

FILED
LOS ANGELES SUPERIOR COURT

NOV 13 2007

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10 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
12

13 KENNETH BERGER, Etc.

14 Plaintiff,

15 vs.

16 VISION REMODELING INC., Etc.,

17 Defendants.

CASE NO.: BC365437

ANSWER TO UNVERIFIED FIRST
AMENDED COMPLAINT BY ASHER
ATIAS

18
19 AND RELATED CROSS-ACTIONS

Case assigned to Judge, William F. Fahey
Department 78

20
21 Defendant, **Asher Atias** answers the unverified First Amended Complaint of plaintiffs, Kenneth
22 Berger and Thu Phan, as follows:

23 Pursuant to the provisions of California Code of Civil Procedure §431.30(d), this answering
24 defendant denies both generally and specifically, each and every allegation contained in each and
25 every cause of action alleged in the unverified First Amended Complaint ("FAC") of plaintiffs, and the
26 whole thereof. Defendant further denies that plaintiffs have suffered any damages, are entitled to
27 recover the prayed for damages, costs of suit, or further relief, as a result of any act or omission
28 complained of against this answering defendant.

Fees rel on 9/21/07

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FIRST SEPARATE AND AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

The FAC, and each purported causes of action contained therein, fail to state facts sufficient to constitute a meritorious cause and causes of action against this answering defendant.

SECOND SEPARATE AND AFFIRMATIVE DEFENSE

(Truth)

At all times relevant hereto, defendant made no representation known to be untrue.

THIRD SEPARATE AND AFFIRMATIVE DEFENSE

(Waiver)

Plaintiffs knowingly and voluntarily relinquished and waived any and all rights they may have had arising from the allegations set forth in the FAC, and have waived the breaches, if any, of which they now complain, and as a consequence thereof, plaintiffs are barred from seeking the relief sought or any relief whatsoever.

FOURTH SEPARATE AND AFFIRMATIVE DEFENSE

(Unclean Hands)

Plaintiffs have come into Court with unclean hands and as a consequence thereof, plaintiffs are barred from recovery herein.

FIFTH SEPARATE AND AFFIRMATIVE DEFENSE

(Set-Off)

In the event that defendant is found to be liable to plaintiffs for any of the things alleged in the FAC, plaintiffs' recovery will be barred or decreased due to the right of set-off by the amount to which plaintiffs owe defendant and/or have benefited from defendant's labor and materials.

FIFTH SEPARATE AND AFFIRMATIVE DEFENSE

(Mitigation of Damages)

If any damages or losses were suffered by plaintiffs herein, and plaintiffs failed to take reasonable and necessary steps in order to mitigate, lessen, reduce and minimize said damages and losses, then any recovery must be reduced by that amount.

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SIXTH SEPARATE AND AFFIRMATIVE DEFENSE

(Comparative Negligence)

Plaintiffs and their agents, servants, employees, and representatives failed to exercise proper care and caution and were, themselves, careless, reckless and negligent in and about those matters alleged in the FAC. Said careless, reckless, and negligent conduct on the part of plaintiffs were the proximate aggravating, contributing or concurrent cause of any purported damages allegedly suffered by plaintiffs. Plaintiffs therefore bear an applicable proportion of any liabilities, damages or losses that may be found to exist on the part of defendant. Accordingly, the recovery, if any, by plaintiffs against defendants must be reduced in proportion to the carelessness and negligence attributable to plaintiffs.

SEVENTH SEPARATE AND AFFIRMATIVE DEFENSE

(Prevention of Performance)

Defendant(s) tendered performance under the contract with plaintiffs, but plaintiffs prevented such performance.

EIGHT SEPARATE AND AFFIRMATIVE DEFENSE

(Time Barred)

The FAC and each cause of action alleged therein are *time barred* - Code of Civil Procedure § 337, et seq.

NINTH SEPARATE AND AFFIRMATIVE DEFENSE

(Plaintiffs' Breach of Contract)

Plaintiffs' by their own breach of contract, have discharged defendant(s) from any obligation to perform said contract.

TENTH SEPARATE AND AFFIRMATIVE DEFENSE

(Estoppel)

In equity and good conscience, the FAC, and each and every purported causes of action contained therein, are barred by reason of acts, omissions, representations, and courses of conduct by plaintiffs, upon which defendant was lead to rely to his/its detriment, thereby barring under the Doctrine of Equitable Estoppel any causes of action asserted by plaintiffs.

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EIGHTEENTH SEPARATE AND AFFIRMATIVE DEFENSE

(Failure to Name Necessary Party(s))

Plaintiffs' causes of action are barred to the extent that plaintiffs have failed to name indispensable party(s) in this action.

NINETEENTH SEPARATE AND AFFIRMATIVE DEFENSE

(Condition Precedent to Performance)

Defendant alleges that if it is determined that this answering defendant had not performed one or more obligations under any contract or agreement, this answering defendant contends that plaintiffs did not perform their obligations under each contract or agreement as aforesaid, which obligations were a condition precedent to any performance by defendant(s) in each instance.

