

DISTRICT COURT, LARIMER COUNTY, COLORADO Court Address: 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521		EFILED Document CO Larimer County District Court 8th JD Filing Date: May 1 2009 2:15PM MDT Filing ID: 24981282 Review Clerk: Melissa D Woolever
Plaintiffs: HARVEST GOLD VILLAGE HOMEOWNERS ASSOCIATION, INC., a Colorado non-profit corporation.	Defendants: HECKEL CONSTRUCTION, LLC, a Colorado limited liability company; LARRY HECKEL, an individual; SCENIC RANGE, LLC, a Colorado limited liability company; and LEROY GABRIEL, an individual.	▲ COURT USE ONLY ▲
Attorney: Benson & Associates PC Name: Douglas W. Benson Jeffrey P. Kerrane Landon L. Reed Address: 1301 Washington Ave., Ste. 300 Golden, CO 80401 Phone No.: 720-898-9680 Fax No.: 720-898-9681 E-mail: doug@bensonpc.com; jkerrane@bensonpc.com; lreed@bensonpc.com Atty. Reg. No.: DWB 29630; JPK 34546 ; LLR 34336	Case No.: Div.:	
COMPLAINT AND JURY DEMAND		

NOW COMES Plaintiff, Harvest Gold Village Homeowners Association, Inc. (hereinafter "Association"), by and through its attorneys, and hereby files its complaint against Defendants as follows.

PARTIES

1. Association is a Colorado non-profit corporation organized as a homeowners association under the Colorado Common Interest Ownership Act ("CCIOA"), §§ 38-33.3-101 to 319, C.R.S. (2000).

2. The community hereinafter referred to as "Harvest Gold," consists of Area A which is 132 single family homes, Area B which is 30 attached single family dwelling units, and

Area C which is 26 attached single family dwelling units in Loveland, CO. Association is described in the recorded declaration for Harvest Gold.

3. Association is composed of the owners of all homes at Harvest Gold. These owners include original purchasers who bought homes from one or more of the Defendants and subsequent owners who have never had any contract with any of the Defendants. The individual units together with the community's common elements and limited common elements form a common interest community as defined by § 38-33.3-103, C.R.S.

4. Association has the general authority and responsibility to bring this action on behalf of its members pursuant to § 38-33.3-302(1)(d), C.R.S., its declaration, and common law. Association brings its claims on behalf of original owners, subsequent owners, and itself.

5. Defendant Scenic Range, LLC (hereinafter "Scenic Range") is a Colorado limited liability company and served as a developer, builder-vendor, and declarant of Harvest Gold and Association.

6. Defendant Heckel Construction, LLC (hereinafter "Heckel Construction") is a Colorado limited liability company and served as a general contractor and builder-vendor in relation to Harvest Gold and Association.

7. Defendant Leroy Gabriel is an individual who was an affiliate of the declarant of Association, was appointed by the declarant to Association's original board of directors, and is and/or was an employee, officer, shareholder, member, or manager of Scenic Range.

8. Defendant Larry Heckel is an individual who was an affiliate of the declarant of Association, was appointed by the declarant to Association's original board of directors, and is and/or was an employee, officer, shareholder, member, or manager of Scenic Range and Heckel Construction.

9. Defendants and other unknown parties consciously conspired and deliberately pursued a common plan or design to commit the tortious acts alleged herein, and Defendants are therefore jointly liable with one another.

10. Some or all of the foregoing Defendants and other parties developed and sold Harvest Gold as a joint venture. There existed among these parties a mutual understanding, express or implied, which arose from their joint interest in the land and property that became Harvest Gold and from the sharing of profits and losses from the development and sale of the units and common elements at Harvest Gold. Each should therefore be held jointly liable for the debts of the others that relate to this venture.

GENERAL ALLEGATIONS

11. Defendants and their subcontractors built, developed, sold, and worked on the units and common elements that form Harvest Gold. Defendants incorporated and controlled Association until they transitioned control to a board of directors elected by the homeowners.

12. Some time after the elected directors assumed control and after the property in the community had been put to its intended use, property damage resultant from certain construction defects became apparent at particular locations in the community. The construction deficiencies included inadequate site grading and drainage, improperly installed concrete flatwork, improper construction and slope of asphalt roadways, improper soil preparation, improperly installed exterior finishes, improperly installed flashings, improperly constructed balconies, decks and patios, improperly constructed foundation and basement walls, improper installation of basement steel support beams, improperly installed stone veneer, improperly sealed wall penetrations, improperly installed basement stair framing, improperly installed roof metal drip edge, penetrations, vents and flashings, improperly installed gutters, and improper installation of irrigation systems. Some or all of these issues and the resultant damage arose from errors or omissions by Defendants during the time they controlled Association.

