

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
T. Springston
Deputy

DEL WEBB COMMUNITIES INC, et al.

WILLIAM A NEBEKER

v.

ATRIUM DOOR & WINDOW COMPANY OF
ARIZONA, et al.

STEVEN MICHAEL CHAET

TROY G ALLEN
JOHN J BELANGER
ROBERT R BRINA
JOHN DANIEL CAMPBELL
ADAM B CAMPBELL
MARK T COLLINSWORTH
C COLE CRABTREE
ROOPALI HARDIN DESAI
MELISSA J ENGLAND
RODNEY GALARZA
KENNETH S KASDAN
RINA K RAI
MITCHELL J RESNICK
BURT RIVIERE
19969 N TEALSTONE DR
SURPRISE AZ 85374
THOMAS J SHORALL JR.
STEPHEN L WEBER
SCOTT A BOOTH
STEPHEN E RICHMAN

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

JFINAL TRIAL MANAGEMENT CONFERENCE

Central Court Building – Courtroom 704

9:02 a.m. This is the time set for the Final Trial Management Conference. Plaintiffs Zelkind Homeowners are represented by counsel, Scott A. Booth, Robert R. Brina and Stephen L. Weber. Defendants Del Webb Communities are represented by counsel, William A. Nebeker and Troy G. Allen.

Court Reporter Cindy Lineburg is present and a record of the proceedings is made by audio and/or videotape.

A Final Trial Management Conference is conducted and legal matters are discussed.

Case caption is discussed. Counsel request the caption to state Glen Zelkind, et al. v. Del Webb Communities, Inc., et al.

Counsel inform the Court that some Homeowner Plaintiffs have reached a settlement leaving 285 Plaintiffs.

Discussion is held regarding Plaintiffs' Motion for Judicial Notice of Codes, filed September 25, 2013. Counsel indicate that they reached an agreement regarding this issue. The Court directs counsel to file a stipulation.

Discussion is held regarding Defendants'/Third-Party Plaintiffs' Motion Requesting Jury Visit to Project and Selected Homes, filed September 25, 2013.

IT IS ORDERED denying Defendants'/Third-Party Plaintiffs' Motion Requesting Jury Visit to Project and Selected Homes without prejudice.

The various pending Motions *in Limine* are argued to the Court.

For the reasons stated on the record, the Motions *in Limine* are ruled on as follows:

Plaintiffs:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

- 1) **IT IS ORDERED** denying Plaintiffs' Motion to Preclude Reference to Partial Compliance [sic] Within the Minimum Standards of the Building Code as Acceptable Practices Motion *in Limine* No. 1, filed September 25, 2013, as it is too broad.
- 2) **IT IS FURTHER ORDERED** denying Plaintiffs' Motion to Preclude Testimony or Opinions Regarding Economic Waste Motion *in Limine* [sic] No. 2, filed September 25, 2013.
- 3) **IT IS FURTHER ORDERED** denying Plaintiffs' Motion to Preclude Evidence or Arguments of Inspections and/or Approvals by Building Officials as Authorizing Noncompliance [sic] With the Building Code Motion *in Limine* No. 3, filed September 25, 2013. Defendants are warned to avoid representing to the jury that any approvals by City inspectors are conclusive evidence that the construction is in compliance with code.
- 4) **IT IS FURTHER ORDERED** denying Plaintiffs' Motion to Preclude Evidence of Alleged Approval for the Omission of Weep Screeds by the Building Official Motion *in Limine* No. 4, filed September 25, 2013.
- 5) **IT IS FURTHER ORDERED** granting Plaintiffs' Motion to Preclude Undisclosed Opinions Re: Homeowner Improvements Contributing to Damage Motion *in Limine* [sic] No. 5, filed September 25, 2013, to the extent that no expert opinions that have not been previously disclosed shall be allowed, as according to the rules.
- 6) **IT IS FURTHER ORDERED** granting Plaintiffs' Motion to Preclude Evidence Based on Tort Defenses Motion *in Limine* No. 6, filed September 25, 2013, to the extent the Defendants, Del Webb, shall not defend the case by pointing the finger at third parties.
- 7) **IT IS FURTHER ORDERED** granting Plaintiffs' Motion to Preclude Evidence of Prior Settlement Amounts and Terms Motion *in Limine* No. 7, filed September 25, 2013, as the risk of prejudice and confusion substantially outweighs the probative value.
- 8) **IT IS FURTHER ORDERED** denying Plaintiffs' Motion to Preclude Testimony or Opinions of Paul Johnson Regarding Diminution in Value of Subject Homes Motion *in Limine* [sic] No. 8, filed September 25, 2013. The method of evaluation is legitimate and subject to stringent cross-examination.
- 9) **IT IS FURTHER ORDERED** granting in part Plaintiffs' Motion Re: The Roberts v. Del Webb Arbitration and Homes No Longer in the Case Motion *in Limine* No. 9, filed September 25, 2013, allowing the use of the homes examined in the case by the experts regardless of whether the homes are in this case, arbitration or have settled. All the evidence the experts have to base their opinions on is available to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

