

**COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS, FORT
WORTH**

**Inimitable Group, L.P. and Soitis, L.L.C. v. Westwood Group
Development II, Ltd.**

Inimitable Group, L.P. v. Westwood Group Development II, Ltd., No. 2-07-289-CV (Tex. App.—Fort Worth
Aug. 14, 2008) · No. No. 2-07-289-CV · Decided August 14, 2008

SUMMARY

The opinion concerns a dispute over an agreement for the construction and sale of an office and warehouse building in Grapevine, Texas. The court affirms a trial judgment awarding Westwood Group Development II, Ltd. damages and attorney’s fees, holding that the parties formed an enforceable oral agreement concerning interior finish-out services and rejecting the appellants’ challenges concerning repudiation, excuse from performance, estoppel, and waiver. The appellate court also notes that the appellants failed to preserve certain arguments and failed to challenge an alternative trial-court finding.

CASE DETAILS

COURT	Court of Appeals for the Second District of Texas, Fort Worth
WRITING FOR THE COURT	Terrie Livingston; Cayce, C.J.; Holman, J.
JURISDICTION	Texas
DECIDED	August 14, 2008
DOCKET	No. 2-07-289-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appellants appealed after a bench trial in which the trial court awarded Westwood damages for breach of contract, attorney's fees, and prejudgment interest.
STANDARD OF REVIEW	Findings of fact in a bench trial are reviewed for legal and factual sufficiency under the same standards applicable to jury findings. Conclusions of law are reviewed for correctness based on the facts. The court of appeals may not make original findings of fact, but may only determine whether findings should be sustained or 'unfound.'
PRECEDENTIAL VALUE	Published Texas intermediate appellate opinion; precedential value is not otherwise specified in the source text.

PARTIES

Inimitable Group, L.P., Soitis, L.L.C. v. Westwood Group Development II, Ltd.

TOPICS

breach of contract

contract formation

anticipatory repudiation

waiver of breach

appellate procedure

PRACTICE AREAS

contracts

real estate

construction law

commercial litigation

appellate procedure

QUESTIONS PRESENTED

1. Whether the parties entered into an enforceable oral agreement for interior finish-out and design services despite the absence of an agreed final price and completion date.
2. Whether appellants could anticipatorily repudiate an oral interior finish-out agreement that the trial court found enforceable.
3. Whether Westwood was excused from further performance under the purchase-and-sale agreement after appellants breached or anticipatorily repudiated the oral interior finish-out agreement.
4. Whether appellants were estopped from asserting that Westwood first breached the purchase-and-sale agreement.
5. Whether appellants waived any right to terminate based on Westwood's alleged failure to substantially complete the project.

HOLDINGS

1. The parties entered into a valid and enforceable oral agreement for Westwood to coordinate interior design and finish-out services. The absence of a final agreed price and a specific completion date did not make the agreement unenforceably indefinite because a reasonable price and reasonable time could be implied.
2. The court overruled appellants' challenge to the finding that they anticipatorily repudiated or breached the enforceable oral interior finish-out agreement because the challenge depended on the rejected premise that no enforceable agreement existed.
3. Appellants could not obtain reversal based on Westwood's alleged failure to elect between continuing performance and treating appellants' conduct as a breach because that avoidance argument was an affirmative defense that appellants neither pleaded nor tried by consent. In addition, an unchallenged finding established that Westwood timely substantially completed the building and satisfied all conditions precedent.
4. The trial court properly applied equitable estoppel because the evidence supported findings that Soitis concealed or misrepresented its intentions regarding closing and that Westwood reasonably relied on that conduct to its detriment.
5. Appellants waived any failure by Westwood to comply with the purchase-and-sale agreement.

KEY QUOTATIONS

“Based on the foregoing, we conclude and hold that the trial court did not err by determining that Soitis and Westwood entered into an enforceable oral agreement for the interior finish-out of the building.” (14)

“Having overruled appellants’ five issues, we affirm the trial court’s judgment.” (23)

FACTUAL BACKGROUND

Soitis and Westwood entered into an agreement for Westwood to construct and sell an office and warehouse building, with substantial completion originally required by October 15, 2005 and a termination right if substantial completion had not occurred by December 31, 2005, as extended by specified delays. The parties later agreed orally that Westwood would assist with interior design and finish-out services, and Soitis participated in approving design documents while requesting changes to the project. In November 2005, Soitis instructed Westwood to stop work and disclosed that it no longer intended to occupy the building, but continued discussing financing, assignment, and closing. After the building was substantially completed, Soitis assigned its rights to Inimitable, and appellants attempted to terminate the agreement based on the absence of a certificate of occupancy and demanded return of the earnest money.

