

Everett & James, PLLC  
Oliver Everett (#54983)  
478 S Main St., Suite 1156  
Salt Lake City, UT 84103  
(801) 584-0382  
[oliver@everettjames.com](mailto:oliver@everettjames.com)  
*Attorney for Defendant*

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

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HORATIO AND BEATRICE  
HOMEOWNER,

Plaintiffs,

vs.

ROBERT THEODORE BUILDER,

Defendant.

**ANSWER AND COUNTERCLAIM**

Case No.: CV6LSX392

Judge: Oaks

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Robert Theodore Builder (hereinafter referred to as “Defendant”), by and through his counsel of record, Oliver Everett, hereby files his Answer and Counterclaim in response to Horatio and Beatrice Homeowner’s Complaint, which was filed in this Court on May 30, 2018.

**FIRST DEFENSE**

Horatio and Beatrice Homeowner (hereinafter collectively referred to as “Plaintiffs,” and individually referred to by his or her respective first name), in their joint and individual capacity, fail to state a claim upon which relief may be granted.

**SECOND DEFENSE**

The relief sought in Plaintiffs’ Complaint is barred, in whole or in part, because of accord and satisfaction, assumption of risk, comparative fault, estoppel, lack of consideration, laches, license, payment, release, res judicata, the statute of frauds, the statute of limitations, waiver,

and/or because Plaintiffs have engaged in inequitable conduct and come to court with unclean hands to seek equitable relief.

### **THIRD DEFENSE**

Defendant denies each and every allegation of Plaintiffs' Complaint not otherwise specifically denied hereinbelow.

### **FOURTH DEFENSE**

Without waiving any of the foregoing defenses and objections, and while reserving Defendant's right to assert additional defenses and objections as the factual basis for them becomes known following an opportunity to conduct discovery, Defendant answers Plaintiffs' Complaint—with Defendant's answers corresponding numerically to the specific numbered allegations of Plaintiffs' Complaint—as follows:

1. Admit, upon information and belief.
2. Admit.
3. Admit.
4. Admit.
5. Admit, upon information and belief.
6. Admit.
7. Deny.
8. Admit.
9. Defendant is with insufficient knowledge to answer the allegations in ¶ 9 of the Complaint, and, therefore, denies same.

10. Defendant is with insufficient knowledge to answer the allegations in ¶ 10 of the Complaint, and, therefore, denies same.

11. Defendant is with insufficient knowledge to answer the allegations in ¶ 11 of the Complaint, and, therefore, denies same.

12. Defendant is with insufficient knowledge to answer the allegations in ¶ 12 of the Complaint, and, therefore, denies same.

13. Defendant is with insufficient knowledge to answer the allegations in ¶ 13 of the Complaint, and, therefore, denies same.

14. Defendant is with insufficient knowledge to answer the allegations in ¶ 14 of the Complaint, and, therefore, denies same.

15. Defendant is with insufficient knowledge to answer the allegations in ¶ 15 of the Complaint, and, therefore, denies same.

16. Defendant is with insufficient knowledge to answer the allegations in ¶ 16 of the Complaint, and, therefore, denies same.

17. Defendant is with insufficient knowledge to answer the allegations in ¶ 17 of the Complaint, and, therefore, denies same.

18. Defendant is with insufficient knowledge to answer the allegations in ¶ 18 of the Complaint, and, therefore, denies same.

19. Defendant is with insufficient knowledge to answer the allegations in ¶ 19 of the Complaint, and, therefore, denies same.

20. Defendant is with insufficient knowledge to answer the allegations in ¶ 20 of the Complaint, and, therefore, denies same.

21. Admit in part and deny in part. Deny that “[d]uring this time, Defendant claimed to have been unaware that the footing had been shifted out of place.” Admit that Defendant was unaware that the footing had been shifted out of place. Deny each and every other allegation of ¶ 21 not otherwise specifically denied.

22. Admit.

23. Admit.

24. Admit.

25. Admit.

26. Admit in part and deny in part. Deny that “Defendant then stated that he would not complete any more work on the home until his demands were met.” Admit that “Defendant then stated that he [*could*] not complete any more work on the home until his demands were met.” Deny each and every other allegation of ¶ 26 not otherwise specifically denied.

27. Admit in part and deny in part. Admit that “Defendant owed a duty of good faith and performance to Plaintiffs.” Deny that “Defendant owed a duty of good faith and performance to Plaintiffs, which duty he breached.” Deny each and every other allegation of ¶ 27 not otherwise specifically denied.

28. Admit.

29. Deny.

a. Deny.

b. Deny.

c. Deny.

30. Deny that there was a breach of duty on the part of Defendant. Deny that there was a breach of duty on the part of Defendant that represents negligence on his part. Deny each and every other allegation of ¶ 30 not otherwise specifically denied.

