

2016

John Mardesich, Plaintiff and Appellant, v. Anthony Bros. Construction, a Utah Corporation, Dba Anthony Bros. Pool & Spa; Sun Hill Homes, l.c., and John Does I-X, Defendants and Appellees. Anthony Bros. Construction, a Utah Corporation, Dba Anthony Bros. Pool& Spa, Third-Party Plaintiff, v. Marie Mardesich, Third-Party Defendant and Appellant.

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Reply Brief, *Mardesich v Anthony Bros Con*, No. 20150730 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3646

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

JOHN MARDESICH,

Plaintiff and Appellant,

v.

REPLY BRIEF OF APPELLANT

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA; SUN HILL HOMES, L.C.,
and JOHN DOES I-X,

Defendants and Appellees.

Case No: 20150730

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA,

District Court No. 080502342

Third-Party Plaintiff,

v.

MARIE MARDESICH,

Third-Party Defendant and Appellant.

Appeal from Judge G. Michael Westfall's Decision
of the Fifth Judicial District Court
Washington County, Utah

Adam C. Dunn
Clifford V. Dunn
110 West Tabernacle
P.O. Box 2318
St. George, UT 84770
Attorney for Appellees

James L. Spendlove
JENSENBAYLES, LLP
216 W. St. George Blvd., Ste. 200
St. George, UT 84770
Attorney for Appellant

UTAH COURT OF APPEALS

JOHN MARDESICH,

Plaintiff and Appellant,

v.

REPLY BRIEF OF APPELLANT

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA; SUN HILL HOMES, L.C.,
and JOHN DOES I-X,

Defendants and Appellees.

Case No: 20150730

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA,

District Court No. 080502342

Third-Party Plaintiff,

v.

MARIE MARDESICH,

Third-Party Defendant and Appellant.

Appeal from Judge G. Michael Westfall's Decision
of the Fifth Judicial District Court
Washington County, Utah

Adam C. Dunn
Clifford V. Dunn
110 West Tabernacle
P.O. Box 2318
St. George, UT 84770
Attorney for Appellees

James L. Spendlove
JENSENBAYLES, LLP
216 W. St. George Blvd., Ste. 200
St. George, UT 84770
Attorney for Appellant

TABLE OF CONTENTS

ARGUMENT	2
I. Both Judge Shumate and Judge Westfall Acknowledged that the Parties Amended the REPC Subsequent to its Execution to Accommodate Changes to the Grading of Lot 8	2
a. The Parole Evidence Rule Does not Prohibit Evidence that the Parties Altered the Terms of Their Agreement After Execution.	2
b. The Fact that the REPC was, at the Time of Its Execution an Integrated and Unambiguous Agreement, Does not Prevent Subsequent Modification....	5
CONCLUSION	6
CERTIFICATE OF COMPLIANCE	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Cases

<i>Tangren Family Trust v. Tangren</i> , 2008 UT 20, ¶13, 182 P.3d 236.....	2
<i>Spears v. Reynolds</i> , 2002 UT 24, ¶19, 44 P.3d 742	2
<i>Gary Porter Constr. dba Porter & Sons v. Fox Constr., Inc.</i> , 2004 UT App. 354 ¶21 fn. 5, 101 P.3d 371.....	2, 3
<i>R.T. Nielson Co. v. Cook</i> , 2002 UT 11 ¶13, 40 P.3d 1119.....	4, 6
<i>Prince v. R.C. Tolman Const. Co., Inc.</i> , 610 P.2d 1267, 1269 (Utah 1980)	4
<i>Davis v. Payne and Day Inc.</i> , 348 P.2d 337, 339 (Utah 1960)	5

UTAH COURT OF APPEALS

JOHN MARDESICH,

REPLY BRIEF OF APPELLANT

Plaintiff and Appellant,

v.

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA; SUN HILL HOMES, L.C.,
and JOHN DOES I-X,

Case No: 20150730
District Court No. 080502342

Defendants and Appellees.

ANTHONY BROS. CONSTRUCTION, a
Utah corporation, dba ANTHONY BROS.
POOL & SPA,

Third-Party Plaintiff,

v.

MARIE MARDESICH,

Third-Party Defendant and
Appellant.

REPLY BRIEF OF APPELLANT

ARGUMENT

I. BOTH DISTRICT COURT JUDGES ACKNOWLEDGED THAT THE REPC, WAS AMENDED TO ACCOMMODATE CHANGES TO THE GRADING OF LOT 8.

a. The Parole Evidence Rule Does not Prohibit Evidence that the Parties Altered The Terms of Their Agreement After Execution.

