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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 GALLERY COMMUNITY ASSOCIATION,
17 an Arizona non-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.
26 HOVNANIAN COMPANIES OF ARIZONA,
27 LLC, an Arizona limited liability company;
28 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.

 K. HOVNANIAN AT GALLERY, LLC, an
 Arizona limited liability company; K.
 HOVNANIAN ARIZONA OPERATIONS,
 LLC, an Arizona limited liability company; K.
 HOVNANIAN DEVELOPMENTS OF

Case No. CV2020-008714

Assigned to Hon. Katherine Cooper

**PLAINTIFF’S RESPONSE AND
OBJECTION TO THIRD-PARTY
DEFENDANTS RENCO, LLC DBA
RENCO ROOFING AND DESERT
VISTA, INC.’S JOINT
APPLICATION FOR
ATTORNEYS’ FEES, COSTS AND
EXPERT FEES AND STATEMENT
OF COSTS**

1 ARIZONA, INC., an Arizona corporation; K.
2 HOVNANIAN COMPANIES OF ARIZONA,
3 LLC, an Arizona limited liability company;

4 Third-Party Plaintiffs,

5 v.

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

22 Third-Party Defendants.

23 The plaintiff, Gallery Community Association (the “Association” or “Plaintiff”), by
24 and through undersigned counsel, hereby submits this Response and Objection to Third-
25 Party Defendants Renco, LLC dba Renco Roofing and Desert Vista, Inc.’s (“Collectively
26 Third-Party Defendants”) Joint Application for Attorneys’ Fees, Costs, and Expert Fees and
27 Statement of Costs (“Application”).

28 **I. INTRODUCTION/BACKGROUND**

The Association and Defendants K. Hovnanian at Gallery, LLC, K. Hovnanian
Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc. and K. Hovnanian
Companies of Arizona, LLC (collectively “KHov” or “Defendants) engaged in the pre-
litigation notice process under the Purchaser Dwelling Act, A.R.S. § 12-1361, et seq.
Manship Decl. ¶ 2. KHov did not argue during the PDA process that the Association was

1 not the proper party to assert the claim. Manship Decl. ¶ 3. KHov offered nominal repairs
2 during the PDA process and several of the repairs were inadequate and the defective
3 conditions returned. Manship Decl. ¶ 4. There is no evidence that Third-Party Defendants
4 Renco Roofing or Desert Vista participated in the pre-litigation PDA process. Manship
5 Decl. ¶ 4.

6 The Association filed its Complaint on July 27, 2020 against Defendants. Defendants
7 agreed to withdraw their motion to dismiss and answer the Complaint in exchange for a
8 dismissal of the Association’s negligence cause of action. Manship Decl., ¶ 5. Defendants
9 answered the Complaint on September 22, 2020 and filed their Third-Party Complaint on
10 or about October 6, 2020, naming eight third-party defendants. Third-Party Defendants
11 were hired by KHov, not the Association, to perform work at the Gallery project. The
12 Association is not a party to Third-Party Defendants’ Master Subcontract Agreements.
13 Manship Decl. ¶ 6.

14 On February 19, 2021, Defendants filed their original motion for summary judgment.
15 Defendants’ original motion for summary judgment did not include an argument that the
16 Association lacked standing to bring a claim for breach of implied warranty. Manship Decl.
17 ¶ 17. During a status conference on April 27, 2021, set to address the Association’s request
18 for an extension of time to file an amended response so the parties could engage in
19 discovery, Defendants’ counsel admitted on the record that:

- 20 • “The case will proceed in some form against probably the builder [K.
21 Hovnanian Arizona Operations, LLC], who we’ve admitted is the builder,
22 who they’ve alleged is the builder, and we’ve admitted.”
- 23 • The motion is about “who [among the Defendants] are the proper parties.”
- 24 • Defendants’ counsel said to the Association’s counsel, “we don’t have a
25 problem with you suing the builder right now, there may be other issues that
26 we raise on summary judgment in the future on that, but of course I understand
27 that their claim against the builder may proceed to a certain extent.”
- 28 • “This is a very complicated area of the law because it is not fleshed out.”

1 Manship Decl. ¶ 17.

2 Ultimately, Defendants withdrew their original motion for summary judgment on
3 March 10, 2022. Manship Decl. ¶ 8; Exh. 3, Notice of Withdrawal of Motion without
4 Prejudice.

