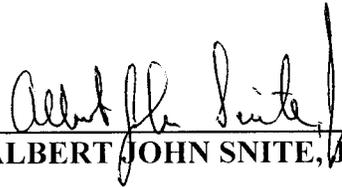


Brown (collectively the “PMC Defendants”), and plaintiff’s opposition thereto, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part as follows, in accordance with the accompanying memorandum opinion:

The Motion is GRANTED in favor of PMC defendants on Count IV (Breach of Warranty), Count V (Breach of Implied Warranties), and Count VI (Fraud in the Inducement). Counts IV, V, and VI are hereby STRICKEN.

The remainder of the Motion is DENIED.

BY THE COURT:



ALBERT JOHN SNITE, JR., J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

METROCLUB CONDOMINIUM	:	
ASSOCIATION,	:	
Plaintiff	:	MAY TERM, 2010
	:	No. 4545
	:	
v.	:	
	:	Control No. 13082445
201-59 NORTH EIGHTH STREET	:	
ASSOCIATES, L.P., 201-59 NORTH EIGHTH	:	
STREET, LLC, RONALD L. CAPLAN,	:	
GREGORY J. WEBSTER, AMY BROWN and	:	
PMC PROPERTY GROUP, INC. d/b/a	:	
PHILADELPHIA MANAGEMENT COMPANY,	:	
Defendants	:	
	:	
PMC PROPERTY GROUP, INC. and 201-59 :	:	
NORTH EIGHTH STREET ASSOCIATES,	:	
L.P.,	:	
Third-Party Plaintiffs	:	
	:	
v.	:	
	:	
M. KAUFMAN FAMILY CONTRACTORS,	:	
INC., COLORY METALS AND GLASS, INC.,	:	
PAUL RABINOWTIZ GLASS CO., JKR	:	
PARTNERS L.L.C., O'DONNELL &	:	
NACCARTAO, INC., DIRECT AIR PHILA	:	
INCORPORATED and SPORTSLINE INC.,	:	
Additional Defendants.	:	
	:	
COLORY METALS AND GLASS, INC.,	:	
Fourth-Party Plaintiffs,	:	
	:	
v.	:	
	:	
ALUMICOR CORP d/b/a ALUMICOR and	:	
ALUMICOR LIMITED d/b/a ALUMICOR	:	
Additional Defendants.	:	

MEMORANDUM OPINION

By: Honorable Albert John Snite, Jr.

Before the court is the Motion for Summary Judgment of defendants 201-59 North Eighth Street Associates, L.P., 201-59 North Eighth Street LLC, PMC Property Group, Inc.,

Ronald L. Caplan, Gregory J. Webster, and Amy Brown (hereinafter the “PMC Defendants”). I am granting in part, and denying in part, the Motion for Summary Judgment.

PROCEDURAL HISTORY

This action was commenced by a Writ of Summons on June 3, 2010.

On October 27, 2010, Plaintiff filed an eight count complaint against the PMC Defendants, composed of Count I (Breach of Contract), Count II (Breach of Contract), Count III (Breach of Public Offering Statement), Count IV (Breach of Warranty), Count V (Breach of Implied Warranties), Count VI (Fraud in the Inducement), Count VII (Unfair Trade Practices and Consumer Protection Law), Count VIII (Breach of Fiduciary Duty), as well as a claim for alter-ego, punitive damages, and attorney’s fees.

On December 7, 2010, this case was transferred into the Commerce Program.

On December 8, 2010, PMC Defendants filed preliminary objections to Plaintiff’s Complaint.¹ On December 27, 2013, Plaintiff filed an opposition to the preliminary objections.

On March 14, 2011, Judge Bernstein sustained the preliminary objections in part, and overruled in part, ultimately dismissing Counts I, II, III, VII, and striking Plaintiff’s request for attorney’s fees in each count of the Complaint. Thus, the remaining causes of action against PMC Defendants remain: Count IV (Breach of Warranty), Count V (Breach of Implied Warranties), Count VI (Fraud in the Inducement), and Count VIII (Breach of Fiduciary Duty).

On May 11, 2011, PMC Defendants filed their Answer with New Matter to Plaintiff’s Complaint, as well as a Joinder Complaint.

On July 29, 2011 the PMC Defendants filed their Second Amended Joinder Complaint against additional defendants M. Kaufman Family Contractors, Inc., Colory Metals and Glass,

¹ Control no. 10121145.

