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*** Electronically Filed ***
08/07/2008 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-019549 08/04/2008

HONORABLE PETER SWANN

CLERK OF THE COURT
D. Monroe
Deputy

ROBERT W JOHNSON, et al.

ANDREW F LLOYD

v.

DONROS DEVELOPMENT L L C, et al.

LOUIS W HOROWITZ

CHRIS R BANISZEWSKI
KEVIN E BARRY
KACI YOUNG BOWMAN
BARTLET A BREBNER
DAVID AARON BROWN
PETER C BROWN
JOHN A BURIC
J GREGORY CAHILL
BRIAN E CIENIAWSKI
EARL POWERS CONSTRUCTION
NO ADDRESS ON RECORD
DIAMOND T CONSTRUCTION INC
NO ADDRESS ON RECORD
C COLE CRABTREE
ADAM B DELONG
JOSEPH E DYLO
LINDSAY A EDMONDSON
ACCURATE ENTERPRISES
NO ADDRESS ON RECORD
TREVOR H GARDNER
D J GRADING & LANDSCAPING INC
NO ADDRESS ON RECORD
BRIAN L HENRY
MARK A HOLMGREN
SCOTT W HULBERT
AMERICAN WESTERN INC

NO ADDRESS ON RECORD
GLAZING INDUSTRIES INC
NO ADDRESS ON RECORD
KYLE A ISRAEL
BRADLEY J JOHNSTON
JASON M KELLY
JOSEPH A KULA
PAUL S KULAR
J GARY LINDER
MICHAEL A LUDWIG
DAMIEN R MEYER
CECILY GREY MONSMAN
MICHAEL DAY MORGAN
SALLY A ODEGARD
CHARLES D ONOFRY
ANDREW R PESHEK
DAVID R REEDER
GREGORY A ROSENTHAL
JONATHAN D SCHNEIDER
GREGORY M SCHULMAN
RICHARD A SEGAL
JOHN SERAFINE
LISA A SHANNON
THOMAS SHEDDEN
JAMES M SHINN
THOMAS J SHORALL
SANDRA A SHOUPE-GORGA
JARED C SIMMONS
DON D SKYPECK
BRYAN R SNYDER
WILLIAM G STINSON
CHRISTY M THOMPSON
STEPHANIE F VAN SPLUNDER
T & W PLUMBING
NO ADDRESS ON RECORD
WILLIAM WESLEY WEBB
STEPHEN C YOST
ELIZABETH J ZANON
ROBERT B ZELMS

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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UNDER ADVISEMENT RULING

The Court has under advisement the motions for summary judgment argued on June 5, 2008. For the following reasons,

IT IS ORDERED granting and denying the pending motions as stated herein and subject to the following principles that will govern the presentation at trial and the decision of any Rule 50 Motions.

I. *Motions based upon absence of proof of work performed*

IT IS FURTHER ORDERED granting Avanti's Motion for Summary Judgment re: Glazing Industries, Samon's Motion for Summary Judgment Re: Window Installation on Lots 23, 120, 132, and 133, and Avanti's Motion for Partial Summary Judgment Concerning Alleged "Product Claims."

II. *Extrapolation and Related Concepts*

IT IS FURTHER ORDERED denying Defendant's Motion for Summary Judgment Re: Claims by Subsequent Purchasers, C&H's Motions for Summary Judgment Re: Defects Not Supported by Homeowner Testimony and Extrapolation, Avanti's Motions for Summary Judgment re: Future Damages, Repairs Not Identified with Specificity, and Water Intrusion.

These motions attack the viability of Plaintiffs' claims on the ground either that (1) the sampling performed in the form of destructive testing is insufficient to establish that each house at issue is affected by a particular defect, (2) the cost-of-repair estimates are generic and not specific to the defects observed at each house, and (3) certain observed defects have not manifested actual damage to date. A review of the record demonstrates disputes of material fact with respect to each home on these points. But those fact issues do not guarantee unfettered recovery of each element of damages reported by Plaintiffs' experts.

The guiding principle of this case is simple: each homeowner has the burden of proving the specific defects that exist in his or her home, the damages likely caused by those defects, and the cost to repair them.

To prove the existence of a defect, destructive testing may be useful but is not required. Defects visually observed by an expert, a homeowner, or both may form the basis for recovery. But defects that have not been observed, and that have not caused actual damage by this late date (approximately ten years after completion) will not be submitted to the jury based solely upon a statistical extrapolation from destructive testing or observation in other houses.

