

DISTRICT COURT

BENCH JUDGMENT: \$10,000 plus interest for Defendant/Counterclaimant builder, \$8,870 for Plaintiff owners of Big Sky spec houses for punch list . . . Tucker.

Two Vistas Holdings sued Elliott Iszler alleging that 2 houses he built at Big Sky were not built to workmanlike standards and not completed within 1 year and the delay caused lost profits by preventing their sale while the Big Sky market was higher. It alleged breach of contract, breach of the implied covenant, and negligence. Iszler counterclaimed alleging breach of the implied covenant by Two Vistas' withholding \$10,000 for work completed plus interest. Bench trial was 2/17-19/09 and 5/28-29/09.

Two Vistas was formed in 2005 to purchase Big Sky real estate. It is comprised of 4 Knoxville MDs including Rick Dooley. Iszler had overseen construction of a personal residence for Dooley at the lower elevations of Big Sky. In 6/05 Iszler and Two Vistas orally agreed for Iszler to provide construction supervision and services for residences on Lots 165 and 166 at the upper elevations where it is substantially more difficult to build due to extremes of elevations and winter conditions. The home on Lot 166 was similar to Dooley's residence except square logs from Tennessee Log Homes rather than round logs. Iszler had arranged for Maus Const. of Bozeman to frame and dry-in Lot 166, but Dooley decided to use Jim Ekman as recommended by TLH. Ekman's work was substandard. Iszler recommended termination of Ekman and his crew. Dooley directed Iszler to work with Ekman. Maus was hired to correct Ekman's mistakes over a period of 4 months. Dooley consistently delayed payment for work completed, which slowed progress. Further delays were encountered when no trusses arrived from TLH. When TLH never responded, Iszler arranged to purchase them locally. Trusses from TLH showed up 2 weeks later. Dooley paid for them and directed Iszler to sell them, but Iszler could not. The roof on 166 developed leaks. It was constructed in accord with the manufacturer's specifications and leaking and associated damages were not the result of improper construction. Ice dams are the cause of 90% of roof leak situations at Big Sky. Ekman installed a bituminous membrane, which will not create a watertight seal around nail holes. Maus could not have corrected it without completely removing the roof resulting in additional significant expense and delay which Two Vistas did not want. It was warned of the need to shovel roofs and guard against ice dams. Dooley failed to do so, resulting in ice dams on both roofs and damages from water infiltration. Extra time was required on 165 due to Dooley's design revisions and changes in work, including 3 separate sets of plans and a number of last-minute design changes, including:

* Maus pointed out that Dooley had a post dead-center in the master bedroom. When Dooley realized he could have only twin beds he asked to have a dormer created where there had been a closet.

* Dooley wanted an opening between the master bedroom and above the garage. Maus opined that it was not possible. Dooley really wanted it. It required moving load bearing points and a great deal of engineering.

* Dooley did not like square timbers and asked that they be covered with round logs. After Maus was half through the change, Dooley required hand-peeled rather than lathe-turned logs. It was necessary to peel the posts that were in place as well as those yet to be installed.

Dooley compromised Iszler's efforts by contracting with Ekman for erection and Lutes for masonry. There are few buyers for homes at over \$1 million. 165 and 166 do not have ski in, ski out amenities which may be the most compelling feature for buyers. No one can determine when the economy, housing, and real estate boom, and frenetic activity at Big Sky slowed/stopped/collapsed, but it is apparent that Two Vistas' plans to build spec houses suffered from colossally bad timing. Its determination to reduce prices was consistent with reasonable efforts to sell the houses. Its determination to raise prices is inconsistent with efforts to sell. Two Vistas and Iszler did not agree on a specific date when 165 and 166 would be completed. Considering all facts and circumstances, he completed the required work in a reasonable time. As of 12/31/06 a variety of minor work was necessary to finish 166 including interior trim, shelves, locks, stain overspray on windows, loose stair rails, and wall holes around electrical socket plates. The reasonable value of this "punch list" work is \$8,870. Two Vistas

withheld \$10,000 from the payment due to Iszler in 1/07. Iszler constructed the buildings in accord with the plans provided to him and changes required by Two Vistas. The time allowed for Iszler to complete 165 and 166 was reasonable. Building codes applicable to other areas of Montana do not apply in Big Sky. Iszler is responsible for the punch list work which was completed by other contractors for \$8,870. Although he was removed before he could complete the list, he has not been harmed because he was not required to complete it. When the owner provides plans and specifications, the persons completing the work are required to build to that plan or the owner's direction. Iszler is not responsible for Two Vistas' inability to sell 165 and 166 at a particular price or within a particular time. Iszler was not negligent in performing the work. Two Vistas was negligent in not maintaining roofs through the winter by allowing ice dams to form which caused the roofs to leak. Iszler did not breach the contract or its implied covenant of good faith and fair dealing. He satisfied his duty to perform in a workmanlike manner and acted as an ordinary prudent person would. Dooley's payments to Iszler throughout the process constituted acceptance of the work which waived opportunity to recover for defects known or discernable with reasonable inspection. Iszler has no responsibility for corrective work by others. The agreement provides that he has no responsibility for any secondary or consequential damages caused by any defect. Therefore, even if defects, breaches, or negligence existed, Two Vistas may not recover lost profits.

Iszler shall have judgment against Two Vistas for \$10,000 with prejudgment interest after 1/07 and post-judgment interest. Two Vistas is entitled to judgment against Iszler for \$8,870 with post-judgment interest. Plaintiff's experts: Bill Schwann, Bozeman (building inspector); David Schroeder, Bozeman (roofing issues); Terry O'Neil, Big Sky (real estate issues).

Defendant's experts: Jamie Latta, Bozeman (construction standards); John Goan, Big Sky (real estate issues); Kim Palmieri, Billings (building codes).

Demand by Two Vistas, \$617,000; offer by Iszler, \$42,000. Stuart Kellner, mediator.

Two Vistas Holdings v. Iszler (Lone Tree Builders), Madison DV 29-07-56, 7/24/09.

Gig Tollefsen (Berg, Lilly & Tollefsen), Bozeman, for Two Vistas; Jared Dahle (Nelson & Dahle), Billings, for Iszler (Mountain West Farm Bureau Mutual Ins.).