

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-023536

08/26/2009

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
T. Tankersley
Deputy

JOAN KIRSCH

BRUCE G MAYFIELD

v.

DEL WEBB COVENTRY HOMES INC, et al.

WILLIAM A NEBEKER

MARK T COLLINSWORTH
DARRELL S DUDZIK

RULING MINUTE ENTRY

Plaintiff's Motion for Class Certification was taken under advisement following oral argument on August 14, 2009. Having considered Plaintiff's motion, Defendants Del Webb and Third-Party Defendant Sunbelts Conveyered Aggregate Delivery, LLC's (collectively "Defendants") Oppositions, and Plaintiff's combined Reply thereto, as well as the oral arguments of counsel, the Court finds as follows.

Plaintiff seeks certification as the representative of a class of approximately 3,533 current owners of houses constructed by Defendants Del Webb in the same planned community development ("Anthem community"). Plaintiff alleges that these homes share the same design defect of running hot and cold unsleeved copper water piping along side one another in a single trench beneath the concrete slab of each home. Plaintiff further alleges that this particular design is defective because it eventually causes the hot water pipes to leak through a process known as Thermal Galvanic Corrosion ("TGC"). As a result, Plaintiff represents that the prospective class members' claims are based on the same legal theories (i.e. breach of express and implied warranties), arise from the same course of conduct (i.e. Defendants, using the same

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subcontractor, improperly installed unsleeved copper water piping), and seek identical legal remedies (i.e. the cost of repairing the unsleeved copper water piping).

Pursuant to Rule 23(a) of the Arizona Rules of Civil Procedure, class certification is proper only if: (1) the class is so numerous that joinder of all members is impracticable (“numerosity”), (2) there are questions of law or fact common to the class (“commonality”), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality”), and (4) the representative parties will fairly and adequately protect the interests of the class (“adequacy”). In addition, the party seeking certification must show that common questions of law or fact predominate over questions affecting only individual members of the class (“predominance”), and that the class action is superior to other methods of adjudicating the controversy (“superiority”). Ariz. R. Civ. P. Rule 23(b)(3). Rule 23 “should be construed liberally, and doubts concerning whether to certify a class action should be resolved in favor of certification.” ESI Ergonomic Solutions, LLC v. United Artist Theatre Circuit, Inc., 203 Ariz. 94, 98, 50 P.3d 844, 848 (App. 2002). The burden of proving class certification is proper is on the party seeking certification. Markiewicz v. Salt River Valley Users’ Ass’n, 118 Ariz. 329, 341, 576 P.2d 517, 529 (App. 1978).

As a threshold issue, Defendants generally assert that the prospective class has not been adequately defined because of pronounced differences among the prospective class members in that: 1) some homeowners have claims subject to the statute of repose (A.R.S. § 12-552); 2) some homeowners are subsequent purchasers who lack contractual privity with Defendants; and 3) some homeowners have not yet experienced plumbing failures.

With respect to the statute of repose issue, the Court notes that it is presently unable to determine the extent to which A.R.S. § 12-552 is applicable to the prospective class members. However, in light of Plaintiff’s allegations and representations that not all homeowners are affected by the statute of repose, and that the statute of repose is tolled as to those homeowners who are affected, the Court finds that the potential applicability of the statute of repose does not render individual class members so dissimilar so as to preclude certification at present. The Court invites Defendants to later reurge the applicability of this statute to specific class members as discovery unfolds to the extent warranted.

With respect to the lack of privity issue, the Court notes that under Arizona law, contractual privity is no longer required for claims involving implied warranties of workmanship and habitability. Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 245, 678 P.2d 427, 430 (1984). *See also*, Lofts at Fillmore Condominium Ass’n v. Reliance Commercial Const., Inc., 218 Ariz. 574, 575, 190 P.3d 733, 734 (2008) (held that a lack of contractual privity does not preclude a homebuyer from asserting a cause of action for breach of the implied warranty of workmanship and habitability against the homebuilder or the vendor). Therefore, the Court finds

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that any purported lack of privity among the prospective class members does not support a denial of certification.

With respect to the fact that only some homeowners have experienced plumbing failures, the Court notes that Plaintiff's damages are for the cost of repairing the defect itself and not necessarily for damages resulting from the failure of that defect. Because Plaintiff has demonstrated that the prospective class members share this common defect, the Court finds that the prospective class members have been adequately defined in terms of damages.

Defendants additionally argue that the lack of homeowners who have experienced plumbing failures is fatal to Plaintiff's underlying breach of warranty claims because Plaintiff cannot prove damages. Defendants argue that in order to prove damages, Plaintiff must not only show the existence of a defect, but also show that the defect is substantially certain to result in damage.

