

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714

02/08/2023

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
C. Ladden
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

LOUIS W HOROWITZ

STEPHEN BEST
JASON J BOBLICK
LEONARD T FINK
SHANNON G HUFF
RINA K RAI
AMY WILKENS
DENNIS I WILENCHIK
JUDGE COOPER

RULINGS RE MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following dispositive motions fully-briefed and argued:

- Defendants' Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action filed September 30, 2022;
- Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects filed September 30, 2022; and
- Third-Party Defendants Desert Vista, Inc. and Renco, LLC dba Renco Roofing's Joint Motion for Summary Judgment filed September 30, 2022.

The Court has reviewed the briefs and considered counsels' oral argument.

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KHOV MOTION FOR SUMMARY JUDGMENT
REGARDING PLAINTIFF'S CAUSES OF ACTION

Defendants K. Hovnanian at Gallery, LLC ("KHov Gallery") and K. Hovnanian Arizona Operations, LLC ("KHov Arizona") move for judgment on the remaining claims against them, Counts 2, 3, and 4.

For the reasons stated, the Court finds that:

1. Plaintiff Gallery Community Association's ("Association"), a homeowners association, cannot assert the claim for breach of the implied warranty of workmanship and habitability. (Count 3)
2. The Association cannot establish that KHov Gallery breached a contract or the implied covenant of good faith and fair dealing because the Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery ("Declaration") does not impose a contractual obligation on KHov Gallery to perform or warrant construction. (Counts 2 and 4)

Summary judgment is granted, and Counts 2, 3, and 4 are dismissed.

Facts

The following facts are undisputed:

The Association is a homeowner's association ("HOA") and non-profit corporation formed under A.R.S. § 10-3010, et. seq. for The Gallery subdivision in Scottsdale.

The Article of Incorporation for the Association state that the Association was formed to maintain the "Common Area," collect assessments, and enforce the Declaration. It also imposes on the Association the duty to maintain the "Association Property" for the benefit of the unit owners. These terms are defined in the Declaration.

KHov Gallery developed The Gallery and sold the units. KHov Gallery is the "Declarant" of the Declaration.

KHov Gallery conveyed fee simple title to the Common Area to the Association by quit claim deed dated October 6, 2016.

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KHov Arizona was the general contractor responsible for constructing the residences.

The Association filed this action on behalf of itself, not the individual homeowners within The Gallery.

Count 3 - Breach of the Implied Warranty of Workmanship and Habitability

Count 3 alleges that KHov Gallery and KHov Arizona breached an implied warranty of workmanship and habitability.

The implied warranty of workmanship and habitability is a right of action available to individual purchasers of single-family homes. In Arizona, the Court of Appeals first recognized the implied warranty in *Columbia Western Corp. v. Vela*, 122 Ariz. 28 (App. 1979). The Supreme Court defined it further in *Richards v. Powercraft Homes*, 139 Ariz. 242 (1984).

The implied warranty arises from the construction of a home. *Lofts at Fillmore Condominium Assoc'n v. Reliance Commercial Construction*, 218 Ariz. 574, 577 (2008) (“*Columbia Western* and *Richards*...make clear that an implied warranty arises from construction of the home...”). It is implied into all contracts between builder-vendors and a home buyer. It is enforceable by the original owner per *Columbia Western* and by subsequent purchasers under *Richards*. A claim based on the implied warranty is a cause of action for damages caused by latent construction defect(s) that manifest after an owner buys a home and are not detectable with a reasonable pre-purchase inspection. The owner must prove that the builder-vendor caused the defect. *Columbia Western*, 122 Ariz. at 32; *Richards*, 139 Ariz. at 245. The implied warranty is enforceable against the builder even if the builder (who constructs the home) and the vendor (who sells the home) are separate entities. *Lofts*, 218 Ariz. 574, 577 (2008).

