to as "Martin Stern" or "respondent". The term appellant shall be used to refer to plaintiff/appellant James Sanchez.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This respondent does not contest the statement of issues presented for review described by appellant in his brief.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES
AND RULES**

In addition to the constitutional and statutory provisions identified by appellant in his brief, the following provisions are relevant respecting Issue No. 4 presented in appellant's brief:

Utah Code Ann. 78-12-35. EFFECT OF ABSENCE FROM STATE.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term that is limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Constitution of the United States, Article I, Section 8:

The Congress shall have Power . . .

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes. . . .

OHIO REV. CODE ANN. §2305.15 (Supp, 1987):

When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in Sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

STATEMENT OF FACTS RELEVANT TO THE ISSUES
PRESENTED FOR REVIEW

Respondent generally accepts the Statement of Facts Relevant to the Issues Presented for Review as set forth in appellant's brief as supplemented herein:

1. Defendant Martin Stern, Jr. AIA Architect & Associates is a professional corporation incorporated under the laws of the State of California with its principal place of business in the State of California.

SUMMARY OF ARGUMENT

Utah Code Annotated 78-12-25.5 is constitutional and was properly applied by the district court to dismiss plaintiff's claims on summary judgment. Martin Stern, Jr. AIA Architect & Associates (hereafter "Martin Stern"), in the interest of brevity, adopts the arguments made and authorities cited in the superior brief of co-defendant Okland Construction Company, including the arguments predicated upon the doctrine of stare decisis, the open courts analysis and the equal protection

analysis advanced therein.

Martin Stern joins with Okland Construction with respect to Point II of Okland's brief regarding the summary judgment granted to Okland against Little America Hotel on the claims for indemnification. Martin Stern did not joint Okland in its motion against the claims raised against Martin Stern on the same theories because Martin Stern elected to first clarify through additional discovery that there is no basis for a claim for contractual indemnification against Martin Stern by Little America. As Martin Stern will advance the same argument made by Okland Construction in due course, it joins with Okland in the arguments advanced in Okland's brief.

There was no basis to deny Martin Stern's motion for summary judgment against plaintiff under the provisions of §78-12-35, a provision which purports to toll applicable statutes of limitation against persons when they are out of the state. The Supreme Court of the United States has recently ruled that provisions such as §78-12-35 present an unconstitutional and unwarranted restriction upon interstate commerce when applied to a corporate defendant such as Martin Stern under these circumstances. The summary judgment of the trial court must therefore be affirmed.

ARGUMENT

POINT I.

MARTIN STERN IS NOT PRECLUDED FROM RAISING THE STATUTE OF REPOSE AT 78-12-25.5 FOR HAVING FAILED TO PLEAD SAME.

In the district court and in his docketing statement filed with this court, plaintiff asserted that defendant Martin Stern failed to plead the statute of repose at 78-12-25.5 U.C.A., as amended, in its answer, and could therefore not predicate a motion for summary judgment upon the same. After discussions between counsel, plaintiff has dropped this issue from his brief, recognizing that Martin Stern did in fact plead the statute of repose in its answer to plaintiff's Second Amended Complaint dated April 15, 1988. Therein, in the second defense, Martin Stern alleged:

Second Defense

Plaintiff's claims against this defendant are barred by virtue of the provisions of §78-12-25.5 U.C.A., 1953 as amended, for the reason that more than seven (7) years have elapsed after the completion of construction of the swimming pool and sauna and/or other improvements to real property which form the basis for plaintiff's claims.

Martin Stern's understanding is that plaintiff has dropped this aspect of his appeal after recognizing that the statute of repose actually was pled in the only response ever filed by Martin Stern to any claim of plaintiff against it. Martin Stern intends that there be no confusion or misunderstanding in this appeal that it did plead the statute of repose as an affirmative defense to plaintiff's complaint.

POINT II.

UTAH CODE ANNOTATED §78-12-25.5 IS
CONSTITUTIONAL AND PROPERLY SUPPORTS THE
GRANT OF SUMMARY JUDGMENT TO MARTIN STERN.