The Court finds that the public policy of this state, as reflected both in case law and in the statute of repose, does not contemplate that suits may be brought for defects that have not yet manifested themselves and are not reasonably likely to do so within a reasonable and predictable period. *Sheibels v. Estes Homes*, 161 Ariz. 403 (Ct. App 1989). Any other ruling would subject nearly every construction project to litigation immediately upon its completion to litigation over speculative claims that defects perceived by experts might someday cause harm – a practice that would vitiate the certainty prescribed by the statute. *Cf. Wagner Construction Co., Inc. v. Noonan*, 403 N.E.2d 1144 (Ind.App.1980).

The Court does not intend by the foregoing language to suggest that claims based upon latent defects will *per se* be disallowed. In *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App.4th 908, 918 (App. 2001), the court held that the cost of repairing latent construction defects could be recovered under a breach of warranty theory without proof that defects have resulted in property damage:

> [i]t is not necessary for each individual homeowner to prove his foundation has already cracked or split or that he has suffered property damage as a result of the cracking or splitting. We see no reason why a homeowner should have to wait for the ***inevitable*** injuries to occur before recovering damages to repair the defect and prevent the injuries from occurring.

Id. at 923 (emphasis added); *see also, Braun v. Agri-Systems*, 2006 WL 1328258 (E.D. Cal. 2006) (noting that plaintiff may present evidence of damages arising from latent construction defects under a breach of warranty theory). Whether a latent defect will "inevitably" manifest itself or whether its importance is merely speculative is a question not susceptible to summary judgment on this record.

With regard to the cost of repair, nothing in Arizona law prevents an expert from relying on others' estimates to form an opinion. But the repairs required are those to correct proven defects – not wholesale system replacements where the evidence does not warrant them.

Generally, the measure of damages in a construction defect case is the reasonable cost of construction and completion in accordance with the contract, i.e. the cost of repair. *See Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 253-54, 603 P.2d 513, 524-25

(App. 1979). However, where an award based on this measure of damages would result in "economic waste," the proper measure of damages would be the difference in value between the building as designed and the building as constructed. *See id., Maricopa County v. Walsh & Oberg Architects, Inc.*, 16 Ariz. App. 439, 441-42, 494 P.2d 44, 46-47 (App. 1972). Economic waste is present when the cost of repair would result in unreasonable duplication of effort or the defects in a completed structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. *See Maricopa County*, 16 Ariz. App. at 441-42. No evidence exists concerning diminution of value, and any claims that are shown at trial to be compensable only in a manner that would create economic waste as a matter of law (or that are unsupported by competent evidence of any other theory) will not be permitted to reach the jury.

The Court has already denied Defendants' Motion for Summary Judgment against the Thursam Plaintiffs and all class members who sold their homes after the class was certified. In accordance with the general rule regarding measure of damages, Plaintiffs who have sold their homes before trial may recover the cost of repair, unless such an award would result in economic waste. For the reasons stated in the Court's earlier ruling concerning Plaintiffs who sold their homes, the Court concludes that the Barton claim is not barred by virtue of the fact that she lost her home to foreclosure.

III. *Motions relating to indemnity*

IT IS FURTHER ORDERED denying the Motion for Summary Judgment regarding indemnities submitted by Metric Roofing, Burrows, and Samons Brothers. As a matter of law, the Court reads the contracts between these moving parties and Roston as creating an indemnity obligation running in favor of the "owner" of the project. The Court therefore concludes that the privity arguments are without merit.

Plaintiffs' action has been brought against the developer because of the unique aspects of construction defect litigation that require privity but not fault in the traditional negligence sense. As a consequence of the procedural posture of the action, the Court cannot hold as a matter of logic or law that the developer has engaged in conduct amounting to "active fault" if a jury finds it liable to Plaintiffs. The existing factual record is subject to competing interpretations, and a jury may find that the moving subcontractors were the only parties who engaged in "active fault," in which case indemnity even under a general indemnity agreement would not be defeated. See generally *Estes Co. v. Aztec Constr., Inc.*, 139 Ariz. 166 (Ct. App.1983).

IT IS FURTHER ORDERED granting in part and denying in part Desert Vista's Motion re: indemnity. The Motion is granted to the extent that it seeks a declaration that the indemnity agreement is general as opposed to specific. It is denied in all other respects.