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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-036352 07/26/2013

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
J. Polanco
Deputy

KIMBERLY P ARCHIBALD CHASE E HALSEY

v.

TOLL BROTHERS AZ LIMITED PARTNERSHIP, et al. JAMES S RIGBERG

UNDER ADVISEMENT RULING

The Court took this matter under advisement following a bench trial and the submission of findings of fact and conclusions of law based on the Third Amended Complaint filed on March 21, 2013. The Court has considered the testimony of the witnesses, the exhibits received in evidence, the proposed findings and conclusions and the arguments of counsel. The Court asked two questions of counsel which have been answered. The findings of the Court and the conclusions of law are set forth below.

General.

The matter arises out of the purchase of a new home by Kimberly Archibald ("Archibald") from Toll Brothers AZ Limited Partnership. The home ("Home"), which was constructed by Toll Brothers AZ Construction Company (the limited partnership and the construction company hereinafter being collectively referred as "Toll"), is located in north Phoenix in the area known as Desert Ridge. The allegations are that after taking possession of the Home following the completion of construction, several rain events took place. Other events deposited water on the property. On these several occasions the water entered the home and caused damage. Archibald offers a number of facts in an attempt to support the various causes of

action. Many of the facts are addressed to the allegations of the failure of Toll to properly prepare the lot and build the Home so that when a rain or other water event occurs, the water will not pond on the Lot and flood the Home and her Lot will properly drain.

The Third Amended Complaint alleges six (6) causes of action: Count 1, Breach of Contract; Breach of the Covenant of Good Faith and Fair Dealing; Count 2, Fraudulent Inducement: Fraudulent Concealment and Rescission; Count 3, Negligent Misrepresentation (Rescission); Count 4, Breach of Warranty and Contract; Count 5, Breach of Implied Warranty of Habitability and Fitness of Purpose; and Count 6, Mutual Mistake, Rescission and Restitution.

The Plaintiff, at the close of her case, elected the remedies at law and waived any claim for rescission. The Defendants did not make a Rule 50 motion for judgment as a matter of law at the close of Plaintiff's case or any time thereafter.

THE COURT FINDS there was sufficient evidence to overcome a Rule 50 motion on the various remaining legal claims except as may be indicated below.

FINDINGS OF FACT

The proposed findings of fact and conclusions of law are extensive. Even though the proposed findings and conclusions may be supported by testimony or other evidence, the Court has not adopted many of the proposed findings because, in the judgment of the Court, they are not necessary towards the determination and disposition of the claims and defenses. See, *River Farms, Inc. v Fountain,* 1 Ariz. App. 504, 520 P.2d 1181 (Ariz.App.1974).

Ultimately, the findings of fact and conclusions of law are made in trials to the bench to allow an appellate court to fully understand the trial court's reasoning for the ultimate decision, admittedly a luxury the appellate court does not have when the matter is tried to a jury, except where special interrogatories have been requested and given. The verdict should reflect those matters which were proved by the evidence or not proved and all legal issues pertinent to the claims should be addressed. The Court has endeavored to do so. All statements of fact set forth below, whether delineated as "the Court finds", the evidence shows" or words of similar import constitute the Court's findings of fact in this case.

Material Factual Stipulations by the Parties.

1. The Defendant Toll developed a residential subdivision in Phoenix AZ known as "Village 11 at Aviano."

2. On August 8, 2005, Plaintiff Archibald and Toll entered into a written agreement titled Aviano at Desert Ridge – Mesquite Purchase Contract and Receipt (the "Contract") for the purchase and sale of Lot 774 (the "Lot") as identified in the plat of the applicable subdivision, and for the construction thereon of a new home. The model was the "Mirador" and the Plans called for a basement.
3. The street address for the home is 22219 North 36th Street, Phoenix AZ 85050.
4. The total purchase price was $1,599,305.00 inclusive of upgrades and Lot Premium.
5. Toll delivered physical possession of the home to Archibald on October 23, 2006.
6. Archibald made numerous improvements to the property after taking possession, including landscaping, and the construction of a swimming pool, spa, patio, and barbeque area.
7. On December 4 and 8, 2007 significant rain events occurred and water intruded into the family room, garage, and basement.

Material Facts Found by the Court.

Contract Requirements, Plans and Specifications.

1. The Contract between Archibald and Toll required Toll to construct the Mirador model home on Lot 774 "in substantial conformance with Seller's standard Plans for the model selected by Buyer (the "Plans") and the Specifications attached [t]hereto as Exhibit "D" (the Specifications")" subject to certain exceptions.

2. Exhibit "D" is not attached to the Contract and nothing has been introduced by either Plaintiff or Defendant purporting to be Exhibit "D" to the Contract. However, a number of exhibits have been received in evidence containing plans and specifications that appear to be applicable to the construction of the home.

3. The Contract provides that future construction on or grading or excavation of the Property by Buyer must comply with applicable drainage plans, and if not correctly engineered, could disrupt drainage and cause ponding or flooding.

