

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-019512

04/29/2004

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
M. Johnson
Deputy

FILED: 05/03/2004

STONEGATE ESTATES HOMEOWNERS
ASSOCIATIO

MICHAEL J WHITE

v.

FULTON HOMES CORPORATION

WILLIAM A NEBEKER

JAY R GRAIF
MERTON E MARKS
ANDREW PESHEK
RINA K RAI
SCOTT A SALMON

MINUTE ENTRY

10:35 a.m. This is the time of pretrial conference and to hear motions in limine. Counsel Michael J. White and Jay Mann are present on behalf of plaintiff. Counsel William A. Nebeker and Carrie Kerksmar are present on behalf of defendants. Counsel Andrew Peshek and Rina K. Rai are present on behalf of defendant Fyffe Masonry. All are present telephonically.

Court Reporter Scott Coniam is present.

After discussion and argument,

THE COURT ORDERS AS FOLLOWS:

Fyffe's Motions in Limine:

1. Re expert witness fees-granting in part so as to exclude expert fees as an element of damage (without objection to further argument by plaintiff at the trial) denying as a reason the investigation was limited. In other words plaintiff may draw the sting on direct examination concerning the costs of the investigation but may not put a specific amount of money in evidence.

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2. To preclude certain expert witness testimony-will be considered in other motions.
3. Motion for jury review-the court made ruling on March 30, 2004 to deny without prejudice to raise during the trial.
4. Re indemnity-will be considered in other motions. The court has already denied motions for summary judgment of Fyffe and Fulton on March 16, 2004 but will consider this in connection with motions to sever and also in connection with Fyffe's motion to reconsider indemnity ruling.
5. To sever third party claimant Fulton's claim against Fyffe at the trial-continued to May 19, 2004 at 8:00 a.m. (30 min.-telephonic).

Defendants' Joint Motions in Limine:

1. Number 11 re testimony of James Maldonado-granted as is only a fact witness and may tell of his observations but he can not say there was a problem or that there wasn't enough rebar.
2. Number 12 to preclude evidence of proposed sound barrier wall-continued to May 19, 2004 at 8:00 a.m. and may be resolved by plaintiff identifying an exhibit where this has been put in evidence. The question is whether Fulton told Fyffe to not build the sound wall even though it was on the plans and this allegation was contested by defendants. The court will allow testimony that an 8 inch wall on 8 inch wall was eventually built as a 4 inch wall on 8 inch wall.
3. Preclude certain expert testimony of Burkett who is structural engineer and is merely adopting, claim defendants, improper expert Wong's analysis and conclusions-goes to weight and court denies the motion.
4. Preclude expert testimony re Jim Weaver-granted on stipulation the issue of the foundation for Mr. Weaver's testimony will be reserved to the trial.
5. Grant on stipulation the motion in limine precluding Wong's testimony. Plaintiff agrees Burkett has replaced Wong who will not testify at the trial.
6. Re speculative damages-deny without prejudice to raising on a directed verdict or when evidence of any disputed damage claim is presented. This really deals with the extrapolation issue which the court has already determined. Furthermore denying plaintiff's oral motions to preclude any statement about back walls being replaced as the court believes there is sufficient documentary evidence for defendants to make this argument.
7. Re insurance-grant on stipulation unless the door is opened. This means if the defendants argue the detrimental effect on their business then the court will permit plaintiff to bring in the fact they are covered by insurance but then allow defendants to show it is under a reservation of rights. No evidence of insurance will be presented to the jury unless this court has first ruled at sidebar.

Plaintiff's Motions in Limine:

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1. Plaintiff's motion in limine number 1-preclude evidence of various matters. The court denies plaintiff's motion to preclude Fulton from having a defense of extrapolation-this issue will go to the jury. Duplicative expert opinion testimony by defendants multiple experts and Fulton's defense of economic waste/diminution of value and Fulton's defense of lack of standing will be considered in other motions. Plaintiff withdraws the motion with respect to documents relied on by defendants' experts not previously disclosed because deadlines were continued in this case with the change of the trial date. Plaintiff also withdraws whether David Sandoval can testify as his deposition was taken and there is no prejudice in the court's view. The court notes that plaintiff's expert Risto relies on Sandoval. The motion to preclude dealing with Robert Larabell (acoustical expert hired by Fulton) will depend on this court's ruling on the sound wall. The court rules that Donald Fyffe may testify as an expert in his own case and that there has been sufficient disclosure.
2. Plaintiff's motion in limine number 2-re homeowner lawsuits previously filed by Stonegate homeowners. The court grants this motion for the moment and no one will mention these lawsuits until the court can rule at the trial at a sidebar. There are two other lawsuits one being a class action (Keaton) and another being lawsuit by a group of homeowners (Abdou lawsuit). Neither of these two lawsuits deal with the common walls. The other part of this motion that there is a lack of legal authority of the Association to repair 4.2 miles of perimeter walls has already been decided in favor of plaintiff. The issue, however, as to whether back walls of individual lots were ever considered common walls and whether the defendants have been sandbagged in this case will be argued on another motion.

Alleged removal/replacement by homeowners of common walls to accommodate installation of swimming pools-denied may be argued in mitigation and goes to weight and argument.

Any alternative wall repairs method other than complete removal and replacement-denied as defendants have an alternative repair methodology such as adding steel in verticals or horizontals or adding grout. Plaintiff's expert Burkett agrees you can add steel. The fact no one can say where to do it or how much it will cost goes to weight in the court's view.

Granting on stipulation that there will be no evidence of the fee arrangement between the association and counsel.

