

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)

v.)

GENESIS DESIGNER HOMES, LLC;)
GENESIS REAL ESTATE GROUP, LLC;)
THOMAS & HUTTON ENGINEERING)
COMPANY; MALPHRUS CONSTRUCTION)
COMPANY, INC; and STONELAKE)
TOWNHOMES PROPERTY OWNERS)
ASSOCIATION, INC.,)

Defendants.)

Civil Action No. CV406-096
(Consolidated with CV407-139)

SAVANNAH-CHATHAM COUNTY)
FAIR HOUSING COUNCIL, INC.,)

Plaintiff,)

v.)

GENESIS DESIGNER HOMES, LLC;)
GENESIS REAL ESTATE GROUP, LLC;)
RICHARD A. FITZER, III; THOMAS &)
HUTTON ENGINEERING COMPANY;)
MALPHRUS CONSTRUCTION COMPANY,)
INC; CARRIE SCHMELTER; and STONELAKE)
TOWNHOMES PROPERTY OWNERS)
ASSOCIATION, INC.,)

Defendants.)

**DEFENDANT RICHARD A. FITZER, II'S ANSWER AND COUNTERCLAIM TO
THIRD-PARTY COMPLAINT FILED BY THOMAS & HUTTON ENGINEERING
COMPANY**

NOW COMES, Defendant Richard A. Fitzer, II ("Fitzer", sometimes incorrectly identified as Richard A. Fitzer, III)) and files his Answer to the Third-Party Complaint of Thomas & Hutton Engineering Company ("Thomas & Hutton").

FIRST DEFENSE

The paragraph numbers of this defense correspond with those of the Third-Party Complaint.

1. Fitzer admits that he was a member and principal of Defendant Genesis Designer Homes, LLC ("Genesis") and that he is a current member and principal of Defendant Genesis Real Estate Group, LLC ("GREG"). Fitzer admits that the court has subject matter jurisdiction over claims brought under the federal Fair Housing Act ("FHA") and that venue is proper. Further answering, Fitzer waived formal service of process. Except as admitted herein, Fitzer otherwise denies the allegations of Paragraph 1 of the Third-Party Complaint.

2. Fitzer admits that in the Second Amended Complaint filed by Savannah-Chatham County Fair Housing Council, Inc. ("SCFHC") in Civil Action No. CV 406-096, in Paragraphs 18 and 19, SCFHC alleged that "Mr. Fitzer is directly and personally involved in the development of" Stonelake and Highlands Crossing. Fitzer further admits that Stonelake Townhomes at Berwick Plantation ("Stonelake") and Highlands Crossing Townhomes at North Godley ("Highlands Crossing") are the townhome developments at issue in this consolidation action. Except as admitted herein, Fitzer otherwise denies the allegations of Paragraph 2 of the Third-Party Complaint.

3. Admitted.

4. Fitzer admits that he is named as a defendant in the Second Amended Complaint filed by SCFHC in Civil Action No. CV 406-096, but denies that he committed any act or omitted to perform any act giving rise to a cause of action against him. Further answering, Fitzer admits that the United States of America ("DOJ") did not name him as a defendant in its Complaint in Civil Action No. CV

407-139. Except as admitted herein, Fitzer otherwise denies the allegations of Paragraph 4 of the Third-Party Complaint.

5. Fitzer admits that GREG transferred 20 Taylor Street, Tybee Island, Georgia 31328 to Fitzer and his wife. Except as admitted herein, Fitzer otherwise denies the allegations of Paragraph 5 of the Third-Party Complaint.

6. Denied.

7. Denied.

8. Denied.

9. Fitzer denies that Thomas & Hutton is entitled to the relief sought in the Prayer for Relief or that Thomas & Hutton is entitled to any relief whatsoever.

10. Fitzer denies all allegations of the Third-Party Complaint not specifically admitted.

SECOND DEFENSE

The Third-Party Complaint should be dismissed to the extent that it fails to state a claim upon which relief may be granted.

THIRD DEFENSE

The Third-Party Complaint should be dismissed to the extent that it is barred by the applicable limitations period.

FOURTH DEFENSE

The Third-Party Complaint should be dismissed because the acts and doings of Fitzer alleged by Thomas & Hutton were exclusively as agent/employee of Genesis and/or GREG; he did no act outside the scope of employment or other capacity with respect to the said entities.

