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Liberty Constructors

8 Superior Court of Arizona

9 Maricopa County

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11 Gallery Community Association, an Arizona
12 non-profit corporation,

13 Plaintiff,

14 vs.

15 K. Hovnanian at Gallery, LLC, an Arizona
16 limited liability company; et al.

17 Defendants.

18
19 And related third-party claims.
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No. CV2020-008714

**Third-Party Defendant Liberty
Constructors' Motion for Summary
Judgment**

(Honorable Katherine Cooper)

(Oral Argument Requested)

21 Third-Party Defendant Liberty Constructors, LLC (“Liberty”) files this Motion for
22 Summary Judgment against Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC and
23 K. Hovnanian Arizona Operations, LLC (collectively, “KHov”). This Motion is supported by
24 Liberty’s Separate Statement of Facts in Support of Its Motion for Summary Judgment (“SSOF”).
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1 **I. Introduction**

2 This matter involves construction defect allegations involving a Townhome complex in
3 Scottsdale, Arizona (the “Project”). The Plaintiff property owners’ association of the Project,
4 Gallery Community Association, initiated construction defect claims against KHov, the
5 developer and general contractor of the Project. In response, KHov brought construction defect
6 claims against the various subcontractors who worked on the Project as an attempt to shift loss
7 to the subcontractors, including Liberty Constructors, which installed the concrete slabs,
8 concrete foundations, and some of the concrete flatwork at the Project.
9

10 Expert testimony is typically necessary to prove a construction defect claim because
11 constructing buildings is inherently complex. KHov’s disclosed expert reports lack any
12 opinions linking the subject construction defects to any respective subcontractor, let alone
13 encompassing opinions on who or what caused each defect or whether its subcontractors
14 performed their work negligently. Without these underlying opinions, KHov lacks the
15 necessary evidence that could allow a reasonable juror to find for any of its claims. Therefore,
16 Liberty is entitled to summary judgment on all causes of action asserted against it.
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19 **II. Facts**

20 Plaintiff Gallery Community Association (“Plaintiff”) is the property owners’
21 association for The Gallery Complex located at 3124 North 71st Street, Scottsdale, Arizona
22 (the “Project”). (SSOF ¶ 1). Defendant/Third Party Plaintiff K. Hovnanian Arizona
23 Operations, LLC acted as the general contractor for the construction of the Project and K.
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1 Hovnanian at Gallery, LLC (collectively, “KHov”) owned the Project, developed the project,
2 and conveyed the Project to Plaintiff through a quit claim deed. (SSOF ¶ 2).

3 On August 13, 2013, Liberty signed a Master Subcontractor Agreement with K.
4 Hovnanian Great Western Building Company, LLC and K. Hovnanian Building Company,
5 LLC to provide labor and materials relating to the concrete foundations and certain flatwork.
6 (SSOF ¶ 3). On August 25, 2016, Liberty signed a Work Agreement with K. Hovnanian Great
7 Western Building Company, LLC, to perform concrete foundation and flatwork at the Project.
8 (SSOF ¶ 4).

9
10 On July 24, 2020 Plaintiff filed its Complaint against KHov alleging that the Project
11 was experiencing construction defects and sought damages repair the defects. (SSOF ¶ 5).
12 Plaintiff also filed a Certificate of Expert Testimony stating that “expert testimony will be
13 required to prove the standard of care and establish liability against defendants.” (SSOF ¶ 6).
14 On October 6, 2020, KHov filed its Third-Party Complaint against Liberty and other various
15 subcontractors who were associated with the Project alleging multiple causes of action: (1)
16 Breach of Express Warranty; (2) Breach of Implied Warranty; (3) Breach of Contract; (4)
17 Negligence; (5) Common Law Implied Indemnity; (6) Contractual Indemnity; (7) Declaratory
18 Relief – Re: Duty to Defend; (8) Declaratory Relief – Re: Duty to Indemnify; (9) Declaratory
19 Relief – Re: Contractual Duties; and (10) Contribution. (SSOF ¶ 7). On March 18, 2021,
20 Liberty filed its Answer to KHov’s Third-Party Complaint generally denying liability. (SSOF
21 ¶ 8). On March 18, 2021, Liberty filed its Certificate of Expert Testimony pursuant to A.R.S. §
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1 12-2602 certifying that KHov required expert testimony to prove its claims against Liberty.
2 (SSOF ¶ 9).

