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E-FILED

Mar 21, 2016 5:00 PM
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Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
Case #1-13-CV-258281 Filing #G-82060
By R. Walker, Deputy

5 Attorneys for Defendant/Cross-Defendant/Cross-Complainant
JELD-WEN, inc., a Delaware Corporation dba SUMMIT WINDOW
6 & PATIO DOOR (erroneously sued herein as separate entities
"SUMMIT WINDOW & PATIO DOOR" and "Doe 3: Jeld-Wen, Inc.
7 dba Summit Window & Patio Door")

8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SANTA CLARA

11 CILKER APARTMENTS, LLC,
12
13 Plaintiff,

Case No. 1-13-CV-258281

14 v.

15 WESTERN NATIONAL
CONSTRUCTION, et al.

**JELD-WEN, INC. DBA SUMMIT
WINDOW & PATIO DOOR'S
ANSWER TO PLAINTIFF'S THIRD
AMENDED COMPLAINT FOR
DAMAGES**

16 Defendants.
17 _____/

Judge: Hon. Peter H. Kirwan
Dept.: One (1)

18 AND ALL RELATED CROSS-ACTIONS.
19 _____/

20 Defendant/Cross-Defendant/Cross-Complainant JELD-WEN, inc., a Delaware
21 Corporation dba SUMMIT WINDOW & PATIO DOOR (erroneously sued herein as
22 separate entities "SUMMIT WINDOW & PATIO DOOR" and "Doe 3: Jeld-Wen, Inc. dba
23 Summit Window & Patio Door") (hereinafter "Defendant") hereby answers the Third
24 Amended Complaint of Plaintiff CILKER APARTMENTS, LLC (hereinafter "Plaintiff").

GENERAL DENIALS

25 1. This answering Defendant, pursuant to the provisions in the Code of Civil
26 Procedure section 431.30, denies each and every paragraph of each and every cause of
27 action in the unverified Third Amended Complaint of Plaintiff, and further denies each and
28 every, all and singular, separately and severally, conjunctively and disjunctively, the

1 allegations therein contained and further denies that Plaintiff was damaged in any sum
2 or sums whatsoever, or at all.

3 2. This answering Defendant denies that by reason of any act or acts,
4 omission or omissions, fault, carelessness or negligence on the part of any of its agents,
5 servants or employees, Plaintiff suffered injuries of any kind or character or damages of
6 any kind or character in any sum or amount whatsoever.

7 **FIRST AFFIRMATIVE DEFENSE**

8 As and for a separate, distinct and First Affirmative Defense, this answering
9 Defendant alleges that Plaintiff does not state facts sufficient to constitute a cause of
10 action against this answering Defendant.

11 **THIRD AFFIRMATIVE DEFENSE**

12 As and for a separate, distinct and Second Affirmative Defense, this answering
13 Defendant alleges that if, as alleged in the Third Amended Complaint, Plaintiff sustained
14 injuries and damages in the manner therein alleged, Plaintiff was totally and one hundred
15 percent (100%) at fault in and about the matter set forth in the Third Amended Complaint,
16 and entirely and solely failed to exercise ordinary care and that such negligence on its
17 part proximately contributed to, and was a proximate cause of, the happening of the
18 incidents, injuries, loss and damage complained of, if any there were.

19 **THIRD AFFIRMATIVE DEFENSE**

20 As and for a separate, distinct and Third Affirmative Defense, this answering
21 Defendant contends that each alleged cause of action within the Third Amended
22 Complaint is absolutely barred by the terms of Defendant's written limited warranty and
23 the failure to give this Defendant reasonable and sufficient notice of the alleged breaches
24 of warranty.

25 **FOURTH AFFIRMATIVE DEFENSE**

26 As and for a separate, distinct and Fourth Affirmative Defense, this answering
27 Defendant asserts that all limitations conspicuously expressed in its Limited Warranty are

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1 enforceable, thus barring and/or limiting any recovery for damages by Plaintiff,
2 Defendants or Cross-Complainants, if any there were.

3 **FIFTH AFFIRMATIVE DEFENSE**

4 As and for a separate, distinct and Fifth Affirmative Defense, this answering
5 Defendant alleges that said injuries and/or damages sustained by Plaintiff were either
6 solely, or in part, negligently or otherwise caused by persons, firms, corporations, or
7 entities other than this answering Defendant and said negligence or other conduct
8 comparatively reduces the percentages of negligence or responsibility, if any, of this
9 answering Defendant.

10 **SIXTH AFFIRMATIVE DEFENSE**

11 As and for a separate, distinct and Sixth Affirmative Defense, this answering
12 Defendant alleges that the injuries or damages claimed by Plaintiff are due solely to the
13 fact that Plaintiff failed to act in a manner which would mitigate any alleged damages
14 and/or injuries.

