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No. 64256-1

COURT OF APPEALS - DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

HARBOUR HOMES, INC. f/k/a
GEONERCO, INC.,
a Washington corporation,

Appellant,

v.

AMERICA 1ST ROOFING &
BUILDERS INC., *et al.*,

Respondent.

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REPLY BRIEF OF THE APPELLANT

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I. SUPPLEMENTAL DESIGNATION

Respondent America 1st Roofing & Builders, Inc. (“America 1st”) admits that it performed the installation of all roofs at the Bluegrass Meadows project. CP 1021–46; 1201–03. America 1st also executed an indemnification agreement wherein it agreed to defend, indemnify and hold harmless Harbour Homes, Inc. f/k/a Geonerco, Inc.’s (“Harbour Homes”) from any and all claims arising from work performed for Harbour Homes. CP 840.

Following the dismissal of Respondents Bickley Construction, Inc. (“Bickley”) and Anthony’s Homes, Inc. (“Anthony’s”), America 1st, the only remaining defendant in the suit, filed a motion for summary judgment seeking dismissal of Appellant Harbour Homes’ claims. CP 862–82. Harbour Homes did not file any responsive briefing to the trial court, nor were America 1st’s arguments heard or ruled upon by the trial court. Instead, for reasons of judicial economy and the law of the case, Harbour Homes and America 1st stipulated to dismissal of America 1st’s claims, on the basis of the trial’s orders as to Bickley and Anthony’s, as if they had been granted to America 1st. CP 758–62.

Harbour Homes filed an amended Notice of Appeal as a matter of right, pursuant to RAP 5.1(a), incorporating all Defendants

into this matter. CP 726–57. Thus, when Harbour Homes filed its opening brief, America’s 1st’s Motion for Summary Judgment, accompanying declarations, and order of dismissal were not part of the original clerk’s papers and a supplemental designation of clerk’s papers was pending. Harbour Homes stated in its opening brief that the citations would be supplemented in Harbour Homes’ reply brief, which are cited and noted above.

II. “CONTEXT RULE” APPLIES

The Bluegrass Meadows homeowners filed suit against Harbour Homes alleging construction defects that arise out of the work of America 1st, Bickley and Anthony’s. CP 710–23. Specifically, the homeowners raised issues with the roofing installed by America 1st and the framing, siding and windows installed by Bickley and Anthony’s. CP 717–18. In response, Harbour Homes filed a separate action against these subcontractors, alleging breach of contract, and also brought claims for defense and indemnity. CP 700–09.

It is undisputed that Bickley and Anthony’s entered into written contracts in March 2002 with Harbour Homes to install the framing, windows, and T1-11 siding on certain homes at the Bluegrass Meadows project. CP 306–17. It is further undisputed

that the first paragraph of both contracts specifically sets forth that Bickley and Anthony's were obligated:

- to frame the homes at Bluegrass Meadows in accordance with the plans and the local building codes;
- to review the plans and "assure they conform to local requirements"; and
- to build the homes to "the highest quality standards within the trade."

CP 307, 313.

Furthermore, all three subcontractors submitted bids and invoices to Harbour Homes for their work on the Project that listed the parties, the Project name, lot number, a description of the work, and the price of the work. The invoices also reflect the mutual intent of the parties that the Respondents performed all framing or roofing of the homes in the Project for Harbour Homes. The bids and invoices alone constitute a written contract and bring Harbour Homes' claims within the six-year statute of limitations for written contracts.

Additionally, Harbour Homes' Production Manager, Bill Schodorf, described the project subcontractors' role as follows:

- A. ... I required the subcontractor, Anthony Homes, or one of his lead guys, one of his

superintendents, to walk with the inspector when they came out to walk the house.

Q. With the building inspector?

A. With the building inspector, because these guys, you know, these guys are the experts. And this guy was the expert, and some of the times I would understand what they were talking about, sometimes I wouldn't, but it was my job to coordinate it.

Q. Is that something you required of all your framing subcontractors?

A. Yes, sir.

....

Q. (BY MR. GILLIGAN) So it was your project, correct?

A. I was the project manager, production manager, yes.

Q. And you expected the subcontractor to know what you wanted them to do at the project?

A. No, I expected the subcontractor to know what he was supposed to do as a professional. I hired professionals to do a job.

Q. And that goes with regard to how they perform their construction services, correct?

A. Correct.

Q. But what about with regard to the scope of the service in terms of how much work they're supposed to do, where they're supposed to do it, how do they know that?

MS. McKOWN: Object to form.

A. General industry consensus. I mean, **when you hire a framer to frame a house he generally knows what framing a house means.**

CP 449–50 (emphasis added); *see also Decl. of Bill Schodorf*, at CP 299–305.

Mr. Schodorf's testimony supports Harbour Homes' position that even though the contracts with the subcontractors do not specifically identify each and every subtask that was to be performed, the subcontractors were the experts and agreed to install all of their work in a professional manner to industry standards.

Moreover, Respondents wholly fail to cite to any case law that requires the listing of specific tasks or a "scope of work" as essential elements to a contract. A written contract is valid and enforceable in Washington, and subject to a six-year statute of limitations, so long as the "essential elements" are set forth in the writing. *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995).

Respondents claim that the contract fails because there is no specific scope of work. However, this is not an "essential

element” required under the law, and more importantly, it is not an issue that is in dispute. Nevertheless, they seek to avoid their contractual obligations by arguing that the contract is not specific, and argue that the three-year statute must apply if parol evidence is required to supplement the written contract. Here, no parol evidence is necessary. Bickley and Anthony’s have admitted that it installed the framing, windows and T1-11. This is what “framing” on a Harbour Homes’ Project includes, and no party disputes this fact. There is also no question that America 1st installed all the roofs.

