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Thomas C. Mabey and Louise S. Mabey v. Kay Peterson Construction Co. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS C. MABEY and LOUISE S. MABEY, his wife,

Plaintiffs and Respondents,

vs.

KAY PETERSON CONSTRUCTION COMPANY, INC., a Utah corporation

Defendant and Appellant.

WASATCH CABINET COMPANY, INC.,

Plaintiff,

vs.

KAY PETERSON CONSTRUCTION COMPANY, INC., a Utah corporation, et al,

Defendants.

Case No. 18338

BRIEF OF RESPONDENTS

Appeal from the Decision of the Second Judicial District Court of Davis County, State of Utah, Honorable J. Duffy Palmer, District Judge

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NATURE OF THE CASE

The case at bar concerns those transactions involving the construction of a home by defendant and appellant herein, Kay Peterson Construction Company, Inc., and the purchase of that home by plaintiffs and respondents herein, Thomas and Louise Mabey. Various subcontractors, suppliers and materialmen filed liens on unpaid accounts arising out of the home's construction. Plaintiffs, Thomas and Louise Mabey, filed suit against defendant

Kay Peterson Construction Company, Inc. for breach of contract for defendant's failure to satisfy the outstanding liens, and further for defendant's failure to complete the home in a quality workmanlike manner. Defendant counterclaimed alleging breach of contract and seeking reformation.

Upon joint and unopposed motions the actions filed by lien claimants were consolidated with the action at bar. Plaintiffs compromised the lien claims, leaving present plaintiffs and defendant identified above as the only parties to the action.

DISPOSITION IN THE LOWER COURT

The matter was tried without a jury before the Honorable J. Duffy Palmer, Judge in the Second Judicial District Court in and for Davis County, State of Utah. The Court rendered judgment for plaintiffs on plaintiffs' causes of action, awarding plaintiffs that amount paid to compromise the outstanding liens together with interest and attorney's fees, and awarding plaintiffs $5,400.00 as and for damages arising from defects in construction. The Court also rendered judgment for defendant in that amount prayed for by defendant based upon relief for a mutual mistake of fact.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek affirmation of the Court's Judgment

in favor of plaintiffs on their causes of action. Plaintiffs further seek reversal of the Court's Judgment in favor of defendant based upon an alleged mutual mistake of fact, or in the alternative that the Court's Order be affirmed in its entirety.

STATEMENT OF FACTS

The subject transactions arose in respect to the construction, sale and purchase of a home on Lot 1 of the Indian Springs Subdivision located at 3604 South Canyon Estates Drive, Bountiful, in Davis County, State of Utah. Kay Peterson Construction Company began construction, following discussions regarding plans with Tom Mabey, a civil engineer, in the fall of 1979, and the home was nearly complete by late March 1980.

Although Mr. Mabey and the firm he was previously employed with had been consulted by the defendant respecting prior residential construction, Mr. Mabey was more involved in this particular project than on prior occasions (T-40-42). Mr. Mabey was involved in the modification of floor plans; he performed various services and purchased materials for the home, such as insulation and plumbing; and both Mabeys had input into sundry aspects of finishing work, such as selection of paint colors and cabinet design.

During the course of construction there were no clear

or defined contractual arrangements between the parties. Mr. Mabey testified that his understanding was that the defendant was building the home on speculation, that is, without a definite buyer and speculating that a buyer would be found after construction (T-36-38). Mr. Mabey also testified that he had affirmatively represented to the defendant that he was not committed and would not commit himself to the purchase of the home during that time (T-26, 36). Mr. Mabey also testified that it was his understanding that if the Mabeys did not purchase the home, they would be reimbursed for materials and services they had contributed to the home (T-25-26). On or about March 20, 1980 defendant did sign a written memorandum (Pl. Ex. D) evidencing an agreement that if the Mabeys did not purchase the home, they would be reimbursed a certain sum of money they had contributed toward the purchase of materials for the home.