Inc., Paul Rabinowitz Glass Co., JKR Partners, L.L.C., O'Donnell & Naccarato, Inc., Direct Air Phila Incorporated, James Sankey & Associated, Ltd. and Sportsline Inc.

Third-party defendants Colory Metals (control no. 11081537), Paul Rabinowitz Glass Co. (control no. 11082170), O'Donnell & Naccarto, Inc. (control no. 11082172), JKR Partners, LLC (control no. 11082491), and Direct Air Philadelphia Incorporated (control no. 11082717), all filed preliminary objections to the Second Amended Joinder Complaint, under the respective control numbers. All preliminary objections were overruled by the court.

On April 9, 2012, Fourth-Party Plaintiff Colory Metals and Glass, Inc. filed a Joinder Complaint against additional defendants Alumicor Corp. d/b/a Alumicor and Alumicor Limited d/ba/ Alumicor. On June 14, 2012, Alumicor filed its Answer.

Upon completion of numerous discovery hearings and motions for extraordinary relief, the final revised Case Management Order was issued on June 28, 2013, with discovery to be completed by June 3, 2013, and all pre-trial motions to be filed by August 19, 2013.

On August 16, 2013, O'Donnell & Naccarto, Inc. filed a motion for summary judgment (control no. 13081821).

On August 19, 2013, JKR Partners, L.L.C. filed a motion for summary judgment (control no. 13082187).

On August 19, 2013, PMC Defendants filed the instant motion for summary judgment (control no. 13082445). On September 20, 2013, Plaintiff filed an answer in opposition. On September 30, 2013, PMC Defendants filed a reply in support of summary judgment.

FACTUAL HISTORY

This action was initiated by the Plaintiff MetroClub Condominium Association, arising from allegedly faulty and defective construction of residential condominiums built and sold by Defendant 201-59 North Eighth Street Associates, L.P. (“Declarant”²). Plaintiff is the MetroClub Condominium Association, a non-profit corporation whose membership is made up of the individuals who own units in the MetroClub Condominium.

In March 2003, Declarant began renovating a building previously known as the Metropolitan Hospital, with the intention of developing a 130 unit condominium, located at 201 North Eighth Street, Philadelphia, Pennsylvania. Compl.¶23. Declarant’s development of the subject property consisted of renovation and redevelopment of the existing building, construction of additional floors and installation of certain amenities such as a swimming pool, fitness facility, extension of elevator service and related improvements. Compl.¶24.

Plaintiff alleges numerous masonry façade defects, glass curtain walls/window problems, roof defects, balcony defects, pool defects, life safety issues and defects, mechanical, electrical and plumbing deficiencies, and structural defects. Compl.¶29.

Plaintiff brought claims against the Declarant, the Declarant’s general partner 201-59 North Eighth Street, LLC, Philadelphia Management Company (the general contractor, and alleged alter-ego of Declarant), and three individuals who were Executive Board Members (Caplan, Webster, and Brown).

Conversion of an existing building to a condominium is regulated by a detailed statutory scheme embodied in the Pennsylvania Uniform Condominium Act, 68 Pa. C.S. § 3101, *et seq* (herein “the Act”).

² Under the Pennsylvania Uniform Condominium Act, 68 Pa. C.S. 3103, “Declarant” is any person (which includes a limited partnership) who has executed a declaration for a condominium, under section 3205 of the Act.

In November 2004, after issuing a Public Offering Statement for the MetroClub, as required by sections 3402 and 3404 of the Act, Declarant began offering units for sale to individual owners, documented by unit purchase contracts.

On May 11, 2005, Declarant recorded the Declaration, and unit owners began closing on their units and moving into the first through seventh floors. Effective with the recording of the Declaration, an Executive Board was appointed by Declarant to oversee the Association. Decl. § 6.06(c). Declarant initially appointed Ronald L. Caplan, Gregory L. Webster, and Amy Brown (the three individual defendants) to the First Executive Board.

In early 2007, unit owners began reporting leaks on the ninth floor and from the patio doors and air infiltration through the curtainwall on floors four through eight. In response, the Board contacted (additional defendants) Alumicor, Colory, and Rabinowitz to investigate and make repairs as needed. The Board also caused Philadelphia Management Company to hire its own technical consultants from Curtainwall Design Company, Cahill Designs, Stuart A. Rosenberg Architects, P.C. and Paul Drier Consulting Company (“PDDC”) to propose remedial measures and supervise any necessary repair work.³

On June 2, 2007, the Declarant turned over control of the Association to the unit owners, under section 3303 of the Act.

