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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 REPLY IN SUPPORT
OF 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”) (collectively, the “Movants”) file their Reply in support of their Joint Motion for Summary Judgment against Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC and K. Hovnanian Arizona Operations, LLC (collectively, “KHov”).

KHov missed the actual issue in its response. KHov riddles its response with various examples of expert opinions from Plaintiff’s experts (and KHov’s experts) *establishing the*

1 *standard of care* or that a defect *exists* to lead the Court to believe that it, in and of itself,
2 satisfies KHov’s burden to show that Desert Vista and Renco work was deficient. That is
3 incorrect. KHov still must establish that the alleged defects were *caused by* the deficient or
4 negligent work of Desert Vista and Renco, and KHov lacks the expert evidence to do so.

5 KHov goes on to argue that because general expert evidence is disputed as a whole,
6 KHov somehow has expert evidence to meet its burden of causation and create a genuine issue
7 of material fact, however, that is also incorrect. KHov and the Movants’ experts generally
8 agree that there lack defects and neither party attributed fault to subcontractors in admissible
9 expert disclosures. Indeed, this Court rejected KHov’s attempts to cure its lack of ability to
10 meet its burden when it struck KHov’s late disclosure of expert opinions to the prejudice of
11 subcontractors.¹ It shows there is undisputed expert testimony between KHov’s expert and the
12 Movants’ experts.

13 **I. KHov Has No Expert Evidence to Establish its Burden that the Alleged Defects**
14 **Were Caused by Desert Vista and Renco’s Deficient Work as Required by Law**

15 It is very important to clarify a crucial distinction that KHov blurs in its response. KHov
16 argues that because there is conflicting expert evidence between Plaintiff and KHov as it
17 relates to *damages or standards of care* (weep screeds for example), that it gives rise to a
18 genuine issue of material fact between KHov and Desert Vista and Renco as it relates to their
19 *deficient work and causation*. This notion is nonsensical. The conflicting expert evidence,
20 should any exist, is related to potential damages and cost of repair as a whole, not issue specific
21 subcontractor allocation that the alleged defects were caused by Desert Vista and Renco’s
22 deficient work – none exists in the record.

23
24
25 ¹ “KHov was obligated to disclose expert opinions and reports in August 2021 pursuant to the Scheduling Order. KHov failed to timely disclose the expert opinions and reports it now seeks to use. KHov’s New Reports will unfairly prejudice DV and Renco. Therefore, it is ordered granting the Motion to Exclude and precluding KHov’s February 22, 2022 expert disclosures.” See Court Record, Ruling Re: Motion to Preclude dated July 29, 2022.

1 Conflicting evidence differs from lack of evidence. If both parties lack expert evidence
2 on causation but disagree on expert evidence on damages or the existence of defects, that does
3 not create a genuine issue of material fact on causation. That is the issue with KHov's case
4 and why summary judgment is appropriate. At trial, KHov will be unable to prove that the
5 alleged defects were caused by Desert Vista and Renco's deficient work, even if it is able to
6 prove a standard of care or the existence of damages or defects. The cause of those damages
7 or defects could be attributed to other subcontractors, design defects, fault of developer or
8 engineers that worked on the Project. We simply do not know, and neither will the jury because
9 KHov's experts never provided any opinions on causation period!

10 KHov also argues that standards of care are a complicated issue but as far as who
11 actually performed the work that breached the work at issue is a factual issue not in dispute.
12 While the standards of care are a complicated issue requiring expert explanations, the expert
13 opinions on the standards of care establish the duties owed, NOT who breached those duties
14 or who caused the damages. The 'WHO' performed the breached work portion is not a factual
15 issue, but an expert opinion issue to tie the subcontractor to the defective conditions, which
16 KHov lacks.

17 Further, KHov argues that if Plaintiff's expert testifies that the stucco work and the
18 roofing work fell below the standard of care, that work was performed by Desert Vista and
19 Renco, however this is not accurate because those opinions only identify a defect or establish
20 issues with that area of the townhouse – but as mentioned, the stucco and roofing issues could
21 be a result of foundation issues, soil movement, framers (setting roof slopes), design defects,
22 fault of KHov as general contractor, or project engineers. Simply because an area of work is
23 defective does not mean the subcontractor that completed it is automatically at fault. That is
24 the purpose of expert opinions, to clarify this aspect of the analysis - which goes beyond
25 common knowledge of a lay juryman, and KHov's expert glaringly omitted these opinions

1 such that it cannot meet its burden and summary judgment is appropriate. *Woodward v. Chirco*
2 *Const. Co., Inc.*, 141 Ariz. 520, 521-22 (App. 1984)(quoting *Miller v. Los Angeles County*
3 *Flood Control Dist.*, 8 Cal.3d 689 106 Cal. Rptr. 1, 505 P.2d 193 (1973).²

4 As KHov’s response progresses, KHov provides additional examples of what it
5 believes are disputed expert evidence on the topic of causation however, any disputed expert
6 evidence is on the topic of the existence of a defect (damages). For example, KHov stated
7 “Hovnanian’s expert opined that Plaintiff had not established a defect or failure to drain at the
8 decks.” *See, KHov’s Response*, p. 13, ¶¶ 6-7. Any issue of material facts relates to the standard
9 of care and damages, not causation or fault. There is a huge gap in KHov’s case that it cannot
10 fill at trial (expert opinions making the connection between the existence of a defect and who
11 caused that defect and fault) because the Court has precluded such evidence, KHov cannot
12 meet its burden of proof as to subcontractor fault.

