

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-004854

01/25/2008

HONORABLE KRISTIN HOFFMAN

CLERK OF THE COURT
D. Glab
Deputy

ENCOMPASS INSURANCE, et al.

VINCENT M CRETA

v.

C A SEYMORE BUILDERS INC, et al.

STEPHEN D HOFFMAN

MICHAEL P FIFLIS
EVAN S GOLDSTEIN
ERIC M JACKSON
DOMINIC L VERSTEGEN
JAMIE D WILLIAMS

RULING

The Court took the issues of Intervenor's Motion for Leave to File Second Amended Complaint and the Parties' proposed Motions in Limine under advisement after oral argument. The Court has considered the pleadings and the argument of counsel.

Intervenor's Motion for Leave to File Second Amended Complaint

Intervenor's seek to amend the complaint several years after this action was filed, after discovery is closed and after the dispositive motion deadline has passed. Because discovery is closed, Defendants would not be able to investigate or conduct discovery regarding the new claim against them. Because the dispositive motion deadline has passed, Defendants would not be able to file dispositive motions on the new trespass claim. Plaintiff claims that "facts and damages that give rise to (and that are pled in) the currently pending claims are exactly the facts and damages that give rise to the trespass claim sought to be added." Intervenor's give no reason for their failure to bring the trespass claim at an earlier stage in the litigation when it would have

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been less prejudicial to Defendants. They do not claim that they have newly discovered evidence regarding facts that give rise to a trespass claim. Trespass is an intentional tort with different elements than the elements of other tort claims by Intervenor.

Because Intervenor was dilatory in bringing the trespass claim, because the requested amendment came well after the close of discovery and the dispositive motion deadline, and because allowing the trespass claim would require new factual discovery and would be prejudicial to defendants,

IT IS ORDERED denying Intervenor's Motion for Leave to File Second Amended Complaint.

Defendants' Joint Motion in Limine # 1: Re: John McDougall

Third Party Defendants Encompass and Defendants Benchmark, Seymore and ServiceMaster move for an order in limine precluding all evidence and testimony of Intervenor's expert John McDougall on the basis that his testimony lacks foundation and represents the unauthorized practice of law. John McDougall is a licensed public adjuster.

IT IS ORDERED that James McDougall may testify as an expert witness on issues of coverage and valuation of damages. He may testify about documentation and valuation of loss. He may testify about the facts of the case. He may not analyze and apply the case law of Arizona or any other jurisdiction to the facts of the case.

Defendants' Joint Motion in Limine # 2 Re: Exclusion of Testimony of John McDougall Pursuant to Rule 26.1(b)(4)(d), Arizona Rules of Civil Procedure

Benchmark, Seymore, ServiceMaster, Encompass and Third Party Defendant I.H.I. move for an order in limine precluding Intervenor from eliciting duplicative expert testimony from John McDougall.

IT IS ORDERED that James McDougall will not offer opinions against the contractor defendants Benchmark, Seymore, ServiceMaster and I.H.I. He may offer testimony that Benchmark and Seymore were agents of Encompass. He may testify that he has read the Faas report and that it forms part of the basis of his own opinions. He may not testify as to the substance of the Faas opinions. He may opine that Encompass should have corrected the allegedly improperly performed work of its guaranteed contractors.

Defendants' Joint Motion in Limine # 3 Re: Claim for Lost Property of Intervenor Nicole Lemaster, Christian Lemaster, Israel Lemaster and Melissa Lemaster

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Defendants Seymore, Benchmark, ServiceMaster, Encompass, and I.H.I. move the Court in Limine for an order excluding any claim for lost property of Intervenors Nicole Lemaster, Christian Lemaster, Israel Lemaster and Melissa Lemaster.

IT IS ORDERED granting the Motion as to all items not listed on the Ken and Lynette Lemaster Non-Salvageable Personal Property Claim Submission or on any other claim submission for personal property loss submitted to Encompass.

IT IS ORDERED denying the Motion as to all items listed on the Non-Salvageable Personal Property Claim Submission and any other claim submission for personal property loss submitted to Encompass.

