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6 *at Gallery, LLC and K. Hovnanian Arizona Operations, LLC*

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 GALLERY COMMUNITY ASSOCIATION, an
10 Arizona non-profit corporation,

11 Plaintiff,

12 v.

13 K. HOVNANIAN AT GALLERY, LLC, an
14 Arizona limited liability company; K.
HOVNANIAN ARIZONA OPERATIONS, LLC,
15 an Arizona limited liability company; K.
HOVNANIAN DEVELOPMENTS OF
16 ARIZONA, INC., an Arizona corporation; K.
HOVNANIAN COMPANIES OF ARIZONA,
17 LLC, an Arizona limited liability company; JOHN
DOES I-X AND JANE DOES I-X, WHITE
18 CORPORATIONS I-X; BLACK
PARTNERSHIPS I-X; AND GRAY LIMITED
LIABILITY COMPANIES I-X,

19 Defendants.

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

25 Third-Party Plaintiffs,

26 v.

27 CHAS ROBERTS AIR CONDITIONING, INC.,
an Arizona corporation; DESERT VISTA, INC.,
an Arizona corporation; GOTHIC
28 LANDSCAPING, INC., a California corporation;

Case No. CV2020-008714

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION *IN LIMINE*
NO. 2 TO EXCLUDE EVIDENCE
THAT THE BUILDING
DEPARTMENT INSPECTED AND
APPROVED THE DESIGN OR
CONSTRUCTION OF THE
GALLERY**

(Assigned to the Honorable Katherine
Cooper)

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1 HOME BUILDERS SITE SERVICES OF
2 ARIZONA, LLC, an Arizona limited liability
3 company; LEBLANC BUILDING CO., INC., an
4 Arizona corporation; LIBERTY
5 CONSTRUCTORS, LLC, an Arizona limited
6 liability company, dba LIBERTY ARIZONA;
7 RENCO LLC, an Arizona limited liability
8 company, dba RENCO ROOFING; R/S SERVICE
& SUPPLY, INC., an Arizona corporation;
SARGON MASONRY CONSTRUCTION, LLC,
an Arizona limited liability company; and DOES
1-50.

Third-Party Defendants,

9 COME NOW Defendants K. Hovnanian at Gallery, LLC, and K. Hovnanian Arizona
10 Operations, LLC, by and through undersigned counsel, and hereby submit their Response to
11 Plaintiff's Motion *in Limine* No. 2 to exclude evidence that the building department inspected and
12 approved the design or construction of the Gallery.

13 Each of the parties has experts who have opined on the standards of care for performance
14 of the work and whether the property as constructed is consistent with those standards. These
15 standards include the construction codes as enacted locally and enforced by local building
16 departments and inspectors. Their actual interpretation of the codes is relevant to the question of
17 whether the methods of construction as inspected and approved are consistent or inconsistent with
18 the local authority's interpretation. Their interpretation of the codes might or might not be relevant
19 to the question of whether a specific instance of workmanship deviated from the standard since
20 the inspectors do not necessarily observe every section of every property improvement. However,
21 evidence that City of Scottsdale inspectors did observe and approve particular items may be
22 relevant to whether specific examples of work are consistent with the local authority's
23 interpretation. The experts on all sides are expected to clarify this (see, for example, Exhibit A,
24 excerpts from deposition of T. Ingo, pp. 55:02-60:11). Building department officials may have
25 other relevant testimony on the general and specific nature of their inspections and their
26 interpretation of the codes.

27 Evidence that the building inspector inspected and approved the property as constructed
28 may be probative of the issue of whether conditions are consistent with the City of Scottsdale's

1 interpretation and enforcement of building codes. To the extent that Plaintiff attempts to
2 generalize that construction was performed consistently, the evidence is probative of the fact that
3 the methods used throughout the property were consistent with the codes as interpreted by the
4 Building Department and its inspectors. For example, Plaintiff’s expert claims that all fenestration
5 heads should have weep screeds (i.e. weep screeds above each window) pursuant to International
6 Residence Code R703.6.2.1 and International Building Code 2512.1.2. Certainly evidence of
7 inspection by the local authority is relevant and probative to the issue of whether the codes actually
8 enacted by the City of Scottsdale and interpreted by the Building Department did or did not require
9 weep screeds above each window. The evidence is relevant and therefore admissible per
10 Ariz.R.Evid.702.

11 Plaintiff argues that the evidence of inspection could be prejudicial, misleading, or wasteful
12 and should be excluded under Ariz.R.Evid. 403. Plaintiff does not explain how or why the
13 evidence could be unfair, prejudicial, confusing, or waste time.

