

Exhibit

9

DISTRICT COURT, GARFIELD COUNTY, COLORADO 109 8 th Street, Suite 104 Glenwood Springs, CO 81601	EFILED Document CO Garfield County District Court 9th JD Filing Date: Feb 24 2009 4:13PM MST Filing ID: 23927776 Review Clerk: N/A <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiffs: SCOTT and RANDE BREWER, v. Defendants: ROBERT GORDON, individually and d/b/a/ ROBERT GORDON CONSTRUCTION; CTL/THOMPSON, INC.; JOHN MECHLING, P.E.; HELM GROUP, LLC; CRAIG HELM; KURTZ & ASSOCIATES, INC.; BRIAN J. KURTZ, P.E.; SOPRIS ENGINEERING, LLC; YANCEY NICHOLS, P.E.	Case Number: 2007CV215 Div.: C
ORDER	

The Court has reviewed plaintiffs' rule 56(h) motion for determination of law; the response filed by defendants CTL/Thompson, Inc. and John Mechling; the response filed by defendant Robert Gordon d/b/a Robert Gordon Construction; and plaintiffs reply; and the file. Being fully advised, the Court makes the following findings and enters the following order.

BACKGROUND

1. This is a construction defect case.
2. Plaintiffs are homeowners claiming that they had a home built, and the home is defective.
3. Defendants (the general contractor, various engineers, and the company that installed the foundation) participated in the planning, design, or building of plaintiffs' home.

4. Plaintiffs assert defendants were negligent because all the defendants knew or should have known that the soil underlying the planned home was peculiar and required special engineering in order to mitigate the problems presented by the peculiar attributes of the soil. Because the special engineering was not done, the home is defective.

I. PLAINTIFF'S MOTION FOR DETERMINATION OF LAW IS GRANTED.

5. Plaintiffs have moved for a determination of law pursuant to Rule 56(h).

6. More specifically, plaintiffs have requested that the Court rule that defendants bear the burden of proving that the limitation of damages provisions of CRS 13-20-806 apply to limit any recovery by plaintiffs. This would leave plaintiffs to prove all the damages they contend they suffered in their case in chief by whatever means they chose. Plaintiffs would not have to prove in their case in chief that these damages do not exceed the limitations imposed by CRS 13-20-806. Defendants would then have the burden of going forward to prove that plaintiffs' claimed damages exceed the limitation imposed by CRS 13-20-806. Plaintiffs could then rebut defendants' limitation arguments in their rebuttal case.

7. Defendants Robert Gordon, d/b/a Robert Gordon Construction, CTL/Thompson, Inc. and John Mechling have objected, contending in substance that damages are an element of the claim asserted by plaintiffs, and plaintiffs, not defendants, should have the burden of proving in their case in chief that the damages they claim do not exceed the limitation imposed by CRS 13-20-806.

8. Defendants do not claim there are any material issues of fact and the Court can see none.

9. All agree that the provisions of Colorado's Act entitled "Construction Defect Actions For Property Loss and Damage," also known as the Construction Defect Action Reform Act of 2003 ("CDARA") applies.

10. Accordingly, this issue is appropriately determined under C.R.C.P. 56(h).

11. CRS 13-20-806(1) provides in part: "A construction professional otherwise liable shall not be liable for more than actual damages,"

12. "Actual damages" is defined as "the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, . . ." together with some other costs, interest, and attorney fees. CRS 13-20-802.5(2).

13. As both parties agree, CDARA imposes a limit on the damages recoverable to the lesser of: (a) the property's fair market value without the alleged defects; (b) the property's replacement cost; or (c) the cost to repair the alleged defects.

