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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
COPRPORTATIONS 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

NO. CV2020-008714

**THIRD-PARTY DEFENDANTS DESERT
VISTA, INC. AND RENCO, LLC DBA
RENCO ROOFING'S JOINT MOTION FOR
SUMMARY JUDGMENT**

*(Assigned to the Honorable Katherine
Cooper)*

(Oral Argument Requested)

1 OPERATIONS, LLC, an Arizona limited
2 liability company; K. HOVNANIAN
3 DEVELOPMENTS OF ARIZONA, INC.,
4 an Arizona corporation; K.
5 HOVNANIAN COMPANIES OF
6 ARIZONA, LLC, an Arizona limited
7 liability company;

8 Third-Party Plaintiffs

9 v.

10 CHAS ROBERTS AIR
11 CONDITIONING, INC., an Arizona
12 corporation; DESERT VISTA, INC., an
13 Arizona corporation; GOTHIC
14 LANDSCAPING, INC., a California
15 corporation; HOME BUILDERS SITE
16 SERVICES OF ARIZONA, LLC an
17 Arizona limited liability company;
18 LEBLANC BUILDING CO., INC., an
19 Arizona corporation; LIBERTY
20 CONSTRUCTORS, LLC, an Arizona
21 limited liability company DBA LIBERTY
22 ARIZONA; RENCO LLC, an Arizona
23 limited liability company; dba RENCO
24 ROOFING; R/S SERVICE & SUPPLY,
25 INC., an Arizona corporation; SARGON
MASONRY CONSTRUCTION, LLC, an
Arizona limited liability company; and
DOES 1-50.

Third-Party Defendants.

Third-Party Defendants Desert Vista, Inc. (“Desert Vista”) and Renco, LLC dba Renco Roofing (“Renco”) file their Joint Motion for Summary Judgment against Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC (collectively, “KHov”).

I. INTRODUCTION

This matter involves construction defect allegations involving a Townhome complex

1 in Scottsdale, Arizona (the “Project”). The Plaintiff property owners’ association of the
2 Project, Gallery Community Association, initiated construction defect claims against the
3 developer and general contractor of the Project, K. Hovnanian (“KHov”). In response, KHov
4 brought construction defect claims against the various subcontractors who worked on the
5 Project as an attempt to shift loss to the subcontractors, including Renco and Desert Vista.
6 Renco provided work related to the foam roofs and walking decks at the Project. Desert Vista
7 provided work related to the stucco on the buildings.

8 It is widely accepted that expert testimony is necessary to prove a construction defect
9 claim, because constructing buildings is inherently complex. A layperson lacks sufficient
10 knowledge to determine if a construction defect exists, the cause of the defect, and the party
11 responsible. KHov’s timely expert report and opinions lack any opinions linking the subject
12 construction defects to any respective subcontractor, let alone encompassing opinions on who
13 or what caused each defect or whether its subcontractors performed their work negligently.

14 For KHov to prove its claims against Desert Vista and Renco, it needed expert
15 testimony that Desert Vista and Renco failed to perform their work in a good workmanlike
16 manner free from defect, that that caused the respective construction defects. However, KHov
17 has no such testimony. KHov recognized the flaws in its case against the subcontractors and
18 attempted to salvage their claims by disclosing new expert opinions six (6) months after their
19 report deadline and after the subcontractors disclosed their expert reports. A component of the
20 new expert testimony included opinions regarding the proportion of fault each subcontractor
21 bears for each respective defect alleged by Plaintiff.

22 However, after objections and motions to exclude the untimely new expert opinions, on
23 July 29, 2022, this Court excluded KHov’s new reports and opinions from being entered into
24 evidence. This Court stated, “[t]he **Third Party Complaint alleges that the subcontractors,**
25 **including DV and Renco, breach contracts, were negligent in their work, and fell below**

1 **the standard of care for their trade. KHov must prove these allegations with expert**
2 **testimony.”**

3 However, even if the new opinions were admissible, it is not enough. There were no
4 opinions that as to the specific cause of each defect, that Desert Vista and/or Renco’s work
5 was poor and defective, or that they fell below the standard of care. Without these underlying
6 opinions, it is insufficient for an expert to allocate a percentage of fault for the defects to
7 subcontractors.

