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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 09-2-06759-2

TYLER & DAWN MITCHELL, husband and wife,
Defendants/Appellants,

v.

BUILDER OF DREAMS, LLC,
Defendant/Respondent.

APPELLANTS' REPLY BRIEF

Brian M. King, WSBA #29197
Rebecca M. Larson, WSBA # 20156
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II. ARGUMENT

a. Fixed-Price Contract:

i. Appellants Have Challenged Sufficient Findings of Fact and Conclusions of Law:

The findings of fact and conclusions of law challenged by Appellants Mitchell demonstrate error on the part of the trial court that warrants reversal of the judgment against them. The Mitchells challenged the trial court's findings that there were separate oral agreements that the parties relied upon (Finding of Fact 27); that the parties understood that the amount to be billed for the house would exceed that financed by the lender (Finding of Fact 43); that there was implied agreement that the Mitchells would pay for extra work (Finding of Fact 85); that the Mitchells could not have assumed that all of the changes they requested would be made without adjusting the price (Finding of Fact 86); that the parties treated the Contract as if it were on a cost-plus basis; (Finding of Fact 110); that the Mitchells' acquiescence to the manner of billing and to the fact that construction of the custom home was being billed on a cost-plus basis is inconsistent with the Mitchells' position that the Contract was for the construction of a custom home for a fixed price; and that this was consistent with Builder of Dreams' position; and that the contract between

the parties was for construction of a custom home on a cost-plus basis, and not on a fixed-price basis. (Finding of Fact 137 and 173).

As these findings of fact are in error, there is no support for the trial court's conclusions of law, and the entry of judgment against the Mitchells should be reversed. The parties did not treat the contract as a cost-plus agreement. The Mitchells were not unreasonable in expecting Builder of Dreams to comply with the terms of the written contract; they never agreed to pay additional amounts for the changes made by Builder of Dreams; and their acquiescence in certain billing methods did not waive any contract terms. Other, unchallenged findings of fact do not excuse these errors or warrant affirming the judgment.

ii. The Mitchells Did Not Waive Terms of the Written Contract:

In Conclusion of Law 26, the trial judge found that by their conduct after the execution of the Contract, each party waived any requirement in the Contract that changes be memorialized in writing. But as already argued in the Mitchells' opening brief, their testimony at trial showed that they never had any intention of waiving any of the contractual requirements. Builder of Dreams' owner Dan Moore repeatedly told them that the numbers would "work out" in the end and comply with the fixed

price. The Mitchells merely relied on these assurances as the contract progressed.

Tyler Mitchell testified that he expected that the total contract price of \$1,032,023 identified in paragraph 9 of the Contract was what he would pay. Mr. Moore never said anything to indicate that this was a fixed price contract. (RP 209:11 to 210:1). Necessary changes to the designs, such as changes to the stairway or the breezeway, did not change the fixed-price understanding. Mr. Moore never indicated that the changes would increase the cost in any way. (RP 216:6-23; 231:7 to 214:24). Mrs. Mitchell's testimony was consistent on this issue. (RP 309:4 to 310:10).

Mr. Moore made assurances that the Cost Breakdown would even out and not exceed the Contract amount. These assurances support the Mitchells' reasonable belief that this remained a fixed price contract. (RP 220:22 to 221:15). They made payments during the course of the work because Mr. Moore told them it was needed, but there is nothing to indicate that any change in the ultimate price was intended or agreed to. In fact, the testimony shows that this was not the case.

When it became clear that the costs were exceeding the contract price, Mr. and Mrs. Mitchell personally took steps to try to reduce them. They contracted directly with subcontractors in order to try and minimize the total amount of the construction costs. (RP 223:1-18). Builder of

Dreams did not object to this approach. While this reduced some costs, the Mitchells still ended up over-paying several hundred thousand dollars. (RP 225:17-25).

iii. The Merger Clause Should Be Given Effect:

The fixed-price Contract clearly provided that any change orders, including changes in the Contract's price, had to be made in writing. Any oral discussions that might have taken place between the parties are irrelevant, as confirmed by Paragraph 23 of the contract:

23. No Verbal Representations. Owners acknowledge and understand that their written contract is the complete and entire understanding of the parties, and **no verbal promise or representation by anyone shall vary or modify the written contract. All discussions shall have no effect unless signed in writing by the parties.**

(CP 55 (Emphasis added)).