15 **SEVENTH AFFIRMATIVE DEFENSE**

16 As and for a separate, distinct and Seventh Affirmative Defense, this answering
17 Defendant alleges that Plaintiff voluntarily and knowingly entered into and engaged in the
18 operations and conduct alleged in said Third Amended Complaint and voluntarily and
19 knowingly assumed all risks incident to said operations, acts and conduct at the time and
20 place mentioned in said Third Amended Complaint.

21 **EIGHTH AFFIRMATIVE DEFENSE**

22 As and for a separate, distinct and Eighth Affirmative Defense, this answering
23 Defendant alleges that any contractual provision(s) delineating that this answering
24 Defendant would indemnify any other parties are unconscionable and unenforceable.

25 **NINTH AFFIRMATIVE DEFENSE**

26 As and for a separate, distinct and Ninth Affirmative Defense, this answering
27 Defendant alleges that any contractual provision(s) delineating that this answering
28 Defendant would defend any other parties are unconscionable and unenforceable.

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TENTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Tenth Affirmative Defense, this answering Defendant alleges that Plaintiff failed to give timely notice to Defendant of its claim and that accordingly, Plaintiff is estopped to pursue its alleged remedies by its own conduct and by application of the doctrines of waiver, estoppel, and laches.

ELEVENTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Eleventh Affirmative Defense, this answering Defendant alleges that the Third Amended Complaint, and each cause of action thereof alleged against this Defendant, is barred by the statutes of limitations set forth in the California Code of Civil Procedure, commencing with Section 335 and continuing through Section 349.4, more particularly, but not limited to, the following: Sections 337(1), 337.1, 337.15, 338, 339, 340, and 343; and by Sections 2607(3), and 2725(1) and (2) of the California Commercial Code.

TWELFTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Twelfth Affirmative Defense, this answering Defendant alleges that the Third Amended Complaint, and each cause of action thereof alleged against this Defendant, fails to state a cause of action against this answering Defendant as there is no privity between Plaintiff and Defendant.

THIRTEENTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Thirteenth Affirmative Defense, this answering Defendant alleges that the Third Amended Complaint, and each cause of action thereof, is barred by the following provisions of the California Commercial Code: Sections 2312, 2313, 2314, 2315, 2316, 2317, 2510(1), 2513(1) and (3), 2601, 2602(1), 2605(1)(a) and (b), 2606(1), 2607, and 2719.

FOURTEENTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Fourteenth Affirmative Defense, this answering Defendant asserts that should Plaintiff recover damages from this answering Defendant, this answering Defendant is entitled to indemnification, either in whole or in part, from all

1 persons or entities whose negligence and/or fault proximately contributed to Plaintiff's
2 damages, if any there are.

3 **FIFTEENTH AFFIRMATIVE DEFENSE**

4 As and for a separate, distinct and Fifteenth Affirmative Defense, this answering
5 Defendant alleges that the Third Amended Complaint, and each cause of action thereof,
6 is barred by virtue of Plaintiff's conduct in causing the damages alleged by Plaintiff under
7 the doctrine of unclean hands.

8 **SIXTEENTH AFFIRMATIVE DEFENSE**

9 As and for a separate, distinct and Sixteenth Affirmative Defense, this answering
10 Defendant alleges that prior to the commencement of this action, this answering
11 Defendant duly performed, satisfied, and discharged all duties and obligations it may
12 have owed to Plaintiff, Defendants, and/or Cross-Complainants arising out of any and all
13 agreements, representations, or contracts made by it or on behalf of this answering
14 Defendant, and this action is therefore barred by the provisions of California Civil Code
15 §1473.

16 **SEVENTEENTH AFFIRMATIVE DEFENSE**

17 As and for a separate, distinct and Seventeenth Affirmative Defense, this
18 answering Defendant alleges that Plaintiff, Defendants, Cross-Complainants, and others
19 unrelated to this answering Defendant, modified, altered, abused, and/or misused the
20 materials and/or equipment provided by this answering Defendant, and such conduct
21 caused and/or contributed to the damages which are alleged in this lawsuit.

22 **EIGHTEENTH AFFIRMATIVE DEFENSE**

23 As and for a separate, distinct and Eighteenth Affirmative Defense, this answering
24 Defendant alleges that the strict liability cause of action contained in the Third Amended
25 Complaint is not a theory of recovery upon which relief may be granted given the
26 commercial sale of goods which is the gravamen of this action.

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NINETEENTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Nineteenth Affirmative Defense, this answering Defendant alleges that any product manufactured, supplied and/or installed by this answering Defendant did not cause damage to any property other than to the product itself and, therefore, recovery may not be granted on any claims sounding in tort or seeking contribution and/or indemnity.