5 The Association is a non-profit corporation formed “for the purpose of the efficient
6 preservation of the values and amenities” of the Gallery project. Manship Decl. ¶ 12; Exh.
7 6, Excerpts from Declaration of Covenants, Conditions Restrictions and Easements for
8 Gallery (“CC&Rs”), Recitals, Section B. The Association is funded through the collection
9 of assessments from the homeowner members. Jones Decl. ¶ 4. Manship Decl. ¶ 12; Exh.
10 6, CC&Rs Section 6. Moreover, the funds in the Association’s reserve account may not be
11 used to pay any attorney fee award. Jones Decl. ¶ 5. Manship Decl. ¶ 12; Exh. 6, CC&Rs
12 Section 6.9 (Declaration requires reserve funds to be used for maintenance, repairs, and
13 capital improvements).

14 **II. ARGUMENT**

15 **A. Third-Party Defendants cannot meet their burden to prove entitlement** 16 **to attorney’s fees under A.R.S. § 12-341.01**

17 Third-Party Defendants, as the parties requesting an award of attorney fees, have the
18 burden of proving their entitlement to the award. *Woerth v. Flagstaff*, 167 Ariz. 412, 419,
19 808 P.2d 297, 304 (App. 1990). A.R.S. § 12-341.01 provides that in an action arising out
20 of contract, “the court **may** award the successful party reasonable attorney fees.” A.R.S. §
21 12-341.01(A) (emphasis added). An award of attorney’s fees under A.R.S. § 12-341.01 is
22 discretionary, and “there is no presumption that the successful party is entitled to attorney’s
23 fees.” *Layne v. Transamerica Fin. Servs.*, 146 Ariz. 559, 563, 707 P.2d 963, 967 (App.
24 1985) (citing *Associated Indemnity Corporation v. Warner*, 143 Ariz. 567, 694 P.2d 1181
(1985)).

25 Courts consider six factors in order to determine whether to award attorney fees
26 under Section 12-341.01:

- 27 (1) whether the unsuccessful party’s claim or defense was meritorious;
28

- 1 (2) whether the litigation could have been avoided or settled and the successful
2 party's efforts were completely superfluous in achieving the result;
- 3 (3) whether assessing fees against the unsuccessful party would cause an
4 extreme hardship;
- 5 (4) whether the successful party prevailed with respect to all of the relief
6 sought;
- 7 (5) whether the legal question presented was novel and whether such claim or
8 defense had previously been adjudicated in this jurisdiction; and
- 9 (6) whether the award would discourage other parties with tenable claims or
10 defenses from litigating or defending legitimate contract issues for fear of
11 incurring liability for substantial amounts of attorney fees.

12 *Wheel Estate Corp. v. Webb*, 139 Ariz. 506, 508-509, 679 P.2d 529, 531-532, (App. 1983);
13 *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184, (1985);
14 *Phoenix Cent. v. Dean Witter Reynolds, Inc.*, 768 F. Supp. 702, 703-704 (D. Ariz. 1991);
15 *Lehman v. Mutual of Omaha Ins. Co.*, 806 F. Supp. 859, 865, (D. Ariz. 1992); *Moses v.*
16 *Phelps Dodge Corp.*, 826 F. Supp. 1234, 1236, (D. Ariz. 1993).

17 A review of these factors in this case supports denying Third-Party Defendants an
18 award of attorney's fees.

19 **1. The Association did not sue Third-Party Defendants, and Third-**
20 **Party Defendants did not succeed on all claims on the merits.**

21 The first factor, whether the unsuccessful party's claim or defense was meritorious,
22 does not support an attorney fee award here. First, the Association did not name Third-Party
23 Defendants as parties in this action. In addition, the Association is not a party to the Master
24 Subcontract Agreements with Defendants, upon which Third-Party Defendants attempt to
25 rely on for their contractual attorney fee award.

26 Second, in deciding Defendants' summary judgment motion, the Court did not rule
27 that no construction defects exist at the Gallery project or that Defendants and Third-Party
28 Defendants are not liable for those defects. Instead, as to the claim for breach of implied

1 warranty of workmanship and habitability, the Court ruled that “[t]he homes – and the
2 implied warranty – belongs to the homeowners,” and Plaintiff, as the homeowner’s
3 association, “has no authority to bring an action for the affected homeowners.” Manship
4 Decl. ¶ 13; Exh. 7, Rulings re Motions for Summary Judgment, February 8, 2023, at 4. This
5 was not a ruling on the *merits* of the implied warranty claim. Rather, the Court found that
6 the Association lacked *standing* to bring the implied warranty claim with respect to the
7 homes. *Cf. Magellan Health, Inc. v. Duncan*, 252 Ariz. 400, 403, 503 P.3d 851, 854 (App.
8 2021) (“Because standing is jurisdictional, lack of standing *precludes a ruling on the*
9 *merits.*”; emphasis added) (quoting *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334
10 F.3d 1366, 1370 (Fed. Cir. 2003).

