

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-008714

07/29/2022

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
AMY WILKENS
M. RYAN WILLIAMS
JUDGE COOPER

RULING RE MOTION TO PRECLUDE

Pending before the Court is Third-Party Defendants' Desert Vista, Inc. ("DV") and Renco, LLC's ("Renco") fully-briefed Joint Objection and Motion to Preclude Defendant/Third-Party Plaintiffs' [K. Hovnanian at Gallery, LLC ("KHov")] Untimely and New Expert Reports and Opinions filed March 29, 2022. On June 10, 2022, the Court heard oral argument and ordered supplemental briefing filed July 1, 2022. The Court has considered the briefs and counsels' argument.

On February 22, 2022, KHov disclosed new expert opinions and reports. The disclosure came six months after KHov's expert disclosure deadline and one month after DV and Renco disclosed their expert opinions and reports.

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DV and Renco move to preclude KHov's February 2022 opinions as untimely and prejudicial. Their experts relied on KHov's original disclosures in their investigation and defense of KHov's claims. KHov's new opinions, particularly as to the damages attributable to DV and Renco, are substantially different from the original estimates. If allowed, the new opinions will require DV and Renco to incur significant cost preparing a response.

KHov argues that the February 2022 opinions are not new, they are timely rebuttal opinions, good cause exists to allow them, and DV and Renco are not prejudiced.

In this construction defect case, Plaintiff Gallery Community Association ("Gallery") is the owners' association for The Gallery, a residential complex in Scottsdale. On July 27, 2020, The Gallery sued KHov, the project's developer, for negligence, breach of warranty, and breach of contract. On October 6, 2020, KHov filed an Answer and Third-Party Complaint naming nine sub-contractors, including DV and Renco.

On May 27, 2021, the Court entered a stipulated Scheduling Order. It adopted the structure for the disclosure of expert opinions and reports common in construction defect litigation with Plaintiff Gallery's disclosures first, then Defendant/Third-Party Plaintiff KHov, followed by the Third-Party Defendants "to allow each party time to investigate those claims being made against it and respond." Response, p. 4.

The Scheduling Order provides in relevant part:

Defendants' liability expert witnesses and reports: July 23, 2021

Defendants' cost of repair expert witnesses and reports: August 23, 2021

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.

Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

None of the subsequent amendments to the Scheduling Order altered KHov's expert disclosure deadlines above.¹

¹ Gallery and KHov informally extended KHov's July 23, 2021 deadline to August 23, 2021. That extension is not relevant to the present disclosure dispute.

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In August 2021, KHov disclosed three expert reports (referred to collectively as “Original Reports”): Peterson Geotechnical Group’s Civil and Geotechnical Engineering Evaluation dated August 10, 2021; Bert L. Howe & Associates, Inc.’s Defense Response Report dated August 11, 2021; and Bert L. Howe & Associates, Inc.’s Preliminary Defense Cost of Defense Scope Estimate (“Original COR”).

On November 24, 2021, the Court entered an amended Scheduling Order, extending certain dates, including the deadline for all parties to disclose rebuttal expert opinions to February 28, 2022.

On January 31, 2022, DV and Renco timely disclosed their expert witnesses, reports, and opinions.

On February 25, 2022, KHov disclosed the new expert reports at issue (referred to as “New Reports”): a revised Bert L. Howe & Associates’ Defense Response Report dated February 25, 2022; revised Bert L. Howe & Associates’ Preliminary Defense Cost of Repair dated February 25, 2022 (“New COR”); and the Subcontractor Allocation Summary dated February 25, 2022.

Law

Having been sued for alleged faulty workmanship on The Gallery structures, KHov named nine subcontractors as Third-Party Defendants. The Third-Party Complaint alleges that the subcontractors, including DV and Renco, breached contracts, were negligent in their work, and fell below the standard of care for their trade. KHov must prove these allegations with expert testimony. Under A.R.S. § 12–2602(A), “[i]f a claim against a licensed professional is asserted in a civil action, the claimant or the claimant’s attorney shall certify in a written statement that is filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional’s standard of care or liability for the claim.”

KHov had a duty to timely disclose to the Third-Party Defendants the basis for its claims against them. KHov was on notice of the deadlines set forth in the Scheduling Order for the disclosure of their expert witnesses, opinions, and reports.

Rule 26.1(f) provides that a party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order...must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

Rule 37(c)(1) states that “[u]nless the court specifically finds that such failure caused not prejudice or orders otherwise for good cause, a party who fails to timely disclose information, a

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witness, or a document as required by Rule 26.1 may not use the information, witness or document as evidence at trial.”

Rebuttal Argument

KHov argues that the New Reports contain rebuttal opinions timely disclosed before the rebuttal deadline of February 28, 2022. They purportedly rebut a) Plaintiff’s Supplemental expert disclosures², and b) KHov’s “additional investigation” conducted after KHov’s Original Reports. The New Reports do not support that position.