31. Admit, upon information and belief.

32. Admit, upon information and belief.

a. Admit, upon information and belief.

b. Admit, upon information and belief.

33. Deny.

34. Deny.

35. Deny.

36. Deny that there was negligence and breach of duty on the part of Defendant. Deny that “Defendant’s negligence and breach of duty are, therefore, the proximate cause of Horatio’s injuries.” Deny each and every other allegation of ¶ 36 not otherwise specifically denied.

a. Deny that Defendant “breached his duties to regularly communicate with Plaintiffs, keep the Project on schedule, supervise the Project, and make the Project site safe.” Deny each and every other allegation of ¶ 36(a) not otherwise specifically denied.

b. Defendant is with insufficient knowledge to answer the allegations in ¶ 36(b) of the Complaint, and, therefore, denies same.

i. Deny that “Defendant failed to communicate with [Horatio] for a considerable amount of time.” Deny that “Defendant failed to communicate with [Plaintiffs] for a considerable amount of time.”

Defendant is with insufficient knowledge to answer the remaining allegations in ¶ 36(b)(i) of the Complaint, and, therefore, denies same.

37. Admit, upon information and belief.

38. Deny.

39. Deny that Defendant failed to initially offer a responsible bid to Plaintiffs. Deny each and every other allegation of ¶ 39 not otherwise specifically denied.

a. Deny that Defendant failed to offer a responsible bid to Plaintiffs. Deny each and every other allegation of ¶ 39(a) not otherwise specifically denied.

b. Defendant is with insufficient knowledge to answer the allegations in ¶ 39(b) of the Complaint, and, therefore, denies same.

40. Deny that Defendant abandoned the project. Defendant is with insufficient knowledge to answer the remaining allegations in ¶ 40 of the Complaint, and, therefore, denies same.

41. Deny that Defendant breached his alleged duty to mitigate damages. Defendant is with insufficient knowledge to answer the remaining allegations in ¶ 41 of the Complaint, and, therefore, denies same.

42. Deny that “Defendant caused additional damages to the Project.” Deny that Defendant caused any damages to the Project. Defendant is with insufficient knowledge to answer the remaining allegations in ¶ 42 of the Complaint, and, therefore, denies same.

43. Defendant is with insufficient knowledge to answer the allegations in ¶ 43 of the Complaint, and, therefore, denies same.

44. Defendant is with insufficient knowledge to answer the allegations in ¶ 44 of the Complaint, and, therefore, denies same.

45. Defendant is with insufficient knowledge to answer the allegations in ¶ 45 of the Complaint, and, therefore, denies same.

46. Defendant is with insufficient knowledge to answer the allegations in ¶ 46 of the Complaint, and, therefore, denies same.

a. Defendant is with insufficient knowledge to answer the allegations in ¶ 46(a) of the Complaint, and, therefore, denies same.

47. Defendant is with insufficient knowledge to answer the allegations in ¶ 47 of the Complaint, and, therefore, denies same.

48. Defendant is with insufficient knowledge to answer the allegations in ¶ 48 of the Complaint, and, therefore, denies same.

49. Deny that there was negligence and breach of duty on the part of Defendant. Deny each and every other allegation of ¶ 49 not otherwise specifically denied.

50. Admit.

51. Deny.

52. Deny.

a. ¶ 52(a) of the Complaint requires no response.

i. Deny.

b. ¶ 52(b) of the Complaint requires no response.

i. Deny.

c. ¶ 52(c) of the Complaint requires no response.

- i. Deny.
- ii. Deny.
- iii. Deny.
- iv. Deny.

53. Deny that Defendant's conduct was unprofessional. Deny that Defendant's conduct constitutes a breach of his contractual duties. Defendant is with insufficient knowledge to answer the remaining allegations in ¶ 53 of the Complaint, and, therefore, denies same.

54. Defendant is with insufficient knowledge to answer the allegations in ¶ 54 of the Complaint, and, therefore, denies same.

55. Deny.

#### **FIFTH DEFENSE**

*(Assumption of Risk)*

Plaintiffs negligently entered the construction site knowing that doing so could pose a reasonable risk of harm to them, thereby assuming the risk of injury associated thereto. Plaintiffs are, therefore, solely responsible for the alleged injuries suffered by Plaintiff Horatio, as well as for all other associated damages allegedly sustained by Plaintiffs, whether said damages were sustained jointly or separately.

Furthermore, pursuant to § 10 of the Building Contractor Agreement, Plaintiffs certified that they understood and acknowledged that the Project may not be safe while under construction. By so doing, Plaintiffs assumed all the risks involved with entering the Project while it was under construction; therefore, Plaintiffs are barred from the relief prayed for in their Complaint.