The Court notes that only sixty homes in Anthem Community have, to date, experienced leaks. Assuming that Defendants are correct in their position that Plaintiff must show that the defect is substantially certain to result in damage in order to prove damages, the Court further notes that "[n]othing in [R]ule 23 nor in Arizona case law...requires a court to make a specific evidentiary finding" before determining the maintainability of a class action. London v. Green Acres Trust, 159 Ariz. 136, 140, 765 P.2d 538, 542 (App. 1988). *See also* Home Federal Savings & Loan Ass'n v. Pleasants, 23 Ariz. App. 467, 469, 534 P.2d 275, 277 (App. 1975), *overruled on other grounds by* Hanania v. City of Tucson, 123 Ariz. 37, 597 P.2d 190 (App. 1979), ("The determination of whether [or not] a class action should be allowed does not depend on whether the plaintiff has stated a cause of action or will prevail on the merits."). Therefore, the Court declines to deny certification based on Plaintiff's purported inability to prove damages, but invites Defendants to later reurge this issue to the extent warranted.

Defendants further assert that the specific requirements of Rule 23 have not been satisfied. The Court will address each element of Rule 23 in turn.

As to "numerosity," Defendants assert that this prong is not satisfied because: 1) some homeowners are subsequent purchasers who lack contractual privity with Defendants; and 2) some homeowners have not yet experienced plumbing failures.

For the reasons stated more fully above, the Court finds that these issues do not impact class certification. As the record reveals that approximately 3,533 homeowners share the same alleged defect, the Court finds the prospective class sufficiently numerous so as to render joinder impractical. Ariz. R. Civ. P. Rule 23(a)(1).

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As to “commonality,” Defendants argue that the prospective class members do not share a common nucleus of operative fact because: 1) some homeowners are subsequent purchasers who lack contractual privity with Defendants; 2) some homeowners have not yet experienced plumbing failures; and 3) some homeowners have different floor/lot plans which impact the cause of plumbing failures. As the first two arguments concern previously raised issues, the Court will only address the latter.

Satisfying “commonality” “requires simply that there exist questions of law or fact common to the class.” Lennon v. First Nat. Bank of Arizona, 21 Ariz. App. 306, 309, 518 P.2d 1230, 1233 (App. 1974).

Although Defendants submit that many of the leaks occurred in water service lines running in trenches containing different soil, the Court finds that Plaintiff has satisfied the commonality element because the issue of whether the design and construction of the copper water piping is defective is common to all prospective class members.

As to “typicality,” Defendants assert that typicality is not met because: 1) some homeowners are subsequent purchasers who lack contractual privity with Defendants; and 2) some homeowners have not yet experienced plumbing failures. For the reasons stated more fully above, the Court finds that these issues do not impact class certification.

To assess whether “typicality” is satisfied, the trial court must consider whether: (1) common issues of law and/or fact are presented; (2) the interests of the proposed class representative are antagonistic to those members of the putative class; and (3) absent class members have suffered the same type of injury as the class representative. Lennon, 21 Ariz. App. at 309, 518 P.2d at 1233. The claims or defenses need not be identical. Id.

The Court finds that Plaintiff’s claims are typical of the prospective class. Plaintiff alleges that Defendants’ design and construction of the copper water piping is defective and constitutes a breach of warranty. As this underlying theory of liability is typical across all prospective class members, the Court finds that the claims present common issues of law and fact and the type of injury suffered by Plaintiff would be the same as that suffered by the prospective class.

As to “adequacy,” Defendants submit that Plaintiff is seeking attorneys’ fees which is not recoverable on behalf of those subsequent homeowners not in privity of contract with Defendants. As a result, Defendants assert that Plaintiff cannot adequately represent the prospective class.

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To establish “adequacy,” the representative parties must fairly and adequately protect the interests of the class. In particular, this requirement asks whether the class representatives have any kind of material conflict of interest with the class with respect to the common questions involved. London v. Green Acres Trust, 159 Ariz. 136, 141, 765 P.2d 538, 543 (App. 1988). Additionally, the Court must also find that counsel is qualified to prosecute the action on behalf of the class. Id.

The Court finds that the issue of attorneys’ fees is not fatal to certification because this issue does not materially impact the underlying theory of the present cause of action. In addition, there is nothing to suggest that Plaintiff has any material conflict with the prospective class with respect to Plaintiff’s underlying theory. Moreover, no doubts have been raised as to the qualifications of Plaintiff’s counsel. Therefore, the Court finds that Plaintiff would fairly and adequately protect the interests of the prospective class.

Defendants finally contend that a class action is not the superior method to fairly and efficiently adjudicate this present controversy because each prospective class member has to prove individualized damages and is subject to different defenses, namely the statute of repose and lack of privity.

The Court finds Defendants arguments unpersuasive. As previously discussed, the Court finds that the issues concerning lack of privity and the statute of repose do not preclude certification. In addition, the Court notes that although individual amounts of damages may vary, differences in the amount of damages alone will not defeat class certification. Winkler v. DTE, Inc., 205 F.R.D. 235, 244 (D. Ariz. 2001). The Court finds that common questions of fact and law in whether the design and construction of the copper water piping is defective and gives rise to Plaintiff’s breach of warranty claims predominate over questions affecting only individual members of the class.

Accordingly, and in light of the foregoing,

IT IS ORDERED granting Plaintiff’s motion.