The New Reports do not rebut Gallery’s Supplemental disclosure because Gallery did not add anything material as to DV or Renco in its Supplemental disclosure. As to the stucco work by DV, Gallery’s Supplemental does not state new findings, recommend additional repairs, or change Gallery’s original cost of repair. As to Renco, Gallery’s Supplemental adds a new category for roof leaks but does not include an additional cost estimate for this category or change the total cost originally projected for roof work.³

By contrast, KHov’s New Reports contain multiple new opinions regarding DV. For example, the Original COR estimated the cost of stucco-related building envelope repairs to be \$49,905. The New COR states \$496,198 for the same category of repair. For the Façade, the New COR increases the direct cost from \$43,975 to \$449,355. The New COR also attributes \$2,392,931 in construction defect damages to DV and includes new opinions regarding repairs not mentioned in the Original Expert Report such as “apply elastomeric stucco paint to entire stucco plane to match adjacent surfaces, install backer rod and sealant at all joints” (at a cost of \$173,088.00) and the installation of a new soffit drip screed, new stucco foam insulation and stucco lath, and new stucco cladding system (total \$102,508.40). None of these opinions are rebuttal to Plaintiff’s Supplemental expert reports.

KHov’s New Reports also change KHov’s claim against Renco. KHov’s Original Reports deny the existence of roof leaks and estimate Renco-related repairs of \$5,930. KHov’s New Reports add a new line item, “roof tune-ups,” at \$27,180 and impute \$378, 334 in total damages to Renco.

In addition, KHov’s Allocation Summary is an entirely new report, produced for the first time in February 2022. This Summary attributes specific percentages of fault to DV and Renco -

² Gallery’s Supplemental Disclosures produced October 15 and November 11, 2021.

³ The Court relies on the summary of Plaintiff’s expert disclosures, Exh. 1 to Supplemental Documentation filed July 1, 2022.

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73% to DV (\$2,392,931) and 11% to Renco (\$378,334). None of Gallery's expert disclosures or KHov's Original Reports allocate percentages of fault to the subcontractors.

KHov's second argument – that the New Reports “respond to...the additional investigation which had occurred” (Response, p. 4) – is also untenable. “Rebuttal evidence is to counter a new fact or allegation made *by an opponent's case.*” *Jansen v. Lichwa*, 13 Ariz. App. 168, 171 (App. 1970). It is evidence given “to explain, repel, counteract, or disprove facts given in evidence *by opposing party*, or that which tends to explain or contradict or disprove evidence offered by adverse party.” *U.S. v. Byers*, 649 F. 3d 197, 213 (4th Cir. 2011) (citing *Allen v. Prince George's County, Md.*, 737 F.2d 1299, 1304 (4th Cir. 1984) (“Evidence offered in ‘rebuttal ‘may be introduced only to counter new facts presented in the defendant's case in chief.’”) (Emphasis added) Reporting information obtained through further investigation is not rebuttal evidence.

The New Reports are not rebuttal to Plaintiff's disclosures. They are new opinions that significantly increase KHov's damages claims against DV and Renco.

Good Cause

KHov fails to show good cause for the delay in disclosing the New Reports and opinions. It offers no explanation as to why the “additional investigation” was not done before KHov's expert disclosure deadline. It fails to establish the connection between any new opinion or cost to information developed through “additional investigation.” It does not address the reason for disclosure (in February 2022) *after* DV and Renco's expert disclosure (in January 2022) when KHov had the information as early as December 2021.⁴

KHov argues that the prejudice of preclusion to KHov is good cause to allow the New Reports. Good cause is the justification for late disclosure; it is not the consequence. The Scheduling Order states expressly that “[t]his court ordinarily will not consider a lack of preparation as good cause.” KHov offers no other explanation for the delay.

Prejudice

KHov asserts DV and Renco are not prejudiced because the deadline for their rebuttal opinions has been and can be extended to allow DV and Renco time to investigate and to supplement their experts' opinions.

⁴ KHov's Response states that KHov's new opinions were discussed at a December 2021 pre-mediation meeting.

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The prejudice is cost, not opportunity. DV and Renco performed their investigation. Their experts relied on KHov's Original Reports to determine the scope of their investigation and in formulating their opinions based on that investigation. In fact, DV adopted KHov's original cost of repair estimate. As shown, the New Reports differ drastically from KHov's Original Reports as to DV and Renco's alleged exposure in this case. Responding to those new opinions will mean re-opening their investigation at significant unwarranted litigation expense.

Conclusion

KHov was obligated to disclose expert opinions and reports in August 2021 pursuant to the Scheduling Order. KHov failed to timely disclose the expert opinions and reports it now seeks to use. KHov's New Reports will unfairly prejudice DV and Renco. Therefore,

IT IS ORDERED granting the Motion to Exclude and precluding KHov's February 22, 2022 expert disclosures.