

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-005392

11/14/2005

JUDGE PRO TEM GLENN M. DAVIS

CLERK OF THE COURT  
L. Muhammad  
Deputy

FILED: 11/16/2005

MILLETT RANCH HOMEOWNERS  
ASSOCIATION INC

ROBERT E BARRY II

v.

BROWN FAMILY COMMUNITIES, et al.

J GREGORY CAHILL  
LEE P BLAKE

TCM MASONRY INC.

ANDREW R PESHEK

TIMOTHY J THOMASON

UNDER ADVISEMENT RULING

After the hearing of November 3, 2005, matters were taken under advisement.

The Court has reviewed and considered the Third Party Defendant TCM Masonry Inc.'s (TCM) Motions for Summary Judgment, the Defendant Homes by Dave Brown's (HDB) and Plaintiff's responses and the replies thereto. The Court has further reviewed the file, the pleadings and the materials filed by the parties in support of their position on the motions.

Based upon its consideration of the foregoing and the arguments presented by counsel, the Court makes the following findings and enters the following Orders in this case.

1. TCM's Motion for Summary Judgment re Breach of Contract and Breach of Express and Implied Warranties:

THE COURT FINDS that there is at minimum a question of fact as to whether HDB was the "owner" within the meaning of the contract. The materials submitted related to motions would indicate that where the contract referred to "the owner," it would have been referring to HDB. If HDB were found in fact to be "the owner," rights under the contract would extend to HDB.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-005392

11/14/2005

There are factual issues as to the breach of the contract, including breach of an implied warranty of workmanship and the damages, if any, caused thereby. Since the provisions of the contract would extend to HDB if it is found to be the "owner" under the contract, summary judgment on the breach of contract and implied warranty issues is not appropriate.

As to whether any express warranty claim is time-barred, there is language in the contract that arguably provides express warranties, in addition to the express warranty language that is specifically time limited. While it appears there may be a conflict between these express warranty provisions, this should be resolved by a determination of the intent of the parties, a fact issue in dispute.

Therefore,

IT IS ORDERED denying Defendant TCM's Motion for Summary Judgment re Breach of Contract and Breach of Express and Implied Warranties.

2. TCM's Motion for Summary Judgment re Diminution in Value:

The Defendants argue that the measure of damages in this matter must be diminution in value, and since there was no diminution in value, the Plaintiffs are entitled to nothing, even though there is evidence that the wall is in need of repair and that the repair may have arisen from the faulty workmanship of the Defendants.

Arizona Courts have allowed costs of repair damages when there is no diminution in value. In *Dixon v. City of Phoenix*, 173 Ariz. 612, 845 P.2d 1107 (App. 1992), the Court allowed "cost of repair" to be the measure of damages where the use of "diminution in value" would effectively deny a party compensation for breach of contract. In that case, the Court stated that where choosing "between a measure of damages that is wholly ineffectual and a measure of damages which offers some compensation," the choice would be made in favor of damages based upon the cost of restoration. *Id.* at 619.

That analysis in the *Dixon* case applies in the instant matter. The effect of using diminution in value as the measure of damages in this case would be "wholly ineffectual," as it would allow the Defendants to breach a contract without having to pay any damages, even if a loss is proven to have resulted from the breach.

Further, as is noted by the Defendant TCM, if there is no diminution in value and the property has sustained some loss of intrinsic value, the cost of repair measure of damages may apply. While the Defendant maintains there is a difference between the aesthetic damage due to loss of vegetation and the aesthetic damage caused by the alleged defects in the subject wall, the Court is unable to make a factual finding one way or the other on that issue.

Therefore, based on the foregoing,

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-005392

11/14/2005

IT IS ORDERED denying Defendant TCM's Motion for Summary Judgment re Diminution in Value.

3. TCM's Motion for Summary Judgment on Duty to Defend and Negligent Procurement of Insurance:

The parties agreed that the issue of the duty to defend is moot in light of the previous ruling in this matter.

On the issue of negligent procurement of insurance, Defendant HDB did not respond or provide any substantiation as to why there would be a duty to provide insurance for HDB on the part of TCM.

Therefore,

IT IS ORDERED granting TCM's Motion for Summary Judgment on the issue of negligent procurement of insurance.

4. TCM's Motion for Summary Judgment re Implied and Express Indemnity; Alternatively, Motion that the Court Find Indemnity Clause to be General:

As noted previously, THE COURT FINDS there is an issue of fact as to whether HDB was the "owner" referred to in the contract documents. Resolution of that fact issue will determine whether there is express indemnity per the language of the subcontract.

TCM argues that there cannot be a claim for implied indemnity if there is an express indemnity provision. However, if that fact issue as to whether HDB is the owner is resolved such that there is no express indemnity, then there is a claim for implied warranty. Because there remains a fact question that will be determinative on the issue of express or implied indemnity, summary judgment is not appropriate.

Similarly, the issue of whether there is general or specific indemnity turns on the issue of whether or not there was an express indemnity provision that controls. Whether there was an express indemnity provision that extended to HDB will again turn on the factual question as to whether HDB was the 'owner' referred to in the contract documents.

