1992

Edwards & Daniels Architects, Edwards & Daniels Associates Architects v. Soter/Knudsen Construction company, INC., Gregory S. Soter, Sherwin L. Knudsen, Gregory D. Knudsen, Lamar D. Knudsen, Soter/Knudsen Development Co.; Farmers Properties, Inc., a revoked Nevada corporation; Herbert L. Bosch Jr., Fran Archuleta; Verl Sortor, Ron Jenkins : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EDWARDS & DANIELS ARCHITECTS, INC., a Utah corporation d/b/a EDWARDS & DANIELS ASSOCIATES ARCHITECTS, Plaintiffs/Appellants and Cross-Appellees, vs. SOTER/KNUDSEN CONSTRUCTION COMPANY, INC., a Utah corporation; GREGORY S. SOTER, SHERWIN L. KNUDSEN, GREGORY D. KNUDSEN, and LAMAR D. KNUDSEN d/b/a SOTER/KNUDSEN DEVELOPMENT CO.; FARMERS' PROPERTIES, INC., a revoked Nevada corporation; HERBERT L. BOSCH, JR.; FRAN ARCHULETA; VERL SORTOR; RON JENKINS; et al., Defendants/Appellees and Cross-Appellants.	Court of Appeals No. 920723-CA Supreme Court Nos. 910432, 910448 District Court Civil No. C86-2461 Priority No. 15

REPLY BRIEF OF APPELLANT EDWARDS & DANIELS ARCHITECTS, INC.

On appeal from the Third Judicial District Court for Salt Lake County, the Honorable Michael R. Murphy, District Judge

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REPLY BRIEF OF APPELLANT EDWARDS & DANIELS ARCHITECTS, INC.

SUMMARY OF ARGUMENT

1. The trial court found that Farmers' Properties agreed that Edwards & Daniels be retained as project architect for a fee of at least $117,000.00. That finding satisfied the "consultation" requirement of paragraph 8 of the Lease Agreement.

2. Edwards & Daniels is entitled to be paid for all of the work that it did, including the 53 percent that Gregory Soter wanted to avoid paying until construction financing was obtained.

3. The trial court did not err in holding that Edwards & Daniels was an intended beneficiary of the Lease Agreement. No extrinsic evidence was admissible, since the provision in paragraph 8 was clear and unambiguous.

4. The trial court properly excluded evidence relating to the alleged failure of conditions precedent, since defendants had not made proper answers to their interrogatories.

ARGUMENT

I.

AS A MATTER OF LAW, THIS COURT SHOULD HOLD THAT FARMERS' PROPERTIES' AGREEMENT TO RETAIN EDWARDS & DANIELS AS PROJECT ARCHITECT SATISFIED THE "CONSULTATION" REQUIREMENT OF PARAGRAPH 8 OF THE LEASE AGREEMENT.

A. The central issue on appeal is whether the "consultation" requirement of paragraph 8 was satisfied by Farmers' Properties' agreement to retain Edwards & Daniels as the project architect for a fee of at least $117,000.00.

Throughout their brief, the Farmers' Properties defendants demonstrate a gaping misunderstanding of the issues that were tried below. The primary issue at trial was whether the "consultation" requirement of paragraph 8 of the Lease Agreement was satisfied. In spite of the lower court's findings that the Farmers' Properties defendants met with Edwards & Daniels in Salt Lake City, that they approved of its being retained as project architect, and that they agreed that Edwards

& Daniels would be paid a fee of between $117,000.00 and $130,500.00 (Findings of Fact Nos. 24, 25, 26, 27, 28; R. 982-83),[1] the lower court held that no "consultation" occurred (Findings of Fact Nos. 9, 12.) According to Finding of Fact No. 26, Farmers' Properties agreed and knew that Edwards & Daniels would be paid a fee of at least $117,000.00 (4.5 percent of $2,600,000).

Edwards & Daniels' opening brief clearly describes the basis for this appeal. Edwards & Daniels is not appealing from the findings that Soter/Knudsen did not advise Farmers' Properties regarding the architects' fees (Findings of Fact Nos. 7, 8; R. 978-79) or that Edwards & Daniels' invoices were not sent to Farmers' Properties (Finding of Fact No. 10; R. 979).[2] Edwards & Daniels is appealing from the finding

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[1] The lower court found that, at the second meeting in Salt Lake City in June, 1984, "the parties discussed the fee that Edwards & Daniels would charge for its architectural services. It was agreed that Edwards & Daniels would charge a fee equal to 4.5 percent of the estimated cost of construction, which the parties discussed as being between $2.6 and $2.9 million." (Finding of Fact No. 26; R. 983.) The fee would thus be between $117,000.00 and $130,500.00. This was consistent with the Agreement between Edwards & Daniels and Soter/Knudsen Construction Company ("Soter/Knudsen"), which provided, at Article 14.2.1, that Edwards & Daniels would be paid a fee equal to 4.5 percent of the "Construction Cost as defined under Article 3." (Exhibit 1-P.) Under Article 3, Edwards & Daniels submitted a Statement of Probable Costs, which showed the probable cost of the project at $2,988,855.00. (Exhibit 4-P; Tr. [1-31-90], at 61-62.) Each of Edwards & Daniels' invoices to Soter/Knudsen (Exhibits 5-P through 20-P) showed the estimated cost of construction as $2.9 million. (Findings of Fact Nos. 32, 33; R. 983.) Soter/Knudsen did not object to any of the invoices. (Finding of Fact No. 31; R. 983.)