3 The Court issued a Scheduling Order on May 25, 2021, pursuant to which KHov's
4 deadline for liability expert reports and opinions was July 23, 2021 and their cost of repair
5 expert reports and opinions were due August 23, 2021. (SSOF ¶ 10). Two (2) weeks after
6 KHov's July 23, 2021 expert report deadline, Plaintiff's counsel advised that Plaintiff and
7 KHov had informally agreed to extend KHov's expert witness report deadline until August 11,
8 2021. (SSOF ¶ 11).

9
10 On August 11, 2021, KHov disclosed its liability expert reports including a
11 Geotechnical Engineering Report by Peterson Geotechnical Group ("PGG") and a Defense
12 Response Report by Bert L. Howe & Associates, Inc. ("BHA"). (SSOF ¶ 12). The PGG report
13 did not include opinions or conclusions as to the cause of the alleged defects or the identity of
14 the responsible party for the defects. (SSOF ¶ 13). The BHA report did not include opinions or
15 conclusions as to the cause of the alleged defects or the identity of the responsible party for the
16 defects. (SSOF ¶ 14). On August 23, 2021, KHov disclosed a BHA Preliminary Defense Costs
17 of Defense Scope Estimate report, which did not include opinions or conclusions as to the
18 cause of the alleged defects or the identity of the responsible party for the defects. (SSOF ¶
19 15).

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22 On January 31, 2022, Liberty timely disclosed the expert report of Shelton Consulting
23 Group on January 31, 2022. (SSOF ¶ 16). The report specifically states that Liberty
24 Constructors should not be allocated any responsibility for any of the alleged defects or for
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1 any associated cost of repair. (SSOF ¶ 17). KHov did not disclose a rebuttal expert report in
2 response to the Shelton Consulting Group report. (SSOF ¶ 18). On July 29, 2022, this Court
3 issued an Order granting the Motion to Preclude and excluded KHov’s new reports and
4 opinions from evidence and also found that “[n]one of Gallery’s expert disclosures or KHov’s
5 Original Reports allocate percentages of fault to the subcontractors.” (See SSOF ¶ 19)
6

7 **III. Argument**

8 KHov alleges construction defect claims against Liberty. However, KHov lacks the
9 necessary expert evidence to establish that the alleged defects were caused by the deficient or
10 negligent work of Liberty. Claims alleging that a licensed contractor’s work is defective must
11 be established through expert testimony. *See* A.R.S. § 12-2602. “Building homes is a
12 complicated activity. The average lay person has neither training nor experience in the
13 construction industry and ordinarily cannot determine whether a particular building has been
14 built with the requisite skill and in accordance with the standards prescribed by law or
15 prevailing in the industry.” *Woodward v. Chirco Const. Co., Inc.*, 141 Ariz. 520, 521-22 (App.
16 1984) (quoting *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal.3d 689 106 Cal. Rptr.
17 1, 505 P.2d 193 (1973)).
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19

20 KHov did not disclose any expert opinions that prove the elements of its claims as
21 pointed out by the Court. KHov’s reports by BHA and PGG offer no opinions on what caused
22 the defects, whether Liberty performed its work deficiently or negligently, or the defects for
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1 which Liberty may be liable. Without timely disclosed opinions on causation, KHov has not
2 proved any of its claims against Liberty.

