

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

VILLAS AT PACKER PARK : February Term 2013  
CONDOMINIUM ASSOCIATION, :  
Plaintiff, : No. 3103  
V. :  
WESTRUM PARK PLACE, L.P. ET. AL., : COMMERCE PROGRAM  
Defendants. : Control Number 13041654  
:

ORDER

AND NOW, this <sup>23<sup>rd</sup></sup> day of July 2013, upon consideration of Defendants' Preliminary Objections to Plaintiff's complaint and all responses in opposition, it hereby is **ORDERED** that the Preliminary Objections are **Sustained** in part and counts III (Breach of Implied Warranty), V (Negligent Misrepresentation) and VI (Violation of the Unfair Trade Practices and Consumer Protection Law) are dismissed. All other Preliminary Objections are **Overruled**.

BY THE COURT,

  
PATRICIA A. McINERNEY, J.

Villas At Packer Park C-ORDOP



13020310300026

DOCKETED

JUL 23 2013

C. HART  
CIVIL ADMINISTRATION

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

VILLAS AT PACKER PARK	:	February Term 2013
CONDOMINIUM ASSOCIATION,	:	
Plaintiff,	:	No. 3103
V.	:	
WESTRUM PARK PLACE, L.P. ET. AL.,	:	COMMERCE PROGRAM
Defendants.	:	Control Number 13041654
	:	
	:	

**OPINION**

This action was instituted by Plaintiff Villas at Packer Park Condominium Association (hereinafter “the Association”) against Defendants Westrum Park Place, L.P. (hereinafter “Westrum Park Place”) the declarant, Westrum Urban GP, LLC (hereinafter “Westrum Urban GP”) the sole general partner of Westrum Park Place and Westrum Urban Construction, LLC (hereinafter “Westrum Urban Construction”) the general contractor who constructed the Villas at Packer Park. The Association also sued John O. Mershon (hereinafter “Mershon”), the President, Managing Member and Assistant Secretary of Westrum Urban and John Westrum (hereinafter “Westrum”), the managing member of Westrum Urban, alleging Mershon and Westrum controlled and dominated the affairs of Westrum Park Place, Westrum Urban, and Westrum Corporation. The Association seeks damages for defects in the units and common elements of the Condominium.

The Villas at Packer Park is a condominium development consisting of twenty three multi-family buildings. Each building is three stories high and contains a total of four units each with a total of ninety two units. All potential owners were provided with a copy of the Declaration, Form Unit Agreement of Sale, a Projected Budget, a Limited Warranty, and a List of Permits and Approvals. The Limited Warranty warranted against numerous defects for a

period of two years and provided for the correction of structural defects and other issues related to the units.

After the declarant, Westrum Park Place, turned over the Condominium, the Association received a report from Kipcon Incorporated (“Kipcon”) identifying numerous breaches and defects in the construction of the structure and units comprising the Condominium. The Association instituted this action alleging claims for breach of contract, breach of express, statutory and implied warranties, negligent misrepresentation, violation of the Condominium Act for failing to file a certificate from a registered architect or engineer stating that the units were substantially completed and a claim for piercing the corporate veil. Presently before the court are defendants’ preliminary objections.

## **DISCUSSION**

### **I. The Implied Warranty of Habitability and Fitness was Disclaimed.**

Count III of the complaint purports to state a claim for breach of implied warranty of habitability and fitness. Specifically, the Association alleges Westrum Park Place breached the implied warranty of habitability and fitness by failing to construct the Villas at Packer Park and the units in a good and workmanlike manner and failed to comply with the Philadelphia Building Code. Pennsylvania law recognizes an implied warranty of habitability in contracts where builders-vendors sell new homes to residential purchasers.<sup>1</sup> The implied warranty requires that a builder, typically more skilled and experienced in the construction field than the purchaser, “bear the risk that a home he built will be functional and habitable in accordance with contemporary and community standards.”<sup>2</sup> Although the implied warranty may be waived by clear and

---

<sup>1</sup> *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972).

<sup>2</sup> *Id.* at 128, 288 A.2d at 777.

unambiguous contract language, such language must be sufficiently particular to inform the home purchaser of the right he or she is waiving.<sup>3</sup> Furthermore, the contract must always be construed against the builder and in order to exclude warranty coverage for latent defects, “language of disclaimer must refer to its effect on specifically designated, potential latent defects.”<sup>4</sup>

Here, section 13 of the form Agreement of Sale provides in pertinent part as follows:

- A. SELLER SHALL CAUSE WESTRUM URBAN CONSTRUCTION, LLC (“BUILDER”) TO PROVIDE BUYER WITH A LIMITED WARRANTY OF CONSTRUCTION OF THE PREMISES...