them regardless of where the house is in the litigation. Plaintiffs are not allowed to share that other homeowners were involved in the litigation. Plaintiffs are not allowed to share that some homeowners settled before trial.

- 10) **IT IS FURTHER ORDERED** denying Plaintiffs' Motion to Preclude Speculative Evidence and Arguments Regarding Defendant Del Webb's Failure to Have Submitted Acoustical Certifications to the City of Surprise Motion *in Limine* No. 10, filed September 25, 2013. It is an issue for the jury to decide.

10:34 a.m. Court stands at recess.

10: 50 a.m. Court reconvenes with respective parties and counsel present.

Court Reporter Cindy Lineburg is present and a record of the proceedings is made by audio and/or videotape.

Oral argument on the various pending Motions *in Limine* continues.

- 11) **IT IS FURTHER ORDERED** granting Plaintiffs' Motion to Preclude Evidence of Subcontractors' Experts' Opinions Motion *in Limine* No. 11, filed September 25, 2013. Experts may use photos and other factual items that were developed by experts. The experts may not bolster their opinions by saying other experts agree with them.
- 12) **IT IS FURTHER ORDERED** granting in part Plaintiffs' Motion to Preclude Evidence of Attorney-Driven Case, Sham Affidavits, Community Letters, Defects No Longer in Case, and Burt Riviere Motion *in Limine* No. 12, filed September 25, 2013, as to sham affidavits and Burt Riviere and denying as to the solicitation letter, drop defects, significantly reduced repair estimates and the letters to the experts.

Defendants:

- 1) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 1 Re: Spacer Migration Standard, filed September 25, 2013. There will be only one expert per issue and no overlap.
- 2) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 2 Re: Plaintiffs' Expert Todd Watson, filed September 25, 2013.
- 3) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs'

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

Motion *in Limine* No. 3 Re: Current Conditions of Homes and Alleged Worsening and Untimely Disclosures, filed September 25, 2013, except as to any undisclosed information. Nothing new is coming in, however, worsened is okay.

- 4) **IT IS FURTHER ORDERED** granting Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 4 Re: One-Expert Per Issue Rule, filed September 25, 2013. There may be more than one expert per claim.
- 5) **IT IS FURTHER ORDERED** granting Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 5 Re: References to Arbitration and Other Matters, Complaints, and Claims Involving Defendants, filed September 25, 2013; Arbitration shall not be mentioned.
- 6) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 6 Re: Plaintiffs' Expert Greg Axten and Opinions Outside His Expertise, filed September 25, 2013. Mr. Axten qualifies as an expert.
- 7) **IT IS FURTHER ORDERED** Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 7 Re: Plaintiffs' Expert Dr. Anthony Cox, filed September 25, 2013, shall abide trial. The Court cannot make the determination at this time.
- 8) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 8 Re: New F-35s at Luke Air Force Base, filed September 25, 2013.
- 9) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 9 Re: New Truseal Window Seal Spacer Products, filed September 25, 2013. Defendants are allowed to raise a lack of disclosure motion if there has been lack of disclosure sufficient to warrant a motion to exclude duraseal claims .
- 10) **IT IS FURTHER ORDERED** granting Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 10 Re: References to Third-Party Claims and Any Settlement With Any Third-Party Defendant, filed September 25, 2013. Plaintiffs shall not bring up the fact that Defendants have sued third parties as evidence of defective product in any way.
- 11) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 11 Re: Untimely Disclosures and Opinions of Plaintiffs' Expert Todd Watson, filed September 25, 2013. Defendants had enough time to correct any prejudice. They may depose Mr. Watson again.
- 12) **IT IS FURTHER ORDERED** denying Defendants'/Third-Party Plaintiffs' Motion *in Limine* No. 12 Re: Plaintiffs' Experts' Teaching Slides, filed September 25, 2013, subject to any specific slides that counsel determine are irrelevant and cannot work out between themselves as to how to handle.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