That same memorandum, dated March 20, 1980, signed by the defendant and admitted into evidence as Plaintiffs' Exhibit D, also provided that if the Mabeys did purchase the home, said certain sum would be "applied toward the Mabeys' purchase of same said lot and dwelling unit (total estimated cost to date is $134,068.40)." Construction was, at that time, very near completion and the Mabeys made efforts to obtain financing such that they could purchase the home. Between the 20th and

25th day of March, 1980 there was some discussion and negotiation between these parties (Plaintiff's testimony T-26; Defendant's T-115, 116, 88) regarding the terms of the sale and purchase.

On March 25, 1981 plaintiffs and defendant entered into a written contract, in form of a standard Earnest Money Receipt with hand written and initialed modifications. This "Earnest Money Contract" specifically provided, inter alia, that in no event shall the "total cost exceed $109,000.00 unless agreed upon in writing by both buyer and seller" (Pl. Ex. C). The figure of $109,000.00 was arrived at from deducting the price of the lot, $27,000.00, from the total estimated cost of $134,068.40, with an approximate $2,000.00 buffer for incidental expenses to final completion. The Earnest Money Contract specifically did not include conveyance or consideration for the lot upon which the home was constructed.

The lot, upon which the home was built, was acquired by the Mabeys through separate transactions, through an individual, a Mr. Jerry James. The essence of such transactions was that pursuant to other dealings and transactions not relevant to the case at bar, Mr. James acquired the lot and conveyed same to the Mabeys. In all, Kay Peterson Construction did in fact recover the full cost of the lot, as testified to by Mr. Peterson (T-86, 116), some $27,000.00.

After closing of the sale a number of subcontractors

and materialmen filed liens against the home on unpaid accounts arising out of construction of the home. Mabeys then filed an action against defendant and subsequently cross-claimed in the action brought by the subcontractors and materialmen. The lien claims, the action by Mabeys and the counterclaim against Mabeys by defendant were consolidated.

Subsequent to consolidation, the Mabeys obtained a loan from Zion's First National Bank in order to settle and compromise the claims of the lienholders, and in fact the Mabeys did compromise claims totalling approximately $13,464.00 for $9,738.70. To facilitate that compromise the Mabeys were required to obtain a loan at current interest rates.

The matter was tried without a jury before the Honorable J. Duffy Palmer. The Court ruled that there had been a mutual mistake of fact and awarded defendant that amount originally demanded by defendant in counterclaim. The Court awarded judgment to the Mabeys for the amount expended by them to satisfy the unpaid lien claims, together with damages for the interest they paid on the loan in respect thereto and attorneys' fees.

The Court further ruled that as respects plaintiffs' claims for defects and the failure to complete construction in a quality workmanlike manner, the plaintiffs were awarded $5,400.00 in damages unless the defendant were to go in and

correct the defects to the satisfaction of the Department of Contractors for the State of Utah within thirty (30) days. The defendant was effectively granted the option of repairing the work to the satisfaction of a non-interested third party, or paying the plaintiffs the sum of $5,400.00 in damages (T-132).

Subsequent to trial defendant made no effort to correct existing defects for a period well in excess of thirty days. Defendant filed objections to proposed findings of fact and conclusions of law and after hearing Court entered said findings and conclusions as submitted.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY AWARDED PLAINTIFFS DAMAGES FOR DEFENDANT'S FAILURE TO COMPLETE CONSTRUCTION IN A QUALITY WORKMANLIKE MANNER.

Mr. Mabey testified that he is a professional and licensed civil engineer. He testified further to experience in residential construction including prior projects involving the defendant (T-13-14), and experience in analysis of management cost evaluation (T-32). His direct involvement in the construction of this home is well documented in the record and testimony at trial, and his familiarity with the home is of course obvious as owner and occupant since completion.

