

Exhibit

11

DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado 80112	EFILED Document CO Arapahoe County District Court 18th JD Filing Date: Oct 7 2009 2:33PM MDT Filing ID: 27454427 Review Clerk: N/A
Plaintiff: WINDMILL CREEK ASSOCIATION, a Colorado nonprofit corporation, v. Defendants: WINDMILL CREEK, LLC, a Colorado Limited Liability Company, et al,	<hr/> <p style="text-align: center;">Court Use Only</p> <hr/> Case No. 2008CV809 Courtroom: 404
ORDER PARTIALLY GRANTING PLAINTIFF'S RULE 56(h) MOTION FOR DETERMINATION OF LAW RE: CDARA DAMAGES CAP	

This matter comes before the Court on Plaintiff Windmill Creek Association's C.R.C.P. 56(h) Motion for Determination of Law (hereinafter "Motion") regarding section 13-20-802.5(2) of the Construction Defect Action Reform Act of 2003 (hereinafter "CDARA"). The Court having reviewed the Motion, Briefs submitted by the parties, and being sufficiently advised, FINDS AND ORDERS:

I. STANDARD OF REVIEW

C.R.C.P. 56(h) permits a party to move for a determination of a question of law at any time after all required pleadings have been filed. The rule expressly provides that the court may grant such a motion only if "there is no genuine issue of any material fact necessary for the determination of the question" See *Henisee v. First Transit, Inc.*, -- P.3d --, 2009 WL 1622783 (Colo. App. 2009), No. 08CA0962 (June 11, 2009). Courts apply summary judgment standards to Rule 56(h) motions. *Id.*, see also *West Elk Ranch, L.L.C., v. United States*, 65 P.3d 479, 480-81 (Colo. 2002).

II. FINDINGS AND ORDER

A. Introduction

In its Motion, Plaintiff requests this Court find that CDARA § 13-20-802.5 imposes statutory “caps” on damages sought by claimants and creates an affirmative defense that defendants must present and prove in order to limit any damages award. Defendants Windmill Creek, LLC, Jeff Barkman, Michael Mutter, Dennis Krüger, Andy Wallace, and Frontier Communities, LLC, (hereinafter “Windmill Defendants”) Defendant Yevoli Excavating, LLC, (hereinafter “Yevoli”), Defendants Casson Duncan Construction, Inc., and Kevin Duncan, (hereinafter “Casson”) and Defendant V3 of Colorado, LLC d/b/a V3 Consultants, Ltd., (hereinafter “V3”) each filed separate responses to the Motion. Defendant PWN Architects & Planners, Inc., filed a joinder, and collectively those who filed separately and those who filed joinder are hereinafter “Defendants.” Generally, Defendants argue that the statutory language of section 13-20-802.5(2) clearly defines “actual damages” as three specific alternate measures of damages, not statutory damage caps, and that Plaintiff bears the burden of proving their requested relief is the least of the three measures by presenting evidence for all three measures. Casson further argues that Plaintiff’s Motion asks the Court to rule on an issue of fact by determining whether the cost to repair the alleged defects is the proper measure of damages in this case. (Defs. Casson Duncan Construction Inc., and Kevin Duncan’s Resp. to Pl.’s Rule 56(h) Mot. for Determination of Issue of Law, p. 3.)

B. Plaintiff Not Required to Present Evidence of Each of the Three Values in Order to Prove Which is the Lesser

CDARA § 13-20-806 limits a construction professional’s liability to actual damages. C.R.S. § 13-20-806 (2009). Section 13-20-802.5(2), at issue in this Motion, defines “actual damages” 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” The statute, however, does not indicate which party bears the burden of proving which measure of damage is the least.

Where parties dispute the meaning of a statute, the court must determine and give effect to the intent of the legislature. *Int’l Truck and Engine Corp. v. Colo. Dept. of Revenue*, 155 P.3d 640, 641 (Colo. App. 2007). This requires the court to first examine the plain language of the statute. *Id.* (citing *People v. Dist.*

Court, 713 P.2d 918 (Colo. 1986)). When the language is clear and unambiguous, the courts must interpret the statute as written. *Id.* Only when a statute is susceptible to more than one reasonable interpretation must a court look beyond the language of the statute and consider other factors, such as the statute's legislative history and the nature of the problem addressed by the legislation. *People v. Pierre*, 30 P.3d 816, 818 (Colo. App. 2001).

In this action, the governing statute is silent as to which party must establish which of the "actual damage" formulas represents the smallest of the three values of damages. In *Land-Wells v. Rain Way Sprinkler and Landscape, LLC*, 187 P.2d 1152, 1154 (Colo. App. 2008), the Colorado Court of Appeals instructs this Court that CDARA "does not alter the substantive elements of a plaintiff's claim." Under common law, the plaintiff bears the burden of establishing damages that the defendant may rebut through offering contradictory evidence. *General Ins. Co. of America v. City of Colorado Springs*, 638 P.2d 752, 759 (Colo. 1981). Once the parties present evidence establishing or rebutting damages, the jury, not the court, determines the extent of damages. *Gold Rush Investments, Inc. v. G.E. Johnson Const. Co., Inc.*, 807 P.2d 1169, 1175 (Colo. App. 1990).

