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No. 61419-3+

COURT OF APPEALS - DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

HARBOUR HOMES, INC. f/k/a
GEONERCO, INC.,
a Washington corporation,

Appellant,
v.

AMERICA 1ST ROOFING &
BUILDERS INC., et al.,

Respondent.

BRIEF OF THE APPELLANT

2009 DEC 29 PM 3:47
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

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I. INTRODUCTION

Appellant Harbour Homes, Inc. f/k/a Geonerco, Inc. ("Harbour Homes") was the general contractor for a project of 101 single family residential homes, located in Mill Creek, Washington, known as "Bluegrass Meadows." Harbour Homes hired specialty subcontractors to perform the vast majority of the construction. The homes were built between 2000 and 2003.

In 2007, Harbour Homes learned for the first time of building defects related to the framing, siding and roofing of the homes. Because this work was performed exclusively by subcontractors, Harbour Homes filed suit for breach of contract against the responsible subcontractors in August of 2007.

In July of 2009, two of the subcontractors, Bickley Construction, Inc. and Anthony's Homes, Inc., moved for summary judgment asserting that the written contracts to build the homes were lacked essential terms, and that the three year statute of limitations applied. The Defendants also argued that, if the contracts were considered oral contracts, the discovery rule did not apply. On August 6, 2009, Snohomish County Superior Court Judge George F. B. Appel granted Bickley and Anthony's motions, dismissing Harbour Homes' claims. Harbour Homes timely moved

for reconsideration, which was denied by the trial court on September 8, 2009.

The only remaining Defendant in the matter was America 1st Roofing & Builders, Inc. America's 1st moved for summary judgment on October 14, 2009. Anticipating the same ruling, Harbour Homes and America's 1st stipulated to the summary judgment dismissal, incorporating Judge Appel's Order as to Bickley and Anthony's Homes.

By way of this motion, Harbour Homes seeks reversal of the trial court's order, and remand for trial.

II. ASSIGNMENT OF ERROR

1. The trial court erred in granting Defendants' motions for summary judgment dismissing Harbour Homes' claim as a matter of law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there are genuine issues of material fact which preclude summary judgment?

2. Whether Defendants are entitled to summary judgment dismissing Harbour Homes claims as a matter of law?

3. Whether Harbour Homes breach of contract claims accrued in 2007 and were timely filed within months of discovery?

4. Whether Harbour Homes breach of contract claims are subject to a valid and enforceable written contract?

5. Whether there are genuine issues of fact as to whether Defendants breached their contracts?

6. Whether there are genuine issues of material fact as to whether Defendants breached their duty to defend Harbour Homes?

IV. STATEMENT OF THE CASE

This appeal arises from a breach of contract action by Harbour Homes, Inc. f/k/a Geonerco, Inc. ("Harbour Homes"), general contractor for the Bluegrass Meadows single family residential neighborhood ("Project") located in Mill Creek, Washington. CP 700-709.

Between 2000 and 2003, Harbour Homes built homes at Bluegrass Meadows using specialty subcontractors to perform the vast majority of the work. CP 299-302. After the Project was complete, Harbour Homes believed the homes were built to the quality and standards that the subcontractor's had agreed. *Id.* However, in early 2007, Harbour Homes received a complaint from a homeowner of water intrusion. *Id.* This was the first time that

Harbour Homes was put on notice of the facts underlying the claims in this lawsuit. *Id.*

On July 12, 2007, 37 homeowners filed suit against Harbour Homes alleging construction defects. CP 710-723. In turn, Harbour Homes filed this action against the responsible subcontractors, including Bickley Construction, Inc. ("Bickley"), Anthony's Homes, Inc. ("Anthony's"), and America's 1st Roofing and Builders, Inc. ("America 1st") or collectively, "Defendants". CP 700-709.