Mr. Mabey identified, by reference to a list set forth

on two exhibits (Pl. Ex. H and I), a number of deficiencies and defects he discovered in the home's construction. He further testified that he was familiar with hourly rates of individuals who would be qualified to repair the identified defects, and that he had estimated total costs of repairing said defects based upon hourly rates averaging $17.00 per hour, some $8.00 per hour less than the rate Mr. Mabey understood the defendant to charge (T-32-35). Mr. Mabey estimated that total cost of repair would be approximately $5,400.00.

Defendant did not offer into evidence any rebuttal as to the nature or cause of the defects, nor as to cost of repairing same. Defendant's counsel did object to the qualifications of Mr. Mabey to testify on these issues and was overruled by the Court, presumably on the basis of the credentials and experience already described (T-32-34). Defendant's counsel did cross-examine Mr. Mabey as to particular defects identified (T-68-72).

The testimony of Mr. Mabey, given his credentials, prior experience and direct knowledge of this particular project, constituted competent evidence and established a reasonable basis to support the trial court's findings in this matter. It has long been the policy of this Court to not disturb the findings of the trial court if there is a reasonable basis in evidence to support such findings,

Holman v. Sorenson, 556 P.2d 499, at 500 (Utah 1976). The testimony presented at trial satisfies the standards noted in the authorities cited by defendant (Appellant's Brief, 25-29): Mr. Mabey's testimony did present evidence upon which the trial court could find, with reasonable certainty, both the basis for and amount of damages.

The Utah Supreme Court has previously stated:

> Damages are not to be denied simply because they cannot be ascertained with exactness. If a reasonable basis of calculation is afforded, it is sufficient although the result is only approximate. Security Development Company v. Fedco, 23 Utah 2d 306, 462 P.2d 706 (1969).

The evidence presented in the case at bar certainly falls within these parameters, and the trial court's findings are supported by said, unrebutted, testimony and evidence.

The defendant further challenges the sufficiency of evidence on this issue in what is apparently an attack on the credibility of Mr. Mabey's testimony (see Appellant's Brief 29-31), referring to the "suspect and uncertain nature of the testimony presented concerning the amount of claimed damages. . ." (App. Brief 29) and further asserting that "No evidence of any kind was presented to show the cause of the alleged defects or to connect or link them to the Defendant Kay Peterson Construction." (App. Brief 31). On the contrary, Mr. Mabey, a professional and licensed civil engineer with credentials and

experience noted above and with extensive personal knowledge of this project, testified that there were certain defects and deficiencies in the home's construction, and said testimony was in no way rebutted. Assessment of the credibility of his testimony is a matter entirely within the sound discretion of the trial court and certianly should not be disturbed upon appeal, especially where no rebuttal evidence was presented in the trial court.

The defendant's final challenge to the trial court's findings regarding damages arising out of defects and deficiencies in construction, appears to be an assertion that the trial court was unduly and improperly influenced by representations as to proceedings before the State Department of Contractors and documents presented in respect thereto (App. Brief 32-33). Defendant proffers that the trial court "believed the "Correction Report" (Pl. Ex. I) to be a prior adjudication by the State Board of Contractors for the liability of the Defendant Kay Peterson Construction for repair of the items listed on the report . . ." (App. Brief 32), and further that "the lower court limited the scope of examination and sustained objections to testimony and evidence apparently in reliance on that belief." (App. Brief 32).

The trial court's position in this regard could hardly be more misconstrued. The exchanges between the trial

court and counsel, and the rulings as regards testimony and evidence, referred to in Appellant's Brief pages 32 and 33, considered in context clearly indicate that the trial court's position was that the plaintiffs were precluded from proceeding on any defects other than those identified on palintiffs Exhibit I and that defendant's counsel was precluded from cross-examination regarding other alleged defects because such defects were not in issue, and that such examination was irrelevant and in the interest of time would not be allowed. The trial court's "belief" as respects the "Correction Report", Plaintiffs' Exhibit I, is most clearly indicated in the trial court's ruling that said exhibit was admitted for "informational" purposes only and not as proof of the substance recited therein (T-73).

