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13 **SUPERIOR COURT OF THE STATE OF ARIZONA**
14
15 **COUNTY OF MARICOPA**

16 GALLERY ASSOCIATION, an Arizona non-
17 profit corporation,

18 Plaintiff,

19 v.

20 K. HOVNANIAN AT GALLERY, LLC, an
21 Arizona limited liability company; K.
22 HOVNANIAN ARIZONA OPERATIONS,
23 LLC, an Arizona limited liability company; K.
24 HOVNANIAN DEVELOPMENTS OF
25 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.

NO. CV2020-008714

**THIRD-PARTY DEFENDANT LEBLANC
BUILDING CO., INC.'S JOINDER IN
THIRD-PARTY DEFENDANTS DESERT
VISTA, INC. AND RENCO, LLC'S JOINT
MOTION FOR SUMMARY JUDGMENT,
DATED SEPTEMBER 30, 2022**

(Assigned to the Honorable Michael Kemp)

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

10 Third-Party Plaintiffs,

11 v.

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

Third-Party Defendants.

Third-Party Defendant LeBlanc Building Co., Inc. (“LeBlanc”), by and through undersigned counsel, and pursuant to Arizona Rule of Civil Procedure 56, hereby joins in and adopts by reference the facts and law as if fully stated herein Third-Party Defendants Desert Vista, Inc. and Renco, LLC d/b/a Renco Roofing's Joint Motion for Summary Judgment Motion, dated September 30, 2022 (“Joint Motion”). KHov’s failure to disclose required expert opinion testimony as set forth in the Joint Motion, is equally fatal to its claims against LeBlanc. In addition, KHov’s claims against LeBlanc fail because KHov failed to disclose any expert opinion testimony of a structural engineering expert to opine on the structural integrity of the Project.

1 LeBlanc’s joinder is supported by LeBlanc’s contemporaneously filed Separate
2 Statement of Facts (“SOF”), the Court record, the following Memorandum of Points and
3 Authorities, and any oral argument the Court may hear on the matter.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 As it is well known, expert opinion testimony is required to establish the standard
7 of care of licensed professionals such as LeBlanc. KHov, however, disclosed no expert opinion
8 testimony to prove that LeBlanc’s failure to perform its work in a good workmanlike manner free
9 from defects caused the construction defects at issue in this case. This fatal flaw prompted KHov
10 to disclose new expert opinions which purportedly allocated a percentage of fault to
11 subcontractors to which the subcontractors objected. In response to the objections, this Court
12 excluded KHov’s new reports and opinions from being entered into evidence.

13 Notwithstanding, even if the new report and opinions were admissible, KHov’s
14 claims still fail because KHov did not disclose any opinions of a structural engineering expert to
15 support the structural defect claims asserted against LeBlanc. Without a structural engineering
16 expert to opine on whether the defects were caused by a design problem and/or problem with
17 faulty materials or poor workmanship, KHov cannot prove nor allocate a percentage of fault for
18 any structural defects to LeBlanc. Without these underlying opinions, KHov lacks the necessary
19 evidence to prevail on any of its claims against LeBlanc. Therefore, LeBlanc is entitled to
20 summary judgment on all causes of action asserted against it.

21 **II. FACTS**

22 LeBlanc incorporates by reference the facts set forth in the Joint Motion with the
23 addition of the facts contained herein pertaining specifically to LeBlanc.

24 On May 6, 2015, LeBlanc signed a Master Subcontractor Agreement with K.
25 Hovnanian Great Western Building Company, LLC and K. Hovnanian Building Company, LLC
26 to provide labor and materials relating to framing. (**LeBlanc’s SSOF ¶ 1**). On October 6, 2020,