8 KHov’s experts were not able to revive the case against the subcontractors during
9 deposition, as any testimony regarding the causation of the defects and attributing fault to
10 respective subcontractors would have constituted impermissible new expert opinions.

11 Discovery and disclosure have concluded. As the case sits at the close of evidence,
12 KHov categorically lacks the necessary evidence that could allow a reasonable juror to find
13 for any of its claims. Therefore, Renco is entitled to summary judgment on all causes of action
14 asserted against it.

15 **II. STATEMENT OF FACTS**

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

22 On June 24, 2016, a representative of Renco signed a Master Subcontractor Agreement
23 with KHov entities, K. Hovnanian Great Western Building Company, LLC and K. Hovnanian
24 Building Company, LLC to provide labor and materials related to the foam roofs and walk
25 decks at the Project. (SSOF ¶ 3). On or about March 3, 2010, Desert Vista entered into a

1 Master Subcontractor Agreement with K. Hovnanian Great Western Building Company, LLC,
2 and on July 21, 2016 Desert Vista entered into a Work Agreement for the Project. Desert Vista
3 provided labor and materials related to the stucco at the Project. **(SSOF ¶ 4).**

4 On or around July 3, 2019, Plaintiff issued a notice of construction defects at the Project
5 under A.R.S. § 12-1361, et. seq. **(SSOF ¶ 5).** On July 27, 2020 Plaintiff filed its Complaint
6 against KHov alleging that the Project was experiencing construction defects and sought
7 damages repair the defects. **(SSOF ¶ 6).** Plaintiff also filed a Certificate of Expert Testimony
8 pursuant to A.R.S. § 12-2602 that stated, “expert testimony will be required to prove the
9 standard of care and establish liability against defendants.” **(SSOF ¶ 7).**

10 On October 6, 2020, KHov filed its Third-Party Complaint against the various
11 subcontractors who performed work on the Project, including Desert Vista and Renco. **(SSOF**
12 **¶ 8).** The Third-Party Complaint sets forth multiple causes of action: (1) Breach of Express
13 Warranty; (2) Breach of Implied Warranty; (3) Breach of Contract; (4) Negligence; (5)
14 Common Law Implied Indemnity; (6) Contractual Indemnity; (7) Declaratory Relief – Re:
15 Duty to Defend; (8) Declaratory Relief – Re: Duty to Indemnify; (9) Declaratory Relief – Re:
16 Contractual Duties; and (10) Contribution. **(SSOF ¶ 8).** On April 5, 2021, Renco filed its
17 Answer to KHov’s Third-Party Complaint generally denying the allegations. **(SSOF ¶ 9).** On
18 October 25, 2021, Desert Vista filed its Answer to KHov’s Third-Party Complaint generally
19 denying the allegations. **(SSOF ¶ 10).** Both Desert Vista and Renco filed Certificates of Expert
20 Testimony pursuant to A.R.S. § 12-2602 asserting that KHov’s claims require expert
21 testimony. **(SSOF ¶ 11).**

22 The Court issued a Scheduling Order on May 25, 2021. **(SSOF ¶ 12).** Under the
23 Scheduling Order KHov’s liability expert reports and opinions were due July 23, 2021 and
24 their cost of repair expert reports and opinions were due on August 23, 2021. **(SSOF ¶ 12).**
25 Two (2) weeks after KHov’s July 23, 2021 expert report deadline, Plaintiff’s counsel advised

1 that Plaintiff and KHov had informally agreed to extend KHov’s expert witness report deadline
2 until August 11, 2021. **(SSOF ¶ 13).**