14 Plaintiff’s Motion *in Limine* No. 2 should be denied for these reasons.

15
16 Dated: January 30, 2023

LORBER, GREENFIELD & POLITO, LLP

17
18 By: /s/Louis Horowitz
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23 *Plaintiffs K. Hovnanian at Gallery, LLC and*
24 *K. Hovnanian Arizona Operations, LLC*

25 Original of the foregoing e-filed
26 this 30th day of January, 2023 with:

27 Clerk of the Court
28 Maricopa County Superior Court
101 W. Jefferson
Phoenix, AZ 85003

1 COPY of the foregoing emailed this
30th day of January, 2023 to:

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Exhibit A

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

3 GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit
4 corporation,
5 Plaintiff,

6 v. CASE NO. CV2020-008714

7 K. HOVNIANIAN AT GALLERY, LLC, an Arizona limited
8 liability company; K. HOVNIANIAN ARIZONA OPERATIONS,
9 LLC, an Arizona limited liability company; K. HOVNIANIAN
10 DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation;
11 K. HOVNIANIAN COMPANIES OF ARIZONA, LLC, an Arizona
12 limited liability company; JOHN DOES I-X AND JANE DOES
13 I-X, WHITE CORPORATIONS I-X; BLACK PARTNERSHIPS I-X;
14 and GRAY LIMITED LIABILITY COMPANIES I-X,
15 Defendants.

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K. HOVNIANIAN AT GALLERY, LLC, an Arizona limited
liability company; K. HOVNIANIAN ARIZONA OPERATIONS,
LLC, an Arizona limited liability company; K. HOVNIANIAN
DEVELOPMENTS OF ARIZONA, INC., an Arizona corporation;
K. HOVNIANIAN COMPANIES OF ARIZONA, LLC, an Arizona
limited liability company,
Third-Party Plaintiffs,

v.

CHAS ROBERTS AIR CONDITIONING, INC., an Arizona
corporation; DESERT VISTA, INC., an Arizona corporation;
GOTHIC LANDSCAPING, INC., a California corporation;
HOME BUILDERS SITE SERVICES OF ARIZONA, LLC, an Arizona
limited liability company; LEBLANC BUILDING CO., INC.,
an Arizona corporation; LIBERTY CONSTRUCTORS, LLC, an
Arizona limited liability company, d/b/a LIBERTY
ARIZONA; RENCO, LLC, an Arizona limited liability
company, d/b/a RENCO ROOFING; R/S SERVICE & SUPPLY,
INC., an Arizona corporation; SARGON MASONRY
CONSTRUCTION, LLC, an Arizona limited liability
company; and DOES 1-50,
Third-Party Defendants.

1 PURSUANT TO NOTICE and the Arizona Rules of
2 Civil Procedure, the videoconferenced deposition of
3 TERRY INGO, whose identity has been verified by the
4 court reporter, was taken on behalf of the Plaintiffs
5 on Monday, August 29, 2022, at 10:02 a.m., before Wendy
6 McCaffrey, Registered Professional Reporter and Notary
7 Public.

8
9 (The reporter, Wendy McCaffrey, appearing remotely via
10 Zoom videoconference from Arvada, Colorado 80004.)

11 (The deponent, Terry Ingo, appearing remotely via Zoom
12 videoconference.)

1 Exhibit 25.

2 Q. (BY MS. MANSHIP) Mr. Ingo, this is a set of
3 building permits. They're all pretty much the same. I
4 wanted to just focus on the first page of this exhibit.

5 MS. MANSHIP: If we could scroll down, Dana,
6 to the bottom part. Great.

7 Q. (BY MS. MANSHIP) Have you seen the building
8 permits on this project?

9 A. I have not.

10 Q. Okay. Are you familiar with the City of
11 Scottsdale building permits?

12 A. Yes.

13 MS. MANSHIP: Okay. So if we can enlarge the
14 part with the signature.

15 Q. (BY MS. MANSHIP) That full paragraph there
16 that starts, "This permit." Do you see where I'm at?

17 A. Yes.

18 Q. The second sentence in this starts, "All
19 provisions of laws." Do you see that?

20 A. I do.

21 Q. It says, "All provisions of laws and
22 ordinances governing this type of work will be complied
23 with, whether specified herein or not. The granting of
24 a permit does not presume to give authority to violate
25 or cancel the provisions of any other state or local

1 law regulating construction or the performance of
2 construction." Do you see that?

3 A. I do.

4 Q. What is your understanding of what is meant
5 by those two sentences?

6 A. That -- that there would not be a -- an
7 intentional violation of the code, that the work would
8 be governed by that.

9 Q. By the code?

10 A. Correct.

11 MS. MANSHIP: Okay. We can go to Exhibit 26,
12 Dana.

13 Q. (BY MS. MANSHIP) And, Mr. Ingo, Exhibit 26
14 is a set of Certificates of Occupancy for this project.
15 Do you recall reviewing the Certificates of Occupancy?

16 A. I did not.

17 Q. Okay. Are you familiar with Certificates of
18 Occupancy for the City of Scottsdale, generally?

19 A. Generally. I don't know if I've looked at
20 City of Scottsdale's. But I am -- I have seen
21 Certificates of Occupancy for other municipalities.