13 **A. Clarification of Expert Testimony**

14 KHov elusively cited to Desert Vistas’ Expert West Harrington’s deposition, among
15 other depositions, to support that it can meet its burden in showing that the defects were caused
16 by deficient work by Desert Vista, however, in KHov’s cited testimony from Mr. Harrington,
17 he is only establishing potential damages, not causation. Mr. Harrington clarified and
18 specifically stated that “I didn’t see evidence of water intrusion that I believed was associated
19 with a deficiency in the installation or type of WRB at the time I prepared by report.” *See*
20 *KHov’s SSOF*, pg. 6 ¶¶ 8-11. This was cited by KHov in its SSOF.

21 KHov assumes the discussion of a topic by Desert Vista’s expert satisfies KHov’s own
22 burden to provide expert evidence on causation and fault. Clearly, that is not the case. As such,
23 KHov still lacks the evidence to show that the alleged defects were caused by the deficient
24

25 ² The court in *Woodward* held, “Building homes is a complicated activity. The average lay person has neither training nor experience in the construction industry and ordinarily cannot determine whether a particular building has been built with the requisite skill and in accordance with the standards prescribed by law or prevailing in the industry.” *Id.*

1 work of Desert Vista (and Renco).

2 KHov stated that Renco's expert did provide opinions of causation but then quoted Mr.
3 Polivka stating that "...Plaintiff's defect claims did not rise from his client Renco's scope of
4 work," and that "testing did not provide proof of a failure of the roof," and that "no significant
5 roof repairs relevant to client's scope of work are warranted and the roofs are generally
6 performing as intended." *See KHov's CSOF*, p. 5 ¶ 18. These statements do not speak to
7 causation and even if it did, these statements do not help KHov satisfy its burden of causation,
8 in fact, it does the opposite and further supports summary judgment.

9 Further, KHov's expert agreed with Renco's expert that no defects exist, thus, if they
10 both agree there are no defects, how can KHov establish its burden that Renco's work caused
11 any defects? It cannot.

12 Similarly, as it relates to Desert Vista, KHov stated that Desert Vista's expert Mr.
13 Harrington quoted Plaintiff's expert report such that Mr. Harrington somehow adopted
14 Plaintiff's expert's report, however that is misleading. Mr. Harrington incorporated Plaintiff's
15 report in its review but ultimately opined that "no party has allocated specific defects to
16 Desert Vista." *See, KHov's CSOF*, p. 3 ¶ 17. Mr. Harrington did not unequivocally adopt
17 Plaintiff's expert report but even if he did, that would not support KHov's position that their
18 gap in expert opinions is satisfied such that it creates a genuine issue of material fact creating
19 a causal connection between the alleged damages and Desert Vista and Renco's work.

20 KHov is grasping at straws in a thinly veiled attempt to persuade the Court that it has
21 expert evidence to support each element of each claim. KHov is attempting to hang on to the
22 coattails of Plaintiff's expert and Desert Vista's and Renco's experts in hopes of leading the
23 Court astray from the fact that it still lacks the expert evidence to prove its case at trial,
24 specifically that the alleged defects were caused by Desert Vista and Renco's defective work.

1 **B. KHov is Unable to Establish that it is Entitled to Indemnification from**
2 **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 based upon Arizona’s
5 anti-indemnity statute. The express terms of the contract between the parties specifically stated
6 that Desert Vista and Renco will indemnify and defend KHov for defects that were “caused
7 by” their actions at the project. This is particularly important language because it required
8 KHov to actually prove that the damages were “caused by” Desert Vista or Renco as opposed
9 to indemnification based on the “allegation of negligence.”

10 This assertion regarding the express terms of the contract is supported by Arizona’s
11 anti-indemnity statute, which voids any provision of an express indemnification clause that
12 obligates a subcontractor to indemnify a general contractor for more than its proportion of
13 fault. *See* A.R.S. § 32-1159.01(A).³ As such, KHov is required to prove causation to be entitled
14 to indemnification but it lacks the expert evidence to do so.

