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KEARNEY TRUST.

6 **CONTRACTORS STATE LICENSE BOARD**

7 **ARBITRATION PROGRAM**

9 DAWN KEARNEY, an individual; THE) CSLB Case No. AS2007-575
DAWN KEARNEY TRUST,)
10 Claimants,) Superior Court Case No. 37-2007-00067295-
11 v.) CU-BC-CTL
12 JOSE LUIS GUDINO, dba GUDINO'S) **ARBITRATION BRIEF**
13 LANDSCAPE,)
14 Respondent.)

15 Claimants Dawn Kearney, an individual, and The Dawn Kearney Trust (hereinafter,
16 collectively, "Kearney") submit the following arbitration brief of legal issues:

17 **I.**

18 **INTRODUCTION**

19 This arbitration proceeding involves the claims of Jose Louis Gudino, dba Gudino's
20 Landscape's (hereinafter "Gudino") for payments allegedly owed for landscaping services performed
21 for Kearney, and Kearney's claims based on the defective and incomplete nature of Gudino's work,
22 and credits owed for work agreed upon but not performed. Gudino's claims should be denied, and
23 an award made in favor of Kearney for three main reasons. First, as a matter of law, no relief may
24 be granted because the additional work underlying the bulk of Gudino's claims for payment was
25 done without any signed, written change order, as required by the parties' agreement and by
26 California law. Moreover, each of the initial contracts between Kearney and Gudino also failed to
27 comply with the requirements of the California Business and Professions Code. Because Gudino's
28

1 California (the “Subject Property”). Three initial contracts were entered in April and May of 2005
2 and January of 2006. In June of 2006, the parties entered a further agreement for further landscaping
3 work, to be performed in four phases.

4 In connection with the work performed under each of these contracts, additional work was
5 performed that was not described in the initial contract. For some of the additional work, change
6 orders were eventually prepared by Gudino, although, importantly, none of these change orders
7 were ever signed. A very substantial portion of the additional work was performed and simply
8 invoiced without any other documentation at all.

9 At the time of the arbitration hearing, Kearney will present the live testimony of her
10 accounting expert Connie Hayes. Ms. Hayes’ testimony will establish, first, that Mr. Gudino’s
11 accounting upon which his claims for payment are based is seriously flawed, and that Mr. Gudino
12 is in fact entitled to no further payments, separate and apart from the question of the unenforceability
13 of the contracts, the defective nature of the work performed, and the cost of repair.

14 Ms. Hayes will demonstrate through her expert testimony on accounting that with respect to
15 certain of the contracts, once credits due to Kearney are properly accounted for, Kearney has
16 substantially overpaid. As to other contracts, a small balance may remain owing (assuming
17 *arguendo* the contracts are even enforceable, which they are not). Once all the contracts, credits, and
18 payments are accounted for, a substantial balance is owed by Gudino, back to Kearney for
19 overpayments, of approximately \$10,317.33.

20 **B. The Work Performed, the Defects in the Work, and the Required Repairs.**

21 Gudino performed a broad variety of various and sundry landscaping and other construction
22 services at Kearney’s property. The problems and defects in the work are numerous, and are set forth
23 in the scope of work and cost of repair estimates submitted herewith. The more significant problems
24 in Gudino’s construction include the encasement of stucco weep screeds with stone and mortar
25 installed by Gudino. This, of course, prevented water from escaping from the stucco system as
26 designed, causing an accumulation of water in the stucco system, and causing substantial resulting
27 damage. Gudino installed several sets of stone stairs with the incorrect and non-uniform stair riser
28 height, violating building codes and creating an unsafe condition. The incorrect installation of a

1 **1. The Contract Terms Prohibit Oral Modification.**

2 Each of the original contracts between Gudino and Kearney contained the following
3 provision in its “Terms and Conditions” section requiring that changes to the contract be approved
4 in writing:

- 5 1. CHANGES IN WORK: Seller will proceed with changes in the work
6 here in (sic) only upon receipt of a written order from buyer
7 specifying the requested change and containing an agreed price and
8 schedule adjustment ...

8 Accordingly, under each of the subject contracts, Gudino was not entitled to proceed with
9 any additional work until receiving a written change order from Kearney. Kearney *never* executed
10 a change order in connection with any of the additional work. Moreover, the majority of the
11 additional work was never even described on a change order form, but instead was merely invoiced
12 after the work was performed.

13 The Terms and Conditions section of the contracts further provides that the “Seller’s
14 election to proceed without such prior written order in any instance shall not be deemed a waiver
15 of seller’s right to receive price and schedule adjustments, therefore (sic) or to insist upon such prior
16 written orders for any subsequent changes in the work.” However, this anti-waiver provision does
17 not in any way alter the requirement that a written change order be received by Gudino, from
18 Kearney, prior to commencing any additional work. Accordingly, no valid or enforceable
19 agreement exists as to any of the extra work preformed by Gudino.