As has been noted in the brief of Okland, statutes are endowed with a strong presumption of validity. They should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework. Murray City v. Hall, 663 P.2d 1314 (Utah 1983).

Indeed, the Colorado Supreme Court, in evaluating a challenge similar to that raised by plaintiff here against the Colorado statute of repose for architects and contractors stated that "[w]e note that the statute is presumed to be constitutional and the plaintiff bears the burden of proving unconstitutionality beyond a reasonable doubt." (citations omitted.) Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 824-825 (Supreme Court of Colorado, En Banc, 1982) (reh.den. 1983.)

In the interest of brevity and to avoid unnecessary repetition, Martin Stern hereby incorporates the arguments advanced in the superior brief filed by Donald J. Purser and Dwight C. Packard of and for Purser, Okazaki & Berrett, counsel for defendant/respondent Okland Construction Company. Martin Stern borrows from the brief of co-respondent Okland with the permission of its counsel and specifically incorporates all of Point I of Okland's brief hereat by reference. This incorporation is intended to incorporate Okland's arguments respecting the doctrine of stare decisis, its argument respecting

the open courts provisions of the Constitution of Utah and its arguments respecting the equal protection provisions of the Constitution of Utah and the Constitution of the United States.

In further support of those arguments, Martin Stern notes that this court was presented with a further opportunity to address the constitutionality of the statute of repose at §78-12-25.5 U.C.A. upon arguments predicated upon Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) in the case Jackson v. Layton City, 743 P.2d 1196 (Utah 1987). While it appears that the argument may have been raised for the first time on oral argument, this court's opinion does not indicate that the court declined to consider the arguments advanced on that basis.

In Jackson, plaintiffs asserted that the seven (7) year statute of repose extended their time for bringing suit against an owner in possession which had also planned and constructed the improvements claimed to have caused plaintiffs' personal injuries. The court noted that the Jacksons had an effective remedy against Layton City as owner in possession of the property that could have been filed within four years from the date of plaintiffs' injuries. Thus the plaintiffs were unable to invoke Berry v. Beech Aircraft Corp., supra, to attack the constitutionality of 78-12-25.5. This court affirmed the trial court ruling under 78-12-25.5 that dismissed Jacksons' actions against Layton City as the improver of the property because, from the record, it appeared that the subject improvements had been completed for over seven (7) years before the Jacksons filed

their Complaint.

The decision of the Colorado Supreme Court in Yarbro v. Hilton Hotels Corp., 655 P.2d 822, supra, fully addressed arguments attacking the constitutionality of a similar Colorado statute of repose respecting architects and contractors. The Colorado statute, as here, was challenged on both due process and equal protection grounds.

In addressing the due process arguments, the Colorado court observed that limitations of liability for architects and others similarly situated by reasonable means do serve a legitimate public purpose. 655 P.2d 825. Citing Rosenberg v. Town of North Bergen, 61 N.J.190, 293 A.2d 662 (1972). The court noted:

There comes a time when [the defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called to resist a claim when "evidence has been lost, memories have faded and witnesses have disappeared." 61 N.J. at 201, 293 A.2d at 667-668 (1972) quoting Developments in the Law, Statutes of Limitations, 63 Harv. L.Rev. 1177, 1185 (1950).

655 P.2d 825. The court further noted, quoting Mishek v. Stanton, 616 P.2d 135, 138 (Colo. 1980):

The general rule is that a statute of limitations . . . does not violate due process "unless the time fixed by the statute is manifestly so limited as to amount to a denial of justice The legislature is the primary judge of whether the time allowed . . . is reasonable." Oberst v. Mays, 148 Colo. 285, 292, 365 P.2d 902, 905 (citations omitted)

655 P.2d 825. The Colorado court noted that since construction projects generally have expected useful lives of many decades,

possibilities for long term liability for builders and architects are enormous. The court affirmed the policy adopted by the General Assembly of Colorado to limit the extended exposure to liability of these persons by barring suits against architects brought without the period of repose specified in the statute. Because the Colorado statute was rationally related to a permissible state objective, it did not violate due process.