TWENTIETH SEPARATE AND AFFIRMATIVE DEFENSE

(Doe defendants)

Defendant is informed and believes and thereon alleges that he/it is not legally responsible for the acts and/or omissions of those defendants named in plaintiffs' FAC as Does 1 through 100.

TWENTY-FIRST SEPARATE AND AFFIRMATIVE DEFENSE

(Changed Conditions)

Defendant is informed and believes and upon such information and belief alleges that plaintiffs, and/or other persons or entities, have changed, altered, and/or modified the subject property of this lawsuit, which conduct discharges this answering defendant from any liability.

TWENTY-SECOND SEPARATE AND AFFIRMATIVE DEFENSE

(Measure of Damages)

In the event that defendant is found to be liable to plaintiffs for any of the things alleged in the FAC, plaintiffs' recovery will be barred or decreased due to the right of set-off, the difference between the contract price, made with plaintiffs, and the price for completing the work undertaken by defendant under the contract with plaintiffs.

TWENTY-THIRD SEPARATE AND AFFIRMATIVE DEFENSE

(No Wrongdoing)

No wrongdoing as alleged in plaintiffs' FAC as against this answering defendant occurred.

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TWENTY-FOURTH SEPARATE AND AFFIRMATIVE DEFENSE

(Interference of Performance by Third Parties)

Defendant alleges that the damages alleged by plaintiffs in their FAC were proximately caused by or contributed by the acts of plaintiffs, or other persons and/or entities, in that said acts were an intervening and superseding cause of the injuries and damages, if any, of which plaintiffs complain, thus barring plaintiffs from any recovery against this answering defendant.

TWENTY-FIFTH SEPARATE AND AFFIRMATIVE DEFENSE

(Proper Notice)

Defendant alleges that the FAC, and each and every cause of action set forth therein, is barred because plaintiffs failed to give defendant proper notice, in a timely reasonable manner, of any such alleged breach, nor was defendant afforded an opportunity to fulfill his obligations in each instance.

TWENTY-SIXTH SEPARATE AND AFFIRMATIVE DEFENSE

(Hindrance of Performance)

Defendant alleges that defendant performed each and every obligation to plaintiffs pursuant to any and all contracts and agreements described in the FAC, except those obligations defendant was prevented and/or excused from performing by the acts and/or omissions of plaintiffs and/or other individuals or entities not named as defendants in the FAC.

TWENTY-SEVENTH SEPARATE AND AFFIRMATIVE DEFENSE

(Waiver of Right to Require Performance)

If it is determined that this answering defendant failed to perform one or more of the obligations under any contract or agreement, this answering defendant contends that plaintiffs waived their right to require such performance by plaintiffs' own acts or omissions in each instance.

TWENTY- EIGHTH SEPARATE AND AFFIRMATIVE DEFENSE

(Acts of Good Faith)

This answering defendant acted in good faith and did not directly or indirectly perform any acts whatsoever which would constitute fraud, negligence or ratification of any tortuous acts.

1 **TWENTY- NINTH SEPARATE AND AFFIRMATIVE DEFENSE**

2 (Conduct Not "Unfair")

3 Defendants' business practice of home remodeling is not "unfair" within the meaning of Business
4 and Professions Code §17200 et seq.

5 **THIRTIETH SEPARATE AND AFFIRMATIVE DEFENSE**

6 (Conduct Not "Fraudulent" Nor "Likely to Mislead")

7 Defendants' practice of home remodeling is and was not likely to mislead the public, and in
8 particular plaintiffs in that full disclosure was made at the time the contract was signed and all
9 subsequent change orders were signed by plaintiffs.

10 **THIRTY-FIRST SEPARATE AND AFFIRMATIVE DEFENSE**

11 (Absolute Barrier to Relief)

12 Plaintiffs' causes of action and each of them, are barred in light of the California Supreme Court's
13 observation in Stop Youth Addiction Inc. v Lucky Stores, Inc. (1998) 17 Cal.4th 553, 556 that "the UCL
14 cannot be used to state a cause of action the gist of which is absolutely barred under some other
15 principal of law."

16 **THIRTY-SECOND SEPARATE AND AFFIRMATIVE DEFENSE**

17 (Puffing)

18 Plaintiffs' claim for false advertising is barred by the fact that the alleged deceptive statements
19 were such that no reasonable person in plaintiffs position could have reasonably relied or
20 misunderstood defendants' statements for claims of fact.

21 **THIRTY-THIRD SEPARATE AND AFFIRMATIVE DEFENSE**

22 (Punitive Damages)

23 This answering defendant alleges that the FAC fails to state facts sufficient to constitute a claim for
24 punitive or exemplary damages. Further, the claim for punitive or exemplary damages is
25 unconstitutional under the United States Constitution, specifically, but not limited to, the Eight and
26 Fourteenth Amendments, and under the California Constitution, including, but not limited to, Article I,
27 Section 1, 7, 17.

