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IN THE SUPREME COURT

OF THE STATE OF UTAH

FRAY W. ZEMP and BILL ZEMP, Plaintiffs and Respondents, v. VAN FRANK & ASSOCIATES, INC., and ROGER M. VAN FRANK, Defendants and Appellants.	)	No. 14089

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APPELLANTS' REPLY BRIEF

Appeal from Judgment and from Order of the
Third District Court for Salt Lake County
Denying Motion to Amend Findings and Judgment

Hon. G. Hal Taylor, Judge

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APPELLANTS' REPLY BRIEF

DISCREPANCIES IN EVIDENCE AND ARGUMENT

As pointed out in appellants' prior brief, there are some glaring discrepancies between the versions of each side as to what happened in this case. Respondents' brief is addressed almost exclusively to the record and, accordingly, we will respond to that.

As before, we will do more than point out the discrepancies between the testimony on one side as against the other. We will show inconsistencies, distortions, and in some instances downright falsity, in respondents' arguments and in representations of fact set out in respondents' brief. Our rebuttal of matters stated in respondents' brief will, generally, follow the order in which they are therein first stated, notwithstanding much

random restatement. An equitable determination of the truth should not be too difficult.

We do not argue against van Frank's obligation to furnish drawings in accordance with the requirements of local building codes. The citation at R 299, by respondent, not only acknowledges this but contains Roger van Frank's statement that he would make any changes that would be required in order to meet those requirements, including trips to the building officials' office if necessary to discuss these with them. And these, emphatically, would not be considered to be changes ordered by the Zemps. This does not establish a major breach not readily correctable upon request. What about mitigation of damages?

Respondents state that the van Frank plans never did qualify for a building permit, but the record is clear that they were never submitted for a building permit. Reference is made to Mr. Ivie's testimony at R 151-3. At R 152-5 Mr. Ivie noted that some of the requirements were met by Exhibit 18-D, the Description of Materials or "specifications" and would be met by a truss diagram.

The changes in appearance of the new duplex, mentioned in respondents' brief, at 2 and 3, were changes that were directed or approved by the Zemps: The existing duplexes do not have cement front porch steps, as declared by respondents (15-P, 17-P). Respondents' reference to R 69 is to van Frank's testimony that Bill Zemp thought roof changes would be elegant, easier to build, would save him substantial dollars and would give an appearance that he felt was quite acceptable. But the reference at R 92

is to Bill Zemp's testimony that there isn't one part of van Frank's detailed drawings that was suitable and acceptable to him, not one part that is similar to the duplex prepared from Mason's plans. The court noted, at R 345-6, the final changes in appearance, but seems to have overlooked the evidence, including Zemp's admissions, that Zemps requested some changes that would necessarily change appearance, e.g., bay windows (R 105-6, 123, 327-32) and roof cover for the front entry (R 68-9, 167-91).

Respondents have expended great effort to place The Fireplaces in a false light, contending that these were the only things for which the $60 additional charge was made, contending that van Frank would always charge extra for drawing any fireplaces, implying that van Frank had not drawn them originally on the outside walls (see R 331-2), implying that there were no design conflicts or problems about putting bay windows and fireplaces in the same area of the same wall (see R 327-32).

Respondents say (Brief 3) that "defendant at no time during the trial was able to explain (this) as being justified, authorized, or agreed to." This is a false statement of the evidence. Van Frank did explain that it represented design changes requested by the Zemps subsequent to the initial drawings, changes at their request not only in the design and location of fire places, but also for a change in room configuration, a storage room or study (R 24-6, 47-8), and other things (R 288-301, see 169, 173-84). He explained that there were criteria changes requested by the Zemps after the first drawings were prepared, "from the second place" (R 76). Compare exhibits 19-D through 24-D with Exhibits 3-P, 26-P, 27-P, 30-P, 31-P,

32-P and with exhibits 37-D through 42-D. Note the ghosts (R 288-94). Respondents' statement that "defendant does not ask for this ($60) in his appeal brief" is erroneous. We asked for $474.30 per-square-foot amount, plus $60 for the extra work, plus $5.23 print charges, which is the sum of $539.53 (Appellants' Brief 23). It should be noted that the court did not make any finding that the $60 charge for extra work or the $5.23 charge for printing copies of the plans were not proper charges, if van Frank was entitled to anything.