4. Before the Home was built, Lot 774 was designed, in part, according to a Grading and Drainage Plan approved by the City of Phoenix. Exhibit 5.

5. As shown on the Grading and Drainage Plan the natural grade of the subdivision slopes downward from north to south. Id.

6. Lot 774 has a northwestern/southeastern orientation such that the front yard faces northwest and the rear yard faces southeast. Id.

7. The rear yard abuts a natural wash and rain run-off may not be directed into it. Id.

8. Water would generally run across the Lot from north to the south but for grading of the home and other improvements.

9. At the time Archibald contracted with Toll for the construction of the Home, Lot 774 had been "rough" or "mass" graded according to the Grading and Drainage Plan. The pad had been graded by Toll to the elevation 1584.7 as called for in the Grading and Drainage Plan. This elevation was certified in 2005 by a licensed surveyor. The Grading and Drainage Plan indicated that the pad is equal to finish floor minus 8 inches.

10. The finish or fine grading was handled by Knochel Bros. Finish or fine grading takes place after the home is constructed. Finish or fine grading includes the installation of grades and swales necessary to prove drainage.

11. All earthworks including finish grading was required to conform to the plans and specifications.

12. No representative of Knochel Bros. was called to testify regarding any aspect of the fine or finish grading.

13. Prior to the development of the Villages 11, Toll commissioned a Soil Investigation and Report that was prepared by Construction Inspection and Testing Co. The report is dated February 7, 2003 (the "Soils Report"). Exhibit 35.

14. The soil investigation for the Village @ Desert Ridge is not a part of the Plans or Specifications or the Contract. Nevertheless it presents general information concerning the engineering characteristics of the soil and provides recommendations for the design of foundations and site preparation for lots within the Villages 11 subdivision.

15. Section 3.5 of the Soils Report addresses drainage and recommends against the structural foundation and floor slabs being exposed to moisture infiltration or moisture content fluctuations. Drainage of water away from the structure is to be provided during construction as well as through the life of the structure. It provides that in no event should long-term ponding be allowed near structures. The grade away from the foundation walls shall fall a minimum of 6 inches of fall within 10 feet; but where lot lines, walls slopes or other physical barriers prohibit such a fall drains or swales shall be provided to ensure drainage away from the structure. Id.

16. The Architectural Plans include the "General Notes" for the construction of the Mirador model. Exhibit 41. These notes are also not attached to or part of the Contract, however, appear to be general guidelines for the construction of the Mirador model which is the model purchased by Archibald.

17. The General Notes provide that "Finish grade shall slope 5% for a distance of 10 feet to an approved water disposal area." Exhibit 41.

18. The testimony confirms that 5% slope means the grade diminishes in height 6 inches for every 10 feet in length and that the requirement of a 5% slope is consistent with the soils report recommendation and is based on an industry standard.

19. The General Notes provide that the "Finish floor shall be a minimum of 8" above finish "grade", not finish "pad." Exhibit 41.

20. The General Notes conflict with the grading and drainage plan in that the latter calls for a finish floor at a distance above the finish pad while the former appears to require the finish floor to be a minimum of eight inches above final grade. Finish pad is not the same as finish grade, which by definition is higher than the finish pad.

21. The Grading and Drainage Plans provide the design for removing water for the lots within the subdivision. The plans show various cross-sections of streets and rights of way. Some areas contemplate that the street will be at an elevation higher than a front yard or portion thereof.

22. The general plan for grading any particular lot indicates that water should be taken of the front of the lot. The point of departure is called the "lot outfall."

23. The plans indicate in a non-UBE lot grading situation that water would outfall in an area of the front yard moving from the rear yard along each side yard. In those lots where the high top of curb is above the front yard then clearly an outfall at that position is not possible because water does not flow uphill. Accordingly, the plans must be read as a general guide for which certain adjustments must be made to accommodate the lay of the land. Indeed, the plans contemplate that for Lot 774 the high top of curb is designed to be at a higher elevation than the finish pad. Exhibit 5.

Compliance with Plans and Specifications.

24. The City of Phoenix has determined and the Court finds that Lot 774 complies with the City of Phoenix Storm Water Policies and Standards Manual Section 6.3.2 regarding construction of the finish floor elevations. Exhibit 39.

25. The Grading and Drainage Plan contemplates by its elevations that the high top of curb at the north side yard (1586.38) would be higher than the finish pad elevation (1584.70) and the finish floor elevation (1585.37). The low top of curb (1584.17) was designed below the design of the finish pad and finish floor. The Lot was to drain at the low top of curb. Exhibit 5.

26. Lot 774's pad was graded at the elevation set forth in the Grading and Drainage Plan.

27. The as-built finish floor elevation for Lot 774 is higher than the dimension on the Grading and Drainage Plan which indicated that the pad is finish floor minus 8 inches. The finish floor is higher than 8 inches above the finish pad elevation. It is at an elevation of 1586.11, approximately 1 foot and 5 inches above the finish pad (1586.11 less 1584.70 = 1.41 feet = 1 foot 4.9 inches). The measured finish floor is .74 feet or just under 9 inches above the finish floor on the grading and drainage plan. However, nothing in the Grading and Drainage Plan indicates that the finish floor cannot be higher and it appears the City of Phoenix Code as well as the architectural notes would require it to be higher.