14. The Court finds that CRS 13-20-806(1) enacts a limitation on damages, or damages cap.
15. This finding is consistent with the economic waste argument presented by plaintiffs. CDARA's damages limitation provision, by its requirement that damages be the lesser of the three amounts, is a clear attempt to avoid economic waste. The legislative history, at least from the viewpoint of Senator McElhany, one of the bill's supporters, confirms that avoiding economic waste was a goal of this statute. See Senate testimony on H.B. 1161 at 12:13-19 (April 16, 2003). As plaintiffs point out, economic waste as a theory of limiting damages has traditionally been proven by defendants as a defense.
16. A limitation on damages, or a damages cap, inures to the benefit of defendants. Logically, defendants should bear the burden of proving this limitation that is to their economic benefit.
17. Limitations on damages, or damage caps, have uniformly been classified as affirmative defenses. Servicios-Expoarma, C.A. v Industrial Maritime Carriers, Inc., 135 F.3d 984, 994-95 (5th Cir. 1998) (defendant carrier had the burden of establishing the availability of the statutory \$500 limitation for items damaged at sea; "[T]he burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him"). See also cases cited by plaintiffs at footnote 2, page 7, of their initial motion.
18. Defendants have not identified any case in which a statutory damages cap or limitation was not classified as an affirmative defense.
19. C.R.C.P. 8(c) is entitled "Affirmative Defenses and Mitigating Circumstances" and provides in relevant part that "Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded." This suggests that a circumstance that reduces the amount of damages must be affirmatively pleaded, like an affirmative defense.
20. Defendants bear the burden of proving an affirmative defense. City of Westminster v. Centric-Jones Constructors, 100 P.3d 472, 480 (Colo. Ct. App. 2003) (failure to mitigate damages is an affirmative defense on which the defendant bears the burden of proof).
21. The Court's conclusion that the damages limitation imposed by CRS 13-20-806(1) is an affirmative defense concerning which the defense bears the burden of proof is consistent with the requirement that a plaintiff, if he or she seeks to qualify for an exception to a damages limitation, bears the burden of proving he or she qualifies for that exception. Wallbank v. Rothenberg, 140 P.3d 177, 180 (Colo. Ct. App. 2006) (plaintiffs had to satisfy a burden of proof to qualify for the exception to the damages cap).
22. Defendants argue that plaintiffs in any negligence case must prove "actual loss or damage" in its case in chief; that under CDARA, "actual damages" are defined as the

lesser of three different amounts, and therefore plaintiff must prove "actual damages" as defined by CDARA.

23. The Court rejects this technical interpretation. There is nothing that says "actual damages" as defined at CRS 13-20-802.5(2) changes the common law elements of a negligence claim. There is no indication in CDARA that the legislature intended to increase a plaintiff's burden of proof as to damages, only that the damages could be limited.

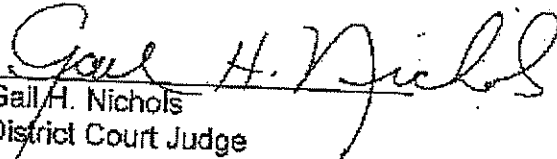
24. It would be inefficient to require plaintiffs to make this showing. Both parties have assumed, and the Court will also for purposes of illustration, that plaintiff will prove the cost to repair the alleged defects. If plaintiffs have the burden of proving that this amount does not exceed the statutory limitations, plaintiffs would have to put on evidence (presumably expert testimony) concerning: (a) the property's fair market value without the alleged defects; and (b) the property's replacement cost. If defendants have the burden of proving the limitation, they would most likely go forward with proof as to one category (either the property's fair market value without the alleged defects OR the property's replacement cost), but not both. Defendants would simply go forward with the evidence that limits the damages to the greatest extent. It may even be that the limitations do not apply at all, because the cost to repair the defects is the lesser amount of the three categories.

25. Thus, the Court concludes that defendants bear the burden of proving that any damages proven by plaintiffs are limited by the provisions of CRS 13-20-806(1) and 13-20-802.5.

IT IS THEREFORE ORDERED that plaintiffs' Rule 56(h) motion for a determination of law is GRANTED.

IT IS FURTHER ORDERED that defendants bear the burden of establishing that the limitation on damages provisions of CRS 13-20-806(1) and 13-30-802.5(2) apply to limit the amount recoverable by plaintiffs.

Dated: February 24, 2009


Gail H. Nichols
District Court Judge