

2012 WL 2576715 (Or.Cir.) (Trial Pleading)  
Circuit Court of Oregon.  
Multnomah County

Margaret A. MYERS, Plaintiff,  
v.  
GREEN HOME RENOVATIONS, INC., an Oregon corporation, Defendant.

No. 1206-08062.  
June 26, 2012.

**Complaint - Breach of Construction Contract, Assumpsit, Fraud, ORS  
20.082 - Attorney Fees, and Elder Abuse under ORS 124.100 \$42,951.00**

[Troy J. Wood](#). OSB 954583, Trial Attorney for Plaintiff.

**CLAIM IS SUBJECT TO MANDATORY ARBITRATION**

Plaintiff MARGARET A. MYERS (hereinafter, "Mrs. Myers") alleges as follows:

**1.**

At all material times herein, Mrs. Myers *was a* resident of Lake Oswego, Oregon.

**2.**

At all material times herein, defendant GREEN HOME RENOVATIONS, INC., (hereinafter, "Defendant" or "GHR") was an Oregon corporation that is in the business of construction contracting and licensed to do so in the State of Oregon under Construction Contractors Board License number XXXXXX, and conducts or performs business services within Multnomah County and surrounding counties.

**3.**

GHR is in the business of providing construction services to customers within and around Multnomah County at its principal places of business located at 2132 SE Oak Grove Boulevard, Oak Grove, Oregon. Its corporate mailing address is 3762 SE Roethe Road, Portland, Oregon 97267.

**4.**

At all material times herein, all sales people and construction personnel of GHR represented themselves to be employees or agents of GHR, and were acting as apparent agents of GHR and were acting within the course and scope of such employment or agency. GHR held out such apparent employees or agents, as its construction personnel and/or its sales representatives, and these individuals dealt directly with GHR's customers on GHR's behalf.

**5.**

On or about December 13,2011, Mrs. Myers was telephoned by a salesperson with GHR. Said phone call was a “cold” sales call designed to illicit appointments from potential customers like Mrs. Myers. The salesperson inquired whether Mrs. Myers was in need of any roofing, windows, siding or other remodel work. Mrs. Myers indicated that she has wanted to remodel her bathroom for some time, and it was becoming a problem for her. The salesperson set an appointment with Mrs. Myers for a GHR salesperson to come out to her house on December 14, 2011, and place a bid on a bathroom remodel for her home.

**6.**

On or about December 14,2011 the same or another salesperson came to visit Mrs. Myers at her home, and placed a bid on the bathroom remodel. Mrs. Myers was unsure whether this was a competitive bid, but after the salesperson assured her that it was at the bottom of the market price, she accepted the bid. The terms of the original contract included the following for the bid price of \$9,816.00 (hereinafter, individually referred to as the “Original Remodel Contract.” When referenced together with all change orders referenced below, the “Remodel Contract”):

- a. 3 cm countertops that were finished in a model called “glass crystal;”
- b. Custom cabinets finish;
- c. 8” back splash that were to be finished in a model called “glass crystal;”
- d. Revise location of master light fixture;
- e. All required demolition and haul away of job related debris;
- f. Plaintiff was to perform all painting for the remodel; and
- g. The bid price was to include the following price limits on certain items;

(1)	Basic Plumbing:	\$500
(2)	Sinks and Faucets:	\$700
(3)	Mirrors:	\$300
(4)	Electrical:	\$250

- h. The work, labor and materials included in the Remodel Contract hereinafter shall be referred to as the “Bathroom Remodel.”

**7.**

At the signing of the Original Remodel Contract, Mrs. Myers made it clear to the salesperson that it was important to her that the Bathroom Remodel be completed in a timely fashion. The salesperson assured Mrs. Myers that the Bathroom Remodel should be completed by the end of January in 2012.

**8.**

On or about December 14, 2011, after signing the Original Remodel Contract, Mrs. Myers paid a \$5,000.00 deposit with a personal check from her checking account that GHR deposited into their account.

**9.**

On or about January 10, 2012, a GHR salesperson contacted Mrs. Myers and informed her that she needed a different type of cabinet from her original cabinets for the Bathroom Remodel “to be done right.” The cost of the new cabinets was \$2,540.00 more than the Original Remodel Contract price. On January 26, 2012, Mrs. Myers entered into a change order that replaced the cabinets selected in the Original Remodel Contract with the new cabinets recommended by the salesperson (hereinafter, the “First Change Order”). At the time of signing the First Change Order, Mrs. Myers paid an additional \$3,000.00 as an additional deposit on the Remodel Contract. The sales person represented that the additional deposit was to pay for upgraded materials and shipping costs only. Additionally, the new completion date for the Bathroom Remodel was to be the end of February, 2012.