3 On August 11, 2021, KHov disclosed its expert liability reports including a
4 Geotechnical Engineering Evaluation report dated August 10, 2021, and a Defense Response
5 Report by Bert L. Howe & Associates, Inc. (“BHA”) dated August 11, 2021. **(SSOF ¶ 14).**
6 Thereafter, on August 23, 2021, KHov disclosed a BHA Preliminary Defense Costs of Defense
7 Scope Estimate report. **(SSOF ¶ 15).** The BHA reports do not include any opinions or
8 conclusions as to what caused each alleged defect, whether the defects were caused by
9 deficient or negligent work of the subcontractors, and the identity of the respective
10 subcontractors who may be responsible for each respective defect allegations. **(SSOF ¶ ¶ 14**
11 **& 15).** Rather, the August 11, 2021 BHA report merely responds to the defect allegations
12 contained in Plaintiff’s expert reports. **(SSOF ¶ 14).**

13 Pursuant to this Court’s November 24, 2021 Amended Scheduling Order, Desert Vista
14 and Renco timely disclosed their expert witnesses, reports, and opinions. **(SSOF ¶ 16).** Desert
15 Vista’s expert, West Harrington, notes in his report that, “[a]s of this date, no party has
16 allocated specific defects to Desert Vista.” **(SSOF ¶ 17).** Mr. Harrington provided no
17 testimony or opinions what caused the defects or who is responsible. **(SSOF ¶ 17).** Likewise,
18 Renco’s expert, Chad Polvika, did not provide opinions or conclusions regarding the
19 responsibilities of any subcontractors who worked on the Project. **(SSOF ¶ 18).**

20 On February 18, 2022, KHov’s counsel informed the parties that they intended to
21 disclose new expert reports and opinions. **(SSOF ¶ 19).** On February 25, 2022, six (6) months
22 after their expert opinion deadline, KHov disclosed three new expert reports: (1) BHA’s
23 Defense Response Report; (2) BHA’s Preliminary Defense Cost of Repair; and (3) BHA’s
24 Subcontractor Allocation Summary. **(SSOF ¶ 20).** Desert Vista and Renco’s counsel objected
25 to the untimely disclosure of new expert reports and opinions and requested that KHov

1 withdraw its new reports and opinions or face a Motion to Preclude. (SSOF ¶ 21).

2 On March 29, 2022, Desert Vista and Renco filed a Third-Party Defendants' Joint
3 Objection and Motion to Preclude Defendant/Third-Party Plaintiffs' Untimely and New Expert
4 Reports and Opinions. (SSOF ¶ 22). KHov filed its Response on April 18, 2022 and the Reply
5 was filed on April 28, 2022. (SSOF ¶ 22). This Court held oral arguments on the Motion to
6 Preclude on June 10, 2022 and Ordered supplemental briefing on the matter. (SSOF ¶ 23).
7 KHov and the Third-Party Defendants filed their supplemental briefing on July 1, 2022.
8 (SSOF ¶ 23).

9 On July 29, 2022, this Court issued an Order granting the Motion to Preclude and
10 excluded KHov's new reports and opinions disclosed on February 25, 2022 from evidence.
11 (SSOF ¶ 24). The July 29, 2022 Order stated, "The Third-Party Complaint alleges that the
12 subcontractors, including DV and Renco, breached contracts, were negligent in their work,
13 and fell before the standard of care for their trade. **KHov must prove these allegations with**
14 **expert testimony.**" (SSOF ¶ 24). The Court also found "None of Gallery's expert disclosures
15 or KHov's Original Reports allocate percentages of fault to the subcontractors." (SSOF ¶ 24).

16 Renco and Desert Vista procedure Commercial General Liability insurance policies and
17 listed KHov an additional insured. (SSOF ¶ 25). The carriers have picked up the Additional
18 Insurance coverage and have been issuing defense payments to KHov's counsel. (SSOF ¶ 25).

19 The parties engaged in party and lay witness and expert depositions. Discovery and
20 Disclosure concluded on September 15, 2022. This Motion for Summary Judgment addresses
21 KHov's claims against Desert Vista and Renco for which they lack evidence to establish at
22 trial.