13. Association has retained consultants to investigate the construction issues at the property and the consultants have documented extensive construction defects, including but not limited to inadequate site grading and drainage, improperly installed concrete flatwork, improper construction and slope of asphalt roadways, improper soil preparation, improperly installed exterior finishes, improperly installed flashings, improperly constructed balconies, decks and patios, improperly constructed foundation and basement walls, improper installation of basement steel support beams, improperly installed stone veneer, improperly sealed wall penetrations, improperly installed basement stair framing, improperly installed roof metal drip edge, penetrations, vents and flashings, improperly installed gutters, and improper installation of irrigation systems, poor workmanship, and other problems.

14. Association is informed and believes, and based thereon alleges that the Association has suffered damages resulting from construction defects beginning on or about the time of the first transfer of units to the Association's members and/or their predecessors in interest. These damages are continuing.

15. Association is informed and believes, and based thereon alleges that Association has suffered consequential damages caused by defective construction as described in ¶12 and ¶13, including, but not limited to, the following:

- a. cracking, shifting, moving and spalling sidewalks, garage floor slabs, and driveways;
- b. bent, dented and damaged garage doors;
- c. water intrusion in basement windows;

- d. eroded asphalt;
- e. cracked, shifting and moving foundation walls;
- f. water intrusion in foundation walls;
- g. water retention, deteriorating, delaminating, and cracking of the Exterior Insulation and Finish System;
- h. failed basement steel support beam;
- i. water intrusion in wall penetrations;
- j. unstable, hazardous, and deteriorating, decks, patios, balconies and railing;
- k. water intrusion at roof rake and fascia, roof and eave intersection, roof and wall intersection;
- l. deteriorating rubber boots at roof penetrations;
- m. deteriorating Exterior Insulation and Finish System at gutter end cap;
- n. water intrusion into roof assemblies from sagging gutters;
- o. penetrated firewall zone.

16. Based on its initial investigation and review of the site conditions, Association believes and alleges that these construction defects result from Defendants' wrongful malfeasance and/or nonfeasance.

17. Although Defendants may not have intended or expected that their actions or inaction would cause damage, it was reasonably foreseeable that their actions or inaction could cause damage to the property of Association and its members.

18. Association provided Defendants with a notice of claim in compliance with § 13-20-803.5, C.R.S. (2005) requesting repairs to the construction defects at Harvest Gold and reimbursement of fees and costs.

19. Association complied with all requirements of the notice of claim as required by § 13-20-803.5, C.R.S. (2005) but the parties have been unable to reach a resolution of Association's claims.

20. Association attended mediation with Defendants on March 13, 2009 within thirty days of the request satisfying one or more clauses within sales and purchase agreements but the parties have been unable to reach a resolution of Association's claims.

21. Association's submission of its notice of claim has tolled all applicable statutes of limitations and repose, and the present action is timely.

22. In May 2009, the Association mailed a notice of the anticipated commencement of the instant action to each homeowner in Association, at the last known address described in Association's records. This notice included a general description of the nature of the action and the relief sought.

23. Venue is proper in Larimer County pursuant to C.R.C.P. 98, as some or all of the Defendants are residents of Larimer County, as the torts and breaches alleged herein occurred in Larimer County, and as the property is located within Larimer County.

FIRST CLAIM FOR RELIEF
Negligence as to All Defendants

24. The foregoing paragraphs and the allegations contained therein are incorporated herein by reference.

25. The Defendants owed legal duties to Association, its members, and all foreseeable purchasers at Harvest Gold to construct and build the units and associated common areas in a workmanlike and non-negligent manner such that they were free from construction defects.

26. These duties arise independent from any contract pursuant to § 13-20-804, C.R.S. and pursuant to Colorado common law.

27. Pursuant to § 13-20-806(7), C.R.S., these duties may not be waived.

28. Defendants breached these duties by failing to exercise reasonable care in their work or in the supervision of their subcontractors, as evinced by widespread construction defects and damage at the site, including but not limited to the items described in ¶¶12, 13 and 15 above and as may be otherwise proven at trial.

29. Association is informed and believes, and based thereon alleges, that the negligence of the Defendants and their subcontractors has in fact caused damage to the property of Association and its members in an amount to be proven at trial.

Wherefore Association prays for damages as set forth below.

SECOND CLAIM FOR RELIEF
Negligence Per Se as to All Defendants

30. The foregoing paragraphs and the allegations contained therein are incorporated herein by reference.

31. In constructing the homes and associated property at Harvest Gold, Defendants were under a duty, independent of any contract, to adhere to all applicable state and local building codes.

32. This duty arises independent from any contract pursuant to § 13-20-804, C.R.S. and pursuant to Colorado common law.

33. Pursuant to § 13-20-806(7), C.R.S., this duty may not be waived.

34. Defendants breached this duty by failing to adhere to the applicable building codes, as evinced by many of the widespread construction defects and damage at the site, including but not limited to the items described in ¶¶12, 13 and 15 above and as may be otherwise proven at trial.