DISCUSSION

I have concluded that the PMC Defendants are entitled to partial summary judgment in their favor on the Breach of Warranty, Breach of Implied Warranty, and Fraud in the Inducement claims.

Once the relevant pleadings have closed, any party may move for summary judgment. Pa. R.C.P 1035.2. “Pennsylvania law provides that summary judgment may be granted only in

³ See PMC Appendix Tabs 26-29.

those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.” Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001). Further, granting summary judgment is appropriate only when the evidentiary record shows the material facts are undisputed. McCarthy v. Dan Lepore & Sons 4 Co., Inc., 724 A.2d 938, 940 (Pa. Super. 1998). The trial court must view the record in the light most favorable to the non-moving party. Rausch, 783 A.2d at 821.

a) Count IV (Breach of Warranty): The Statutory Warranty is limited to two years, and had run before this action was initiated.

Under Count IV of the Complaint, the Association notes that Article V, Section 5.11 of the Declaration details the Declarant’s statutory obligation to “warrant the Common Elements constructed by it against ‘structural defects’ as defined in Section 3411(a) of the Act for a period of two (2) years from the later of the date of completion of such Common Elements or the date the first Unit was conveyed to a bona fide purchaser.” Compl. ¶98.

The Declarant of a conversion condominium is required under section 3411 of the Act to provide certain limited warranties regarding elements of the condominium.⁴ The statutory warranty found under section 3411 of the Act is a warranty only against “structural defects.” As defined under the act:

⁴ A Declarant who constructs a new residential condominium warrants against all structural defects, but a Declarant of a conversion condominium warrants only against structural defects:

“(c) **Condominiums containing conversion buildings.**--A declarant of a condominium containing one or more conversion buildings warrants as follows:

(1) That there are no structural defects in components installed anywhere in the condominium by or on behalf of the declarant or in work done or improvements made by or on behalf of the declarant anywhere in the condominium.
(2) That all units and common elements in each conversion building have been inspected for visible structural and mechanical defects and for other visible conditions that adversely affect the health or safety of residential occupants, as required by section 3404(a)(1) (relating to public offering statement; condominiums containing conversion buildings), except that no such inspection is required of any unit if the tenant or other lawful occupant of the unit does not permit such inspection to be conducted.
(3) That any such defects and other visible conditions found have been repaired.” Pa. C.S. §3411(c).

(a) Definition.--As used in this section, “structural defects” means those defects in components constituting any unit or common element which reduce the stability or safety of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration or replacement. Nothing in this section shall be construed to make the declarant responsible for any items of maintenance relating to the units or common elements. 68 Pa. C.S. §3411 (underlined emphasis added).

PMC Defendants take the position that some of the defects alleged by Plaintiff are not “structural defects,” but are maintenance issues that are explicitly excluded from the statutory warranty and should be partially summarily dismissed.⁵ I need not address this issue of determining if claims are maintenance, and already excluded from the warranty, as the statutory warranty is strictly limited to two years:

(b) General rule.--A declarant warrants against structural defects, each of the units for two years from the date each is conveyed to a bona fide purchaser, and all of the common elements for two years. The two years shall begin as to each of the common elements whenever the common element has been completed or, if later:

- (1) as to any common element within any additional real estate or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser;
- (2) as to any common element within any convertible real estate or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser; and
- (3) as to any common element within any other portion of the condominium, at the time the first unit therein is conveyed to a bona fide purchaser. 68 Pa. C.S. § 3411(b).

PMC Defendants argue that the Association’s statutory warranty claims are barred because the statutory warranty only extends two years. The latest date the warranty could run is from completion of the roof, June 28, 2006,⁶ which is the later of the date the first unit was conveyed (in 2005). Thus, the statutory warranty extended until, at the latest, June 28, 2008. This action was not initiated until June 3, 2010.

⁵ These allegations include deficiencies of the masonry façade, curtainwall, windows, roof, balconies, pool, life safety, mechanical, electrical, and plumbing systems, unit doors, and party walls. Compl.¶29.

⁶ See final M. Kaufman Family Contractors, Inc. invoice, dated June 28, 2006, PMC Appendix tab 17.