Sun Hill properly points out that the Supreme Court has "... defined an integrated agreement as a writing constituting a final expression of one or more terms of an agreement." *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶13, 182 P.3d 236. Sun Hill similarly provides "To determine whether a writing is an integration, a court must determine whether the parties adopted the writing 'as the final and complete expression of their bargain.'" *Id.* While it is true that at the time the REPC was executed it was the anticipated to be the final expression of the parties, the Parties modified the REPC multiple times. The written REPC was not the "final and complete expression of their bargain."

Despite Sun Hill's contention the Parole Evidence Rule does not prohibit agreements to modify the contract. The Utah Supreme Court has previously stated "parole evidence of contemporaneous [or prior] conversations, representations, or statements will not be received for the purpose of varying or adding to the terms of the written agreement." *Spears v. Reynolds*, 2002 UT 24, ¶19, 44 P.3d 742. That being said, the Utah Court of Appeals has differentiated between contemporaneous or prior conversations, representations or statements and subsequent agreements. The Utah Court of Appeals in *Gary Porter Constr. v. Fox Constr.* stated as follows:

Fox seems to consider evidence of the subsequent mutual agreement parole evidence, and from this assumption concludes that all parole evidence should be considered to interpret the scope of the subcontract. However, because the subsequent mutual agreement between Fox and Porter to strike Section 02680 was not a “contemporaneous [or prior] conversation, representation, or statement, it is not parole evidence. *Gary Porter Constr. dba Porter & Sons v. Fox Constr., Inc.*, 2004 UT App. 354 ¶21 fn. 5, 101 P.3d 371.

Sun Hill asserts that the changed expectations of the parties relating to the construction of Lot 8, including evidence relating to the changed grading and the suitability of the soil for construction of improvements is parole evidence. However, according to *Gary Porter Construction v. Fox Construction*, because the evidence of the agreement of the parties was subsequent to entering into the REPC, such evidence is not parole evidence but is evidence of a subsequent agreement or amendment to the existing REPC, and is not prohibited by the parole evidence rule. As stated previously, the Court recognizes the ability of the parties to change, modify, extend, or add to their agreement, and the evidence of such change or modification is admissible.

The Mardesichs are not the only ones to rely on the evidence of subsequent agreement. It is undisputed that the agreement of the parties was changed. The REPC specifically states that REPC requires that Sun Hill construct the Property “in substantial conformity with Seller’s Standard Plans and Specifications as of the time of Start of Construction.” Record at 2047(Exhibit 1, REPC at Section 7). It is also undisputed that the grading of Lot 8 was not in conformity with the Grading Plan prepared by Sun Hill at the time of the Start of Construction. Record at 1786 (Order Vacating Findings, Conclusions and Judgment; Amended Findings of Fact and Conclusions of Law and Judgment, ¶29). While the REPC allows Sun Hill to alter the plans, it does not allow Sun

Hill to simply ignore the plans or to fail to build Lot 8 in conformity with the plans. There is no evidence that Sun Hill prepared another grading plan, as such, Sun Hill must assert that the parties agreed Lot 8 would not be built according to the Grading Plan, if not Sun Hill has breached the terms of the REPC. Therefore, Sun Hill wants its cake and wants to eat it to. Sun Hill asks this court to not allow any evidence of a subsequent agreement, however, if the Court were to accept such a position Sun Hill is in breach of the terms of the REPC as Sun Hill failed to construct Lot 8 in conformity with the “Standard Plans and Specifications as of the time of Start of Construction.” Therefore, either there was an agreement to modify the grading of Lot 8 which included the suitability of the soil for the construction of improvements or there was no agreement and Sun Hill breach the terms of the REPC, either way the Mardesichs are entitled to a judgment.

The Utah Supreme Court has held that a contract may be altered orally, even if the contract states that no non-written modifications will be recognized. The Utah Supreme Court held “there is nothing so sacrosanct about having entered into one agreement that it will prevent the parties entering into any such change, modification, extension or addition to their arrangement for doing business with each other that they may mutually agree.” *R.T. Nielson Co. v. Cook*, 2002 UT 11 ¶13, 40 P.3d 1119. The Court went on to state “apart from statute, the common law rule is that even where the contract specifically states that no non-written modification will be recognized, the parties may yet alter their agreement by parole negotiation.” *Id*, See *Prince v. R.C. Tolman Const. Co., Inc.*, 610 P.2d 1267, 1269 (Utah 1980)(In Utah, parties to a written agreement may not only enter into separate, subsequent agreements, but they may also modify a written agreement

through verbal negotiations subsequent to entering into the initial written agreement, even if the agreement being modified unambiguously indicates that any modifications must be in writing.), *Davis v. Payne and Day Inc.*, 348 P.2d 337, 339 (Utah 1960)(It is a well-established rule of law that parties to a written contract may modify, waive, or make new terms notwithstanding terms in the contract designed to hamper such freedom.)