The cases hold that the right of implied warrant belongs to the homeowner and applies to homes. It serves “to protect innocent purchasers and hold builders accountable for their work.” *Richards*, 139 Ariz. at 245. *Richards* extended this protection to subsequent purchasers based on the same policy considerations underlying an original owner’s right to an implied warranty. *Id.* as a warranty of habitability, the warranty applies to structures built for living purposes. As stated in *Zambrano v. M & RC II, LLC*, 254 Ariz. 53, 59 (2022), “Under this implied warranty, the builder-vendor guarantees it built the home in a workmanlike manner *and that it is habitable*.” (emphasis added.) The public policy behind the implied warranty is “to protect buyers of newly built *homes* and successive owners against latent construction defects that were not reasonably discoverable when the *home* was initially sold.” *Id.* (internal citations omitted) (emphasis added).

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In this case, the Association holds no implied warranty. It does not own the residences. It owns the Common Area that KHov Gallery conveyed to it in the quit claim deed and as defined in the Declaration. The Common Area is exactly that -- areas such as the parking lot, pool, and cabana intended for “for the common use and enjoyment” of the homeowners, not the residences. The Declaration defines Common Area as “all areas (including the improvements thereon) owned, or to be owned, by the Association for the common use and enjoyment of the Owners and/or Residents of the Property, and any other areas that the association is required to maintain, either by this Declaration or the recorded subdivision plat, other than those areas located on the Lots.” Decl. § 1.12

The Association’s responsibility to maintain common aspects of the residences, such as exterior walls and roofs, cannot create an implied warranty. The Association did not purchase the homes; it assumed a duty to help maintain their exteriors. The homes – and the implied warranty – belongs to the homeowners.

Finally, the Association relies on *Lofts* for the proposition that the Association can assert an implied warranty claim. In fact, the Lofts Association brought an action against the builder *on behalf of the unit owners* and was statutorily authorized to do so. *Id.* at 577 (issue was whether “suit on this warranty can be brought by residential homebuyers like those in the Association,”); (A.R.S. § 33-1242(A)(4). Here, the Association filed this lawsuit on behalf of the Association only and has no authority to bring an action for the affected homeowners. *Lofts* is consistent with *Columbia Western* and *Richards* and does not support the Association’s position. Count 3 is dismissed.

Counts 2 and 4 -- Breach of Contract Claims

Counts 2 and 4 allege Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Contract, respectively, against KHov Gallery only.¹ The Association claims that, under the Declaration, KHov Gallery owed the Association a contractual duty to perform, construct, and warrant “work.” It claims KHov Gallery breached that duty and the implied covenant of good faith and fair dealing.

To prove that KHov Gallery breached a contract, the Association must prove the terms of the contract, that KHov Gallery breached a term of the contract, and that the Association incurred damages as a result of that breach. Revised Arizona Jury Instructions (Civil) 6th – Contract 2; *Holmes v. Graves*, 83 Ariz. 174, 177 (1957).

¹ Counts 2 and 4 are not alleged as to KHov Arizona. The Defendants who were named with KHov Gallery have been dismissed.

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To prove breach of the duty of good faith and fair dealing, the Association must prove the existence of a valid contract and that KHov Gallery deprived the Association from receiving the benefit of the contract. *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 14 (1998) (citing *Rawlings v. Apodaca*, 151 Ariz. 149, (1986); *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466 (App. 1998).

The Complaint does not identify the “terms” of the Declaration that KHov Gallery allegedly violated. Nor does the Association’s Response. In fact, there is no provision in the Declaration that states that KHov Gallery agreed to “build[ing] a project” that conformed to “applicable laws and building codes” or that KHov Gallery promised that the work would be or had been done correctly.” Complaint, ¶¶ 25-26, 39.

Alternatively, the Association contends that KHov Gallery’s contractual obligation to construct and warrant work is derived from the “duties and obligations” imposed on KHov Gallery in the Declaration. Response, 11:7. The Association relies on Arizona cases that hold that a declaration (also referred to as the Covenants, Conditions, and Restrictions or CC&Rs) is a contract between and among lot owners and cases from other jurisdictions that also find a contract between owners and the declarant. *See Powell v. Washburn*, 211 Ariz. 553, 557 (2006) citing *Ahwatukee Custom Estates Management Ass’n Inc. v. Turner*, 196 Ariz. 631 634 (App. 2000); *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal. App. 4th 819 (2000); *Solowicz v. Forward Geneva Nat’l, LLC*, 780 N.W.2d 111, 125 (Wis. 2010).