A. Anthony's Homes, Inc.'s and Bickley Construction, Inc.'s written contract.

Anthony's and Bickley were hired by Harbour Homes to install the framing, windows, and T1-11 siding on some of the homes at Bluegrass Meadows. Anthony's executed a written contract for this purpose on March 25, 2002, and Bickley executed a similar written contract on March 17, 2002. CP 306-317. In both cases, the contract identifies Bickley and Anthony's trade as "Framer," and lists its responsibilities as follows:

1. Subcontractor Responsibilities

Plans will be provided to the Subcontractor for review to assure they conform to local requirements. Local requirements or plan omissions should immediately be brought to the Site Superintendents attention. **Subcontractor agrees to complete their portion of the work per the plans supplied, and in accordance with all current building codes, (including but not limited to UBC, IRC, UMC, UPC, CABO, and NEC) and City, County, State and Harbour requirements and specifications. . . .** Subcontractor verifies that he is familiar with and has reviewed all the plans, specifications and items which are related to the execution of their work. . . . **All workmanship on any Harbour project shall be first class and represent the highest quality and complete product. . . .**

Id. ¶ 1 (emphasis added).

Bickley installed the framing on four of the homes at Bluegrass Meadows: Lots 21, 25 37 and 43. CP 379-382. The invoices from Bickley to Harbour Homes are for Bickley's services at the homes, and show that Bickley's work on the homes was performed after the written subcontract, dated March 17, 2002, was executed:

Lot Number	Date of Last Invoice	Date of Building Permit Issue¹
Lot 21	5/6/2002	3/18/2002
Lot 25	4/21/2002	2/19/2002
Lot 37	8/23/2002	7/16/2002
Lot 47	8/23/2002	7/16/2002

Each of the homes Bickley performed work on is therefore subject to the terms and conditions of the written contract and is governed by a six year statute of limitations.

Anthony's performed work on nineteen (19) of the homes involved in the underlying litigation: Lots 87, 80, 12, 20, 68, 78, 65, 61, 16, 19, 27, 34, 66, 62, 29, 22, 51, 48, and 43. CP 319-375. At least nine of the homes were completed after Anthony's executed the contract, dated March 25, 2002:

Lot No.	Date of Last Invoice	Date of Substantial Completion
66	Invoice Missing	4/17/2002
62	Invoice Missing	4/10/2002
27	3/25/2002	5/30/2002
34	3/25/2002	5/30/2002
29	6/4/2002	7/8/2002
22	6/4/2002	7/15/2002
51	6/27/2002	8/5/2002
48	6/27/2002	8/14/2002
43	8/27/2002	10/3/2002

Id.

¹ The implication is that the framing could not be complete before the permit was issued.

B. America 1st Roofing & Builders, Inc.'s scope of work.

America 1st performed the installation of the roofs of all homes at Bluegrass Meadows. CP Pending.² The vast majority of these homes were roofed after August 24, 2001, exactly six years before Harbour Homes filed its Complaint in this matter. CP 700-10. America 1st's invoices for its work at Bluegrass Meadows show that it completed its work for purposes of the six year statute of repose as follows:

Lot	Last Invoice by America 1st Roofing and Builders, Inc.
72	9/18/01
47	8/21/02
43	8/21/02
87	8/14/01
91	6/19/01
51	6/18/02
80	10/17/01
19	1/21/02
12	11/20/01
27	4/18/02
29	5/21/02
20	12/19/01
25	3/21/02
85	8/14/01
22	6/18/02
78	8/21/01
06	7/17/01

² America's 1st Roofing & Builders, Inc.'s motion for summary judgment and accompanying declarations are not currently part of the clerk's papers, because these documents were not included in the original designation of clerk's papers. A supplemental designation of clerk's papers is pending. These citations will be supplemented in Harbour Homes' reply brief.

97	6/14/01
65	12/19/01
05	6/19/01
61	1/21/02
68	11/20/01
21	4/23/02
16	1/23/02
66	2/21/02
62	2/19/02
76	9/20/01
18	1/21/02
99	No Invoice
88	8/20/01
67	11/20/01
37	8/21/01
28	4/23/02
34	3/21/02
48	6/20/02
94	5/18/01

CP Pending.

Thus, of the 36 homes roofed by America 1st, 26 were roofed after August 24, 2001, and are therefore not barred by the six year statute of repose, RCW 4.16.326(g). Harbour Homes is therefore entitled to defense of the claims brought against it for America 1st's defective roofing. Further, because the defects were not discovered and the claims did not accrue until 2007, Harbour Homes is entitled to breach of contract damages.