In this regard, the trial court did not limit defendant's cross-examination of Mr. Mabey as respects defects identified on the "Correction Report"; nor did the trial court deny admission of evidence or testimony that would rebut the existence of said defects, as there was, indeed, no such testimony or evidence proffered.

The testimony and evidence presented constituted competent evidence and establishes a reasonable basis to support the findings of the trial court as to damages arising from defects in construction, and said findings should be

upheld upon review.

POINT II

THE TRIAL COURT PROPERLY AWARDED PLAINTIFF THE COST OF SATISFYING UNPAID LIENS AGAINST THE HOME AND COSTS INCLUDING INTEREST AND A REASONABLE ATTORNEY'S FEE.

The "Purchase Money Contract" specifically provided, in writing, for the recovery of costs and attorney's fees in the event of a breach (Pl. Ex. C, l. 47-48). The trial court found, upon competent and sufficient evidence, that the defendant had breached the contract in two respects: failure to complete construction in a quality workmanlike fashion and the defendant's failure to satisfy obligations owing to subcontractors and materialmen. In respect to the latter, the plaintiffs obtained a loan at current interest rates in order to compromise said claims, and thereby clear their title to the subject property, and in fact did settle claims in excess of $13,400.00 for the consideration of approximately $9,737.00. Defendant offered no testimony or evidence rebutting either allegation of breach of contract.

Defendant, however, offers a novel theory to challenge the trial court's judgment granting recovery of the cost of satisfying the unpaid liens, including interest, and a reasonable attorney's fee (see App. Brief 20-25); arguing that defendant was entitled to reformation of the contract,

that consequently plaintiffs failed to tender the total price and therefore defendant's failure to satisfy subcontractors, suppliers and materialmen did not constitute a breach of the contract. Such analysis is fatally flawed in at least two respects.

First, the trial court clearly determined that the defendant did breach the contract in the two respects noted above, and the record reflects that said findings were based on competent, substantial and sufficient evidence. On that basis, and pursuant to the specific terms of the written contract providing for recovery of cost and attorney's fees as against the breaching party, the court was acting properly and within its discretion in awarding plaintiffs such costs, including in this instance the higher interest rate incurred in clearing title, and attorney's fees as were reasonable.

Secondly, as regards defendant's contentions pursuant to a reformed contract, as defendant would have it reformed, prayer for reformation invokes the trial court's equity jurisdiction and thus accords the trial court wide discretion in formulating a just and proper remedy. The trial court did not, pursuant to such equity jurisdiction, relieve the defendant of paying costs and attorney's fees arising out of defendant's failure to complete construction in a quality workmanlike fashion and defendant's failure to satisfy subcontractors and materialmen.

The policy of the Utah Supreme Cout, in equity cases, has been often and clearly stated, as in Pagano v. Walker, 539 P.2d 452 (Utah 1975) where, at 454, it is stated that

> . . . due to the advantaged position of the trial court we will review its findings and judgments with considerable indulgence, and will not disagree with and upset them unless the evidence clearly preponderates against them, or the court has mistaken or misapplied the law applicable thereto.

In all, the trial court's award of costs and attorney's fees was proper and within its discretion, and should not be disturbed upon appeal.

POINT III

THE COURT ERRED IN AWARDING JUDGMENT TO DEFENDANT BASED UPON MUTUAL MISTAKE OF FACT.