Even in cases where a purchaser has actual notice that costs are increasing, a builder is still required to comply with written notice provisions. *Mike M. Johnson v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003). Here, Builder of Dreams never once, verbally or in writing, requested that Mr. and Mrs. Mitchell agree to any change in the Contract's price, and Mr. and Mrs. Mitchell never waived this requirement of the Contract.

Waiver is the intentional and voluntary relinquishment of a known right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). There was clearly no express waiver by Mr. and Mrs. Mitchell in the present matter. And while a waiver may be implied, such an implied waiver must be shown by *unequivocal conduct* that evinces intent to waive. *Birkland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958)(emphasis added). This requires proof of conduct that is inconsistent with any intent other than waiver. *Id.* at 565. There was never any such conduct by the Mitchells. Their conduct in paying bills was based upon assurances from Mr. Moore that the costs would even out in the end. Their payment directly to contractors was an attempt to limit overruns. None of this shows acquiescence to a cost-plus contract.

The trial court further found that Paragraph 23 of the Contract, the Integration (Merger) Clause, was boilerplate language and was factually false at the time the parties entered into the Contract, thus making it unenforceable. (COL 7, 8, and 9). The trial court and Builder of Dreams both rely upon *Lyall v. DeYoung*, 42 Wn.App. 252, 711 P.2d 356 (1985) to show that the merger clause was factually false when the parties entered into it. But, again as already argued, this case is factually distinguishable. In the present matter, there was nothing in the Cost Breakdown sheet that conflicted with the Contract; in fact, both documents contained the same

fixed-price number - \$1,032,523.00. The merger clause was not factually false and should not have been disregarded by the trial court.

b. Award of Attorneys Fees and Costs:

i. Builder of Dreams Incorrectly Attempts to Parse Out the Last Sentence of Paragraph 28.

Paragraph 28 of the Contract makes it clear by its terms that the “dispute” being addressed involves claims that a “Purchaser” may have against “Contractor”. The fact that the term “Owner” is also specifically used in this paragraph indicates that it is not the same party as a “Purchaser”. There would be no reason to use two separate terms for the same party within the same paragraph. Thus, Paragraph 28 deals with claims of a “Purchaser” other than the “Owner”.

The first sentence of Paragraph 28 shows that the paragraph is directed to a Purchaser’s claims for faults, construction defects, or breach of contract, and sets forth a time limit for asserting such claims. The second sentence mandates that any warranty work shall not extend “this provision”. Builder of Dreams argues that the next sentence should somehow be read completely separately from the rest of the paragraph and extend the dispute resolution provisions to beyond potential Purchaser’s claims. But there is nothing in Paragraph 28 which warrants such a reading. The final sentence is not set apart or otherwise distinguished

from the rest of the paragraph to show that it is meant to address a wider array of claims. The reasonable reading of the term “[f]or any dispute” should be taken in the conjunctive to mean “for any dispute discussed in this paragraph”.

As argued in the Mitchells’ Opening Brief, contract language must be interpreted most strongly against the party that drafted it. *Guy Stickney v. Underwood*, 67 Wn.2d 824, 827 (1966).

“Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. **In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.**”

Restat 2d of Contracts, § 206 as adopted through *Berg v. Hudesman*, 115 Wn.2d 657, 677 (1990)(emphasis added).