The Association seeks to recover for defects that it only became aware of in April 2010.⁷ The Association seeks application of the discovery rule, wherein a statute of limitations does not begin to run until the plaintiff knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct.⁸ This equitable doctrine, however, ignores the statutory limitation under section 3411(b) of the Act. The discovery rule cannot apply to such a breach of warranty action,⁹ as the applicable statute of limitations for breach of warranty, 68 Pa. C.S. 3411(b), permits an action to be brought within two years from the sale of the first unit is conveyed to a bona fide purchaser.

Thus, the two year statutory warranty expired no later than June 28, 2008. There is no allegation that any alleged condition arose after June 28, 2008, when the warranty expired, or that PMC Defendants should have performed any work prior to that date. As such, I am granting PMC Defendants' motion as to Count IV (Breach of Warranty).

b) Count V (Breach of Implied Warranty): Declarant clearly and unambiguously disclaimed all implied warranties.

PMC Defendants argue that there is no implied warranty, because the Public Offering Statement, the Declaration, and the actual contracts¹⁰ executed by the Declarant and the individual members of the Association expressly disclaim all such implied warranties.

Pennsylvania law allows for waiver of implied warranties in commercial real estate sales by clear and unambiguous contract language.¹¹ Likewise, the Act provides that the Declarant of

⁷ Pl. Memo. p. 15.

⁸ Dalrymple v. Brown, 701 A.2d 164, 167 (Pa. 1997)

⁹ See e.g., Northampton Cnty. Area Cmty. Coll. v. Dow Chem., U.S.A., 566 A.2d 591, 599 (1989) aff'd, 528 Pa. 502, 598 A.2d 1288 (1991).

¹⁰ PMC Appendix Tabs 1, 2, 21.

¹¹ Ecksel v. Orleans Const. Co., 519 A.2d 1021,1025 (Pa. 1987).

a conversion condominium may waive all implied warranties and offer the units and common elements of a conversion building in an “as is” condition. Pa. C.S. §3411(c).

The form Unit Purchase and Sale Agreement Purchase states:

THE [PENNSYLVANIA UNIFORM CONDOMINIUM ACT] WARRANTY IS THE ONLY WARRANTY GIVEN BY SELLER CONCERNING THE PROPERTY AND IS GIVEN IN PLACE OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. BUYER UNDERSTANDS THAT CERTAIN IMPLIED WARRANTIES MIGHT OTHERWISE APPLY TO THE PROPERTY. BUYER WAIVES ALL SUCH IMPLIED WARRANTIES, AND SELLER DISCLAIMS ALL IMPLIED WARRANTIES INCLUDING (1) ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE, AND (2) THE IMPLIED WARRANTY OF HABITABILITY. SELLER IS NOT LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES. UPC ¶ 14(e) (emphasis in original).

Under the clear and unambiguous terms of the Purchase Contracts, the Unit Owners expressly and unambiguously waived any right to bring the implied warranty claims that the Association alleges on their behalf in Count V of the Complaint.

The Association argues that it may proceed on Count V because the disclaimer in the Purchase Contracts did not designate specific defects that might interfere with MetroClub’s fitness, merchantability, or habitability. This is not, however, the standard for disclaiming implied warranties: clear and unambiguous language that is specific and particular to the legal rights the purchaser is waiving is all that Pennsylvania law requires.¹²

c) Count VI (Fraud in the Inducement): The Association lacks standing to bring a claim for fraud in the inducement on behalf of the unit owners.

¹² Ecksel, 519 A.2d at 1025.

The Association's claim under Count VI for Fraud in the Inducement relates solely to the individual unit owners' decisions to purchase units in the MetroClub. As such, the Association does not have standing to bring a claim for fraud in the inducement on behalf of the unit owners.

In order for an association to have standing to bring suit on behalf of its members, "neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit."¹³ The Act provides that a condominium association may institute litigation "in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." 68 Pa. C.S. §3302(a)(4) (emphasis added). An association does not have standing to address matters affecting only individual unit owners. The fraud alleged in the Complaint does not constitute matters affecting the condominium but concern matters affecting the unit owners, who allegedly were fraudulently induced to purchase a condo.

The Association alleges that it has representational standing to assert claims on behalf of its members, and to hold otherwise would mean that up to one hundred and thirty unit owners would have to bring separate actions for the same defective building components.¹⁴ However, this is, in effect, what the Act requires in this situation.