3 The design and construction of the Project townhomes is a complex activity. Without
4 expert assistance, a layperson juror is unable to determine what and/or who caused the alleged
5 defects. For example, a defect could be design-related or it could have been caused by
6 someone or something unrelated to the subcontractor's scope of work. The defects may have
7 been caused by owner alteration, neglect, or lack of maintenance.
8

9 To prove liability, KHov must prove that Liberty's deficient work caused those defects.
10 However, KHov has not done so. Therefore, without timely disclosed expert opinions that
11 Liberty's work was deficient and caused or contributed to any defects, KHov cannot meet its
12 burden for its causes of action.
13

14 **A. Because KHov cannot establish causation, KHov's express indemnity cause**
15 **of action fails.**

16 Without timely disclosed expert opinion testimony that Liberty's work caused the
17 alleged defects, KHov cannot show it is entitled to indemnification. The Master Subcontract
18 Agreement signed by KHov and Liberty includes an express indemnification provision in
19 Paragraph 15, specifically 15(a) which provides:
20

21 With the exception that this Paragraph 15 shall in no event be construed to
22 require indemnification by subcontractor to a great extent than permitted by the
23 Laws and public policy of the States ... Subcontractor agrees to indemnify,
24 defend (with legal counsel selected by Contractor in its sole and absolute
25 discretion), and hold harmless Contractor ... from and against any and all claims,
26 demands, causes of action, liabilities, judgments, settlements, losses ... of every
kind that is and nature whatsoever (collectively, the "Claim" or "Claims") that in
any way arise out of or relate to this Subcontract, any Work Agreement, any

1 Work hereunder or thereunder or any other work performed or materials supplied
2 by or on behalf of Subcontractor in, at, about or on any Project and arise out of or
3 relate to, in whole or in part, the presence of, or activities conducted, in, at, about
4 or on any Project, including, without limitation, any act or omission to act, active
5 or passive negligence, or willful misconduct, by or for Subcontractor, anyone
6 directly or indirectly employed, hired or used by Subcontractor or anyone for
7 whose acts Subcontractor may be liable.

8 Further Paragraph 15(a) provides:

9 However, notwithstanding any contrary provision, nothing in this Paragraph 15,
10 any other Paragraph of this Subcontract or any Exhibit hereto shall require
11 Subcontractor to indemnify, hold harmless, or defend any Indemnified Party
12 from or against liability or loss or damage resulting from the sole negligence of
13 the Indemnified Party, or the Indemnified Party's agents, employees or
14 indemnitees.

15 Regardless of the nature of the indemnity provision at issue, Arizona's anti-indemnity
16 statute voids any provision of an express indemnification clause that obligates a subcontractor
17 to indemnify a general contractor for more than its direct proportion of fault. See A.R.S. § 32-
18 1159.01(A). A.R.S. § 32-1159.01(A) states:

19 Notwithstanding § 32-1159, a covenant, clause or understanding in, collateral to
20 or affecting a construction contract or architect-engineer professional service
21 contract involving a dwelling that purports to insure, to indemnify or to hold
22 harmless the promisee from or against liability for loss or damage is against the
23 public policy of this state and is void only to the extent that it purports to insure,
24 to indemnify or to hold harmless the promisee from or against liability for loss or
25 damage resulting from the negligence of the promisee or the promisee's
26 indemnitees, employees, subcontractors, consultants, or agents other than the
promisor. *Id.*

27 In short, the express indemnification provision in the contract can, at most, only require
28 Liberty to indemnify, hold harmless, and/or defend KHov for defects or losses that were
29 caused by the actions or omissions at the Project. *See* A.R.S. § 32-1159.01. As such, Liberty

1 can only be obligated to indemnify KHov for the proportion of losses or damages stemming
2 from the defects that were directly caused by K Hov. However, KHov’s disclosed expert
3 opinions do not address causation or allege that Liberty did anything improper. Without such
4 opinions, KHov cannot establish any entitlement to indemnification. For the same reasons,
5 KHov cannot establish any entitlement to a defense from Liberty.
6

7 **B. Because an express indemnity provision exists as between KHov and
8 Liberty, KHov’s common law indemnity cause of action fails.**

9 “When there is an express indemnity contract, the extent of the duty to indemnify must
10 be determined from the contract, and not by reliance on implied indemnity principles.” *INA*
11 *Ins. Co. of North America v. Valley Forge Ins. Co.*, 150 Ariz. 248, 252, 722 P.2d 975, 979
12 (App. 1986). KHov is not entitled to common law implied indemnification from Liberty due to
13 the existence of an express indemnification provision.
14