22 Q. Okay. I wanted to focus on -- in the middle
23 of the page here, municipalities under the heading
24 "Certificate of Occupancy," Section 111.1, "Use and
25 Occupancy." Do you see that?

1 A. I do.

2 Q. It says, "A building or structure shall not
3 be used or occupied and a change in the existing use of
4 occupancy classification of the building or structure
5 or portion thereof shall not be made until the building
6 official has issued a Certificate of Occupancy
7 therefore, as provided herein.

8 "Issuance of a Certificate of Occupancy shall
9 not be construed as an approval of a violation of the
10 provisions of this code or of other ordinances of the
11 jurisdiction." Do you see that?

12 A. I do.

13 Q. So this Section 11.1 is a section of the City
14 of Scottsdale's adopted codes, correct?

15 A. That -- that looks like it, yes.

16 Q. Okay. And so, this last sentence, do you
17 agree that what this code means is that, by issuing the
18 Certificate of Occupancy, the building official or
19 building department is not -- or that should not be
20 construed as an approval of a violation of the code?

21 A. As -- as they enforce them -- the code, yes.

22 Q. It doesn't say, "as they enforce them,"
23 though, right? It says, "provisions of this code,"
24 correct?

25 A. I think it's a given that it's -- that's how

1 they enforce it and how they interpret and enforce it.

2 Q. And what do you mean by, "how they interpret
3 it and enforce it"?

4 A. Each municipality has -- they adopt a certain
5 code, and they can -- they can choose to enforce
6 certain things that they -- that are specific to
7 their -- their region, their municipality.

8 Things that are of concern to them in their
9 municipality may not be of concern in another
10 municipality. Building officials have the authority to
11 enforce the code as they -- as they see -- as the
12 municipality has adopted it.

13 Q. However, the intention of this code section
14 is to say that the code must be complied with, not just
15 the codes that that building official needs should pick
16 and choose; isn't that correct?

17 A. It -- yes, absolving them of any violations
18 that they may have missed.

19 Q. Because when building officials do
20 inspections, they cannot possibly inspect every single
21 part of the project during every single phase of
22 construction, correct?

23 A. Correct.

24 Q. So there may be code violations that they
25 don't catch and they can't catch or would just not be

1 practical, correct?

2 A. Correct.

3 Q. And so the building department intends that
4 any construction that they give a permit for or
5 Certificate of Occupancy will comply with all codes,
6 correct?

7 A. As they interpret them, yes.

8 Q. I still don't understand what you mean by --

9 A. There -- there are certain code -- the --
10 "code" is such a broad term. There are seismic codes,
11 for example, that are in the -- in the code book, but
12 there -- that in the location, for instance, of
13 Scottsdale, Arizona, may not have the same seismic
14 requirements as other parts of the country.

15 So if there -- if a -- if something is
16 constructed without following those seismic codes, and
17 that municipality adopted it saying that's not a
18 requirement in our municipality, then that's their
19 interpretation of that, and that's how they're
20 enforcing it.

21 Q. Doesn't the City of Scottsdale say that
22 specifically? I mean, the City of Scottsdale has
23 adopted the codes with City of Scottsdale's amendments,
24 correct?

25 A. Correct.

1 Q. So if City of Scottsdale did not want -- or
2 was not intending that construction within -- within
3 its jurisdiction comply with those earthquake or
4 seismic requirements, then they'd have that amendment
5 in there, correct?

6 A. They -- yes. And -- and the official can --
7 can interpret that that way.

8 Q. And that would be that City of Scottsdale has
9 adopted the ones that they intend to have construction
10 comply with, correct?

11 A. Correct.

12 MS. MANSHIP: Okay. This is probably is good
13 time for a break. Then I am going to start with your
14 report. Is that fair to everybody?

15 MS. RAI: This is Rena, I was just wondering,
16 just for planning purposes. I mean, all day is fine.
17 But I don't know about how long you think you're going
18 to be.

19 MS. MANSHIP: So I have to leave by 2:00 p.m.
20 Arizona time. And I think that Lou has to leave by
21 2:00 p.m. Arizona time. So I think we're doing better
22 than we did on Friday. I think I'm further along than
23 we were at this point on Friday.

24 I can get done in a couple of more hours.
25 That leaves everybody an hour or two to do follow-up.


C E R T I F I C A T I O N

I, WENDY MCCAFFREY, Registered Professional Reporter and Notary Public within the State of Colorado, commissioned to administer oaths, do hereby certify that previous to the commencement of the examination, the deponent, TERRY INGO, was duly sworn by me to testify to the truth in relation to matters in controversy between the said parties; that the said deposition was taken in stenotype by me at the time and place aforesaid and was thereafter reduced to typewritten form by me; and that the foregoing is a true and correct transcript of my stenotype notes thereof.

I further certify that I am not an attorney nor counsel nor in any way connected with any attorney or counsel for any of the parties to said action nor otherwise interested in the outcome of this action.

My commission expires: January 31, 2024.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of September, 2022.



Wendy McCaffrey
Registered Professional Reporter