Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-019511 02/08/2024

HONORABLE JOAN M. SINCLAIR

CLERK OF THE COURT
M. R. Diaz
Deputy

JENNIFER DUNCAN, et al.

RODNEY GALARZA

v.

LABLONDE DEVELOPMENT CORPORATION, et al.

BENJAMIN J BRANSON

J GREGORY CAHILL
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RICHARD V MACK
RINA K RAI
AMORETTE C RINKLEIB
BRIAN D RUBIN
COLLIN T WELCH
KURT M ZITZER

JUDGE SINCLAIR

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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MINUTE ENTRY

Defendants LaBlonde Development and Thomas LaBlonde ("Defendants") filed a Motion for Summary Judgment, a Statement of Facts ("DSOF"), and supporting exhibits on October 2, 2023. Plaintiffs Jennifer and Raymond Duncan ("Plaintiffs") filed a Response, Separate Statement of Facts ("PSOF") and supporting exhibits on October 16, 2023. On November 6, 2023, Defendants filed a Reply. Oral argument was held on January 12, 2024, and the matter was taken under advisement. The Court now rules.

The claims in the Plaintiff's Amended Complaint ("FAC") are: (1) Breach of Contract (FAC at ¶¶ 8–12); (2) Breach of Implied Covenant Good Faith and Fair Dealing (FAC at ¶¶ 13–20); (3) Negligent Hiring, Retention, and Supervision (FAC at ¶¶ 21–23); (4) Fraud (FAC at ¶¶ 24–43); and (5) Injunctive Relief (FAC at ¶¶ 44–59). This fifth claim against the Talus Homeowners Association was already dismissed. *See* Ruling filed on August 31, 2023.

Under Ariz. R. Civ. P. 56(a), the court shall enter summary judgment in favor of the moving party if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." When considering summary judgment motions, the court must believe the evidence of the non-movant "and all justifiable inferences are to be drawn in his favor." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10 (1990) (citation omitted).

Defendants argue that the contract claims are time-barred as the parties contracted for a one-year statute of limitations; the claims raised here were fully litigated in the administrative proceedings; and the express acknowledgement that LaBlonde was not an architect, and the lack of any damages from the alleged fraud, entitles the Defendants to summary judgment on the four claims against them. Plaintiffs counter that the disclaimer and waiver in this context is against public policy; recent amendments to A.R.S. § 12-910 remove any preclusive effect from the decision of an administrative agency; and LaBlonde admitted to the fraud and discovery is ongoing. The claim preclusion argument is dispositive here.

Administrative Law Judge Thomas Shedden issued his decision on March 24, 2021. That decision was accepted by the Registrar and became final on May 17, 2021. *See* Defendants' Exhibit 5 (Administrative Law Decision"). In their licensed complaint form sent to the Registrar of Contractors the Plaintiffs identified the issues as: abandonment, poor work and fraud. Defendants' Exhibit 4, p.1. Specifically, the Plaintiffs complained of the contractor: abandoning the contract and refusing to perform work; failing in a material respect to complete the construction project for the price stated or in any modification of the project; making material misrepresentations which the Plaintiffs relied on which resulted in damage to them and the property; disregarded plans and specifications that is prejudicial to the Plaintiffs; knowingly

entering into contracts with unlicensed workers and specific listed defects (drywall, framing, electrical, masonry, paver installation, HVAC, roof, flooring, stucco, metal fences/gates, plumbing, door hardware, windows, doors, concrete, fireplaces, cabinets, BBQ, appliances, paint, countertops, chimney shroud, rough/final clean, landscaping, bath mirrors, backsplashes, shower glass enclosures, fire sprinklers, and general finishing). Defendants' Exhibit 4.