C. Defendants' agreement to defend and indemnify Harbour Homes.

Each Defendant executed an agreement to defend and indemnify Harbour Homes from any and all claims arising from the subcontractor's work. On May 13, 1999, America 1st executed an agreement with Harbour Homes, Inc., titled "Washington Indemnification addendum." CP Pending. Anthony's and Bickley executed the same document on March 22, 2002 and March 17, 2002, respectively. CP 377; 384. The agreement states in part that the subcontractors will indemnify and defend Harbour Homes:

_____ (hereinafter Contractor) agrees to defend, indemnify and hold Geonerco, Inc. dba: Harbour Homes (hereinafter Owner), its Representatives, Officials and Architech/Engineer harmless from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from or connected with services performed or to be performed under this Contract by Contractor, Contractor's agent or employees or support, to the fullest extent of the law.

CP Pending; 377; 384.

Harbour Homes concedes that it did not file its claim for indemnity within the statutory period required under *Parkridge Assoc. v. Ledcor Indus.*, 113 Wn. App. 592, 94 P.3d 225 (2002), and therefore that its claim for indemnity was properly

dismissed. However, the accrual date for the duty to defend differs from indemnity, and that claim remains viable and should not have been dismissed. *See infra* § V.D.

D. Procedural Status

On August 6, 2009, the Honorable George F.B. Appel heard argument on Bickley and Anthony's motions for summary judgment. CP 625-645; 521-531. The Court granted the motions, thereby dismissing the Harbour Homes' claims. CP 103-106; 110-114. Harbour Homes moved for reconsideration on August 17, 2009. CP 94-102. The Court denied Harbour Homes' motion for reconsideration on September 8, 2009. CP 45. Harbour Homes filed a notice of discretionary review on October 6, 2009. CP 26-44.

On October 14, 2009, the only remaining defendant, America 1st Builders, Inc., filed a motion for summary judgment seeking dismissal on the same basis as Bickley and Anthony's. CP Pending. Because the law of the case would have required the same result, Harbour Homes and America 1st stipulated to dismissal of America 1st's claims, incorporating Judge Appel's rulings as to Bickley and Anthony's as if they had been granted to America 1st. CP Pending.

On November 6, 2009, Harbour Homes filed an amended Notice of Appeal as a matter of right pursuant to RAP 5.1(a), incorporating all Defendants into this matter. CP Pending.

V. ARGUMENT

A. The standard of review of a motion for summary judgment is de novo.

The appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court, considering all matters de novo. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). A court may grant a motion for summary judgment only if "there is no genuine issue as to any material fact." CR 56(b). "The court must consider all facts submitted and all reasonable inferences drawn from them in the light most favorable to the nonmoving party. The court should grant the motion only if, from all the evidence, reasonable persons could reach but on conclusion." *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654,662, 63 P.3d 125 (2003).

B. Harbour Homes' claims are not time barred because they accrued pursuant to the discovery rule as adopted by the Supreme Court, and were filed prior to the expiration of the statute of repose.

Harbour Homes entered into contractual agreements with the three defendants to build the homes at the Project. Regardless

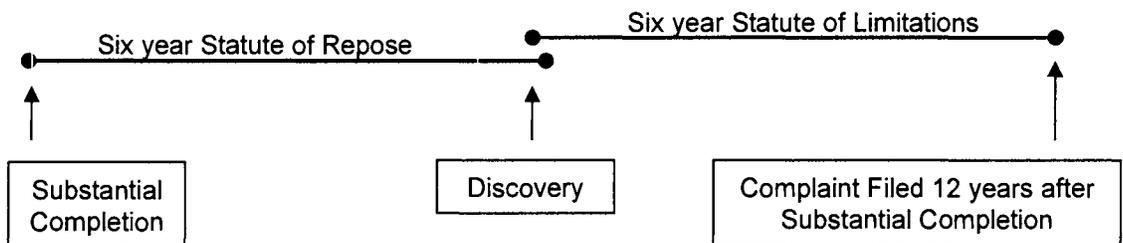
of whether the contracts were oral or written, Harbour Homes' claims are not time barred. Written contracts are subject to a six year statute of limitations, RCW 4.16.040, and Harbour Homes claims were filed within this period. See *infra* § V.C. Oral contracts are subject to a three year statute of limitations, RCW 4.16.080, but, in the case of construction contracts, are also subject to the discovery rule. Here, Harbour Homes discovered the claims in 2007 and filed this action shortly thereafter.