28. After Archibald closed on and occupied the Home and advised Toll of the drainage issue, Toll ordered that an as-built survey be conducted to check the height of the as-built finish floor and the finish grade, not the finish pad. Exhibit 40. Toll was advised that the finish elevations were "all good." Accordingly, the information could not have been relied on by Archibald in purchasing the Home.

29. The Court finds any raising of the finish floor does not substantially change the grading and drainage elements which are addressed to the movement of water away from the Home to specified locations. Archibald's counsel argues that any change of greater than 1.2 inches requires plan amendment but never offered any evidence that the increase in the finish floor, given the requirements of the architectural notes, requires an amendment where the raising of the finish floor does not appear to alter the grading and drainage design as it pertains to the movement of water. Simply put, neither the raising of the finish floor nor the failure to discover or disclose it, even in light of all the other surrounding circumstances, is clear and convincing evidence of any element of fraud where there is absolutely no testimony that anyone at Toll knew prior to closing that the finish floor was higher than shown on the Grading and Drainage Plan and why.

30. The Architectural Notes indicate that the finish floor must be a minimum of 8 inches above the finish grade. The finish grade is not the same as the finish pad and in most instances will be at a higher elevation than the finish pad. When the Architectural Notes are read together with the Grading and Drainage Plan the apparent inconsistency explains why the as-built finish floor would be higher than shown on the Grading and Drainage Plan.

31. No evidence indicates that the finish floor, being constructed higher than what is suggested by the Grading and Drainage Plan, has resulted in or caused any damage to the home or to Archibald. The argument that the Home is not built in an "engineering sump condition" is not supported by the evidence and even if it was the failure to do so does not lead to the conclusion that Toll is culpable because Plaintiff has failed to show how that condition, whether it exists or not, caused any damage.

32. Evidence of the design finish grade is not supplied in the form of any pre-construction plan or report by a licensed surveyor; rather, the as-built finish grade is evidenced by a survey conducted as a result of the litigation and is found in Exhibit 78.

33. While Plaintiff argues that Exhibit 40 is evidence of an as-built survey, it does not indicate the final grade for Lot 774, but does indicate that DEI Professional services was engaged to perform an as-built survey or report on the final grade on the Lot and the finish floor of the Home.

34. The evidence shows and the Court finds that at the south side of Lot 774, the finish grade at the footprint of the home is higher than the finish pad elevation by approximately 7+ inches.

35. The evidence shows and the Court finds that the finish grade along the north footprint of the home averages about 9+ inches above the finish pad elevation.

36. The evidence shows and the Court finds that the finish grade has a positive slope away from the home on the south side of Lot 774 and that a swale is constructed to catch run-off.

37. The evidence shows and the Court finds that the patio on the north side of the Lot has a negative slope toward the Home. The northwest corner of the patio has an elevation of 1585.90 while the southwest corner of the patio has an elevation of 1585.80. The approximate center of the patio has an elevation of 1585.81 while the approximate center of the southern edge of the patio has an elevation of 1585.69. The north side yard grassy area also appears to negatively slope toward the home. The center of the grassy area

having an elevation of 1585.64 while the elevation at the foundation near the window wells is 1585.31, 1585.52 and 1585.35. This change in elevation is approximately 3 inches over a distance of approximately 20 feet. Exhibit 78. The Court has considered all the evidence regarding the effect of the patio, landscape and hardscape improvements and finds that Plaintiff's evidence is not convincing. Exhibit 144 is a grading and drainage review prepared by Plaintiff's expert that ignores the very clear evidence that the landscaping and the patio in the north side yard run contrary to the Grading and Drainage Plan. It concludes that the landscaper/hardscaper did the best it could to install the improvements given what it was left to work with. The Court finds this conclusion to be not credible because there is no direct evidence of the slope and swale that existed on the north side when the sale of the Home closed.

38. The evidence, which is part direct and part circumstantial, indicates that the finish grade substantially complied with design requirements for moving water from the Home into a swale that would allow outfall at the low top of curb at the southwest portion of Lot 774. The east rear yard and south side yard each contain a drainage swale which was required by the grading and drainage plan and the Soils Report. The north side yard deviates from the foregoing plans and specifications in that it does not have a positive slope away from the home and it does not have the swale feature. Id.

39. The circumstantial evidence strongly suggests that the construction of the landscaping and the improvements in the north side yard disturbed what was a slope away from the structure and a swale that has been covered by the patio, grassy area and the pool. This is supported by the existence of the swale in the back and south side yards and evidence that an adjacent lot was final graded in this fashion. Id.

40. The south side yard measurements indicate that the slope substantially complies with the 5% slope requirement and/or the recommendation contained in the Soils Report that a water collection area be established if the 5% slope is inhibited by a wall or other element. Id.

