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1 CASE NO. 87-5699

2 DEPT. NO. 2

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FILED

'91 JUL 11 AM 10:23

4 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

5 IN AND FOR THE COUNTY OF WASHOE
L. Romero
DEPUTY

6

* * * * *

7 AGATE SALES, INC., a
8 Nevada corporation,

8

Plaintiff,

9

v.

10

11 JACK ARMSTRONG, individually,
12 JACK F. STATEN and M. JANE
13 STATEN, husband and wife, and
14 ABC CORPORATIONS I through V,
15 inclusive, and JOHN DOES
16 I through V, inclusive,

14

Defendants.

15

16 JACK F. STATEN and M. JANE
17 STATEN, husband and wife,

17

Counterclaimants,

18

v.

19 AGATE SALES, INC., a Nevada
20 corporation,

20

Counterdefendant.

21

AND CONSOLIDATED CASE NO. CV88-5482

22

23 JACK ARMSTRONG,

23

Plaintiff,

24

v.

25

26 JACK F. STATEN, M. JANE
27 STATEN, and DOES I
28 through V,

27

Defendants.

28

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT

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1 JACK F. STATEN, M. JANE
STATEN,

2 Counterclaimants,

3 v.

4 JACK ARMSTRONG,

5 Counterdefendant.
6 _____/

7
8 The above-entitled case having come on regularly for trial
9 before the Court commencing on May 6th, 1991 and continuing until
10 May 14th, 1991; Allison, MacKenzie, Hartman, Soumbeniotis &
11 Russell, Ltd., Karen Peterson, Esq. appearing for Agate Sales; Bob
12 Angres, Esq. appearing for Jack Armstrong; and the Law Offices of
13 Michael B. Springer, Michael B. Springer, Esq. and Stephen S.
14 Sprinkel, Esq. appearing for Jack and M. Jane Staten; the Court
15 having read and considered the Complaints, Answers and
16 Counterclaim, Reply to the Counterclaim, the documents admitted
17 into evidence during the trial, and briefs and points and
18 authorities filed by the parties at the request of the Court; and
19 having heard and carefully considered the testimony of the
20 witnesses called to testify, the Court finds the following facts
21 and states the following conclusions of law:

22 FINDINGS OF FACT

23 1. From late 1983 until 1986-1987 Jack Armstrong operated
24 an unlicensed proprietorship called "Armstrong Construction."

25 2. In 1983-1984 Jack Armstrong and Jack Staten entered into
26 a cost-plus construction contract, for the construction of a
27 residence at 905 Tyner, Incline Village, Nevada ("The Project"),
28 which provided that Jack Armstrong receive a seven percent (7%)

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1 commission in excess of his cost and also receive Fifteen Dollars
2 (\$15) per hour for craftsmanship efforts. This cost-plus
3 construction contract was one not for the entirety of the project,
4 but one which Jack Staten could terminate at will.

5 3. Prior to entering the contract, Jack Armstrong knowingly
6 falsely represented himself as being a licensed contractor in the
7 State of Nevada and State of California. He, further, falsely
8 represented and exaggerated his construction expertise.

9 4. The Statens' reasonably relied upon these
10 misrepresentations of Jack Armstrong to their material detriment,
11 and the court finds that the Statens' would not have entered this
12 relationship had Armstrong not misrepresented his licensed status
13 and ability.

14 5. Jack Armstrong was responsible for, and in fact,
15 supervised construction on the project for 3 years, from late 1983
16 until the winter of 1986-1987. It is clear, however, that the
17 supervision was inadequate.

18 6. Jack Armstrong greatly exceeded a normal and reasonable
19 time for construction of a custom home of this nature at this
20 location, despite the difficulties of the site which the Court has
21 taken into consideration.

22 7. Jack Armstrong greatly exceeded the reasonable costs of
23 construction, as is discussed below, and this fact renders
24 inconsequential Armstrong's claims that the cash flow from Statens
25 affected the progress of construction. The Court finds that the
26 funding by the Statens was more than sufficient and timely to
27 allow construction of the project.

28 8. Jack Armstrong was terminated by Jack Staten in the

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1 winter of 1986-1987.

2 9. Jack Armstrong commingled the funds with this project
3 with others in his own personal banking account.

4 10. Armstrong's practices in constructing the Staten
5 residence were substandard. Among other things, the more serious
6 errors in construction are as follows:

7 A. Armstrong did not use glu-lam beams in some cases
8 where they were required on the plans.

9 B. Many of the beams did not bear upon supporting
10 columns as required in the plans.

11 C. The roof rafters and joists were inadequately
12 constructed, and did not bear on exterior walls as required.

13 D. Column loads were not, in all cases, transferred to
14 the foundation, creating structural defects.

15 E. The roof joists were overcut at bearing points which
16 created structural defects.

17 F. Joist hangars were skewed and/or missing on many of
18 the joists, creating structural defects.

19 G. Armstrong allowed a heavy brick chimney chase to be
20 constructed upon the roof of the residence without properly
21 supporting or anchoring the chimney structure which created a
22 structural overload of the roof framing.

23 H. Staircases were constructed in violation of the
24 building code.

25 11. The Statens' cost to cure the structural deficiencies
26 totaled Forty-Three Thousand, Five Hundred Thirteen and 27/100
27 Dollars (\$43,513.27).

28 12. Statens paid Five Hundred Eleven Thousand Dollars

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1 (\$511,000.00) for the construction of the Project under
2 Armstrong's supervision pursuant to the contract between Staten
3 and Armstrong.