Respondent says (Brief 3) "Also Mr. Mason, a licensed Architect, testified that a fire place is not usually charged as an extra, knows of no time or person that has ever charged such as an extra (See 225)." He says this testimony was never rebutted, but that is false. We refer to the foregoing portions of the record: Mr. Mason was not a licensed architect, whether or not a fireplace is usually charged as an extra is immaterial, and the charge was made for much more than an original drawing of a fireplace, anyway.

Concerning the eight-inch versus nine-inch foundation thickness: Zemps' witness, Ronald Ivie from the Salt Lake County Building and Zoning Department acknowledged that there is no building code requirement that a foundation be nine inches thick (R 265-8); that there must be proper tie-in and support for brick veneer walls, but that this is often done by red-lining in such changes (R 153, 273) and that such things are often provided in attached specifications; he testified that the specifications (Exh 18-D) provide some of Code-required information about building materials, qualities,

etc. (R 154-5). Another Zemp witness, Gordon Connley from the Salt Lake County Building Inspection Department, testified at R 140-9. Most of his testimony is referred to in respondents' brief. He said that that agency in examining plans and specifications for approval would ordinarily spot the foundation thickness, would normally require an inch to be added to the dimension on the plans, by so specifying in red ink, and that that normally and quite readily would take care of it (R 144-5). The testimony of Alvin Mason, at R 234-8, is particularly helpful in this connection, also.

Respondents repeat on page 3 of their brief their contention that they were unable to use any part or portion of the van Frank drawings. We think they did not dare use them unless they paid for them and that they were still willing to use and pay for them if they could only bargain van Frank down. They acknowledged the obligation, at least Fray Zemp did. (R 204-5, 210, 255-7, 264). In fact, they tendered payment for the full principal amount claimed, except for attorney's fees. They apparently felt they could avoid paying collection fees, notwithstanding that the contract so provided, as do nearly all form contracts. (See R 261, 264). They finally obtained substitute plans from a man who is not a licensed architect, and whose legal entitlement to prepare architectural drawings for others (R 147) was so uncertain that it required litigation to decide it (R 228). It would seem significant that he did not even sign his name nor affix a seal nor enter a license number upon his drawings (Exh 35-C). He and his work are Zemps' standard of comparison.

The Zemps' testimony at the trial thus reaffirmed the position they took in the answers to defendants' interrogatories: that there was no part of the plans and specifications that were satisfactory to them (R 129). Yet, Fray Zemp, who apparently did read her lawyer's answers, immediately acknowledged in her testimony (R 130 and following) that she did want the stairs and the entry doors in front of the building and that she and her husband did want the bay windows that van Frank drew, as requested -- windows that, quite importantly, would necessarily and substantially change the external appearance of the new duplex, as mentioned above.

Respondents contend (Brief 3) that "from the outset of the trial" Roger van Frank admitted he had over-figured and over-charged the square footage and the amount owed. The record shows he did not know at the outset that this was the case (R 321, 344), that it was only after detailed computation in court that it became apparent his figures were too high, just as Zemps' lawyer's figures in his answers to interrogatories had been too low.

Respondents stress that the original contract provides for modifications thereof to be in writing only (Brief 3) and then argue that the plans changes are modifications of that Agreement. This is faulty reasoning. We would have to assume that there were drawings in existence at the time this contract was signed, that were made a part of the contract. But it was a contract to prepare drawings and the phrase quoted by respondents refers to modifications or assignments of the agreement -- not to modifications or assignments of the drawings themselves.

Respondents continue to contend that there were two liens (Brief 5, 6). The evidence shows there was one lien, that was amended. The trial court said in his ruling that he did not have to hold whether there was one lien or two liens (R 344) but Zemps' lawyer, acting for the court, found that there were two liens, as he has contended. This is particularly inconsistent when he stated, at R 320, that "there is only one lien in this case."