The written agreements to frame the homes, install the windows, and install the T1-11 siding or to roof the homes and install all roofing products is implicit in the contract terms, and evidenced by the Respondents’ conduct. There is no question regarding their conduct, and no question that the roofing installation or framing, window installation, and T1-11 installation was part of the written agreement. The written contract is not invalid simply because these tasks are not specifically spelled out. The six-year statute of limitations applies to the claims against the Respondents.

At least since *Berg v. Hudesman*, Washington courts have applied the “context rule” to determine the intent of parties to a contract, which allows for the admission of extrinsic evidence to

help courts determine the intent of the parties to a written contract and the reasonableness of the parties' respective interpretations. 115 Wn.2d 657, 662, 667–68, 801 P.2d 222 (1990) (Extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent adopting the Restatement (Second) of Contracts §§ 212, 214(c) (1981).); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999). The rule applies regardless of whether or not a contract contains an integration clause. *King v. Rice*, 146 Wn. App. 662, 670–71, 191 P.3d 946 (2008), *review denied*, 165 Wn.2d 1049, 208 P.3d 554 (2009).

Here, there is no question that Bickley and Anthony's agreed to install the siding and windows as part of their work as framers on the project in accordance with the plans and the local building codes and using a framer's highest quality standards. There is also no question that America 1st agreed to install all the roofs at Bluegrass Meadows under the same standards. Mr. Schodorf testified that Harbour Homes' expectation was that these expert subcontractors would install all of the work related to their trade to the industry standards of their profession, regardless of whether the contracts specifically laid out each task. He further stated that the

price charged by the subcontractors is a rate consistent with high quality, workmanlike, and code compliant standards. CP 300. Therefore, it is reasonable to interpret that the parties intended all framing and roofing components be installed without defects by these identified trades.

Moreover, the trial court may look to the course of dealing between the parties when construing the terms of a contract. *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 166-67, 70 P.3d 966 (Div. 1, 2003) (citing *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002); *Morgan v. Stokely-Van Camp, Inc.*, 34 Wn. App. 801, 808-09, 663 P.2d 1384 (1983); Restatement (Second) of Contracts § 223 (1981)). The contracts between Harbour Homes and its framing and roofing subcontractors are all “course of dealing” contracts. CP 1021–46; 1201–03; 840; 306-317. Additionally, express language in the Bickley and Anthony's agreements stated that they cover all projects at which the subcontractors worked for Harbour Homes, not just the specific projects at issue in this lawsuit. See *Contract ¶ 13*, CP 306-317 (“This Subcontract Agreement shall be applicable **to any Harbour jobsite...**”) (emphasis added).

There is no dispute that America 1st, Bickley and Anthony's performed framing work on many Harbour Homes' Projects over the course of many years, and Bickley continued to work with Harbour Homes even after the suit against Bickley was filed. CP 460. The contracts also expressly state that framing work pursuant to written plans is included in the work to be performed under the contracts. *Contract ¶ 1*, CP 306-317 ("Subcontractor agrees to complete their portion of the work **per the plans supplied**") (emphasis added). Consequently, the course of dealing with Harbour Homes over the years, when considered with the express terms of the written contracts, conclusively establish that the contractors had a written contract, subject to the six-year statute of limitations, to perform framing and roofing work according to the plans provided by Harbour Homes.

At a minimum, there are material issues of fact as to whether America 1st, Bickley and Anthony's complied with these expectations, terms and conditions of their written contracts. Thus, the trial court incorrectly dismissed Harbour Homes' claims against Bickley and Anthony's, finding that the written contracts lacked essential terms. CP 103-06, 110-14.

III. "LATENT" DEFECTS NOT RAISED

In their appellate briefs, both Bickley and Anthony's argue for the first time that the alleged defects associated with their work at the project are latent in nature. This argument is in response to Harbour Homes' position that the discovery rule applies if the Court determines that the contracts were oral and a three-year statute of limitations applies.

Issues not raised at a trial court hearing on a motion for summary judgment cannot be considered for the first time on appeal. *Davis v. Sill*, 55 Wn.2d 477, 481, 348 P.2d 215 (1960); *Almy v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963). Therefore, any arguments by Bickley and Anthony's that the alleged defects were latent have been waived at the appellate level since Harbour Homes was not provided the opportunity to address this position at the trial court level.

Additionally, for reasons of judicial economy and law of the case, Harbour Homes and America 1st agreed to stipulate to the dismissal of Harbour Homes' claims against America 1st and incorporated the trial court orders that dismissed Bickley and Anthony's. CP 758-62. Again, the trial court never considered the issue of whether the defects alleged are latent. Therefore,

Respondents' position that the defects are latent to support arguments that the discovery rule does not apply are not properly before this Court and should not be considered.

IV. CONCLUSION

For the above stated reasons, Harbour Homes respectfully requests that the Court reverse the trial courts order of summary judgment dismissal and remand this matter for trial.

Respectfully submitted this 1st day of March, 2010.

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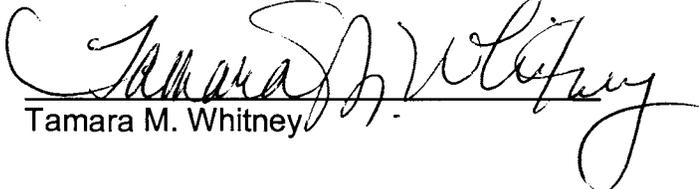
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