

Homeowner Estopped from Recovery  
for Alleged Construction Defects

by

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A homeowner is estopped from recovery for alleged construction errors. The case is *Roy v. MBW Construction, Inc.*, 2015 WL 6689128, filed November 3 in the Missouri Court of Appeals for the Western District.

Estoppel involves the unfairness of allowing a party to belatedly make a claim when the other party would be disadvantaged. Estoppel is commonly pled as an affirmative defense to a construction defect claim. Courts, however, seldom find there actually is estoppel, making the result in this case very unusual.

The homeowner, H. David Roy, had entered into a contract with MBW for construction of a home for the purchase price of \$490,000. On appeal, Roy argued that he was entitled to credits based upon errors in the construction of the garage and laundry room cabinetry.

He claimed that MBW failed to install the laundry room cabinets as required by the contract and breached a specification requiring the third-car garage to be a minimum of 24 feet in length.

An estoppel defense requires 1) an admission, statement or act (in this case, by Roy) that is inconsistent with a claim later asserted, 2) an action taken by MBW based on the admission, statement or act, and 3) an injury to MBW that would result if Roy were permitted to contradict or repudiate his admission, statement or act.

Silence that amounts to concealment of a material fact may be sufficient to constitute the admission, statement or act.

In this case, Roy sought the recovery of \$5,595 in claimed damages due to the alleged errors in the construction of the garage and laundry room cabinetry.

Roy complained about the garage during construction. He asserted that it did not meet the specifications because he could not fit his boat into the third-car garage.

Responding to Roy's complaints, MBW extended the garage at no additional cost to make sufficient room for Roy's boat. Roy also requested that MBW remove a portion of the laundry room that had a built-out into the third-car garage to make the garage larger and provide more room for the boat. MBW accommodated this request.

Because of the removal of the built-out, the cabinetry that was supposed to go into the laundry room would no longer fit.

Roy did not make any further complaints about either the garage or the laundry room during construction. Instead, after the construction was completed, he closed on the house and took possession.

Both the trial court and the Western District on appeal determined that Roy's silence and acceptance of the house constituted a representation to MBW that Roy was satisfied with the garage and the laundry room area as constructed.

MBW relied upon this representation to transfer ownership of the property to Roy at closing. Thus, the courts at trial and on appeal concluded that Roy was estopped from challenging the construction and that Roy was not entitled to any recovery for this claim.

Roy also argued that MBW breached the contract by not providing documentation and an accounting of charges for change orders totaling \$19,316, within ten days of closing as required by an amendment to the contract. MBW's president testified that Roy received invoices throughout construction for all 16 additional items making up the change orders. While Roy testified to the contrary, the trial court expressly found him not to be credible.

On appeal, the Western District noted that an appellate court defers to the trial court's determination of credibility because the trial court is in a better position to determine witness credibility, sincerity, character and other "trial intangibles that may not be completely revealed by the record" on appeal.

Roy also unsuccessfully contended that he was entitled to a credit for payments made during construction for landscaping, carpeting and painting. Roy asserted that MBW failed to provide sufficient allowances for these items to reflect the actual cost as they appeared in a model home being used for comparison purposes.

In essence, Roy argued that MBW misrepresented its costs for these items in the model home which was used to establish the allowance amounts for the contract between Roy and MBW. Consequently, Roy sought a dollar-for-dollar credit for the money he spent on the items even though the actual costs exceeded the stated allowances and specifications in the contract.

While there was conflicting testimony about the amount of credits and allowances for these items, the appellate court concluded that under any scenario Roy was over budget regardless of what figures were used. Thus, Roy was not entitled to any further credit on these items.

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