11 In sum, because the Association is not a party to the Master Subcontract Agreements
12 on which Third-Party Defendants rely, and the Court did not find that the alleged defect
13 claims failed *on their merits*, this factor weighs against awarding Defendants attorney’s
14 fees.

15 **2. The vast majority of attorney fees could have been avoided by**
16 **seeking a ruling on the standing issue early in the litigation.**

17 The second factor, whether the litigation could have been avoided or settled and
18 whether the successful party’s efforts were superfluous in achieving the result, also does
19 not support a fee award here. The vast majority of the litigation and related attorney’s fees
20 and litigation expenses could have been avoided by obtaining a ruling on the issue of the
21 Association’s standing to bring the claims at the outset of the case. KHov could have
22 brought a motion to dismiss on this issue prior to naming Third-Party Defendants as parties
23 in this action.

24 Instead, KHov answered the Complaint, filed a third-party complaint, settled with
25 several third-party defendants, and litigated the case for over two years. KHov proceeded
26 with the litigation, through discovery and expensive expert investigations, until shortly
27 before the scheduled trial date. All of these litigation efforts, *unrelated to the purely legal*
28 *standing issue*, were “superfluous” in achieving the result in this case. Therefore, this factor

1 does not support awarding Third-Party Defendants’ requested attorney fees.

2 **3. Assessing fees against the Association would cause an extreme**
3 **hardship to the Association and its unit owner members.**

4 The third factor, whether assessing fees against the unsuccessful party would cause
5 extreme hardship, also favors denying Third-Party Defendants’ fee request. The
6 Association is a non-profit corporation formed “for the purpose of the efficient preservation
7 of the values and amenities” of the Gallery project. Manship Decl. ¶ 12; Exh. 6, CC&Rs,
8 Recitals, Section B. The Association is funded through the collection of assessments from
9 the homeowner members. Jones Decl. ¶ 4. Manship Decl. ¶ 12; Exh. 6, CC&Rs Section 6.
10 Moreover, the funds in the Association’s reserve account may not be used to pay any
11 attorney fee award. Jones Decl. ¶ 5. Manship Decl. ¶ 12; Exh. 6, CC&Rs Section 6.9
12 (Declaration requires reserve funds to be used for maintenance, repairs, and capital
13 improvements). Thus, the homeowner members in effect must *themselves* pay any
14 attorney’s fees awarded to Defendants, while the defects in their homes remain unresolved.

15 As set forth in the Declaration of Matthew Jones, the Association does not have the
16 funds to pay Defendants’ requested attorney’s fees, and such an award would cause an
17 extreme hardship on the Association, (Jones Decl. ¶ 3, 6-7; Exh. 1, Balance Sheet and
18 Income Statement), and, thus, by extension, on its individual homeowner unit owners.
19 Therefore, this factor weighs strongly in favor of denying Third-Party Defendants’ fee
20 request.

21 **4. KHov did not prevail with respect to all of the relief sought.**

22 The fourth factor, whether the successful party prevailed with respect to all of the
23 relief sought, also weighs against Third-Party Defendants’ fee request. As stated above, the
24 Association did not sue Third-Party Defendants, and the Association was not a party to the
25 Master Subcontract Agreements between KHov and Third-Party Defendants. The Court did
26 not rule on Third-Party Defendants motion for summary judgment, rather, it found the
27 motion was moot. In addition, Third-Party Defendants Renco and Desert Vista brought a
28 motion to preclude expert reports, which was based upon KHov’s attempt to disclose new

1 expert reports after the disclosure deadlines passed. Plaintiff should not be responsible for
2 paying Third-Party Defendants' attorney's fees incurred related to the motion to preclude,
3 which was wholly unrelated to Plaintiff's claims.

4 Accordingly, this factor weighs against Third-Party Defendants' requested fee
5 award.

6 **5. The legal question upon which the Court granted summary**
7 **judgment was novel and had not previously been adjudicated in**
8 **this jurisdiction.**

9 The fifth factor, whether the legal question presented was novel and whether such
10 claim or defense had previously been adjudicated in this jurisdiction, also supports denying
11 Third-Party Defendants' requested fees. There are no published Arizona appellate cases
12 directly addressing the standing issue KHov successfully raised in this case.

13 Defendants argued, and the Court agreed, that the Association could not bring the
14 breach of implied warranty claims because the Association does not own the Gallery
15 community's units and did not have statutory authority to bring claims on behalf of the unit
16 owners. No Arizona court of appeal decision has directly addressed whether a non-
17 condominium homeowner association which has the duty to repair and replace the unit
18 exteriors may bring an action for breach of implied warranty against the builder/vendor of
19 those units.

