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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
JACK R. ARMSTRONG dba
ARMSTRONG CONSTRUCTION,
Debtor.

Case No. 92-55746-JRG
Chapter 7

JACK F. STATEN and M. JANE
STATEN,
Plaintiffs,

Adversary No. 92-5597

vs.

MEMORANDUM DECISION

JACK R. ARMSTRONG,
Defendants.

I. INTRODUCTION

In this case plaintiffs seek a judgment against the defendant based on defendant's alleged misrepresentations about his ability as a contractor and capability of building a new home for the plaintiffs. For the reasons hereafter stated, the court will render judgment in favor of the defendant.

II. FACTUAL BACKGROUND

Armstrong initially became involved in the construction

1 business after his freshman year in high school. He continued
2 working in construction throughout high school and while he
3 attended college. Armstrong worked on construction crews during
4 summer vacations, painting, and pouring concrete foundations,
5 patios and walkways. After college, he worked in a family-owned
6 business for a year, and then began working in construction
7 again. In 1971, Armstrong was employed by the Community Action
8 Board in Santa Cruz which was organizing a low income housing
9 project in Watsonville.

10 Prior to meeting the plaintiffs, Armstrong spent 17 years
11 working in various construction capacities. Over the years he
12 built, or was involved in building, 11 homes that were
13 constructed on an owner-builder basis; that is, either as an
14 owner-builder himself or for an owner-builder. During this time
15 he never became a licensed contractor in California.

16 Armstrong's first building efforts were in the Felton area
17 of California. In the early 1970's he built a 1,500 square foot
18 home from a Monarch Package Plan. He built a second home based
19 on a modification of the package plan and then a third home that
20 approximated 1,700 square feet. He also participated in
21 building a garage and guest house in back of the family home,
22 which totaled approximately 3,000 square feet.

23 In 1977, Armstrong relocated to the Incline Village area of
24 Nevada. He built a home in Incline using the same plan from his
25 first Felton home with some reengineering to accommodate the
26 snow load. He then built a second home for his mother and step-
27 father based on plans obtained from a local builder. His third
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1 home, built in 1979, was based on a plan he purchased and had
2 reengineered for the snow load.

3 Armstrong's fourth Incline house was completed in 1981 on a
4 lot owned by his mother. It was located at 995 Tyner and was a
5 two story, wood frame house. During this time, Armstrong had
6 still not become a licensed contractor. The Statens owned a
7 vacation home at 204 Nadine Court which backed up to the four
8 homes on Tyner that Armstrong had built. When Armstrong put the
9 last Tyner property up for sale and held an open house, Mr.
10 Staten came by and introduced himself.

11 Staten is a sophisticated businessman, having worked for
12 General Dynamics, Martin Marietta Corporation, ITT, Cannon
13 Electric, Microdot Corporation and Pepsi Building Systems. He
14 has many years experience in both accounting and management.
15 Since 1975 he has owned his own business located on Enterprise
16 Street in Incline Village. Staten, with a friend, Dr. Lloyd
17 Gauntt, also owns the building where the business is located.
18 Gauntt was looking for a house at that time and Staten thought
19 Armstrong's Tyner property was just right for his friend.

20 Staten expressed interest and then put together a purchase
21 of the property for Gauntt. His experience and sophistication
22 eliminated the need for a real estate broker or a lawyer. After
23 "checking the comps" he "negotiated all the economic terms" of
24 the purchase, including an interest pre-payment feature that
25 would provide tax advantages to Gauntt.

26 Shortly thereafter, Armstrong met Mrs. Staten and there
27 were discussions about the homes that Armstrong had built and
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1 the new home the Statens were planning. Staten had acquired a
2 lot at 905 Tyner which had a 180° view of Lake Tahoe. He
3 intended to build a larger home for himself at that location.

4 Staten and Armstrong had relatively little contact until
5 more than a year later. During this time Staten had plans
6 prepared for the new home by Thomas Maurer, an architect who had
7 done work for him in Southern California. This was to be a
8 large complex home built on a steep lot. It had three levels to
9 maximize the view, a slate roof, Anderson windows, and was
10 designed with double walls for increased insulation. As he got
11 ready to begin construction of his new home, Staten took out a
12 building permit as an owner/builder. At this time, the summer
13 of 1983, Staten was negotiating with Van Noord & Quimby for the
14 construction of his new residence. Van Noord was a local
15 contractor located in Incline Village who had previously worked
16 on the Enterprise Street building where Staten's business was
17 located. Staten and Van Noord were discussing a two stage
18 process whereby the shell of the home would be constructed and
19 the interior would be done at a later time, possibly by another
20 contractor. Van Noord proposed to do the work at cost plus 15%,
21 estimating the cost of the shell at \$155,000. Van Noord wanted
22 to start work at the beginning of August so that they could
23 complete the work before winter set in. On August 9, 1983,
24 Staten signed the contract to proceed with construction but did
25 not deliver it to Van Noord.