Defendants' Joint Motion in Limine # 4 Re: Unfounded and Lay Opinions

The parties have agreed that Plaintiffs' expert James Faas had not offered and will not offer any opinion with respect to Seymore's build-back work. Intervenors may not testify that any of the work performed violated the Uniform Building Code or the City of Phoenix Building Code. Lynette LeMaster may testify that the bottom of the shower flexed when she stood in it. Faas may opine that Benchmark breached the standard of care. There is not sufficient foundation for the OSHA document as there is no testimony or background as to when the OSHA document was published and any information about the standard of care must relate to the standard of care in existence at the time of the alleged breaches of the standard of care. Plaintiffs have stated that they do not intend to use the OSHA document.

Defendants' Joint Motion in Limine # 5 Regarding Worker Safety Measures

The parties agree that there will be no mention of the OSHA complaint or citation regarding worker safety measures and failure of workers to use protective gear.

Defendants' Joint Motion to Compel or, In the Alternative, Motion in Limine # 6 Re: Damages Claimed by Intervenors

The Court grants Defendants' Motion to Compel in part.

IT IS ORDERED that Plaintiffs shall list those damages that they seek from Encompass for their claim for bad faith. Those damages must be among those set forth in RAJI 4th Bad Faith 7.

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IT IS ORDERED that Plaintiffs shall set list those damages that they seek from Encompass on their claim for negligent misrepresentation.

IT IS ORDERED that Plaintiffs shall list those direct and consequential damages that they seek from each Defendant against whom they assert a claim for breach of contract for each breach of contract. To the extent that they are unable to distinguish damages caused by each defendant's breach of contract and seek damages from more than one Defendant for a breach of contract, they are to provide Defendants with that information. Those damages sought must be among those set forth in RAJI 4th Contract 16 and 17.

IT IS ORDERED that Plaintiffs shall list those damages they seek for the negligence of each Defendant against whom they assert a claim for negligence. To the extent that they are unable to distinguish damages caused by each Defendant's failure to use reasonable care, they are to provide Defendants with that information.

Defendants' Joint Motion in Limine # 7 Re: Native Environmental Litigation

IT IS ORDERED denying the Motion in Limine with regard to amounts paid to Native Environmental including the amount paid in settlement of the Native Environmental litigation.

IT IS ORDERED granting the Motion with regard to attorney's fees, related costs and any other alleged damage arising in connection with the Native Environmental litigation.

Defendants' Joint Motion in Limine # 8 Re: Intervenors Failure to Properly Disclose Damages for Lost Items and Other "Unknown" Damages

Intervenors seek damages for Lost Unknown and Lost Unknown Personal Property. To the extent that they seek damages for these items,

IT IS ORDERED they are limited to seeking damages for those items disclosed with some specificity on or before August 2, 2007.

Defendants' Joint Motion in Limine # 9 Re: Claim for Damages Associated With The Yard and Pool

IT IS ORDERED that Intervenors may seek damages related to pool and lawn service for the period in which they did not live in their home during the events that gave rise to this litigation. Because there was no evidence presented to the Court that the pool was resurfaced or a new pump purchased after the events that gave rise to this litigation or that any such

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expenditure was related to the events that gave rise to this litigation, Intervenors may not seek damages for resurfacing the pool or for a new pool pump.

Defendants' Joint Motion in Limine # 10 Re: Fees of Independent Adjuster

Lynette Lemaster testified that she hired the independent adjuster to help her deal with Encompass. There was nothing in the record presented to the Court that indicated that the independent adjuster was hired for any other purpose.

IT IS ORDERED granting the Motion with regard to the contractor defendants.

IT IS ORDERED denying the Motion with regard to Encompass.

Defendants' Joint Motion in Limine # 11 Re: Lack of Insurability

IT IS ORDERED that any attempts by Encompass to cancel Intervenors' insurance policy are admissible against Encompass only and only as part of Intervenors' claim for bad faith against Encompass. Because they have not disclosed any computation and measure of damages with regard to this claim, Intervenors are limited to damages for inconvenience and annoyance with regard to any efforts by Encompass to cancel the policy and regarding their inability to obtain other coverage. Because there is no evidence that Intervenors were ever uninsured, they may not claim damages for uninsurability.

