

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROHAN B. GOLDSON & SUZETTE
HOLNESS, Individually and as Personal
Representatives for the Estate of DAVIE
GOLDSON

Plaintiff(s),

vs.

Case No. 8:17-CV-340-T-24AEP

KB HOME, a Delaware Corporation, and
KB HOME TAMPA, LLC, a Florida
Limited Liability Company

Defendant(s).

/

PLAINTIFFS MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiffs, ROHAN B. GOLDSON & SUZETTE HOLNESS, Individually and as Personal Representatives for the Estate of DAVIE GOLDSON, by and through their undersigned counsel, pursuant to Rule 15, Fed.R.Civ.P hereby files this its Motion for Leave to Amend Complaint on the following grounds:

1. This case involves a construction defect of a private home and wrongful death based on a mold infestation.
2. That Plaintiffs' counsel has just recently learned the identity and name of the general contractor, Defendant, MARSHALL SCOTT GRAY, who worked with the Defendants, KB HOME, a Delaware Corporation, and KB HOME TAMPA, LLC, a Florida Limited Liability Company on the Plaintiffs home.

3. An employer typically is vicariously liable for the negligent acts of its employees committed within the course and scope of their employer if the employer is without fault. *Amtrack v. Rountree Transp. & Rigging*, 286 F.3d 1233, 1255 (11th Cir. 2002). However, an employer is not liable for injury caused by an independent contractor's negligence unless the employer's own negligence caused or contributed to the injury. *Amtrak* at 1248.
4. Plaintiffs seek leave of Court for the purpose of amending their Complaint to include an additional party, namely Defendant, MARSHALL SCOTT GRAY, henceforth. That the amendment asserts a claim against the individual who was either working for the Defendant or was an independent contractor. Regardless, evidence shows that this individual was the general contractor for this project. Moreover, that the Defendant, MARSHALL SCOTT GRAY's conduct arose out of the same conduct, transaction or occurrence set out or attempted to be set out in the original pleading.
5. Pursuant to Rule 15, Fed.R.Civ.P, a copy of the proposed Second Amended Complaint is attached hereto as Plaintiffs Exhibit "A".
6. Pursuant to Rule 15, Fed.R.Civ.P, "leave of court shall be given freely when justice so requires". *McKinley v. Kaplan*, 177 F.3d 1253 (11th Cir. 1999). Moreover, the district court's denial of leave to amend the Complaint is based upon an abuse of discretion standard. *Technical Resource Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1463 (11th Cir. 1998).
7. That the Defendants are in no way prejudiced by the amendment of the Amended Complaint to include Defendant, MARSHALL SCOTT GRAY, since it knew or should

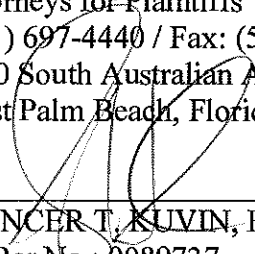
have known that the action would have been brought against Defendant, MARSHALL SCOTT GRAY, but for Plaintiffs recently learning of the party's identity and name.

8. Plaintiff contacted counsel for KB HOMES and KB HOME TAMPA, LLC who stated that they object to Plaintiffs Motion and cannot agree.

WHEREFORE, Plaintiffs, ROHAN B. GOLDSON & SUZETTE HOLNESS, Individually and as Personal Representatives for the Estate of DAVIE GOLDSON, requests this Honorable Court enter an Order allowing for the amendment to their Complaint, and, to deem the Complaint filed as of the date of the Court's Order.

I HEREBY CERTIFY that on this 15th day of March, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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KB HOME, a Delaware Corporation,
KB HOME TAMPA, LLC, a Florida
Limited Liability Company and
MARSHALL SCOTT GRAY,
Individually.

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs, ROHAN B. GOLDSON & SUZETTE HOLNESS, Individually and as Personal Representatives of the Estate of DAVIE GOLDSON, by and through their undersigned attorneys, hereby sues the Defendants, KB HOME, a Delaware Corporation and, KB HOME TAMPA, LLC, a Florida Limited Liability Corporation MARSHALL SCOTT GRAY, Individually, (hereinafter collectively the “**Builders**”), and allege as follows:

GENERAL ALLEGATIONS

1. This is an action for damages in excess of the sum of Fifteen Thousand (\$15,000.00) Dollars, exclusive of costs, interest and attorney's fees.
2. At all times material hereto, the Plaintiff, ROHAN GOLDSON, SUZETTE HOLNESS and DAVIE GOLDSON, were residents of Hillsborough County, Florida.