The Court dismissed Harbour Homes' claims on summary judgment, holding that our Supreme Court's decision in *1000 Virginia* requires the trial court to perform a balancing of unfairness for barring actionable claims against the policy of preventing stale claims. The trial court then determined that under this balancing, Harbour Homes' claims should be dismissed.

Harbour Homes' claims are viable because they accrued pursuant to the discovery rule, which was adopted by our Supreme Court in the case of *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, and because the claims were filed before the statute of repose expired. 158 Wn.2d 566, 573, 146 P.3d 423 (2006). In *1000 Virginia*, the Supreme Court performed a balancing analysis in adopting the

discovery rule; therefore, no balancing is required or permitted at the trial court level.

The discovery rule was first applied to breach of contract claims in 2002 by Division One of the Court of Appeals in *Architechtonics Const. Mgmt., Inc. v. Khorram*, 111 Wn. App. 725, 45 P.3d 1142 (2002). In that case, the Court of Appeals held that an "action accrues and the statute of limitation begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts that give rise to the claim." *Id.* at 728. The Court held that the statute of limitations begins to run when the claim accrues (or is discovered), so long as it is discovered within the six year statute of repose, RCW 4.16.310. Thus, under *Architechtronics*, a contractor's liability could extend to as much as 12 years after substantial completion of a project.



The very next year, our legislature responded by enacting RCW 4.16.326(1)(g), an affirmative defense that expressly limits claims against a builder to six years, regardless of discovery. Specifically, the statute provides that construction related claims are barred:

To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 [Six Year Statute of Repose] or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations. In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later...

As discussed in the legislative history, the purpose of this affirmative defense was to limit a contractor's liability to six years post substantial completion. See Final Bill Report on SHB 2039, 57th Leg., Reg. Sess. (2003). The statute does not revoke the discovery rule, but instead terminates the ability to file a claim after the six year statute of repose has run, regardless of discovery.

Shortly thereafter, our Supreme Court decided *1000 Virginia*, in which it held that notwithstanding RCW 4.16.326(1)(g), the discovery rule applies to breach of contract cases. *1000 Virginia Ltd. P'ship.*, 158 Wn.2d at 579 ("We are persuaded that the rule

should apply to contract claims involving latent construction defects.") The Court came to this decision by balancing the possibility of stale claims against the unfairness of precluding justified causes of action. *Id.* at 579-80. It held that the discovery rule applies to breach of contract cases, because "it is unfair to permit a defendant to escape responsibility for shoddy construction simply because an action is based on contract rather than a tort theory," and because "it is more equitable to place the burden on the party best able to prevent it." *Id.* at 580.

The Supreme Court recognized that the discovery rule would have little impact to breach of written construction contract cases, because the statute of limitation and the statute of repose are both six years. *Id.* at 582. However, the Court held that in the case of oral contracts, the discovery rule may apply to extend a builder's liability to six years post substantial completion. Specifically, the Court stated:

[P]arties can enter an oral contract for new construction, remodel, or repair. If they do so, the discovery rule may apply because the statute of limitations for an oral contract is three years. RCW 4.16.080(3). A latent defect could be discovered more than three years but less than six years after substantial completion. Notably, RCW 4.16.326(1)(g) does not say that the discovery rule does not apply to construction contracts...

Id. at 582-83.

This case fits squarely within our Supreme Court's example of how the discovery rule and RCW 4.16.300 *et seq.* operate. Latent defects exist at the homes at issue in this matter. The defects were discovered by Harbour Homes for the first time in early 2007, more than three years but less than six years after substantial completion. Thus, under *1000 Virginia*, Harbour Homes' claims are viable because they accrued (were discovered) and filed before the statute to repose expired. As applied to this case, Harbour Homes' claims against the Defendants survive.