"Collateral estoppel, also known as issue preclusion, means that 'when an *issue of ultimate fact* has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *State v. Cruz*, 249 Ariz. 596, 598 ¶ 8 (App. 2020) (citation omitted). Where administrative agencies act in an adjudicative capacity, "courts will, where appropriate, give preclusive effect to such decisions…." *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 409-410 (App. 1984). Whether issue preclusion applies is an issue of law. *Crosby-Garbotz v. Fell in & for Cnty. of Pima*, 246 Ariz. 54, 56 ¶ 9 (2019).

"Claim preclusion, or res judicata bars a claim when the earlier suit (1) involved the same claim or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Howell v. Hodap*, 221 Ariz. 543, 546, ⁋ 17 (App. 2009) (internal quotations and citations omitted).

The most significant findings and conclusions of the Administrative Judge are as follows:

1. "Mr. Fagerburg [the ROC's assigned investigator] testified to the effect that about 95% of the items from Ms. Duncan's first complaint that ROC had ordered Respondent to correct had been corrected by November 6, 2020, and that the remaining items were all minimal." Administrative Law Decision, p. 8, ¶ 20.

2. "It has not been proven that Respondent is unscrupulous, unqualified, or financially irresponsible." Administrative Law Decision, p. 10, ¶ 9.

3. "The preponderance of evidence does not show that Respondent violated Ariz. Admin. Code R4-9-108(A) or Ariz. Rev. Stat. section 32-1154(A)(3)." Administrative Law Decision, p. 11, ¶ 15 (This Court notes that "Rule 4-9-108 aligns with the purposes of the implied warranty of workmanship and habitability." *Zambrano v. M&RC II LLC*, 254 Ariz. 53, 60, ¶ 18 (2022)).

4. There was no finding of abandonment despite it being alleged in the ROC Complaint. Administrative Law Decision, p. 2, ¶¶ 9, 11.

5. There was no finding that LaBlonde employed unlicensed entities to perform work as stated in the ROC Complaint. Administrative Law Decision, p. 2, ¶ 9 and *see generally* Conclusions of Law at pp. 9–12, ¶¶ 1–17.

6. Finding no material violations, the ALJ dismissed the matter without imposing any discipline. Administrative Law Decision, p. 12, ¶ 17 (This is separate and distinct from the Consent Agreement and Order of Discipline issued by the Arizona State Board of Technical Registration on March 22, 2022. Defendants' Exhibit 11).

The allegations in the amended complaint are that the Defendants: breached the express and implied warranties when they failed to perform their work under the terms of the contract in a good and workmanlike manner (FAC, ¶¶ 10-11); breached the covenant of good faith and fair dealing by failing to use licensed, skilled workers, applied an architectural stamp purportedly from an licensed Arizona architect, and abandoned the project (FAC, ¶¶ 15, 18); did not hire and retain licensed, skilled workers and failed to "even visit the project" (FAC, ¶ 22); represented that the home would be built in a good and workmanlike manner, that licensed contractors would perform the work, that architectural plans would be designed, approved and stamped by a licensed Arizona architect, that these representations were false, were relied upon by the Plaintiffs and caused damages (FAC, ¶ 25); Mr. LaBlonde signed the consent decree from the Arizona Board of Technical Registration demonstrating that he engaged in the practice of engineering without Board registration and fraudulently applied the seal of another professional engineer, he advertised and submitted documents purporting to be a licensed architect, and was disciplined for this activity (FAC, ¶¶ 27-41); and the Defendants allowed several unlicensed contractors to work on the project (FAC, ¶ 43). These are the same complaints made to the Registrar of Contractors that were adjudicated in the administrative proceeding below.

The Administrative Decision meets the necessary elements to be issue preclusive: (1) issue is actually litigated in previous proceeding; (2) full and fair opportunity to litigate the issue; (3) resolution of such issue is essential to decision; (4) valid and final decision on the merits; (5) common identity of parties. These same parties participated in the administrative proceedings before the Registrar of Contractors and the allegations of this complaint were the same as the issues raised administratively.

