STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT

CAUSE NO. 49D12-0507-PL-026701
49D12-0501-CC-002753

GREGORY S. McNULTY and LAURA P. McNULTY,
Plaintiffs,

v.

GREYSTONE DEVELOPMENT CORPORATION; R.J. CUSTOM BUILDERS, INC.; and ALT & WITZIG ENGINEERING, INC.,

Defendants.

GREYSTONE DEVELOPMENT CORPORATION,
Cross-Claim Plaintiff,

v.

R.J. CUSTOM BUILDERS, INC.
Cross-Claim Defendant.

GREYSTONE DEVELOPMENT CORP; ROBERT W. KRUSE and TERESA S. KRUSE; ALTON E. LOWE and SUE ELLEN LOWE; and GREYSTONE HOMEOWNERS' ASSOCIATION, INC.

NUNC PRO TUNC FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

On July 31, 2006, the Court entered its Findings of Fact, Conclusions of Law and Judgment in this matter. The entry failed to include the entire caption and the second case number that was transferred to this Court and tried simultaneously with the first action filed in this court. Therefore, this entry is made, nunc pro tunc, to clarify the matters disposed by this Judgment entry. No other changes have been made to the July 31, 2006 judgment.

The Plaintiffs, Gregory S. McNulty and Laura P. McNulty (McNulty), having appeared in person by Gregory S. McNulty (McNulty) and by counsel, William T. Rosenbaum; Defendant Greystone Development Corporation (Greystone) having appeared in person by its representative Dennis Copenhaver and by counsel Alan H. Lobley; Defendant R.J. Custom Builders d/b/a Johnson Excavating (Johnson) having appeared in person by its representative William R. Johnson (Bill) and by counsel Thomas W. Vander Luitgaren; and Defendant Alt & Witzig Engineering, Inc. (A&W) having appeared in person by its representative Skip Dilk and by counsel David E. Bostwick at a bench trial held on March 30 and April 24, 26 and 27, 2006.

The court having heard and considered the evidence presented at trial and otherwise being duly advised in the premises, now issues the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has subject matter jurisdiction of this case and personal jurisdiction over all parties hereto.
2. Greystone was the developer of Greystone Section VII, a subdivision in Marion County, Indiana.
3. R. J. Custom Builders d/b/a/Johnson Excavating ("Johnson") was an Indiana corporation engaged in the business of excavation work.
4. Alt & Witzig was an Indiana corporation engaged in the business of geotechnical engineering.
5. On October 21, 2002, McNulty offered to purchase Lot 138. The McNultys and Greystone entered into a lot purchase agreement on October 21, 2002 for the McNultys to purchase Lot 138 in Greystone, Section VII for the sum of Eighty Four Thousand Nine Hundred Dollars ($84,900). This was a 1.5 acre lot at the end of the cul-de-sac, and a significant portion of this lot was within the 100 year floodplain. At the time of the purchase agreement the lot had not yet been developed, and the McNultys had not

compacted to a 95% Standard Proctor while areas outside of the pad were to be lightly compacted.

11. Prior to offering to purchase Lot 138, closing on the purchase of Lot 138 and the start of construction, McNulty and his representatives met with Donna Smithers, a registered land surveyor whose firm, Maurer & Smithers, prepared the Development Plan, to discuss McNulty's concerns regarding the amount of fill material called for on Lot 138 in order to bring it out of the floodway. After one meeting with McNulty, Smithers sent him a letter dated May 12, 2003, cautioning McNulty against purchasing the lot without first discussing the matter with his builder. The letter specifically stated that "[t]his lot will require creativity to build on. It is very possible that retaining walls will be required to lift areas up during the construction of the house to obtain elevations desired by the future homeowner." The final sentence in the letter stated that "[i]t is my opinion that you should discuss this site with your builder to determine what would be required during construction to obtain a finished product and if this lot is suitable for you." The letter also advised McNulty that the "proposed dimensions of the building pad are shown as 60-feet wide by 50-feet deep."

12. After receiving the letter from Donna Smithers and learning that Johnson completed the excavation work sometime in June of 2003, McNulty instructed his builder, Rick Campbell, of Rick Campbell Builder, Inc. (Campbell) to inspect Lot 138.