CDARA clearly limits a claimant's requested relief to actual damages. Plaintiff, therefore, has the burden of presenting evidence proving the claimant suffered actual damages. This Court finds that CDARA does not, however, require a plaintiff to prove actual damages in a manner other than that imposed at common law. Section 18-20-802.5(2) defines for the parties what constitutes "actual damages," and limits recovery to the smallest of the three alternate damages. The Court further finds that the statute does not create a burden on a defendant to prove the lesser of the three formulas, therefore, the statute does not create an affirmative defense. The defendant's rebuttal of the plaintiff's evidence of damages is a tactical issue. Under established principles of common law, the defendant has the option to present evidence that the plaintiff's calculation of damages is improper and present evidence of the proper calculation. CDARA limits both the plaintiff's and the defendant's calculation methodologies to either 1) the fair market value of the real property without defect, 2) the replacement cost of the real property, or 3) the reasonable cost to repair the alleged defect. The Court then has the obligation to instruct the jury to award the lesser level of damages if the theories presented prove actual damage occurred.

C. The Court's Finding Does Not Rule on an Issue of Fact

Casson asserts that Plaintiff's Motion asks this Court to rule on an issue of fact. As noted in the "Standard of Review" section, the court may only grant a

Rule 56(h) motion if the court's findings do not rely on any genuine issue of material fact. *See Henisee v. First Transit, Inc.*, -- P.3d --, 2009 WL 1622783 (Colo. App. 2009), No. 08CA0962 (June 11, 2009). Courts apply summary judgment standards to Rule 56(h) motions. *Id.*, *see also West Elk Ranch, L.L.C., v. United States*, 65 P.3d 479, 480-81 (Colo. 2002).

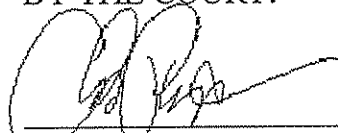
Casson accurately states that Plaintiff's Motion clearly indicates Plaintiff believes the cost to repair the alleged defects is the appropriate measure of damages. (Defs. Casson Duncan Construction Inc., and Kevin Duncan's Resp. to Pl.'s Rule 56(h) Mot. for Determination of Issue of Law, p. 3.) Further, Plaintiff's Motion does not present evidence to support their advancement of the cost of repair measure. (*Id.*) The Court's finding that Plaintiff does not bear the burden to prove its chosen measure of damages is the least of the three possible measures does not, however, hold that Plaintiff's suggested measure is the proper measure. The task of determining the appropriate measure of damages is the jury's responsibility at the close of trial. The Court's findings do not rely on a determination of which measure of damage is the appropriate measure. Rather, the Court has only found that CDARA does not require Plaintiff to present evidence of all three possible measures of damages and that CDARA does not create an affirmative defense.

III. RULING

THEREFORE, the Court hereby partially GRANTS Plaintiff's Rule 56(h) Motion for Determination of Issue of Law regarding CDARA section 18-20-802.5(2) finding that CDARA does not require Plaintiff to prove damages in a manner other than that imposed at common law. Further, the Court finds that CDARA section 18-20-802.5(2) does not create an affirmative defense or create a burden on Defendants to prove the lesser of the three possible measures of damages. Finally, the Court's findings do not depend on a determination of any genuine issue of material fact.

SO ORDERED this 7th day of October, 2009

BY THE COURT:



Charles M. Pratt
District Judge

Exhibit

12

INSTRUCTION NO. 33

If you find in favor of the Hildebrands on any of their claims of negligence, negligent misrepresentation, violation of Colorado's *Consumer Protection Act*, or breach of implied warranty, you shall award as their Actual Damages, insofar as they have been proved by a preponderance of the evidence and insofar as they were caused by Defendant New Vista Homes II, LLC's negligence, negligent misrepresentation violation of Colorado's *Consumer Protection Act*, or breach of implied warranty.

In determining such Actual Damages, you shall consider the following:

1. Actual damages, which are defined as the lesser of:
 - a. The fair market value of the real property without the alleged construction defect;
 - b. The reasonable cost to repair the alleged construction defect, and,
2. Other direct economic costs related to loss of use of the Hildebrands' home, together with housing and personal property relocation costs, which losses or costs the Hildebrands have incurred and/or will incur in the future.
3. Reasonable compensation for personal injury, if any, for physical annoyance, inconvenience, aggravation and discomfort to the Hildebrands caused by defects in and resulting damage to their home.

In addition, if you find in favor of the Hildebrands on their *Consumer Protection Act* claims, you shall consider the following personal injury damages:

1. Reasonable compensation for emotional distress resulting from any *Consumer Protection Act* violation.