3. At all times material hereto, the Defendant, KB HOME, was a Delaware corporation duly licensed and authorized to conduct business in the State of Florida, and doing business in Hillsborough County, Florida.

4. At all times material hereto, the Defendant KB HOME TAMPA, LLC., was a Florida limited liability company, with its principal address in Riverview Florida and doing business in Hillsborough County, Florida.

5. The Builders operate as developers of residential housing projects throughout the state of Florida through various related entities, many of which are licensed real estate corporations, construction qualified businesses, and developers under Florida law.

6. At all times material hereto, MARSHALL SCOTT GRAY, individually, is a resident of Tampa, Hillsborough County, Florida, where his home was homesteaded.

7. MARSHALL SCOTT GRAY, was the general contractor for the home of Plaintiff, ROHAN GOLDSON, SUZETTE HOLNESS and DAVIE GOLDSON and pulled he permits for this home.

8. Venue is proper in this county because the home is located in this county and all of Defendants' acts and omissions occurred in this county.

9. ROHAN B. GOLDSON & SUZETTE HOLDNESS, have been appointed co-personal representatives of the Estate of DAVIE GOLDSON. The Order appointing them joint personal representatives is attached as "Exhibit A" to this Complaint.

10. At the time of her death, DAVIE GOLDSON left two survivors, her parents:

- a. ROHAN B. GOLDSON, DOB: 2/2/1973 and
- b. SUZETTE HOLDNESS, DOB: 8/31/1971

11. Plaintiff purchased a home from the Builders which was located at 1608 Atlantic Drive, Ruskin, FL at the Blackstone at Bay Park community (hereinafter the “Home”).

12. Plaintiff and KB HOME entered into a Construction Agreement (the “Contract”) for the construction of the Home. Plaintiff took possession of the home on or about June 23, 2006.

13. The Builders were responsible for the construction, installation and maintenance of windows, doors, stucco, exterior and interior walls, roofing, and all other materials to make the house waterproof and livable.

14. At all times material hereto, the Builders, in performing their work as it pertains to the Home, knew and intended that Plaintiff’s home would be utilized as a residence.

15. Plaintiffs have retained the undersigned attorneys to represent them in this action and are obligated to pay a reasonable fee for their services.

16. All conditions precedent to bringing this action have been satisfied or waived.

17. As soon as 2007, after moving into the home built by the Builders, DAVIE GOLDSON began experiencing headaches, polyps in her nostrils, swollen tonsils, severe allergies, breathing problems, upper respiratory complications, swelling in the neck and chest area among other adverse symptoms. At the time, her parents had no idea what could be causing these severe affects in their child.

18. DAVIE GOLDSON was eventually diagnosed with Acute Lymphoblastic Leukemia (ALL). ALL is a blood disease that is one of the most common childhood cancers. Treatment for this disease includes chemotherapy and bone marrow transplants, which leaves the child immunocompromised.

19. She began treatment for ALL immediately at various children’s cancer specialty centers in Florida.

20. While ALL is a potentially lethal disease if untreated, if treatment is rendered quickly, medical research shows that approximately 98% of children go into remission within weeks after beginning their treatment, and the long term survival rate (greater than 5 years) exceeds 85%.

21. Eventually DAVIE GOLDSON received a bone marrow transplant in or about January 2013, and was eventually discharged home on or about March 2013. As a result of her chemotherapy and bone marrow transplant, DAVIE GOLDSON was immunosuppressed.

22. From March through September 2013, after being discharged back to their home which had been built and sold by the Builders, DAVIE GOLDSON began experiencing symptoms such as headaches, swollen polyps in her nose, breathing problems, swollen face, and a black tongue. Her doctors advised ROHAN B. GOLDSON & SUZETTE HOLDNESS that the symptoms were not from DAVIE's transplant or disease at this point, and that they should check their home for possible allergens.

