

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

KEITH KLEIN, et al.

RICHARD C GRAMLICH

v.

K HOVNANIAN GREAT WESTERN HOMES L L C, et al. DAVID A TIMCHAK

PINE COUNTRY CABINETS INC
ATTN WADE MACNEILLE
1640 E ADAMS ST
SHOW LOW AZ 85901
GIANNI PATTAS
DOMINIC L VERSTEGEN
MICHAEL A LUDWIG
ADAM M TRENK
JUDGE STEPHENS

MINUTE ENTRY

East Court Building - Courtroom 712

9:14 a.m. This is the time set for Oral Argument on pending motions. Appearing on behalf of Plaintiffs are counsel, Richard C. Gramlich and Michael Wrapp. Appearing on behalf of Defendants, the K. Hovnanian entities, is counsel, David A. Timchak. Appearing telephonically on behalf of Defendant, Bob Meredith Masonry, Inc., is counsel, Dominic L. Verstegen. Also present is Josh Forest, representative for the K. Hovnanian entities.

A record of the proceedings is made digitally in lieu of a court reporter.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

Discussion is held regarding Plaintiffs' ***Request for Rule 16 Scheduling Conference for Purposes of Setting Trial Date***, filed on April 13, 2018.

Discussion is held regarding the status of the case and the parties advise the Court they are prepared to set a trial date. Accordingly,

IT IS ORDERED as follows:

Setting a **Trial Management Conference** on **April 16, 2019 at 8:30 a.m.** (time allotted: **One hour**). Lead counsel for all parties must appear in person and cannot appear telephonically.

Setting a **Jury Trial** for the following days: **May 28-31, 2019 and June 3, 2019**. The trial days will begin at 9:30 a.m. (time allotted: 5 days).

*Trial information shall be set forth by separate minute entry.

Argument is heard on Defendant/Third-Party Plaintiffs' ***Motion to Sever***, filed on April 20, 2018.

IT IS ORDERED taking this matter under advisement.

Argument is heard on Defendants/Third-Party Plaintiffs' ***Motion to Preclude/Motion to Strike***, filed on May 2, 2018.

IT IS ORDERED taking this matter under advisement.

Argument is heard on Defendants/Third-Party ***Plaintiffs' Motion to Dismiss and Alternative Motion for Summary Judgment***, filed on May 2, 2018.

IT IS ORDERED taking this matter under advisement.

10:18 a.m. Matter concludes.

LATER:

The Court has considered the Motion to Sever filed April 20, 2018, Plaintiffs' Response to Motion to Sever filed May 9, 2018, the Reply in Support of Motion to Sever filed May 21, 2018, and the oral argument conducted on July 25, 2018.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

In this motion, Defendant seeks to sever Plaintiffs' claims into separate actions. Defendant also requests attorneys' fees and costs.

Defendant Great Western Homes (GWH) built residential properties in the Torreon Woods subdivision in Show Low, Arizona in or around 2007. GWH represented to home buyers that the subdivision soils were investigated by Geo Technologies, Inc. (GTI) and found to be suitable for single-family homes. Plaintiffs claim there was post-construction damage to their homes (drywall cracking and damage) due to unmitigated expansive soils and improper structural drainage conditions. Further, Plaintiffs allege GWH did not follow the recommendations provided by GTI to mitigate expansive soil conditions. Plaintiffs Gignac have claims for breach of contract and breach of implied warranty. Plaintiff Klein does not have a claim for breach of contract claim since she was a subsequent purchaser but has alleged a claim for breach of implied warranty.

Rule 20, Ariz.R.Civ.P., provides in pertinent part:

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

* * *

(3) *Extent of Relief.* Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

Rule 21, Ariz.R.Civ.P., provides:

Joinder of a party that is not permitted under Rule 20(a) is not a ground to dismiss an entire action. At any time--on terms that are just--the court may dismiss an improperly joined party or join any party who may be properly joined under Rule 20(a). The court may also sever any claim against a party, and that severed claim may proceed as a separate and independent action.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

The authors' comments to Rule 20, Ariz.R.Civ.P., state the rule as amended in 2017 is designed to expedite the determination of claims by permitting the inclusion of all parties interested in the subject matter of the controversy. Rule 20 carries forward the goal of encouraging the joinder of all appropriate and interested parties in a single action and thereby avoiding multiplicity of litigation, citing to *Staffco Inc. v. Maricopa Trading Co.*, 122 Ariz. 353 (1979).