A. THE ISSUE OF MUTUAL MISTAKE WAS NOT PROPERLY BEFORE THE TRIAL COURT.

Rule 9(b) of the Utah Rules of Civil Procedure, which provides "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," has been strictly interpreted and applied in cases where reformation is sought by reason of mutual mistake. Neely v. Kelsch, 600 P.2d 979 (Utah 1979); and Battiston v. American Land And Dev. Co., 607 P.2d 837 (Utah 1980). In Neeley, supra, this Court stated:

> In the counterclaim, Kelsch did not set forth with particularity any attack upon the deeds based on mutual mistake. They only generally asserted their ownership. In his opening statement, counsel for Kelsch did mention mistake, but did not ask for an amendment of the pleadings to properly put mistake before the trial court. Therefore, the trial court improperly heard parol evidence intended to modify the deeds and thus should have only examined the face of the deeds in resolving the dispute. Neeley v. Kelsch 600 P.2d 989 (Utah 1979).

The court's analysis in Neeley, supra, is particularly applicable to the case at bar. Defendant herein did make a general claim for reformation in counterclaim (Defendant's Counterclaim, Second Cause of Action, R-15), but nowhere alleged that there was a mutual mistake underlying the execution of the "Purchase Money Contract," and did not plead with particularity circumstances constituting any such mistake. Defendant's counsel did not even mention "mutual mistake" in opening statements and did not move to amend pleadings to aver mutual mistake. During the course of trial plaintiffs' counsel objected to testimony that would alter or contradict the terms of the written agreement (see T-89-93, T-54-55, and T115-116). Defendant's counsel did not, on occasion of said objections, proffer "mutual mistake" as justifying an exception to the parol evidence rule.

At best, defendant offered evidence that might indicate

that defendant had made a mistake in preparing the project's cost estimate, and that said estimate was the basis for negotiating the purchase price. Defendant did not offer clear and convincing evidence that such a unilateral mistake was made, and defendant's counsel did not formally proffer the "mutual mistake" theory for reformation until closing argument. Indeed, very near the end of the trial, plaintiffs' counsel objected to a line of questioning specifically on the ground that that line of questioning was directed toward adding to or contradicting the terms of the written agreement (T-115-116). Again, defendant's counsel did not proffer the mutual mistake exception to the Parol Evidence Rule, and plaintiffs' objection was sustained.

In all, the issue of mutual mistake was not properly before the trial court, indeed it did not even appear to be before the court at all until defendant's closing argument, and therefore the trial court erred in awarding defendant judgment based upon the alleged mutual mistake of fact.

B. THE DEFENDANT FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE, BY CLEAR AND CONVINCING EVIDENCE, THAT THERE HAD BEEN A MUTUAL MISTAKE OF FACT.

In cases where reformation of a written instrument is sought on the basis of a mutual mistake of fact, it is the firmly

established rule that the party alleging reformation based on mutual mistake has "the burden of proving by clear and convincing evidence that there was a mutual mistake of fact." Hatch v. Bastian, 567 P.2d 1100, 1102 (Utah 1977); Maytime Manor Inc. v. Stakermatic, Inc., 597 P.2d 866, 868 (Utah 1979). In the case at bar the evidence presented at trial at best indicates, and not clearly or convincingly, that the defendant may have erred in preparing the project cost estimate and that negotiations for purchase price were based on that estimate. In the absence of a showing of fraud or inequitable conduct by the other party, and no such conduct is herein in any way indicated, Utah case law clearly states that "unilateral mistake is not a ground for reformation." Ingram v. Forres, 563 P.2d 181 (Utah 1977).

The mistake here, if any, was defendant's and was not mutual; indeed, plaintiffs merely relied on the representations of defendant in two distinct written instruments: First, the written agreement signed by defendant on March 20, 1980, indicating a total cost, including lot, of $134,068.40 (Pl. Ex. D). Secondly, the "Purchase Money Contract" which on its face shows a total purchase price of $109,000.00 for the improvements excluding the lot (which was paid for, in the amount of $27,000.00, by separate transaction), with specific reference to a project cost estimate prepared by the defendant.

C. THE DEFENDANT DID NOT PROVE, BY CLEAR AND CONVINCING EVIDENCE, THAT THERE HAD BEEN A MISTAKE FOR WHICH THE REMEDY OF REFORMATION WOULD BE PROPER.

