

AMERICAN ARBITRATION ASSOCIATION  
IN THE MATTER OF

JOHN AND ALLISON PEEBLES	)	
CLAIMANTS,	)	
	)	
V.	)	CASE NO. 01-17-0000-0394
	)	
THE TERMINIX INTERNATIONAL CO.,	)	
LP, AND KEN STROH,	)	
RESPONDENTS.	)	

ARBITRATOR'S FINAL AWARD

I, Curtis R. Hussey, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, each represented by counsel, at evidentiary hearings held, do hereby, AWARD, as follows:

This case was "tried" (i.e., in the form of an arbitration hearing) over the course of two weeks from May 29–31, 2019 and August 12–16, 2019, before the undersigned in Mobile County, Alabama. During those approximately two weeks of hearing, evidence was presented by numerous live and video witnesses, as well as voluminous documentary evidence. The undersigned also considered various matters submitted after the in-person testimony had been concluded, including various exhibits submitted by counsel, as well as oral argument of counsel in the form of telephonic and written argument.

Having carefully considered the voluminous evidence and the argument submitted by the parties, the undersigned hereby enters the following findings, conclusions and Award.

FINDINGS OF FACT

When John and Allison Peebles (“Claimants”) purchased their home at 107 Ryan Avenue in Mobile (the “Property”) in 1992, an existing 1981 termite bond on the home issued by a franchisee of Terminix, Allied Bruce-Terminix Companies, Inc. to the Claimants’ predecessor in title, was transferred to them. In early 2001, The Terminix International Co., L.P. (“Terminix”), acquired the Peebles’ account from Allied Bruce and became obligated to service the Property on a going-forward basis.

Termite damage was discovered at the Property in 2007. The expense of that repair was paid, at least in part, by Terminix. In 2010, Terminix and the Peebles entered into a new termite bond.

There were no reports of termite damage at the property again until late 2015. Soon after this discovery, Claimants initiated a claim against Terminix, and thereafter sought counsel, cancelled their agreement with Terminix, and hired another company to treat their home going forward. As a result of various inspections, it was determined that the Property has suffered substantial termite damage. Although the amount of damage cannot be determined without significant work being performed on the Property, it is undisputed that most, if not all, of the damage occurred while Terminix was under contract to provide protection against such.

Particularly given the degree of technical skill required to perform the services provided by Terminix and other providers in the industry, as well as the facts that (i) South Alabama is a “hot spot” for both subterranean and Formosan termites; and, (ii) the Alabama legislature has seen fit to regulate the termite protection industry heavily, the public necessarily, reasonably and properly relies upon the expertise of those providers in performing proper maintenance on their homes and businesses. These duties include acting with a “high quality of workmanship”. Ala. Code § 2-28-3.

The evidence established that Terminix, both through its predecessor, Allied-Bruce, and on its own, failed to perform its obligations under governing statutes, as well as those anticipated and reasonably required within the industry. These failures of performance by Terminix include: (1) failing to provide a proper initial treatment; (2) failure to properly inspect or provide for remedial measures in the face of improper initial treatment; (3) failure to provide ongoing treatment in a manner that meets the “high level of workmanship” standard, and (4) failure to disclose to Claimants or their predecessors in title the lack of a proper initial and subsequent treatments.

At all times, Terminix had far superior knowledge of these material facts, and given the technical nature of the services performed, Claimants and others in a similar situation have no reasonable basis to have knowledge of such facts. For these reasons, as well as the duties imposed on Terminix by statute, Terminix had the duty to disclose such facts, obligations and deficiencies to Claimants as they became known (or should have become known) by Terminix.

Given, *inter alia*, the deficient initial treatment, the long term nature of the known deficiencies in treatment inspection and treatment (both initially and during the time the contract between the parties was in effect), the superior knowledge of Terminix regarding the specific conditions and lack of proper treatment at the Property, and the knowledge that Terminix had of the type of serious problems such actions or inactions on their part may very well cause (and in fact did cause in this case), as well as certain of the other reasons as argued by Claimants, the undersigned determines that punitive damages are proper.

