

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017284

01/07/2019

HON. ROSA MROZ

CLERK OF THE COURT
D. Charbagi
Deputy

RHESA FOWLIS

SCOTT F FRERICHS

v.

VICTORIA HAYES, et al.

R COREY HILL

NEAL H BOOKSPAN
MICHAEL H ORCUTT
ROBERT B ZELMS
JUDGE MROZ

MINUTE ENTRY

The Court has considered Inspect-It First Defendants' Motion for Summary Judgment filed on September 26, 2018, The Ellis Defendants' Joinder to the Inspect-It First Defendants' Motion for Summary Judgment Regarding Damages, Hayes Defendants' Response to and Joinder in Inspect-It First's Motion for Summary Judgment, Plaintiff's Response, Inspect-It First Defendants' Reply to Hayes Defendants' Response, and Inspect-It First Defendants' Reply to Plaintiff's Response.

Inspect-It First Defendants' request that the Court dismiss with prejudice Plaintiff's claims of (1) Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing and (2) Negligent Misrepresentation. The Inspect-It First Defendants also requests that the Court rule as a matter of law that (1) Plaintiff is limited to the cost of repairs to the Property and (2) Plaintiff is not entitled to attorneys' fees from Inspect-It First Defendants.

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Defendant Frank Ellis is Hayes Defendants' listing real estate agent. The Ellis Defendants join in Inspect-It First Defendants' argument that Plaintiff's damages are limited to the cost of repairs to the Property, and further requests that the Court transfer this case to mandatory arbitration under Rule 72(e)(6) of the Arizona Rules of Civil Procedure, as the damages potentially recoverable by Plaintiff are less than \$50,000.

The Hayes Defendants also join in Inspect-It First Defendants' argument that Plaintiff's damages are limited to the cost of repairs to the Property, but request that the Court deny Inspect-It First's motion to the extent it seeks judgment as a matter of law on Plaintiff's entire complaint.

On October 31, 2014, Plaintiff entered into a Residential Resale Real Estate Purchase Contract with Defendant Victoria Hayes to buy a residence located at 7525 Gainey Ranch Road, #108, Scottsdale, Arizona ("the Property"). In connection with the sale, Plaintiff hired Inspect-It First Defendants to perform a home inspection of the Property. On November 1, 2014, Plaintiff signed a home inspection contract ("Inspection Contract") with Inspect-It First Defendants. The Inspection Contract defined the scope of the inspection:

SCOPE OF INSPECTION: The inspector will report the general condition and major defects of the primary building on the property, that are visible without disassembly, in order to identify any system or component listed in the report which may be in need of immediate major repair. . . . The inspection does not include any destructive testing or dismantling. Customer agrees to assume all the risk for all conditions that are concealed from view at the time of the inspection.

Defendant Lenich of Inspect-It First performed the home inspection on November 2, 2014. He issued an inspection report, which stated: "it appears that the underground ductwork (sump) is currently full of water. Recommend further investigation as to the source of the water. . . . Contact a licensed air conditioning technician for further evaluation and repairs as needed to the condensate system and a licensed plumber for further evaluation of the sump pump. Having water in one's underground ductwork is a significant problem that requires resolution." Thereafter, Plaintiff included an item in the Residential Buyer's Inspection Notice regarding the sump pump: "clear water from sump pump, verify by license plumber that there is no leak, if there is a leak, repair per the warranted section of the AAR contract" and provided the Trust an opportunity to correct the condition. Defendant Ellis then hired Defendant Side Jobs, Inc. who replaced the sump pump.