The Court finds the claims of both plaintiffs involve the same subject matter as they arise out of the alleged defective construction of homes in the same subdivision during the same time period and the claims involve a common question of fact relating to expansive soil conditions. Plaintiffs are not required to seek identical relief in order to be joined for trial. See Rule 20(a)(3), Ariz.R.Civ.P. (joinder does not require a plaintiff be interested in obtaining all the relief demanded). Separate trials would result in duplicative efforts and costs for all parties. Defendant's concern that joinder will result in prejudice does not outweigh the benefits of joinder and can be addressed with appropriate jury instructions. Considering all facts and circumstances, the Court finds joinder of all plaintiffs is appropriate.

Accordingly,

IT IS ORDERED denying the Motion to Sever filed April 20, 2018 and request for attorneys' fees and costs.

The Court has considered the Motion to Preclude/Motion to Strike filed May 2, 2018, Plaintiffs' Response to Motion to Preclude/Motion to Strike filed May 21, 2018, the Reply in Support of Motion to Strike filed June 4, 2018, and the oral argument conducted on July 24, 2018.

In this motion, Defendant seeks an order precluding or striking evidence disclosed in Plaintiffs' Sixth Supplemental Disclosure Statement provided on April 26, 2018 because it was submitted after the discovery deadline. The evidence disclosed by Plaintiffs relates to the costs of repair and includes a new expert report, new photographs, and an amount of money Plaintiffs will seek for diminution of value damages. Further, Defendant argues this supplemental disclosure does not explain how the damages were calculated, methodology, or which witnesses will provide testimony on the issue of diminution damages.

Plaintiffs respond that the disclosure provided was required by Rule 26.1(d)(2), Ariz.R.Civ.P., as it supplements and updates information relating to their claims. Plaintiffs contend damage to their homes is continuing as time passes. Trial is currently scheduled for late May 2019.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

On March 27, 2017, the Court ruled on a motion for summary judgment in this case. Defendant filed a special action challenging that ruling. The Court of Appeals declined to accept jurisdiction as did the Arizona Supreme Court. In this Court's ruling, the Court stated:

The Court is asked to determine whether Plaintiff is entitled to seek consequential damages, including loss of use and diminution in value, at trial and attorney fees pursuant to A.R.S. §§ 12-341.01 and/or A.R.S. § 12-1364 should they prevail. Defendants contend that the Plaintiffs are prevented from seeking consequential damages and attorney fees and that their sole remedies are repair or payment of reasonable costs of repair or if not repairable, the lesser of the reasonable cost of repair or diminution in value of the lots and improvements due to the unrepaired or irreparable condition.

The Court finds that Plaintiffs are entitled to seek consequential damages, including loss of use and diminution in value, at trial and attorney fees pursuant to A.R.S. § 12-341.01 and/or A.R.S. § 12-1364 should they prevail.

The Court finds Defendant failed to establish any basis for precluding or striking the disclosure notice. With regard to the allegation that Plaintiffs' damages evidence is deficient, the Court cannot speculate regarding the adequacy of Plaintiffs' testimony at trial. Plaintiffs have requested leave of court to add an expert witness on the issue of diminution of value. Since the trial is currently set to begin in ten months, the Court finds minimal prejudice to Defendant in permitting Plaintiffs to obtain expert testimony on that issue if they so choose.

Accordingly,

IT IS ORDERED denying the Motion to Preclude/Motion to Strike filed May 2, 2018.

IT IS FURTHER ORDERED granting Plaintiffs' oral motion for leave of court to add an expert witness on the issue of diminution damages. Such disclosure must be submitted on or before August 10, 2018.

The Court has considered the Motion to Dismiss and Alternative Motion for Summary Judgment (with exhibits) filed May 2, 2018, Plaintiffs' Response to Motion to Dismiss and Alternative Motion for Summary Judgment filed May 21, 2018, the Reply in Support of K. Hovnanian's Motion to Dismiss and Alternative Motion for Summary Judgment filed June 4, 2018, and the oral argument conducted on July 24, 2018.

