

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-019613

10/03/2008

HONORABLE A. CRAIG BLAKEY II

CLERK OF THE COURT
T. Melius
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

MINUTE ENTRY

In the Court's Minute Entry dated February 5, 2008, the Court granted Defendants' Motion for Summary Judgment Regarding Compliance with A.R.S. § 33-2002 as to All Claims and as to Claims Based on Rights of Individual Members, Third-Party Defendant Castle

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Drywall, Inc.'s Motion for Summary Judgment Regarding Standing, and Third-Party Defendant GAC, Inc.'s Motion for Summary Judgment re: HVAC Claims on the ground that Plaintiff failed to comply with A.R.S. § 33-2002. Therefore, the Court found it unnecessary to address Plaintiff's Motion for Partial Summary Judgment re: Liability, Defendants' and Third-Party Defendants' Motion for Summary Judgment on Claims for Damages for Allegations of Defect Not Supported by Evidence, and Defendants' Motion for Summary Judgment as to Plaintiff's claims for breach of contract and breach of fiduciary duty.

In its Minute Entry dated August 18, 2008, the Court found that Plaintiff is now in compliance with A.R.S. § 33-2002. Accordingly, the Court addresses the merits of the following motions.

I. DEFENDANTS' AND THIRD-PARTY DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT REGARDING STANDING

Defendants and Third-Party Defendants submit that Plaintiff lacks standing to assert claims for damages within the individual units or pertaining to limited common elements. Defendants and Third-Party Defendants maintain that claims for such damages belong to the individual homeowners because the Condominium Declaration ("the declaration") confers the obligation to maintain and repair those areas solely on the homeowners. Plaintiff responds by arguing that A.R.S. § 33-1242(A)(4) statutorily grants Plaintiff the authority to pursue all claims for damages, regardless of whether the alleged defect is within the individual unit or pertains to a limited common element. Plaintiff alternatively submits that it has standing to pursue all claims in the interest of judicial economy.

"Subject to the provisions of the declaration," a homeowners' association may litigate "on behalf of itself or two or more unit owners on matters affecting the condominium." A.R.S. § 33-1242(A) and (A)(4). According to the declaration at issue, the association has authority and control over all common elements including the obligation to maintain, repair, and make necessary improvements to the same. Declaration Art. 5.0. The declaration further provides that the individual homeowners have authority and control over all areas within their individual unit as well as all limited common elements allocated to their individual unit. Declaration Art. 5.1.

Because Plaintiff's authority is expressly limited by the declaration, the Court finds that A.R.S. § 33-1242(A)(4) does not grant Plaintiff standing to assert claims on behalf of its homeowners for all damages to the condominium complex. Indeed, without a specific agreement with the individual homeowners permitting Plaintiff to assert claims for damages

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beyond the common elements, granting standing to the association could usurp a homeowner's right to bring an individual action or, if allowed for some but not all the members, subject the Defendants and Third-Party Defendants to multiple claims.

Although not specifically argued, to the extent Plaintiff believes its compliance with A.R.S. § 33-2002 is sufficient to constitute acquiescence to Plaintiff's counsel's representation, the Court rejects this proposition. Notice to the association's members does not constitute a retention of Plaintiff's law firm by each of the individual homeowners.

As to Plaintiff's position that judicial economy is best served by conferring standing on Plaintiff to pursue claims for damages wherever located in the complex, the association relies on Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona, 148 Ariz. 1 (1985). There, the Arizona Supreme Court held that an association had standing to assert a claim for injunctive relief on behalf of its members. Id. at 6. However, on the issue of judicial economy, the Court found it significant that the association sought "an injunction rather than damages for separate property owners" because "the relief sought [was] universal to all of [the association's] members and require[d] no individual quantification by the court." Id.

In the case at bar, the remedy sought is legal and the damages are not necessarily uniform across all of the homeowners and some members may not have suffered any damages. Accordingly, judicial economy is not a persuasive reason for permitting Plaintiff to pursue claims for damages within the individual units or pertaining to limited common elements.