Therefore,

IT IS ORDERED denying Motion for Summary Judgment re Implied and Express Indemnity; Alternatively, Motion that the Court Find Indemnity Clause to be General.

5. TCM's Motion for Summary Judgment re Negligence and Contribution:  
Docket Code 019

Form V000A

Page 3

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-005392

11/14/2005

The claims of HDB against TCM arise from contractual and indemnification arguments, not based upon any negligence of TCM as to HDB. There is no evidence of any negligence damages as to HDB, only losses claimed based on express or implied contractual obligations. If there was negligence on the part of TCM in constructing the wall, HDB was not damaged by it except to the extent that it might be vicariously liable or liable pursuant to the contract. Those claims are asserted in the contract and indemnity-based claims.

Similarly, their claim for contribution is based on the theory that TCM and HDB may be found to have been joint-tortfeasors, and there is no evidence that they were. The fact is that any liability of TCM to HDB in this matter would be contract based, not a claim based on tort liability. There is no contribution claim by HDB against TCM under the law in this situation.

Therefore,

IT IS ORDERED granting TCM's Motion for Summary Judgment re Negligence and Contribution.

6. TCM's Motion for Summary Judgment re Speculative Damages:

TCM alleges that the claimed damages are too speculative and remote to form the basis for a judgment. However, Plaintiff has an expert who asserts that a certain amount of money will be needed in a reserve fund to cover costs of repair for cracks that are "inevitable." The issues are whether the opinion of the expert that cracks are inevitable is credible and whether his estimate for the future costs to repair the cracks is reasonable. Those are issues of fact that may be challenged at trial.

Therefore,

IT IS ORDERED denying TCM's Motion for Summary Judgment re Speculative Damages.

7. TCM's Motion for Summary Judgment re Agency:

TCM requests summary judgment as to the fact that KCB Construction (KCB) was the agent of HDB based upon the facts that they shared the office address and a principal of HDB also worked to supervise the construction job.

However, the fact that entities share the same address or have common officers or directors does not necessarily mean that one is the agent of the other. The issue of agency is determined based upon intent and other circumstances. There is evidence in the contract documents that specifically states that KCB was an independent contractor, not a joint venturer or employee of the owner, and there is a fact issue as to whether HDB was that owner. So there

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-005392

11/14/2005

are not sufficient undisputed facts to allow the Court to find as a matter of law that KCB was the agent of HDB.

Therefore,

IT IS ORDERED denying TCM's Motion for Summary Judgment re Agency.

The Court has reviewed and considered the Defendant HDB' Motion for Summary Judgment re Breach of Implied Warranty, Contract, Negligence per se and Consumer Fraud, the Plaintiff's response and the reply thereto. The Court has further reviewed the file, the pleadings and the materials filed by the parties in support of their positions on the motions.

Based upon its consideration of the foregoing and the arguments presented by counsel, the Court makes the following FINDINGS and enters the following ORDERS in this case.

1. Standing:

On the issue of standing, THE COURT FINDS that the Defendant HDB waived that issue by its failure to raise it in its previous answer and motion to dismiss. However, even if it had not been waived, there is substantial evidence and documentation supporting standing by the Plaintiff Millett Ranch Homeowner's Association (the Association) in this claim, including the CC&R's stating the Association is the agent and representative of the members and residents as to maintaining the common areas.

Therefore,

IT IS ORDERED FINDING there is no dispute that the fence at issue is part of the common area and the Association has standing to raise claims related to that fence.

2. Breach of Contract/Implied Warranty:

HDB maintains that a developer who conveys and deeds common areas of their development to the residents or the association of the resident of the development, has no contractual duties or warranties as to condition of those common areas.

THE COURT FINDS that in such a transaction there is in the deed an implied warranty of workmanship and habitability that extends to common areas of residential dwellings. Based on A.R.S. § 33-2201, there is a cause of action by Associations related to common improvements owned by a homeowners association or jointly by members of the association.

Therefore,

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-005392

11/14/2005

IT IS ORDERED denying HDB's Motion for Summary Judgment on the Issue of Breach of Contract and Implied Warranty.

3. Negligence Per Se:

A claim of negligence per se must be based upon violation of a code, statute or ordinance. The Plaintiffs have failed to cite any statute or rule or ordinance that was violated, other than offering general expert testimony that the construction did not meet "standards." While such testimony may support a claim for general negligence, it is not sufficient evidence to support a claim for negligence per se.

Therefore,

IT IS ORDERED granting HDB's Motion for Summary Judgment on the Issue of Negligence Per Se.

4. Consumer Fraud:

There is no evidence of any misrepresentation, much less any intent that others rely on the misrepresentation on the part of HDB. While there may have been an implied warranty as to the fence, there has been no evidence offered regarding any representation as to the fence. The only representation argued to have been false was a very general statement that the company builds consistent with "prevailing codes"; but there is no evidence that a specific code was even violated, much less that there was any intent to make a misrepresentation.

Therefore,

IT IS ORDERED granting HDB's Motion for Summary Judgment on the Issue of Consumer Fraud.