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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; et al.,

Defendants.

K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company; et al.,

Third-Party Plaintiffs,

v.

DESERT VISTA, INC., an Arizona corporation; et al.

Third-Party Defendants.

Case No. CV2020-008714

PLAINTIFF'S RESPONSE TO THIRD-PARTY DEFENDANTS RENCO, LLC DBA RENCO ROOFING AND DESERT VISTA, INC.'S JOINT MOTIONS *IN LIMINE* NOS. 1 AND 2

Assigned to Hon. Katherine Cooper

Plaintiff, Gallery Community Association (the "Association" or "Plaintiff"), by and through its attorneys Burg Simpson Eldredge Hersh & Jardine PC, hereby file this Response to Third-Party Defendants Renco, LLC d/b/a Renco Roofing and Desert Vista, Inc.'s

(collectively "Third-Party Defendants") Joint Motions *in Limine* Nos. 1 and 2.

Motion *in Limine* No. 1

Third-Party Defendants' Motion *in Limine* No. 1 is overly broad as it seeks to preclude Plaintiff from presenting any evidence of causation or damages related to Desert Vista and Renco. Although Plaintiff did not name Desert Vista or Renco as defendants in this lawsuit, Plaintiff's claims against Defendants K. Hovnanian at Gallery, LLC, as the seller and Declarant, and K. Hovnanian Arizona Operations, LLC, as the general contractor, will necessarily require Plaintiff to present evidence regarding the cause of the defects and Plaintiff's damages, which evidence may relate to Desert Vista's and Renco's work.

Therefore, granting Third-Party Defendants' Motion *in Limine* No. 1 will be prejudicial to Plaintiff's ability to present evidence against Defendants, and therefore, it should be denied.

Motion *in Limine* No. 2

Third-Party Defendants' Motion *in Limine* No. 2 seeks to preclude evidence regarding the EPS foam board behind the stucco that was installed by Desert Vista at the Project. First, the Motion *in Limine* is overbroad because it seeks to preclude all evidence regarding the foam board, however, it only discusses the defect related to the lack of grooves. Plaintiff's expert, SBSA, noted other defects with the EPS foam board installed at the Project, including:

- improper thickness (minimum 1" thickness was required in certain locations, however, all EPS foam board observed was less than 1" thick);
- 3/8 inch projecting tongues and compatible grooves (none were observed);

Exh. 1 (Depo. Exh. 47, Excerpts from SBSA Construction and Design Compliance Report, p. 91-98).

Because Motion *in Limine* No. 2 seeks to preclude all evidence of EPS foam board despite failing to address these other defects, it should be denied because it is overly broad.

Second, with respect to the defect regarding lack of vertical grooves in the EPS foam board, Motion *in Limine* No. 2 purports to provide, as Exhibit A, invoices evidencing the

purchase of EPS foam board with grooves 12-inches on center. However, Exhibit A is an ICC-ES Evaluation Report, not an invoice.

Even assuming, *arguendo*, that there is evidence that Desert Vista purchased such foam board with grooves, it only goes to the weight of the evidence. Just because Desert Vista purchased foam board with grooves, it does not conclusively prove that it was installed properly at the Project. Moreover, SBSA's report shows photos of foam board that SBSA identified as missing vertical grooves on the back face. Exh. 1, p. 93-95, 97-98 (Depo. Exh. 47). The jury should decide what weight to give evidence from both sides.

Based upon the foregoing, the Court should deny Third-Party Defendants' Motion *in Limine* No. 2.

RESPECTFULLY SUBMITTED this 30th day of January, 2023.

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

By: */s/ Penny J. Manship*
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Copy of the foregoing E-FILED and sent via the TurboCourt eFiling system to:

Hon. Katherine Cooper
Maricopa County Superior Court
101 W. Jefferson, No. 413
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Copy of the foregoing E-FILED and E-MAILED via TurboCourt electronic mailing system this 30th day of January, 2023 to:

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EXHIBIT 1

June 23, 2021

Craig S. Nuss
Penny J. Manship
Burg Simpson Eldredge Hersh & Jardine PC
8310 South Valley Highway, #270
Englewood, Colorado 80112

Project Number: 219061.00 (030)
Project Name: Gallery
Location: 3104-3127 North 71st Street
Scottsdale, Arizona 85251

Subject: Construction and Design Compliance Report

Dear Mr. Nuss and Ms. Manship:

PREAMBLE

Per your request, SBSA, LLC, A Charles Taylor Company (SBSA), conducted site observations, interior observations, exterior observations, intrusive examinations, and site measurements at the Gallery Townhomes site (Gallery) in Scottsdale, Arizona. The evaluation also consisted of file review as noted within this report. A record of site observation dates is contained in the attached Observation Drawing Set, Observation Photographs, and photograph log.