23 **III. SUMMARY JUDGMENT**

24 "The court shall grant summary judgment if the moving party shows that there is no
25 genuine dispute as to any material fact and the moving party is entitled to judgment as a matter

1 of law.” Rule 56(a), Ariz. R. Civ. P. Summary judgment “should be granted if the facts
2 produced in support of the claim or defense have so little probative value, given the quantum
3 of evidence required, that reasonable people could not agree with the conclusion advanced by
4 the proponent of the claim or defense.” *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d
5 1000, 1008 (1990). If the moving party does not bear the burden of proof at trial, then it may
6 meet its burden by “point[ing] out by specific reference to the relevant discovery that no
7 evidence exist(s) to support an essential element of the [non-moving party’s] claim.” *Nat’l*
8 *Bank of Ariz. v. Thruston*, 219 Ariz. 112, 117, 180 P.3d 977, 982 (quoting *Orme School v.*
9 *Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000,1008 (1990)); *see also Celotext Corp. v. Catrett*,
10 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L.Ed. (1986). Summary judgment cannot be
11 defeated by relying solely on conclusory allegations unsupported by factual data or evidence.
12 *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989); *cf. Angel v. Seattle-First Nat’l Bank*, 653 F.2d
13 1293, 1299 (9th Cir. 1981).

14 **IV. ARGUMENT**

15 **A. KHov Lacks Evidence to Establish Any of its Claims Against Desert Vista** 16 **and Renco**

17 KHov alleges construction defect claims against Desert Vista and Renco. However,
18 KHov lacks the necessary expert evidence to establish that the alleged defects were caused by
19 the deficient or negligent work of Desert Vista and Renco.

20 It is well established that allegations that a subcontractor’s work was not performed in
21 a good and workmanlike manner, fell below the standard of care, and/or caused any damages
22 must be established through expert testimony. *See* A.R.S. § 12-2602. “Building homes is a
23 complicated activity. The average lay person has neither training nor experience in the
24 construction industry and ordinarily cannot determine whether a particular building has been
25 built with the requisite skill and in accordance with the standards prescribed by law or

1 prevailing in the industry.” *Woodward v. Chirco Const. Co., Inc.*, 141 Ariz. 520, 521-22 (App.
2 1984)(quoting *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal.3d 689 106 Cal. Rptr.
3 1, 505 P.2d 193 (1973). Moreover, this Court held that KHov’s complaint “alleges that the
4 subcontractors, including DV and Renco, breached contracts, were negligent in their work,
5 and fell below the standard of care. KHov must prove these allegations with expert testimony.”

6 KHov lacks the necessary expert opinions to prove the elements of its claims as pointed
7 out by the Court. KHov’s August 11, 2021 Defense Response Report by BHA offers no
8 opinions on what caused the defects, whether Desert Vista or Renco performed their work
9 deficiently or negligently, or the defects for which Desert Vista or Renco may be liable.

10 Acknowledging that the August 11, 2021 BHA report was fatally flawed, KHov
11 attempted to remedy this shortcoming by disclosing its new reports six (6) months (2/25/22)
12 after the expiration of its expert report deadline and over a month after Desert Vista and Renco
13 disclosed its expert reports. This included the February 25, 2022 BHA Subcontractor
14 Allocation Summary, wherein KHov’s expert assigned a percentage of responsibility to the
15 subcontractors for the total Project-wide cost of repair offered by Plaintiff. Regardless, the
16 new reports and opinions still lacked the necessary opinions to establish KHov’s claims against
17 Desert Vista and Renco. The new report did not contain opinions on what caused each
18 respective defect. Without opinions on causation, it is not enough to conclusory attribute
19 percentages of fault to subcontractors with no opinions establishing why the respective
20 subcontractor would be liable.