The Court addresses trial matters, courtroom policies, and procedures including:

1. The length of the trial is discussed. The **69-day Jury Trial** scheduled to commence on **November 4, 2013** in this division is affirmed. Trial days will be:

November: 4-7, 12-14, 18-21, 25-26, 2013;
December: 2-5, 9-12, 2013;
January: 2, 6-9, 13-16, 21-23, 27-30, 2014;
February: 3-6, 10-13, 18-20, 24-27, 2014;
March: 3-6, 10-13, 17-20, 24-27, 31, 2014.
2. The Rule of Exclusion of Witnesses is invoked by Plaintiffs Homeowners per the Joint Pretrial Statement, filed October 16, 2013.
3. The parties agree the jury shall consist of 14 jurors, including 6 alternates who will not deliberate, with 6 of 8 required to return a verdict. If any juror is unable to complete jury service, the number of jurors to return a verdict are as follows: 5 of 7 if 7 jurors remain; and/or 4 of 6 if 6 jurors remain.
4. The Court will conduct initial voir dire. At the conclusion of the Court's questioning, each side will have one (1) hour to ask follow-up questions of the panel.
5. The parties agree that Plaintiffs shall have 213 hours and Defendants shall have 142 hours to present their cases.
6. Counsel are advised that the Court's trial hours are generally as follows: Monday through Thursday, 9:30 a.m. to 4:30 p.m. with a lunch recess from noon to 1:30 p.m. daily, and two 15-minute breaks: one in the morning and one in the afternoon.
7. Counsel shall provide at least 24 hours notice to each party of the witnesses each party intends to call, and any exhibits they plan to use during examination of those witnesses to which the other side has made an objection.
8. One day's jury fees will be assessed unless the Court is notified of settlement or that the panel will not be needed for the trial by **2:00 p.m.** one judicial day prior to trial. Counsel are reminded to promptly notify the Court of any settlement

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

pursuant to Rule 5.1(c), Ariz.R.Civ.P.

9. The parties agree to store the physical exhibits in the courtroom during trial.

NOTE: Any party may request the presence of a court reporter by contacting the division three (3) court business days before the scheduled Trial. Trial in this matter is set before:

**The Honorable Douglas L. Rayes
Maricopa County Superior Court
Central Court Building
201 West Jefferson
Courtroom 704
Phoenix, AZ 85003
Phone: (602) 506-0816**

PLEASE NOTE: If/when a party files a pleading within 48 hours of a scheduled event, the party should also e-mail same to the Court's Judicial Assistant at the following:
mfarmer@superiorcourt.maricopa.gov

NOTE: COUNSEL SHALL UPLOAD AND E-FILE ALL PROPOSED ORDERS IN WORD FORMAT ONLY TO ALLOW FOR POSSIBLE MODIFICATIONS BY THE COURT.

11:57 a.m. Matter concludes.

BEFORE FILING ANY DISCOVERY MOTION, parties are instructed to contact this division for an informal teleconference. Division contact information: Judicial Assistant, Mary Farmer, phone: (602)506-0816.

For copies of hearings or trial proceedings recorded, please call Electronic Records Services at (602)506-7100. Should an official transcript be required, you may request that the court prepare it. The party ordering the transcript must pay for it. To request a transcript, call (602)506-7100 and provide the date of the proceeding, the case number, the case caption, if the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003089

10/18/2013

transcript is for an appeal, and your name, address, and telephone number.

Pursuant to Part 1, Chapter 6, Section 1-602 D (4)(a), of the Arizona Code of Judicial Administration, **if a court reporter is present**, the court reporter's record is the official record and requests for transcripts shall be made by contacting the court reporter at (602)506-6100 or email request to lineburgc@superiorcourt.maricopa.gov.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 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.