41. The south side yard swale is compromised, however, by what can only be considered a construction defect in that the rear side yard swale is separated from the front yard swale by a cinder block privacy wall. The finish grade elevation in the front yard at the south side is higher than the side yard which prevents the side yard from effectively draining. It appears that this condition was recognized at some point in time by Toll because a pass through cider block appears to have been installed to alleviate the problem, however it has failed. The record is muddled as to when Toll knew of this problem and when the repair was attempted.

42. Except as noted below, the record fails to indicate that other than ponding and erosion of soil and landscape material along the south side yard privacy wall, no other damage is caused by the defective swale condition noted in the preceding finding between the south front yard and the south side yard.

43. The Grading and Drainage Plans call for a swale slope of 0.5%. The as-built swale slope is .39% and is adequate to move water off the lot assuming the water course has a proper outfall and the flow is not obstructed. The side yard privacy wall and the grade on the front yard side of the privacy obstruct the flow of water off the lot.

44. The record does not show that Toll knew prior to closing that the drainage swale was inadequate to move water off the property. The Court does not find that the swale was inadequate at closing.

45. Although the plans presented and the policies of Toll indicate that any landscaping improvements or hardscape should conform to the drainage plan, the north side yard improvements fail to conform to the drainage plan.

46. The patio and other north side yard improvements were not installed by Toll or its agents. The patio and, to a lesser degree, landscaping, have a negative slope toward the Home. Exhibit 78.

47. Whether the water on the north side was to run east to west or west to east, the patio inhibits flow in either direction. Id.

48. The landscaping has failed to provide any swale for the collection or movement of water in any direction other than toward the Home.

49. There is no evidence that Toll knew or should have known prior to closing that the landscaping, patio and pool had been or would be installed contrary to the Grading and Drainage Plan.

50. Most importantly, the landscaping and the patio improvements run afoul of the Grading and Drainage Plan because they move water toward the Home and then cause it to flow into an area where any substantial rain, such as a monsoon, is likely to pond, and with enough water, overflow the window wells into the basement. The drainage grates and lines, apparently installed by the landscaper, did not perform in the heavy rains and other water event. Toll did not cause this condition or the damage to the basement as a result of the various rain or water events.

51. The front yard and driveway slopes toward the home. It appears it is impossible to comply with any 5% slope away from the home in this area. The Soils Report recommendation is "[w]here lot lines, walls, slopes or other physical barriers prohibit 6 inches of fall within 10 feet, drains or swales shall be provided to ensure drainage away from the structure IRC Section R401.3)." The Court understands the quoted language from the Soils Report to be a quote from the IRC, also known as the International Residential Code, and is applicable to all residential one and two family dwellings.

52. The evidence does not show that Toll provided any adequate drains or swale to move water away from the foundation in the front yard prior to turning the property over to Archibald. However, the Plaintiff has failed to meet her burden to show that Toll knew or should have known before contracting with Archibald or before closing the sale of the Home to her that water would invade the Home in the area of the planters and the garage.

53. Water did in fact invade the Home in the Courtyard area. Toll acknowledges that water invaded the Home in the front yard areas at the planters where the Courtyard converges with the garage and the exterior laundry wall and the opposite side of the Courtyard and where the south garage meets bedroom #4. See Exhibit 3. While there is no evidence to indicate specific plans or specifications were not followed as to the connecting of the slab and the wall, clearly a defect exists that caused, in part, the water damage to the Home.

<u>Other Construction issues.</u>

54. Toll explains the front yard invasion by alleging a defect in the construction between the basement stem wall and the garage post-tension slab. No evidence is offered by Toll to dispute that water runs toward the home at the Courtyard and this water fills the space that was improperly constructed between the stem wall and the slab. Exhibit 21.

55. The record shows that Toll also improperly installed plumbing through walls which was not properly sealed and allowed water to seep into the basement. Exhibit 21. Toll performed repairs under the home warranty and paid for the resulting damage. Id.

56. Water also entered the Home through a vent near the garage door. Some of the water was blown against the vent by wind and other water was the result of a ponding or flooding condition in the north side yard. Again, Toll did not create this condition.

57. Water also intruded the Family Room because of a faulty door threshold. The uncontroverted testimony is that the wind blew water against the door. However, it must follow that if blown water invades the threshold, ponding water that would contact the same point would invade the room. Again, Toll did not create this condition.

58. The construction of the basement required excavation to allow for the construction of the footings and basement walls. At the completion of construction, standard practice is to backfill with soil the area outside the basement walls and properly compact that soil to a certain density.

59. The soil around the basement walls was not compacted to the design specifications.

60. The Defendants' evidence challenging the Plaintiff's soils compaction report is not convincing because it is not based on first-hand knowledge as to much of the expert's testimony, including but not limited to, the fact that Toll did not conduct its own compaction test and speculates at the manner in which the compression tests were conducted. The Defendants' opinion testimony regarding the minor nature of the cracks that are found in the home are self-serving and are contrary to the physical evidence.