#### **AWARD OF DAMAGES**

The damages incurred in this matter are difficult to quantify. There is testimony regarding necessary repair costs to the home which varies greatly, and indeed regardless of which estimates

are deemed to be more acceptable the evidence indicates that there is certainly a substantial amount of work that will need to be done which has not been discovered yet, and will not be discovered until such work is underway. Damages for diminution in value are subjective and will change over time. Emotional distress damages are necessarily subjective. After due consideration of the evidence, relevant law, and equity the undersigned hereby awards damages as follows:

1)	Diminution in value -	\$ 700,000 <sup>1</sup>	
2)	Incidental damages -	\$ 88,281 <sup>2</sup>	
3)	Emotional distress damages -	\$ 50,000 <sup>3</sup>	
4)	Litigation expenses -	\$ <u>45,000</u>	
	<b>Total compensatory damages -</b>		\$ 883,281
5)	Attorneys' fees		\$ 397,476 <sup>4</sup>
6)	Punitive damages -		\$ <u>883,281</u> <sup>5</sup>
	<b>TOTAL AWARD</b>		<b>\$2,164,038</b>

<sup>1</sup> The undersigned finds that diminution of value is proper under the facts of this case and under the principles of equity. This figure is the lower of the estimated figures offered by the un rebutted testimony of John Peebles, a realtor with decades of experience in this market. Diminution of value has been utilized because of the highly uncertain nature of actual repair costs.

<sup>2</sup> These damages are in the form of termite services paid, new termite bond, and re-location (i.e., storage and temporary housing expenses).

<sup>3</sup> Given the age of claimants and limited options available to them, the severity of the problems experienced in the home, the long term of ownership and the family connection to the home, the undersigned believes this to be a proper award.

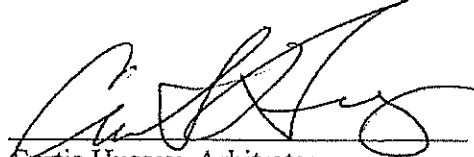
<sup>4</sup> This figure is calculated according to the 45% fee agreement between Claimants and their counsel. For the same reasons that punitive damages are determined to be proper, the undersigned believes equity requires the payment of fees by Terminix. However, the 45% is calculated as against the *compensatory* damages amount only; the undersigned will leave it to Claimants and their counsel as to the proper division of punitive damages, awarded separately as set forth above, as well as the actual division of overall damages awarded herein. Moreover, the undersigned declines to follow the calculation as set forth in Claimants' proposed calculation worksheet, footnote 1, as that approach results in an undue multiplier effect on the overall award.

<sup>5</sup> This amount is a 1:1 ratio of compensatory damages (excluding Claimants' fee award) to punitive damages, but exclusive of attorneys' fees. (Claimants and their counsel are of course free to apportion punitive damages as they see fit). As to the assessment of punitive damages, several matters have been considered. (1) Claimants' calculation based on the gross revenue is rejected as excessive. (2) The other documents presented offer a less than clear financial picture of Terminix, but the amount assessed here is intended to have deterrent effect, while not being unduly harsh as against Terminix. (3) It is well known that Terminix is the target of numerous cases in which punitive damages are asserted, with no end in sight. While the purpose of punitive damages is to punish and deter, they should not be so large as to destroy. Although Terminix is certainly well-heeled, if punitive damages are awarded in each case in an amount sufficient to punish and deter, as though each such case were standing alone, the overall effect will certainly be greater than anticipated or justified under prevailing law.

An award is hereby entered in the foregoing amount against Terminix only.<sup>6</sup> Payment in full is due within 30 days of the date of this order.

The administrative fees of the American Arbitration Association totaling \$2,400.00 and the compensation of the arbitrator totaling \$13,500.00 shall be borne as incurred.

This award is in full settlement of all claims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

  
Curtis Hussey, Arbitrator

Date: Dec. 11, 2019

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<sup>6</sup> Although Claimants asserted a claim against Mr. Ken Stroh, an Alabama resident and employee of Terminix, they failed to present sufficient evidence at trial for a finding of liability against him, and all claims against him are denied.