[2] It was on this basis, and this basis alone, that the lower court held against Edwards & Daniels. The court held that the "consultation" condition of paragraph 8 had not been met. The court disbelieved Greg Soter, who testified that he consulted with Farmers' Properties from time to time and that he sent copies of Edwards & Daniels' invoices to them. (Findings of Fact Nos. 7, 8, 9, 10; R. 978-79.) Edwards & Daniels has not (continued...)

that "the meetings in the summer of 1984 were not consultations as contemplated by paragraph #8 of the September, 1984 lease." (Finding of Fact No. 12; R. 980.)[3]

The Farmers' Properties defendants completely ignore the finding that they knew of and agreed to the hiring of Edwards & Daniels as the project architect. They fail to address the significance of that finding in their brief. They do not explain why, if they knew and agreed that Edwards & Daniels was going to be the project architect for a fee of at least $117,000.00, they needed any further consultation under the terms of paragraph 8. The Farmers' Properties defendants utilize most of the space in their brief rehashing arguments that they made at trial, focusing on the testimony that Soter/Knudsen failed to consult or send the architect's invoices. Nowhere in their brief do they explain what additional information they would have obtained from a further consultation with Soter/Knudsen regarding the work that Edwards & Daniels' was doing and the fee to be charged.

B. The lower court's application of the facts to the provisions of paragraph 8 was erroneous as a matter of law, being an application of facts (uncontroverted for the purposes of this appeal) to the terms of a written document.

As noted above, the lower court specifically found that the Farmers' Properties defendants agreed that Edwards & Daniels would be retained as the project

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[2](...continued)
appealed from these findings.

[3] As discussed below, that finding is, in reality, nothing more than a conclusion of law and should not be accorded any added deference simply because it was denominated as a finding of fact. State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990).

architect and that Edwards & Daniels would charge a fee equal to 4.5 percent of the estimated cost of construction of between $2.6 and $2.9 million. (Findings of Fact Nos. 24, 25, 26; R. 982-83). The lower court erred in its application of the facts set forth in the Findings of Fact to paragraph 8 of the Lease Agreement. The legal significance of Findings of Fact Nos. 24-45 (R. 982-86) under paragraph 8 involves a purely legal analysis. This Court need not defer to the trial court's conclusion that the meetings in the summer of 1984 were not "consultations" as contemplated by paragraph 8. As a matter of law, this Court can hold that Farmers' Properties was bound by the notice that they had previously received when they signed the Lease Agreement on September 14, 1984. The lower court found that, when the Farmers' Properties defendants signed the Lease Agreement, they "knew that Edwards & Daniels had been retained as the project architect and that it was going to complete all of the necessary drawings, plans, and specifications for the construction of the Hotel/Casino project." (Finding of Fact No. 28; R. 983.)

The lower court's finding that the agreement reached in the summer of 1984 was not a "consultation" within the meaning of the Lease Agreement is not so much a finding of fact, as a conclusion of law to which this Court should accord no deference. This Court can apply the facts found by the lower court to the Lease Agreement as easily as the lower court. In In re Estate of Dodge, 98 Cal. Rptr. 801, 491 P.2d 385 (1971), the court considered the standard of review where the issue involves the construction of a written instrument. Relying on the rule that it is "a

judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence," 491 P.2d at 389, the court stated:

> The possibility that conflicting inferences can be drawn from uncontroverted evidence does not relieve the appellate court of its duty independently to interpret the instrument; it is only when the issue turns upon the credibility of extrinsic evidence, or requires resolution of a conflict in that evidence, that the trial court determination is binding.

Id. In a subsequent case, the same court held that "where the extrinsic evidence is uncontroverted, but conflicting inferences may be drawn . . . the appellate court must exercise an independent judgment with respect to the interpretation of a written instrument, and if it determines that the interpretation of the instrument, as made by the trial court, is erroneous, it may reverse the judgment." Matter of Estate of Huntington, 58 Cal. App. 3d 197, 129 Cal. Rptr. 787, 793 (1976).