Similarly, the Utah statute of repose at 78-12-25.5 is rationally related to and furthers the same permissible state objective and does not violate due process of the law.

The Yarbro court similarly dismissed the related "open courts" argument raised by the plaintiff in that action, noting that as the statute applied to nonvested rights to sue an architect or contractor and to vested rights which were not timely prosecuted, the statute did not violate the open courts provision of the Colorado Constitution. That provision is similar in effect to Article I, Section 11 of the Constitution of Utah. The Yarbro court held that since the time for filing suit against the architect in that case had lapsed pursuant to the statute prior to the time of the plaintiff's/decedent's injuries, the cause of action against the architect never arose or vested. 655 P.2d 827. The court thus rejected the argument attacking the referenced statute of repose predicated upon the Colorado open courts provision. This court should reject plaintiff's arguments on the same basis because, as noted in the brief of Okland, plaintiff has not been denied a remedy against the owner

of the property.

The Yarbro court also addressed an attack on the statute of repose on equal protection grounds. As here, plaintiff Yarbro argued that the statute granted immunity to a certain classification of defendants without a rational basis. The Yarbro court noted that since no fundamental right or class such as race, sex or national origin was involved, scrutiny of the statute was based upon the inquiry as to whether the statutory classification was reasonably related to a legitimate state objective. 655 P.2d 827 citing Friedman v. Rogers, 440 U.S. 1, 17, 99 S.Ct. 887, 898, 59 L.Ed.2d 100 (1979); New Orleans v. Duke, 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976); Cudahy Co. v. Ragnar Benson, Inc., 514 F.Supp. 1212, 1217 (D.Colo. 1981). 655 P.2d 827.

The Yarbro court, as previously observed by Okland in its brief, noted the rational basis for a distinction between architects and contractors on one hand and materialmen and owners on the other. Beyond the reasons discussed in the Yarbro case, the following other factors should be considered which justify the rationality of the distinction:

1. Builders and architects are subjected to a broad scope of liability which requires limitation. As noted by the Pennsylvania Supreme Court in Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715 (Pa. 1976):

The scope of liability of the class of builders differs significantly from that of the class of owners. First, the class of persons to whom builders may be liable is

larger than the class to which owners may be liable. Landowners may be liable to others who come onto their land. Builders, however, may be liable both to the landowners and to others who use the land. Second, a builder may be liable for construction defects under various legal theories -- contract, warranty, negligence, and perhaps strict liability in tort. Landowner liability for such defects, on the other hand, typically lies only in tort, unless the land owner is a lessor, in which case he is liable only for events occurring while the tenant is in possession.

382 A.2d 718. See also Barnhous v. Pinole, 183 Cal.Rptr. 881 (Cal.App. 1982); Cheswold Volunteer Fire Co. v. Lambertson Construction Co., 489 A.2d 413 (Del. 1984); Beecher v. White, 417 N.E.2d 662 (Ind.App. 1983).

2. It is rational to limit the liability of builders and architects since they have no control over the building after relinquishing it to the owner. After the owner of a structure accepts the finished product, the architect has no right to control the number and type of persons entering the building or to regulate the condition of entry. Following acceptance of the completed structure, there is a possibility of neglect, abuse, poor maintenance, improper modification and unskilled repair. The architect and builder have no opportunity to make ongoing inspections or to control these factors. These distinctions have been recognized and accepted by a number of courts in sustaining the constitutionality of their respective state architects' statutes of repose. See Barnhous v. Pinole, supra; Yarbro v. Hilton Hotels Corp., 655 P.2d 822, supra and Cheswold Volunteer Fire Co. v. Lambertson Construction Co., supra.

3. Statistically a seven (7) year period in which to bring an action against an architect will encompass almost all claims that will arise. As noted in Okland's brief, Congressional studies have indicated that the overwhelming majority of claims brought against architects are brought within seven (7) years of completion of construction. This is true because most defects in the design or construction of improvements to real property manifest within seven (7) years. See Hearing on H.R. 6527, H.R. 6678 and H.R. 11544 before Subcommittee No. 1 of the House Committee on the District of Columbia, 90th Cong., 1st Session 28 (1967).