20 **2. California Law Clearly Prohibits Oral Modification.**

21 The failure to obtain written change orders from Kearney prior to commencing the
22 additional work (or ever) also renders the any change orders or other purported agreements for
23 additional work unenforceable under the California Contractor’s State License Law. (Cal. Bus &
24 Prof. Code Sec. 7000 et seq.) Any agreement between Gudino and Kearney falls squarely within
25 the definition of a “home improvement contract,” and the Contractor’s State License Law requires
26 a “home improvement contract” *and any changes thereto* to be in writing. In pertinent part,
27 Business and Professions Code Section 7159 provides:

- 28 (a)(1) This section identifies the projects for which a home

1 improvement contract is required, outlines the contract requirements
2 and lists the items that shall be included in the contract, or may be
provided as an attachment.

* * * * *

3 (5) Failure by the licensee, his or her agent or salesperson, or by a
4 person subject to be licensed under this chapter, to provide the
5 specified information, notices, and disclosures in the contract, or to
otherwise fail to comply with any provision of this section, is cause for
discipline.

* * * * *

6 (b) For purposes of this section, ***“home improvement contract”***
7 ***means an agreement***, whether oral or written, or contained in one or
8 more documents, ***between a contractor and an owner*** or between a
contractor and a tenant, regardless of the number of residence or
9 dwelling units contained in the building in which the tenant resides, if
the work is to be performed in, to, or upon the residence or dwelling
10 unit of the tenant, ***for the performance of a home improvement***, as
defined in Section 7151, and includes all labor, services, and materials
11 to be furnished and performed thereunder, if the aggregate contract
price specified in one or more improvement contracts, including all
labor, services, and materials to be furnished by the contractor,
12 exceeds five hundred dollars (\$500) ...

* * * * *

13 (c)(5) ***A change-order form for changes or extra work shall be***
14 ***incorporated into the contract and shall become part of the contract***
only if it is in writing and signed by the parties prior to the
commencement of any work covered by a change order.

15 (d) ***A home improvement contract and any changes to the contract,***
16 ***shall be in writing and signed by the parties to the contract prior to***
the commencement of any work covered by the contract or
17 ***applicable change order....***

18 Clearly, the work Gudino agreed to perform for Kearney was “home improvement.”
19 Business and Professions Code Sec. 7151 provides that “‘Home improvement’ ... shall include ...
20 landscaping [and] ...shall also mean the installation of home improvement goods or the
21 furnishing of home improvement services.” Accordingly, any agreement between Gudino and
22 Kearney for the subject landscaping work was a “home improvement contract,” as defined by
23 Section 7159(b) and could not be modified without a writing, as provided by Section 7159(d).
24 There is therefore absolutely no enforceable agreement for any of the additional work.

25 **3. Even the Original Written Contracts Fail to Comply with Statutes.**

26 The Legislature has set out mandatory requirements for home improvement contracts, in
27 addition to the requirement of a writing, with which the contracts here do not comply. (Cal. Bus.
28 & Prof. Code § 7159; and see Miller & Star Cal. Real Estate, Ch. 27, section 14.) The contract

1 must be in writing, signed by the parties, and must contain or reflect the following which are not
2 included in the alleged contracts here: (*Ibid.*)

- 3 ● A boldfaced designation as a “home improvement” contract. (*Id.* § 7159(d)(3).)
- 4 ● A statement that a notice of cancellation may be mailed to contractor’s address (*Id.*
5 § 7159(c)(3)(B)(ii)); a statement that a release from any claim or lien shall be
6 provided upon payment for any portion of work performed. (*Id.* § 7159(c)(4));
7 notice of the owner’s right to require a payment or performance bond (*Id.* §
8 7159(c)(6)); a notice of entitlement to a signed copy of the agreement (*Id.* §
9 7159(d)(4)); specification of the start and completion dates under descriptive
10 headings (*Id.* § 7159(d)(10-11).)
- 11 ● *A notice regarding change orders, stating they must be in writing, describe the*
12 *work, the cost, and the effect on the schedule.* (*Id.* § 7159(d)(13).)
- 13 ● *A notice regarding change order work stating that the change order is*
14 *unenforceable unless in a writing specifying the scope, cost and effect on*
15 *schedule of additional work* (*Id.* § 7159(e)(3).)
- 16 ● A notice regarding change order work stating that “the contractor’s failure to comply
17 with the requirements of this paragraph does not preclude the recovery of
18 compensation for work performed ***based upon legal or equitable remedies designed***
19 ***to prevent unjust enrichment.*** (*Id.* § 7159(e)(3).)
- 20 ● A notice concerning CGL insurance, (*Id.* § 7159(e)(1)); a notice concerning workers
21 compensation insurance, (*Id.* § 7159(e)(2)); a mechanic’s lien warning, (*Id.* §
22 7159(e)(4)); a CSLB notice (*Id.* § 7159(e)(5)) [provided in an improper and very
23 abbreviated form]; a 3-day right to cancel notice in a statutorily specified form (*Id.*
24 § 7159(e)(6)); a 7-day right to cancel notice in a statutorily specified form (*Id.* §
25 7159(e)(7)).