4 13. The reasonable cost to construct this residence, taking
5 into consideration all factors, including the Project site, was
6 Three Hundred Ten Thousand Dollars (\$310,000.00)

7 14. Armstrong, in breach of contract and as a result of his
8 negligence in constructing, and supervising the construction of,
9 the Project, exceeded all reasonable costs by Two Hundred One
10 Thousand Dollars (\$201,000.00), thereby damaging the Statens to
11 the same amount.

12 15. Because Jack Staten obtained the building permit in his
13 own name he had the ability to control and supervise Armstrong's
14 work. The Court finds that forty-nine percent (49%) of the
15 damages of Two Hundred One Thousand Dollars (\$201,000.00), for
16 excessive cost, were attributable to the Statens' failure to
17 mitigate, or their negligence, stemming from their failure to
18 exercise control and supervision over Armstrong's excessive
19 expenditures and construction costs.

20 16. The Court concludes, therefore, that the Statens have
21 been damaged by cost overruns of fifty-one percent (51%) of Two
22 Hundred One Thousand Dollars (\$201,000.00) or One Hundred Two
23 Thousand, Five Hundred Ten Dollars (\$102,510.00), for which
24 Armstrong is liable.

25 17. Armstrong failed to apply the stain product as specified
26 by the Statens.

27 18. The damage to the Statens resulting from Armstrong's
28 failure and refusal to apply the specified siding product totals

1 Five Thousand Dollars (\$5,000.00).

2 19. The Statens have sustained damages for which they may
3 recover from Armstrong in the amount of One Hundred Fifty-One
4 Thousand, Two Hundred Eighty-Three and 27/100 Dollars
5 (\$151,283.27).

6 20. Armstrong placed the order for materials supplied to 905
7 Tyner Way with Agate Sales and was in privity of contract with
8 Agate Sales.

9 21. There was no privity of contract existing between Agate
10 Sales and the Statens.

11 22. The material supplied by Agate Sales was accepted by
12 Jack Armstrong, the Court is not persuaded that the material was
13 accepted by the Statens.

14 23. The Statens were not unjustly enriched by the siding
15 materials supplied by Agate Sales. The materials were not
16 retained by the Statens to their benefit, and in fact were
17 replaced at a substantial additional cost to the Statens.

18 24. There is a balance due and owing to Agate Sales pursuant
19 to its invoices for material supplied to 905 Tyner Way in the sum
20 of \$1,783.97.

21 25. Agate is entitled to judgment against Armstrong for One
22 Thousand, Seven Hundred Eighty-Three and 97/100 Dollars
23 (\$1,783.97) as damages for Armstrong's breach of his contract with
24 Agate Sales, plus reasonable attorney's fees.

25

26

CONCLUSIONS OF LAW

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28

1. That to the extent any "Findings of Fact" contains a
legal conclusion, that conclusion is incorporated into these

1 Conclusions of Law.

2 2. That there existed a valid contract between Statens and
3 Armstrong.

4 3. That Armstrong breached his Contractual duties and
5 furthermore was grossly negligent in many aspects of his
6 supervisory duties to the Statens relating to this project.

7 4. That because of this negligence and breach of Contract
8 with the Statens, Armstrong has damaged the Statens in the amount
9 of Two Hundred Forty-Nine Thousand, Five Hundred Thirteen and
10 27/100 Dollars (\$249,513.27).

11 5. That the Statens failed to mitigate Ninety-Eight
12 Thousand, Four Hundred Ninety Dollars (\$98,490.00) of their Two
13 Hundred Forty-Nine Thousand, Five Hundred Thirteen and 27/100
14 Dollars (\$249,513.27) damages sustained, and the Statens are
15 entitled to recover from Armstrong One Hundred Fifty-One Thousand,
16 Twenty-Three and 27/100 (\$151,023.27), for their damages
17 sustained.

18 6. That there existed no contract between Agate Sales and
19 Statens.

20 7. That Statens were not unjustly enriched by the materials
21 supplied by Agate Sales.

22 8. That because there existed no privity of contract between
23 Statens and Agate Sales, the claims and Counterclaims between
24 Agate Sales and Statens are dismissed.

25 9. That there existed a contract between Agate Sales and
26 Armstrong, and that Armstrong has breached that contract, by non-
27 payment, damaging Agate Sales in the amount of One Thousand, Seven
28 Hundred Eighty-Three and 97/100 Dollars (\$1,783.97).

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1 10. That Armstrong has failed to prove his claims against the
2 Statens and that because of the insufficient proof the claims are
3 dismissed.

4
5 JUDGMENT

6 Pursuant to the foregoing Findings of Fact and Conclusions of
7 Law, Statens are hereby awarded judgment against Armstrong in the
8 amount of One Hundred Fifty-One Thousand, Twenty-Three and 27/100
9 Dollars (\$151,023.27) Agate Sales is entitled to judgment against
10 Armstrong in the amount of One Thousand, Seven Hundred Eighty-
11 Three and 97/100 Dollars (\$1,783.97).

12 Armstrong's claims against Statens, Statens claims against
13 Agate Sales, and Agate Sales claims against Statens are hereby
14 dismissed.

15
16 DATED this 11th day of July, 1991.

17 *Charles M. McGee*

18 _____
19 DISTRICT JUDGE

20
21
22 CERTIFIED COPY

23 The document to which this certificate is at-
24 tached is a true, correct and exact copy of the
original on file with the County Clerk.

25 By 8/20/91
26 _____
27 District Clerk for the County of
28 Washoe, Nevada.

By [Signature] **SEAL** Deputy

REQUESTED BY

Michael Springer
IN OFFICIAL RECORDS OF
GOVERNMENT OF NEVADA

'91 AUG 22 AIO:41

SUZANNE BLAUREAU
RECORDER

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\$12 PAID Ke DEPUTY

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