20 Many construction defect lawsuits have been filed and resolved by townhome
21 associations similarly situated to the Plaintiff in this case, without a ruling that the
22 association does not have standing to bring a breach of implied warranty claim. *See, e.g.,*
23 *Aire on McDowell Cmty. Ass'n v. K. Hovanian at Aire on McDowell, LLC*, No. CV2022-
24 008601 (Maricopa Cty. Super. Ct.) (case pending). Undersigned counsel is unaware of any
25 another superior court rulings on the specific standing issue raised in this case. Manship
26 Decl. ¶ 14.

27 In addition, KHov did not seek a ruling on whether the Association had standing to
28 bring a claim for breach of implied warranty at the outset of the case. If this issue was

1 unambiguously was determinative of the case, KHov would have made that argument in a
2 motion to dismiss or in their original motion for summary judgment. During the status
3 conference before Judge Kemp, Defendants' counsel admitted that the Association's case
4 would proceed against "the builder." Counsel also admitted that this is a complicated area
5 of law that is not "fleshed out." Manship Decl. ¶ 17.

6 Clearly, the standing issue was novel and not the subject of settled case law. For this
7 additional reason, the Court should deny Third-Party Defendants' fee request.

8 **6. Awarding Third-Party Defendants' requested fees would**
9 **discourage other parties from litigating legitimate claims.**

10 The sixth factor, whether the award would discourage other parties with tenable
11 claims or defenses from litigating or defending legitimate contract issues for fear of
12 incurring liability for substantial amounts of attorney fees, also supports denying the fee
13 request. An award of attorney's fees to Third-Party Defendants in this case would
14 discourage homeowners who are members of an association from litigating legitimate
15 claims for construction defects. As discussed above, the Association is funded by
16 assessments received from its homeowner members. Any fee award will ultimately be
17 funded by the Gallery homeowners who KHov argued, and the Court has ruled, are the ones
18 the implied warranty claim belongs to.

19 Moreover, an award of attorney's fees in this case is not necessary to discourage
20 other similarly situated associations from asserting similar claims. The costs necessary to
21 prosecute a construction defect case are substantial due to the expert investigation required.
22 Here, the Association incurred litigation costs, including expert investigation costs, in
23 excess of \$400,000. Manship Decl. ¶ 15. The inability to recover those expert costs are a
24 sufficient disincentive to similar claims. This factor, too, weighs in favor of denying Third-
25 Party Defendants' fee request.

26 **B. The Association is not a party to the Master Subcontract Agreements**
27 **and, therefore, attorney's fees and expert fees cannot be awarded against**
28 **the Association under the terms of those Agreements.**

Third-Party Defendants reference the Master Subcontract Agreements,

1 (“Subcontracts”) with KHov as a basis for the Court awarding their attorney’s fees and
2 expert fees. However, the Association’s claims were not based upon the Subcontracts, and
3 the Association is not a party to the Subcontracts. Therefore, they cannot serve as a basis
4 for such award.

5 *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 155 P.3d 1090 (App. 2007),
6 on which Third-Party Defendants rely, does not hold that a subcontractor must be awarded
7 attorney’s fees and costs against a non-party to a contract based upon the language in the
8 contract between the builder and the subcontractor. In *Fulton Homes*, the court of appeal’s
9 ruling relied on the discretionary attorney’s fee language in A.R.S. § 12-341.01. *Id.*

10 The Association did not assert a breach of contract claim based upon the
11 Subcontracts, and there has been no determination that the Subcontracts are in fact
12 enforceable. While attorney’s fees may be recoverable under the discretionary language in
13 A.R.S. § 12-341.01 even where the absence of a contract is found, Third-Party Defendants
14 do not cite any case law or statute that permits a third-party defendant to be awarded
15 mandatory attorney’s fees and expert costs against a plaintiff that was not a party to the
16 contract containing the mandatory award language.

17 **C. Defendants cannot meet their burden to prove entitlement to attorney’s**
18 **fees or expert witness fees under A.R.S. § 12-1364.**

19 A.R.S. § 12-1364 is part of the Purchaser Dwelling Act (“PDA”), A.R.S. § 12-1361,
20 *et seq.*, and states that a court “**may** award the prevailing party with respect to a contested
21 issue reasonable attorney fees and taxable costs” and “**may** award the prevailing party with
22 respect to the contested issue reasonable expert witness fees.” A.R.S. § 12-1364(A) and (D)
23 (emphasis added). However, Third-Party Defendants are only a prevailing party under
24 Section 12-1364 if Plaintiff did not obtain a more favorable result than “the repairs or
25 replacements and offers made by the [Third-Party Defendants] before the [Plaintiff] filed a
26 dwelling action pursuant to section 12-1363.” *Id.* Third-Party Defendants presented no
27 evidence that they participated in the PDA repair process at all. Undersigned counsel is not
28 aware of any involvement by either Renco Roofing or Desert Vista in the PDA process.