61. The expert testimony as to the severity of the cracks is not a proper subject of expert testimony as the damage speaks for itself. The Court finds the testimony incredible that the cracks in the floors are "expected". The Court finds such damage to be material. Exhibits 28 and 29.

62. The failure to properly compact the soil causes structural members to shift. The defense position that lateral shift will not occur is not credible and flies in the face of the other evidence including the requirement that the backfill be compacted. It defies common sense and simple physics that without proper backfilling lateral and vertical shift would occur. The fact that the garage floor slopes down toward the Home with a significant void at the joint between the stem wall and the slab is clear evidence of settlement due to the failure to properly compact the soil and connect the concrete elements.

63. The Defendants' expert admits construction defects in the concrete floors by virtue of the failure to provide proper expansion joints which leads to buckling of the concrete which in turn leads to cracks in the tile and in the travertine. This buckling together with movement from the failure to compact the soil leads to cracks in walls, the stucco, the flagstone and movement in the areas where the basement stem walls would meet a post-tension slab poured on top of the improperly compacted soil. Exhibits 28, 29 and 31.

<u>Damages.</u>

64. The basement of the Home was damaged as a result of water intrusion on the north side of the property and water entered into the Family Room also causing damage. But the evidence does not show this damage was caused by any failure of Toll to properly grade the north side yard. The record shows the landscaping and the hardscaping and the pool

were constructed in a fashion that was contrary to the grading plan by moving run-off toward the Home. Toll did not cause this condition.

65. There is no evidence that water intruded into the Home from the south side yard through or over the window wells or otherwise on that side of the Home.

66. The cracking and the separation of decking near the pool results from the pooling of water due to rain run-off. However, that run-off results from the negative slope toward the Home from the patio and landscaping that runs through a small channel created by the southern edge of the patio and the Home's foundation. This damage is from a combination of pooling water and the failure to properly compact the basement wall backfill.

67. Toll has already paid for repairs resulting from water damage to the basement and other improvements to the property, including but not limited to:

    a. Demolition and water extraction, drain repair, water leak testing, adjusting garage door, slurry cement for leaks, water testing of garage access door and French door at a cost of $4,262.50.
    b. Cutting of driveway to install drainage element (Toll Field Purchase order no. 2520619) $1,636.25.
    c. Replacement of carpet and pad and 30 travertine tiles. $5,789.28.
    d. Rebuild for the garage, basement and family room for drywall, baseboards, finish carpentry, doors, painting and labor for same, installation of speakers in basement and clean up. $5,950.00.
    e. Drilling core holes in both garages between slab and basement wall to inject polyurethane product to fill gaps in the cold joint between garage slab and basement stem wall. $3,500.00.
    f. Filled void under slab due to plumbing penetration repair, drilled holes in slab and epoxy rebar and pretreat area for termites. Poured 3,000# PSI cement to fill void under house to plumbing penetration and apply finish to garage floor. $1,000.00.
    g. Repair to epoxy garage floor. $220.00.
    h. Installation of a block wall 27 feet in length to prevent run off from neighbor's yard. $1,250.00.
    i. Rain gutters installed to direct water from roof to the street. $3,275.00.

(Exhibit 21).

68. Water enters the property during heavy rain at the rear "view" wall because the natural wash is higher than the finish grade for Lot 774. However, other than ponding and the resulting erosion as the water drains south and then west to the outflow, no other damage

has been caused by the entry of the water from the east view wall. No event of such intrusion at the east side wall has caused any damage.

69. The stucco and flagstone have cracked as a result of the movement of the Home's foundation due to the failure to properly compact the backfill from the basement excavation and the water invasion contributing to same.

70. The testimony that the Lot is too low is not credible. The swale sole is not at 0.5% however, that exact specification is not necessary. The slope of 0.39% is adequate and substantially complies with the design criteria.

71. The Plaintiff's damages expert who offers evidence of the various costs to lower the street assumes that such a radical remediation is necessary. The Court rejects that premise. The notion that the street would need to be lowered, or the Lot raised, are not economically reasonable or reasonably necessary. There is no credible or admissible evidence that it is a necessary repair to make the Home habitable. Raising the Home would require it to be demolished which constitutes waste. Lowering of the street would require approval of the homeowner's association and no evidence shows such approval has been given. It would also require the approval of the City of Phoenix and there is no evidence that such an approval is given. It appears feasible for a drainage system to be installed to eliminate any drainage issue and that drainage system could be connected to the City's storm drain. The City will not approve this only where there is a condition that the City maintains such a connection at its own expense. The cost to maintain such a connection was a condition that the City would not accept and for that reason the plan was rejected.