The limited circumstances upon which a party may be entitled to the remedy of reformation on the ground of mistake are specifically cited by the Utah Court in Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints, 565 P.2d 63 (Utah 1977), at 64, as follows:

> The power to obtain the reformation of a written instrument exists when it can be satisfactorily proved (1) that the instrument, as made failed to conform to what both parties intended; or (2) that the claiming party was mistaken as to its actual content and the other party, knowing of this mistake, kept silent; or (3) that the claiming party was mistaken as to actual content because of fraudulent affirmative behavior.

There is no evidence whatsoever that the circumstances in subsection (3) above would apply to the action at bar. The case at bar clearly does not fall within subsection (2) above either, for there is no indication whatsoever, in the record or testimony at trial, that plaintiffs knew of the alleged mistake and kept silent; indeed, the plaintiffs could do no more than rely on the representations of defendant as to the costs defendant had incurred in construction of the home.

Thus, in order for defendant to prevail on the claim for

reformation, it was necessary that the defendant establish, by clear and convincing evidence (See citations in Point III-B above), "that the instrument, as made failed to conform to what both parties intended." Jensen, supra (emphasis added). In this context, the Utah Court also stated therein that "We do not rewrite the contract, we merely allow the writing to be made to conform, to the contract as made." Jensen, supra, at 65.

The irony of defendant's claim on this issue is that defendant does not clearly set forth what it purports to have been the contract as intended; nowhere in the record or in the testimony of any witness at trial, is there support for the position that plaintiffs intended to enter a contract to purchase the home for $127,000.00, exlcuding the lot. Nowhere in the record or testimony at trial is there support for the proposition that plaintiffs would have purchased the home, or could have even found financing that was crucial to their being able to purchase the home, if the price of $127,000.00, excluding lot, had been demanded. In sum, there is no support in the record or testimony, for the proposition that the Mabeys, plaintiffs, intended to enter a contract for the purchase of the home except upon a the specific and written terms set forth in the "Purchase Money Contract," where it set forth a purchase price based upon a total cost not to exceed $109,000.00.

That was the contract as written and signed by the parties on March 25, 1980, and the record and testimony does not show that plaintiffs intended to enter any other contract than that. Indeed, just five days prior the defendant signed another written agreement (Pl. Ex. D) representing two very significant facts: First, recognition that plaintiffs were not committed to the purchase of the home at that time. Secondly, that the total cost of the home, <u>including</u> the lot which cost $27,000.00, was approximately $134,068.00.

Not only has defendant failed to proffer clear and convincing evidence that the intended contract was any other than what the written "Purchase Money Contract" (Pl. Ex. C) specifies, the evidence and testimony presented clearly preponderates against a finding that both parties intended a contract differing in terms from the written instrument. The weight of the evidence clearly preponderates in favor of the proposition that the intended contract was identical to the written contract: a purchase price of $136,000.00 with the lot included, or $109,000.00 not including the lot.

D. THERE WAS NO MISTAKE.

The ultimate irony in defendant's prayer for reformation by way of conterclaim is that defendant asserts that the contract should be reformed to recite a purchase price of $127,000.00,

excluding the lot, when the record, and evidence and testimony presented at trial, clearly, unequivocally and convincingly establishes that the contract was a cost plus contract with a maximum ceiling. The defendant offered no evidence to show that the costs of contruction incurred in building the subject home exceeded $109,000.00 excluding the lot. At best, defendant offered the testimony of an employee, Mrs. Squires, as to the records that were utilized in compiling the project cost estimate that served as the basis for negotiating the ceiling purchase price (T-94-113) and that she did not account for the price of the lot when compiling that estimate, and Mr. Kay Peterson testified that he mistakenly agreed to deduct the full $27,000.00 lot price from the total estimated cost of $136,000.00.