The purpose of this evaluation was to document the Construction and Design Compliance, including analysis of the design and construction components as necessary, to determine if the work was designed and constructed in conformance with the applicable code, regulations, technical criteria, site-specific plans, and recognized standard industry requirements. This report includes an evaluation of site civil systems, the stucco and roof systems, as well as additional miscellaneous issues as listed within.

SBSA conducted visual examinations and analysis of the provided file as necessary to determine the commonality of the construction practices used on this site. As well, the examination was conducted to determine the extent or likely extent of the manifestation of resultant damage caused by the inability of the systems to perform their intended function.

Field observations and testing were performed by Edward L. Fronapfel, MSCE, PE, Jerod B. Faris, MSCE, PE, Jeffrey J. Felderman, PE, Sameer S. Rampurawala, M.Eng., EI, and Peter E. Rabner, PE, under the responsible charge of Edward L. Fronapfel, MSCE, PE, D-IBFES, DFE, CBIE, CFCC,

c. Non-Compliant EPS Foam Board for Stucco System

The architectural drawings and builder's specifications both specify Amerimix stucco system installed over a 1-inch-thick rigid foam substrate. The architectural drawings and the manufacturer's product specification both refer to ESR-3529. Where the stucco system is installed over open stud framing, the ESR-3529 requires a minimum 1-inch-thick EPS foam plastic insulation board with 3/8-inch projecting tongues and compatible grooves for horizontal joints. Where installed over solids substrates such as OSB sheathing, the ESR-3529 requires a minimum 1/2-inch-thick EPS foam plastic insulation board with vertical grooves on the back face (interior side) of the boards. The groves are required to be a minimum 1/4-inch wide by 1/8-inch deep spaced a maximum of 12-inches to allow efficient drainage of moisture between the EPS foam boards and the WRB. As an alternative to EPS foam boards with vertical grooves, ESR-3529 allows using flat-faced EPS foam boards if Tyvek StuccoWrap® or Tyvek DrainWrap® WRB is installed over the solid substrate.

Intrusive examination revealed that the foam board used at the Gallery site was generally 3/8- to 7/8-inch thick, did not have the required vertical grooves, and was installed tight to the improperly selected WRB. The GMCraft-10 WRB was installed at all buildings and is not recognized by ESR-3529 for application of flat-faced foam boards without vertical grooves. Flat-faced foam boards installed tight to the WRB are non-compliant with the project requirements, prevent a bond break or drainage gap between the stucco system and the WRB, and obstruct drainage of the moisture behind the stucco. Use of non-compliant EPS foam boards in combination with the non-compliant WRB type reduces the overall performance of the moisture-management system. Damage included stains on the interior face of the EPS foam boards and full-length rusted fasteners where entrapped water overwhelmed the moisture-management system. This non-compliant condition, along with the combination of other construction defects of the stucco system, will more likely than not reduce the integrity of the structural components and the general appearance of the cladding in the foreseeable future.

Where non-compliant EPS foam board exists, the as-built condition falls short of the prescriptive requirements of the relevant codes, design, and industry standards and, therefore, the developer, contractor, and subcontractors who performed the work fell below the standard of care.

Applicable Code/Industry Standard References/Project-Specific Documents:

ICC Evaluation Service Report (ESR), Evaluation Report ESR-3529 "Evaluation Subject: Amerimix Fiber Base Coat Stucco," reissued February 2017, Section 3.0 "Description," subsection 3.2 "Material," states the following:

- *"3.2.4 **Foam Plastic Insulation Boards:** Foam plastic insulation formed from expanded polystyrene (EPS) resin, with a maximum flame spread index of 25 or less and a smoke-developed index not exceeding 450 when tested in accordance with ASTM E84 in the thickness intended for use. The foam plastic insulation boards must have a minimum nominal density of 1.5 pounds per cubic foot (24.0 kg/m3). When installed over open stud framing, the boards must be a minimum of 1 inch (25.4 mm) thick and have 3 /8-inch (9.5 mm) projecting tongues with compatible grooves for horizontal joints. See Figure 1 for*

joint detail. Foam plastic boards installed over solid substrates must have a minimum thickness of 1/2 inch (12.3 mm). The maximum board thickness must not exceed 4 inches (25.4 mm). All boards must be recognized in a current ICC-ES evaluation report. See Section 7.3 for board identification. When installation is over solid substrates, as described in Section 4.3, the boards must have minimum 1/4-inch-wide-by-1/8-inch-deep (6.4 mm by 3.2 mm) vertical grooves spaced a maximum of 12 inches (305 mm) on the back face of the boards. As an alternate to the vertical grooves in the foam plastic board, flat-faced boards may be installed over solid substrates provided the Tyvek StuccoWrap or Tyvek DrainWrap water-resistive barrier, recognized in ESR-2375, is installed between the EPS board and the solid substrate."