FIFTH DEFENSE

The Third-Party Complaint should be dismissed because Fitzer at all times acted reasonably, in good faith and because of legitimate non-discriminatory reasons.

SIXTH DEFENSE

The Third-Party Complaint should be dismissed to the extent that the Court lacks subject matter jurisdiction over Thomas & Hutton's state law claims under Article III.

SEVENTH DEFENSE

The Third-Party Complaint should be dismissed to the extent that Thomas & Hutton has failed to comply with its duty to mitigate the damages sought, if any, its entitlement to which is expressly denied.

EIGHTH DEFENSE

The Third-Party Complaint should be dismissed to the extent that Thomas & Hutton seeks equitable remedies but comes to the Court with unclean hands and is otherwise barred by concepts of fairness and equity.

NINTH DEFENSE

To the extent Thomas & Hutton attempts to assert any claim for punitive damages against Fitzer, Fitzer is not liable for punitive damages because he did not commit any discriminatory practices with malice or reckless indifference to any federally protected rights of Thomas & Hutton.

TENTH DEFENSE

To the extent Thomas & Hutton attempts to assert any claim for punitive damages against Fitzer, Fitzer is not liable for punitive damages because he did not make any statements or take any actions with malice, fraud, wantonness, oppression, or entire want of care which would raise the presumption of conscious indifference to the consequences to the rights of Thomas & Hutton.

ELEVENTH DEFENSE

To the extent Thomas & Hutton attempts to assert any claim for punitive damages, the Third-Party Complaint should be dismissed because any claim of Thomas & Hutton for punitive damages violates the Constitution of the United States and the Constitution for the State of Georgia.

TWELFTH DEFENSE

The Third-Party Complaint should be dismissed to the extent that the claims alleged are moot or are not ripe.

THIRTEENTH DEFENSE

If Fitzer is liable to Thomas & Hutton for any judgment, damages, or other relief, the entitlement to which Fitzer expressly denies, Fitzer is entitled to contribution, to the extent that this doctrine applies, from other liable defendants, persons and/or entities including Thomas & Hutton, for such judgment, damages and other relief.

FOURTEENTH DEFENSE

If Fitzer is liable to Thomas & Hutton for any judgment, damages, or other relief, the entitlement to which Fitzer expressly denies, Fitzer is entitled to indemnification and/or set-off, to the extent that these doctrines apply, from other defendants, persons and/or entities including Thomas & Hutton, for such judgment, damages and relief.

FIFTEENTH DEFENSE

The Third-Party Complaint should be dismissed because Fitzer, individually, is an improper party to the FHA action.

WHEREFORE, having fully answered the Third-Party Complaint, Fitzer prays:

- (a) that the Court enter judgment for Fitzer and against the Thomas & Hutton Engineering Company and that the Third-Party Complaint be dismissed with prejudice;

- (b) that all attorney's fees and costs be borne by the Thomas & Hutton Engineering Company; and
- (c) that the Court grant such other and further relief as it deems just and proper.

COUNTERCLAIM

NOW COMES, Defendant Richard A. Fitzer, II and files this Counterclaim against Thomas & Hutton.

Jurisdiction And Venue

1. Original jurisdiction is conferred on this Court by 42 U.S.C. § 3613 and by 28 U.S.C. § 1331 in that the claims arise under the laws of the United States.
2. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over this Counterclaim, which arises under the laws of the State of Georgia, in that such claims are so related to the claims under the FHA that they form part of the same case or controversy under Article III of the United States Constitution.
3. Venue is proper in this Court under 28 U.S.C. § 1391(b) in that Defendant Thomas & Hutton resides in, and a substantial part of the events or omissions giving rise to Fitzer's claims occurred in, this judicial district.

Parties

4. Fitzer is a resident of Chatham County, Georgia.
5. Defendant Thomas & Hutton is a Georgia Corporation, with its principal place of business in Savannah, Chatham County, Georgia.

Factual Background

6. Fitzer was a member and principal of Genesis until November 30, 2005. He is a member and principal of GREG. Both Genesis and GREG were involved in the development of Stonelake,

located in Chatham County, Georgia. Genesis was also involved in the building of the townhomes at Stonelake and Highlands Crossing. GREG was also involved in the development of Highlands Crossing, also located in Chatham County, Georgia. Fitzer acted exclusively in his capacity as agent and employee of Genesis and/or GREG, with respect to these projects.

