

Christi Underwood

CAUSE NO. DC-16-13759

**RODNEY SMITH and
DEBBIE SMITH,**

Plaintiffs,

v.

**BELLA VITA CUSTOM HOMES,
LLC, ANDY CLEM, and MIKE
CLEM**

Defendants.

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

191ST JUDICIAL DISTRICT

§
§
§
§
§
§
§
§
§
§

PLAINTIFFS’ ORIGINAL PETITION

Plaintiffs Rodney Smith and Debbie Smith (“**Rod**” and “**Debbie**” or the “**Smiths**”) file this Original Petition against Defendants Bella Vita Custom Homes, LLC, Andy Clem, and Mike Clem (together, “**BVCH**” or the “**Clems**”) and in support thereof respectfully pleads as follows:

I. Discovery Control Plan

1. Rod and Debbie intend to conduct discovery under Level 2 of the Texas Rules of Civil Procedure because this suit involves monetary relief aggregating more than \$50,000, excluding court costs, prejudgment interest, and attorney’s fees. *See* TEX. R. CIV. P. 190.3.

II. Parties

2. Rod and Debbie Smith are individuals residing in Tarrant County, Texas.

3. BVCH is a limited liability company registered and doing business in the State of Texas, with corporate headquarters located at 12400 Coit Road, Suite 6000, Dallas, Texas 75251. It may be served through its registered agent, Mike Clem, whose address is 1200 Brophy Drive, Pflugerville, Texas 78660-2922.

4. Andy Clem is an individual residing in Dallas County, Texas. He may be served personally at his home address, which is 4428 Livingston Avenue, Dallas, Texas 75205-2610.

5. Mike Clem is an individual residing in Travis County, Texas. He may be served personally at his home address, which is 1200 Brophy Drive, Pflugerville, Texas 78660-2922, or wherever he may be found.

III. Jurisdiction and Venue

6. This Court has subject matter jurisdiction because the amount in controversy exceeds this Court's minimum jurisdictional limits.

7. Venue in this suit is Dallas County, Texas, the county where Defendant Andy Clem resides and BVCH maintains its corporate headquarters.

IV. Conditions Precedent

8. All conditions precedent to the filing of this suit have been fulfilled.

V. Relief

9. Plaintiff seeks monetary relief over \$200,000 but not more than \$1,000,000. *See* TEX. R. CIV. P. 47(c)(5). This suit is therefore not governed by the expedited-actions process in Texas Rule of Civil Procedure 169.

VI. Factual Background

10. Unaware that BVCH had been sued by other customers just months before, the Smiths first met with a BVCH representative, Maritza Voth, on October 13, 2015, to discuss the possibility of BVCH constructing a home on property the Smiths own in Keller, Texas (the “**Property**”). Ms. Voth provided a detailed rundown of BVCH’s build process, touting the fact that BVCH supposedly handles every aspect of the process “in-house,” and offering a guaranteed move-in date. In fact, BVCH said that the Smiths could “go ahead and schedule the movers,” and promised that, if they missed the move-in date, they would compensate the Smiths.

11. The Smiths spent the next few months meeting with BVCH’s in-house architect repeatedly, working out in detail exactly what they wanted. Finally, on or about April 14, 2016, Rod and Debbie entered into an agreement entitled “Residential Construction Contract – Fixed Price” (the “**Contract**”) with BVCH. That was also when they gave BVCH a check for \$157,077.09.

12. Within days, Ms. Voth called Mrs. Smith to say that she had resigned from BVCH, that BVCH was a deceptive company, and that she was sorry to have got the Smiths involved with them. She also said BVCH owed her money.

13. Mrs. Smith immediately called the BVCH office to try to find out what was going on. She spoke with Tracey Clem, who assured her that Ms. Voth was just a disgruntled employee, and that the build was proceeding as promised. BVCH then assigned the Smiths to a new representative for the company, Curt DuBoise.

14. Based on those reassurances—along with the fact that BVCH already had over \$150,000 of the Smiths’ money—the Smiths moved forward with the build, believing that BVCH was actually taking steps to build the home it had contracted to build

15. It quickly became apparent, however, that BVCH had made no progress whatsoever. The company offered a variety of excuses, blaming everyone from the surveyor to Ms. Voth for the lack of progress.

16. In mid-July, Ms. Smith received a call from the City of Keller clerk asking what the Smiths wanted to do with their—unbeknownst to them—unpaid plat application on the Property. The clerk explained that the application had actually been on her desk for weeks, but nobody had paid the fee.