13. Campbell visited the lot in June of 2003. While there, Campbell phoned Smithers to ask whether anyone tested the compaction of the lot's fill material. Smithers instructed him to call Johnson to ask whether Johnson hired an engineering firm to test the pad. After Johnson informed Campbell that Johnson obtained no tests, Campbell called Smithers back and she referred Campbell to A&W since she had a good experience with them when she constructed her home in Greenwood, Indiana.

14. On September 17, 2003, McNulty consummated the purchase of Lot 138 at a closing. Greystone conveyed Lot 138 to McNulty via a corporate warranty deed. The deed stated in pertinent part that the "conveyance is made

been informed how much fill would be required to build up the lot to bring it out of the floodplain.

6. The Purchase Agreement states in pertinent part that McNulty "shall have complete possession of the real estate on the date of closing and shall bear the risk of loss from and after the date of closing."

7. The Addendum states in pertinent part as follows:

> (1) Closing to be within 10 days after infrastructure is in place. (Electricity, water, sewer, street and roof grading to plat if applicable).
> (2) Contingent upon buyer receiving and accepting final specifications and drawings regarding slope, flood zone and floodway limits. (See attached floodway exhibit.)
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> . . .
>
> (6) Contingent upon final inspection and approval by buyers of lot after infrastructure is in place and buyers are able to access area for inspection.
> (7) Contingent upon buyers being able to build home with daylight basement.

8. The Development Plan, on page 3, specified a 50' deep by 60' wide proposed building pad on Lots 137, 138 and 139 with somewhere between 6' to 10' feet of fill over those lots.

9. The Development Plan's specifications on page 10 at E(6) stated in pertinent part that:

> fill material in areas outside building and pavement areas shall be compacted lightly and protected from erosion by one or more of the methods of Item G. Areas where building and pavement construction is feasible shall not have unsuitable material placed in that location and fill shall be compacted to 95% Standard Proctor or better. These areas shall be determined by the Developer's representatives.

10. Based on the combined testimony of William DuBois, P.E. of Patriot Engineering, Joe Meyer, P.E. of K.O.E. Engineering, Inc. and Larry Walker of Timberwood Homes, the Development Plan showed Lot 138 to be designed for a daylight or walkout basement with a 50' deep and 60' wide proposed building pad

subject to . . . the state of facts that would be disclosed by an accurate survey and physical inspection of the subject real estate."

15. In late September of 2003, McNulty and Campbell met Steve Werling, P.E. of A&W on site where McNulty and Campbell delivered one of the pages from the Development Plan to Werling as well as a rough sketch of the intended home on the lot. While on site with McNulty and Campbell, Werling marked the locations around the perimeter of the home's foundation where A&W was to perform four soil borings. A&W marked the locations for the soil borings without regard for the 50' deep by 60' wide proposed building pad.

16. A&W issued a four page report dated November 4, 2003, with several attachments to McNulty detailing the scope of and findings from its soil investigation. The first page of the report stated in pertinent part that "the purpose of this subsurface investigation was to determine the depth, consistency, and in place density of the existing fill materials . . . to determine if the density of these fill materials is sufficient for the support of residential construction."

17. The third page of the report stated the Standard Proctor values for the tested soil and then concluded that "the fill material was placed at densities which may result in . . . distress of the floor slab and differential settlement of the footings . . . it is not recommended that footings or floor slabs be constructed on this existing fill material . . .it appears that the most feasible method would be to remove the existing fill material and re-compact the material . . . at a minimum density of 97 percent of maximum dry density in accordance with ASTM test procedure D-698 (standard proctor)."

18. On the fourth page of the report, A&W recommended that a representative of A&W be on site to "monitor and test all compaction procedures." The final paragraph of the report then went into great detail as to the proper compaction methods including a recommendation that "it will be necessary to properly compact the fill material a minimum of ten (10) to fifteen (15) feet beyond the limits (horizontal distance) of any new structure."

19. A&W provided a copy of the November 4, 2003, report to Campbell.

20. McNulty demanded that Johnson re-compact the pad under A&W's supervision. The project manager from Johnson Excavating, Mr. Copenhaver, confirmed that Johnson would re-compact the pad at no cost to McNulty.