In the present case, the lower court found that Farmers' Properties agreed that Edwards & Daniels would be retained as the project architect and that it would be paid a fee of at least $117,000.00. Those facts are uncontroverted for the purpose of this appeal. It remains for this Court to apply those uncontroverted facts to the written Lease Agreement. The lower court erred in holding that the consultation requirement had not been met under these facts. This Court is in as good a position to draw inferences from the uncontroverted facts, as they apply to the Lease Agreement, as the lower court.

C. The court found that the Farmers' Properties defendants knew that Edwards & Daniels had been retained as project architect for a minimum fee of $117,000.00 and had extensive contact with Edwards & Daniels regarding the design of the project.

Consistent with their agreement that Edwards & Daniels be retained as the project architect, the Farmers' Properties defendants thereafter had significant contacts with Soter/Knudsen and with Edwards & Daniels regarding the design work being performed by Edwards & Daniels. The lower court made extensive findings regarding Farmers' Properties' contacts with Edwards & Daniels after Farmers' Properties agreed that Edwards & Daniels be retained as project architect.

The court found that Farmers' Properties had extensive involvement in the project, including ongoing communications with Edwards & Daniels regarding its architectural work. (Findings of Fact Nos. 27-29, 34-45; R. 983-86.) From these findings of fact, it is clear that Farmers' Properties knew exactly what Edwards & Daniels was doing and how much it was going to cost. The Farmers' Properties defendants were hardly innocent and unknowledgeable bystanders to the project, but were intimately involved.[4] (Findings of Fact Nos. 27, 34-45.) Most significantly,

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[4] In their brief, the Farmers' Properties defendants quote Verl Sorter's testimony that Greg Soter told him "very emphatically not to have any contact with the architects whatsoever." (Farmers' Properties' Brief, at 30, quoting Tr. [2-2-90], at 72.) In attempting to downplay their substantial involvement in the project, the Farmers' Properties defendants ignore the court's findings that Edwards & Daniels sent them copies of all plans and had ongoing communications with Farmer's Properties relating to the design of the project. Farmers' Properties also disregards the evidence that it made suggested many design changes to Edwards & Daniels and that it coordinated the design of the kitchen. (Findings of Fact Nos. 36, 37, 38, 40-45; R. 984-86.) Seen in light of (continued...)

from the very beginning, Farmers' Properties knew that Edwards & Daniels' fee would be at least $117,000.00. (Finding of Fact No. 26; R. 982-83.) In their brief, the Farmers' Properties defendants entirely ignore this important Finding of Fact. They attempt to side-step the considerable knowledge that they were found to have had regarding the work of Edwards & Daniels. They fail to discuss the legal significance of their having approved Edwards & Daniels as the project architect for a fee of at least $117,000.00. Farmers' Properties completely neglects to explain why, if they knew and agreed that Edwards & Daniels was to act as project architect and to prepare a complete set of architectural plans and drawings, they should not be responsible for paying those fees under paragraph 8 of the Lease Agreement.

In their brief, Farmers' Properties argue that paragraph 8 of the Lease Agreement required "advance meaningful consultations" (Farmers' Properties' Brief, at 24-25), but they fail to explain why their agreement to hire Edwards & Daniels to perform all the design work for the entire project for a fee of at least $117,000.00 did not constitute an "advance meaningful consultation." What more did they want to know after Edwards & Daniels had been retained? The record and their brief are silent on that crucial question.

Instead of addressing these important issues, the Farmers' Properties defendants devote their brief to a discussion of the expectations of the parties that the

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[4](...continued)
these findings, Verl Sorter's statement that he never contacted Edwards & Daniels, relied on by defendants in their Brief, at 30, is disingenuous at best.

architects fees would be paid through construction financing.[5] The Farmers' Properties defendants document at length in their brief the fact that they and Soter/Knudsen expected that Edwards & Daniels would be paid through construction financing. Even Edwards & Daniels expected it, as Ralph Edwards testified.[6] Consequently, in their brief, the Farmers' Properties defendants assert that they believed that all debts, including the architect's fee, would be paid through a construction loan that Soter/Knudsen expected to obtain.[7] The Farmers' Properties defendants even go so far in their brief as to concede that they failed to contact Edwards & Daniels regarding its fees simply because they believed that the anticipated construction loan would take care of the debt. (Farmers' Properties' Brief, at 29-30; emphasis added.)

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[5] To be sure, as Edwards & Daniels observed in its opening brief, all of the parties expected that construction financing would be obtained. (Edwards & Daniels Brief, at 32 n.23.)

[6] Ralph Edwards testified that Soter/Knudsen had indicated that it had a "source of funding" and that all Edwards & Daniels had to do was to "get the documents ready and the funding would be available." (Tr. [1-31-90], at 118.) Edwards emphasized that Edwards & Daniels "didn't agree to this, it just seemed logical that it was going to end up coming out of the construction money." (Tr. [1-31-90], at 119.)