17. Ms. Smith reached out to BVCH again to find out what was going on. They assured her that they were just waiting for one more piece of documentation to

complete the plat, and that they would soon send the City a check. At this point, Ms. Smith began to wonder whether the delays were the result of incompetence, fraud, or some combination of each.

18. On August 31, the bank that was supposed to finance the build called with alarming news. The bank had learned that BVCH was facing a multitude of lawsuits brought by former customers as well as several subcontractors that BVCH had failed to pay. She reached out to BVCH *again*, and again, was told that everything was proceeding as planned and that the build would be just fine.

19. BVCH's pattern of deception, however, was just too much. Ms. Smith demanded a list of subcontractors who had actually done work on the build. There were not many, but BVCH was able to provide contact details for two engineering firms.

20. Ms. Smith contacted the two companies. The first had never been paid, and was planning to file a lien against the Property. The second had not yet been paid either. Ms. Smith also contacted the surveyor on the project. The surveyor was awaiting completion of his work to invoice BVCH, but at that time invoiced BVCH out of concerns that he might not get paid either. Again, BVCH ultimately did not pay that invoice. The Smiths immediately paid all of the outstanding invoices to avoid having liens filed on their Property.

21. In September, the Smiths wrote to BVCH to terminate the Contract. Among other things, BVCH's failure to pay the subcontractors constitutes a "Material Breach" under the terms of the Contract, which is an agreement that BVCH drafted and provided. The Smiths demanded that BVCH return the \$157,000 deposit.

22. BVCH did not even try to deny it had failed to pay the subcontractors. Instead, they claimed that the Smiths had not specifically identified the subcontractors that had not been paid, and that there was therefore no material breach.

23. The Smiths quickly responded to BVCH's absurd non-denial with the names of the companies that BVCH never paid, and reiterated their demand for the return of their deposit. To date, BVCH has neither responded nor returned the money.

24. The Smiths worked with BVCH for months to come up with a design for what was supposed to be their dream home—a place they could live in for the rest of their lives. Now, a year after first meeting with BVCH, they have no and are out over \$170,000. It remains to be seen whether further subcontractors will turn up demanding payments that BVCH failed to make.

VII. Causes of Action

25. The following causes of action are pleaded, as appropriate or necessary, in the alternative.

A. Breach of Contract

26. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Rod and Debbie re-allege and fully incorporate by reference the preceding paragraphs.

27. Rod and Debbie entered into a valid and binding Contract with BVCH.

28. Rod and Debbie performed all of their obligations under the Contract.

29. BVCH breached the Contract by failing to perform its obligations under the Contract, as set out herein.

30. Rod and Debbie have suffered harm as a direct and consequential result of BVCH's actions, including the loss of more than \$150,000 and the monies they paid to BVCH's subcontractors to avoid those companies imposing liens on the Property—monies that should have been paid from their deposit.

B. Negligence, Gross Negligence, and Negligence *Per Se*

31. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Rod and Debbie re-allege and fully incorporate by reference the preceding paragraphs.

32. BVCH owed various duties to Rod and Debbie, including but not limited to the duty to exercise ordinary care in making representations to them and

the duty to perform its obligations under the contract with care, skill, and reasonable expedience.

33. BVCH breached these and other duties owed to Rod and Debbie.

34. BVCH's negligence also violated at least Texas Penal Code § 32.42, and therefore constitutes negligence *per se*.

35. BVCH's breaches proximately caused injuries to Rod and Debbie, as set out herein.

36. Rod and Debbie's injuries resulted from BVCH's gross negligence, which entitles Rod and Debbie to exemplary damages under TEX. CIV. PRAC. & REM. CODE § 41.003(a)(3).

C. Fraud and Fraudulent Inducement

37. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Rod and Debbie re-allege and fully incorporate by reference the preceding paragraphs.

38. BVCH committed actual fraud by inducing Rod and Debbie to enter into the Contract with them so that the Clems could continue operating their pyramid scheme.

39. The misrepresentations were false, and BVCH knew they were false. In the alternative, BVCH made the misrepresentations with reckless disregard for their veracity.

40. BVCH made the Misrepresentations with the intent that Rod and Debbie would rely on them, and the knowledge that they would do so.

41. BVCH's Misrepresentations proximately caused injuries to Rod and Debbie, as set out herein.

42. Rod and Debbie's injuries resulted from BVCH's Misrepresentations, which fact entitles Rod and Debbie to exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a)(1).

D. Violations of the Texas Deceptive Trade Practices Act

43. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Rod and Debbie re-allege and fully incorporate by reference the preceding paragraphs.