In this motion, Defendant seeks dismissal of the complaint because Plaintiffs have failed to properly disclose diminution damages. Specifically, Defendant argues Plaintiffs have failed to provide a reasonable basis for computing the amount of diminution damages. Defendant

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

contends the alleged damages that occurred because of the alleged failure to mitigate the expansive soil condition is a permanent injury and thus the only damages that may be proven by Plaintiffs are diminution in value. Since Plaintiffs have not provided a computation and measure of damages as required by Rule 26.1, the case should be dismissed or summary judgment should be granted for Defendant. Secondly, Defendant argues the case should be dismissed for failure to prosecute, citing *Paul v. Paul*, 28 Ariz. 598 (1925), *Cooper v. Odom*, 6 Ariz.App. 466 (1967) and *Old Republic Nat'l Title Ins. Co. v. New Falls Corp.*, 224 Ariz. 526 (App. 2010). Defendant argues Plaintiffs failed to take any action in the past year and have never properly disclosed the measure of damages they are legally permitted to seek.

Plaintiffs respond that the motion for dismissal/summary judgment is untimely as the dispositive motion deadline passed two years ago. Further, the motion does not provide a separate statement of facts as required by Rule 56(c)(3), Ariz.R.Civ.P. In addition, the motion is based upon a supplemental disclosure notice that was required and was not untimely under Rule 26.1(d)(2), Ariz.R.Civ.P. Also, Plaintiffs contends their disclosure as to damages for diminution of value is adequate and justified. Plaintiffs argue they may testify as to the value of their homes both before and after the discovery of the soil condition, citing to *City of Tucson v. Hughes*, 23 Ariz.App. 350 (1975). Plaintiffs contend they have disclosed figures for residual diminution in value after accounting for the cost of repairs. Those figures do not represent the total diminution in the value of their homes. As to the motion to dismiss for failure to prosecute, Plaintiffs deny they have failed to prosecute and that any delays were caused by Defendant's special action of the ruling on the motion for summary judgment. Plaintiffs have filed seven disclosure statements and taken numerous depositions. They assert they are ready for trial.

Dismissal is appropriate under Rule 12(b)(6), Ariz.R.Civ.Proc., only if as a matter of law the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. See *Vortex Corp. v. Denkwicz*, 235 Ariz. 551, 556, 334 P.3d 734, 739 (App. 2014) and *Fid. Sec. Life Ins. Co. v. State Dept. of Insurance*, 191 Ariz. 222 (1998). Arizona follows a notice pleading standard. In determining if a complaint states a claim on which relief can be granted, the court must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts. Mere conclusory statements are insufficient. See *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012). Courts will not grant a motion to dismiss unless it is certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claims stated. See *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 637 P.2d 1088 (App. 1981). The question is whether enough is stated which would entitle the plaintiff to relief upon some theory to be developed at trial. The purpose of the rule is to avoid technicalities and give the other party notice of the basis of the claim and its general nature. *Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 106, 537 P.2d 1329, 1331 (1975). In considering the motion, the court will assume the truth of all allegations contained in the complaint. *Bloxham v. Glock, Inc.*, 203 Ariz. 271, 275, 53 P.3d 196, 198 (App. 2003). There are

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

two exceptions to the general rule that extrinsic evidence converts a 12(b)(6) motion to a summary judgment motion: (1) a court may consider material which is properly submitted as part of the complaint; and (2) a court may take judicial notice of matters of public record. See *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012), *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 226 P.3d 1046 (App. 2010), and *Lee v. City of Los Angeles*, 250 F.3d 668 (9th circuit 2001).

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., *MacKinney v. City of Tucson*, 231 Ariz. 584 (App. 2013), *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App. 2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011) and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P. Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292 (App. 2010).

The Court finds Defendant failed to establish Plaintiffs failed to prosecute and thus dismissal on that ground is not appropriate. The Court also finds the motion is untimely as it was filed two years beyond the dispositive motion deadline of June 30, 2016. See Stipulated Joint Scheduling Order filed 2/22/2016. Finally, even if the motion was timely, the Court cannot conclude that it is certain Plaintiffs would not be entitled to relief under any state of facts susceptible of proof under the claims stated. As to the request for summary judgment, the motion is not supported by a statement of facts as required by Rule 56, Ariz.R.Civ.P. Regardless, given the quantum of evidence required to establish the claims and damages in the complaint and, viewing the evidence in a light most favorable to Defendant, the Court finds there are genuine issues of material fact and summary judgment for Defendant is not appropriate.

Accordingly, for the reasons stated:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-006002

07/24/2018

IT IS ORDERED denying the Motion to Dismiss and Alternative Motion for Summary Judgment filed May 2, 2018.