**10.**

On or about February 24, 2012, Mrs. Myers was again visited by a GHR salesperson who told her that some changes had been made to her final plans, and that she needed to enter into a new change order. The new change order altered the backsplash from 8” to 6”, and changed the texture and color of the countertops and backsplash from “glass crystal” to “pretty woman” (hereinafter, the “Second Change Order”). The sales person stated that this would not increase the costs at all, and that this was the final revision before they started work. The salesperson promised that the Bathroom Remodel would be completed by the end of March, 2012. Based upon this promise, Mrs. Myers entered into the Second Change Order on February 24, 2012. Shortly after the Second Change Order was signed, Mrs. Myers initialed her approval on the final plans for the Bathroom Remodel.

**11.**

Mrs. Myers stayed in regular contact with the salesperson from GHR to determine when the project would start and when the project would be completed. Toward the end of March, 2012, the GHR salesperson told Mrs. Myers that there was a problem with the cabinet manufacturer, that was causing delays for a number of projects, and the Bathroom Remodel could not be started in March. The salesperson promised that all issues would be resolved soon and that the new “Hard” start date for the Bathroom Remodel was to be April 30, 2012.

**12.**

On or about April 26, 2012, the sinks and faucets for the Bathroom Remodel were delivered to Mrs. Myers home by a GHR salesperson. At the time of this delivery, the GHR salesperson indicated that the April 30, 2012 start date for the Bathroom Remodel probably will not be met, and admitted that the Bathroom Remodel “might never be started or at least will not be completed any time soon.” The salesperson then indicated that these delays were all part of GHR’s business model. Based upon the salespersons general demeanor at the time that these statements were made, Mrs. Myers reasonably viewed these comments as an employee having a bad day or was disgruntled at that time. On April 30, 2012, no GHR employee showed up to work on the Bathroom Remodel. Mrs. Myers tried calling GHR to find out what was causing the delay and to schedule a new start date, but no employee or representative of GHR would return her calls, or explained that they did not have an answer.

**13.**

On May 11, 2012, Mrs. Myers had a notice of default sent to GHR, stating that the Remodel Contract had been breached by GHR by failing to complete the Bathroom Remodel by any of its prior represented completion dates or altogether within a reasonable time. That notice stated that GHR had 30 days in which to cure its breach by starting and completing the Bathroom Remodel or GHR would be in default and certain legal actions would be taken. On May 29, 2012, the President of GHR, Keith Schiller (hereinafter, "Mr. Schiller"), contacted Mrs. Myers and told her that the Bathroom Remodel would be started by June 8, 2012 and would be completed within a few days after that. On June 8, 2012, Mr. Schiller again called Mrs. Myers and told her that it would start on June 19, 2012 at the latest, and would be completed within a few days. No representative or employee of GHR showed up on or at any time before these start dates to do any work on the Bathroom Remodel. On June 21, 2012, Mrs. Myers notified Mr. Schiller, and thereby GHR, that the contract was breached, and that GHR's opportunity to cure the breach had passed, and that no further work or efforts were to be made in trying to start or complete the Bathroom Remodel, and demanded that the unspent portion of her deposit be returned and her attorney fees be paid (hereinafter "Final Default Notice").

**14.**

The Original Remodel Contract, the First Change Order and the Second Change Order all contained the following provision within the four corners of such documents, and prior to signing the Original Remodel Contract, this provision was described as an attorney fee provision by GHR's salesperson (hereinafter, the "Attorney Fee Provision"):

"Attorney Fees; Buyer will pay collection costs and fees seller incurs due to buyer's default, whether or not suit is filed against buyer, including, but not limited to Seller's reasonable attorney fees and any fees or costs to foreclose any loan. If seller files a lawsuit to collect the unpaid balance or to foreclose any deed of trust securing the contract, or enforce of have declared seller's rights under this contract of the deed of trust, of if seller is named a party in any court suit action brought with respect to the property buyer may have given as reasonable attorney's fees determined by any trial, appellate or bankruptcy court, buyer will also pay any costs involved and the actual costs of obtaining title reports to foreclose or defend the deed of trust given by the buyer.

By signing this notice you are indicating that you have received this notice, have read it and understand it."