Defendants will likely reiterate their arguments to the trial court that by simply pleading RCW 4.16.326(1)(g) as an affirmative defense, the discovery rule does not apply. *1000 Virginia* holds that pleading RCW 4.16.326(1)(g) only prevents the discovery rule from extending a claim beyond the six year statute of repose. As discussed above, prior to the legislature's enactment of RCW 4.16.326(1)(g), a contractor's liability could extend to 12 years post substantial completion. Failure to plead RCW 4.16.326(1)(g) subjects a contractor to such liability. It does not, as the defendants claim, abrogate the discovery rule. The Court was clear

in adopting the discovery rule to apply to the accrual of claim, and equally clear in that RCW 4.16.326(1)(g) applies only to limit when the statute of limitations expires: "RCW 4.16.326(1)(g) simply identifies a point at which the 'applicable' limitations period expires, without identifying what that limitations period is." *Id.* at 584.

Defendants claim that the case of *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Dev, Inc.* somehow stands for abrogation of the discovery rule is likewise misplaced. 143 Wn. App. 345, 177 P.3d 755 (2008). *Harmony at Madrona* considers whether a written contract claim may accrue before substantial completion, and only states that the discovery rule does not apply because the defects at issue were not latent. *Id.* at 356.

The law in Washington is that the discovery rule applies to breach of construction contract cases, that a claim accrues when discovered, and that a claim is valid if it accrues and is filed before the statute of repose runs, i.e., six years from substantial completion of the Project. The facts here fit squarely within this scheme. Latent defects are alleged at the Project, which Harbour Homes did not discover until 2007. Harbour Homes promptly filed its Complaint before the six year statute of repose expired. Harbour Homes' claims are not time barred.

C. Harbour Homes' claims are not time barred because it executed valid and enforceable contracts with Defendants' Bickley and Anthony's.

1. Harbour Homes' claims are governed by the six year statute of limitations, RCW 4.16.040(1), because the contracts contain all of the requisite elements of a valid and enforceable contract.

The written contracts between Harbour Homes and Anthony's, and Harbour homes and Bickley, contain the requisite elements of a valid and enforceable contract, and therefore the six year statute of limitations applies to Harbour Homes' claims. A written contract is valid and enforceable in Washington, and subject to a six year statute of limitations, so long as the "essential elements" are set forth in the writing. *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995). The essential elements of a contract are "the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration." *Family Medical Bldg., Inc. v. D.S.H.S.*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985). Further, RCW 4.16.040(1), the statute of limitations on written contracts, was intentionally drafted broadly such that liability *implied* (but not express) in the written contract does not subject the claim to a three year statute of limitations as an oral contract. *Kloss*, 77 Wn. App.

at 299 ("what is normally regarded as a necessary element of a written contract need not be expressly addressed if it is implicit in the writing, and the fact that the obligation is implicit in the writing does not cause the contract to be 'partly oral' for statute of limitations purposes.")

Here, all of the essential elements of a contract are present. The contracts identify "Geonerco, Inc. dba Harbour Homes" and "Bickley Const. Inc." or "Anthony's Homes, Inc." as the parties, and states the subcontractor's trade as "framer." CP 307-317. The contract also sets forth numerous terms and conditions, including those which describe how the subcontractors were to perform their work. *Id.*

The Court agreed with the Defendants' argument that the written contract is invalid because it does not specifically identify Bluegrass Meadows as the project, and it does not list the specific lots that the defendants were hired to frame. However, these omissions were intentional, mutually agreed to by the parties, and are incidental and not harmful to the validity of the contract. Restatement (Second) of Contracts § 33, comment a (1981). ("Where the parties have intended to finalize a bargain, any

uncertainty as to incidental or collateral matters is generally not harmful to the validity of the contract.")

There is no requirement that the project or lots be identified. In fact, the project and lot numbers were left uncertain and the contract was intentionally drafted to cover all projects that the subcontractors worked on to provide flexibility. See *Contract* ¶ 13 ("*This Subcontract Agreement shall be applicable to any Harbour jobsite...*"). This is because both Bickley and Anthony's performed work on many Harbour Homes' Projects. CP 460. In fact, Bickley and Anthony's have worked with Harbour Homes for many years, and Bickley continues to work with Harbour Homes today. *Id.* The lack of a project name or lot numbers are incidental and collateral to the contract; it is not a material term. Moreover, the lack of a project name and lot numbers was by design, to which both parties mutually assented to, as evidenced by their signatures on the last page. Defendants' claim that the contract is void because it does not list the project is meritless.