## **SIXTH DEFENSE**

*(Waiver)*

The Building Contractor Agreement, § 10, provides that “[Plaintiffs] assume[] all risks for [Plaintiffs’] . . . personal injury from, relating to, or associated with, the Project and/or product of [Defendant’s] performance, and agree to absolve [Defendant] from all liability for any personal injury that [Plaintiffs] may sustain.” Therefore, Plaintiffs, in their joint and separate capacity, explicitly waived their right to hold Defendant liable for injury. Consequently, § 10 of the Building Contractor Agreement serves as an affirmative defense to Plaintiffs’ allegations.

WHEREFORE, having fully answered Plaintiffs’ Complaint, Defendant respectfully request:

- A. that it be dismissed with prejudice and upon the merits;
- B. that Plaintiffs take nothing thereby;
- C. that Defendant be awarded reasonable attorney’s fees and the costs incurred in defending this action; and
- D. that relief be granted as prayed for in Defendant’s Counterclaim, as is set forth hereinbelow.

### **VERIFIED COUNTERCLAIM**

Defendant, by and through his counsel of record, hereby counterclaims to Plaintiffs’ Complaint, as follows:

1. Defendant incorporates his Answer to Plaintiffs’ Complaint into his Counterclaim, to be interpreted so as to supplement his Counterclaim and avoid any conflict therein.

## **JURISDICTION AND VENUE**

2. According to 28 U.S. Code § 1332, this court has subject matter jurisdiction in this case because Plaintiffs are citizens of the state of Idaho and Defendant is a citizen of the state of Utah, and the amount in controversy is greater than \$75,000.00.

3. Additionally, pursuant to 28 U.S. Code § 1391(b), the venue in this court is proper because the events giving rise to the claim occurred within the boundaries of the District of Utah.

## **FACTS**

4. Defendant is the building contractor whom Plaintiffs hired to build a house (hereinafter referred to as the “Project”).

5. Said house was to be built on Plaintiffs’ property, located on 245 S Ideal Neighborhood Road, Logan, Utah 84301.

6. After hiring Defendant, Plaintiffs signed a Building Contractor Agreement, agreeing to be bound by the provisions contained therein.

7. § 10 of the Building Contractor Agreement provides that “[Plaintiffs] understand[] and acknowledge[] that during the course of construction, the [Project] may not be safe for non-construction personnel. [Plaintiffs] assume[] all risks for [Plaintiffs’] . . . personal injury from, relating to or associated with, the Project and/or product of [Defendant’s] performance, and agree to absolve [Defendant] from all liability for any personal injury that [Plaintiffs] may sustain.”

8. During the course of construction, Plaintiff Horatio entered the Project and injured himself.

9. Horatio alleges that Defendant is liable for the injuries he sustained.

## CAUSE OF ACTION

### *(Breach of Contract)*

10. Plaintiffs sued Defendant for Horatio's injuries, *inter alia*, despite having agreed to assume all risks of injury involved with entering the Project, and to waive their right to hold Defendant liable.

11. Therefore, Plaintiffs breached § 10 of the Building Contractor Agreement.

12. Due to Plaintiffs' above-referenced breach of contract, Defendant has suffered, and continues to suffer, pecuniary damages.

13. Said pecuniary damages are, among other things, related to the necessary expenses that Defendant has had to incur throughout the course of defending himself in this action.

14. Additionally, the time and money Defendant has spent in defending this action has caused him significant emotional distress.

15. Furthermore, the time and money spent has caused Defendant significant delays in getting several of his other construction projects finished on time.

16. Said delays have resulted in further damages to Defendant, as well as to his construction company, reputation, livelihood, future earning capacity, etc.

### PRAYER FOR RELIEF

WHEREFORE, Defendant, Robert Theodore Builder, prays that judgement be entered against Plaintiffs, and each of them, for:

- A. Pecuniary Damages in an amount to be proven at trial and determined by the trier of fact;

- B. General Damages in an amount to be proven at trial and determined by the trier of fact;
- C. reasonable attorney fees and costs of suit incurred herein; and
- D. any other further relief as the Court deems just and proper under the circumstances, under the Court's inherent equitable powers.

DATED June 5, 2018.

Everett & James, PLLC

/s/ Oliver Everett

Oliver Everett,

Attorney for Defendant and Counterclaimant

VERIFICATION

I declare under criminal penalty under the law of Utah that the foregoing allegations made in my Counterclaim are true and correct.

Signed on: June 5, 2018

Signed at: Cache County, State of Utah

Signature: /s/ Robert Theodore Builder\*

Robert Theodore Builder,

Defendant and Counterclaimant

\*Signed electronically by counsel for Defendant, with permission.

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, I served, by electronic filing, a true and correct copy of the foregoing upon:

Addison Smith

/s/ Altioem Legal Services