4. Buildings may last for literally hundreds of years and a limitation is needed to eliminate perpetual liability on the part of architects. This is especially apparent given problems of proof in defending stale claims. As noted in Okland's brief, there are already problems of proof presented in this case with respect to the routine destruction of city building inspection records and the death of the inspector who inspected these premises on behalf of Salt Lake City Corporation. Brief of Okland, page 15; Transcript of Hearing on Motions for Summary Judgment, page 6; Record at 513.

5. The statute under consideration promotes innovation and experimentation to the end of improving design and construction of improvements to real property. As noted in O'Brien v. Hazelet & Erdal, 299 N.W.2d 336, 342 (Mich. 1980):

Innovations are usually accompanied by some unavoidable risk. Design creativity might be

stifled if architects and engineers labored under the fear that every untried configuration might have unsuspected flaws that could lead to liability decades later.

Cited in Yarbro v. Hilton Hotels, 655 P.2d 822, 828.

There is no question that the statute enacted by the Utah Legislature to secure repose from actions against architects and contractors after improvements to real property have been completed for more than seven years is rationally related to accomplish legitimate legislative objectives. The statute thus passes muster under the equal protection clauses of both state and federal constitutions. For these reasons and based upon the reasons and arguments cited in the brief of Okland, the appeal of Sanchez with respect to the constitutionality of 78-12-25.5 must be denied and the order of the district court granting summary judgment to Martin Stern must be affirmed.

POINT III.

THE PROVISIONS OF U.C.A. 78-12-35 (THE TOLLING STATUTE) MAY NOT OPERATE TO DENY MARTIN STERN SUMMARY JUDGMENT.

Plaintiff argues that the district court's summary judgment order in favor of Martin Stern was inappropriate and/or premature because it has not been established in the record whether Martin Stern, a California corporation, ceased doing business in Utah after it completed its work on the Little America project. Plaintiff relies upon the tolling statute found at 78-12-35.

Plaintiff's argument fails and Martin Stern was properly entitled to summary judgment because, as applied to Martin Stern, the tolling provisions of 78-12-35 are unconstitutional as an

impermissible restriction upon interstate commerce under the rule of Bendix Autolite Corp. v. Midwesco Enterprises, Inc., _____ U.S. _____; 108 S.Ct. 2218; 100 L.Ed.2d 896, 56 U.S.L.W. 4648, Westlaw: 1988 W.L. 59900 (U.S.) (decided June 17, 1988).

In Bendix Autolite, Bendix sued an Illinois corporation not qualified to do business in Ohio for breach of contract in relation to a boiler which had been installed by Midwesco in Ohio. Bendix brought suit in federal district court in Ohio against Midwesco. Midwesco asserted the Ohio statute of limitations as a defense. Bendix argued that the limitation did not run because Midwesco was an Illinois corporation not qualified in Ohio and therefore the running of the statute of limitations was tolled pursuant to a provision in the Ohio Revised Code similar to the provisions of §78-12-35 U.C.A., 1953.¹

The Supreme Court of the United States held that states may

¹ Ohio Rev. Code Ann. §2305.15 (Supp. 1987) provides as follows:

When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in Sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

not withdraw defenses predicated upon statutes of limitations on conditions repugnant to the Commerce Clause, Article I, Section 8 of the Constitution of the United States. In holding that the Ohio statute was unconstitutional, the Supreme Court noted that the burden that the tolling statute placed upon interstate commerce was significant. It stated:

The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts (by appointing a resident agent for service of process and qualifying to do business in Ohio) or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden. (citation omitted.) 56 L.W. 4650, 108 S.Ct. 2221

The court further noted:

In the particular case before us, the Ohio tolling statute must fall under the Commerce Clause. Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done in the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long arm statute would have permitted service on Midwesco throughout the period of limitations. The Ohio statute of limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts. In this manner the Ohio statute imposes a greater burden upon out-of-state companies than it does upon Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations. (citation omitted.) 56 LW 4650, 108 S.Ct. 2222

Like the Ohio statute, the provisions of §78-12-35 U C A require that a foreign corporation choose between (1) registering and qualifying to do business in Utah and thereby subjecting itself to the jurisdiction of Utah courts for all purposes, or (2) remaining subject to suit in Utah in perpetuity for acts committed in Utah for which long arm jurisdiction is available. Thus, like the Ohio statute, the Utah statute discriminates between foreign and domestic corporations and imposes an unnecessary and unconstitutional burden upon interstate commerce. For that reason, the provisions of §78-12-35 are unconstitutional as applied to Martin Stern in these circumstances.