28 ***

1 **THIRTY-FOURTH SEPARATE AND AFFIRMATIVE DEFENSE**

2 (Uncertainty)

3 The FAC and each purported claim for relief therein are barred, in whole or in part, by being
4 uncertain, ambiguous, and unintelligible.

5 **THIRTY-FIFTH SEPARATE AND AFFIRMATIVE DEFENSE**

6 (Fraud and Inequitable Conduct)

7 The FAC and each purported claim for relief therein are barred, in whole or in part, by plaintiffs'
8 fraudulent and inequitable conduct.

9 **THIRTY-SIXTH SEPARATE AND AFFIRMATIVE DEFENSE**

10 (No Damages)

11 Plaintiffs did not sustain any cognizable damages whatsoever, and did not sustain any cognizable
12 damages as a consequence of any act or omission attributable to defendant(s).

13 **THIRTY-SEVENTH SEPARATE AND AFFIRMATIVE DEFENSE**

14 (Additional Defenses – Amendment)

15 Defendant(s) presently has insufficient knowledge or information upon which to form a belief,
16 whether he/it may have additional, yet unstated, affirmative defenses. This answering defendant
17 reserves the right to assert additional affirmative defenses in the event discovery indicates additional
18 affirmative defenses are appropriate.

19 **THIRTY-EIGHTH SEPARATE AND AFFIRMATIVE DEFENSE**

20 (Cross-complaint)

21 Defendant, Vision Remodeling Inc., has filed a cross-complaint against plaintiffs. Defendant
22 incorporates by this reference, all allegations alleged in said cross-complaint, as an additional
23 Affirmative Defense against the FAC of plaintiffs.

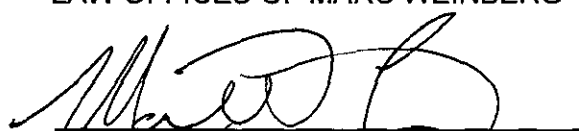
24 **WHEREFORE**, this answering defendant prays judgment as follows:

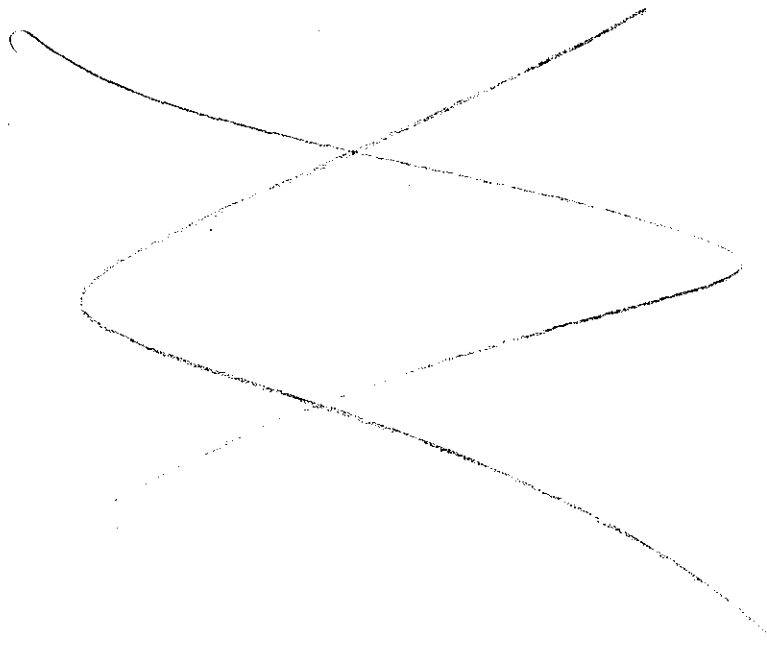
- 25 1. That plaintiffs take nothing by their First Amended Complaint;
26 2. For costs of suit incurred herein;
27 3. For reasonable attorney's fees incurred herein; and
28 4. For such other and further relief as the Court deems just and proper in this instance.

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Dated: November 12, 2007

LAW OFFICES OF MARC WEINBERG


MARC WEINBERG, Attorney for
Defendant, Asher Atlas



VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

CHECK APPLICABLE PARAGRAPHS

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am an Officer a partner a of

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. The matters stated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, at _____, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name

Signature

PROOF OF SERVICE

1013a (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 6320 Canoga Avenue, Suite 1500, Woodland Hills, CA 91367

On, November 12, 2007 I served the foregoing document described as

ANSWER TO FIRST AMENDED COMPLAINT BY ATIAS

on Interested parties in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

X by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

Christopher J. Olsen, Esq.
3075 East Thousand Oaks Blvd.
Suite 100
Westlake Village, CA 91362

John M. Correlli Esq.
3835 R. East Thousand Oaks Blvd.
Suite 119
Westlake Village, CA 91362

BY MAIL

X I deposited such envelope in the mail at Woodland Hills, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 12, 2007, at Woodland Hills, California.

(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, at _____, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Marc Weinberg

Type or Print Name

Signature

(BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG)

(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)

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