[7] In their brief, Farmers' Properties declare that Soter/Knudsen "repeatedly assured" them that financing would be available and that it would be "almost automatic." (Farmers' Properties' Brief, at 21.) Both Soter/Knudsen and Edwards & Daniels "expected" that Edwards & Daniels fees "would be paid from the eventual construction financing to be obtained from an institutional lender." Id. at 29. "Soter/Knudsen expected to pay E&D from the construction financing rather than consult with Farmers Properties on those fees." Id. at 31. "Financing for construction was not to come from Farmers Properties, but was to come from an institutional lender. Id.

Thus Farmers' Properties candidly admits that, because construction financing was expected, they saw no need to inquire of the architects regarding its fees--even though Farmers' Properties knew that Edwards & Daniels was performing all of the necessary work to create a final set of plans and even though they knew that Edwards & Daniels was to be paid at least $117,000.00 for its services. Farmers' Properties' overconfidence that financing would be obtained explains Verl Sorter's answers to questions put to him by the court during the trial in which he admitted that he did not give any thought to the fact that Edwards & Daniels was incurring additional fees, because he believed they would be paid from construction financing. (Tr. [2-8-90], at 144.)[8] Fran Archuleta conceded at trial that Farmers' Properties knew "there was some possibility that the $50,000 could be exceeded if we were consulted, if we agreed." (Tr. [2-9-90], at 21.)

Farmers' Properties' confidence that financing would be obtained explains why they never troubled to determine the exact amount of fees that Edwards & Daniels had incurred. It was not until after Edwards & Daniels had sent Farmers' Properties a final set of architectural plans that Verl Sorter became concerned with the fees that had been incurred. The trial court found that, after Farmers' Properties received the final set of plans from Edwards & Daniels, Soter/Knudsen requested that Farmers' Properties pay a plan-check fee to the City of Winnemucca so that the plans

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[8] Sherwin Knudsen gave a similar answer when asked what he intended "if no construction financing was ever obtained, or if construction never occurred." He testified, "I never thought of that." (Tr. [2-1-90], at 185.)

could be reviewed and approved by the city. Farmers' Properties refused to do so and "gave notice to Gregory Soter, or Soter/Knudsen Construction Company, that Farmers' Properties was not going to pay any more money for the project." (Finding of Fact No. 39; R. 984.)[9]

The fact that none of the Farmers' Properties defendants expected the construction financing to fall through does not render the provisions of paragraph 8 of the Lease Agreement unenforceable. Even though the individuals did not expect their financing to fall through, the Lease Agreement provided for that contingency. Paragraph 8 describes the rights and duties of the parties "[i]n the event the Lessor fails to obtain a commitment for financing." (Exhibit 3-P, ¶ 8.) In that event, according to paragraph 8, and in the event that the amount of preliminary expenses exceed the amount of $50,000.00, "Lessee [Farmers' Properties] shall pay said additional preliminary expenses at the time Lessor [Soter/Knudsen] gives written notice to lessee that said financing is not obtainable." Id.

Under this provision, Farmers' Properties is liable to Edwards & Daniels for the full unpaid fee due and owing. Farmers' Properties agreed to Edwards & Daniels' retention and agreed that it would be paid a fee of at least $117,000.00.

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[9] Verl Sorter testified that, when he gave the notice to Greg Soter, he told him, "that we were not spending any more money on that project until the financing was in place." (Tr. [2-2-90], at 62.) It was not until this late date that it finally dawned on Farmers' Properties that their long-awaited financing might not come through. Their belated notice was not soon enough to stop Edwards & Daniels from performing all of its work, however. According to Finding of Fact No. 39 (R. 984), Edwards & Daniels had completed the final set of architectural plans and had sent them to Verl Sorter prior to his communication to Greg Soter.

Edwards & Daniels is entitled to judgment against the Farmers' Properties defendants as a third-party beneficiary to the Lease Agreement.

D. The "consultation" requirement was satisfied even though the meetings in Salt Lake City occurred before the Lease Agreement was signed.

The fact that Farmers' Properties agreed to the retention of Edwards & Daniels before the Lease Agreement was executed does not invalidate the effectiveness of the decision that Edwards & Daniels be retained as the project architect. When Farmers' Properties signed the lease, they knew and agreed that Edwards & Daniels had been retained for a fee of at least $117,000.00. They knew that "Edwards & Daniels had been retained as the project architect and that it was going to complete all of the necessary drawings, plans, and specifications for the construction of the Hotel/Casino project." (Finding of Fact No. 28; R. 983.)

Had the meetings in Salt Lake City occurred after the Lease Agreement was executed, Farmers' Properties would be hard-pressed to argue that the "consultation" requirement of paragraph had not been satisfied. If the meetings would have been effective to give Farmers' Properties notice of Edwards & Daniels' retention as the project architect after the Lease Agreement was signed, why would the meetings not have been similarly effective before the document was signed. There was no magic in the signing of the agreement. The purpose of the "consultation" requirement--to give notice to Farmers' Properties of proposed expenditures and an opportunity to object--would be fully satisfied regardless whether the knowledge was gained before or after the signing of the Lease Agreement.

