

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-000930

11/23/2011

HONORABLE EILEEN S. WILLETT

CLERK OF THE COURT
J. Rutledge
Deputy

SCOT B COMPTON, et al.

CHRISTOPHER JAY WILSON

v.

RICHMOND AMERICAN HOMES OF
ARIZONA INC, et al.

DENNIS I WILENCHIK

STEVEN MICHAEL CHAET
ANDREW R PESHEK
BRIAN P ROTELIUK
ROBERT B ZELMS

UNDER ADVISEMENT RULING

On October 27, 2011 the Court heard Oral Argument on Defendants' Motion for Summary Judgment Re: Implied Warranty, filed July 19, 2011; Defendants' Motion for Summary Judgment Re: A.R.S. § 12-1363(E), filed July 19, 2011; and Defendants' Motion for Summary Judgment Re: Damages, July 27, 2011. The Court has considered all authorities cited, all briefing of the parties, and all information presented.

Defendants' Motion for Summary Judgment Re: Implied Warranty

Looking at the evidence in a light most favorable to the non-moving party, the Court finds that a genuine issue of material fact exists as to whether the alleged latent defects of the home were discoverable had a reasonable inspection of the residence been made prior to purchase. Richards v. Powercraft Homes, Inc. 139 Ariz. 242 (1984). Whether an average purchaser such as Plaintiff would have discovered the defects upon reasonable inspection is a question of fact, and whether the SPDS form was sufficient to put Plaintiffs on Notice of the alleged defective condition of the home is also a question of fact for the jury. Defendants are not entitled to judgment as a matter of Law.

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IT IS ORDERED denying the Motion for Summary Judgment Re: Implied Warranty.

Defendants' Motion for Summary Judgment Re: A.R.S. §12-1363(E)

Looking at the evidence in a light most favorable to the non-moving party, the Court finds that no immediate threat to life or safety exists to excuse Plaintiffs from the requirements of A.R.S. § 12-1363(E). The material facts regarding the communications between the parties prior to the filing of Plaintiff's Complaint are undisputed. As a matter of law, the Court finds that the requirements of A.R.S. §12-1363(E) have been met by Plaintiffs.

IT IS ORDERED denying Defendants' Motion for Summary Judgment Re: A.R.S. §12-1363(E).

IT IS FURTHER ORDERED denying Plaintiffs' Motion to Strike Defendants' Exhibits. All information presented has been considered.

Defendants' Motion for Summary Judgment Re: Damages

The Court finds that the appropriate method for calculating damages in this case is diminution in value. An award based on cost of repair constitutes economic waste as a matter of law where the costs of repair are imprudent and unreasonable, exceeding the fair market value of the home after repairs are made. *See, Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.* 124 Ariz. 242 (App. 1979) and Maricopa County v. Walsh & Oberg Architects, Inc., 16 Ariz. App. 439 (1972)

The material facts are undisputed, but arguably incomplete. The current fair market value of the home without construction defects is estimated between \$100,000.00 and \$110,000.00. The Plaintiffs' cost of repairs are set forth at more than \$600,000.00. In addition, the RWC payment was \$132,160.00. As erected, the house originally was sold for \$140,550.00. Plaintiff's purchased the home for \$275,000.00.

As a matter of law, the collateral source rule is inapplicable in a contract case. Defendants are entitled to an offset for the \$132,160.00 Plaintiffs have received from the RWC. Further, the concept of non-party at fault sounds in tort, not contract. Offers made pursuant to A.R.S. §12-1363 are not settlement negotiations as set forth in Rule 408, Arizona Rules of Evidence, and may be relevant to the issue of mitigation of damages.

IT IS ORDERED denying Plaintiffs' Motion to Strike. Plaintiff's objections go to the weight rather than the admissibility of the report.

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The burden of proof rests with the Defendant to show the measure of damages in this case should be diminution in value. They have done so.

The amount of damages Plaintiffs' have sustained under the diminution of value method is a question of fact for the jury.

No trial date has been set. Each side may supplement their discovery with a diminution in value expert.

IT IS ORDERED granting in part Defendants Motion for Summary Judgment Re: Damages. The amount of damages issue shall proceed to the jury.

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.