It must be noted that Mrs. Squires was an employee for less than three months out of that period in excess of five months during which the home was constructed (T-95), and thus could not possibly have personal knowledge as to whether all the records she referred to in the file on the subject home represented actual costs incurred in building that home. Secondly, she testified that she did not personally record or complete the information noted in defendant's Exhibits 4 through 10 (T-105), and thus she could have no personal knowledge of whether the information contained therein referred to actual costs incurred in the construction of the subject home. Finally,

neither Mrs. Squires nor Mr. Kay Peterson nor any one else testified that those draws, disbursements or invoices, whether in part or in whole, recorded actual costs incurred in constructing that home purchased by the plaintiffs. In short, the testimony presented by the defendant indicates a sum of draws and disbursements against the proceeds of financing obtained for the purpose of constructing the subject home, but does not even purport to indicate, as there was no testimony presented on the matter, whether or what part of those draws and disbursements went toward the actual costs of constructing the subject home or some other project of the defendant.

On cross-examination it was clearly brought out that the best Mrs. Squires would testify to was that many of the draws and disbursements went directly to subcontractors, suppliers and materialmen (T-111-113); but she could not testify that the services or supplies, or what part of them, went into the subject home's construction, except as to two of defendant's twelve exhibits on this; she testified that she could say that "most of probably exhibit 11, 12" went into the house (T-109).

To sum up this point, there is no showing in the record or in the evidence presented at trial, that the actual costs of constructing this home ever exceeded $109,000.00; indeed, there is no proof submitted as to what the actual costs were with any degree of certainty or specificity. Thus, there was no showing

that there was a mistake at all in the execution of the subject contract.

POINT IV

EVEN IF REFORMATION IS AWARDED, DEFENDANT'S MAXIMUM RECOVERY IS LIMTED TO $11,037.47 OR LESS.

The record, testimony and evidence at trial clearly and unequivocally establishes that the sale and purchase contract was a cost plus contract with a maximum ceiling. Plaintiffs and defendant only disagree, basically, as to what that "ceiling" price was, not as to other terms. Plaintiffs urge that the figure specified in the written contract was the agreed upon and intended ceiling price ($109,000.00, excluding the lot); while defendant urges that the ceiling price should be reformed to be $127,000.00, excluding the lot.

Granting, for the moment, reformation as demanded by defendant, while that may change the terms of the written contract it does not result in any ground upon which the defendant can be awarded any sum of money; the defendant nowhere has shown where the "cost plus" amount exceeds $109,000.00. That is, the defendant never did present adequate or competent evidence to show that the actual costs incurred, plus the profit amount identified as $8,500.00, ever exceeded the sum of $109,000.00. (See discussion on this point, analyzing the facts and evidence presented at

trial, in Point III-C and D, above.) Thus, the defendant never did show entitlement to any sum more than that tendered by plaintiffs.

Moreover, defendant's counterclaim alleges that plaintiffs were credited with payments totalling $148,000.00, which included payment for the lot (See Defendant's Counterclaim, Paragraph 14, R-14), (the lot payment, in total, was $27,000.00; see T-86, testimony of Mr. Kay Peterson). No evidence or testimony was presented at trial, one way or the other, as to the total sum paid by plaintiffs, and thus the $148,000.00 figure must be assumed as against that party, the defendant, so alleging. Defendant also alleged by way of counterclaim that the total costs incurred in the construction of the home, including the lot, plus financing and interest costs, and including the $8,500.00 profit amount, totalled $159,037.47. Defendant certainly never introduced evidence tending to establish that "costs plus" were anywhere near that amount (See Point III-C and D, supra.), but that is also certainly the maximum amount defendant can now be heard to claim was incurred.