Defendant's Motion for summary Judgment should not have been denied on the basis of §78-12-35 even if Martin Stern was absent from the state of Utah from the very day it completed its work on the Little America Hotel to the present. No material factual question is presented as to whether or not Martin Stern, a California corporation, was absent from this state after completion of the Little America Hotel. The appeal of plaintiff/appellant on this issue must be denied and the order granting Martin Stern's summary judgment by the trial court affirmed.

POINT IV

MARTIN STERN JOINS IN THE ARGUMENTS OF OKLAND CONSTRUCTION WITH RESPECT TO THE INDEMNIFICATION CLAIMS OF LITTLE AMERICA HOTEL CORPORATION

Little America Hotel Corporation has raised similar claims

for indemnification against Martin Stern as those under review in the appeal by Little America of the trial court's order granting Okland Construction summary judgment. Martin Stern did not file its own motion for summary judgment against Little America on the indemnification claims in the interest of conducting further discovery to establish that there was no basis for a claim of contractual indemnification by Little America against Martin Stern.

It is likely, at the appropriate time after completion of discovery relevant to this issue, that Martin Stern will file a motion similar to that previously granted in favor of Okland Construction. Martin Stern therefore supports and joins in the arguments of Okland Construction to the effect that Little America's claims for contractual indemnification, express or implied and/or equitable indemnification are barred by the statute of repose at 78-12-25.5.

CONCLUSION


The statute of repose for architects and builders at 78-12-25.5 is not unconstitutional under an open courts analysis, an equal protection analysis or a due process analysis. Plaintiff is not denied a remedy because he can still sue the owner and/or materialmen who are not subject to the statute of repose. The statute of repose serves legitimate state objectives and social policy as declared by the Legislature of the State of Utah. The statute of repose is reasonably related to those legitimate social policy objectives, and does not unduly or irrationally

discriminate in favor of architects and builders.

Plaintiff's appeal must be denied as respects the tolling provisions of U.C.A. 78-12-35 for the reason that the same, as applied to Martin Stern, are an unconstitutional burden upon interstate commerce in violation of Article I, Section 8 of the Constitution of the United States under recent and controlling authority announced by the Supreme Court of the United States. The appeals of plaintiff and co-defendant Little America Corporation should be denied and the orders of the trial court affirmed.

DATED this 24th day of April, 1989.

Respectfully submitted,


Jeffrey L. Silvestrini
COHNE, RAPPAPORT & SEGAL
Attorneys for Respondent Martin
Stern, Jr. AIA Architect &
Associates, Inc.

MAILING CERTIFICATE

The undersigned hereby certifies that four true and correct copies of the foregoing Brief were mailed, postage fully prepaid, on the 24th day of April, 1989 to the following:

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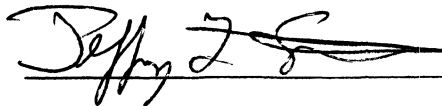
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A P P E N D I X A

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Attorney for Defendants Martin Stern, Jr.
and AIA Architect & Associates

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

	* * * * *	
JAMES SANCHEZ,)	
)	ANSWER OF
Plaintiff,)	MARTIN STERN, JR., AIA,
)	ARCHITECT & ASSOCIATES
vs)	TO SECOND AMENDED COMPLAINT
)	
LITTLE AMERICA HOTEL)	
CORPORATION, a Utah)	
corporation, MARTIN STERN, JR.)	
AND AIA ARCHITECT & ASSOCIATES,)	
OKLAND CONSTRUCTION CO., a Utah)	
corporation, ROCKY MOUNTAIN)	Civil No. C87-268
POOLS, INC., a Utah corporation,)	
HIGHAM-HILTON MECHANICAL)	Judge David S. Young
CONTRACTORS, INC., a Utah)	
corporation and)	
JOHN DOES I THROUGH III,)	
)	
Defendants.)	
)	
	* * * * *	

Defendant Martin Stern, Jr., AIA, Architect & Associates, a California professional corporation, through its counsel Jeffrey L. Silvestrini of and for Cohne, Rappaport & Segal responds to the Second Amended Complaint of plaintiff as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state claims for relief against this defendant upon which relief can be granted.