21. On November 21 and 22, 2003, Johnson sent its employees to Lot 138 to re-compact the proposed building pad and directed one of them to make arrangements with A&W to have a representative present at the time of re-compaction.

22. When Johnson's employees arrived to Lot 138 on November 21, 2003, Dylan Whitaker (an employee of Johnson) and Bill (an employee of Johnson) noticed that the soil borings were outside the dimensions of the proposed building pad that had been re-staked by Maurer & Smithers for re-compaction. The soil borings were marked with stakes and there were either holes or indentations in the ground showing their location. Bill measured the distance between the soil borings and the re-staked pad and recorded his findings on the Development Plan on p 3. These measurements show the borings occurred at least 5' outside the proposed building pad.

23. To maintain goodwill with Johnson and with the window of opportunity for re-compaction closing due to the onset of winter weather, Bill decided to re-compact the proposed building pad even though A&W performed the borings outside the proposed building pad. Furthermore, Greystone still owed Johnson $7,250 and Johnson hoped Greystone would pay it after Johnson performed the re-compaction work.

24. Johnson properly compacted the proposed building pad on its first attempt. While removing the original fill material within the dimensions of the proposed building pad area as re-staked for re-compaction by Maurer & Smithers, Whitaker and Bill concluded that the pad had been well compacted the first time. Whitaker, who had twenty years of construction and excavation experience, arrived at this conclusion based on the resistance the excavation equipment experienced when he used it to remove the compacted fill material. Based on the A&W test results dated November 22, 2003, A&W tested and approved all lifts.

25. Johnson Excavating was performing the recompaction work to satisfy Greystone, its customer. McNulty had almost no contact with any employee of Johnson Excavating.

26. McNulty signed a building contract with Rick Campbell on February 11, 2004.

27. McNulty and Campbell knew or should have known that the footprint of the proposed house was larger than the compacted pad was ever designed to be. It appears that McNulty and Campbell assumed that the building pad that was provided by Greystone was sufficient to build any home design. T

28. The home pad that was provided was usual and customary for homes in that area. McNulty and Campbell had been given the information from which they could determine the size of the building pad provided but they failed to verify this very important fact before initiating construction.

29. Campbell relied on Custom Concrete to make sure that the soil compaction was sufficient. Custom Concrete correctly informed Campbell and McNulty that the compaction was not sufficient to support the home proposed to be built by Campbell and McNulty.

30. Alt & Witzig were called back to the building site and took more soil samples. They confirmed that the soils investigated contained soil variations under the proposed footprint of the house. They recommended taking the foundations down to natural soils.

31. Alt & Witzig did not breach any duty to McNulty nor did Alt & Witzig breach a contract with McNulty. At all times, Alt & Witzig performed their work in a workmanlike manner.

32. Ultimately, McNulty incurred substantial expenses to change the foundation design to conform to recommendations from Campbell to proceed pursuant to Custom Concrete's revised basement plan.

33. The increased costs incurred by McNulty were due solely to the failure of McNulty and Campbell to observe that the footprint of the home McNulty wanted to build was outside the building pad. No defendant had the duty to modify the building pad based upon the home design chosen by McNulty.

34. All defendants performed their work in a workmanlike manner.

35. On March 3, 2003 Greystone Development Corp. (hereinafter "Greystone") and R J Custom Builders, Inc d/b/a Johnson Excavating (hereinafter "Johnson") entered into a written contract for Johnson to perform the earth work on Section 7 of Greystone.

36. A dispute arose between Greystone and Johnson with respect to the amount to be paid on the balance on the contract. As a result Johnson filed a Notice of Intention to Hold Mechanics Lien with the Recorder of Marion County on February 20, 2004 within 90 days of the last work performed by Johnson.

37. Said notice was on lots 133, 135 and 139 through 144 all of Greystone Subdivision, section 7, an addition to the City of Indianapolis, per plat recorded on August 20, 2003 as Instrument Number 030171690.