21 The July 29, 2022 Order excluded the new untimely expert opinions, because they
22 contained new opinions not previously disclosed. As such, KHov’s experts could not and did
23 not offer testimony on what caused the alleged defects or the identity of the responsible
24 subcontractors at depositions as such testimony would constitute untimely new expert
25 opinions. Without this testimony, KHov cannot prove any of its claims against Desert Vista or

1 Renco.

2 To be sure, the design and construction of the Project townhomes is a complex activity,
3 with many moving pieces. Expert testimony solely encompassing whether a defect exists is
4 insufficient to allow a jury to find that Desert Vista or Renco bear any liability for that defect.
5 Without expert assistance, a layperson juror is unable to determine what and/or who caused
6 the alleged defects. The defects may have been a result of inadequate or defective design plans
7 or specifications, for which Desert Vista and Renco cannot be held liable under the *Spearin*
8 Doctrine. *See United States v. Spearin*, 248 U.S. 132, 136 (19189). The defects may have been
9 caused or resulted from the subsequent work of other subcontractors, for which Desert Vista
10 or Renco would not be liable. Further, the defects may have been caused by homeowner
11 alteration, neglect, or lack of maintenance.

12 For instance, in a case involving construction defect surrounding drywall cracking, the
13 drywall cracks alone are insufficient for a general contractor to establish fault to the drywaller.
14 The general contractor must prove through expert testimony that the cracks were caused by
15 the drywaller's deficient and negligent installation. Otherwise, the cracks could have been
16 caused by factors completely unrelated to the drywaller's installation, including soil movement
17 and settlement and framing movement. Similarly here, it is not enough for KHov to show
18 stucco or roofing defects to establish Desert Vista and Renco's liability for those defects. To
19 prove liability, KHov must prove that Desert Vista and Renco's deficient work caused those
20 defects. However, KHov simply has not done so.

21 Therefore, without expert testimony that Desert Vista or Renco's work was deficient or
22 negligent, and caused or contributed to any defects, KHov cannot meet its burden for its causes
23 of action.

1 **1. KHov is Unable to Establish that it is Entitled to Indemnification**
2 **from Desert Vista or Renco**

3 Without expert opinion testimony proving that Desert Vista or Renco’s work caused
4 the alleged defects, it cannot show that it is entitled to indemnification.

5 Arizona’s anti-indemnity statute voids any provision of an express indemnification
6 clause that obligates a subcontractor to indemnify a general contractor for more than its direct
7 proportion of fault. See A.R.S. § 32-1159.01(A). A.R.S. § 32-1159.01(A) states,

8 Notwithstanding § 32-1159, a covenant, clause or understanding in, collateral to
9 or affecting a construction contract or architect-engineer professional service
10 contract involving a dwelling that purports to insure, to indemnify or to hold
11 harmless the promisee from or against liability for loss or damage is against the
12 public policy of this state and is **void only to the extent that it purports to
13 insure, to indemnify or to hold harmless the promisee from or against
14 liability for loss or damage resulting from the negligence of the promisee or
15 the promisee’s indemnitees, employees, subcontractors, consultants, or
16 agents other than the promisor.** *Id.* (emphasis added)

17 The Master Subcontract Agreement signed by Desert Vista and Renco includes an
18 express indemnification provision in Paragraph 15, specifically 15(a) which provides:

19 With the exception that this Paragraph 15 shall in no event be construed to
20 require indemnification by subcontractor to a great extent than permitted by the
21 Laws and public policy of the States ... Subcontractor agrees to indemnify,
22 defend (with legal counsel selected by Contractor in its sole and absolute
23 discretion), and hold harmless Contractor ... from and against any and all claims,
24 demands, causes of action, liabilities, judgments, settlements, losses ... of every
25 kind that is **caused** by Subcontractor’s activities conducted in, at, about or on
 any Project, without limitation, any act or omission to act, active or passive
 negligence, or willful misconduct, by or for Subcontractor, anyone directly or
 indirectly employed, hired or used by Subcontractor or anyone for whose acts
 Subcontractor may be liable.