The form Unit Purchase and Sale Agreement for each unit owner explicitly states:

BUYER IS NOT RELYING ON ANY ORAL OR WRITTEN REPRESENTATIONS, WARRANTIES, STATEMENTS OR AGREEMENTS NOT CONTAINED IN THIS WRITTEN AGREEMENT. NO REAL ESTATE AGENT OR OTHER PERSON IS AUTHORIZED TO MAKE ANY REPRESENTATIONS OR PROMISES THAT ARE NOT CONTAINED IN THIS AGREEMENT. NEITHER PARTY SHALL MAKE ANY CLAIM AGAINST THE OTHER BASED ON ANY ALLEGED REPRESENTATION, WARRANTY OR AGREEMENT THAT IS NOT CONTAINED IN THIS AGREEMENT OR THE EXHIBITS HERETO. UPC § 19(m) (emphasis in original).

¹³ Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (emphasis added).

¹⁴ Pl. Memo. p. 21.

The Association further takes the position that PMC Defendants have not shown evidence that Unit Owners are bound by the Purchase Contracts, alleging PMC Defendants have failed to establish that each unit owner executed the form Agreement.¹⁵ The Association cannot have it both ways; in order to have representational standing, the Association must be acting for the condominium association matters, *not* each individual unit purchaser whose participation would be necessary in the case.¹⁶ Further, the Association’s Complaint avers that each prospective purchaser (would-be unit owner) received the Public Offering Statement. Compl. ¶79, which provides that all unit owners will sign a form Purchase Contract, which is part of the Public Offering Statement as Exhibit F. The Public Offering Statement also clearly states: “ANY INFORMATION THAT IS NOT INCLUDED IN THIS PUBLIC OFFERING STATEMENT SHOULD NOT AND MUST NOT BE RELIED ON.” POS at 29.

The precise language in the Public Offering Statement and the Purchase Contracts is clear that the unit owners waived any claim that PMC Defendants’ representations induced them to purchase individual units. UPC §19(k). Even without this explicit waiver, it is clear that the Association lacks standing to assert fraud on behalf of the individual unit owners, when the fraud claim does not arise out of issues “affecting the condominium.” 68 Pa. C.S. §3302(a)(4).

d) Count VIII (Breach of Fiduciary Duty): The Association may proceed with this claim against all PMC Defendants.

The Association alleges that all PMC Defendants – the Declarant, the general partner of the Declarant, PMC, and the three individual defendants – owed a fiduciary duty to the Association, which they breached by failing to detect and repair various alleged defects. Compl. ¶156, 159-160.

¹⁵ Pl. Memo. p. 21.

¹⁶ See 1000 Grandview Ass’n v. Mt. Washington Associates, 434 A.2d 796, 797 (Pa. 1981).

It is quite clear that during the time between inception (May 11, 2005) and Turnover to the unit owners (June 2, 2007), the individual defendants owed a statutory fiduciary duty to the Association under the Act:

In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties, including duties as members of any committee of the board upon which they may serve, in good faith in a manner they reasonably believe to be in the best interests of the association and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. 68 Pa. C.S. §3303(a) (emphasis added).

PMC Defendants assert that any fiduciary duty owed to the Association ended on the date the Declarant turned over control to the unit owners, on June 2, 2007, and as such, a breach of fiduciary duty claim is time barred by the two year statute of limitations. PMC Defendants asserts that the statute of limitation for a breach of fiduciary duty claim expired on June 2, 2009, one year before this action was brought. This argument, however, ignores the Association's assertion of equitable tolling, for any time the Association did not know of the problems, or believed that the PMC Defendants were attempting repair to remedy the problems. This remains a valid question for the jury.

There further remains a question of the duty, and possible breach thereof, owed by the Declarant during the period of its control, as well as the alleged alter-ego theory and responsibility of general partner of the Declarant.

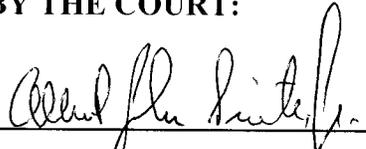
Likewise, summary judgment is not appropriate on the demand for punitive damages, as the Association has presented sufficient evidence to support its claim to be presented to the jury, subject to section 3412 of the UCA.

CONCLUSION

In conclusion, PMC Defendants' motion for summary judgment is granted in part, on Counts IV (Breach of Warranty), V (Breach of Implied Warranties), and VI (Fraud in the Inducement). The remainder of PMC Defendants' motion is denied, and Count VIII (Breach of Fiduciary Duty) may proceed.

DATE: October 16, 2013

BY THE COURT:


ALBERT JOHN SNITE, JR., J.