

DISTRICT COURT, SUMMIT COUNTY, COLORADO
501 North Park Avenue
Breckenridge, CO 80424

Plaintiff: EAST BAY CONDOMINIUMS HOMEOWNERS ASSOCIATION, INC., a Colorado nonprofit corporation

Defendants: KINGHORN CONSULTANTS, LLC; and MARK E. KINGHORN, individually.

Attorneys for Plaintiffs

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Case No. 2022 CV _____

Div.:

COMPLAINT AND JURY DEMAND

Plaintiff, East Bay Condominiums Homeowners Association, Inc. (the “Association”), through its Board of Directors (the “Board”) and its attorneys, BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC, submits the following *Complaint and Jury Demand* against the above-named Defendants:

THE PROJECT AND THE PARTIES

1. This action involves a 26-unit residential common interest community known as “East Bay Condominiums,” which was created pursuant to the Colorado Condominium Ownership Act. East Bay Condominiums are located at 460 Tenderfoot Street, Dillon, Colorado. The units, the common areas and common elements, and all other structures, spaces and facilities that comprise the East Bay Condominiums common interest community shall be referred to as the “Property.”

2. The Plaintiff is the Association, acting by and through its Board. The Association is a Colorado nonprofit corporation. The subject matter of this case relates to the common and limited elements of the Property that the Association has the obligation to maintain, replace and repair.

3. Upon current information and belief, Defendant Kinghorn Consultants, LLC. (“Kinghorn”) is a Colorado limited liability corporation located in New Castle, Colorado.

4. Upon current information and belief, at all times material to this *Complaint*, Defendant Mark E. Kinghorn (“Mark E. Kinghorn”) was a principle, officer, director, manager, employee and/or agent of Defendant Kinghorn, who actively participated in, cooperated with, directed, sanctioned, and otherwise implemented directly the negligent and otherwise wrongful conduct of Kinghorn described in this *Complaint*. At all times material to this *Complaint*, the acts and omissions of Mark E. Kinghorn were the acts and omissions of Kinghorn.

5. Kinghorn entered into a contract and/or contracts on May 21, 2020 with the Association (the “Contracts”) in which Kinghorn agreed to perform work on the Property including, but not limited to, removing and replacing the existing cable wired railings throughout the Property (the “Renovation Project”).

6. Upon current information and belief, Mark E. Kinghorn and Kinghorn acted as the general contractors for work performed at the Property and self-performed the Renovation Project work.

7. As the general contractors, Mark E. Kinghorn and Kinghorn had nondelegable duties to exercise reasonable control and supervision over all construction activities relating to the Renovation Project and to act reasonably in quality checking and approving such work and also had nondelegable duties to ensure such work was done in a good and workmanlike manner and in accordance with all applicable contract terms, plans, specifications, product manufacturer installation instructions, recommendations and building codes.

8. The Defendants Mark E. Kinghorn and Kinghorn wrongfully made misrepresentations, caused the making of such misrepresentations, and/or ratified such misrepresentations to the Association in its capacity as an actual or potential consumer, and/or wrongfully failed to disclose, caused the failure to disclose, and/or ratified the nondisclosure of material facts, as described elsewhere in this *Complaint*.

OWNERSHIP AND DEVELOPMENT OF THE PROJECT

9. The Association was created pursuant to the “Articles of Incorporation of East Bay Condominiums Homeowners Association, Inc.” recorded with Colorado’s Secretary of State on July 26, 1985. The Declaration of Covenants, Conditions and Restrictions of East Bay Condominiums (the “Declaration”) was executed on June 26, 1985.

10. Pursuant to Article 1, Section K of the Declaration, the Property’s “Common Elements” include the decks and railings that are the subject of this case.

11. Pursuant to Article 16 of the Declaration, an owner’s maintenance and repair responsibility is limited to the interiors of the units including windows and doors.

12. The Association is responsible for maintenance, repair, and replacement of the exterior portions of the building, including deck railings.

DEFENDANTS' VICARIOUS, IMPUTED, JOINT AND/OR ALTER EGO LIABILITY

13. Upon information and belief, Mark E. Kinghorn, Kinghorn and their subcontractors consciously and deliberately pursued a concerted and common plan, design, and course of conduct and action, expressly or impliedly, the execution of which common plan or design was done tortiously or otherwise wrongfully, as described elsewhere in this *Complaint*, resulting in the damages alleged herein. Defendants Mark E. Kinghorn and Kinghorn are jointly and severally liable with each other for one another's tortious or otherwise wrongful acts.

14. Defendants Mark E. Kinghorn and Kinghorn also are vicariously liable and/or liable as a matter of law for one another's acts and/or omissions and the acts and/or omissions of their subcontractors.