23. ROHAN B. GOLDSON & SUZETTE HOLDNESS checked the Home and found that mold mycotoxins were detected and hairline cracks existed in the stucco of the home.

24. In approximately August 2013, after finding these defects and mold, ROHAN B. GOLDSON & SUZETTE HOLDNESS notified the Builders.

25. Shortly thereafter, in approximately November 2013, DAVIE GOLDSON had a relapse of her condition, which her doctors advised was unrelated to her medical condition (ALL) or treatment.

26. The Builders attempted to fix the defects in the home after being notified by ROHAN B. GOLDSON & SUZETTE HOLDNESS, but failed to correct the extensive mold

infestation in the home. Despite this, the Builders notified ROHAN B. GOLDSON & SUZETTE HOLDNESS that the home was safe for DAVIE GOLDSON to move back into.

27. As a result of the defendant's actions, the Plaintiffs home was rendered unlivable by the mold infestation, and DAVIE GOLDSON suffered substantial adverse health consequences including, but not limited to, death as a result of her immunosuppressed system.

28. DAVIE GOLDSON's symptoms were consistent with exposure to elevated levels of allergenic mold and eventually DAVIE GOLDSON passed away on June 9, 2015.

29. At some point prior to the completion of the Home, the Builders negligently constructed and/or installed certain components of the home, including but not limited to waterproofing, windows, stucco, walls, doors, and/or roofing in that they failed to prevent water from penetrating and otherwise leaking into the interior walls of the Home.

30. The ingress of penetrating water led to mold growth in the walls and ceilings of the home, in the paper coverings of gypsum wall board and at the wood furring.

31. This resulted in the incubation and growth of several species of allergenic mold within the exterior of the walls of the Home.

32. As time wore on, the growing mold began to sporelate and emit spores which, in turn, traversed into the ambient air within the Home contaminating Plaintiffs' furniture, clothing and possessions and permeating the air that they breathed.

33. The mold also emitted a must odor which soon overtook the Home and could be smelled throughout the Home.

34. Environmental hygienists were retained by the Plaintiffs to determine the extent of the mold infestation in Plaintiff's home.

35. The hygienists tested both for the presence of active mold contamination as well as the presence of mold spores capable of developing into active mold colonies.

36. The hygienists, in approximately August 2013, determined that the Home contained active mold contamination as well as the presence of mold spore counts of the molds *Aspergillus/Penicillium*, *Basidiospores*, *Curvularia*, *Amium*, *Cladosporium*, and *Myxomycetes*.

37. The extent of the allergenic mold and mold spores in the Home rendered it unfit for occupancy, and certainly dangerous for an immunosuppressed individual like DAVIE GOLDSON. Ultimately, this condition caused the Plaintiffs to be constructively evicted from the Home.

38. In addition, the mold infestation contaminated Plaintiffs' furniture, clothing and other possessions.

COUNT I - BREACH OF CONTRACT

39. Plaintiffs re-allege and incorporate the allegations in paragraphs 1 through 38 above as if set forth in full herein.

40. Despite notice and an opportunity to cure, the Builders breached the Contract by:

- a. failing to supply enough properly skilled workers and proper materials to construct the Home (the "Work");
- b. failing to properly accomplish the Work required of it under the Contract;
- c. performing defective and incomplete work such that it caused water intrusion and mold growth;
- d. failing to properly supervise, schedule, and sequence subcontractors, thereby resulting in defective work to the home;

41. As a result of the Builder's breaches, Plaintiff has suffered, and will continue to suffer damages, including:

- a. Costs of correcting the Builders defective Work;
- b. Costs of completing the Work, including but not limited to costs to supplement the Builder's labor forces;
- c. Damages for delay in the Builder's performance of the Work, including but not limited to unnecessary moving and storage expenses, loss of use of the Home;
- d. Accounting expenses incurred in attempting to assimilate and analyze the Builder's records; and
- e. Financial loss of the home do to it being uninhabitable, and subsequently all expenses (including but not limited to costs and attorneys fees) related to the foreclosure on the home;
- f. The total deposit paid for the Home and all payments made related to the mortgage and closing on the Home;
- g. All expenses spent by Plaintiff in attempts to discover, investigate and correct the defects caused by the Builder's regarding the Home before having to move out;
- h. Any other damages discovered during litigation.