With respect to the alleged HVAC defects, Third-Party Defendant GAC, Inc ("GAC") contends that the HVAC units are limited common elements within the exclusive authority and control of the homeowners. In support, GAC submits the deposition testimony of Plaintiff's property manager, Mr. Hennick, that HVAC problems are generally the responsibility of the homeowners and not the Plaintiff.

Plaintiff contends that summary judgment is inappropriate because there is no evidence showing the location of any of the alleged defects. However, the declaration states that even if a "heating or air conditioning unit...lies partially within and partially outside the designated boundaries of a [u]nit," it will nonetheless be considered a limited common element if the heating or air conditioning system serves only one condominium unit. Declaration Art. 2.4(A)(3). Mr. Hennick testified that each of the HVAC units serves only one condominium. Therefore, the Court finds that Plaintiff has failed to rebut GAC's prima facie showing that the HVAC systems are limited common elements solely within the responsibility of the individual homeowner.

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Because it has standing to assert claims for damages occurring as a result of a defect in a common area, Plaintiff argues that it may nonetheless pursue the HVAC claims. However, Plaintiff offers no evidence to show that any HVAC problems were caused by faulty workmanship, etc., to a common area. Accordingly, as there is no genuine issue of material fact that Plaintiff lacks standing to pursue claims for damages pertaining to limited common elements,

IT IS ORDERED granting GAC's and the Defendants' motions for summary judgment regarding HVAC claims.

As to Plaintiff's standing to seek damages for all remaining alleged defects, the Court finds that a genuine issue of material fact exists as to whether the defects fall under the definition of a common element, a limited common element or are within the boundaries of the individual units. Accordingly, on these issues,

IT IS ORDERED denying Defendants', Castle Drywall's and Sunrise Stucco Inc.'s motions for summary judgment.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: LIABILITY

Plaintiff submits that Defendants are liable for breach of the implied warranty of workmanship and habitability because Plaintiff's and Defendants' experts are in agreement that certain alleged problem areas are defects. Regardless of any agreement, Plaintiff maintains that Defendants are at least liable for what Defendants' expert considers to be problem areas.

To establish liability in the builder-vendor for breach of the implied warranty of workmanship and habitability, the plaintiff must prove that the defect is the result of "improper construction, design or preparation." Woodward v. Chirco Construction Co., Inc., 141 Ariz. 514, 516 (1984). "The standard to be applied in determining whether or not there has been a breach of warranty is one of reasonableness in light of the surrounding circumstances. The age of a home, its maintenance, the use to which it has been put, are but a few factors entering into this factual determination at trial." Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 245 (1984).

Plaintiff asserts that Defendants are liable for the alleged defects because the parties' experts purportedly agree that certain problem areas are caused by defects. However, it is not enough for Plaintiff to present expert testimony that the conditions are defective in some manner. Plaintiff must also show that the alleged defect was caused by the "improper construction, design or preparation" of Defendants. Woodward, 141 Ariz. at 516. The Court finds that a genuine

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issue of material fact exists as to whether the alleged problem areas are attributable to the improper construction, design or preparation by the Defendants as opposed to improper homeowner maintenance, age or ordinary wear and tear. Having failed “to show that the [alleged] defect had its origin and cause in the builder-vendor,” Plaintiff is not entitled to summary judgment. Richards, 139 Ariz. at 245. Accordingly,

IT IS ORDERED denying Plaintiff’s Motion for Summary Judgment re: Liability.

III. DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT ON CLAIMS FOR DAMAGES FOR ALLEGATIONS OF DEFECT NOT SUPPORTED BY EVIDENCE

The issue raised by Defendants is whether Plaintiff’s use of extrapolation is sufficiently reliable so as to constitute admissible evidence supporting Plaintiff’s claim for damages. Plaintiff desires to use extrapolation as the primary proof of establishing internal defects (i.e., using a small sample of units to predict the likelihood of internal defects in all the other units).