15. Defendants Mark E. Kinghorn and Kinghorn wrongfully represented, caused to be represented, and/or ratified representations that were made to the Association and/or wrongfully failed to disclose, caused the failure to disclose, and/or ratified the nondisclosure of material facts, as described elsewhere in this *Complaint*.

16. At all times material to this *Complaint*, Defendant Kinghorn acted through his, her, or its officers, directors, employees, agents and other authorized representatives and, as such, liability for their conduct is imputed to such Defendant, whether due to vicarious liability principles or otherwise.

JURISDICTION AND VENUE

17. This Court has personal jurisdiction over the Defendants because: (a) they are residents of the State of Colorado; (b) they did business in the State of Colorado at times material to this action; (c) they purposefully availed themselves of the rights and privileges of the State of Colorado at times material to this action; and/or (d) they committed the tortious or other wrongful acts and omissions described in this Complaint, with resulting, injury, damages, loss or other consequences in the State of Colorado. To the extent any Defendant is not a resident of the State of Colorado, this Court has "long-arm" jurisdiction pursuant to C.R.S. § 13-21-124.

18. This Court has subject matter jurisdiction over this matter and the controversies described herein.

19. Venue is proper in Summit County because: (a) the real property which is the subject of this action is located in Summit County; (b) as to any out-of-state Defendant, this is the County designated in this Complaint; (c) some of the agreements that are the subject of this action were entered into and performed and/or breached in Summit County; and/or (d) some of the tortious or other wrongful conduct described elsewhere in this Complaint occurred in and/or had consequences and caused injury, damages or losses in, Summit County.

20. The Association has complied with C.R.S. §§ 13-20-801, *et seq.* ("CDARA").

21. The Association has complied with C.R.C.P. 16.1 by previously filing a District Court Civil (CV) Cover Sheet for Initial Pleading of Complaint, Counterclaim, Cross-Claim or Third Party Complaint. The Association further states that this case is subject to the simplified procedures for court actions under Rule 16.1 because claims against any party do not exceed \$100,000.

GENERAL ALLEGATIONS

22. Pursuant to the terms of the Declaration, the Association has agreed to perform and/or is legally obligated to perform certain duties and obligations with regard to the Property in exchange for all members' agreement to pay the Association monthly assessments. These duties and obligations include, without limitation, reasonable maintenance, repair and replacement of the Property.

23. At the time Defendants designed and/or constructed the Renovation Project, each Defendant knew or should have known, that the Renovation Project was designed and/or constructed with errors, defects, and deficiencies.

24. The Association served a notice of claim pursuant to C.R.S. § 13-20-801, *et seq.* on Defendants on June 28, 2021.

25. As a result of work of the Defendants on the Renovation Project, without limitation, various elements of the Common Elements suffer from the following construction defects or deficiencies, among others, which have caused, and will continue to cause, resultant and consequential property and other damages:

- a. Improperly spaced railing wires that are not compliant with the building code.
- b. Unevenly spaced railing wires.
- c. Improper anchoring of eyebolts into synthetic stucco system resulting in eyebolts pulling out of walls.
- d. Damage to stucco system due to improper installation of eyebolts.
- e. Failure to use stainless steel eyebolts as required by the Contract.
- f. Failure to use new turnbuckles as required by the Contract.
- g. Failure to tighten railing wires between turnbuckles.
- h. Creation of an unsafe condition as a result of improper installation of the wire railings.
- i. Upon information and belief, improper billing by Defendants resulting in payment for work not performed.

26. The above list of defects shall constitute Plaintiff's Initial List of Defects pursuant to C.R.S. § 13-20-803. Upon information and belief, the defects listed herein occurred at all locations on the Property in which Defendants performed work during the Renovation Project. The Association had to incur costs and expenses in repairing Defendants, defective work at the Property.

27. Upon information and belief, these and other errors, deficiencies and defects, for which the Defendants are legally liable, have caused and continue to cause the Association actual property damage and/or other losses, and consequential damage to, and the loss of use of, various elements of the Property, over time from the date those areas were first put to their intended use. The occurrence of this property damage and/or loss of use was unmanifested and unknown to the Association until it progressed to the point it was reasonably detectable to the Association.

28. Upon information and belief, these and other errors, deficiencies and defects, for which the Defendants are legally liable, have caused the Association past repair expenses in an amount to be proven at trial. The Association will continue to incur repair costs as a result of the above described errors, deficiencies and defects.

29. Upon information and belief, Defendants performed some repair work to components essential and integral to the function of the Renovation Project. Defendants' defective real property improvement repair construction resulted in and/or failed to properly and permanently remedy the defects described elsewhere in this *Complaint*.