72. There is no evidence that the Home is permanently structurally unsound such that it is not habitable. The damaged concrete work in the foundation is, however, permanent. The Home is structurally sound and habitable but does need repairs. The Home is not so defective that it must be torn down to effect proper repairs or remediation to correct ponding of water. The ponding of water on the north side yard is not caused by action or inaction by Toll; rather, it is the result of landscaping and patio improvements installed by a non-party. The Plaintiff has not proved that the Lot as delivered at closing would not drain. If the north side yard had maintained a positive slope away from the Home the remaining evidence shows the lot would drain making the radical remediation suggested by the Plaintiff, street lowering or demolition of the Home, unnecessary. Accordingly, the costs of such radical repairs are rejected.

73. The testimony of Ms. Archibald regarding the diminution in value is not based on anything more than her visceral feeling. There is no foundation or basis for her conclusion. The testimony of the Plaintiff's expert regarding the effect the extraordinary expenses have on property value is rejected because it is based on the flawed premise that the radical remediation is warranted when it is not, at least not as the result of anything Toll did or did not do. The testimony regarding the effect of an underground water collection chamber is conclusory at best and is not credible. It is made without knowledge of whether a working system is beneficial or performs better than similarly situated properties. The testimony is therefore not relevant.

74. The opinion that the Home is worth "20 to 30% less than the lower valued home in the entire Desert Ridge area" about $600,000.00 is conclusory at best because it assumes the value of the least desirable house without any data to support the opinion. Furthermore, the adverse condition of ponding and pooling is in the north side yard, a condition not created by Toll. It is this condition that is the cause of damage or potential future damage to the Home that the expert and the Plaintiff would attribute to Toll which the Court finds to be improper. The ponding and erosion in the south side yard is repairable. The compacting of the backfilled area is repairable. The defective concrete is not repairable without tearing down the Home. The stucco and the floors and the drywall are all repairable.

75. The Plaintiff has not submitted any evidence of the cost of repair for the backfill, the south side yard swale and erosion, the flagstone and cracks in the pool decking, the basement window wells. The Court cannot award any damages as to those matters where there is no evidence to establish a proper amount.

76. Based on the cost to construct a block wall as shown in Exhibit 21, the Court can estimate to a degree of reasonable certainty that the cost of repair to the privacy wall and eroded landscaping on the south side yard is $2,500.00.

77. The cost to inject the backfill with grout/concrete around the perimeter of the home cannot be extrapolated from the evidence.

78. The cost of repair of the flagstone and pool deck cannot be determined based on a lack of evidence.

79. The evidence fails to disclose the scope of the work, and therefore the cost, necessary to repair the stucco and drywall.

80. The evidence fails to disclose the cost of repair to the east rear yard wall to prevent water from seeping in or the weep holes that appear along the north privacy wall. As to the latter, the record fails to disclose whether the weep holes was a condition left by Toll or the landscaper such that he Court cannot say who is responsible for the repair.

81. Evidence has been submitted indicating a range for the cost of installing an underground water collection system (referred to at trial as the "Stormtech system"), however, the Court cannot conclude based on the record made that such a system is an appropriate repair to address standing or ponding water. Even if it was the problem of ponding and standing water, and indeed water infiltration into the Home during heavy rain lies predominantly in the north side yard, again a condition not created by Toll such that the total cost of that system should be attributed to Toll. Because the Court cannot find it to be the proper repair, the cost is not assessed at all.

82. The Court finds the non-repairable and permanent damage that was caused by Toll to be $250,000.00 representing the diminution in value of the Home as a result of those conditions as of the date of transfer of title.

CONCLUSIONS OF LAW.

Breach of Contract – Implied Covenant of Good Faith and Fair Dealing.

1. Arizona law implies a covenant of good faith and fair dealing in every contract. *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 985 P.2d 556, ¶ 14 (1998) (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *see also Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985)). Such implied terms are as much a part of a contract as are the express terms. *Golder v. Crain*, 7 Ariz.App. 207, 437 P.2d 959 (1968). The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement. The duty arises by operation of law but exists by virtue of a contractual relationship. *Rawlings* at 153-54, 726 P.2d at 569-70.

THE COURT FINDS, that the Plaintiff has not met its burden of proof on the claim of breach of the covenant of good faith and fair dealing. The evidence shows misfeasance, not any action or inaction to prevent Archibald from receiving the benefits and entitlements of the agreement. The record shows that once alerted to the problem of pooling water as the result of the various rain and water events, Toll took actions to remediate much of the damage and to address the matter of pooling and drainage.

2. A party may breach an express covenant of the contract without breaching the implied covenant of good faith and fair dealing. *Rawlings* at 157-60, 726 P.2d at 573-76. The evidence shows there is a failure to properly construct the Home. This includes a defective concrete foundation, a defective privacy wall on the south side of the property, a defective view fence on the eastern boundary of the property, the failure to properly compact the backfill for the basement excavation, the connections between the basement stem wall and the post-tension slabs at grade, vents and door thresholds. Nothing in the record indicates that any of these deficiencies were performed in bad faith.

THE COURT FINDS, Plaintiff has met its burden of proof as to count one on the breach of contract but not on the count as it pertains to bad faith or breach of the covenant of good faith and fair dealing.

Fraudulent Inducement; Fraudulent Concealment; Rescission – Count 2.