In its opening brief, Edwards & Daniels discussed the purpose of the "consultation" requirement of paragraph 8. The paragraph was designed, according to the attorney who drafted the provision, to avoid giving Soter/Knudsen a "blank check." (Tr. [2-9-90], at 46-47, 48; see Edwards & Daniels' opening brief, at 23.)[10] Fran Archuletta,[11] of Farmers' Properties, testified that he had a similar understanding. He acknowledged that Farmers' Properties would be responsible for preliminary expenses incurred in excess of the initial $50,000.00 if they agreed. "My understanding," he testified, " was that there was some possibility that the $50,000 could be exceeded if we were consulted, if we agreed." (Tr. [2-9-90], at 21; emphasis added.)

Farmers' Properties failed in its brief to recognize or address in any way the lower court's finding that, when they signed the Lease Agreement, they had already agreed that Edwards & Daniels be retained as project architect. (Findings of Fact Nos. 26-28; R. 983-83.) In their brief, Farmers' Properties argues that, under paragraph 8, they would not be liable for expenses over and above the initial

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[10] In their brief, the Farmers' Properties defendants seemingly take issue with Stan Stoll's testimony regarding his drafting of paragraph 8. They argue that he "conceded that his testimony concerning Paragraph 8 was highly colored in favor of his client." (Farmers' Properties' Brief, at 24.) In point of fact, Mr. Stoll was asked by Farmers' Properties' counsel at trial whether his "understanding may have been somewhat colored to the benefit of Soter-Knudsen." He answered, "Certainly." (Tr. [2-9-90], at 49-50.) Nowhere in their brief, however, do the Farmers' Properties defendants take issue with Mr. Stoll's statement that Farmers' Properties' primary concern was that Soter/Knudsen not be given a "blank check."

[11] Mr. Archuleta is an attorney licensed in the State of Nevada, and represented Farmers' Properties and the individual defendants in negotiating the Lease Agreement with Soter/Knudsen. (Tr. [2-2-90], at 80; [2-9-90], at 14.)

$50,000.00 unless they first agreed. They quote Archuleta's testimony that Soter/Knudsen "were supposed to talk to us and ask us if we agreed that we should expend this amount of money." (Farmers' Properties' Brief, at 23.) They argue that Soter/Knudsen "could not fulfill this obligation merely be notifying and sending a copy of an invoice or a bill after the expense had been incurred." Id. (emphasis in original).

Farmers' Properties somehow overlooks the fact that Edwards & Daniels did not argue in its brief that the obligations of paragraph 8 were satisfied by the conversations that Greg Soter testified he had with Verl Sorter or by Greg Soter's claim that he sent copies of Edwards & Daniels' invoices to Farmers' Properties.[12] Edwards & Daniels' argument on appeal is simple: Farmers' Properties had in fact agreed that Edwards & Daniels be retained as project architect, as the lower court found in meetings held in Salt Lake City during the summer of 1984. Farmers' Properties' agreement to retain Edwards & Daniels was valid prior to the execution of the Lease Agreement and it continued to be valid even after the agreement was signed.

E. The Lease Agreement was an integrated contract and evidence of the intent of Farmers' Properties is inadmissible to vary or contradict the terms of paragraph 8.

Instead of addressing the legal effect of their agreement in the summer of 1984 that Edwards & Daniels be retained as the project architect, the Farmers' Properties defendants devote most of their brief to a discussion of their intent that the

[12] The trial court found against Edwards & Daniels on these points. (Findings of Fact Nos. 7-10; R. 978-79.) Edwards & Daniels has not appealed from those findings and does seek any review thereof.

architects would be paid through construction financing that Soter/Knudsen was attempting to obtain. The lower court found that the Lease Agreement was an integrated contract and that it represented the entire contract between the parties. (Finding of Fact No. 17; R. 981.) Defendants' intent is inadmissible to vary or contradict the terms of the Lease Agreement under the parol evidence rule. Plateau Min. Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990). The lower court allowed the Farmers' Properties defendants to testify regarding their intent, but only for the purpose of resolving the ambiguity inherent in the "consultation" clause.

II.

ALL OF EDWARDS & DANIELS' WORK IN PREPARING PLANS AND DESIGNS WAS NECESSARY FOR THE CONSTRUCTION OF THE PROJECT.