30. As a result of Defendants' acts and/or omissions, the Association has sustained damages including, for example and without limitation, property damage, diminished value, past and future repair and mitigation expenses, loss of the use of all or portions of the Property, attorney fees and litigation costs, among other damages, injuries and losses, including damages, injuries or losses paid or incurred by others, which recovery has been assigned or transferred to the Association by contract, statute or operation of law.

31. At the time Defendants designed, improved, constructed and/or repaired the Renovation Project, Defendants, as professional contractors, designing, constructing and repairing real property in Colorado, knew that their failure to follow the reasonable standard of care of contractors, subcontractors in Colorado could result in significant damage to the Property, would not result in the Renovation Project being constructed in a good and workmanlike manner, and would result in the Renovation Project likely not complying with all applicable codes, and that the Renovation Project would not be fit and sound for its reasonably anticipated use. Defendants knew or should have known that the reasonable standard of care of contractors, subcontractors in Colorado included the design and construction of the Renovation Project in such a way as to avoid the construction defects and deficiencies present at the Renovation Project.

32. At the time Defendants designed, constructed and/or repaired the Renovation Project, Defendants knew or should have known that the failure of contractors and subcontractors to follow a reasonable standard of care in the design and/or construction of improvements to real property constituted adverse material facts and information that ought to have been disclosed to the Association. It was foreseeable to Defendants that members of the Association would be members of a class of people that would be expected to rely upon statements, representations, concealments, and non-disclosures by the Defendants and their agents.

33. Upon information and belief, Defendants misrepresented the quality, condition, nature, suitability and fitness of the Renovation Project by representing, or causing to be represented, that the Renovation Project was of a particular standard, grade, or quality, when these Defendants knew or should have known that it was not, and/or failing to disclose the same. Specifically, without limitation, these Defendants represented that:

- a. The Renovation Project was constructed within the recognized standards of the industry, when, in fact, the Renovation Project was not constructed in compliance with those standards;
- b. The Renovation Project was designed and constructed to meet the reasonable standard of care for contractors and subcontractors in Colorado;
- c. The Renovation Project was constructed in a good and workmanlike manner, and;
- d. The Renovation Project was constructed in compliance with all applicable codes (and would continue to comply with such codes if reasonably maintained).

34. Each of the nondisclosed facts, as set forth above, was an adverse material fact or information that should have been disclosed to the Association and its Board by Defendants, so that the Board could effectively carry out the performance of all Board duties, including its duty to care for, maintain, and repair the Property.

35. Mark E. Kinghorn actively participated in, cooperated with, directed, sanctioned, and/or otherwise implemented directly some of the negligent and/or otherwise wrongful conduct of Kinghorn and, upon information and belief, was Kinghorn' principal, officer, director, owner, employee and/or agent.

FIRST CLAIM FOR RELIEF
(Negligence Resulting in Property Damage)

36. The Association incorporates the above paragraphs herein.

37. Defendants each owed a duty to the Association and/or its members to cause the Renovation Project to be performed in a good and workmanlike manner, and to exercise reasonable care in their specifications, retention of contractors and employees, supervision, inspection, construction, installation of materials and quality control relating to the Renovation Project.

38. These Defendants' duty of care included the duty to ensure that all construction was performed in accordance with industry standards, applicable building codes, and/or applicable plans and specifications, or a greater duty of care if reasonably required under the circumstances.

39. These Defendants' duty of care included the duty to ensure that all construction was performed in a good and workmanlike manner, suited for its reasonably anticipated uses, met appropriate standards of care, and that all repairs were done in a good and workmanlike manner.

40. These Defendants breached these duties of care.

41. In addition, Defendants each owed a nondelegable duty to the Association to cause the Renovation Project to be constructed and/or repaired in accordance with applicable statutes, ordinances and building codes, including but not limited to the following:

a. The building code as adopted by Summit County.

42. Defendants violated these statutes, ordinances and building codes by failing to construct and/or repair the Renovation Project in accordance with these statutes, ordinances and/or building codes.

43. The violation of these statutes, ordinances and/or building codes by Defendants damaged the Association in an amount to be proven at trial.

44. One of the purposes of these statutes, ordinances and building codes was to protect against the type of damages sustained by the Association.

45. The Association is a member of the group of persons these statutes, ordinances and building codes were intended to protect.

46. The violation of these statutes, ordinances and/or building codes by Defendants constitutes negligence *per se*.

47. The negligence of these Defendants in relation to the construction of the Renovation Project has damaged the Property, including but not limited to its Common Elements, causing the Association resultant and consequential property and other damages in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF
(Negligent Repair Resulting in Property Damage)

48. The Association incorporates the above paragraphs herein.

49. Defendants each owed a nondelegable duty to the Association to cause the Renovation Project to be repaired in a non-negligent manner.