TWENTIETH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Twentieth Affirmative Defense, this answering Defendant alleges that recovery by Plaintiff is barred by the provisions of Civil Code Sections 2782 and 2782.5.

TWENTY-FIRST AFFIRMATIVE DEFENSE

As and for a separate, distinct and Twenty-First Affirmative Defense, this answering Defendant alleges that Plaintiff has suffered no damage as contemplated by the case of Aas v. Superior Court and therefore cannot recover in tort for the alleged damages.

TWENTY-THIRD AFFIRMATIVE DEFENSE

As and for a separate, distinct and Twenty-Second Affirmative Defense, this answering Defendant alleges that the work and/or activities of this Defendant were done in a professional and satisfactory manner.

TWENTY-THIRD AFFIRMATIVE DEFENSE

As and for a separate, distinct and Twenty-Third Affirmative Defense, this answering Defendant alleges that Plaintiff expressly, voluntarily, and knowingly assumed all risks about which it now complains as stated in the Third Amended Complaint, and is therefore barred either totally or partially to the extent of said assumption of any damages.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

As and for a separate, distinct and Twenty-Fourth Affirmative Defense, this answering Defendant alleges that the work it completed met the standard of care known

1 at the time the work was performed and was the recognized state of the art at all relevant
2 times herein.

3 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

4 As and for a separate, distinct and Twenty-Fifth Affirmative Defense, this
5 answering Defendant alleges that the persons or entities legally responsible for the
6 alleged damages, if any, sustained by Plaintiff in this action are persons or entities other
7 than this answering Defendant. Therefore, Defendant is not responsible for any damages
8 alleged by Plaintiff in its Third Amended Complaint.

9 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**


10 As and for a separate, distinct and Twenty-Sixth Affirmative Defense, this
11 answering Defendant alleges that prior to the filing of this action, the claimant (as defined
12 in Civil Code §895) failed to provide proper and/or any written notice under Civil Code
13 §910(a) which bars any claim asserted herein against Defendant.

14
15 WHEREFORE, Defendant prays Judgment as follows:

- 16 1. Plaintiff take nothing by virtue of this action;
- 17 2. For costs of suit incurred herein;
- 18 3. For reasonable attorney's fees;
- 19 4. For such other and further relief as the court may deem just and proper.

20
21 DATED: March 21, 2016

THE SIEVING LAW FIRM, A.P.C.

22
23 By: 
LUKE G. PEARS-DICKSON
 Attorney for Defendant/Cross-Defendant/
 Cross-Complainant JELD-WEN, inc., a
 Delaware Corporation dba SUMMIT
 WINDOW & PATIO DOOR (erroneously
 sued herein as separate entities
 "SUMMIT WINDOW & PATIO DOOR"
 and "Doe 3: Jeld-Wen, Inc. dba Summit
 Window & Patio Door")

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name and Address</i>): Richard N. Sieving, Esq. (SB #133634) Luke G. Pears-Dickson, Esq. (SB #296581) THE SIEVING LAW FIRM, A.P.C. Attorneys at Law 100 Howe Avenue, Suite 220N Sacramento, CA 95825		TELEPHONE NO.: (916) 444-3366	FOR COURT USE ONLY
ATTORNEY FOR (<i>Name</i>): Defendant/Cross-Defendant/Cross-Complainant JELD-WEN, inc. dba SUMMIT WINDOW & PATIO DOOR (erroneously sued herein as separate entities "SUMMIT WINDOW & PATIO DOOR" and "Doe 3: Jeld-Wen, Inc. dba Summit Window & Patio Door")			
Insert name of court and name of judicial district, if any: Santa Clara County Superior Court			
SHORT TITLE OF CASE: Cilker Apartments, LLC v. Western National Construction, et al.			
HRG DATE:		CASE NUMBER: 1-13-CV-258281	
TIME:	DEPT:		

PROOF OF SERVICE
 [C.C.P. §§1013A and 2015.5]

I, the undersigned, declare:

I am a citizen of the United States and am employed in the County of Sacramento, California. I am over the age of eighteen (18) years, not a party to the above-entitled action, and my business address is located in the County of Sacramento at 100 Howe Avenue, Suite 220N, Sacramento, California 95825.

On the date executed below, I served the document(s) described as:

- 1.) **JELD-WEN, INC. DBA SUMMIT WINDOW & PATIO DOOR'S ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT FOR DAMAGES**

on interested parties in this as follows:

- BY ELECTRONIC TRANSFER:** I caused all of the above-entitled document(s) to be served through the Santa Clara County Superior Court's Electronic Filing System to all parties appearing on the Court's electronic service list on the date executed below. The file transmission was reported as complete and a copy of the "SC Superior Court E-Filing Receipt" page will be maintained with the original document(s) in our office.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 21, 2016 at Sacramento, California.



LARINA T. FALCONA

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