15 **C. K Hov’s contract claims fail because there is no timely disclosed
16 expert opinion that Liberty is responsible for any defects or damages.**

17 A viable breach of contract claim requires the showing of: (1) the existence of a
18 contract; (2) breach of the duties therein; (3) and resulting damages. *Graham v. Asbury*, 112
19 Ariz. 184, 540 P.2d 656 (1975). As noted, KHov’s disclosed expert opinions do not address
20 causation or any duties allegedly breach by Liberty. Without such opinions, KHov cannot
21 establish that any entitlement to recovery under its contract claims.
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1 **D. KHov’s warranty claims fail because there is no timely disclosed expert**
2 **opinion that Liberty breached any warranties or is otherwise responsible**
3 **for the alleged defects.**

4 The implied warranty of workmanship and habitability “protects the homebuyer and
5 successive purchasers from financial responsibility for latent defects in the home that the
6 buyer could not have reasonably discovered at the time of purchase and holds the builder
7 accountable for the home’s faulty construction.” *Richards v. Powercraft Homes, Inc.*, 139
8 Ariz. 242, 245 (1984). The express warranty language in the Master Subcontract states, in part,
9 that:

10 Subcontractor warrants and represents to Contractor that the workmanship of the
11 Work, all materials and equipment furnished for the Work, and all other aspects
12 regarding the Work to be performed under this Subcontract and any Work
13 Agreement shall be in conformance with all Laws, this Subcontract, the
14 applicable Work Agreement and the other Contract Documents, be of the finest
15 quality, and be free from faults and defects of design, material and workmanship
16 . . .

17 KHov’s disclosed expert opinions do not state that Liberty is responsible for any
18 defects, caused any damages, or breached any warranties. Without such opinions, KHov
19 cannot establish that any entitlement to recovery under its warranty claims.

20 **E. The economic loss doctrine bars KHov’s negligence claim.**

21 Under the economic loss doctrine, when construction defect claims encompass the
22 construction of a building/home that is the subject of a contract, the contracting parties are
23 limited to the contractual remedies for purely economic losses. *Flagstaff Affordable Hous. Ltd.*
24 *P’ship v. Design All., Inc.*, 223 Ariz. 320, 326, 223 P.3d 664, 670 (2010); *See also Salt River*
25 *Project Agr. Imp. And Power Dist. V. Westinghouse Elec. Corp.*, 143 Ariz. 368, 379, 694 P.2d
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1 198, 209 (1984) A party is prohibited from bringing a negligence claim in connection with the
2 development or construction of a structure unless there is personal injury or damage to
3 personal property. *Colberg v. Rellinger*, 160 Ariz. 42, 46-47, 770 P.2d 346, 350-51 (Ct. App.
4 1988).

5 KHov has made no allegations involving personal injury or damage to personal
6 property. Therefore, KHov's negligence claim is precluded by the economic loss doctrine.
7

8 **F. KHov's contribution action fails because there is no timely disclosed**
9 **expert opinion that Liberty is responsible for any defects or damages and**
10 **because it is barred by the economic loss doctrine.**

11 Contribution causes of action derive from tort law and are only available where there is
12 a viable claim against a tortfeasor for causing some amount of common liability. A.R.S. § 12-
13 2501(B). As set forth in the preceding section, the economic loss doctrine bars KHov's
14 negligence cause of action, which also serves to render KHov's contribution cause of action
15 moot.
16

17 Additionally, KHov's disclosed expert opinions do not state that Liberty is responsible
18 for any defects, caused any damages, or breached any duties. Without such opinions, KHov
19 cannot establish that any entitlement to recovery under its contribution cause of action.
20

21 **Conclusion**

22 For all of the foregoing reasons, Liberty requests that the Court grant summary
23 judgment as to all of KHov's causes of action against Liberty.
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Dated on September 30, 2022.

Shorall McGoldrick Zerlaut

By /s/ Jason Boblick

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Liberty Constructors

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Certificate of Service

The foregoing filed with AZTurboCourt and copies served upon all via email on September 30, 2022, to:

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