PROCEDURAL HISTORY

Soitis sued Westwood seeking a declaration that the purchase-and-sale agreement had been terminated and seeking return of \$50,000 in earnest money. Westwood counterclaimed for breach of contract and other relief. After a bench trial, the 48th District Court of Tarrant County found for Westwood and awarded damages and attorney's fees. The court of appeals overruled all five appellate issues and affirmed.

DISPOSITION

affirmed

CASES CITED

- Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991)
- Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996)
- Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994)
- Tex. Nat’l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986)
- Zeptner v. Zeptner, 111 S.W.3d 727, 734 (Tex. App.—Fort Worth 2003, no pet.)
- Citizens Nat’l Bank v. City of Rhome, 201 S.W.3d 254, 256 (Tex. App.—Fort Worth 2006, no pet.)
- Dominey v. Unknown Heirs and Legal Representatives of Lokomski, 172 S.W.3d 67, 71 (Tex. App.—Fort Worth 2005, no pet.)
- Searcy v. DDA, Inc., 201 S.W.3d 319, 322 (Tex. App.—Dallas 2006, no pet.)
- Oakrock Exploration Co. v. Killam, 87 S.W.3d 685, 690 (Tex. App.—San Antonio 2002, pet. denied)
- Fort Worth ISD v. City of Fort Worth, 22 S.W.3d 831, 846 (Tex. 2000)
- T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992)

- Harris v. Balderas, 27 S.W.3d 71, 77 (Tex. App.—San Antonio 2000, pet. denied)
- KW Constr. v. Stephens & Sons Concrete Contractors, Inc., 165 S.W.3d 874, 883-84 (Tex. App.—Texarkana 2005, pet. denied)
- Buxani v. Nussbaum, 940 S.W.2d 350, 353 (Tex. App.—San Antonio 1997, no writ)
- Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp., 113 S.W.3d 889, 894-95 (Tex. App.—Dallas 2003, no pet.)
- Pennington v. Jerry F. Gurkoff, D.O., P.A., 899 S.W.2d 767, 770 (Tex. App.—Fort Worth 1995, writ denied)
- Cytogenix, Inc. v. Waldroff, 213 S.W.3d 479, 486 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)
- Avila v. Gonzalez, 974 S.W.2d 237, 244-45 (Tex. App.—San Antonio 1998, pet. denied)
- Moore v. Dilworth, 142 Tex. 538, 179 S.W.2d 940, 942 (1944)
- Kennedy Ship & Repair L.P. v. Pham, 210 S.W.3d 11, 25 (Tex. App.—Houston [14th Dist.] 2006, no pet.)
- Houston Belt & Terminal Ry. v. J. Weingarten, Inc., 421 S.W.2d 431, 435 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.)
- Chilton Ins. Co. v. Pate & Pate Enters., Inc., 930 S.W.2d 877, 887-88 (Tex. App.—San Antonio 1996, writ denied)
- Mastin v. Mastin, 70 S.W.3d 148, 154 (Tex. App.—San Antonio 2001, no pet.)
- Compass Bank v. MFP Fin. Servs., Inc., 152 S.W.3d 844, 852, 857 (Tex. App.—Dallas 2005, pet. denied)
- McGalliard v. Kuhlmann, 722 S.W.2d 694, 696 (Tex. 1986)
- Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n, Inc., 178 S.W.3d 384, 390 (Tex. App.—Fort Worth 2005, pet. denied)
- Cal-Tex. Lumber Co. v. Owens Handle Co., 989 S.W.2d 802, 821 (Tex. App.—Tyler 1999, no pet.)
- Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 422 (Tex. App.—Corpus Christi 1990, writ denied)
- Roberts v. Clark, 188 S.W.3d 204, 213 (Tex. App.—Tyler 2002, pet. denied)
- Braugh v. Phillips, 557 S.W.2d 155, 158 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.)
- Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 515-16 (Tex. 1998)
- Argyle ISD ex rel. Bd. of Trustees v. Wolf, 234 S.W.3d 229, 241 (Tex. App.—Fort Worth 2007, no pet.)
- Douglas v. Aztec Petroleum Corp., 695 S.W.2d 312, 317 (Tex. App.—Tyler 1985, no writ)
- Shear Cuts, Inc. v. Littlejohn, 141 S.W.3d 264, 270-71 (Tex. App.—Fort Worth 2004, no pet.)
- UBS Fin. Servs., Inc. v. Branton, 241 S.W.3d 179, 189 (Tex. App.—Fort Worth 2007, no pet.)
- Mikey's Houses LLC v. Bank of Am., N.A., 232 S.W.3d 145, 167 (Tex. App.—Fort Worth 2007, no pet. [mand. pending])