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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit corporation,

Plaintiff,

v.

K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; K. HOVNANIAN ARIZONA OPERATIONS, LLC, an Arizona limited liability company; K. HOVNANIAN DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation; K. HOVNANIAN COMPANIES OF ARIZONA, LLC, an Arizona limited liability company; JOHN DOES I-X AND JANE DOES I-X, WHITE CORPORATIONS I-X; BLACK PARTNERSHIPS I-X; AND GRAY LIMITED LIABILITY COMPANIES I-X,

Defendants.

K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; K. HOVNANIAN ARIZONA OPERATIONS, LLC, an Arizona limited liability company; K. HOVNANIAN DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation; K. HOVNANIAN COMPANIES OF ARIZONA, LLC, an Arizona limited liability company;

Third-Party Plaintiffs,

v.

Case No. CV2020-008714

DEFENDANTS'/ THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Assigned to the Hon. Michael Kemp)

(Oral Argument Requested)

ARTISTIC STAIRS, LTD., an Arizona limited liability company; CHAS ROBERTS AIR CONDITIONING, INC., an Arizona corporation; DESERT VISTA, INC. an Arizona corporation; HOME BUILDERS SITE SERVICES OF ARIZONA, LLC an Arizona limited liability company; IDG INNOVATIVE DEVELOPMENT, GROUP, LLC, an Arizona limited liability company, dba DESERT SERVICES SWPPP SOLUTIONS; INTERIOR LOGIC HOLDINGS, LLC, a Delaware limited liability company; LEBLANC BUILDING CO., INC., an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an Arizona limited liability company, DBA LIBERTY ARIZONA; PAUL JOHNSON DRYWALL, INC., an Arizona corporation; RENCO LLC, an Arizona limited liability company, dba RENCO ROOFING; R/S SERVICE & SUPPLY, INC., an Arizona corporation; SARGON MASONRY CONSTRUCTION, LLC, an Arizona limited liability company; AND DOES 1-50,

Third-Party Defendants.

COMES NOW Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC, K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc., and K. Hovnanian Companies of Arizona, LLC (collectively, "Defendants"), who hereby move for dismissal pursuant to Ariz. R. Civ. P. 56, for reasons more fully set forth in the accompanying Memorandum of Points and Authorities and accompanying Statement of Facts (DSOF). Defendants seek their attorney fees and court costs pursuant to A.R.S. §12-341.01(A) and 12-341 and 12-341.01 (C) and 12-349.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff is an Arizona nonprofit corporation that acts as the property owner's association (the "Association" or "HOA") for the common areas of the property known as The Gallery in

Scottsdale, Arizona. (DSOF at ¶ 1), a townhouse community alleged to have been built by K Hovnanian Defendants. Plaintiff admits it is governed by the recorded Declaration of Covenants, Conditions, Restrictions and Easements (CC&R's) for Gallery. (DSOF at ¶ 2). However, those CC&R's require the Association, after the turnover from the Declarant occurred to the HOA, and not any of these Defendants, to repair and maintain the common elements on the Association Property and Common Areas thereafter, as defined therein, as well as the common exterior walls, stucco, façade, roofs, or other surfaces of the Dwelling Units. (DSOF at ¶ 3). There is no known express or implied warranty running to the HOA after acceptance of the Declarant rights to the Property conveyed. That acceptance occurred after inspection and no limitation was placed on the conveyance by the HOA at that time. (DSOF at ¶ 4)

In the "Quit Claim Deed" dated October 6, 2016 that was publicly recorded, only Defendant K Hovnanian at Gallery, LLC, ("KHov Gallery") who had developed the project and was the Declarant under the CC&R's, conveyed the common areas to the Association. (DSOF at ¶ 5). There is no privity of contract anywhere alleged in the Complaint as to any contract the Association has with any of the other Defendants, or even with KHov Gallery either, or with the actual builder, K Hovnanian Arizona Operations, LLC ("KHov Operations"). (DSOF at ¶ 6). Moreover, there is no stated basis for why K Hovnanian Developments of Arizona, Inc., alleged to be a "member" of KHov Gallery or KHov Operations, has any possible liability to Plaintiff. (DSOF at ¶ 7).