SECOND DEFENSE

Plaintiff's claims against this defendant are barred by virtue of the provisions of §78-12-25.5 U.C.A., 1953 as amended, for the reason that more than seven (7) years have elapsed after the completion of construction of the swimming pool and sauna and/or other improvements to real property which form the basis for plaintiff's claims.

THIRD DEFENSE

Defendant responds to the specific allegations of plaintiff's Complaint as follows:

1. In response to paragraph 2 of the Second Amended Complaint, this defendant asserts that the party which contracted with Little America Corporation and/or Little America Refining Company for architectural services in connection with the construction of the Little America Hotel is Martin Stern, Jr., AIA, Architect & Associates, a California professional corporation, and not Martin Stern, Jr. & Associates, a California partnership. Martin Stern, Jr., AIA, Architect & Associates, a corporation, admits this court's jurisdiction over it in connection with the Little America Hotel pursuant to 78-27-24 et seq., U.C.A., 1953. This defendant denies that it is regularly engaged in the business of designing pools and saunas as part of its architectural design service as further alleged in paragraph 2.

2. This defendant denies the allegations of paragraphs 37, 38, 39, 41, 42, 44, 45, 46, 47, 49, 50, 51, 53, 53 (second paragraph numbered 53), 55, 56, 57 and 58.

3. In response to the allegations of paragraphs 24, 27, 32, 36, 40, 43, 48, 52, 54, 59, 63, 66, 71, 75, 78, 83, 87, 90, 95, 99 and 102, this defendant reincorporates by reference its response to the paragraphs referenced therein.

4. This defendant lacks information to form an opinion as to all remaining allegations of the Second Amended Complaint and therefore denies the same in their

entirety.

FOURTH DEFENSE

Plaintiff's claims against this defendant are barred under the doctrine of comparative negligence as the negligence of plaintiff equalled or exceeded that of defendants and this defendant in particular.

FIFTH DEFENSE

Plaintiff has a duty to mitigate his damages and to the extent he has not done so, this defendant is entitled to a defense or offset against plaintiff's claims herein.

SIXTH DEFENSE

Given the length of time that has elapsed since the improvements which are the subject of this action were designed and constructed, plaintiff's claims hereunder are barred under the doctrine of laches.

SEVENTH DEFENSE

Plaintiff's claims against this defendant are barred by virtue of plaintiff's assumption of the risk related to his conduct and plaintiff's claims are therefore barred under the Utah comparative negligence statute.

EIGHTH DEFENSE

The instant project, insofar as the pool and sauna were concerned, was a design-build project implemented by a party or parties other than this defendant, subject only to the general scheme for floor plan and layout and other similar criteria provided by this defendant.

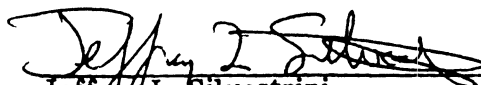
NINTH DEFENSE

Plaintiff's damages were caused or contributed to by persons, conditions or acts outside of the control of this defendant.

TENTH DEFENSE

Any of plaintiff's claims of breach of any express or implied warranty are barred by virtue of the provisions of §§70A-2-316, 70A-2-317, 70A-2-607 and 70A-2-725, U.C.A., 1953.

DATED this 15th day of April, 1988.


Jeffrey L. Silvestrini
COHNE, RAPPAPORT & SEGAL
Attorneys for Defendants
Martin Stern, Jr., AIA
Architect & Associates and
Martin Stern, Jr.

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage fully prepaid, on the 15th day of April, 1988 to the following:

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