7. Thomas & Hutton provided certain engineering services in relation to the development, design, and building of both Stonelake and Highlands Crossing, including without limitation, preparation of all engineering site plans and drawings.

8. Fitzer and Thomas & Hutton have been named as Defendants in the Second Amended Complaint brought by SCFHC. The DOJ named Thomas & Hutton as a Defendant in its Complaint, but did not name Fitzer as a Defendant.

9. At all relevant times, Thomas & Hutton held itself out to the general public, and to Fitzer, Genesis and GREG in particular, as being an engineering firm which employed one or more registered engineers and who was competent to perform certain engineering services in a manner that is reasonable and within the standard that is accepted in the engineering profession under similar and like circumstances. The services which Thomas & Hutton held itself out as being capable of performing competently included all services it rendered to both Genesis and GREG.

10. At all times, it was clear that Fitzer was acting as an agent of GREG and/or Genesis and that he was a disclosed agent of these entities.

11. Thomas & Hutton knew that Stonelake and Highlands Crossing developments included multifamily units consisting of attached townhomes.

12. If the FHA applies as contended by SCFHC and the DOJ, Thomas & Hutton knew or should have known that both Stonelake and Highlands Crossing developments, including without limitation, the dwellings and common areas, were subject to the requirements of the FHA.

13. As a professional engineering firm, Thomas & Hutton was aware or should have been aware that the development, design and building of Stonelake and Highlands Crossing had to comply with all applicable government rules and regulations.

14. Thomas & Hutton represented to Fitzter, Genesis and GREG that the site plans and drawings and other work for Stonelake and Highlands Crossing were in compliance with all applicable government rules and regulations.

15. Thomas & Hutton failed to advise Fitzter, Genesis and GREG about the FHA requirements or otherwise make them known to Fitzter, Genesis and GREG.

16. It was foreseeable that Fitzter, Genesis and GREG would rely on the representations made by Thomas & Hutton regarding the site plans and drawings and other work for Stonelake and Highlands Crossing.

17. Thomas & Hutton knew or should have known that Fitzter, Genesis and GREG would and did rely on Thomas & Hutton to provide site plans and drawings for Stonelake and Highlands Crossing that were in compliance with all applicable government rules and regulations.

COUNT I: NEGLIGENCE/NEGLIGENT MISREPRESENTATION

18. The allegations of Paragraphs 1 through 17 of this Counterclaim are hereby incorporated and reasserted as if set forth in full herein.

19. To the extent that the FHA applies to Stonelake and Highlands Crossing, Thomas & Hutton negligently prepared and provided site plans and drawings and did other work for Stonelake and Highlands Crossing that was not in compliance with applicable government rules and regulations, specifically the FHA.

20. To the extent that the FHA applies to Stonelake and Highlands Crossing, Thomas & Hutton knew or should have known that its representations that its site plans and drawings and other work were compliant with applicable government rules and regulations were false.

21. If Fitzer is held individually responsible in this consolidated action, which liability Fitzer expressly denies, he has been injured and has incurred substantial damages proximately resulting from his reasonable reliance on Thomas & Hutton's work and its representations concerning its work, which include but are not limited to the cost of modifications to Stonelake and Highlands Crossing to meet FHA requirements, together with attorneys' fees and costs associated with defending this consolidated action, in an amount to be proven at trial.

22. Accordingly, to the extent that the FHA applies to Stonelake and Highlands Crossing, Thomas & Hutton is liable to Fitzer based on its negligence and negligent misrepresentation.

COUNT II: CONTRIBUTION AND INDEMNITY

23. The allegations of Paragraphs 1 through 22 of this Counterclaim are hereby incorporated and reasserted as if set forth in full herein.

24. While Fitzer denies that he has any individual liability in this consolidated action, to the extent that there should be a determination that Fitzer is in any way individually liable, Fitzer shows that his alleged fault is significantly less than that of Thomas & Hutton and that any liability should be equitably proportioned.