Further, Defendant K Hovnanian Companies of Arizona, LLC is simply alleged to be somehow "involved in the development, design, construction, and/or sale of The Gallery and the units in the Complaint and nothing more. (DSOF at ¶ 8). How this relates to any liability it could have here, other than any other innocent bystander, is unknown. The Complaint, as to the other entities is woefully deficient even for notice purposes, and states no claim at all, even under Rule 12 (b) (6) Ariz. R. Civ. Proc. let alone under a summary judgment standard.[1] (DSOF at ¶ 9)

[1] The Complaint originally stated a claim for negligence (Count One) for failure of "Defendants" to design and construct the common areas and elements of The Gallery in a non-negligent and workmanlike manner, which has since been voluntarily removed upon K Hovnanian showing it is not a viable cause of action in Arizona.

This Motion for Summary Judgment addresses the remaining breach of contract and breach of implied warranty claims that have no basis in law or fact.

II. LAW AND ARGUMENT

Plaintiff's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims fail as they are both contractually based claims, that have no contract, to be simple. Plaintiff is not in privity of contract with any of the Defendants, nor is it a third-party beneficiary even were that alleged, which it is not. Plaintiff's Breach of Implied Warranty of Workmanship and Habitability similarly fails because only homeowners themselves, or subsequent purchasers from others without notice can bring any contractually based claims including implied warranty claims. There is no allegation of any warranty claim, or compliance with A.R.S. 12-1361 et seq. by any owner, nor is any owner a Plaintiff concerning construction defects in their units. The claim here is solely made by an HOA, for construction defects in common areas (DSOF at ¶ 10), given acceptance of the common areas after inspection in the patent condition they were in, or the opportunity to fully inspect, without any express or implied warranty given to the HOA.

A. Plaintiff's Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing claims must fail because there is no contract with Defendants.

Plaintiff's Count Two, Breach of Implied Covenant of Good Faith and Fair Dealing, and Count Four, Breach of Contract Claim, must be adjudicated in Defendants' favor, because these are contract claims (DSOF at ¶ 11), and the Plaintiff is not in privity of contract with any of the Defendants, and has no contract with them at all. The "duty of good faith and fair dealing arises by virtue of that contractual relationship," *See, Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *see also, Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466, 967 P.2d 607 (App. 1998) ("[I]mplied covenants of good faith and fair dealing presume the existence of a valid contract"), which cannot exist here either, without such a contractual relationship. The purported "contract" that Plaintiff mistakenly bases its claims on can only be the Declaration of Covenants, Conditions, & Restrictions for Gallery. (DSOF at ¶ 12). It is well established under Arizona law that CC&Rs only "constitute a contract between the property owners as a whole and the individual lot owners." *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 31, 57 P.3d 1168, 1177

(App. 2011); *see also, College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 241 P.3d 897 (App. 2010) (holding that "restrictive covenants are a contract between the subdivision's property owners as a whole and individual lot owners."). That means these cases clearly demonstrate that the CC&Rs create a contract only between the HOA and its homeowners, and has nothing to do with the Declarant having any contractual duty to the HOA except as may otherwise be assumed expressly therein. There is no assumption of any such warranty duty to the HOA therein by the Declarant, or under established Arizona law either.

Because it is well established that breach of contract and breach of implied covenant of good faith and fair dealing claims must be based on a valid contract between the parties, and the Plaintiff is not in privity of contract with any of the Defendants, and assumed no such obligations to the HOA, the Plaintiff's breach of contract and breach of implied covenant of good faith and fair dealing claims must be adjudicated by summary judgment. *See e.g., Thomas v. Montelucia Villas*, LLC, 232 Ariz. 92, 302 P.3d 617 (2013) ("[t]o bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract…"); *Norman v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 196, 33 P.3d 530 (App. 2001) ("[t]here is no breach of the implied covenant of good faith in a contract if there is no contract.").

Furthermore, there is no breach of contract or breach of the duty of good faith and fair dealing where there is no loss of the benefit of the bargain expected by the Plaintiff. There is no such "bargain" here at all with the HOA, and no consideration was even alleged with respect to the purported conclusory "contract" all claims are based on here. There could be no loss of expectation of any benefit of the bargain where there is no bargain at all. Here, the Declaration, which is not a contract between the Plaintiff and Defendants as discussed above, contains absolutely no duty to the HOA that is involved here, let alone assumed or breached, and the Declaration is not even a "contract" insofar as the Declarant is concerned at all vis a vis the HOA as to any warranty assumed. Other than to issue the Quit Claim Deed, if the HOA accepts the common area as is, there is no other bargain involved. We understand the principle that a breach of an express covenant in a contract is not a necessary prerequisite to an action for bad faith, and understand also that a Plaintiff may simultaneously bring an action both for breach of contract and