Regardless of the Court’s rulings in Section I, *supra*, the Court finds that Plaintiff’s proffered extrapolation evidence is problematic. Two critical assumptions of extrapolation are that: 1) the inspected units are the same or substantially similar to the units not inspected; and 2) the alleged internal defects caused the same damage in all the units. It is apparent from the record that most, if not all, of the condominium units that comprise the test sample had reported problem areas to the association’s secretary prior to the testing and Plaintiff’s expert followed up on the same. If only units that experienced problems formed the basis for extrapolation, there is no reliability that the sample is representative of the units as a whole. Thus, not being truly random, the test sample is ripe with bias.

Additionally, it is not clear from the record which subcontractor is responsible for the work performed at each of the units. This information is critical to the assumption that the internal defects and resulting damages are substantially uniform throughout all of the units. If the units were built by different subcontractors, using different workers and supervisors, this assumption is undermined. On the other hand, if it can be shown that the same subcontractor consistently performed the same mistake in a number of units, extrapolation is strengthened in that the same mistake is more likely to be present in other units as well. The Court finds the record shows no sufficient correlation between the methodology of the construction work and the extrapolation so as to make the sample reliable.

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The sample being unreliable, the Court finds that the extrapolation evidence is inadmissible because it will not assist the jury in determining either the extent of the alleged defects or the alleged total cost of repairs. Accordingly,

IT IS ORDERED granting Defendants' Motion for Summary Judgment on Claims for Damages for Allegations of Defect Not Supported by Evidence.

IV. DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF JEFFREY HENNICK

Plaintiff opposes Defendants' motions for summary judgment as to Plaintiff's claims for breach of contract and fiduciary duty by submitting the affidavit of Mr. Hennick which purportedly establishes Defendants' improper reserve funding as well as Defendants' failure to pay their respective homeowners' association assessments ("assessments"). Defendants move to strike Mr. Hennick's affidavit on the grounds that it is contradictory, hearsay, lacks personal knowledge, lacks foundation and is untimely.

For an affidavit to defeat a motion for summary judgment, it must set forth specific facts showing that there is a genuine issue for trial. Florez v. Sargeant, 185 Ariz. 521, 526 (App. 1996). An affidavit which contradicts the affiant's own prior deposition testimony should be disregarded on a motion for summary judgment. MacLean v. State Dept. of Educ., 195 Ariz. 235, 241 (App. 1999). However, exceptions exist "if the affiant was confused at deposition and the affidavit explains those aspects of the deposition testimony or if the affiant lacked access to material facts and the affidavit sets forth the newly discovered evidence." Id.

The Court finds that the affidavit has been properly submitted. Mr. Hennick, as the Association's property manager, is the proper person to verify the records set forth in the affidavit and is competent to testify to the matters stated therein. ARIZ.R.CIV.P. Rule 56(e). Accordingly, Defendants' objections pertaining to hearsay, lack foundation, and lack of personal knowledge are rejected at this time; however, Defendants may re-argue these objections if Plaintiff introduces this evidence at trial.

Additionally, although Mr. Hennick did not have knowledge of Defendants' alleged unpaid assessments at the time of his deposition, the Court finds that Mr. Hennick later obtained this knowledge upon gaining access to Plaintiff's bank statements, balance and budget sheets, and reserve account balance sheets. Therefore, Mr. Hennick's affidavit should not be disregarded as contradictory.

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The Court further finds that Defendants are not harmed by Plaintiff's reference to damage calculations produced after the discovery deadline. Mr. Hennick's affidavit is based on bank statements and records that were timely submitted and disclosed. Additionally, Defendants' contention that the damage calculation is based on the wrong assumption can be developed at trial.

Accordingly,

IT IS ORDERED denying Defendants' Motion to Strike Affidavit of Jeffrey Hennick.

V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT

Defendants assert that Plaintiff's claim for breach of contract must fail because there is no evidence in the record showing that Defendants failed to pay their respective assessments. However, the Court finds that Mr. Hennick's affidavit, accompanied by Plaintiff's bank statements, balance and budget sheets, and reserve account balance sheets, creates a genuine issue of material fact as to whether or not Defendants paid their assessments. Defendants' arguments concerning the weight and credibility of this evidence may be properly addressed at trial.