1 KHov filed its Third-Party Complaint against LeBlanc and other various subcontractors who were
2 associated with the Project alleging multiple causes of action: (1) Breach of Express Warranty;
3 (2) Breach of Implied Warranty; (3) Breach of Contract; (4) Negligence; (5) Common Law
4 Implied Indemnity; (6) Contractual Indemnity; (7) Declaratory Relief – Re: Duty to Defend; (8)
5 Declaratory Relief – Re: Duty to Indemnify; (9) Declaratory Relief – Re: Contractual Duties; and
6 (10) Contribution. (**LeBlanc’s SSOF ¶ 2**). On January 25, 2021, LeBlanc filed its Answer to
7 KHov’s Third-Party Complaint generally denying liability. (**LeBlanc’s SSOF ¶ 3**). On that same
8 day, LeBlanc filed its Certificate of Expert Testimony pursuant to A.R.S. § 12-2602 certifying
9 that KHov required expert testimony to prove its claims against LeBlanc. (**LeBlanc’s SSOF ¶ 4**).
10 On February 14, 2022, LeBlanc timely disclosed its expert report which did not include opinions
11 or conclusions as to the cause of the alleged defects or the identity of the responsible party for the
12 defects. (**LeBlanc’s SSOF ¶ 5**).

13 **III. LEGAL ARGUMENT**

14 As argued in the Joint Motion, summary judgment is appropriate because KHov
15 lacks the necessary expert evidence to establish the alleged defects were caused by deficient or
16 negligent work of Desert Vista and Renco. (Joint Motion. 8:17-19). This argument equally applies
17 to KHov’s claims against LeBlanc. *See* A.R.S. § 12-2602. *See also* *Woodward v. Chirco Const.*
18 *Co., Inc.*, 141 Ariz. 520, 521-22 (App. 1984)(quoting *Miller v. Los Angeles County Flood Control*
19 *Dist.*, 8 Cal.3d 689 106 Cal. Rptr. 1, 505 P.2d 193 (1973).

20 Moreover, KHov lacks the necessary expert opinions to prove the structural defects
21 were a result of LeBlanc’s negligent or poor workmanship. As is here, allegations involving
22 structural defects, such as the non-compliant Lateral Force Resisting System, require a structural
23 engineering expert because only a structural engineer can determine if the cause of the defect was
24 improper or defective design plans, problems with faulty materials or poor workmanship. The
25 cause of the non-complaint LFRS could have been the result of defective design plans or
26 specifications for which LeBlanc cannot be held liable for under the *Spearin* Doctrine. *See United*

1 *States v. Spearin*, 248 U.S. 132, 136 (1989). Furthermore, the cause of the defects attributed to
2 LeBlanc may have been homeowner negligent, lack of maintenance, or subsequent work of other
3 subcontractors. Due to the lack of investigation conducted by KHov, there is no evidence to
4 establish any of the alleged defects were caused by LeBlanc, therefore precluding KHov from
5 recovery because it cannot meet its burden of proof on any of its causes of action.

6 **A. KHov is not entitled to Express or Common Law Indemnity from LeBlanc**

7 As argued in the Joint Motion, without expert opinion testimony proving the
8 subcontractor's work caused the alleged defects, KHov is not entitled to express indemnity. (Joint
9 Motion 11:1-12). Similarly, KHov is not entitled to common law indemnity because of the
10 existence of the express indemnification clause. (Joint Motion 12: 11-15).

11 Like Desert Vista and Renco, the Master Subcontract Agreement between LeBlanc
12 and KHov includes an express indemnification provision in Paragraph 15, specifically 15(a) which
13 provides:

14 With the exception that this Paragraph 15 shall in no event be
15 construed to require indemnification by subcontractor to a great extent
16 than permitted by the Laws and public policy of the States ...
17 Subcontractor agrees to indemnify, defend (with legal counsel
18 selected by Contractor in its sole and absolute discretion), and hold
19 harmless Contractor ... from and against any and all claims, demands,
20 causes of action, liabilities, judgments, settlements, losses ... of every
21 kind that is **caused** by Subcontractor's activities conducted in, at,
22 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.

23 However, notwithstanding any contrary provision, nothing in this
24 Paragraph 15, any other Paragraph of this Subcontract or any Exhibit
25 hereto shall require Subcontractor to indemnify, hold harmless, or
26 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 indemnities.