15 “When there is an express indemnity agreement between parties, the extent of the duty
16 to indemnify must be determined from that agreement.” *MT Builders, L.L.C. v. Fisher Roofing,*
17 *Inc.*, 219 Ariz. 297, 197 P.3d 758 (Ct. App. 2008). “Indemnity provision in contract between
18 general contractor and roofing subcontractor required general contractor to prove the extent of
19 subcontractor's negligence, in order for general contractor to recover indemnity damages and
20 the expenses general contractor incurred in defending against claims based on subcontractor's
21 work, after general contractor settled construction defect action brought by condominium
22 association; indemnity provision created a narrow form of indemnification as it limited
23 subcontractor's indemnity obligation to the extent caused in whole or in part by any negligent

24 ³ A.R.S. § 32-1159.01(A) states, “Notwithstanding § 32-1159, a covenant, clause or understanding in, collateral to or
25 affecting a construction contract or architect-engineer professional service contract involving a dwelling that purports to
 insure, to indemnify or to hold harmless the promisee from or against liability for loss or damage is against the public
 policy of this state and **is void only to the extent that it purports to insure, to indemnify or to hold harmless the
 promisee from or against liability for loss or damage resulting from the negligence of the promisee or the promisee’s
 indemnitees, employees, subcontractors, consultants, or agents other than the promisor.”** *Id.* (emphasis added).

1 act or omission of the subcontractor.” *Id.*

2 In *MT Builders*, defendant *Fisher* argued that its indemnity obligation was limited to
3 only those losses and expenses **caused by** its own fault pursuant to the indemnity language in
4 that contract and the Court agreed that in order to obtain indemnity, *MT Builders* was required
5 to prove the extent of *Fisher’s* fault. *Id.* at 765.

6 Here, the express indemnification provision in the contract requires Desert Vista and
7 Renco to indemnify, hold harmless, and/or defend KHov for defects or losses that were **caused**
8 by their actions or omissions at the Project – not the allegation of negligence. As such, KHov
9 is required to prove its case and show that the alleged defects and damages were caused by
10 Desert Vista or Renco, and based on the lack of evidence in the record, KHov has failed to do
11 so and thus, will not prevail on this cause of action.

12 Additionally, A.R.S. § 32-1159.01 further limits the reach of this express
13 indemnification provision. Under that statute, KHov cannot seek indemnification from Desert
14 Vista or Renco for damages resulting from the negligence or fault of any other party. KHov
15 categorically lacks expert evidence to prove the alleged defects were caused by Desert Vista
16 or Renco’s defective work such that KHov can distinguish the negligence or fault of any other
17 party in satisfaction of the anti-indemnity statute to recovery. Without such testimony, KHov
18 cannot establish any entitlement to indemnification.

19 **C. Breach of Contract or Warranty**

20 KHov’s breach of contract claim is contingent upon Desert Vista and Renco failing to
21 perform in compliance with its express and implied warranties and other contractual terms
22 including workmanship. These claims are not independent causes of action but rather based
23 on contingent and derivative liability. This is a disguised indemnity claim and since KHov
24 must still prove that the alleged defects were caused by Desert Vista and Renco’s defective
25 work in order to prevail on the breach of contract and warranty claims, and KHov lacks expert

1 evidence to prove such issues, KHov cannot prevail at trial and summary judgment is
2 appropriate.

3 KHov has not established that Desert Vista or Renco breached the contract or
4 warranties, let alone that any breach caused damages. KHov “must prove” its breach of
5 contract and warranty claims against Desert Vista and Renco “with expert testimony.”
6 However, KHov has no such expert testimony.

7 **D. KHov’s Negligence Claim and Contribution Claim**

8 KHov concedes in its response that Plaintiff has withdrawn its Negligence claim and
9 therefore KHov’s claim for Contribution is moot. *See, KHov’s Response*, p. 15, ¶¶ 22-25. As
10 such, these claims should be dismissed.

11 **E. Desert Vista and Renco Have Satisfied Their Defense of KHov**

12 Desert Vista and Renco have defended and continue to defend KHov. KHov is aware
13 that Desert Vista and Renco’s insurance carrier under a commercial general liability policy
14 named KHov as an additional insured and that the carrier has provided a complete defense.
15 KHov is playing coy in its response. This is evidenced by the attached endorsement document
16 showing KHov’s defense was picked up and reimbursed. *See, Exhibit A attached.*

17 As such, Desert Vista and Renco have fulfilled any obligation to defend KHov through
18 the carrier additional insured payments.

19 **II. CONCLUSION**

20 THEREFORE, Desert Vista and Renco respectfully request that this Court grant its
21 Motion for Summary Judgment as to all of KHov’s claims. It is undisputed that expert
22 testimony is required and it has been shown that KHov lacks the requisite expert testimony to
23 fully satisfy their burden at trial for all claims and show that the alleged defects were caused
24 by Desert Vista and Renco’s defective work. Lastly, Desert Vista and Renco reiterate their
25 request for their attorneys’ fees and costs pursuant to A.R.S. § 12-341 and 341.01.

Service List

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

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