Here, Builder of Dreams drafted the contract language at issue. In the case of interpreting Paragraph 28, there are no “decisive” factors that would warrant accepting Builder of Dreams’ reading of the attorney fees provision rather than that of the Mitchells. Thus, the attorney fees provision cannot be read to apply to the present matter.

ii. The Context Rule Does Not Support the Award of Attorney Fees to Builder of Dreams:

Builder of Dreams argues that reading Paragraph 28 in the context of the rest of the contract, specifically including Paragraph 26, shows that the dispute resolution language in Paragraph 28 was meant to address any and all disputes of any nature. It points to the fact that Paragraph 26 also uses the term “any dispute”. But again, the last line of Paragraph 26 must be read in light of that entire paragraph, just as Paragraph 28 must be. When Paragraph 26 is read as a whole, it does not support Builder of Dreams’ position.

Paragraph 26 discusses “Party In Interest”:

Purchasers understand that the sole party they are contracting with is Builder of Dreams, L.L.C., a Washington limited liability company. As such, no officer, employee, agent, or worker of that company shall be named individually as a party in any dispute between the parties of **any kind**, save and except for specific factual instances of intentional torts for which an individual is clearly liable under the law, and for which facts shall be plead with particularity or claim is waived. Owners agree that **any dispute arising out of this transaction** shall be with Contractor only, and failure to abide will cost Owner the liquidated sum of \$100.00 per day, payable immediately each day of violation.

(CP 55)(emphasis added).

The last line of Paragraph 26 specifically addresses any dispute between the parties. It addresses the fact that if the parties have a dispute

“of any kind”, the Owners can only sue the corporate entity and not individuals.

The language of Paragraph 26 demonstrates what language Builder of Dreams could have used in Paragraph 28, had it so chosen. Paragraph 28 does not have the language “of any kind” when discussing disputes. The reasonable reading of the last line of Paragraph 28, then is that it does not apply to any kind of dispute but rather only to the types of disputes mentioned earlier in that paragraph.

Builder of Dreams cites to the case of *Scoccolo Construction, Inc. v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006) and argues that it shows a broad attorney fee provision immediately following a more limited indemnification provision is enforceable. *Scoccolo* is distinguishable, however, because the attorney fee provision there specifically said “[contractor] agrees to pay all costs, expenses, and reasonable attorney’s fees that may be incurred or paid by the City in the enforcement of any of the provisions and agreements hereunder.” *Id.*, at 520. This provision is much more specific than the last sentence of Paragraph 28 in the present matter. The *Scoccolo* provision applies expressly between the contractor and a city for the expenses that the city might incur for enforcement of the contract. This is different from Paragraph 28.

iv. RCW 4.84.330 Does Not Mandate An Award Of Attorneys Fees To Builder Of Dreams

Builder of Dreams next argues that RCW 4.84.330 requires a finding that it is entitled to attorneys fees. While this statute can turn a one-sided attorney fee provision into a bilateral provision, that attorney fee provision needs to be enforceable to begin with before it can be applied bilaterally. As discussed in the Mitchells' opening brief, the attorney fee provision in the Dispute Resolution paragraph is ambiguous and open to several different reasonable interpretations. As the drafter of the Contract, the ambiguities must be construed against Builder of Dreams. RCW 4.84.330 does not mandate an award of attorney fees in its favor.

Builder of Dreams cannot demonstrate a contractual right to attorney fees for prevailing on claims it brought against defendants Mitchell. Because of this, the trial court abused its discretion in making an award of attorneys fees based upon Paragraph 28, and this Court should reverse that award.

III. CONCLUSION

The trial court erred in finding that the parties entered into a cost-plus contract as opposed to a fixed price contract and in awarding damages, interest, and attorneys fees and costs to Builder of Dreams.

Appellants Mitchell respectfully request that this Court reverse the trial court's entry of judgment in favor of Builder of Dreams.

RESPECTFULLY SUBMITTED this 30th day of July, 2012.

DAVIES PEARSON, P.C.
Attorneys for Appellants Mitchell

A handwritten signature in black ink, appearing to be "B.M. King", written over a horizontal line.

Brian M. King, WSBA #29197
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