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VERDICTS AND SETTLEMENTS

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CONTRACTS
NEGLIGENCE

Construction Defect

BENCH DECISION: \$8.6 million gross (\$3,164,945 net); \$10.5 million in settlements.

CASE/NUMBER: El Escorial Homeowners' Association v. Santa Barbara Villas /01003147.

COURT/DATE: Santa Barbara Superior / January 29, 2003.

JUDGE: Hon. Thomas P. Anderle, Dept. 3.

ATTORNEYS: Plaintiff - A. Barry Cappello, Matthew Clarke (Cappello & Noel, LLP, Santa Barbara); Kelton Lee Gibson, Dennis Neil Jones (Myers, Widders, Gibson, Jones & Schneider, LLP, Ventura).

ATTORNEYS: Defendant/cross-defendant - Barton C. Merrill, Michael S. Mars (Dale, Braden & Hinchcliffe, Ventura) for DLC Plastering and Alderman Construction; David E. Driscoll (Driscoll & Reynolds, Riverside) for Midcal Painting & Drywall; **Michael K. Budra** (Law Offices of Larry D. Langley, San Jose) for

Brooks Quality Coatings; Bruce A. Finck (Benton, Orr, Duval & Buckingham, Ventura) for Brooks Quality Coatings; Mark T. Coffin, Bret A Lunsford (Hardin & Coffin, LLP, Santa Barbara) for Pyramid Tile, Coastline Painting & Drywall, Midcal Painting & Drywall.

TECHNICAL EXPERTS: Plaintiff - Michael D. Shotwell, forensic architecture, Palm Dessert; Steve Olsen, building code expert, Cedarpines Park; James Hansen, decking and waterproofing, Orange; A. James Montgomery, landscape architecture, Riverside; Daniel J. McNichol, windows and waterproofing, Chatsworth; David F. Jolly, cost of repair, Newport Beach; Raymond J. Shreenan, structural engineer, Hacienda Heights; Tom Marsh, geotechnical issues, San Diego; Alan Forbess, mold sampling and abatement, Ventura; David Hedman, mold remediation, Ventura; Bart Mendel, construction management, Goleta; Sharon Harney, microbiology, Rancho Dominguez; Dean G. White, concrete testing, San Dimas.

TECHNICAL EXPERTS: Defendant - John Parkhurst, construction, Lancaster; Michael Byrne, ceramic tile, Los Olivos; Ian Ross, Ph.D., mycology/microbiology, Santa Barbara; Stephen J. Cullen, Ph.D., groundwater, Santa Barbara; Brian Kramer, geotechnical/materials testing, Santa Barbara; Pete Cruz, fenestration, Alta Loma; Michael S. Roberts, plastering, Orange; West Harrington, cost estimator, Diamond Bar; [Michael S. Poles, Brooks Quality Coating, \(MPGroup\) West Hollywood](#).

MEDICAL EXPERTS: Plaintiff - James Craner, M.D., environmental medicine, Verdi, Nevada.

FACTS: The defendant, Santa Barbara Villas purchased a hotel/apartment complex in Santa Barbara consisting of more than 260 units. The developer began converting the hotel rooms and apartments to luxury condominiums.

The conversion affected all aspects of the buildings and grounds and lasted many years. The developer employed more than 40 subcontractors and formed its own general contracting company after discharging the original general contractor.

The conversion proceeded in four phases. Once the conversion, was completed, homeowners discovered that cast iron waste pipes had longitudinal cracks which leaked effluent into the wall cavities. The effluent encouraged mold and bacteria to grow.

El Escorial, the plaintiff, paid to have all of the cast iron waste pipes replaced from the slab to the roof and to have the mold removed.

While remediating the mold in the wall cavities, El Escorial discovered that exterior facades were leaking, the wood members were rotting and mold was growing in those cavities as well. El Escorial found a number of other deficient conditions.

After the condominium owners gained control of the condominium association, negotiations under Civil Code, section 1375 (Calderon Act) were exhausted.