26 None of the foregoing requirements are met by the contracts between Gudino and Kearney.
27 The failure to provide the various notices regarding change orders is particularly relevant given
28 Gudino would then fail to comply with *any* of the requirements regarding change orders. Because

1 the original contracts, like the unsigned and unwritten “change orders,” do not comply with the code
2 requirements, they are unenforceable under California law, as explored more fully below.

3 **4. Case Law Supports That the Noncompliant Contracts are Unenforceable, and**
4 **That Only Reasonable Value, If Anything, Is Owed to Gudino.**

5 The claimed contracts and agreements for additional work performed without a writing
6 violate Cal Bus & Prof Code § 7159, and are therefore not enforceable. Generally, a contract made
7 in violation of a regulatory statute is void. (*Asdourian v. Araj* (1985) 38 Cal. 3d 276, 291.)
8 Normally, courts will not “lend their aid to the enforcement of an illegal agreement or one against
9 public policy” (*Id.*, citing *Felix v. Zlotoff* (1979) 90 Cal. App. 3d 155, 162, and *Norwood v. Judd*
10 (1949) 93 Cal. App. 2d 276, 288-289.) This rule is based on the rationale that “the public
11 importance of discouraging such prohibited transactions outweighs equitable considerations of
12 possible injustice between the parties.” (*Id.*, citing *Southfield v. Barrett* (1970) 13 Cal. App. 3d 290,
13 294.) In *King v. Hinderstein* (1981) 122 Cal. App. 3d 430, the Court found a contract to construct
14 a swimming pool to be invalid and unenforceable because it failed to comply with provisions of the
15 Business and Professions Code pertaining to pool contracts, which are analogous to the provisions
16 regarding home improvement contracts at issue here, and enacted for the same purpose of protecting
17 consumers from unscrupulous contractors. (*Id.* at 439.)

18 The Court in *Asdourian v. Araj*, *supra*, 38 Cal. 3d 276, made an exception to the “general
19 rule” of unenforceability based on facts that do not apply here. The *Asdourian* court first
20 recognized that the statute was enacted to protect consumers from unscrupulous home improvement
21 contractors. (*Id.* at 290-292; and see *Davenport v. Spieker* (1988) 197 Cal. App. 3d 566, 569.)
22 *Asdourian* made an exception to the general rule of unenforceability because the defendant
23 homeowner was a partner in a real estate investment and development firm, and thus not an
24 “unsophisticated consumer” in need of the statute’s protection. (*Asdourian*, *supra*, at 293, and
25 *Davenport*, *supra*, at 570.) Here, Kearney is not a real estate development professional as in
26 *Asdourian*, and should be afforded the protection of Section 7159.

27 *Asdourian* also noted that it may be unfair to allow a homeowner to retain the benefit
28 bestowed by the contractor’s work, and that unjust enrichment should be avoided. (*Asdourian*,

1 *supra*, at 571.) Here, were that a concern, Gudino may be entitled to the reasonable value of his
2 work performed, in order to avoid any unjust enrichment. Indeed, in both the *Asdourian* decision
3 and the *Davenport* decision, even when the courts found that Cal. Bus. & Prof. Code § 7159 did not
4 render the contract unenforceable, the courts ***only awarded the reasonable value of the work***
5 ***performed.*** (*Asdourian, supra*, at 571, *Davenport, supra*, at 281.) The court in *Arya Group v. Cher*
6 (2000) 77 Cal. App. 4th 610 reached the same conclusion, awarding ***only the reasonable value*** of
7 the work performed, and only to avoid unjust enrichment, where a home construction contract did
8 not meet statutory requirements. (*Id.* at 618.) Gudino is therefore entitled to, at the most, the
9 reasonable value of the work performed - an amount which he has already been more than paid.