for bad faith, and need not prevail on the contract claim in order to prevail on the bad faith claim, but that is **only** provided that the Plaintiff proves a contract exists to base the bad faith claim on. *Id*. Neither a contract, and thus, a claim for breach of contract, or a bad faith claim based on one, exists here. The grant of the common area by the Declarant was not a contract at all, and thus not able to be "manipulated" or carried out in bad faith, since, again, there was nothing required of the Declarant at all other than the grant itself, which is not at issue here, nor was there consideration for any contract claim, and no representations or warranties made that could be carried out in bad faith.

i. Plaintiff fails to even allege that Defendants K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc, and K. Hovnanian Companies of Arizona, are in privity of the alleged contract.

Furthermore, these claims must be dismissed against Defendants K. Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc, and K. Hovnanian Companies of Arizona, as Plaintiff does not even allege these Defendants were in privity of any contract whatsoever. (DSOF at ¶ 13) Plaintiff itself clearly alleged, albeit wrongfully, that "The Association and defendant K. Hovnanian at Gallery, LLC entered into a contract," with no mention of any other entity named in the underlying Complaint. *See* (DSOF at ¶ 14).

As such, Plaintiff unnecessarily brought suit against numerous entities that could not possibly be responsible for these alleged contracts claims, as Plaintiff itself acknowledges these Defendants were not involved in the alleged contract in any way. Therefore, the claims against these entities must be dismissed as such for this reason alone. *See e.g.*, *Thomas v. Montelucia Villas*, LLC, 232 Ariz. 92, 302 P.3d 617 (2013) ("to bring an action for the breach of the contract, the plaintiff has the burden of proving the existence of the contract…"); *Norman v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 196, 33 P.3d 530 (App. 2001) ("there is no breach of the implied covenant of good faith in a contract if there is no contract.").

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B. Plaintiff's Breach of Implied Warranty of Workmanship and Habitability claim also fails because Arizona has never directly found such an implied contract.

No Arizona case has directly dealt with this issue raised herein. While it may simply be presumed, there is no actual basis for such a finding in a case like this. The Implied Warranty at Law for construction has been established to protect innocent purchasers from fly by night developers, a situation not presented here. Here, we are dealing with a sophisticated group of owners and managers dealing in an Association who were under no compulsion to accept any of the common area, particularly without limitation if they chose not to accept this gift. No consideration was paid. No purchase of any dwelling. And, just as our Supreme Court en banc has affirmed that a subsequent purchaser may be deprived of the implied warranty if they have the ability to investigate and thus have knowledge or notice of a defect, and can thus negotiate the purchase based on it (See, e.g., *Richards v. Powercraft*, 139 Ariz. 242 (1984)) here, the Plaintiff could be said to have clearly done the same, and thus has no basis to claim an implied warranty at all either. In Plaintiff's Breach of Implied Warranty of Workmanship and Habitability Claim, Plaintiff conclusively alleges that "Defendants" impliedly warranted that "they" would perform their work in a "workmanlike manner." (DSOF at ¶ 15). Who exactly "they" is, of course, never explained. No such implied warranty exists as to any of the Defendants other than arguably the Declarant here for reasons already stated, and there is no known appellate case in Arizona squarely addressing the issue presented, of whether such a warranty runs as a matter of law. In the absence of such specific authority, as stated, there is no basis to find one. Such a warranty has only been found as to homeowner claims against builder/vendors in Arizona. There is no notice or specific pleading as to how all Defendants somehow made any such implied promise, or why they would ever do so, or be found to have done so as a matter of law. Assuming, solely for the sake of argument, that the contractor was KHov Operations, as is alleged in ¶ 10 of the Complaint, it is entirely unclear what contract this entity had with the Plaintiff, if any, or how it impliedly warranted anything to Plaintiff, as opposed to the individual homeowners. As for any other Defendant, the Complaint and disclosures are entirely devoid of any basis at all to simply lump all these Defendants into the case, or to find a warranty existing.