According to Plaintiff, Lenich convinced her to hire Inspect-It First to perform a re-inspection of the Property to confirm that Hayes completed the work identified in the Residential Buyer's Inspection Notice. The terms of the re-inspection contract between Plaintiff and Inspect-It First were contained in the November 13, 2014 email: "Attached find an invoice for the home reinspection scheduled for Wednesday 11/26/14 at 8 am. Cost is \$150." According to Plaintiff,

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Lenich assured her that it would be done properly and carefully. Plaintiff believed that Lenich represented that he would review the work and action required by the Residential Buyer's Inspection Notice to see if it had been completed, including confirming that Hayes used a licensed plumber to check the underground duct. On November 26, 2014, Lenich sent an email to Plaintiff stating: "Rhesa, we returned to the property earlier today and completed the reinspection. Here are our findings: 1) All items on the BINSR were completed except: 14.6-MBA tub faucet divertor" Thereafter, Plaintiff completed the purchase of the Property on December 1, 2014.

Plaintiff later discovered that there was still water in the underground duct work and that the sump pump did not appear to be fixed properly. Plaintiff hired ARCS who pumped out water and resealed the area twice. However, no one knows where the water is coming from. Plaintiff's mechanical engineer reviewed the condition and performance of the underground air return, and opined that the given the multiple failures, the duct is likely to fail again.

Plaintiff sued Inspect-It First Defendants for negligent misrepresentation (count 7), and breach of contract/breach of implied covenant of good faith and fair dealing against Inspect-It First only (count 8).

The Court finds that Plaintiff properly alleged a contract claim because this is a contract implied-in-fact in which there is an express contract. *Barmat v. Doe Partners*, 155 Ariz. 519, 747 P2d 1218 (1987)(a claim based on a contract implied in fact sounds in contract while a claim on a contract implied by law sounds in tort).

The Court further finds that there are genuine issues of material facts which preclude the granting of Inspect-It First Defendants' Motion for Summary Judgment on both the negligent misrepresentation claim and the breach of contract/implied covenant of good faith and fair dealing, including, but not limited to, whether Lenich agreed to ensure that the repairs were done by a licensed plumber and ensure that the repairs were completed as required by the Residential Buyer's Inspection Notice. Although Inspect-It First Defendants denies such a representation and point to "the unbiased statements of the Ellis Defendants and Mr. Cadwell", those are credibility determinations that are left to the jury. Another area is whether Inspect-It First Defendants provided Plaintiff with false or incorrect information, or omitted or failed to disclose material information from the re-inspection of the Property.

Finally, Inspect-It First Defendants, Hayes Defendants, and Ellis Defendants argue that Plaintiff's damages are limited to the lesser of the diminution of value or the cost to repair the damage. *See Blanton & Co. v. Transamerica Title Ins. Co.*, 24 Ariz. App. 185, 188, 536 P.2d 1077, 1080 (1975) ("if the land may be restored to its original condition, the cost of restoration may be used as the measure of damages if it does not exceed the diminution in the market value of the land."). These Defendants claim that

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the issue with the underground ductwork has been remedied because there has not been any more moisture as evidenced by the two site visits from Ron Barrett, President of Brayden Management, LLC., on December 12, 2017, and July 30, 2018. Barrett concluded that “no water was observed anywhere in the pipe”; that “[t]he interior of the pipe was repaired properly and is no longer allowing water to hydraulically infiltrate the perimeter joints”; that “[w]ater no longer appears to be entering the piping from any source”; and that “no repairs are necessary.”

While the Court agrees with the general principle that Plaintiff’s damages are limited to the lesser of the diminution of value or the cost to repair the damage, the Court finds that there are genuine issues of material facts as to what those values are. Although Defendants argue that no further repairs are necessary and that Plaintiff’s cost to repair the underground duct condition is only \$16,722.50, Plaintiff has an opposing expert who has opined that the condition has not been permanently fixed because the multiple failures in the duct and the unstable condition of the duct will result in repeated failures of the duct in the future. It is up to the jury to resolve that issue and decide what the diminution of value¹ is and what the cost to permanently repair the damage is.²

IT IS ORDERED denying Inspect-It First Defendants' Motion for Summary Judgment filed on September 26, 2018.

¹ Plaintiff claims that she is entitled to diminution of value damages in the range of \$250,000 to \$350,000.

² Plaintiff claims that an additional \$72,350 in future expenses are necessary to remedy the Property, including adding French drains and a retrofitted mechanical system to operate with the duct work.