 Further Paragraph 15(a) provides:

 However, notwithstanding any contrary provision, nothing in this Paragraph 15,
 any other Paragraph of this Subcontract or any Exhibit hereto shall require
 Subcontractor to indemnify, hold harmless, or defend any Indemnified Party
 from or against liability or loss or damage resulting from the sole negligence of
 the Indemnified Party, or the Indemnified Party’s agents, employees or

1 indemnitees.

2 The express indemnification provision in the contract only requires Desert Vista and
3 Renco to indemnify, hold harmless, and/or defend KHov for defects or losses that were **caused**
4 by their actions or omissions at the Project. A.R.S. § 32-1159.01 further limits the reach of this
5 express indemnification provision. Under that statute, KHov cannot seek indemnification from
6 Desert Vista or Renco for damages resulting from the negligence or fault of any other party.
7 As such, Desert Vista and Renco can only be obligated to indemnify KHov for the proportion
8 of losses or damages stemming from the defects that were directly caused by Desert Vista or
9 Renco. However, KHov categorically lacks this expert. Without such testimony, KHov cannot
10 establish any entitlement to indemnification.

11 To be sure, KHov is not entitled to common law implied indemnification since an
12 express indemnification clause exists. “When there is an express indemnity contract, the extent
13 of the duty to indemnify must be determined from the contract, and not by reliance on implied
14 indemnity principles.” *INA Ins. Co. of North America v. Valley Forge Ins. Co.*, 150 Ariz. 248,
15 252, 722 P.2d 975, 979 (App. 1986).

16 KHov lacks the necessary evidence that Desert Vista or Renco caused any of the alleged
17 defects claimed by Plaintiff and as thus cannot establish any indemnification obligation owed
18 by Desert Vista or Renco.

19 **2. KHov’s Contract and Warranty Claims are Disguised**
20 **Indemnity Claims and Not Independent Claims**

21 Indemnity is its own legal cause of action and is in itself an attempt to shift liability.
22 *INA Ins. Co. of North America*, 150 Ariz. at 253. However, KHov’s Breach of Express
23 Warranty and Breach of Implied Warranty causes of action, as pled, are disguised indemnity
24 claims based on contingent liability. KHov’s Breach of Express Warranty claim alleges that
25 the subcontractors warranted that “their plans, workmanship, materials, and/or
professional/engineering/design services shall be of merchantable quality, safely and properly

1 designed, constructed and erected, and reasonably fit for their intended purpose.” The Breach
2 of Implied Warranty claim is identical, however, with the addition that the subcontractors
3 impliedly warranted that they “have exercised their skills with care and diligence and in a
4 reasonable, non-negligent manner.” However, KHov did not identify the manner in which
5 these warranties have been breached by Desert Vista or Renco. Rather, it alleges “to the extent
6 that Plaintiff’s allegations are true” the subcontractors have breached the warranties.

7 Additionally, KHov’s breach of contract claim is contingent upon Desert Vista and
8 Renco failing to perform in compliance with its express and implied warranties and other
9 contractual terms: “By their failure to perform as required by the express, implied, and
10 warranted terms of the contracts and subcontracts, as alleged by the Plaintiff, the named Third-
11 Party Defendants and Third-Party DOE Defendants breached the contracts and subcontracts.”
12 In substance, these claims are not independent causes of action but rather based on contingent
13 and derivative liability.

14 Through these separately pled causes of action KHov seeks one thing: indemnification.
15 As pled, these claims are not independent, viable causes of action.

16 **i. KHov Lacks Sufficient Evidence that Desert Vista or**
17 **Renco Breached Any Contract or Warranty**

18 Without expert testimony linking Desert Vista or Renco to the alleged defects, KHov
19 cannot meet its burden to prevail on its breach of contract or warranty claims. KHov has not
20 established that Desert Vista or Renco breached the contract or warranties, let alone that any
21 breach caused damages. KHov “must prove” its breach of contract and warranty claims against
22 Desert Vista and Renco “with expert testimony.” However, KHov has no such expert
23 testimony.

