

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-017918

12/01/2005

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT
D. Glab
Deputy

FILED: 12/05/2005

DONALD HARMON, et al.

MICHAEL D DICKS

v.

BEAZER HOMES ARIZONA INC, et al.

THOMAS A WALCOTT

PETER C BROWN
WARREN R BROWN
KENNETH M FRAKES
STEVEN E HARRISON
KENNETH JANUSZEWSKI
ANDREW R PESHEK
RINA K RAI
DEAN C ROBERTSON
JAMES M SHINN
CHRISTY M THOMPSON
MARK G WORISCHECK

MINUTE ENTRY

The Court took the following motions under advisement after oral argument on November 21, 2005.

1. Beazer Homes Sales' Motion for Summary Judgment Re: "Class Members" Who Have Sold Their Homes

Beazer seeks to exclude class members who have sold their homes, not made any proof of diminution in value and have not transferred the right to participate in the class action to the new purchaser.

The Court finds that proof of loss is an essential part of the claim of those who have sold their homes.

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IT IS ORDERED that those class members who have sold their homes following class certification will be excluded from the class at the end of trial unless they provide evidence of loss incurred when selling the home due to the alleged defects at issue or any evidence of costs incurred to repair the alleged defects. If a class member assigned his rights to a buyer, the buyer will be entitled to recover the same damages as other class members.

2. Beazer Homes Sales' Motion To Dismiss Homeowners in Park or Crossings at Horizons at Camelback

Beazer Homes Sales seeks to Dismiss Homeowners in Park or Crossings at Horizons at Camelback because there are no class representatives in either of those series of homes.

The defects in grading/drainage design, slab/ foundation system design and stucco system installation are common to all homes in the subdivision.

IT IS ORDERED denying the Motion to Dismiss Homeowners in Park or Crossings at Horizons at Camelback as to Beazer Homes Sales and Sage Engineering.

3. Beazer Homes Sales' Motion for Rule 23(b) Class Decertification re: Different Parties/ Subcontractors

Beazer seeks decertification of the alleged defect claims because different subcontractors worked on various homes. The alleged defects in grading/design, slab/foundation system design and stucco system are common to all homes in the class.

IT IS ORDERED denying decertification as to those subcontractors who worked on grading/drainage design, slab/foundation design and stuccos system installation.

Because there are substantial variations in the occurrence of bent window flanges among the work done by the three framing contractors and because the alleged framing defect occurred in only 12.5% of homes inspected by plaintiff's architectural expert the court finds that there are not common questions of law and fact with regard to the framing subcontractors.

IT IS ORDERED granting decertification of the class of framing subcontractors.

4. Beazer Home Sales Arizona Motion of Rule 23(b) Class Decertification re: Adequate Representation

Beazer Home Sales has moved for Rule 23(b) Class Decertification re: Adequate Representation by class members.

IT IS ORDERED denying the Motion for Class Decertification re: Adequate Representation.

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5. Sage Engineering Motion for Partial Summary Judgment

Sage Engineering moves for partial summary judgment because it claims no contract exists between Sage and Beazer and Beazer's claim sounds in tort and not in contract.

The written consultant agreement between Sage and Beazer covered only Units I and II at Horizons on Camelback. It is undisputed that Sage also did the drainage design and grading on Unit III.

There are change orders between Sage and Beazer covering Unit III. These orders refer to a contract between the parties.

In addition, Arizona recognized implied contracts. There is sufficient evidence from which a jury could find an expressed or implied contract between the parties.

IT IS ORDERED denying Sage Engineering's Motion for partial summary judgment.

The test to determine whether the action sounds in tort or contract is "whether the defendant would have the duty of care even in the absence of a contract." *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15-16, 6 P.3d315, 320-21, (App. 2000).

Any duty of care owed by Sage to Beazer in this matter would arise out of either the express or implied contract between Sage and Beazer if the trier of fact finds an express or implied contract.

The Court further holds that the claim between Beazer and Sage **sounds in contract and not in tort.**

7. Sage Engineering's Motion for Partial Summary Judgment re: Proximate Cause and Standard of Care

Sage Engineering moves for Partial Summary Judgment arguing that plaintiff's expert is unable to state that Sage's grading plan had any quantifiable effect on plaintiff's claimed damages and that Sage's plans comply with UBC and HUD requirements.

Because plaintiffs' claims against Beazer are for breach of implied warranty and Beazer's claims against Sage are for breach of contract and indemnity or breach of implied contract and implied indemnity, tort concepts including proximate cause are not an issue.

In addition, the experts in the case disagree about whether Sage's grading plan complies with UBC and HUD requirements. This creates a jury question.

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IT IS ORDERED denying Sage Engineering's Motion for Partial Summary Judgment re: Proximate Cause and Standard of Care.

8. Sage Engineering Motion for Partial Summary Judgment re: Beazer Indemnity Claim

Sage Engineering argues that under *Busy Bee*, only a party free from wrongdoing can maintain a cause of action of implied indemnity against another alleged contributor to plaintiff's damages. Sage argues that plaintiff's primary issue is slab design, which is a Beazer issue. Sage further argues that Beazer has not yet accrued an indemnity claim against Sage.

The Court finds nothing in the record to indicate that Beazer was actively negligent with regard to grading/drainage design. Beazer may make an implied indemnity claim against Sage.

Beazer may name Sage as a Third-Party Defendant in this matter, although Beazer may not recover until such time as it has been found liable in the underlying cause.

IT IS ORDERED denying Sage Engineering's Motion for Partial Summary Judgment re: Beazer Indemnity Claim.

9. Plaintiff's Motion re: Severance/Bifurcation and Manner in Which Case Should Be Tried

Plaintiff moved that the case should be bifurcated. That motion was denied at oral argument.

Plaintiff further moved that the trial of the class representative be limited to the class representatives only. Defendants and third party defendants argue that they should be able to call rebuttal witnesses who are not class members.

IT IS ORDERED that defendants and third party defendants may call rebuttal witnesses who are not class members.

IT IS ORDERED affirming the pretrial conference set on **February 13, 2006 at 9:00 a.m.** and the trial set on **March 7, 2006 at 9:30 a.m.**