

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-019613

03/31/2009

HONORABLE A. CRAIG BLAKEY II

CLERK OF THE COURT
J. Rutledge
Deputy

MIRAGE CROSSING RESORT CASITAS
HOMEOWNERS ASSOCIATION INC

JOHN E CHAIX

v.

MIRAGE HOMES CONSTRUCTION INC, et al.

LOUIS W HOROWITZ

JACK G BARONE
DANIEL A BEATTY
JASON J BLISS
ADAM B CAMPBELL
WILLIAM H DOYLE
DOUGLAS H FITCH
MICHAEL J FRAZELLE
MICHAEL L GREEN
JAMES K KLOSS
LARRY D LANGLEY
MELISSA LIN
ANDREW R PESHEK
MITCHELL J RESNICK
RICHARD L RIGHI
JAN-GEORG ROESCH
DON D SKYPECK

RULING

The Court is in receipt of *Third-Party Defendants'* [Castle Drywall] *Motion for Reconsideration of the Court's February 13, 2008 Minute Entry* as well as *Third-Party Plaintiffs'* Response thereto. Having considered the foregoing memoranda, the Court finds as follows.

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The Third-Party Defendants move the Court to reconsider its February 13, 2008 Minute Entry finding that Third-Party Defendants have a duty to defend Third-Party Plaintiffs for the claims and damages alleged by Plaintiff pursuant to the subcontract agreements. Relying on MT Builders, LLC v. Fisher Roofing, Inc., Third-Party Defendants submit that an upfront duty to defend is not required because Third-Party Plaintiffs are only entitled to reimbursement from Third-Party Defendants for its defense costs if a jury determines that Third-Party Plaintiffs are entitled to indemnification. 219 Ariz. 297 (Ariz. App. Nov. 13, 2008).

In MT Builders, the parties agreed that the subcontractor's obligation to indemnify and hold the contractor harmless from and against all claims would be limited "to the extent caused in whole or in part" by the fault of the subcontractor. 219 Ariz. at 766. The appellate court found that the phrase "to the extent" "prevents any interpretation of the indemnity provision as creating a duty to defend." Id. As this language "envisioned a determination of [the subcontractor's] fault before [the subcontractor] would be required to indemnify and hold [the contractor] harmless against all claims," the appellate court could not reconcile "the language of th[e] indemnity provision with a duty to defend existing in advance of a determination of fault." Id.

Here, Third-Party Defendants' obligation to indemnify and hold Third-Party Plaintiffs' harmless from and against all claims is not conditioned "to the extent" that Third-Party Plaintiffs are determined to be at fault. Thus, a determination of the subcontractor's fault is not required before the duty to defend the contractor is triggered. Accordingly, as the Court finds that MT Builders is distinguishable from the case at bar,

IT IS ORDERED denying Third-Party Defendants' Motion for Reconsideration of the Court's February 13, 2008 Minute Entry.

IT IS FURTHER ORDERED denying the same as to all parties who joined in this motion.