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8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

9 IN AND FOR THE COUNTY OF MARICOPA

10 JOAN KIRSCH, individually and on behalf of
the class members at the Anthem; and ROE
11 HOMEOWNERS 1 through 9500,,

12 Plaintiff,

13 v.

14 DEL WEBB COVENTRY HOMES, INC., an
Arizona corporation; ANTHEM ARIZONA,
15 LLC, an Arizona limited liability company;
PULTE HOMES CORPORATION, a Illinois
16 corporation; DEL WEBB'S COVENTRY
HOMES CONSTRUCTION CO., an Arizona
17 corporation; and DOES 1 through 100,
inclusive,

18 Defendants.

19
20 DEL WEBB'S COVENTRY HOMES
CONSTRUCTION CO., an Arizona
21 corporation,

22 Third Party Plaintiff,

23 v.

24 AMPAM RIGGS PLUMBING, INC., an
Arizona corporation; BEBOUT CONCRETE,
25 INC., an Arizona corporation; KEITH RIGGS
PLUMBING, INC., an Arizona corporation;
26 SUN BELTS CONVEYERED AGGREGATE
DELIVERY, LLC, an Arizona corporation; and
27 BLACK & WHITE CORPORATIONS I-X,

28 Third Party Defendants.

Case No. CV2007-023536

**DEFENDANTS/THIRD-PARTY
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON 287
HOMES CURRENTLY INCLUDED IN
THE CLASS BUT ARE BARRED BY
THE STATUTE OF REPOSE**

(Assigned to the Honorable Douglas Rayes)

(Mandatory E-File)

Defendants/Third-Party Plaintiff, Del Webb Coventry Homes, Inc., Anthem Arizona, L.L.C., Pulte Home Corporation, and Del Webb's Coventry Homes Construction, Co. (collectively "Del Webb"), by and through undersigned counsel, hereby submit their Motion for Summary Judgment on 287 Homes Currently Included in the Class but are Barred by the Statute of Repose ("Motion"), on the basis that Plaintiff's Class Action Complaint was not filed within eight years after substantial completion of these homes as required by A.R.S. § 12-552. This Motion is supported by the attached Memorandum of Points and Authorities, KB Home's Separate Statement of Facts and the exhibits attached thereto, and the Court's file.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This litigation arises out of Plaintiff's allegations that the design of the underslab copper plumbing systems installed at the homes in the Anthem project is defective because it could cause the hot water pipes to leak through a process known as Thermal Galvanic Corrosion. The Court has certified Plaintiff's Complaint as a Class Action for homes in the project that are believed to have underslab copper plumbing pipe. Over Del Webb's objection, the Court determined that the potential applicability of the statute of repose set forth in A.R.S. § 12-552 to the homes in the putative class did not preclude certification, but invited Del Webb to reurge the applicability of the statute to specific class members. There is no question of fact that Plaintiff's Complaint was filed on December 28, 2007, and that 287 homes included in the class closed escrow prior to December 28, 1999. Therefore, as the Complaint was not timely filed for these homes before the expiration of the eight year statute of repose set forth in A.R.S. § 12-552, Del Webb is entitled to judgment on Plaintiff's Complaint for these homes as a matter of law.

II. RELEVANT FACTS

Plaintiff Joan Kirsch, individually and on behalf of potential class members at the Anthem community, filed her Complaint for Breach of Express Warranties and Breach of Implied Warranties against Del Webb on December 28, 2007, alleging that the design and construction of the underslab copper plumbing pipe at the homes is defective. *See* Del Webb's

1 Separate Statement of Fact (“SSOF”) 1. On June 17, 2009, Plaintiff filed her Motion for Class
2 Certification, requesting certification of a class to include 3,628¹ homes at the Anthem
3 community believed to have underslab copper plumbing pipe. See SSOF 2. Over Del Webb’s
4 opposition, the Court granted Plaintiff’s Class Certification Motion on August 26, 2009, thereby
5 certifying as a class the 3,628 homes included in Plaintiff’s Motion. See SSOF 3. Two hundred
6 eighty-seven (287)² homes included in the certified class closed escrow prior to December 28,
7 1999. See SSOF 4.