1 Manship Decl. ¶ 4.

2 Moreover, in determining the reasonableness of attorney fees or expert witness fees
3 under Section 12-1364, the Court “**shall** consider all of the following”:

- 4 1. The repairs, replacements or offers made by the seller, if any, before the
5 purchaser filed the dwelling action pursuant to section 12-1363.
- 6 2. The purchaser’s response to the seller’s repairs, replacements or offers
7 made or proposed, if any, before the purchaser filed the dwelling action
8 pursuant to section 12-1363.
- 9 3. The relation between the fees incurred over the duration of the dwelling
10 action and the value of the relief obtained with respect to the contested
11 issue.
- 12 4. The amount of fees incurred in responding to any unsuccessful motions,
13 claims and defenses during the duration of the dwelling action.

14 A.R.S. § 12-1364(B). (emphasis added).

15 Third-Party Defendants did not present any information to this Court regarding what
16 occurred during the PDA process prior to Plaintiff filing the action. Third-Party Defendants’
17 only reference to Section 12-1364 is two sentences on Page 8 of their Application. *See*
18 *Application at 8:2-12.* They do not set forth what contested issues were involved in the PDA
19 process or discuss the factors that the Court must consider in order to determine the
20 reasonableness of the fees under Section 12-1364. Therefore, there is no way for the Court
21 to determine whether to award attorney’s fees, or the reasonableness of the requested fees
22 under Section 12-1364.

23 Moreover, as shown above, several factors weigh in favor of determining that Third-
24 Party Defendants’ request for fees is not reasonable:

- 25 • KHov did not argue during the PDA process that the Association was not the
26 proper party to assert the claim;
- 27 • KHov offered nominal repairs during the PDA process and several of the
28 repairs were inadequate and the defective conditions returned;
- There is no evidence that Renco Roofing or Desert Vista participated in the
PDA process.

Therefore, the Court should not make a discretionary award of attorney’s fees and

1 expert costs in favor of Third-Party Defendants under Section 12-1364.

2 **D. The requested fees are not reasonable.**

3 A court may properly deny a fee award for “separate and distinct claims which are
4 unrelated to the claim upon which the [party] prevailed.” *Pioneer Roofing Co. v. Mardian*
5 *Constr. Co.*, 152 Ariz. 455, 467-68, 733 P.2d 652, 664-65 (Ct. App. 1986) (quoting
6 *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933
7 (App.1983); *see also Trus Joist Corp. v. Safeco Ins. Co.*, 153 Ariz. 95, 110, 735 P.2d 125,
8 140 (App. 1986).

9 As discussed above, Third-Party Defendants Renco and Desert Vista brought a
10 motion to preclude expert reports, which was based upon KHov’s attempt to disclose new
11 expert reports after the disclosure deadlines passed. Plaintiff should not be responsible for
12 paying Third-Party Defendants’ attorney’s fees incurred related to the motion to preclude,
13 which was wholly unrelated to Plaintiff’s claims.

14 In addition, pursuant to Section 12-341.01(B), an award of reasonable attorney’s fees
15 “should mitigate the burden of the expense of litigation” Here, Third-Party Defendants
16 were provided defense counsel by their insurer and did not come out of pocket financially
17 for their representation. Therefore, the Court should not grant an award of attorney’s fees
18 to Third-Party Defendants, who did not incur the burden of such fees.

19 **E. Third-Party Defendants’ Taxable Costs should not be awarded against**
20 **Plaintiff.**

21 As discussed above, the Association did not sue Third-Party Defendants. Third-Party
22 Defendants were brought into this case by KHov, who did not seek a ruling from the Court
23 on the issue of the Association’s standing to bring the claim prior to naming Third-Party
24 Defendants in this action. Therefore, the Court should not award Third-Party Defendants’
25 taxable costs against Plaintiff.

26 **III. CONCLUSION**

27 Based upon the foregoing, Plaintiff respectfully requests that the Court deny Third
28 Party Defendants’ Application for Attorneys’ Fees, Costs, and Expert Fees.

1 RESPECTFULLY SUBMITTED this 10th day of March, 2023.

2 BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

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