In footnote 8 of their Brief, the Farmers Properties defendants assert that Edwards & Daniels moved 53 percent of its fee from the last design phase to the construction phase and that "[b]ecause construction never started, at least 53 percent of E&D's fee should never have been due." (Farmers' Properties Brief, at 33 n.8.) At trial, Gregory Soter admitted he made the change to the contract unilaterally. (Tr. [1-31-90], at 137.)[13] He testified that he wanted to avoid having to pay Edwards & Daniels for 53 percent of its work in preparing plans and designs until the construction phase began when financing would be available, so he moved 53 percent

[13] Ralph Edwards, the principal responsible for the project on behalf of Edwards & Daniels, testified that Soter's change to the contract document was unilateral and that he did not agree to the modification. (Tr. [1-31-90, at 121-22.)

from the construction document phase to the actual construction phase. He stated that he wanted to pay Edwards & Daniels 53 percent of its fee from construction draws. It was merely for the purpose of delaying payment to Edwards & Daniels for preparation of construction documents. (Tr. [1-31-90], at 138; Tr. [2-1-90], at 86-90.)

Greg Soter testified that, although he had hoped to pay Edwards & Daniels the 53 percent from construction draws, no financing was ever obtained on the project. That fact did not affect Soter/Knudsen's liability to Edwards & Daniels. He testified that Edwards & Daniels was entitled to be paid, even though no construction phase occurred. (Tr. [1-31-90], at 140.) Soter testified further that the 53 percent was due and owing to Edwards & Daniels even though the construction financing fell through and no construction phase occurred. (Tr. [2-1-90], at 161-62.) The trial court agreed with Edwards & Daniels' position that Edwards & Daniels was entitled to payment in full, including the 53 percent. The court found that Edwards & Daniels "fully performed under its Contract with Soter/Knudsen Construction Company" (Finding of Fact No. 19; R. 981), and awarded Edwards & Daniels judgment against Soter/Knudsen in the principal amount of $119,301.99. (R. 1006.)

RESPONSE TO CROSS-APPEAL

III.

THE LOWER COURT DID NOT ERR IN HOLDING THAT EDWARDS & DANIELS WAS A THIRD-PARTY BENEFICIARY AS A MATTER OF LAW.

A. Farmers' Properties misquoted the record; the trial court did not exclude the evidence of Farmers' Properties' intent to benefit Edwards & Daniels as a third-party beneficiary.

In their brief, Farmers' Properties complains that the court erred in excluding evidence of the parties' intent to benefit Edwards & Daniels during the examination of Gregory Soter. A more complete examination of the transcript, however, reveals that the court actually overruled Edwards & Daniels' objection. Farmers' Properties quoted only a portion of the court's ruling in their brief. (Farmers' Properties' Brief, at 43.) After indicating that there was no genuine issue of material fact whether the architects were intended beneficiaries under paragraph 8,[14] the court went on to add that the evidence would be allowed if it related to Farmers' Properties' fraud claim and fraud defense. After a discussion with Mr. Archuleta, the court reversed its previous position and overruled the objection, allowing Greg Soter to answer the question. Soter answered that he could not recall telling Archuleta that the parties never intended to benefit the architects when they signed the contract. (Tr. [2-1-90], at 136.)

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[14] This was the portion of the court's ruling that Farmers' Properties cited in their brief. (Tr. [2-1-90], at 133-34), quoted in Farmers' Properties' Brief, at 43.)

Although the trial court refused to consider this testimony on the issue whether Edwards & Daniels was an intended third-party beneficiary, even had he considered it, it would have been of no probative value whatsoever. Greg Soter gave no evidence that would have supported a finding that the parties to the Lease Agreement did not intend to benefit the architects.

B. Evidence of Farmers' Properties' intent to benefit Edwards & Daniels as a third-party beneficiary was inadmissible under the parol evidence rule.

Edwards & Daniels does not dispute that the issue whether a third party is intended to be a third-party beneficiary of a contract is an issue of fact, as Farmers' Properties asserts. (Farmers' Properties Brief, at 44-45.) That principle, however, does not require the admission of extrinsic evidence in violation of the parol evidence rule. In the present case, the issue of fact regarding the intent of the parties could be determined from the language of the Lease Agreement alone. The lower court properly refused to consider evidence that would vary or contradict the unambiguous language of paragraph 8 of the Lease Agreement. Paragraph 8 provided that Farmers' Properties would be liable for "preliminary expenses," which were specifically defined as including architectural fees. The court found that the Lease Agreement was an "integrated contract and represented the entire agreement between the parties." (Finding of Fact No. 17; R. 981.) Hence, the court's refusal to consider extrinsic evidence could not have been erroneous.