24 A viable breach of contract claim requires the showing of: (1) the existence of a
25 contract; (2) breach of the duties therein; (3) and resulting damages. *Graham v. Asbury*, 112

1 Ariz. 184, 540 P.2d 656 (1975). KHov alleges Desert Vista and Renco breached the contract
2 by “failing to perform as required by the express, implied, and warranted terms” of the
3 contract. (TPC, p. 8). In short, KHov alleges that Desert Vista and Renco breached the contract
4 by failing to provide labor and materials at the Project in a workmanlike manner, free from
5 defect from negligence. Again, KHov has no expert opinions that Desert Vista or Renco’s
6 labor or materials was deficient, defective, and/or negligent. Thus, KHov is unable to meet its
7 evidentiary burden that Desert Vista or Renco breached any contract.

8 Similarly, KHov has not established that Desert Vista or Renco breached the purported
9 expressed or implied warranties.

10 First, KHov’s breach of the implied warranty of workmanship and habitability claim is
11 improper against Desert Vista and Renco and should be dismissed. The implied warranty of
12 workmanship and habitability “protects the homebuyer and successive purchasers from
13 financial responsibility for latent defects in the home that the buyer could not have reasonably
14 discovered at the time of purchase and holds the builder accountable for the home’s faulty
15 construction.” *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 245 (1984). An implied
16 warranty of workmanship and habitability is intended to protect a homebuyer from a
17 developer, not protect a developer against its subcontractors. It is inappropriate for a general
18 contractor to bring this claim against a subcontractor. Here, KHov improperly seeks
19 indemnification for any damages it may owe Plaintiff through this implied warranty claim.

20 KHov is also claiming a breach of express warranty claim against Desert Vista and
21 Renco.

22 Paragraph 19(a) of the Master Subcontract Agreements states:

23 Subcontractor warrants and represents to Contractor that the workmanship of the
24 work, all materials and equipment furnished for the Work, and all other aspects
25 regarding the Work to be performed under this Subcontractor and any **Work
Agreement shall be in conformance with all Laws, this Subcontractor, the
applicable Work Agreements and the other Contract Documents, be of the**

1 **finest quality, and be free from faults and defects of design, material and**
2 **workmanship...**

3 KHov has provided no expert opinion or testimony showing that any labor or materials
4 provided by Desert Vista or Renco were provided in an unworkmanlike, defective, or negligent
5 manner.

6 Therefore, there is no evidence that could allow a jury to find that Desert Vista or Renco
7 breached the contract or warranties. Thus, summary judgment is warranted.

8 **3. KHov's Negligence Claim is Barred by the Economic Loss Doctrine**

9 KHov improperly seeks solely economic damages through tort for defects to the
10 structures of the Project townhomes in violation of the economic loss doctrine.

11 Tort law seeks to protect the public from harm to person or personal property and does
12 not provide a remedy for purely economic damage. Under the economic loss doctrine, when
13 construction defect claims encompass the construction of a building/home that is the subject
14 of a contract, the contracting parties are limited to the contractual remedies for purely
15 economic losses. *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 Ariz. 320,
16 326, 223 P.3d 664, 670 (2010); *See also Salt River Project Agr. Imp. And Power Dist. V.*
17 *Westinghouse Elec. Corp.*, 143 Ariz. 368, 379, 694 P.2d 198, 209 (1984) A party is prohibited
18 from bringing a negligence claim in connection with the development or construction of a
19 structure unless there is personal injury or damage to personal property. *Colberg v. Rellinger*,
20 160 Ariz. 42, 46-47, 770 P.2d 346, 350-51 (Ct. App. 1988).

21 Here, the construction of the Project was governed by contract. KHov's negligence
22 claim against Desert Vista and Renco exclusively involves defects to the structures at the
23 Project and purely economic damages. KHov has made no allegations involving personal
24 injury or damage to personal property. Therefore, KHov's negligence claim is precluded by
25 the economic loss doctrine.