WHEREFORE, Plaintiffs ROHAN B. GOLDSON & SUZETTE HOLDNESS demand judgment in their favor and against KB HOME, KB HOME TAMPA, LLC and MARSHALL SCOTT GRAY, for general and special damages as alleged herein, interest, costs and attorneys' fees pursuant to the Contract, trial by jury and for any additional relief that this Court deems just and proper under the circumstances.

COUNT II - FRAUD AGAINST THE BUILDERS

42. Plaintiffs re-allege and incorporate the allegations in paragraphs 1 through 38 above as if set forth in full herein.

43. The Builders submitted applications for payment to Plaintiffs in which it requested payments to be made on account of work performed.

44. The Builders prepared and signed the applications.

45. Each application contained the Builders's certification that:

The undersigned Contractor certifies to the best of the Contractor's knowledge, information and belief that the Work covered by this Application for payment has been completed in accordance with the Contract Documents, *that all amounts previously paid Owner have been properly paid by the Contractor for Work and that current payment shown herein is now due.* (Emphasis added).

46. The Builders made each certified statement knowing that it was false because the amount of Work covered by the application was overstated or the Builders had not paid all amounts due to its subcontractors and suppliers from funds received from Plaintiffs.

47. The Builder's certified statements were made to induce Plaintiffs to pay the Builders.

48. Plaintiffs paid the Builders in reliance upon these false statements.

49. Plaintiffs have been damaged as a result of their reliance upon the Builder's false statements, which damages include:

- a. Costs of correcting the Builder's defective Work;
- b. Costs of completing the Work, including but not limited to costs to supplement the Builder's labor forces;
- c. Unnecessary construction expenses, and increased material and labor costs;
- d. Payments made to the Builder which were neither earned nor due;
- e. Accounting expenses incurred in attempting to assimilate and analyze the Builder's records; and
- f. Loss of use of funds and unnecessary interest on borrowed construction funds.

WHEREFORE, Plaintiffs ROHAN B. GOLDSON & SUZETTE HOLDNESS demand judgment in their favor and against Defendants, KB HOME, KB HOME TAMPA, LLC and MARSHALL SCOTT GRAY, for general and special damages as alleged herein, interest, and costs, trial by jury, and for any additional relief that this Court deems just and proper under the circumstances.

COUNT III – VIOLATION OF FLORIDA BUILDING CODE

50. Plaintiffs re-allege and incorporate the allegations in paragraphs 1 through 38 above as if set forth in full herein.

51. Pursuant to Florida Statute 553.84, Plaintiffs ROHAN B. GOLDSON & SUZETTE HOLDNESS have a private right of action for any damages resulting from a violation of the Florida Building Code.

52. Pursuant to section R613.8 of the Florida Building Code in effect during, or immediately after, the time the Residence was constructed, windows shall be sealed in accordance with Florida Building Code section R703.8.

53. Pursuant to Florida Building Code section R703.8, flashing shall be provided in the exterior wall envelope in such a manner as to prevent entry of water into the wall cavity or penetration of water to the building structural framing components.

54. Defendant Builders violated sections R613.8 and R703.8 by, among other things, designing and/or installing windows in the Home in such a fashion which failed to prevent entry of water into the wall cavity or penetration of water into the building structural framing components.

55. As a result of the foregoing code violations, as well as other violations pertaining to the exterior stucco and walls of the Home, Plaintiffs have been damaged in an amount to be

determined at trial, which amount includes, but is not limited to damage to the Home and to Plaintiffs' personal property.

56. The foregoing Code violations were both the legal and factual cause of the aforementioned damages.

WHEREFORE, Plaintiffs ROHAN B. GOLDSON & SUZETTE HOLDNESS, respectfully requests that this honorable Court enter a judgment against the Defendants, KB HOME, KB HOME TAMPA, LLC and MARSHALL SCOTT GRAY, for damages, costs, trial by jury and such further and additional relief as the court deems just, fair and proper.

