

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 1999-092049

11/13/2003

HON. BARBARA M. JARRETT

CLERK OF THE COURT
M. Brady
Deputy

FILED: 11/18/2003

LAURENCE LISTON, et al.

JOYCE J KAPSAL

v.

SHEA HOMES INC, et al.

JILL ANN HERMAN

JERRY C BONNETT
JAY R GRAIF
GARY L HUDSON JR.
JOSEPH A KULA
JAMES M MALDONADO
CHARLES D ONOFRY
ANDREW PESHEK
DEAN C ROBERTSON
ROBERT H SCHLOSSER
WILLIAM G STINSON
G MICHAEL TRYON
STEPHEN C YOST
LEE P BLAKE
WILLIAM J MALEDON

MINUTE ENTRY

The Court having taken this matter under advisement after a Trial to the Court enters the following orders.

I. FINDINGS OF FACT

A. CONTRACT AND EXPRESS WARRANTY ISSUES

(1) UDC Homes, Inc. was the builder and seller of homes in the North Shore project, located in Gilbert, Arizona, including the sixteen homes in this litigation.

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66. Plaintiffs have not met their burden of proving that the grading and drainage of their lots at the time they took possession of the properties was not done in accordance with the requirements of the Town of Gilbert. Plaintiffs have not met their burden of proving that the grading and drainage of their lots was not done in a workmanlike manner consistent with the custom and practice for residential grading in the Phoenix metropolitan area, and in Gilbert, Arizona, during the period from 1993 to 1996.

(4) Causation Issues.

67. The primary cause of the movement of the foundations and floor slabs of the Plaintiffs' homes is from water that has penetrated the dried-out expansive soils under the foundations and stem walls of the homes and has caused such movement. As stated previously, UDC allowed the soil to dry out before commencing construction of the homes, rendering the soil highly expansive. The geo-technical experts for both parties agree that there is a direct correlation between homeowner-installed lawns and other substantial landscaping features that require irrigation on the one hand and the amount of foundation and slab movement that a home has experienced on the other.

68. Each of the Plaintiffs has installed some landscaping and other improvements (such as pools, decks, concrete walkways, etc.) to their property. These improvements and landscaping have had the effect of substantially altering and/or eliminating the original drainage patterns for the properties and have caused irrigation and rain water to pond or otherwise become trapped at or near the foundations of the homes.

69. The amount of water used by the Plaintiffs (with the exception of the Draper Plaintiffs on Lot 52) to irrigate their landscaping and other improvements is, in general, excessive.

70. The impeded drainage, lack of positive drainage away from the foundations of their homes, and excessive irrigation, combined with the existence of the highly expansive soil conditions, have caused the movement of the foundations of the homes. The movement of the foundations has produced the vast majority of the cracking and other distress about which the homeowners now complain. In fact, there is a direct correlation between areas of blocked drainage on Plaintiffs' lots and monometer readings showing movement of the homes' foundations and/or floor slabs.

(5) Architectural and Structural Construction Defect Issues.

71. Plaintiffs' experts testified regarding various architectural deficiencies in Plaintiffs' homes. These consist of defective windows that leak and that have caused water stains and water damage to wall framing, drywall and stucco. Based on the evidence presented at trial,

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Plaintiffs have shown the existence of architectural deficiencies in their homes that fail to conform with workmanship standards.

72. Plaintiffs' experts testified regarding various structural deficiencies in Plaintiffs' homes. These consist of inadequate nailing of the gypsum board sheer walls; unblocked plywood at the OSB edges' discontinuous sheer material, and/or inadequate sheer transfer; inadequate roof sheer transfer; and inadequate floor sheer transfer. Based on the evidence presented at trial, Plaintiffs have shown the existence of structural deficiencies in their homes that fail to conform with workmanship standards.

73. In regard to the structural deficiencies, Plaintiffs relied on draft plans to prove their case because the final approved plans have been destroyed and are no longer available to either party. While Defendants have encouraged the Court to assume that the homes were constructed in conformance with the final approved plans, which may have been different from the draft plans, the Court declines to make this assumption. Instead, the Court assumes that the draft plans and the final approved plans are the same, as there is no evidence to the contrary.

74. Although Defendants criticize Plaintiffs' experts for extrapolating in regard to defects, the Court finds no basis for discounting their testimony on that account. The Court agrees with Defendants that Plaintiffs' experts could have examined all sixteen homes, but has taken into account the added cost to Plaintiffs that would have entailed.

75. Plaintiffs have failed to prove their defect allegation regarding water and sewer lateral connection and gas service at entry points of the homes; gaps in the firewall; power surges; and color coat peeling.

(6) The Amount and Severity of Cracking and Other Distress at Plaintiffs' Homes.

76. Some drywall, stucco and concrete cracking, some sticking of doors and windows, and some movement of woodwork is normal and to be expected during the first two years after construction of a new home. The Homeowner Orientation Guide, which was given to all home purchasers at North Shore, explains that because the homes are "located in a desert environment" and because of "temperature variations combined with expansive soils that are common in the area," the resulting "expansion and contraction from day to day" can cause "minor warping of wood materials and hairline cracking of drywall, stucco, concrete and mortar." The Guide also states that, because minor cracking of these building materials is normal and to be expected, "UDC Homes will not be responsible for minor cracking that falls within accepted industry standards."