3. Plaintiff's motion in limine number 3-re city inspection continued to **June 18, 2004 at 1:30 p.m.** for court to get an idea of what kinds documents the City of Mesa has just turned over to defendants which they are in process of getting to plaintiff. Plaintiff contends there is no one disclosed to testify to any inspections done by the City and that even if projects are green tagged this is irrelevant and hearsay.

Fulton's Motions in Limine:

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1. Re Larry Dolan and/or representative of Canyon State Inspections-withdrawn.
2. Limit plaintiff to one expert- continued to June 18, 2004 at 1:30 p.m. and the court at the same time will consider defendants' experts which may be determined if the court grants the motion to sever as then there will only be one set of experts and not two on certain issues where Fyffe and Fulton are adverse parties. Plaintiff's experts are as follows: Burkett-structural engineer; Glos-civil and geotechnical engineer who will testify as to design and standards and is a masonry wall expert; Risto-a construction expert; and Opsal-testifying to repair costs based on repair protocol of Risto. The issue is whether a construction standard is any different from a civil engineer standard so that Risto should not also be able to opine along with Burkett and Glos that the wall is defective. Defendant Fyffe's experts are Deatherage-civil engineer and cost of repairs; Scott-structural engineer and there is a joint expert of Fulton and Fyffe being Peter Martori who is the appraiser. Fulton's experts are Felton-structural engineer and McMichael-geotechnical engineer (to rebut Glos) and Perry who is a cost estimator. The question is whether Perry should be allowed to testify along with Deatherage as to cost of repair. Also shouldn't the defendants have to pick either Scott or Felton and not have two structural engineers. Defendants Fyffe point out that even though people may be on same side and normally precluded from having a separate expert under Rule 26 (b)(4)(d) where those on the same side are really adverse they should be allowed to have their own experts under the Pioneer Roofing case. The court will be deciding Fyffe's motion to sever on May 19, 2004 at 8:00 a.m. and much of this may be resolved by that ruling. For the moment the hearing on the identity of experts and what they may testify to is continued to **June 18, 2004 at 1:30 p.m.**
3. Testimony re walls not maintained or owned by plaintiff-will be handled on the standing ruling.
4. Qualifications of expert to testify about structural integrity of walls, et.-withdrawn.
5. Re allegations and evidence of Fulton's negligence and Fyffe's cross motion to have court hold CMX is agent of Fulton to be determined on June 18, 2004 at 1:30 p.m. The question of whether that issue goes to the jury or is a question of law to be determined at the trial will be gone into on June 18, 2004.
6. Plaintiff's untimely disclosure-withdrawn in view of extended deadlines and new trial date.
7. Re City of Mesa's standards-withdrawn.
8. Re qualifications of experts to testify about structural integrity of walls-withdrawn.
 - a. Re Ron Risto-preclude him from testifying to life, health, safety and welfare policy reasons for the adoption of Mesa's building codes and preclude him from relying on Burkett's opinions-denied.
9. Extrapolation of evidence-ruled on elsewhere.
10. Re George Glos-handled elsewhere.
11. Re John Opsal-handled elsewhere.
12. Re James Weaver-handled elsewhere.

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13. Re plaintiff's experts reports and testimony-moot in view of resetting the trial and deadlines.
14. Life expectancy of the perimeter-withdrawn.
15. Re speculative damages-handled elsewhere.
16. Former Stonegate Estates residents-withdrawn.
17. Re site visit by jury-handled elsewhere.

Reargument of Fyffe's motion to reconsider denial of motion for summary judgment on standing after which the court denies the motion to reconsider on the legal issue the court ruling that plaintiff has standing the sue for the perimeter walls and also finding there was adequate disclosure of what plaintiff meant the 4.2 miles to be which included, in the court's view the perimeter walls which was disclosed at least two years ago.

Thereafter Fyffe's motion for reconsideration of the court's ruling denying its motion for summary judgment re indemnification is argued to the court and taken under advisement.

Reargument of the issue of economic waste as requested by plaintiff which was also taken under advisement.

If not previously set forth the motion to intervene of Ohio Casualty will be heard on **June 18, 2004 at 1:30 p.m.**

If not previously set forth the only motion to be considered on May 19, 2004 at 8:00 a.m. is Fyffe's motion to sever Fulton's claim against Fyffe from the claim of plaintiff against Fulton.

LATER:

After further consideration the court orders as follows:

1. Granting Fyffe's motion on the issue of indemnity and affirmatively holding, pursuant to the court's inclination as set forth on March 16, 2004, that this is a general indemnity clause and the same is defeated if Fulton is at least 1% at fault under Busy Bee (82 Ariz. 192) and Herstam (186 Ariz. 110, 118). The issue of indemnity will not be presented to the jury under this ruling. The parties understand the court is not saying that Fulton is negligent in any way which will be up to the jury. Once the jury has made its determination this matter can again be considered. The court by this ruling has now reaffirmed the denial of Fulton's motion for summary judgment re indemnity but on the basis now as set forth in this minute entry.
2. The court reaffirms its denial of Fulton and Fyffe's joint motion for summary judgment re economic waste and plaintiff's cross motion re economic waste and diminution in value as the reargument has not changed the court's mind. This is an issue in the court's view to be decided at the end of plaintiff's case and thereafter if

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necessary in jury instructions and is an issue for the jury if not decided as a matter of law by the court at the trial.

If not noted above the issue of whether CMX is to be regarded as an alleged agent of Fulton Homes as briefed by Fyffe and responded to Fulton will be considered on **June 18, 2004 at 1:30 p.m.**/and probably at the trial as well. There may be an exchange of preliminary views on June 18, 2004.