8 **III. ARGUMENT**

9 **A. Plaintiff’s Complaint is Barred by the Eight Year Statute of Repose Set Forth**
10 **in A.R.S. § 12-552 for the 287 Homes that Closed Escrow Prior to December**
11 **28, 1999.**

12 A.R.S. § 12-552 is a statute of repose that limits the time within which parties may bring
13 contract and warranty claims against developers and builders, and sets forth a period of time
14 within which claims **must** be brought regardless of when the cause of action may accrue. See
15 *Maycock v. Asilomar Dev., Inc.*, 2007 Ariz 495, 88 P.3d 565, (App. 2004). Pursuant to A.R.S. §
16 12-552, no action based in contract may be instituted or maintained against a person who
17 develops or sells real property more than eight years after substantial completion of the property.
18 A.R.S. § 12-552(A). This limitation includes any action based on implied warranty arising out
19 of the contract or construction, including implied warranties of habitability, fitness or
20 workmanship. A.R.S. § 12-552(C).

21 For purposes of application of the statute of repose, an improvement to real property is
22 considered substantially complete when any of the following first occurs: 1) it is used by the
23 owner or occupant; 2) it is first available for use after having been completed; or 3) final
24

25 ¹ Plaintiff’s Motion failed to include the complete matrix of homes believed to have underslab copper plumbing pipe. Del
26 Webb anticipates that Plaintiff will correct this error with a filing with the Court.

27 ² There are 292 homes included in the certified class that closed escrow prior to December 28, 1999. However, five of these
28 homes (41609 M. Cedar Chase Rd., 41333 N. Clear Crossing Rd., 41230 N. Sutter Ln., 40618 N. Apollo Way, and 40705 N.
Apollo Way) have formally opted out of the class, and are not included in this Motion, as Del Webb anticipates that Plaintiff
will file a formal notice with the Court of all of the class members that have opted out of the class.

1 inspection, if required. A.R.S. § 12-552(E). Therefore, substantial completion of the homes
2 occurred, at the very latest, when the home closed escrow and was first available for use by the
3 homeowners. Thus, in order for the December 28, 2007 Complaint to have been timely filed
4 prior to the expiration of the eighth year as required by A.R.S. § 12-552, each home must have
5 closed escrow no earlier than December 28, 1999. However, the 287 homes included in the
6 matrix attached as Exhibit 5 to Del Webb's Separate Statement of Facts in support of this
7 Motion, all closed escrow prior to December 28, 1999. As Plaintiff's December 28, 2007,
8 Complaint was filed after the expiration of the eighth year after substantial completion of these
9 homes, Plaintiff's causes of action for Breach of Express Warranties and Breach of Implied
10 Warranties are barred by A.R.S. § 12-552. As such, Del Webb is entitled to judgment as matter
11 of law on Plaintiff's Complaint for these 287 homes.

12 **IV. CONCLUSION**

13 A.R.S. § 12-552 clearly sets forth the time limitation for which an action may be brought
14 against a builder or developer arising out of the construction of the home, and whenever a
15 statute of repose applies, it bars at least some claims for relief. See *Evans Withycombe, Inc. v.*
16 *Western Innovations, Inc.*, 215 Ariz 237, 240, 159 P.3d 547, 550 (2006 Ariz. App.). There is no
17 question of fact that Plaintiff's Complaint was filed after the expiration of the eight year statute
18 of repose set forth in A.R.S. § 12-552 for the 287 homes detailed herein. Therefore, for the
19 foregoing reasons, Del Webb respectfully requests this Court to grant judgment in its favor on
20 Plaintiff's Complaint for these 287 homes as a matter of law.

21 Respectfully submitted this 9th day of April, 2010.

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1 ORIGINAL e-filed this 9th day of April, 2010
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