This one sided Attorney Fee Provision is made reciprocal pursuant to [ORS 20.096](#), and under Oregon law applies to actions for enforcement or breach of the Remodel Contract.

**15.**

To date, Mrs. Myers has paid \$8,000.00 in deposits to GHR for the Remodel Contract and Bathroom Remodel. GHR has purchased \$683.00 worth of sinks and faucets, and \$3,000.00 worth of cabinets. All of the cabinets have been completed and are ready for delivery for this price. GHR has spent no additional monies in furtherance of starting or completing the Bathroom Remodel on Mrs. Myers' behalf. Mrs. Myers has hired a new contractor to perform the Bathroom Remodel at an expense of \$1,740.00, a plumber to perform all plumbing aspects of the Bathroom Remodel for \$500.00, and an electrician to perform all electrical aspects of the Bathroom Remodel for \$317.00. Mrs. Myers spent \$300.00 on mirrors. Prior to the Final Default Notice, Mrs. Myers spent \$3,200 in pre-litigation attorney fees in an effort to enforce the Remodel Contract, and then in an effort to have the unspent portion of her \$8,000.00 deposit returned to her, all such fees are damages under the Attorney Fee Provision of the Remodel Contract.

**First Claim for Relief**

**(Breach of Contract)**

**16.**

Plaintiff re-alleges paragraphs 1- 15 as if fully set forth herein.

**17**

Mrs. Myers has performed all conditions that she was required to perform under the Remodel Contract.

**18.**

Since no specific start dates or completion dates were stated in the Remodel Contract, under Oregon common law and construction industry standards, GHR was required to complete its performance under the Remodel Contract within a reasonable time. A reasonable time for completion for this Bathroom Remodel would have been 3 months or less from the date of signing the Original Remodel Contract. Additionally, all contracts in Oregon have an implied duty or covenant of good faith and fair dealing.

**19.**

At the dates and places described herein, GHR breached the Remodel Contract in one or more of the following list of particulars, each of which caused damages to Mrs. Myers:

- a. Failing to complete performance under the Remodel Contract within a reasonable time, despite no conditions needing to be completed by Mrs. Myers;
- b. Failing to start the Bathroom Remodel on any of the dates that it previously committed to Mrs. Myers that it would start on;
- c. Failing to comply with the implied duty or covenant of good faith and fair dealing by continuously making promises for a start date that it never intended to meet; thereby delaying the inevitable recognition that it was breaching its performance obligations under the Remodel Contract, and delaying Mrs. Myers ability to find another contractor to complete the Bathroom Remodel; and
- d. Failing to comply with the implied duty or covenant of good faith and fair dealing by charging Mrs. Myers a contract price that represents approximately 200% of the fair market value of such services.

**20.**

Of the \$8,000.00 that Mrs. Myers has already paid G HR, GHR still has \$4,317.00 that it has not spent on any materials, and no labor has been extended on the remodel up to the date of the breach of Remodel Contract. It will cost Mrs. Myers an additional \$2,857.00 to complete the Bathroom Remodel through other contractors. The total amount of attorney fees and other collection costs allowed under the Attorney Fee Provision of the Remodel Contract for pre-litigation expenses totals \$3,200.00. Therefore, the total foreseeable economic damages incurred by Mrs. Myers as a result of Defendant's breach of the Remodel Contract are \$1,701.00, together with 9% interest from May 11, 2012 until paid.

**21.**

In the alternative, Mrs. Myers requests that the contract be rescinded by the Court on the following grounds:

a. Mrs. Myers was fraudulently induced to enter into the contract the following intentional misrepresentations by GHR: (1) that their contract was near the bottom of the market price; (2) by promising to complete the Bathroom Remodel by dates it had no intention or ability to complete by; and (3) by misrepresenting what the additional deposit was needed for; and

b. By failing to perform the contract at any of the previously represented completion dates or completing it within a reasonable time

**22.**

Upon rescission of the Remodel Contract, Mrs. Myers damages will still be \$4,317.00, which represents the unspent portion of Mrs. Myers' \$8,000.00 deposit, together with 9% interest from May 11, 2012 until paid.

**Second Claim for Relief**

**(Assumpsit)**

**23.**

Plaintiff re-alleges paragraphs 1- 22 as if fully set forth herein.

**24.**

Based upon GHR's conduct at the dates and places described herein, especially in taking \$8,000.00 in deposits from her, failing to ever start performance within a reasonable time, and then refusing to return the unspent portion of those deposits after default had been declared; it would be unjust and unfair for plaintiff to pay for work that defendant never performed, and for defendant to hold such excess monies with no future obligation to perform.