The cases cited by the Association rely on widely recognized principles of contract interpretation. Courts construe contract language to give effect to the intent of the parties. Courts look to the language to ascertain the scope and purpose of the document, meaning of the words as well as the surrounding circumstances. *Powell*, 211 Ariz. at 376 (citing *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153 (1993) (“When interpreting a contract ... it is fundamental that a court attempt to ‘ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.’”)

In this case, the language shows that KHov Gallery prepared the Declaration to promote the orderly preservation and use of The Gallery by establishing permitted uses and restrictions for the property and an Association to enforce the restrictions, collect assessments, and maintain the Common Area. (Recitals B, C, D). The Declaration imposed minimal requirements on KHov Gallery. Under the Declaration, KHov Gallery is required:

- to convey fee simple title to the Common Area to the Association, § 3.5
- to control the make-up of the Association, including the Board and Architectural Committee until control transferred to the Owners, and then to keep one seat on the Board post-transition §§ 5.3, 7.1, 4.3.1

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- as an Owner of a unit (if any), to pay for repairs in the Common Area caused by Owner or Owner's guest, § 8.2.4

(Declaration, Exh. A to Defendants' SOF). None of these duties are at issue. This case is about alleged defective original construction.

Further, the Declaration provisions related to construction appear as restrictive covenants under Section 8 regarding "Use Restrictions." For example, Section 8.1.1 restricts development to single family residences that are subject to Architectural Committee approval. Section 8.1.30 limits an owner's choice of contractor to KHov Gallery or its designee as long as KHov Gallery owns or has an option to purchase a lot.

These provisions state limitations on the use of the lots; they do not impose a contractual obligation on KHov Gallery. The restrictions refer specifically to the property: § 8.1.1.1 -- "All lots shall be used [for]...single family residential use;" 8.1.30 -- "Dwelling Units on the Property must be constructed by Declarant or its designees." By contrast, where KHov Gallery is required to act, the Declaration states that it "shall" act: § 3.5 -- "Declarant covenants that it shall convey fee simple title to the Common Area to the Association." 5.3 -- "Declarant shall maintain absolute control over the Association...until the Transition Date;" § 7.1 -- Declarant shall appoint all of the original member of the Architectural Committee; § 8.2.4 -- repairs caused by an Owner to the Common Area "shall be paid by such Owner." Had KHov Gallery intended to require it to perform and warrant construction for the Association, it would have stated that requirement -- as it did for the duties listed above.

Accordingly, in considering the language of the Declaration and the purpose behind it, no contractual duty to perform or warrant construction for the Association can be derived from this document. As a result, KHov Gallery cannot be held liable for breaching a contract or the implied covenant of good faith within a contract. There are no disputed issues of fact, as the Association relies solely on the Declaration in alleging a contractual duty. Summary judgment is granted on Counts 2 and 4.

Conclusion

The ruling granting Defendants' Motion on Plaintiff's Causes of Action disposes of the Complaint and, therefore, Defendants' Third-Party Complaint for indemnity. The Court need not reach Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects and Third-Party Defendants Desert Vista, Inc. and Renco, LLC's Joint Motion for Summary Judgment. Had the Court reached those motions, material issues of fact would have precluded summary judgment as to both motions.

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IT IS ORDERED:

1. Granting Defendant's Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action,
2. Denying as moot Defendant's Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects, and
3. Denying as moot Third-Party Defendants Desert Vista, Inc. and Renco, LLC's Joint Motion for Summary Judgment.

IT IS FURTHER ORDERED Defendants shall submit a proposed Judgment and Statement of Costs by **February 24, 2023**.

IT IS FURTHER ORDERED vacating the Final Trial Management Conference set on February 24, 2023 at 2:00 p.m. and the Jury Trial set to begin on March 13, 2023 at 9:00 a.m. in this division.