The implied warranty of habitability and fitness has been recognized in Arizona, but only as to specified circumstances, as to homeowners specifically. *See, Richards v. Powercraft Homes, Inc. supra*. The "purpose of implied warranty of workmanship and habitability is to protect innocent purchasers and hold home builders accountable for their work." There is no evidence presented here of any work by the Declarant at all, nor any agreement to perform work for the HOA at all. In fact, to the extent any work was performed as to the common areas, it would have been for the benefit of the Declarant, and not any homeowner or HOA at the time. No case has expressly addressed, discussed or distinguished the issue, as directly presented here in Arizona. Plaintiff is not alleged to be a homeowner, but rather the recipient of a grant of property by the Declarant, and in fact, with no warranties provided. Any construction contract for the common area elements of the subdivision is not shown to be for the HOA or with it. So, beyond the conclusory allegations in the Complaint as to implied warranties, none is known to exist. Again, nothing was purchased by the HOA, and certainly nothing known to be purchased from the Declarant. And, more importantly, such an implied warranty would not extend to the HOA, that was not in privity with any of the Defendants, and where the HOA did not purchase from anyone that was in privity with the Builder, let alone the Declarant, as is the case where an implied warranty at law has been found. Rather, and significantly, any construction would have been expressly performed for the Declarant, KHov Gallery, and not for the HOA. The HOA could not make express, intended third-party beneficiary claims and has not done so, nor has it cited to anything establishing such a basis for a claim in the Declaration anywhere so far.

Typically, Declarations and Declarants do not grant warranties on turnover to the HOA upon the pre-determined time when they exit and turn over Common Areas to an HOA, and nothing is claimed or cited to in the Complaint to the contrary that was intended here. That is why they simply "quit claim" the property with no warranties, as the Plaintiff recognizes here. The HOA is under no compulsion to accept, and certainly not unconditionally as here. Thus, even were the law of implied warranty even assumed to apply here, there is nothing alleged in the Quit Claim Deed which would establish any liability under the Declaration or any expectation of any standard

of construction for Plaintiff's benefit. Plaintiff, frankly, had a duty to inspect the premises when it accepted the quit claim deed, or it could have rejected it. It did neither apparently.

The law of implied warranty has only been extended, as said, to original homeowners and subsequent owners under specific conditions, as a matter of public policy, to deter shoddy workmanship of fly by night builders serving the public, and has not been extended beyond that limited sphere in Arizona to any commercial type work for this reason. *See, e.g., Yanni v. Tucker Plumbing, Inc.*, 233 Ariz. 364, 312 P.3d 1130 (App. 2013) (holding "that lack of contractual privity precluded homeowners from asserting claims against subcontractors for breach of warranty of workmanship and habitability."); *Richards v. Powercraft Homes, Inc*., 139 Ariz. 264, 266–67, 678 P.2d 449, 451–52 (Ct. App. 1983), *approved in part, vacated in part, on other grounds*, 139 Ariz. 242, 678 P.2d 427 (1984). The same reasoning should apply here, where this is not a typical consumer transaction. Subsequent homeowners may bring claims for implied warranties, as stated above, with the limitation excepting those who have notice of, or reason to know of, alleged defects when taking title after inspection.

Even if such an implied warranty did exist here, which we contend it does not, Plaintiff would be analogous to a subsequent owner with notice, since the original "owner" would be KHov Gallery as Declarant, and the contractor would be KHov Operations. Plaintiff claims that KHov Gallery DID have notice of the shoddy workmanship alleged when it took title. *See e.g., Maycock v. Asilomar Dev., Inc*., 207 Ariz. 495, 88 P.3d 565 (App. 2004) ("prior homeowner's knowledge of a construction defect was imputed to subsequent owners for purposes of the statute of repose governing claims against builders."). This reasoning should apply here too. Thus, it has long been the law of this State that a subsequent owner having the ability to fully investigate, *i.e*., with notice, does not have the benefit of claiming the implied warranty extending to an original purchaser, even where one exists. *See, e.g., Richards v. Powercraft Homes, supra*.

III. CONCLUSION

For the foregoing reasons, summary judgment is appropriate as there is no contract, and thus no breach either, of any provision of any contract shown, and there can thus also be no breach of any implied warranty attendant to any contract or breach of any duty of good faith and fair

dealing shown. Defendants request dismissal of any claims and an award of their reasonable attorneys' fees and costs under A.R.S. §12-341.01(A), 12-341 for Defendants having to disprove the existence of any contract.

RESPECTFULLY SUBMITTED this 19th day of February, 2021.

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