COUNT IV – WRONGFUL DEATH

57. Plaintiffs re-allege and incorporate the allegations in paragraphs 1 through 38 above as if set forth in full herein.

58. At all times material hereto, the Builders owed Plaintiff, ROHAN B. GOLDSON & SUZETTE HOLDNESS, as Personal Representatives of the Estate of DAVIE GOLDSON, a duty to construct and build a home which would be reasonably mold free and waterproof such that leaks would not occur.

59. The Defendants further owed to Plaintiffs the duty to use due care, and to perform in a competent and workmanlike manner all of the work and activity which they agreed to, were required to, and undertook to perform.

60. Defendants breached their duties of due care to the Plaintiffs by performing their work in a faulty and negligent manner; by performing such work in a manner which fell below the accepted construction standards in their area of practice; by performing work which was inadequate and inappropriate for the purposes for which it was intended; causing and/or contributing to growth of allergenic fungi and creating an adverse health risk, personal injury and death to DAVIE

GOLDSON; and such breaches contributed to and/or caused the defects and damages described herein.

61. At the time Plaintiffs took possession of their home, it was negligently constructed, defective and otherwise not reasonably fit for continued habitation or for its intended purpose.

62. Plaintiffs home was not erected in a workmanlike manner and was and/or otherwise became defective in that, among other things, the following defects existed:

- a. Defective, negligent, and/or inadequate construction, design, manufacture and/or installation of windows; and
- b. Chronic water intrusion into the walls, columns, floors, and/or retaining walls which have caused and continue to cause microbiological contamination, including the growth of allergenic fungi including *Aspergillus/Penicillium*, *Basidiospores*, *Curvularia*, *Amium*, *Cladosporium*, and *Myxomycetes*, among others, which posed a serious health hazard to the occupants of the home, caused personal injury to the Plaintiffs, evacuation of the occupants of the home for the repair and remediation of this serious health hazard, and ultimately the death of DAVIE GOLDSON.
- c. Violation of Florida's Building Code as stated above in paragraphs 52 through 54.

63. All the defects and conditions were latent and in existence at the time of the completion of the home.

64. No contractual limitation exists which, under the terms of any contract or under the economic loss rule, would preclude the assertion of the foregoing claim with respect to Plaintiffs' home.

65. To the extent any contractual limitation purported to limit, or preclude altogether, Plaintiffs' ability to assert the foregoing claim, any such limitation would be voidable for failing to

leave the Plaintiffs with a cognizable remedy pursuant to Article I, Section II of the Florida Constitution and governing common law, including *Holland v. Mayes*, 19 So. 2d 7009 (1944) and *Stewart v. Gilliam*, 271 So. 2d 466 (4th DCA 1972).

66. As a direct and proximate result of the Defendants' negligence and breaches of their duties, ROHAN B. GOLDSON & SUZETTE HOLDNESS, as Personal Representatives of the Estate of DAVIE GOLDSON, are entitled to recover damages pursuant to Florida's Wrongful Death Act, § 768.16 *et seq.*, and other applicable Florida law.

67. As a direct and proximate result of the Defendants' above described breaches of its duties of care, Plaintiffs ROHAN B. GOLDSON & SUZETTE HOLDNESS, as Personal Representatives of the Estate of DAVIE GOLDSON, are entitled to recover damages that include, but are not limited to mental pain and suffering, loss of DAVIE GOLDSON's companionship, medical expenses associated with DAVIE GOLDSON's injuries, funeral and burial and related expenses, and such other damages as are allowed under Florida law.

WHEREFORE, Plaintiffs ROHAN B. GOLDSON & SUZETTE HOLDNESS, as Personal Representatives of the Estate of DAVIE GOLDSON, demand judgment against the Defendants in excess of fifteen thousand dollars (\$15,000), all damages allowed by Fla. Stat. §768.16 *et seq.*, post judgment interest as allowable by law, and demands trial by jury of all issues so triable. Plaintiff reserves their right to add a claim for punitive damages at a later date.

JURY TRIAL DEMAND

Plaintiffs hereby demand trial by jury on all claims and issues in this Action so triable.

DATED: March _____, 2017.

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