Similarly, Defendants argue that the "terms and conditions" element of the contract is missing because there is no "scope of work." Defendants ignore the first paragraph of the contract, that

specifically sets forth the terms and conditions of the contract, which obligated Defendants to:

- frame the homes at Bluegrass Meadows in accordance with the plans and the local building codes;
- to review the plans and "assure they conform to local requirements"; and
- to build the homes to "the highest quality standards within the trade."

CP 307; 313. Defendants further ignore the contract language that identifies its trade as "framer."

These contract provisions identify what the Defendants were obligated to do under the contract, and are sufficient to determine whether the Defendants breached their contractual obligations. The Defendants do not dispute that they contracted to frame the homes, which included installing framing components, windows, and the T1-11 siding. In fact, Defendants admit that the framing work included T1-11 siding installation and window installation. CP 631. The question in this case is whether the Defendants performed their framing work in accordance with the terms and conditions outlined in paragraph 1 of the contract. This question is for a jury.

All of the material elements of a contract are present in the contract executed by Harbour Homes and Bickley, and Harbour Homes and Anthony's. The contract is valid and enforceable, and Harbour Homes' claims are governed by RCW 4.16.040(1), the six year statute of limitations.

2. In addition to the contracts, Defendants' invoices and bids constitute a written contract because they include all material terms of a written contract.

In addition to the contracts, all three defendants submitted bids and invoices to Harbour Homes for their work on the Project, which together constitute a written contract and bring Harbour Homes' claims within the six year statute of limitations. Ex parte writings are sufficient to establish a written contract if the writings contain all of the elements of a contract. For the purposes of six-year limitations, the writings must contain "all the essential elements of the contract, which include the subject matter, parties, terms and conditions, and price or consideration." *Urban Dev., Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn. App. 639, 650, 59 P.3d 112 (2002). What is normally regarded as a necessary element of a written contract need not be expressly addressed if it is implicit in the writing, and the fact that the obligation is implicit in the writing

does not cause the contract to be 'partly oral' for statute of limitations purposes." *Kloss*, 77 Wn. App. at 298.

Here, Anthony's Homes provided invoices to Harbour Homes which contain all of the material elements of a written contract. The invoices list the parties, the Project name, lot number, a description of the work, and the price of the work. The invoices also reflect the mutual intent of the parties, that is, that the Defendants would frame or roof the homes in the Project for Harbour Homes. Further, the price charged by the Defendants is a rate consistent with high quality, workmanlike, and code compliant standards. CP 300. Therefore, implicit in the writing is the term that Defendants' work is consistent with the building code and a workmanlike standard. The invoices therefore contain the essential elements of a written contract, and require that Harbour Homes' claims be governed by a six year statute of limitations.

3. Material issues of fact exist as to whether the Defendants breached their contract with Harbour Homes.

There are a multitude of factual issues surrounding whether each Defendants' work was deficient under the terms and conditions of its contract with Harbour Homes. Whether a party has breached a contract is a question of fact. *Palmiero v. Spada*

Distrib. Co., 217 F.2d 561, 565 (9th Cir. 1954) ("the question of breach of any contract, oral or written, is a question of fact.")

Here, Defendants Bickley and Anthony's argue that because Harbour Homes did not provide building paper and head flashing, the Defendant framers had no obligation to install them. However, the alleged defects in this matter go beyond building paper and head flashing. Defendants' work was deficient in numerous areas. Moreover, in contrast to Defendants' claim that they were primarily hired to perform labor, the express terms of the contracts state otherwise. Anthony's was retained as an expert in framing, and was charged with reviewing the plans and assuring that they conformed to building codes and workmanlike standards. CP 307; 313. Each of these issues must be resolved by a jury.