ICC Evaluation Service Report (ESR), Evaluation Report ESR-3529 "Evaluation Subject: Amerimix Fiber Base Coat Stucco," reissued February 2017, Section 4.0 "Installation," subsection 4.3 "Application over Solid Substrates," states the following:

- *"**4.3.1 General:** All solid substrates, except for concrete and unit masonry, must be covered with a minimum of one layer of water-resistive barrier as described in Section 3.2.10.1 of this report and the lath described in Section 3.2.3 of this report. The installation of EPS boards over solid substrates is optional and must be governed by the conditions stated in this report. When EPS boards are installed over solid substrates, the EPS boards must incorporate vertical grooves as described in Section 3.2.4 or be flat-faced foam boards incorporating Tyvek water-resistive barriers described in Section 3.2.4 of this report. Two layers of water-resistive barriers as described in Section 3.2.10.1 are needed where wood-based substrates occur and the length of the fasteners used to attach the lath must be increased by the thickness of the EPS boards."*

Example Photographs:

May 14, 2019, Disc IT3, Photograph 18, JBF, Building A, EPS foam board installed tight to WRB and vertical grooves generally missing at the inner face.

March 9, 2021, Disc IT6, Photograph 271, SSR, Building A, EPS foam board installed tight to GMCraft WRB and vertical grooves generally missing at the inner face.

March 10, 2021, Disc IT7, Photograph 20, JJF, Building B, EPS foam board installed over WRB with vertical grooves generally missing at the back face.

March 9, 2021, Disc IT5, Photograph 155, JJF, Building B, 3/8-inch-thick EPS foam board installed over WRB with vertical grooves generally missing at the back face.

May 13, 2019, Disc IT1, Photograph 116, JBF, Building B, 1/2-inch-thick EPS insulation installed over OSB sheathing does not incorporate vertical grooves.

March 10, 2021, Disc IT7, Photograph 279, JJF, Building C, EPS foam board installed over WRB with vertical grooves generally missing at the back face.

March 10, 2021, Disc IT7, Photograph 210, JJF, Building C, EPS foam board installed tight to WRB and vertical grooves generally missing at the back face.

March 10, 2021, Disc IT9, Photograph 92, PER, Building C, rusted lath

March 10, 2021, Disc IT9, Photograph 90, PER, Building C, rusted staples

March 10, 2021, Disc IT9, Photograph 87, PER, Building C, rusted staples and lath

March 10, 2021, Disc IT9, Photograph 95, PER, Building C, EPS foam board installed tight to WRB and vertical grooves generally missing at the back face. Note corrosion from the nails on the EPS foam board.

March 10, 2021, Disc IT7, Photograph 117, JJF, Building D, EPS foam board installed over WRB with vertical grooves generally missing at the back face.

March 10, 2021, Disc IT7, Photograph 226, JJF, Building D, EPS foam board installed over WRB with vertical grooves generally missing at the back face.

Locations:

Non-compliant EPS foam board installation for stucco exists at locations where stucco is applied over solid substrates across the Gallery site. Refer to the attached Observation Drawings and Defect Matrix for locations and details of findings.

Limitations of Liability:

All comments made are based on conditions seen at the time of these visual observations and review of provided documentation. SBSA does not accept any responsibility for unknown or unknowable conditions within the existing site or structures. In addition, if the professional services of the consultant do not extend to the repair phase, then, by acceptance of this report, it is agreed that the owner will defend, indemnify, and hold harmless SBSA from any claim or suit whatsoever. SBSA agrees to be responsible for its own or its employees' negligent acts, errors, or omissions.

Sincerely,

SBSA, LLC
A Charles Taylor Company
Firm # 16794-0

Jeffrey J. Felderman, PE
Senior Vice President – Construction and Design Compliance

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Chief Executive Officer

SSR:DMD:JJF:ELF:kn

Attachments: Observation Photographs
Photograph Log
Observation Drawing Set, Sheets G0.00, A1.01-1.04, C1.01-C1.16, C2.01-C2.04, C3.01-C3.08
Repair Drawings, Sheets B1.01-B1.04
Defect Matrix
References

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