10 **B. Gudino Did Not Meet His Obligation of Substantial Performance.**

11 There is an implicit promise in a contract for construction or home improvement that the
12 workmanship promised will be of reasonable quality. (*Tolstoy Construction Co. v. Minter* (1978)
13 78 Cal. App. 3d 665, 672.) Courts in California deny contractors the right to recover pursuant to
14 the doctrine of substantial performance where their performance was not found to meet a reasonable
15 standard. (*Tolstoy Construction Co. v. Minter, supra*, 78 Cal. App. 3d at 672.) When a work of
16 improvement is so poorly constructed that it is of little or no value and must be replaced, there is
17 no substantial performance, and recovery on the contract should be denied. (*Williams v. Elliott*
18 (1954) 127 Cal. App .2d 357, 364.) Even where some of the defects are minor, an accumulation
19 of minor defects may render performance less than substantial. (*Tolstoy Construction Co. v. Minter,*
20 *supra*, 78 Cal. App. 3d at 673.) The contractor has the burden of proving he substantially
21 performed his obligations. (*U.S. Industries, Inc. v. Edmond J. Vadnais* (1969) 270 Cal. App. 2d 520,
22 526.)

23 Here, Gudino’s work is rife with defects, as we outlined herein above, and will detail
24 through the testimony of expert contractors at the time of the arbitration. As established in
25 Kearney’s cost of repair documentation, these extensive defects in Gudino’s work will require
26 substantial repairs to correct. Accordingly, Gudino’s work failed to meet a reasonable standard of
27 quality, and was so poorly constructed, that any recovery under the contract should be denied.
28 Moreover, as the cost to repair Gudino’s defective work exceeds any claim for payment, there can

1 be no recovery of any further sums by Gudino.

2 **IV.**

3 **CONCLUSION**

4 Because each of the subject contracts and agreements for additional work fail to conform
5 with the requirements of the California Business and Professions Code, the agreements are not
6 enforceable, and Gudino is therefore only entitled to receive, for his work, only the reasonable
7 value of the work performed, less the costs to correct the defects in Gudino’s work and the
8 damage resulting therefrom, and less the amounts owed by Gudino to Kearney for credits for
9 work not performed or not completed. Because Gudino has already received far in excess of the
10 reasonable value of his work, the cost of repairing the defects, and the credits owing to Kearney,
11 should result in an award in favor of Kearney and against Gudino.

12 Date: June 19, 2008

MORRIS & SULLIVAN LLP

14 By: _____

15 Will Lemkul
16 Matthew Yarling
17 Attorneys for Defendants/Cross-
18 Complainants DAWN KEARNEY, an
19 individual; THE DAWN KEARNEY
20 TRUST.
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Arbitration Award
Contractors State License Board Arbitration Program

CSLB Case Number: AS2007-575

Dawn Kearney
 6350 Camino De La Costa
 La Jolla, CA 92037

Jose Luis Gudino
Gudino's Landscape
 2295 Primrose Avenue
 Vista, CA 92083
 License #: 854979

TO THE ABOVE PARTIES AT INTEREST, IN THE MATTER OF CSLB CASE NO: AS2007-575
 The undersigned Arbitrator, in accordance with California Business and Professions Code §7085, has investigated and considered all the material facts and available information pertaining to this case, and has decided upon a final and binding Arbitration Award as described below.

DECISION	REMEDY
Claim for improperly installed sump pump.	\$ 0.00
Improperly covered weep screed at north deck	\$ 1,200.00
Improper stair riser heights at south courtyard.	\$ 7,211.00
Improper stair riser heights at workout room.	\$ 5,794.00
Improper stair riser heights at upper north garden.	\$ 6,654.00
Improper stair riser heights at north deck stair.	\$ 11,885.00
Improper stair riser heights at pool area.	\$ 14,763.00
Improper stair riser heights and weep screed improperly covered at west stair.	\$ 15,857.00
Claim because schematic not provided to locate low-voltage wiring.	\$ 0.00
Claim for incomplete tree light wiring.	\$ 0.00
Claim for the following landscape issues: grass along street, incomplete and unadjusted irrigation system, irrigation piping and waterline too high in trenches, incomplete drainage work, incomplete stonework, incorrect irrigation sprayer type at hot tub, incomplete irrigation at parking area, change to waterproof wire nuts and incomplete soil preparation.	\$ 0.00
Claim for site wall stucco.	\$ 0.00
Respondent's claim for unpaid balance of contract.	\$ 0.00
TOTAL:	\$ 63,364.00

- Respondent shall pay the Complainant the Sum of **\$50,000.00 per statutory limitations.**

- Other: Respondent shall remove any Mechanic's Liens against Complainant's property within the time parameters set forth below.**

THIS ARBITRATION AWARD SHALL BE VALID AND BINDING UPON ALL PARTIES CONCERNED. PARTIES SHALL HAVE THIRTY (30) DAYS FROM DATE OF THIS AWARD TO SATISFY REMEDIES.

SIGNED:

David Neagley, AMCC Arbitrator

DATE: 7/8/2008

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