IN CONSIDERATION OF THE LIMITED WARRANTIES PROVIDED IN THIS SECTION 13(A), BUYER AGREES THAT THERE SHALL BE NO IMPLIED WARRANTIES OF HABITABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE AND THAT THERE SHALL BE NO EXPRESS WARRANTIES OTHER THAN THOSE MENTIONED HEREIN...

This language clearly and unambiguously disclaims coverage for the implied warranties of habitability and of fitness. Consequently, the court finds any claim for breach of implied warranty for habitability and fitness is disclaimed and count III is dismissed.

## **II. The Association lacks standing to bring a claim under the UTPCPL.**

Count VI of the complaint purports to state a claim for violation of the Unfair Trade Practices and Consumer Protection Law (the “UTPCPL”). Defendants maintain that the Association lacks standing to assert such a claim since the Association is not a purchaser as required by the statute. The court agrees.

The UTPCPL provides in pertinent part as follows:

Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money

---

<sup>3</sup> *Tyus v. Resta*, 328 Pa.Super. 11, 476 A.2d 427 (1984).

<sup>4</sup> *Id.* at 20, 476 A.2d at 432.

or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars (\$100.00) whichever is greater...<sup>5</sup>

According to the plain and unambiguous terms of the statute, only parties who have made purchases or leased goods and services may sue. Here, the complaint fails to allege that the Association is a purchaser as intended by the UTPCPL. Although the Uniform Condominium Act permits an association to institute litigation in its own name on behalf of itself or two or more unit owners on matters affecting the condominium<sup>6</sup>, the UTPCPL was intended to enhance the protection of consumers against deceptive or unfair trade practices. As such, the language found in the UTPCPL requires that the persons who can bring a claim be a “purchaser.”

Here, the claim arising under the UTPCPL did not affect the condominium but affected the purchaser of the condominium unit. Since the Association is not a purchaser, it is statutorily precluded from bringing a private cause of action under the UTPCPL. <sup>7</sup> Accordingly, Count IV is dismissed.

### **III. The claim for negligent misrepresentations is dismissed.**

Count V of the complaint purports to state a claim for negligent misrepresentation. Specifically, the Association alleges that through the Offering Statement, Declaration and Agreement, Westrum Park Place and Westrum Urban Construction made misrepresentations that

---

<sup>5</sup> 73 Pa.C.S. § 201-9.2(a).

<sup>6</sup> 68 Pa. C. S. A. § 3302 (4).

<sup>7</sup> See *Greencourt Condominium Ass'n v. Greencourt Partners, et. al.* 2004 Phila. Ct. Com. Pl. Lexis 58, 2004 WL 3051336 (2004)(citing *Balderston v. Medtronic Sofamor Danek, Inc.*, 285 F.3d 238, 241 (3<sup>rd</sup>.Cir.2002); *Coronado Condo. Ass'n, Inc v. Iron Stone Coronado, L.P.*, 2691 DEC.TERM 2004, 2005 WL 3036541 (Pa. Com. Pl. Nov. 7, 2005) cf. *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulation, Inc.*, 393 Pa.Super. 339, 574 A.2d 641 (Pa.Super.1990)(holding that a condominium association could proceed under the UTPCPL based on the condominium associations purchase of roofing material from the defendant)).

Consumer Protection Law) are sustained and said counts are dismissed. All other preliminary objections are overruled. <sup>10</sup>

BY THE COURT,

  
PATRICIA A. McINERNEY, J.

---

<sup>10</sup> Defendants also preliminary object to count I (breach of contract) and count XI (Action to Pierce the Corporate Veil). Defendants argue the claim for breach of contract should be dismissed against Westrum Urban since the Association fails to identify any contract between the unit owners and Westrum Urban. Although defendants are correct, Westrum Urban is the sole general partner of Westrum Park Place. Under Pennsylvania law, all general partners of a Pennsylvania limited partnership are liable for the debts and obligations of the partnership. See, 15 Pa.C.S.A. §§ 8327, 8533(b). Accordingly, the claim for breach of contract against Westrum Urban is proper. As it pertains to the claim to pierce the corporate veil and hold Mershon and Westrum individually responsible, the court finds that said claim has been adequately plead. Defendants also argue the complaint should be dismissed for failing to attach the Kipcon report. According to the Association, the Kipcon report is already in possession of defendants; therefore, the preliminary objection is overruled.