**25.**

After applying a credit toward amounts paid for materials to be used on the Bathroom Remodel, the total amount of excess monies currently being wrongfully held by GHR, which rightly belongs to Mrs. Myers is \$4,317.00, together with 9% interest from May 11, 2011 until paid.

**Third Claim for Relief**

**(Fraud - Tort)**

**26.**

Plaintiff re-alleges paragraphs 1- 25 as if fully set forth herein.

**27.**

On seven different occasions, GHR through its employees, owners or agents represented to Mrs. Myers that the Bathroom Remodel would be started within a reasonable time or by a specific date, and that the Bathroom Remodel would be completed no later than a week after its start date (hereinafter, "Start Date Representations"). At the time that the Original Remodel Contract was entered, GHR's salesperson represented that the Remodel Contract price was near the bottom of reasonable prices within the

market (hereinafter, "Price Representation"). At the time that Mrs. Myers signed the Second Change Order, GHR's salesperson demanded a \$3,000.00 deposit from Mrs. Myers, and said salesperson told Mrs. Myers that the monies were needed to pay for additional materials, and that such deposits would only be used for the Bathroom Remodel's increased cost of materials and shipping (hereinafter, "Deposit Representation"). Hereinafter, the Start Date Representations, Price Representation and Deposit Representation shall be referred to as the "Misrepresentation(s)."

**28.**

Each of the above Misrepresentations was false at the time they were made, in that the employee, officer or agent of GHR knew the following:

- a. As to Start Date Representations, that in fact such time frames would not be met;
- b. As to the Price Representations, that in fact the Remodel Contract Price was more than double the market price; and
- c. As to the Deposit Representation, that in fact Mrs. Myers first deposit of \$5,000 was at least a \$1,000 more than what was needed for all the materials included in the Bathroom Remodel.

**29.**

Each of these Misrepresentations was material to the Remodel Contract because of the following:

- a. As to the Start Date Representations, Mrs. Myers stressed that this was an important aspect to hiring GHR to perform the Bathroom Remodel, and if it could not be completed within a reasonable time, Mrs. Myers would have hired someone else to perform the Bathroom Remodel. In the alternative, after the Remodel Contract was signed, Mrs. Myers would have recognized earlier that GHR had no ability to perform in a timely fashion, and would have taken remedial actions sooner which would have included hiring a new contractor to perform the Bathroom Remodel, and it would have been completed prior to June 21, 2012;
- b. As to the Price Representation, Mrs. Myers intimated that she needed to confirm that bid price for the Bathroom Remodel was competitive and would have but for the assurances by the salesperson that the price was near the bottom of the market price; and
- c. As to the Deposit Representation, Mrs. Myers would have never paid the second deposit of \$3,000.00 on January 24, 2012.

**30.**

The officer, employee or agent who made each of the aforementioned Misrepresentations made them knowing that such Misrepresentation was false at the time of speaking each such Misrepresentation.

**31.**

The officer, employee or agent who made each of the aforementioned Misrepresentations made them with the intent that Mrs. Myers would act upon such Misrepresentations by signing the Original Remodel Contract, First Change Orders, Second Change Order, or avoid taking such remedial actions as declaring GHR in default and finding a new contractor to complete the Bathroom Remodel.

**32.**

At the time that each of the aforementioned Misrepresentations were made, Mrs. Myers believed them and was ignorant as to their falsity.

**33.**

At the time that each of the aforementioned Misrepresentations were made, Mrs. Myers relied on these statements as it assured her that it was prudent to enter into or stay in the Remodel Contract with GHR or allow them more time to perform.

**34.**

At the time that each of the aforementioned Misrepresentations were made, Mrs. Myers had a right to rely upon such representations in that, after checking with Construction Contractors Board and Oregon Corporation Division, she confirmed that GHR was a business in good standing with both government bodies.

**35.**

As a direct and proximate result of Defendant's fraudulent conduct, Mrs. Myers paid \$4,317.00 in excessive deposits for the materials needed and to start the Bathroom Remodel, and she has had to hire new contractors to actually complete the Bathroom Remodel for which she hired GHR at an additional expense of \$2,857.00. She has further incurred \$3,200.00 in pre-litigation attorney fees in an effort to try and collect these funds, and the Remodel Contract that she was fraudulently induced to enter into allows for recoupment of such fees under the Attorney Fee Provision. Therefore, as a proximate result of Defendant's fraudulent conduct, Mrs. Myers has incurred total economic damages not to exceed \$10,374.00.

