

CONSTRUCTION

BREACH OF CONTRACT

Consumer Legal Remedies Act

VERDICT: Defense

CASE/NUMBER: Salvador
Falcone, Elizabeth Falcone v. J.T.
Harris Inc., Joseph P. Harris / 56-
2010-00380030-CU-BC-VTA.

COURT/DATE: Ventura Superior
/ Dec. 15, 2011.

JUDGE: Hon. Mark S. Borrell.

ATTORNEYS: Plaintiff - Carolyn C.
Phillips (Law Offices of Carolyn C.
Phillips, Westlake Village).

Defendant - Larry A. Rothstein
(Law Offices of Larry A. Rothstein,
Woodland Hills).

TECHNICAL EXPERTS: Plaintiff
- Andrew Gillespie, general
contractor/cost estimator/
waterproofing, Los Angeles; Fritz
Von Batsch, waterproofing, Santa
Barbara.

Defendant - Joseph Harris,
waterproofing, Newbury Park;
Alex Moody, waterproofing, Yorba
Linda.

FACTS: In July 2008, J.T. Harris
Inc. ("Harris") waterproofed an
1800 square feet deck on a custom
home being built by plaintiffs
Salvador and Elizabeth Falcone.
Salvador Falcone is a concrete
contractor.

In December 2008, Harris was
called out when leaks appeared
in the garage. When Harris
arrived, he noticed that Falcone
had poured concrete directly
over the waterproofing. Harris
believed the leak was as a result
of a "pilot hole," which had been
drilled through the concrete and
waterproofing by the ornamental
railing installer. Harris asked
Falcone to remove a portion of the
concrete to better determine the
cause of the leak. Falcone refused.

In October 2009, Harris was
called back out when more leaks
were found in another location in
the garage. Again, Harris asked
Falcone to remove a portion of
the concrete and again Falcone
refused.

In January 2010, Falcone agreed
to remove a portion of the
concrete, but the area he agreed
to remove was much smaller than
the area Harris recommended to
be removed. Harris replaced the
waterproofing under the removed
concrete, but the source of the leak
still could not be determined.

In July 2010, after more leaks were
discovered in the kitchen, the
entire deck was demolished.

The parties and their experts were
present during the demolition.
Both sides at trial introduced
pictures and physical evidence
from the demolition.

The Falcones spent approximately
\$135,000 to demolish the deck,
repair the plywood substrate,
install new waterproofing, sheet
metal, concrete, stucco, etc.

The Falcones sued Harris for
breach of contract, negligence,
fraud, violation of Consumer Legal
Remedies Act and unfair business
practices. The latter three causes
of action were bifurcated on motion
by defense.

PLAINTIFFS' CONTENTIONS:
Plaintiffs contended that
Harris improperly installed the
waterproofing system because
the anti-fracture membrane was
applied too thin and that anti-
fracture fabric was not properly
imbedded in the elastomeric.

Plaintiffs claimed that Harris
should not have cut the plywood
substrate prior to installation of
the waterproofing; and that Harris
knew or should have known that
Falcone intended to pour concrete
over the waterproofing system,
which was not designed for under-
concrete waterproofing.

DEFENDANTS' CONTENTIONS:
Harris claimed that it contracted to
install "under tile" waterproofing,
the functional equivalent of
flagstone as depicted on the
permitted plans. Harris had never
seen 2 1/2 inch of reinforced
concrete installed directly over
a waterproofing system on a
residential deck and could not
reasonably have anticipated that is
what would be installed.

Harris alleged that Falcone left
approximately a 1/2 inch void
where he terminated the concrete
short of the exterior wall, which
allowed standing water to become
trapped next to the concrete
thereby rapidly deteriorating
the surrounding flashing and
waterproofing.

Harris claimed that the ornamental
railing installer drilled 132 post
screws through the concrete
and waterproofing material; the
sheet metal was short-lapped; the
weep screeds were installed too
low; the gutter spikes at the eave
compromised the waterproofing
and plywood; the installation of the
downspouts at the wall breached
the stucco allowing water to enter
behind the stucco paper and below
the flashing; and the window and
door flashing were improperly
installed.

Harris further claimed that
Falcone, who acted as his own
general contractor, failed to
adequately supervise, coordinate
and schedule the project.

JURY TRIAL: Length, 11 days;
Deliberation, two days

SETTLEMENT DISCUSSIONS:
Plaintiffs demanded \$100,000.
Defendants offered \$20,000.

RESULT: Defense verdict.

OTHER INFORMATION: After the
jury returned its verdict in favor of
Harris on the breach of contract
and negligence causes of action,
the Court dismissed the bifurcated
causes of action as moot as a
matter of law.

FILING DATE: Aug. 20, 2010.