

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-004932

05/08/2006

HONORABLE RUTH H. HILLIARD

CLERK OF THE COURT
L. Gilbert
Deputy

FILED: 05/11/2006

NICK ARICO, et al.

STEPHANIE MONROE WILSON

v.

PHILLIP JOSEPH PFEIFF

FREDERICK G GAMBLE

KIRK H HAYS

MINUTE ENTRY

The following motions have been under advisement. Having considered all memoranda submitted and the arguments of counsel, the Court finds and orders as follows.

As to Defendants Pfeiff and Foshee's Motion for Summary Judgment re: McBride's Damages Claim, defendants urge that they are entitled to judgment on plaintiffs McBride's claims for damages because the McBrides have failed to disclose any recoverable damages.

As to their claim for damages in the amount of approximately \$460,000, these plaintiffs claim that this is the cost-to-repair, including costs to demolish and rebuild the home. Plaintiffs McBride have urged, in the alternative, that the cost to repair is somewhere in the range of \$89,787.91 to \$176,374.91. Finally these plaintiffs argue that the reduction in value to their home is the cost to demolish and rebuild.

Defendants move for summary judgment on the claim for damages based on destruction and rebuilding of McBrides' home due to economic waste.

The general rule is that damages for construction defects are the cost of repairing those defects. However, where the cost of repair would constitute economic waste, the plaintiff is not entitled to cost of repair and the proper measure of damages is the difference in value between the building as designed and the building as constructed. Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc., 124 Ariz. 242, 603 P.2d 513 (App. 1979).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-004932

05/08/2006

Plaintiffs McBride urge that factual questions exist as to whether demolition of their home constitutes “an unreasonable duplication of effort”, i.e., economic waste. The Court finds, however, that plaintiffs have failed to establish questions of material fact as to whether the repair contemplated by them would substantially destroy the home; it is evident that the entire home is to be destroyed under this claim. The Court finds that under the evidence presented there are no questions of material fact and there is no reasonable basis for a jury to determine that destruction of McBrides’ home requires total destruction. Such damages would constitute economic waste.

IT IS ORDERED granting defendants’ Motion for Summary Judgment on the claim for damages based on total destruction of McBrides’ home.

As to their claim for damages based on the difference in value of the home due to the defects, defendants urge that plaintiffs McBride have failed to present credible evidence to support this claim. Plaintiffs have relied on an appraisal by Daniel Smith who has opined that the diminution in value is equal to the cost of demolishing and rebuilding the home; however, Smith relied on the report submitted by Mario Capriotti and that report calling for repairs of \$167,000 lacks foundation according to defendants.

Thereafter, on January 28, 2006, Capriotti submitted a supplemental report indicating that the cost to repair the defects and deficiencies, and not to rebuild the McBride home, would total \$176,374.91.

Defendants have moved in limine to strike this late filed report as being untimely. In light of the manner in which claims and defenses have been raised in this case this Court finds that Capriotti’s report dated January 28, 2006 is not untimely.

IT IS ORDERED denying defendant Foshee’s Motion in Limine to Exclude Plaintiffs’ New Cost of Repair.

The Court finds that there are questions of material fact as to what amount, if any, is the proper measure of damages for any defects found to have caused plaintiffs McBride damages based on the latest report from Mr. Capriotti. The Court finds that there is sufficient evidence for the jury to consider what the cost is to repair the McBride home and summary judgment on cost-to-repair is not appropriate.

IT IS ORDERED denying defendants’ Motion for Summary Judgment as to cost-to-repair the McBride home.

Defendants Pfeiff’s Motions in Limine have been under advisement. The Court rules herein as follow.

As to Pfeiff’s Motion in Limine re: Elevation of Arico’s Garage Floor and Steps into the Garage, the Court has reviewed the orders of the Registrar of Contractors and finds that this claim has been resolved at the administrative level. Accordingly,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-004932

05/08/2006

IT IS ORDERED granting Pfeiff's Motion in Limine re: Elevation of Garage Floors and Steps into the Garage.

As to Pfeiff's Motion in Limine to Preclude Plaintiff and their Experts from Describing Defects, Damages or Repair Costs Which Were Not Disclosed Before the Discovery Cutoff of June 17, 2005,

IT IS ORDERED denying this Motion in Limine in light of the manner in which issues have developed in this case.

As to defendants' Motion for Partial Summary Judgment on plaintiffs Arico's claims, the Court notes that the Aricos also claim damages for the cost to demolish and rebuild their home. Defendants seek partial summary judgment on this basis for determining damages and urges that cost-to-repair is the proper method of calculating damages.

The evidence presented by plaintiffs Arico sets forth a cost-to-repair and an estimate of damages based on demolishing and rebuilding the home. The Court finds that there are no questions of material fact as to whether demolishing and rebuilding the home would constitute economic waste. The Court finds that there is evidence of cost-to-repair damages that is well below the cost to demolish and to destroy the home would constitute economic waste.

IT IS ORDERED granting defendants' Motion for Partial Summary Judgment on the issue of economic waste and it is ordered that the cost to demolish and rebuild the Arico home is not the proper measure of damages.

As to Foshee's Motion for Partial Summary Judgment regarding Mr. Smith's opinions regarding the cost-to-repair, the Court will not exclude Smith from testifying as to this cost. While the basis for his opinion may be subject to attack, the Court will allow him to testify. Accordingly,

IT IS ORDERED denying defendant Foshee's Motion for Partial Summary Judgment re: Smith's Opinions of Cost-to-Repair.