

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-093035

11/25/2024

HONORABLE ADAM D. DRIGGS

CLERK OF THE COURT
T. Aird
Deputy

DESERT COVE CONDOMINIUM
ASSOCIATION

MARK A HOLMGREN

v.

B C K COATINGS INC

CHRISTINA W KELLY

CHRISTOPHER L ENOS
ANDREW APODACA
JUDGE DRIGGS

UNDER ADVISEMENT RULING

On November 15, 2024, the Court heard argument on Plaintiff's Motion for Summary Judgment filed May 31, 2024, the Defendant's Response to Plaintiff's Motion for Summary Judgment filed June 28, 2024, and Plaintiff's Reply in Support of Motion for Summary Judgment filed July 18, 2024. At the conclusion of the hearing, the Court took the matter under advisement and now issues its ruling.

Plaintiff moves for summary judgment asserting that all discovery deadlines have passed, and that defendants have not disclosed a witness to testify at trial, nor have they disclosed any competent, admissible evidence that could support a jury finding in their favor.

A motion for summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990); Ariz. R. Civ. P. 56(c)(1).

The party moving for summary judgment must produce evidence that it believes

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demonstrates the absence of a genuine issue of material fact and must explain why summary judgment is warranted. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 (App. 2008). If the moving party meets its burden, the burden shifts to the nonmoving party to present sufficient evidence demonstrating the existence of a disputed fact. *Id.* at 119. The nonmoving party cannot then rest on its pleadings, but must call to the court's attention evidence to explain why the motion should be denied. *Id.* "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990).

"The court does not try issues of fact, but only whether the same are genuine and in good faith disputed. The mere general statement in a pleading, when attacked by such motion supported by proof of specific facts in the form of affidavit or deposition, places on the author of the statement the obligation to present something which will show that when the date of trial arrives, he will have some proof to support the allegation in the pleading." *Stevens v. Anderson*, 75 Ariz. 331, 334 (1953). "[A] party opposing a motion for summary judgment may not rest on the pleadings; it must respond with specific facts showing a genuine issue for trial." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287 (App. 2000), *citing Doe v. Roe*, 191 Ariz. 313, 323 (1998).

In this case, the Court finds that the Plaintiff has demonstrated the absence of a genuine issue of material fact by producing undisputed facts in the form of affidavits and expert reports. The Defendant in response relied almost entirely on a two-page affidavit from Robert Welch, who has been president of Defendant BCK for nearly 25 years. Defendant BCK had not previously disclosed Mr. Welch as a witness, although their disclosure statement advised that an agent or representative from BCK would testify as to their versions of the events surrounding the contract and the work performed under the contract. Perhaps more problematic, Defendant BCK had not previously disclosed the content of Mr. Welch's affidavit testimony during the discovery period.

THE COURT FINDS that Plaintiff has met its burden by offering competent, admissible evidence demonstrating the existence of a contract, implied warranty, and legal duties that the defendant breached by performing defective work.

THE COURT FURTHER FINDS that the Plaintiff has presented evidence of the appropriate repair, the cost of that repair, and the damages already incurred by the Plaintiff in performing other repairs and patching before and during the lawsuit.

THE COURT FURTHER FINDS that Defendant has failed to offer any competent, admissible evidence to dispute any material fact, because Mr. Welch was not disclosed as a

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witness and a summary of his testimony was not disclosed within the disclosure period. Additionally, Defendant's statement of facts and controverting statement of facts include statements that cite to Mr. Welch's affidavit but are not supported by the affidavit. The Court also notes that Defendant did not request to extend disclosure deadlines or demonstrate any good cause for which the Court would consider extending the disclosure period.

IT IS THEREFORE ORDERED granting Plaintiff's Motion for Summary Judgment filed May 31, 2024, and entering summary judgment in Plaintiff's favor on all counts in the amount of \$1,042,429.24, plus attorneys' fees and costs.

IT IS FURTHER ORDERED that **not later than 20 calendar days after the entry of this order**, Plaintiff may submit an application for an award of attorney's fees and statement of costs. If an application or statement is submitted that Defendant wishes to oppose, a response must be filed **not later than 20 calendar days after service**. Plaintiff is not permitted to file a reply unless requested to do so by the court.

IT IS FURTHER ORDERED that **not later than 20 calendar days after the entry of this order**, Plaintiff must also submit a proposed form of judgment, leaving blank spaces for attorney's fees and taxable costs. That form of judgment may incorporate by reference what is said here but otherwise should be confined to the amounts being awarded along with Rule 54(c) language.