Accordingly,

IT IS ORDERED denying Defendants' Motion for Summary Judgment Regarding Plaintiff's Cause of Action Number Four, Breach of Contract.

VI. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFF'S CLAIM FOR BREACH OF FIDUCIARY DUTY

Defendants assert that Plaintiff's breach of fiduciary duty claim was not brought within the two year statute of limitations imposed on tort actions. In response, Plaintiff submits that: 1) the applicable statute of limitations is six years because the claim arises out of contractual duties; 2) Plaintiff was not put on notice that Defendants breached their fiduciary duties until they were so informed by their expert witness; and 3) the statute of limitations has not begun to run because there has been no appreciable harm to Plaintiff.

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Generally, for a cause of action to accrue, the plaintiff must have knowledge of the facts underlying the cause, or would have been able to obtain the requisite knowledge in the exercise of reasonable diligence. Gust, Rosenfeld & Henderson v. Prudential Ins. Co., 182 Ariz. 586, 588 (1995). Once a plaintiff is aware, even in part, of an injury, she is imposed with a duty to investigate with due diligence. Doe v. Roe, 191 Ariz. 313, 324 (1998). However, “the limitations period does not commence until actionable negligence exists, that is, negligence that results in appreciable, non-speculative harm.” Commercial Union Ins. Co. v. Lewis and Roca, 183 Ariz. 250, 254 (App. 1995).

The Court finds the date of accrual for Plaintiff’s breach of fiduciary duty claim is the date of Douglas Vlaming’s August 5, 2002 reserve report. In this report, Mr. Vlaming advised the association’s board of directors of abnormally low reserve contributions and recommended that a large increase in funding was warranted. Although Mr. Vlaming did not specifically state who was at fault for the underfunding, the report gives more than sufficient knowledge of both the injury and the facts underlying the cause of action so as to impose a duty to Plaintiff to investigate who was at fault. Doe, 191 Ariz. at 324.

Plaintiff contends that the statute of limitations has yet to run because the monies set aside in reserve have not yet been needed for repairs or improvements to the common areas. Plaintiff relies on several legal malpractice cases to advocate tolling the statute of limitations on the ground that actual harm has not yet occurred. However, these cases stand for the proposition that a victim cannot know if the negligent conduct of her attorney will result in damages until resolution of the litigation in which the malpractice occurred. In this sense, “[h]arm is actual and appreciable when it becomes ‘irremedial’ or ‘irrevocable.’” Commercial Union Ins. Co., 183 Ariz. at 254.

The alleged harm to Plaintiff has been calculated by its expert to be a specific amount of monies that should have been deposited into the reserve fund. Thus, the damage has in fact occurred and is “irrevocable.” Id. The rationale that favors extending the statute of limitations in legal malpractice cases is not present here because Plaintiff’s alleged damages are not conditioned on anything other than a successful verdict in the present action. Although experts may speculate as to the proper amount of damages, this fact does not render Plaintiff’s alleged damages unascertainable. The reserves were either appropriate or not. Merely because there has been no need to delve into the reserve funds does not change the fact that an alleged duty was breached.

As to the alleged breach, at oral argument Plaintiff stated that its fiduciary duty claim was premised on professional negligence. The association filed the present action in December of 2005. Section 12-542 provides for a two year limitation on “actions for accountant malpractice, breach of fiduciary duty, and negligent misrepresentation.” CDT, Inc. v. Addison, Roberts &

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Ludwig, C.P.A., P.C., 198 Ariz. 173, 175 (App. 2000). *See also* Barmat v. John and Jane Doe Partners A-D, 155 Ariz. 519, 523 (1987) (“essential nature of actions to recover for breach of [professional] duties is not one ‘arising in contract’ but rather one arising out of tort-breach of legal duties imposed by law”). As more than two years elapsed between the filing of the present lawsuit and Plaintiff’s knowledge of the alleged conduct, the statute of limitations bars Plaintiff’s claim for breach of fiduciary duty.

Accordingly,

IT IS ORDERED granting Defendants’ Motion for Summary Judgment Regarding Plaintiff’s Cause of Action Number Three, Breach of Fiduciary Duty.