38. Thereafter Lot 140 was conveyed to be Kruses and Lot 133 was conveyed to the Lowes.

39. On January 25, 2005, Johnson filed three separate actions to foreclose the mechanic's lien. Separate actions were filed against Kruses and the Lowes for the lots they had acquired and an action for the balance of the lots was filed against Greystone. Each action sought to recover the identical amount of $7,250 which Johnson claimed Greystone owed it as set forth in the Notice of Intention to Hold Mechanic's Lien filed only against Greystone.

40. Kruses and Greystone moved to consolidate Johnson's action against each of them. Lowes moved to consolidate Johnson's action against them with those against the Kruses and Greystone.

41. Johnson's total claim is for $7,250.

42. Greystone alleges three set-offs to this claim. The first is in the amount of $480 which Greystone paid to Bladerunner for the completion of a storm structure at the rear of Lot number 140. The work was necessary. Greystone paid Bladerunner for this correction and is entitled to a set off in this amount.

43. The second claimed offset was an over billing for dirt hauling. In a handwritten addition to Johnson's proposal for "import dirt work", Johnson agreed

to accept and Greystone agreed to pay three dollars per cubic yard for dirt moved from Section IV as contrasted to the $2.50 per cubic yard for moving other dirt. Johnson seeks to recover for dirt it moved in Johnson's attempt to build a bridge to cross the creek between Section IV and Section VII. Johnson failed to successfully bridge the creek. Johnson then billed for the three dollars per cubic yard for hauling the dirt around the creek. Dennis Copenhaver on behalf of Greystone orally agreed to pay for the bridge dirt. Greystone is not entitled to a set off for this amount.

44. The third claimed offset was for one half of the cost of an engineering compaction report on the two lots on each side of Lot 138, the McNultys' lot. Greystone contends that Johnson agreed to pay one half of the cost of such testing. There is insufficient evidence to support the conclusion that Johnson agreed to pay one-half of the soil testing. Therefore, Greystone fails on this offset.

45. The balance due Johnson by Greystone after setoff is $6,970.

46. Johnson has provided an affidavit that the attorney fees incurred in Johnson's efforts to collect the amount due Johnson from Greystone was the sum of $23,444.30.

47. The filing of three separate lawsuits to collect one mechanics lien unnecessarily increased the attorney fees.

48. A portion of the fees were incurred to collect the amount due Johnson and a portion of the fees were incurred to defend claims brought by McNulty for faulty workmanship.

49. The litigation between McNulty and Johnson was not caused by any act or omission by any party to this litigation, other than McNulty and Johnson. A fair and honest dispute arose as to whether Johnson had properly compacted the fill. Johnson should pay their own attorney fees for the defense of the McNulty claims.

50. Only the portion of the fees reasonably necessary to collect the amount due is recoverable by Johnson. The Court having reviewed the evidence, considering the complexity of the issues involved, the necessity of the

filing of 3 separate lawsuits, the reasonableness of the fee in light of the amount in controversy, and the hours spent by counsel in this matter, finds that Johnson should recover the sum of $8,400.00 as attorney fees in the mechanics lien matter.

CONCLUSIONS OF LAW

1. The Plaintiff has failed to carry his burden and judgment shall be with Defendants Greystone Development Corporation, R.J. Custom Builders, Inc. and Alt & Witzig Engineering, Inc. and against Gregory and Laura McNulty.

2. Johnson did not submit the affidavit for final payment. However, this litigation arose to address the performance and lien issues; and therefore the necessity of the affidavit has been satisfied. The denial of payment based upon the lack of the affidavit is pretexual only. Greystone did not fail to pay Johnson the money it owed Johnson because of the affidavit, but rather because the McNulty litigation arose.

3. Greystone shall pay R. J. Custom Builders, Inc. d/b/a Johnson Excavating the sum of $8970 plus attorney fees in the sum of $8,400. **Judgment is entered in favor of R. J. Custom Builders, Inc. and against Greystone Development Corporation in the sum of $17,370.00.**

4. Plaintiffs Gregory and Laura McNulty shall be responsible for court costs incurred in the action that they initiated and Greystone shall be responsible for court costs incurred in the action that it initiated.

Dated: August 3, 2006

Robyn L. Moberly, Judge
Marion Superior Court, Civil Division 12

Distribution: SAS

Mr. Rosenbaum
Mr. Lobley
Mr. Vander Luitgaren
Mr. Bostwick
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