The above figures lead to some curious conclusions. First, if the contract were reformed as defendant would have it, plaintiffs' obligations would total $127,000.00 plus $27,000.00 for the lot, for a total of $154,000.00; crediting the plaintiffs'

the $148,000.00 averred to in defendant's pleadings, that would leave plaintiffs owing only $6,000.00 instead of the $11,037.47 awarded. Even as against the entire $159,037.47 "cost plus" figure plead by defendant, but not supported by the evidence, crediting the plaintiffs the $148,000.00 averred to in defendant's pleadings leaves the plaintiffs owing at most $11,037.47, and then only if the contract is reformed to a "cost plus" contract with no maximum ceiling (which is clearly contrary to the written terms of the "Purchase Money Contract").

Plaintiffs' counsel does not urge that the above figures present an accurate picture of the subject transactions. Indeed, plaintiffs' counsel urges that the most accurate picture of the subject transactions, including the intention of both parties, is specifically set forth on the face of the "Purchase Money Contract" (Pl. Ex. C), which document is entirely consistent, noting the $2,000.00 buffer for incidental costs to final completion added by Mr. Mabey, with the total cost including lot figure cited in the March 20, 1980 agreement (See discussion toward conclusion of Point III-C above) signed by defendant.

Plaintiffs' counsel does urge respectfully, that if the Court determines that the defendant is entitled to reformation of the contract based upon mistake or any other ground, that defendant's recovery be limited to $6,000.00 the basis therefor

noted above, or in the alternative, the $11,037.47 awarded by the trial court below.

CONCLUSION

Plaintiffs proceeded in the action at bar upon two causes of action arising out of defendant's failure to complete construction in a quality workmanlike fashion and defendant's failure to satisfy obligations owing to subcontractors and materialmen resulting in liens against the purchased home. At trial plaintiffs presented competent and sufficient evidence to support the trial court's findings that plaintiffs were entitled to judgment on both causes of action, and sufficient to establish, with reasonable certainty, the amount of damages incurred. Thus, the record and evidence presented at trial clearly support the Court's Judgments in favor of plaintiffs, and said Judgments should be upheld on review.

Defendant proceeded by way of counterclaim seeking reformation of the written "Purchase Money Contract." It is upon this issue that the record and transcript of trial are replete with confusion, vague generalities and inconsistencies. Defendant's counsel did not proffer the mutual mistake theory until closing argument; indeed, "mutual mistake" is not averred in the pleadings, was not mentioned in opening remarks and was not once raised as an issue against plaintiffs repeated objections

to testimony that tended toward altering or contradicting the terms of the written contract. The transcript of trial nowhere indicates that any testimony was received for the purpose of contradicting the terms of the written contract by reason of mutual mistake. Two separate written agreements, both signed by defendant, represent on their face that the total purchase price, including lot, would be approximately $136,000.00, and excluding the lot would be $109,000.00 (See Pl. Ex. C and D). Finally, defendant did not proffer competent evidence nor the testimony of any one with personal knowledge to establish just what the actual cost of construction was or that it ever exceeded $136,000.00 <u>including</u> the lot.

The defendant simply did not present sufficient evidence to give the trial court grounds to reform the written instrument, or even granting reformation, to give the trial court grounds for awarding defendant any sum of money. Moreover, even granting the defendant the reformation as sought, altering the terms of the contract to $127,000.00 excluding the lot, comparing that against defendant's pleadings where it is alleged that plaintiff contributed a total of $148,000.00 toward the home, subtracting the $27,000.00 lot price, that only leaves a difference of $6,000.00, not $11,037.47 and not $18,000.00, owing to defendant <u>on the contract as defendant would have it reformed</u>.

Plaintiffs respectfully submit that judgments in their

favor should be upheld; that the trial court's finding of mutual mistake and judgment awarded based thereon be reversed, or in the alternative, that judgment for defendant thereon be reduced to $6,000.00 or affirmed at $11,037.47.

Respectfully submitted this 31 day of July, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Respondents upon counsel for the Defendant and Appellant, W. Waldan Lloyd, at Jensen and Lloyd, 870 Commercial Security Bank Tower, 50 South Main Street, Salt Lake City, Utah 84144-0457, postage prepaid, on the 31 day of July, 1982.

Barbara Huff