The plaintiff filed suit against the developer, general contractor and 35 subcontractors. Prior to trial, the plaintiff achieved settlements with the developer, general contractor and nearly all of the 35 subcontractors of approximately \$10 million.

The case went to trial with 6 subcontractors on the issues of defective stucco work, deficient framing, improper use, of elastomeric paint, [improper application of deck coatings](#) and improperly installed tile on Roman tubs. The parties waived, Jury and the bench trial lasted 11 months.

El Escorial asserted construction defect claims against the 6 subcontractors and asserted express indemnity claims which had, been assigned by the settling general contractor.

PLAINTIFF CONTENTIONS: The plaintiff contended that each of the subcontractors had performed work below the standard of care. As to the framer and the stucco contractors, the plaintiff alleged that the decorative facades were not properly attached to the existing buildings which allowed water to leak into these cavities. Also, the stucco was allowed to terminate below ground level which allowed moisture to seep into the structures.

With respect to the [decking contractor \(Brooks Quality Coatings\)](#), the plaintiff contended that the contract called for a waterproof deck surface. The plaintiff further contended the deck surface allowed water to leak into the deck soffit and encouraged rot and mold growth.

The plaintiff alleged that the tile installer failed to ensure a proper slope in the bottom of the Roman tubs, that weep holes in the sub-drains were clogged and the tubs lacked a crucial flange to prevent leaks.

The plaintiff alleged that the painting contractors applied elastomeric paint one-third as thick as the manufacturer required which permitted pin-holes and "holidays" in the paint.

The plaintiff contended that by painting below grade level, the painters fell below the standard of care.

The plaintiff also argued that each subcontractor was liable on the claim for express indemnity vis a vis the general contractor.

The plaintiff contended that a variety of construction defects, at the project led to water intrusion damage, causing the growth of toxic mold and subjecting the residents to health hazards from microtoxin exposure.

DEFENDANT CONTENTIONS: Each of the subcontractors defended the plaintiff's claims by arguing that their work was not below the standard of care and that they were following the plans and specifications for the conversion project and instructions from the general contractor.

Some defendants argued claims against them had been addressed and released during the "Calderon Process" under Civil Code section 1375. Many of the defendants argued that the plaintiff's claims were barred by the applicable statute of limitations.

At the last mediation before trial, the six remaining defendants against whom the case was tried, collectively offered less than \$1 million.

THE RESULT: The court wrote a 90 page decision in which each of the claims and each of the defects alleged was discussed in great detail.

The court specifically found that defendants Pyramid Tile, Midcal Painting, Coastline Painting, and [Brooks Quality Coatings](#) were [not negligent](#), and awarded them a defense judgment. The court also found that certain claims had been released during the Calderon process.

The court found that two of the subcontractors Alderman Construction and DLC Plastering were negligent.

The total judgment against defendant DLC Plastering was \$2,645,195 (\$2,086,495 for negligence; \$377,500 for DLC's express indemnity liability and \$181,200 for "Type I" express indemnity liability for the negligence of cross-complainant Investec Construction Inc.).

The total judgment against defendant Alderman Construction was \$519,750 (\$375,000 for negligence damages; \$94,750 for express indemnity and \$50,000 for "Stearman" damages).

The court found that the plaintiff failed to meet its burden of proof on the issue of toxic mold as an element of consequential damages, or that mold is a hazard to health at the complex.

The court also found that defendants Pyramid Tile, Midcal Painting and Coastline Painting obtained a more favorable judgment than their pretrial statutory offers to the plaintiff.

OTHER INFORMATION: According to the plaintiff: The developer's insurance company refused to defend the developer in the case. As part of the plaintiffs settlement with the developer, the developer assigned its insurance rights to plaintiff and agreed that plaintiff's claim could be liquidated via an uncontested prove-up hearing. That hearing before retired Justice Jack Goertzen, resulted in a **\$65 million award**, which plaintiff is now litigating to recover against Republic Western Insurance Company and others.

All parties moved for attorney fees and costs and various other post-trial motions. The court awarded attorney fees and costs to El Escorial as well as to the defendants that prevailed.

El Escorial, Alderman Construction and DLC Plastering have filed notices of appeal.