Defendants' Joint Motion in Limine No. 12 Re: Damage to Credit

IT IS ORDERED granting Defendants' Joint Motion in Limine No. 12. Intervenors have not disclosed any evidence of the damages sought for damage to credit or any evidence that their credit rating changed as a result of the events that gave rise to this litigation. They have disclosed no witnesses who could testify as to damage to credit.

Defendants' Joint Motion in Limine No. 13 Re: Intervenors' Alleged Mold Damages

IT IS ORDERED granting the Contractor Defendants' Motion in Limine to Preclude Intervenors from offering any evidence against them at trial regarding damages related to mold. This ruling does not preclude Intervenors from seeking damages for loss of use of their home.

Defendants' Joint Motion in Limine No. 14 Re: James Faas' Testimony Regarding the Age of the Dust Found in Intervenors' Home

IT IS ORDERED denying Defendants' Joint Motion in Limine No. 14.

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Defendants' Joint Motion in Limine No. 15 Re: Intervenors' Non-Salvagable Personal Property

IT IS ORDERED denying Defendants' Joint Motion in Limine No. 15.

Defendants' Joint Motion in Limine # 16 Re: Intervenors' Personal Injury and Emotional Distress Claims

IT IS ORDERED granting Defendants' Joint Motion in Limine # 16. Intervenors may not introduce evidence of personal injury in this litigation. They may introduce evidence of emotional distress only as it relates to their claim against Encompass for bad faith.

Defendants' Joint Motion in Limine #16 Re: Intervenors' Diminution in Value/Stigma Claims

Intervenors may seek either damages for cost of repair or diminution in value/stigma damages. They may not seek both.

Third Party Defendant Encompass Insurance Company's Motion in Limine Re: Claim for Emotional Distress by Intervenors Against Encompass

IT IS ORDERED denying Third Party Encompass Insurance Company's Motion in Limine Re: Claim for Emotional Distress by Intervenors Against Encompass.

Intervenors' Motion in Limine # 1 (Other Insurance Claim Evidence)

IT IS ORDERED denying Intervenors' Motion in Limine #1. To the extent evidence of other insurance claims is relevant, it is admissible.

Intervenors' Motion in Limine #2 (Insurance Coverage)

IT IS ORDERED denying Intervenors' Motion in Limine # 2. If requested to do so, the Court will give the RAJI 4th Standard 9 Insurance instruction.

Intervenors' Motion in Limine # 3 (Medical Evidence)

IT IS ORDERED that Defendants' may introduce medical evidence relevant to Intervenors' claims for emotional distress, stress and anxiety.

Intervenors' Motion in Limine # 4 (Anthony Cannon)

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IT IS ORDERED denying Defendants' Motion in Limine # 4. The Court will rule on objections to Anthony Cannon's testimony as they are made at trial.

Intervenors' Motion in Limine # 5 (Seymore Expert Testimony)

The parties agree that neither Seymore nor Intervenors will not present expert testimony with regard to the build back. Seymore has properly disclosed Ryan Kuhn and Bart Ashley with regard to Intervenors' claims regarding deficiencies in the work of Benchmark and with regard to the work of remediation contractors.

Intervenors' Motion in Limine No. 6 (Duplicative Expert Testimony)

Mr. Kuhn will testify regarding mold remediation issues. Mr. Ashley will testify regarding asbestos abatement issues.

Intervenors' Motion in Limine # 7 (Witness Rob Smith)

IT IS ORDERED denying Intervenors' Motion in Limine # 7. Rob Smith's testimony will be limited to that properly disclosed before trial.

Intervenors' Motion in Limine # 8 (Police Blotter)

Because the Court has not seen the police blotter and is unable to determine whether "the sources of information or other circumstances indicate lack of trustworthiness," the Court makes no ruling on Intervenors' Motion in Limine # 8 at this time.

Intervenors' Motion in Limine # 9 (Home Inspection Photographs)

IT IS ORDERED denying Intervenors' Motion in Limine # 9. The jury will determine what weight to give the photographs.