Sun Hills' assertion that any modification to the REPC must be in writing due to the terms of the REPC is contrary to Utah law. Not only is it contrary to Utah law, if all modifications of the REPC were required to be in writing, Sun Hill has breached the terms of the REPC. The REPC requires that the Property, which includes the lot, to be built "in substantial conformity with Seller's Standard Plans and Specifications as of the time of Start of Construction." Record at 2047(Exhibit 1, REPC at Section 7). Sun Hill did not prepare an alternate grading plan, and the undisputed evidence presented at trial shows that Lot 8 was not built in substantial conformity to the Grading Plan. Accordingly, either there was a subsequent agreement to alter the terms of the REPC or Sun Hill has breached the terms of the REPC by failing to build Lot 8 according to the Grading Plan. Both Judge Shumate and Judge Westfall ruled that as a result of the changed circumstances that the grading of Lot 8 and therefore the REPC was modified from its original terms.

b. The Fact that the REPC was, at the Time of Its Execution an Integrated and Unambiguous Agreement, Does not Prevent Subsequent Modification.

Sun Hill asserts that the Parties agreed that the REPC was an integrated and unambiguous contract, and neither party disputes that at the time of its execution the REPC was just that, however, subsequent to its execution the agreement was modified. Because

“there is nothing so sacrosanct about having entered into one agreement that it will prevent the parties entering into any such change, modification, extension or addition to their arrangement for doing business with each other that they may mutually agree.” *R.T. Nielson Co. v. Cook*, 2002 UT 11 ¶13, 40 P.3d 1119. Nothing in the parole evidence rule or the case law dealing with integrated unambiguous contract prohibits the parties from modifying the contract which is what was clearly done. The District Court both under Judge Shumate and Judge Westfall found that the REPC had been modified by oral agreement. Record at 1600 (Findings, Conclusions and Judgment, ¶¶28-30) and Record at 1786 (Order Vacating Findings, Conclusions and Judgment; Amended Findings of Fact and Conclusions of law and Judgment, ¶29). Sun Hill’s position is that not only was the REPC not altered, but that it could only have been altered in writing, if that is the case Sun Hill breached the terms of the REPC as Lot 8 was not built according to the plans and specifications as prepared by and for Sun Hill at start of construction or according to any other plans. Both District Court judges found the original REPC to be integrated and also found that the terms of the REPC were verbally altered. However, Judge Westfall selectively ignored the evidence presented regarding such modification. The only evidence presented regarding the subsequent modification was the testimony of John Mardesich and based on said undisputed evidence Judge Shumate’s original Judgment is reasonable and should not have been vacated.

CONCLUSION

Sun Hill’s argument that the agreement of the parties subsequent to the execution of an integrated and unambiguous contract is barred by the Parole Evidence Rule or any

other rule is not well taken, even if the agreement states that it requires written modifications. Additionally, both Judge Shumate and Judge Westfall acknowledge that the Parties agreed that the grading of Lot 8 would not be in conformity with the grading plan and specification prepared by Sun Hill. If Judge Westfall had not found that such modification was agreed to, then Sun Hill breached the REPC by failing to construct Lot 8 in conformity with the plans identified by Sun Hill as the plans according to which Sun Hill would construct Lot 8. The only evidence presented to the Trial Court regarding the modification of the grading plan was the testimony of Mr. Mardesich which also stated that not only was there an agreement that the grading would be changed but that the newly added soil would be suitable for the building of improvements. As such, the parties were able and did modify their agreement and Judge Shumate's ruling, after hearing all of the evidence and assessing the credibility of the witnesses, is supported by the evidence presented at trial, and the order granting a new trial, amended judgment, and judgment in favor of Sun Hill for attorney fees should be reversed.

DATED this 26th day of May, 2016.

JENSENBAYLES, LLP


James L. Spendlove

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellant contains 2,292 words, based on the word count of the word processing system used to prepare the brief exclusive of the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record, and therefore complies with the type-volume limitation set forth in Utah R. App. P. 24(f)(1).




James L. Spendlove

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2016, I caused to be served a copy of foregoing document, on the parties listed below as follows:

Party(ies) Served	Method of Service
Utah Court of Appeals 450 South State Street P.O. Box 140230 Salt Lake City, UT 84114-0230	<input checked="" type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Electronic File <input type="checkbox"/> Email <input type="checkbox"/> Fax (Person agreed to service by fax.)
<i>Attorney for Defendant</i> Adam C. Dunn Clifford V. Dunn 110 West Tabernacle P.O. Box 2318 St. George, UT 84770	<input checked="" type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (agreed to service by email.) <input type="checkbox"/> Electronic File



 PARALEGAL