The homeowners made four claims in their Complaint against Harbour Homes and allege a host of construction defects. CP 710-723. Most notably, the homeowners complain of water intruding into the wall cavities. CP 717. This allegation is directly related to the framers' failure to properly install the T1-11 siding and windows. CP 401-403. Specifically, Anthony's and Bickley did not install the T1-11 siding in accordance with code, manufacturers' recommendations, or in a workmanlike fashion, because it did not

install the T1-11 with a sufficient gap around penetrations (doors and windows) to allow for expansion during heating cycles. *Id.* Failure to provide a sufficient expansion gap caused the T1-11 panel siding to warp during heating cycles causing damage to the caulked joints around the penetrations, and thereby allowing water to intrude into the wall cavities. *Id.*

The homeowners have also asserted a claim under the Consumer Protection Act, alleging that Harbour Homes represented that the homes were of the highest quality, when in fact the homes were not of the highest quality. This claim is also directly related to the Defendants' work. Anthony's and Bickley expressly contracted to perform its work to the highest standards: "All workmanship on any Harbour project shall be first class and represent the highest quality standards of the trade." CP 307; 313.

Taken in the light most favorable to Harbour Homes, the evidence shows that the Defendants' work was substandard and breach of its contract. Over cut windows, rusted nails, stained siding, and insufficient gaps around the windows are not of the highest quality. The Defendants breached their contract. At a minimum, the issues must be decided by a jury.

D. Harbour Homes claim for breach of duty to defend was timely filed and should not have been dismissed.

Each Defendant agreed to indemnify and defend Harbour Homes through both its contract and a separate indemnity agreement. A claim for indemnity does not accrue until the indemnitee is obligated to pay a judgment. *Parkridge Assoc. v. Ledcor Indus.*, 113 Wn. App. 592, 94 P.3d 225 (2002). Harbour Homes was not obligated to pay any judgment within the six years of the Project's completion, and therefore, Harbour Homes claim for indemnity is stale, and Harbour Homes does not seek reversal of dismissal of its indemnity claim.

The duty to defend, however, accrues much earlier. In Washington, under a contractual indemnity provision, "the duty to defend is determined by the facts known at the time of tender of defense.' [T]he facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend.'" *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 836 P.2d 851 (1992) (quoting *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 694, 509 P.2d 86 (1973)).

Here, Harbour Homes tendered its defense through its Third-Party Complaint on August 24, 2007. In the Complaint, Harbour Homes points to the allegations asserted in the homeowner's complaint, which point directly to each of the Defendant's work:

- Failure to properly install siding material or trim;
- The failure to properly install or construct hold down straps, sheer walls and other structural elements;
- The failure to properly install windows, skylights, and doors;
- The failure to properly flash penetrations such as vents, electrical appliances and hose bibs so they are weatherproof;
- Failure to properly install metal flashing over roof to wall transitions, doors, windows and other opening;
- The failure to properly design and/or install roofs, including proper venting, flashing and drainage.

CP 717-18.

Harbour Homes claim for breach of duty to defend accrued and was filed within the statute of repose, and therefore should not have been dismissed on summary judgment.

E. Harbour Homes should be awarded attorneys fees and costs on appeal.

The appellate court is authorized to award statutory attorney fees and reasonable expenses actually incurred and reasonably necessary for review to the substantially prevailing party on review.

RAP 14.3. When a contract or agreement provides for payment of attorney fees, the prevailing party is entitled to reasonable fees and costs incurred at both trial and appeal. *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814, 142 P.3d 206 (2006).

Here, the Anthony's and Bickley's contract specifically states that attorneys' fees shall be awarded to the prevailing party:

11. Attorneys Fees:

In the event either party to this Agreement files litigation regarding a dispute, the prevailing party in such litigation shall be awarded their attorneys fees and court costs at trial and on appeal.

CP 310, 316.

Harbour Homes is therefore entitled to its attorneys fees related to this appeal.

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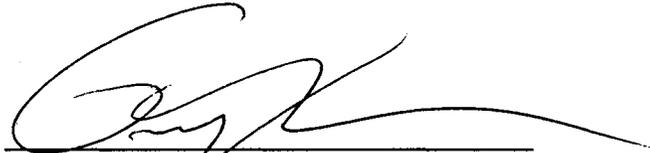
VI. CONCLUSION

For the above stated reasons, Harbour Homes respectfully requests that the Court reverse the trial courts order of summary judgment dismissal and remand this matter for trial.

Respectfully submitted this 29th day of December, 2009.

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By



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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

1. Brief of the Appellant;

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DATED at Seattle, Washington, this 29th day of December,
2009.



Nicole Calvert