The court impliedly granted summary judgment in favor of Edwards & Daniels, holding that it was an intended third-party beneficiary based on the plain

language of paragraph 8 of the Lease Agreement. Although the Order on the motion did not specifically hold that Edwards & Daniels was a third-party beneficiary impliedly did so. The court specified that one of the issues to be tried was whether paragraph 8 was ambiguous on the question whether the consultation requirement "was a condition precedent to any liability on the part of Farmer' Properties, and its guarantors, to plaintiff, as a third-party beneficiary." (R. 705-06; emphasis added.)[15]

Edwards & Daniels had moved for summary judgment on the ground that it was a third-party beneficiary as a matter of law based on the language of the Lease Agreement. Farmers' Properties did not oppose the motion on that ground, but implicitly agreed that Edwards & Daniels was a third-party beneficiary.[16] Thus, the trial court noted that "there was nothing submitted to me at the time of the Motion for Summary Judgment, and there was no genuine issue of material fact as to whether or not there were intended beneficiaries, one of which being the plaintiff architect." (Tr. [2-1-90], at 134.) The court needed no evidence beyond that contained in

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[15] A copy of the Order of January 31, 1990, is appended to Farmers' Properties Brief as Exhibit G.

[16] A review of Farmers' Properties memoranda in opposition to the motion for summary judgment (appended to Farmers' Properties' Brief as Exhibits B and D) contain no argument whatsoever that Edwards & Daniels was an intended third-party beneficiary. Hence, the lower court noted at trial that "there was nothing submitted to me at the time of the Motion for Summary Judgment" on the third-party beneficiary issue. (Tr. [2-1-90], at 134.) Moreover, at the hearing on the motion for summary judgment, held on January 26, 1990, the Court signed the Pretrial Order (R. 704), which set forth the factual issues to be tried based on representations made by defendants' counsel regarding the factual issues to be tried. (Tr. [1-26-90].) At the hearing counsel for defendants made no mention that there was any issue regarding whether the parties to the Lease Agreement intended to benefit Edwards & Daniels.

paragraph 8 in order to determine that Edwards & Daniels was an intended beneficiary, as the court so found. (Finding of Fact No. 21; R. 981.)[17]

Farmers' Properties contends that the court's ruling on the summary judgment was error since the Affidavit of Fran Archuleta raised an issue of fact regarding the intent of the parties. Yet, Archuleta's self-serving assertion in his affidavit that "it was never our intention or a subject of discussion to give anyone else, in the nature of the architects, any rights under the contract" (R. 572) contradicts the language of paragraph 8, which obligates Farmers' Properties to pay fees owed to the architects, provided that the specified conditions were met. Although the record is unclear, the trial court apparently refused to consider Archuleta's affidavit on the question since it varied or contradicted the unambiguous language of paragraph 8 of the Lease Agreement.[18]

Farmers' Properties asserts that the "the trial court's Finding of Fact that E&D was a third-party beneficiary was clearly erroneous because no evidence was taken on the issue."[19] To the contrary, the trial court had ample evidence of the

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[17] In this Finding of Fact, the court found that "Edwards & Daniels was an intended beneficiary of the Lease Agreement between Soter/Knudsen Construction Company and Farmers' Properties, Inc., dated September 14, 1984, pursuant to Paragraph 8 of the Lease Agreement." (R. 981-82.)

[18] As noted above, Farmers' Properties did not argue in its memoranda in opposition to the motion for summary judgment or at the hearing on the motion held January 26, 1990, that Edwards & Daniels was not a third-party beneficiary. (See Tr. [1-26-90].)

[19] Farmers' Properties made no effort in their brief to marshal the evidence in favor of the court's finding.

parties' intent from the plain language of paragraph 8. Under the law of Utah and Nevada[20] Edwards & Daniels would be a third-party beneficiary.

C. Edwards & Daniels' need not prove that it relied on its status as a third-party beneficiary.

In footnote 12 of their brief, the Farmers' Properties defendants assert that Utah and Nevada law require "that the third-party beneficiary rely to some extent on its status as a third-party beneficiary." (Farmers' Properties Brief, at 44 n.12.) This is an erroneous statement of law. Neither of the cases that they cite describes any such rule of law. In Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App. 1990), this Court upheld the lower court's finding that Ringwood was not an intended beneficiary of the contract between Poggio and Gardner and Hernandez. The lower court had found that Ringwood was an intended third-party beneficiary of two prior contracts, which had been superseded by the contract at issue. Because "Ringwood did not rely upon, assent to, nor file an action" based on either of those prior contracts before they were superseded, the lower court did not err in finding that Ringwood was not an intended beneficiary. The Ringwood case does not hold that a third-party beneficiary must rely on its status as such in order to maintain a claim.

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[20] See Ron Case Roofing & Asphalt Paving, Inc. v. Blonquist, 773 P.2d 1382, 1386 (Utah 1989) (Court held that subcontractor was third-party beneficiary to contract between owner and contractor, which provided that the owner would pay all indebtedness relating to the furnishing of labor and materials); Lipshie v. Tracy Investment Co., 566 P.2d 819, 824 (Nev. 1977) (court held that "[a] contract to pay a debt to a third person is presumed for his benefit unless it appears that the contract was not so intended").