26 Staten was nevertheless anxious to get a start before
27 winter set in. It was getting harder to build in the area and
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1 people wanted to get a start while they had their permits in
2 hand. There were some concerns in the area about a building
3 moratorium. Instead of proceeding with Van Noord, Staten
4 tracked down Armstrong and asked him if he was interested in
5 working on the project. Armstrong said that he was interested
6 and would do the work for cost plus 7%. Staten decided to
7 proceed with Armstrong. He did so without asking for
8 verification of his contractor's license, without asking for
9 references, without seeing his prior work other than Gauntt's
10 home, and without requiring a bond or even a written contract.
11 Proceeding with Armstrong provided Staten with two important
12 advantages. Staten could potentially save money since the
13 contractor's markup was 7% rather than 15%. Additionally, since
14 Staten was building for cash rather than utilizing a loan, he
15 could control the pace of work. Van Noord had wanted a \$155,000
16 contractual commitment for two and a half months work in the
17 summer of 1983.

18 Armstrong initiated work about September 1, 1983, and
19 worked until about October 15th when winter weather began to set
20 in. Armstrong continued to work on the Staten home during the
21 building season in 1984, 1985 and 1986. For reasons that are
22 unclear, the architect who designed the home, Thomas Maurer, had
23 no role in supervising or inspecting the project.

24 Armstrong's work on the project ceased on approximately
25 November 15, 1986, when he was fired. Thereafter, it was
26 discovered that there had been some deviations from the building
27 plans. The deviations resulted in concerns about the ability of
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1 the structure to handle a heavy snow load. It was estimated
2 that the problems would take about three months to correct.
3 Ultimately, they were corrected. The Staten home was completed
4 in 1994 or 1995, some eight or nine years after it was started.

5 There ensued litigation between Staten and Armstrong in the
6 Nevada State Court ultimately resulting in a judgment in favor
7 of Staten. When Armstrong subsequently filed bankruptcy, this
8 action followed.

9 **III. DISCUSSION**

10 To establish a claim under 11 U.S.C. § 523(a)(2)(A) the
11 plaintiff must prove that:

12 1. A materially false representation was made by the
13 defendant,

14 2. With knowledge of its falsity,

15 3. And with an intent to defraud,

16 4. That the plaintiff justifiably relied on the
17 representation,

18 5. And that damage proximately resulted.

19 In re Britton, 950 F.2d 602 (9th Cir. 1991); In re Howarter,
20 114 B.R. 682 (9th Cir. B.A.P. 1990); In re Kirsh, 973 F. 2d 1454
21 (9th Cir. 1992). Claims arising under 11 U.S.C. § 523 need to
22 be proven only by a preponderance of the evidence. Grogan v.
23 Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 755 (1991).

24 Plaintiffs' case is based on allegations that fall into two
25 categories. The first deals with Armstrong's ability as a
26 contractor. Armstrong represented that he had the ability to
27 construct the home which included purchasing the proper
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1 materials and engaging competent workers and subcontractors.
2 Plaintiffs contend that Armstrong's deviations from the plans,
3 which resulted in problems, demonstrate that he was not
4 competent and that these representations therefore amount to
5 fraud. While Armstrong did create some problems, which were
6 remedied, there is no evidence that he did so intentionally.
7 There is no evidence that Armstrong questioned his own ability
8 to build the home. In fact, after considering the evidence and
9 weighing the credibility of the witnesses, it is clear that
10 Armstrong truly thought he could build the home. Even though
11 Armstrong's statements turned out to be incorrect, the court
12 does not find any knowledge of their inaccuracy nor any intent
13 to deceive by these statements.

14 The second prong of plaintiffs' case is based on the
15 allegation that Armstrong misled plaintiffs about being a
16 licensed contractor. After weighing all of the evidence and
17 evaluating the credibility of the witness, the court finds that
18 the plaintiffs have not met their burden in establishing that a
19 misrepresentation was made.

20 **IV. CONCLUSION**

21 Based on the foregoing, the court finds in favor of the
22 defendant. Plaintiffs shall take nothing by virtue of their
23 complaint.

24 The foregoing shall constitute the court's findings of fact
25 and conclusions of law pursuant to Bankruptcy Rule 7052 and
26 Federal Rule 52.

27 Counsel for defendant shall lodge a proposed form of
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UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

1 judgment with the court within twenty days. It need not contain
2 the findings and conclusions which the court has made in this
3 memorandum.

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