77. The Guide further informed the buyers at North Shore that repair of (1) minor cracking of drywall, stucco and concrete, (2) resetting of nails that have popped out of position, and (3) resetting molding and trim that has moved or warped due to normal expansion and

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contraction are all part of normal maintenance of the home and are the responsibility of the homeowner.

78. Although the homes that are the subject of this litigation are approximately seven or eight years old, the evidence at trial disclosed that most of the homeowners had done little routine maintenance (except for warranty repairs by UDC), and most had not taken steps to repair even normal and expected cracking of drywall, stucco and concrete at their homes.

79. The Arizona Registrar of Contractors has established and published Minimum Workmanship Standards that were applicable at the time the homes in question were built. Those Standards apply for the first two years after construction of a new home and specify that the following things are normal construction tolerances and are not deemed to be construction defects:

80. Gypsum Wall Board – “Visible defects such as nail pops, cracks and seam lines due to expansion and contraction of structure” are normal. “Normal defects such as hairline cracks where drywall meets a dissimilar material are considered acceptable and can readily be corrected by the owner when redecorating. If nail pops occur, the contractor shall be responsible to correct the fault only one time during the first year of occupancy.

81. Stucco – “Hairline cracks, if not excessive, are acceptable. If crack exceeds 1/16”, it is unacceptable and should be repaired.”

82. Concrete – “Cracks 1/8” are acceptable without repair. Cracks wider than 1/8” shall be properly repaired with appropriate material.” With respect to garage slabs, carports, patios and sidewalks, “cracks in excess of 3/32” width and 1/8” vertical displacement or compound cracks are not acceptable.”

83. Drainage – “[T]he contractor . . . is not responsible for conditions caused by others not under his control after close of escrow.”

84. All cracking of drywall, stucco and concrete and all other distress that was determined to exceed the Registrar Guidelines at the sixteen Plaintiffs’ homes was cataloged as of March 2003 by UDC’s experts (Grosz, Calderone and Keach) who visited all sixteen of the homes on multiple occasions and who measured and photographed all such cracks and other distress. This catalog of information is reflected for each home in Trial Exhibit 444. Trial Exhibit 444 shows that the amount of cracking and distress in Plaintiffs’ homes is highly variable and in many cases quite limited. For example, the Draper residence (Lot 52) has only one stucco crack, only three drywall cracks, and only one concrete crack. Similarly, the Lambert residence (Lot 156) has only two stucco cracks, nine drywall cracks, and no concrete cracks. The Roberts residence (Lot 140) has no stucco cracks, only five drywall cracks, and only four exterior concrete cracks. For all sixteen homes, there are a total of only 24 stucco cracks (less than two per home); a total of only 25 concrete flat-work cracks (less than two per home); a total of only

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10 garage or driveway slab cracks (less than one per home); a total of only three interior slab cracks (which could be intended control joint cracks); and an average of about twelve drywall cracks and/or nail pops per home that fall outside of the Registrar's Guidelines.

85. The Draper residence (Lot 52) exhibited no floor slab movement as of November 2000 and it has not been resurveyed by monometer reading since that time. The monometer surveys likewise show that the floor slabs of the Duncan residence (Lot 127), the Dreicer residence (lot 128), the Roberts residence (Lot 140), the Wennerstrom residence (Lot 147), the Shockley residence (Lot 150), and the Lambert residence (Lot 156) have demonstrated minimal floor level differentials of one inch or less, and the evidence at trial established that floor level differentials of one inch or less are within normal tolerances.

86. None of the cracking or other distress at Plaintiffs' homes undermines the structural integrity of the homes. While it may be unsightly, such cracking and other distress is considered to be cosmetic and non-structural in nature.

87. Even had the Plaintiffs' homes been constructed with a stiffened slab, both Mr. Josephson and Mr. Steussy admit that there would still have been movement of the slabs because of the introduction of excess moisture being introduced under the foundations. Mr. Steussy also admitted that he could not guarantee that Plaintiffs' proposed repair recommendation would prevent further movement or damage.

C. NEGLIGENT MISREPRESENTATION ISSUES

88. Plaintiffs have failed to meet their burden of proving that UDC Corporation made any negligent misrepresentation of any then-existing fact to any of the Plaintiffs. Although several Plaintiffs testified that they now thought that they did not receive the quality of home they believed they were purchasing, none of the Plaintiffs identified an actual then-existing fact that they claimed was represented to them by an employee of UDC Corporation, and which they later determined to be factually incorrect.

89. Plaintiffs also failed to meet their burden of proving that they relied on any then-existing fact that was allegedly negligently misrepresented to them by a representative of UDC Corporation at the time that they purchased their homes.

90. Plaintiffs were on notice of the facts giving rise to their alleged negligent misrepresentation claims more than two years before commencement of this action in August 1999.

D. DAMAGE ISSUES

(1) Proof of Damages/Over-Estimating of Damages.