1. In order to prove fraud in the inducement the claimant must prove nine elements. A showing of fraud requires (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injury. Nielson v. Flashberg, 101 Ariz. 335, 419 P.2d 514 (1966). Each element must be supported by sufficient evidence. "Fraud may never be established by doubtful, vague, speculative, or inconclusive evidence." In re McDonnell's Estate, 65 Ariz. 248, 253, 179 P.2d 238, 241 (1947); Fridenmaker v. Valley National Bank of Arizona, 23 Ariz.App. 565, 534 P.2d 1064 (1975). Echols v.Beauty Built Homes, Inc., 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982). "Fraud will not be presumed and must be proved by clear and convincing evidence." Universal Inv. Co. v. Sahara Motor Inn, Inc., 127 Ariz. 213, 214, 619 P.2d 485, 486 (App.1980).

The record in this case fails to show that Toll made a representation to Archibald that was false or that Toll knew of a false representation. The Plaintiff tries to establish by circumstantial evidence that Toll knew that the lot purchased by Archibald would not drain and that it would flood before Archibald purchased it. But the only circumstantial evidence is that which is in hind sight. The evidence shows that Toll obtained approval of its Grading and Drainage Plan from the City of Phoenix. The Lot had to be graded. Even the Grading and Drainage Plan does not show the final grade. Final grading is done to provide the necessary slopes and swales that will allow a lot to grade. Archibald has presented no evidence of what the final grading was prior to the installation of a patio pool and other hardscape improvements which run afoul of the Grading and Drainage Plan and in fact cause water to run toward the Home and pond in areas that are not recommended by the Soils Reports and the plans.

There is no evidence that Archibald relied on any representation regarding drainage. To the extent the argument is that Archibald relied on the representation that she would receive a habitable home, there is no evidence to support that representation was false when made. No evidence proves Toll did not believe the Home was habitable on close of escrow.

2. As it pertains to fraudulent concealment, Plaintiff alleges and argues that Toll hid facts known to it but not to Archibald. This includes the fact that the as built finish floor and finish pad were 8 inches above that stated on the Grading and Drainage Plan. The evidence shows that the finish pad was graded per the plan. The argument that the finish pad is above the design requirements is not proved by the evidence. The evidence shows the finish floor is higher than that set on the Grading and Drainage Plan. However, the record fails to show that Toll knew that the finish floor was higher than shown on the plan. Most importantly nothing in the record shows that a higher finish floor caused any injury or damage to Archibald as a result. Liability for fraudulent concealment occurs under § 550 of the RESTATEMENT (SECOND) OF TORTS and lies against a "party to a transaction who by *concealment or other action intentionally* prevents the other from acquiring material information. The common law clearly distinguishes between concealment and nondisclosure. The former is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. Nothing in the record shows that Toll intentionally prevented Archibald from learning anything about the property.

The matter of rescission having been waived,

IT IS ORDERED, Count Two is dismissed.

Negligent Misrepresentation; Rescission - Count 3.

1. Arizona has adopted the definition of negligent misrepresentation outlined in the Restatement (Second) of Torts § 552. *See*, *St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co.*,154 Ariz. 307, 312, 742 P.2d 808, 813 (1987).

   Section 552 provides:

   552. Information Negligently Supplied for the Guidance of Others

   (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if

> he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> In this case Toll did not provide any false information upon which Archibald relied. There was no discussion of any finish floor elevations or drainage from the north, east or west. Count three confuses matters by indicating Toll concealed information, a different cause of action altogether which has already been addressed. Plaintiff alleges Toll failed to exercise reasonable care or competence in obtaining or communicating such information but the record is murky at best as to what information Toll failed to obtain and communicate. The matter of drainage was not known to Toll. No other evidence in the record indicates what Toll should have done to test the drainage or the finish floor elevation or the performance of the east wall or the north privacy wall.

IT IS ORDERED, dismissing Count Three.

Breach of Warranty and Contract; Breach of Implied Warranty of Habitability and Fitness of Purpose – Counts 4 and 5.

1. In an action for breach of contract the claimant has the burden of showing a contract a breach and damages. *Thunderbird Metallurgical, Inc. v. Arizona Testing Laboratories*, 5 Ariz. App. 48, 423 P.2d 124 (Ariz. App. 1967). In this case the Plaintiff has produced sufficient evidence of a contract and its breach. While it has offered evidence of its damages the Court believes the measure of damages and the proof offered is not correct.

2. Arizona courts have long recognized that, "as to new home construction, the builder-vendor impliedly warrants that the construction was done in a workmanlike manner and that the structure is habitable." *Columbia Western Corp. v. Vela*, 122 Ariz. 28, 33, 592 P.2d 1294, 1299 (App.1979). A claim for breach of the implied warranty sounds in

contract. *Woodward v. Chirco Constr. Co.*, 141 Ariz. 514, 516, 687 P.2d 1269, 1271 (1984). *Lofts at Fillmore Condominium Ass'n v. Reliance Commercial Const., Inc.*, 218 Ariz. 574, 190 P.3d 733 Ariz., 2008.