**36.**

As a direct and proximate result of GHR's fraudulent conduct alleged herein, Mrs. Myers has suffered non-economic damages including mental anguish, anxiety and mental stress which has interfered with her normal daily activities in an amount to be found reasonable by a jury not to exceed \$10,000.00.

#### **Fourth Claim for Relief**

**(Financial Abuse of a Vulnerable Person pursuant to ORS 124.100 et seq.)**

37.

Plaintiff re-alleges paragraphs 1- 36 as if fully set forth herein.

**38.**

Mrs. Myers is a "vulnerable person", as that term is defined in [ORS 124.100\(1\)\(e\)\(A\)](#), and an "**elderly** person" as that term is defined in [ORS 124.100\(1\)\(a\)](#) in that she was 65 years of age or older at the time she initially entered into the contract with GHR.

**42.**

As available under [ORS 124.100\(2\)\(b\)](#), and as a direct and proximate result of GHR's conduct alleged herein, Mrs. Myers has suffered non-economic damages including mental anguish, anxiety and mental stress which has interfered with her normal daily

activities in an amount to be found reasonable by a jury not to exceed \$10,000.00. Pursuant to [ORS 124.100\(2\)\(b\)](#), her non-economic damages for this financial **abuse** are tripled to \$30,000.00.

**43.**

Pursuant to [ORS 124.100\(2\)\(c\)](#), Mrs. Myers is required to be reimbursed for her reasonable attorney fees incurred in pursuit of this Fourth Claim for Relief.

#### **Fifth Claim for Relief**

##### **Attorney Fees - [ORS 20.082](#) or [20.083](#))**

**44.**

Plaintiff re-alleges paragraphs 1- 24 as if fully set forth herein.

**45.**

Despite written demand at least 20 days prior to the filing of this suit, defendant has failed to pay or make any offer to pay. Accordingly, Mrs. Myers is entitled to its reasonable attorney fees for First and Second Claims of Relief pursuant to the provisions of [ORS 20.082](#).

**46.**

In the alternative, if the remodel contract is found to be void, rescinded, terminated or canceled, then Mrs. Myers is entitled to her attorney fees under [ORS 20.083](#) in that the contract that was cancelled had the Attorney Fee Provision.

WHEREFORE, Plaintiff prays for judgments against the defendants, and each of them, as follows:

***1. For her First claim for Relief:***

- a. For Mrs. Myers' economic damages in an amount not to exceed \$1,701.00;
- b. In the alternative, if the contract is rescinded, then her damages are in an amount not to exceed \$4,317.00
- c. For her reasonable attorney fees incurred herein;
- d. For her costs and disbursements incurred herein; and
- e. For any other relief the Court deems appropriate, just and equitable.

***2. For her Second Claim for Relief:***

- a. For Mrs. Myers' economic damages in an amount not to exceed \$ 4,317.00;
- b. For her reasonable attorney fees incurred herein;
- c. For her costs and disbursements incurred herein; and

d. For any other relief the Court deems appropriate, just and equitable.

**3. For her Third Claim for Relief:**

- a. For Mrs. Myers' economic damages in an amount not to exceed \$10,374.00;
- b. For Mrs. Myers' non-economic damages in an amount not to exceed \$10,000.00
- c. For her costs and disbursements incurred herein; and
- d. For any other relief the Court deems appropriate, just and equitable.

**4. For her Fourth Claim for Relief:**

- a. For Mrs. Myers' economic damages in an amount not to exceed \$12,951.00, representing three times the actual economic damages resulting from GHR's financial **abuse** of Mrs. Myers;
- b. For Mrs. Myers' non-economic damages in an amount not to exceed \$30,000.00, representing three times the actual non-economic damages resulting from GHR's financial **abuse** of Mrs. Myers.
- c. For her reasonable attorney fees incurred herein;
- d. For her costs and disbursements incurred herein; and
- e. For any other relief the Court deems appropriate, just and equitable.

**5. For her Fifth Claim for Relief:**

- a. For her reasonable attorney fees incurred herein pursuant to [ORS 20.082](#) or [20.083](#);
- b. For her costs and disbursements incurred herein' and
- c. For any other relief the Court deems appropriate, just and equitable.

DATED: 6/26/12.

<<signature>>

Troy J. Wood. OSB 954583

Trial Attorney for Plaintiff