25. Should it be determined that any damages or other relief adjudged against Fitzer are not subject to equitable apportionment, Fitzer shows that any alleged negligence or other liability on his part, which is expressly denied, was entirely passive while Thomas & Hutton was actively negligent so as to entitle Fitzer to common law or implied indemnity and/or contribution against Thomas & Hutton.

WHEREFORE, Defendant Fitzter respectfully requests the following relief on his Counterclaim against Thomas & Hutton:

(a) that Fitzter have judgment against Defendant Thomas & Hutton in the same amount or manner which may be recovered against him;

(b) that judgment be entered in favor of Fitzter and against Thomas & Hutton for damages in an amount to be determined at trial, as well as pre-judgment and post-judgment interest;

(c) that Fitzter be awarded all costs and attorney's fees;

(d) that the Court grant such other and further relief as it deems just and proper;

Respectfully submitted this 4th day of February, 2008.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

s/ Sarah H. Lamar

T. Mills Fleming
Georgia. Bar No. 263560
Sarah H. Lamar
Georgia Bar No. 431185

Attorneys for Defendant Richard A. Fitzter, II

200 East Saint Julian Street
Post Office Box 9848
Savannah, Georgia 31412
(912) 236-0261

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
GENESIS DESIGNER HOMES, LLC;)
GENESIS REAL ESTATE GROUP, LLC;)
THOMAS & HUTTON ENGINEERING)
COMPANY; MALPHRUS CONSTRUCTION)
COMPANY, INC; and STONELAKE)
TOWNHOMES PROPERTY OWNERS)
ASSOCIATION, INC.,)
)
Defendants.)

Civil Action No. CV406-096
(Consolidated with CV407-139)

SAVANNAH-CHATHAM COUNTY)
FAIR HOUSING COUNCIL, INC.,)
)
Plaintiff,)
)
v.)
)
GENESIS DESIGNER HOMES, LLC;)
GENESIS REAL ESTATE GROUP, LLC;)
RICHARD A. FITZER, III; THOMAS &)
HUTTON ENGINEERING COMPANY;)
MALPHRUS CONSTRUCTION COMPANY,)
INC; CARRIE SCHMELTER; and STONELAKE)
TOWNHOMES PROPERTY OWNERS)
ASSOCIATION, INC.,)
)
Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2008 I caused **ANSWER AND COUNTERCLAIM TO THIRD-PARTY COMPLAINT** to be filed electronically with the Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

David H. Johnson
McCorkle & Johnson, LLP
319 Tattnall Street
Savannah, GA 31401-8184
dhj@mjlawfirm.net

Delora Kennebrew
Assistant U.S. Attorney
Chief, Civil Division
Southern District of Georgia
P.O. Box 8970
Savannah, GA 31412
delora.kennebrew@usdoj.gov

William C. Thompson
George E. Nowack, Jr.
Weissman, Nowack, Curry &
Wilco, P.C.
One Alliance Center, 4th
Floor
3500 Lenox Road
Atlanta, GA 30326
billthompson@wncwlaw.com

Christopher Brancart
Brancart & Brancart
Post Office Box 686
Pescadero, CA 94060
cbrancart@brancart.com

Jennifer C. Cass
Department of Justice
Civil Rights Division
Housing and Civil Enforcement
Section
950 Pennsylvania Avenue, N.W.
Northwestern Building, 7th Floor
Washington, DC 20530
Jennifer.C.Cass@usdoj.gov

Roy E. Paul
Bouhan, Williams & Levy
P.O. Box 2139
Savannah, GA 31402
repaul@bouhan.com

The Undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon all parties of record by depositing a copy of the same in the United States Mail, postage prepaid, and addresses as follows:

Edmund A. Booth, Jr.
United States Attorney
Southern District of Georgia
P.O. Box 8970
Savannah, GA 31412

John Paul Berlon
Post Office Box 10745
Savannah, GA 31412

Rena J. Comisac
Steven H. Rosebaum
Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
950 Pennsylvania Avenue, N.W.
Northwestern Building, 7th Floor
Washington, DC 20530

This 4th day of February, 2008.

s/ Sarah H. Lamar

T. Mills Fleming

Georgia State Bar No. 263560

Sarah H. Lamar

Georgia State Bar No. 431185

Attorneys for Defendants Genesis Designer Homes, LLC

200 East Saint Julian Street
Post Office Box 9848
Savannah, Georgia 31401
(912) 236-0261