44. BVCH's actions, as described above, violated provisions of the Texas Deceptive Trade Practices Consumer Protection Act, TEX. BUS. & COM. CODE §17.41 *et. seq.* (the "DTPA").

45. By perpetrating the various acts, omissions, misrepresentations, outright lies, and breaches set out herein, BVCH engaged in false, misleading, or deceptive acts or practices that Rod and Debbie relied on to their detriment, and engaged in unconscionable actions or courses of action that, to Rod and Debbie's detriment, took advantage of their lack of knowledge, ability, experience, or capacity to a grossly unfair degree.

46. Each of these actions was a producing cause of injuries to Rod and Debbie, as set out herein.

47. BVCH, Andy Clem, and Mike Clem acted intentionally and knowingly, and with flagrant disregard of prudent and fair business practices, as set out herein, which entitles Rod and Debbie punitive and mental anguish damages under the DTPA, including treble economic damages under Section 17.50(b)(1) of the DTPA—damages which would not be barred under the RCLA even if it applied here.

48. Rod and Debbie have provided written notice as required by Section 17.505(a) of the DTPA.

E. Conversion, Unjust Enrichment, and Money Had and Received

49. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Rod and Debbie re-allege and fully incorporate by reference the preceding paragraphs.

50. The Clems stole \$158,077.09 from Rod and Debbie. It was their money, and is currently owed to Rod and Debbie, but the Clems have refused to return it.

F. Declaratory Judgment

51. Rod and Debbie seek a declaratory judgment under Chapter 37 of the Texas Civil Practices and Remedies Act that there is no longer a valid contract between them and BVCH regarding the sale of any house to BVCH.

52. As noted above, on or about September 14, 2016, Rod and Debbie wrote to BVCH to terminate the Contract based on multiple material breaches of the Contract by BVCH.

53. The requisite period has passed, during which BVCH took no action to remedy the breaches. The Contract is therefore terminated.

VIII. Exemplary Damages

54. Rod and Debbie are entitled to exemplary damages under at least TEX. CIV. PRAC. & REM. CODE § 41.003(a) and the DTPA, as set out herein.

IX. Attorney's Fees and Costs

55. Due to the actions of BVCH, Rod and Debbie have been required to retain the services of the undersigned attorneys to preserve, protect, and defend their rights. Rod and Debbie are therefore entitled to their reasonable and necessary attorney's fees and costs under at least Sections 37.009 and 38.001 of the Civil Practice and Remedies Code and Section 17.50(d) of the DTPA.

X. Jury Demand

56. Plaintiffs hereby demand a trial by jury on all claims asserted either by or against him in this case, and will tender the appropriate fee.

XI. Request for Disclosure

57. Under Rule 194 of the Texas Rules of Civil Procedure, BVCH is requested to disclose to Plaintiffs, within fifty days of service of this request, the information or material described in Texas Rule of Civil Procedure 194.2(a)-(1).

XII. Objection to Associate Judge

58. Plaintiffs object to the referral of the trial of this case to an associate judge.

XIII. Prayer

59. Plaintiffs pray that the BVCH, Andy Clem, and Mike Clem be cited to appear and answer herein and that the Court enter a judgment in favor of Rod and Debbie on their claims awarding the following relief:

- a. Imposition of a constructive trust on BVCH, Andy Clem, and Mike Clem, their business, and all of their assets, income, and profits, in favor of Plaintiffs;
- b. Actual damages, both direct/general and consequential/special, including the more than \$150,000 stolen by the Clems and the amounts paid by Rod and Debbie to BVCH's subcontractors, restitution, disgorgement, and expectancy damages;
- c. Punitive, mental anguish, and exemplary damages;
- d. A declaratory judgment that there is no longer a valid contract between Plaintiffs and Defendant;
- e. Costs of suit, including reasonable legal expenses and attorney's fees;
- f. Pre- and post-judgment interest at the maximum rate provided by law; and

- g. Any and all other and further relief, both at law and in equity, as the Court deems appropriate.

Dated: October 21, 2016



S. Scott Pershern

State Bar No. 24060412

scott@mppfirm.com

Anthony P. Miller

State Bar No. 24041484

tony@mppfirm.com

MILLER PATTI PERSHERN PLLC

5001 Spring Valley Rd., Suite 400 East

Dallas, Texas 75244

Tel.: 214-935-4930

Fax: 214-935-4946

**ATTORNEY FOR PLAINTIFFS
RODNEY SMITH AND
DEBBIE SMITH**