Defendants also miscite Lipshie v. Tracy Investment Co., 93 Nev. 370, 566 P.2d 819 (1977). There, the defendant Tracy Investment Company had entered into an agreement that a debt owed to the plaintiff, Lipshie, would survive certain bankruptcy proceedings. Tracy Investment Company did not make any promises to assume or pay the obligation to Lipshie. Id. at 825. The court held that in order to obtain the status of a third-party beneficiary, "there must clearly appear a promissory intent to benefit the third-party . . . and ultimately it must be shown that third-parties' reliance is foreseeable . . . ." Id. at 824-25 (citations omitted). The Court did not hold that actual reliance must be shown, but only that the promise to benefit the third-party must be of the nature that it could be foreseen that the third-party would rely on it. The present case is far different from the facts of Lipshie. Here, the promise contained in Paragraph 8 of the Lease Agreement very clearly was intended to benefit Edwards & Daniels and the promise was of such a nature that Edwards & Daniels' would foreseeably have relied on it.

Edwards & Daniels has been able to discover no case, and defendants cite none, that holds that a third-party beneficiary must prove actual reliance by the promise. Other Nevada cases involving questions of third-party liability do not even mention the reliance element discussed in Lipshie. See Morelli v. Morelli, 720 P.2d 704, 705 (Nev. 1986); Gibbs v. Giles, 607 P.2d 118, 120 (Nev. 1980); Olson v. Iacometti, 533 P.2d 1360, 1364 (Nev. 1975). Similarly, reliance is not an element

mentioned by the Utah Supreme Court in Ron Case Roofing & Asphalt Company v. Blonquist, 773 P.2d 1382 (Utah 1989).[21]

IV.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT SOTER/KNUDSEN VIOLATED PARAGRAPH 7 OF THE LEASE AGREEMENT.

Farmers' Properties sought to introduce evidence that paragraph 7 of the Lease Agreement constituted a condition precedent to any liability under paragraph 8. Paragraph 7 provided that Farmers' Properties' obligations under the agreement were subject to and contingent on the parties securing necessary licenses and permits, including gaming licenses required in Nevada for the operation of a casino.

The trial court excluded all evidence on this question because it had not been raised as a defense prior to trial. Edwards & Daniels served interrogatories that required defendants to state the factual basis for the seventh affirmative defense, which asserted that there was a failure of a condition precedent. (Interrogatory No. 63.) In their answers to that interrogatory, the Farmers' Properties defendants did not make any reference to paragraph 7 of the Lease Agreement. (R. 709, 751, 776, 801.) Without notice of the defense, Edwards & Daniels was not prepared through discovery to address the issue at trial and was prejudiced. (Tr. [2-1-90], at 7.) Because of the

[21] In addition, Edwards & Daniels was not required to introduce evidence of its reliance since that was not an issue raised at the Pretrial Conference held on January 26, 1990 (Tr. [1-26-90] nor in the Pretrial Order (R. 704.)

failure to respond to the interrogatories, the court ruled that paragraph 7 would not be an issue at trial. (Tr. [2-1-90], at 20.)

The Farmers' Properties defendants contend on appeal that their "attempt to introduce evidence on Paragraph 7 was in the nature of an amendment to the pleadings during trial." (Farmers' Properties Brief, at 48.) This is a curious position to take. The record does not reflect that Farmers' Properties ever sought to amend their pleadings.[22] Farmers' Properties cannot raise this issue for the first time on appeal. Mascaro v. Davis, 741 P.2d 938 (Utah 1987); Shine Dev. v. Frontier Invs., 799 P.2d 221 (Utah App. 1990).

Finally, Farmers' Properties claims that questions and answers given during the deposition of Verl Sorter was sufficient to put Edwards & Daniels on notice of the existence of the defense. The court properly rejected this argument. The few questions asked in the deposition regarding gaming licenses were hardly sufficient to put Edwards & Daniels on notice that paragraph 7 was a condition precedent to liability under paragraph 8. (Tr. [2-7-90], at 130.)

CONCLUSION

The lower court found that Farmers' Properties agreed that Edwards & Daniels be retained as project architect. Edwards & Daniels performed its contract with the knowledge and participation of Farmers' Properties. Under paragraph 8 of

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[22] It seems unclear why, exactly, Farmers' Properties would want to amend their pleadings, since they had pled the affirmative defense of failure of a condition precedent. The issue at the trial was not whether it had been pled, but whether defendants had properly answered interrogatories addressed to the affirmative defense.

the Lease Agreement, Farmers' Properties is liable to Edwards & Daniels for its unpaid fees. Edwards & Daniels urges this Court to reverse the lower court and direct the entry of judgment against the Farmers' Properties defendants.

DATED this 2nd day of March, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing Appellant's Reply Brief to be hand delivered this 27 day of March, 1992, to the following:

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