1 4. **KHov's Contribution Claim is Inapplicable to this Matter and**
2 **Invalid**

3 KHov alleges, based on comparative fault principles, that it is entitled to contribution
4 from Desert Vista and Renco for the damages, attorney's fees and legal costs that may be part
5 of any judgment against KHov.

6 Contribution is available only amongst jointly liable tortfeasors. A.R.S. § 12-2501(D).
7 However, as mentioned above the economic loss doctrine bars tort claims in this action as no
8 claim of personal injury or personal property damage has been asserted. Even if KHov had a
9 valid tort claim, tortfeasors are jointly liable only where a principal is liable for an agent's
10 torts, or the tortfeasors were acting in concert to commit an intentional tort. A.R.S. § 12-
11 2506(D). Neither of those situations exist in this case. There are no allegations that Desert
12 Vista and/or Renco acted in concert with another party to commit an intentional tort.
13 Moreover, the substance of KHov's Contribution claim merely seeks indemnification and is
14 not an independent cause of action.

15 Therefore, KHov's contribution claim is invalid and summary judgment is warranted
16 in favor of Desert Vista and Renco.

17 5. **Desert Vista and Renco are Defending KHov**

18 KHov asserts that Desert Vista and Renco have a duty to defend KHov and seeks
19 declaratory relief and asks this Court to declare that a duty to defend is owed. Irrespective of
20 whether the duty exists, Desert Vista and Renco have defended and continue to defend KHov.
21 Desert Vista and Renco procured a commercial general liability policy and named KHov as
22 an additional insured. Desert Vista and Renco's insurance carrier has picked up the additional
23 insured coverage and has been issuing defense payments to KHov's defense counsel in this
24 matter.

25 Desert Vista and Renco have fulfilled any obligation to defend KHov through the
carrier additional insured payments. Any defense obligation is limited to providing one form

1 of defense.

2 **V. CONCLUSION**

3 Since this matter involves construction defects, it is widely understood that expert
4 testimony and opinions are required to establish liability. However, KHov provided no expert
5 opinions that establish liability against Desert Vista or Renco for the alleged construction
6 defects. In fact, there is no expert opinions linking Desert Vista or Renco to the defect
7 allegations at all.

8 The substance of KHov's claims against Desert Vista and Renco require evidence that
9 their defective, poor, or negligent labor or materials caused and/or contributed to the defects
10 alleged by Plaintiff. Without this evidence, KHov prove its claims against Desert Vista or
11 Renco. KHov cannot prove that it is owed indemnification, that Desert Vista or Renco
12 breached any contracts or warranties. Further, KHov's negligence and contribution claims are
13 not viable in this matter.

14 Therefore, Desert Vista and Renco respectfully requests that this Court grant its Motion
15 for Summary Judgment as to all of KHov's claims. Further, Desert Vista and Renco requests
16 their attorneys' fees and costs pursuant to A.R.S. § 12-341 and 341.01.

17 **DATED** this 30th day of September, 2022.

18 **RAI DUER, P.C.**

19
20 By: /s/ Marcus McGillivray

21 Rina Rai

22 Marcus McGillivray

23 ***Attorneys for Third-Party Defendants Renco,
LLC dba Renco Roofing and Desert Vista,
Inc.***

1 **ORIGINAL** of the foregoing e-filed
This 30th day of September, 2022, with:

2 Clerk of the Court
3 **Maricopa County Superior Court**
201 W. Jefferson
4 Phoenix, Arizona 85003

5 **COPY** of the foregoing e-delivered
6 This 30th day of September, 2022, to:

7 The Honorable Katherine Cooper
Maricopa County Superior Court
8 **East Court Building – 711**
101 W Jefferson
9 Phoenix, AZ 85003

10 **COPIES** of the foregoing e-mailed
11 This 30th day of September, 2022, to:

12 (See Attached Service List)

13 By: /s/ Tracy L. O'Brien

Service List

Gallery Community Association v. K. Hovnanian at Gallery, LLC

CV2020-008714

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