Re "notice" of the square-foot error (Brief 5-6): In light of Zemps' obviously false contentions that there was nothing about the van Frank drawings that was acceptable, that they were wholly unsatisfactory and misfit, coupled with the fact that Zemps did not register any dissatisfaction with the amount of the van Frank billing until after the lien was recorded -- not until after Zemps were substantially in default of payment -- and coupled with the argumentative nature of their complaint and their answers to defendants' interrogatories, van Frank had no particular reason to believe them about the amount of square footage. When he realized the amount was wrong he readily acknowledged it.

FURTHER ANALYSIS

Much of respondents' argumentation does not hold water. Their brief, at page 7, refers to Roger van Frank as "a highly trained professional, well versed in figures and trained sufficiently to be licensed as an Architect individual." Is this the same man they have referred to as stupid, who makes stupid mistakes, who prepares so-called building drawings which are wholly unsatisfactory, drawings that are piss-poor? Which is he? He can hardly be both.

How about Bill Zemp? Can he be both a licensed general construction contractor and an alcoholic with a tenth grade education? It appears that he can. They have not taken the position that he is incompetent and should have a guardian.

Comment is made about a "highly one sided contract". If one-sided contracts were unlawful it would abolish many constitutional and statutory provisions, much of the common law, the free-enterprise system and nearly every standard-form contract of adhesion. We think this contract is much less uneven than are most form contracts.

Respondents' argument that they were stuck with an obligation to pay for a set of plans "regardless of what they might look like or how adequate they may be" and without any opportunity to obtain what they wanted is insupportable, in view of the evidence. We will not restate all of the detailed comments and references we have already made in this connection but if this line of argument is to be believed we then must believe that the court has no duty to hear or take into account large portions of the testimony of nine of the witnesses in this case, nor many details of the evidence appearing in most of the 46 exhibits. The fact-finder would have to be very selective about the testimony of Bill Zemp and Fray Zemp, themselves -- ready to say, "I will believe this statement implicitly"; I won't believe that statement at all;" "I will overlook these discrepancies." Substantial portions of the testimony of the men brought in from the Salt Lake County Building Department, Ronald Ivie and Gordon Connley, must also be disregarded, but other portions of their testimony must be accepted, to find

for Zemps against vanFrank.

To find that vanFrank's office was not preparing what the Zemps requested, including many changes, and that Fray Zemp had not promised payment, without complaint, a fact-finder must determine not only that Roger vanFrank was lying under oath but that his employees, Dennis Cecchini, Brigitta Gornik, and Carol Merritt were also perjurers (See their testimony cited supra). It is significant to note that respondents rely upon the testimony of all of these witnesses in an effort to establish that there was no work done for Zemps after June 26, 1973 (Brief 8) but would completely negate the testimony of each of these witnesses when they said that such work was done after such date, as above recited, and that Fray Zemp thereafter acknowledged Zemps' duty to pay and did not raise any objections to the drawings. This is an equitable review. A judge should not simply accept all supportive evidence and disregard all nonsupportive evidence from the same witness, without sufficient cause. That makes fact-finding much easier but it does not make it right.

Concerning the application of the penalty statute, UCA 38-1-24 (Brief 9) the testimony in the transcript, set forth in black and white (and often in yellow), does not show a willful violation that would invoke such a penalty. We refer to Point 3 in our main brief.

CONCLUSION

The course of development of this lawsuit is apparent: vanFrank's office did the work requested including making the changes that were requested. This was accepted without express objection by the Zemps, until

pressure was applied to pay for it. Payment was not readily made so the lien was filed. Zemps got a lawyer and wanted to know what they could do about it. Then, it would appear for the first time, they began to find all sorts of things wrong with the agreement and its performance. They tried to settle out cheaply, could not, and in anger attacked van Frank. Van Frank in anger rejected what otherwise might have been acceptable, except for the defamations and threats. Now this Court is asked to believe that Zemps are all white and van Frank is all black. But the evidence and the law, and equity, do not support such a result.

Respectfully submitted, this 18th day of November, 1975.

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