35. Association and its members are within the class of persons that the relevant building codes were designed to protect.

36. Defendants' violations of the applicable building codes have caused actual damage to property, have resulted in the loss of use of property, have caused bodily injury, and present risks to the life, health, and safety of the residents of the community and their guests.

Wherefore Association prays for damages as set forth below.

THIRD CLAIM FOR RELIEF

Breach of Implied Warranty of Habitability as All Defendants

37. The foregoing paragraphs and the allegations contained therein are incorporated herein by reference.

38. When Association and its members took possession of the homes and additional real property at Harvest Gold, they received an implied warranty that all property was fit for habitation, built in compliance with all applicable building codes, and constructed in a workmanlike manner.

39. Defendants breached the implied warranties given to Association and its members by failing to build a property that was fit for habitation, failing to comply with all applicable building standards and codes, and failing to construct Harvest Gold in a workmanlike manner, as evinced by many of the widespread construction defects and damage at the site, including but not limited to the items described in ¶¶12, 13 and 15 above and as may be otherwise proven at trial.

40. Defendant's breach of the implied warranty of habitability has caused damage to the property of Association and its members in an amount to be proven at trial.

Wherefore Association prays for damages as set forth below.

FOURTH CLAIM FOR RELIEF

Breach of Fiduciary Duty as to Defendants Larry Heckel, and Leroy Gabriel

41. The foregoing paragraphs and the allegations contained therein are incorporated herein by reference.

42. Directors of nonprofit corporations such as Associations occupy a fiduciary relationship and owe a fiduciary duty to the corporations. Pursuant to § 38-33.3-303, C.R.S., appointees of a declarant to the board of directors of a common interest community such as Harvest Gold also owe a fiduciary duty to Association's members. As relevant here, Defendants owed fiduciary duties to Association and its members:

- 42.1. to act at all times in the best interests of Association and its members;
- 42.2. to act in a reasonably competent and diligent manner to protect Association and its members from defects in construction;
- 42.3. to disclose that portions of Harvest Gold had not been built in a workmanlike manner or in compliance with applicable codes, regulations, and ordinances, to the extent these Defendants knew or should have known that these conditions existed; and
- 42.4. to capitalize Association with sufficient funds to repair the construction defects in the community.

43. Association is informed and believes, and based thereon alleges, that Defendants violated their fiduciary duties owed to Association and its members by failing to act in the best interests of Association and its members, by failing to make reasonably diligent efforts to protect Association and its members from construction defects, by failing to disclose that portions of Harvest Gold had not been built in a workmanlike manner and in compliance with applicable codes, regulations, and ordinances, and by failing to capitalize Association with sufficient funds to maintain the property and correct the construction defects and resultant damage in the community, including but not limited to the items described in ¶¶ 12, 13 and 15 above and as may be otherwise proven at trial.

44. Association is informed and believes, and based thereon alleges, that Defendants' breaches of their fiduciary duties have caused Association and its members to suffer property damage and other economic losses in amounts to be proven at trial.

Wherefore Association prays for damages as set forth below.

FIFTH CLAIM FOR RELIEF

Negligent violation of CCIOA as to Defendants Scenic Range, Larry Heckel, and Leroy Gabriel

45. The foregoing paragraphs and the allegations contained therein are incorporated herein by reference.

46. Defendants, as the declarant of Harvest Gold and Association or as affiliates of the declarant, owed the following duties to Association and its members:

- 46.1. to develop and improve the Harvest Gold property in accordance with applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements;
- 46.2. to use reasonable care in the supervision of development, design, construction, marketing, sale and repair of the units and common elements;
- 46.3. to use reasonable care in the exercise of those powers necessary and proper for the governance and operation of the board of directors during construction; and
- 46.4. to develop a functional common interest community that did not contain unmaintainable and defective construction.

47. Defendants breached these duties by failing to develop and improve the property in accordance with applicable plans, specifications, design professionals' recommendations, manufacturers' installation instructions, building codes, industry standards, and government agency requirements; by failing to use reasonable care in the supervision of development, design, construction, marketing, sale and repair of the units and common elements; by failing to use reasonable care in the exercise of those powers necessary and proper for the governance and operation of the board of directors during construction; by developing a community that, due to numerous construction defects, could not be practically maintained; and by failing to fully, reasonably, and accurately communicate with Association regarding the deficiencies and inadequacies described herein so as to allow Association to act upon that information in a timely manner.

48. Defendants' negligent violation of CCIOA has caused harm to Association and its members in an amount to be proven at trial.

Wherefore Association prays for damages as set forth below.