50. Defendants breached their duty by failing to cause the Renovation Project to be repaired in a non-negligent manner such that foreseeable damage would be prevented.

51. The negligence of Defendants has proximately caused damage to the Property, causing the Association resultant and consequential property and other damages in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(Misrepresentation/Nondisclosure Resulting in Property Damage)

52. The Association incorporates the above paragraphs herein.

53. Defendants caused or permitted misrepresentations to be made to the Association as more fully set forth elsewhere in this *Complaint*.

54. Alternatively, Defendants failed to disclose or caused the failure to disclose certain material facts as more fully set forth elsewhere in this *Complaint*, when Defendants had a duty to disclose these facts.

55. In causing or permitting the foregoing information to be communicated to the Association, Defendants did so knowing the information was material and that the representations were false or made with reckless disregard as to whether the representations were true or false; furthermore, to the extent the misrepresentations concerned Defendants' present intent, they intentionally, recklessly and/or negligently misrepresented that present intent.

56. Defendants each knowingly, intentionally, recklessly or negligently failed to disclose, caused the failure to disclose, or ratified the non-disclosure of information from the Association, including, without limitation, the information specifically described above, which information was material and which information Defendants each was under a duty to disclose.

57. Each of these Defendants, or the persons whose acts and omissions they ratified, had a duty to cause the disclosure to the Association of the true adverse material facts or information in an understandable manner.

58. Defendants each failed to cause the disclosure of these adverse material facts or information to the Association with the intent that the Association rely on such information.

59. This reliance was a cause of the physical harm to the property of, or property beneficially belonging to, the Association, as well as economic loss.

FOURTH CLAIM FOR RELIEF
(Breach of Contract/Warranty)

60. The Association incorporates the above paragraphs herein.

61. Kinghorn entered into a written contract with the Association for the performance of certain work on the Property, including removal and replacement of the deck railing wires.

62. Per the terms of the contract, Kinghorn agreed to perform its work in compliance with the Summit County building requirements and codes.

63. Kinghorn provided a 1-year warranty on workmanship and product.

64. Defendants failed to perform their work on the Property in compliance with the contract and failed to correct defective work as required by the contract.

65. Defendants' breach of contract has caused damages to the Association, including resultant and consequential damages, in an amount to be proven at trial.

PRAYERS FOR RELIEF

WHEREFORE, the Association requests that judgment enter against all Defendants on its behalf and as applicable to the separate claims made against all Defendants, and that such judgment enter jointly and severally where the Defendants have acted jointly or in concert:

1. For the Association's actual damages, costs of suit, fees of experts, including engineering and construction experts, attorney fees as provided by law or contract, interest as permitted by law from the date of occurrence to the date of entry of judgment, as well as post-judgment interest until paid;

2. For the cost of repairing the Property to a reasonably good condition, and to a better condition, if that is what was promised or represented by Defendants;

3. For the cost of past repairs incurred by the Association to correct defective construction elements and repair consequential damages;

4. For the cost of the replacement of any defective construction elements, as well as the repair of those portions of the Property which the Association has the legal responsibility to repair, and which were damaged by these defective construction elements;

5. For the costs and expenses incurred for storage charges and cleaning costs incurred as a result of such repairs, if any;

6. For the reasonable costs of rental or similar housing during the reasonable periods of repair, if any;

7. For loss of the use of the Property arising from the injury to the Property and any required investigation and repair efforts;

8. For specific performance of the promises made by Defendants that remain unfulfilled, and for specific performance of the representations made by Defendants that were false; or, alternatively, for specific restitution and payment to the Association in the amount necessary for the Association to fund the cost of fulfilling such promises and/or effecting such representations;

9. For forensic investigation and analysis costs, including engineering fees and inspection and testing costs;

10. For attorney fees and costs as provided for by any applicable statute, law or contract; and,

11. For moratory damages.

THE ASSOCIATION DEMANDS TRIAL BY A JURY OF ALL ISSUES SO TRIABLE

Dated this 30th day of December 2022.

Respectfully submitted,

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

Original signature on file with Plaintiff's counsel

/s/Craig S. Nuss

Craig S. Nuss, No. 17935

Plaintiff's Address:

East Bay Condominiums Homeowners Association
c/o Deb Borel
Summit Resort Group
PO Box 2590
350 Lake Dillon Drive
Dillon, CO 80435

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 2022, a true and correct copy of the foregoing *Complaint and Jury Demand* was e-filed with the Court.

Original signature on file with Plaintiff's counsel

/s/Laura Sherman

Laura Sherman