Plaintiffs sought administrative relief under Title 32, specifically A.R.S. § 32-1154(A)(3) and (A)(22) as well as Ariz. Admin. Code § R4-9-108(A) which states, "A contractor shall perform all work in a professional and workmanlike manner." *See* Administrative Law Decision, pp. 1, 3–7, 11-12. The same parties to this case participated in the administrative proceedings. The same claims of failing to perform the construction work in a good and workmanlike manner, failing to use licensed, skilled workers, abandoning the project, and material misrepresentations were the claims litigated in the administrative proceedings. All parties had ample opportunity to

present their respective positions and a determination was made as to these claims by the administrative law judge.

Plaintiffs argue that the "2021 revisions to A.R.S. § 12-910… removed any deference previously given to administrative proceedings and made Superior Court proceedings of administrative proceedings trials *de novo*." Response at 2. Furthermore, in his Separate Statement of Facts, Plaintiffs' Counsel states in Paragraph 15 states "The results of the ROC proceedings have no bearing on this case under Arizona law. See § 12-910(E)." PSOF at ¶ 15. Presumably, the Plaintiffs are referring to A.R.S. § 12-910(D) which states:

For review of final administrative decisions of agencies that regulate a profession or occupation pursuant to title 32, title 36, chapter 4, article 6, title 36, chapter 6, article 7 or title 36, chapter 17, the trial shall be de novo if trial de novo is demanded in the notice of appeal or motion of an appellee other than the agency.

The Plaintiffs did not appeal the final administrative decision here. The Plaintiffs only get a trial de novo if they properly appeal. The statute reads: "[u]nless review is sought of an administrative decision within the time and in the manner provided in this article, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of the decision." A.R.S. § 12-902 (B). "An action to review a final administrative decision shall be commenced by filing a notice of appeal within thirty-five days from the date when a copy of the decision sought to be reviewed is served upon the party affected… ." A.R.S. § 12-904(A).

The lack of "deference to any previous determination" mentioned in subsection (F) and the "de novo trial" mentioned in subsection (D) still exist within the context of the review process encompassed within A.R.S. §12-901–§ 12-914. The plain language of the statutory section requires the Plaintiffs to file a notice of appeal of the administrative determination within thirty-five days of service of the decision. Failing to properly appeal the decision means that the Plaintiffs are estopped from relitigating them here. The Court agrees with the Defendants that this lawsuit against LaBlonde and his company are collateral attacks on this final judgment. *See* DSOF at ¶ 22. The "same defects addressed in the ROC proceedings are the same as are being asserted in this matter." *See* PSOF at ¶¶ 14, 23, 24; PSOF at ¶¶ 14, 23, 24.

This is true for the breach of contract claim, the breach of the implied covenant of good faith and fair dealing, the negligent supervision claim and the fraud claim. The underlying allegations that the Defendants improperly constructed the Plaintiffs' home are the same allegations addressed in the administrative proceeding below. If the Plaintiffs wanted a review of those findings, they needed to file a proper notice of appeal, not file a civil lawsuit. Therefore,

IT IS ORDERED granting the Defendants' motion for summary judgment on all claims against the LaBlonde Defendants in counts 1, 2, 3 and 4 of the amended complaint.

Given the aforementioned determination, the Court declines to address the other arguments raised in the pleadings.

IT IS ORDERED that the Defendants shall file a proposed judgment and any request for attorneys' fees or costs by March 4, 2024. Any objections to the foregoing may be filed by March 15, 2024.

Because of the Court's ruling above,

IT IS FURTHER ORDERED denying all pending motions including the Plaintiffs' Motion to Appoint the Honorable Timothy Thomason as Discovery Master filed on November 6, 2023; Plaintiffs' Motion to Bifurcate Defendants' Third-Party Claims under Rule 42(b) filed on November 7, 2023; the LaBlonde Defendants' Motion to Preclude Improperly Disclosed Expert Reports filed on November 27, 2023; and the Plaintiffs' Motion for Leave to Amend Complaint filed on December 15, 2023.