3. In actions for breach of the implied warranty of habitability the measure of damages has been recognized to be the cost of repair. *Woodward v. Chirco Const. Co., Inc.*, 141 Ariz. 514, 687 P.2d 1269 (Ariz.,1984). *See also*, *Continental Townhouses East Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 733 P.2d 1120 (Ariz.App., 1986). The unrepaired damage to the Home in this case caused by Toll is the backfill that was improperly compacted and the improperly poured concrete that contains little if any expansion joints. The other damage is the eroded grade and soil in the south side yard and the improperly constructed block wall that prevents water to run the length of the side yard swale to the street. Other damage includes the cracks in the walls and flagstone and the stucco. The record contains no evidence of the cost of repair of these items.

4. The Plaintiff offers evidence of damage in the form of diminished value. In *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 217 P.3d 1220 (Ariz. App. Div. 1, 2009) our Court of Appeals held that

   "[d]amages based on diminished land values may be, and often are, available under a negligence theory. *See* Douglas A. Blaze & Jefferson L. Lankford, *The Law of Negligence in Arizona* § 5.02[2][i][ii] at 5–13–5–14 (3rd ed. 2007) ("Generally, the measure of damages for injury to land is the difference in fair market value before and after the injury to the property."). Contrary to the District's claim, a party's cause of action is less important than the property interest invaded when determining an appropriate remedy. *See* 1 Dan B. Dobbs, *Law of Remedies* § 5.1, at 710 (2d ed.1993). Thus, diminished land value may be an appropriate measure of damages for a negligence claim. *Id*. at 711."

   A Tumbling-T Ranches, 222 Ariz. at 534. In this case the Plaintiff did not assert a cause for negligence. However, the case was litigated with negligence concepts in mind in that the Plaintiff introduced testimony that Toll fell below the standard of care in several respects regarding the construction of the Home and the grading of the Lot. No objection was made to such testimony and the matter becomes an issue in the case. See, *Thomas v. Goudreaul*, 163 Ariz. 159, 786 P.2d 1010 (Ariz.App.,1989). Accordingly, the Court will consider the evidence of diminished value.

5. An injury to real property may be characterized as permanent or temporary. *City of Tucson v. Transamerica Title Ins. Co. of Ariz.*, 26 Ariz.App. 42, 44, 545 P.2d 1004, 1006 (1976). An injury is temporary if its cause is abatable (or preventable) and repair costs are otherwise reasonable; that is, the costs to repair do not exceed the damaged property's diminished value. *A Tumbling T, supra.* The Court finds in this case the injury to some of the property caused by the actions of Toll to be permanent. The admission that the concrete was not properly installed is permanent damage that cannot be repaired. These are defects that that Archibald would be required to disclose to subsequent purchaser. Archibald would also have to disclose the nature of the problem and the damage that resulted to the Home. This information would have an effect on any reasonable buyer would consider purchasing the Home. Similarly, Archibald would have to disclose the fact that the patio and landscaping have a negative slope that tends to move water toward the Home. This condition was not created by Toll and any consideration of diminished value must not include diminished value caused by another who is not the agent of Toll.

Mutual Mistake, Rescission, Restitution – Count 6.

1. A contract, may be rescinded where it was entered into under conditions of fraud or mutual mistake. Atchison Etc. Ry. Co. v. Peterson, 34 Ariz. 292, 271 P. 406 (1928); Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962). However, the party attacking the contract has the burden of establishing the vice which he alleges induced it, and a mere preponderance of the evidence is inadequate. The evidence of fraud or mistake must be clear and convincing.

In this case, the Plaintiff originally alleged mutual mistake as a ground for rescission. However, the Plaintiff has elected the remedy of legal damages instead and has waived rescission as a remedy.

IT IS ORDERED, dismissing Count Six.

The Court having made the aforementioned findings of fact and conclusions of law in this matter has found that the Plaintiff has met its burden of proof as to the claims for breach of contract and the implied warranty of habitability and fitness of purpose. All other claims or causes of action either have not been proved or have been waived or withdrawn.

THE COURT FINDS the Plaintiff has proved damages in the total amount of $252,500.00 and this constitutes the verdict of the Court in favor of the Plaintiff.

THE COURT FURTHER FINDS, the Plaintiff is the prevailing party and the matter arises out of contract. Accordingly, she is entitled to an award of reasonable attorney's fees and costs pursuant to A.R.S. § 12-341.01.

IT IS FURTHER ORDERED, the Court will sign this decision as its verdict but it shall not constitute a final order; rather the matter of attorneys' fees shall be decided in the final order. In this regard, the Plaintiff shall submit a form of judgment together with a proper application for attorneys' fees and cost before the expiration of 20 days from the date of the entry of this order.

The foregoing ruling is in accordance with the formal written order signed by the Court on July 26, 2013 and filed (entered) by the clerk on July 29, 2013.

FILED: Exhibit Worksheet.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.