1 The express indemnification provision says LeBlanc can only be obligated to
2 indemnify KHov for the proportion of losses or damages stemming from the defects that were
3 caused by LeBlanc. Without the necessary expert opinion testimony to opine on what defect was
4 caused by LeBlanc, then KHov cannot establish it is owed indemnity for the same. Moreover,
5 A.R.S. § 32-1159.01 further protects LeBlanc from owing KHov indemnity for damages resulting
6 from the negligence or fault of any other party.

7 Here, KHov lacks any evidence that can support the defects attributed to LeBlanc
8 were caused by LeBlanc, and not the design professionals, homeowner neglect, lack of
9 maintenance, or subsequent work of other subcontractors. Without this evidence, KHov can only
10 offer expert testimony that the defect exists, which is insufficient to prove LeBlanc bears any
11 liability for that defect. Simply put, KHov cannot be indemnified because there is no evidence to
12 establish the proportion of losses or damages which can be attributed to LeBlanc. Therefore,
13 summary judgment is appropriate on KHov's indemnification claims.

14 **B. KHov's Contract and Warranty Claims Fail Because They Are Disguised**
15 **Indemnity Claims and Not Independent Claims**

16 LeBlanc incorporates by reference the law and argument set forth in the Joint
17 Motion on KHov's Contract and Warranty claims. The Joint Motion correctly argues KHov's
18 Breach of Express Warranty and Breach of Implied Warranty causes of action are contingent on
19 liability and are therefore disguised as indemnity claims. (Joint Motion 12:21-23). Additionally,
20 KHov's Breach of Contract claim is contingent on the subcontractors failing to perform in
21 compliance with its express and implied warranties and other contractual terms. (Joint Motion
22 13:7-9).

23 Here, LeBlanc concurs with Desert Vista and Renco that the septately pled causes
24 of action against the subcontractors are not independent causes of action but rather based on
25 contingent and derivative liability. (Joint Motion 13:12-15). Moreover, KHov cannot prove
26 LeBlanc breached the contract by failing to provide labor and materials at the Project in a
workmanlike manner, free from defect from negligence because it lacks expert opinions to support

1 the allegation. Therefore, summary judgment is appropriate on KHov's Contract and Warranty
2 Claims.

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

4 As argued in the Joint Motion, the economic loss doctrine precludes KHov from
5 asserting a negligence cause of action because there are no allegations made involving personal
6 injury or damage to personal property. (Joint Motion 15: 8-19). Equally applied here, summary
7 judgment on KHov's negligence cause of action against LeBlanc is appropriate.

8 **D. KHov's Contribution Claim is Inapplicable to This Matter and Invalid**

9 LeBlanc incorporates by reference the law and argument set forth in the Joint
10 Motion on KHov's Contribution claims. (Joint Motion 16:2-15). KHov's Contribution Claim
11 equally fails against LeBlanc because KHov does not have a viable tort claim nor has it proven
12 LeBlanc acted in concert with any other party to commit an intentional tort. Therefore, summary
13 judgment is warranted on KHov's Contribution claims against LeBlanc.

14 **IV. CONCLUSION**

15 KHov lacks any evidence against LeBlanc that can establish liability for the alleged
16 construction defects. As is well known, defects can be attributed to a design problem and/or
17 problem with faulty materials or poor workmanship. The mere fact a defect exists is not enough
18 to prove LeBlanc should be liable for that defect. Without expert opinions to establish LeBlanc
19 caused the defect, then KHov cannot prove it is owed indemnity. Furthermore, any remaining
20 contract, negligence, and/or contribution claims must fail as they are not viable in this matter.

21 Therefore, LeBlanc respectfully requests that this Court grant its Motion for
22 Summary Judgment as all KHov's claims. LeBlanc also requests this Court award its attorney's
23 fees and costs pursuant to A.R.S. § 12-341 and 341.01.

1 DATED this 3rd day of October, 2022.

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3 By /s/ Michael A. Ludwig

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