

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

GREENCORT CONDOMINIUM ASSOCIATION,	:	January Term 2004
	:	
Plaintiff,	:	No. 04045
v.	:	
GREENCORT PARTNERS,	:	Commerce Program
CHRISTOPHER J. CLARK, R. LAMAR	:	
KILMORE, RICHARD L. CANTORE,	:	Control Numbers 021802/030742/
JEROME MILLER, PAUL E.	:	021378
OBERKIRCHER, CHARLES G. ROACH,	:	
ROBERT ROACH, JOHN C. SNYDER,	:	
ROBERTY J. TARLECHY, LENTZ,	:	
CANTOR & MASSEY, LTD,	:	
HISTORICAL PROPERTIES, INC., FOX	:	
& ROACH, LP, LINDA SCHAAL, KISE,	:	
STRAW & KOLODNER, INC.,	:	
Defendants.	:	

ORDER

AND NOW, this 30th day of April 2004, upon consideration of the Preliminary Objections of Defendants Kise, Straw & Kolodner, Inc. (Control Numbers 021802 and 030742) and Fox & Roach, L.P. d/b/a Prudential Fox & Roach and Linda Schaal (Control Number 0211378), all responses thereto, all matters of record and in accordance with the Memorandum Opinion entered contemporaneously herewith, it hereby is **ORDERED** and **DECREED** that

1. Defendants' Preliminary Objections to Counts IX (fraud), X (fraud) and XI (conspiracy) are **Sustained**. Plaintiff is granted leave to amend said counts within twenty (20) days from the date of this Order.
2. Defendants' Preliminary Objection to Count XII (UTPCPL) is **Sustained**. Count XII is dismissed against Defendants Kise, Straw & Kolodner and Fox & Roach d/b/a Prudential Fox & Roach and Linda Schaal.

3. Defendants' Motion to Strike Plaintiff's Request for Attorneys' Fees in Counts IX, X and XI is **Granted**.
4. Defendants' remaining Preliminary Objections are **Moot**.

BY THE COURT,

GENE D. COHEN, J.

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

GREENCORT CONDOMINIUM	:	January Term 2004
ASSOCIATION,	:	
Plaintiff,	:	No. 04045
v.		
GREENCORT PARTNERS,	:	Commerce Program
CHRISTOPHER J. CLARK, R. LAMAR	:	
KILMORE, RICHARD L. CANTORE,	:	Control Numbers 021802/030742
JEROME MILLER, PAUL E.	:	021378
OBERKIRCHER, CHARLES G. ROACH,	:	
ROBERT ROACH, JOHN C. SNYDER,	:	
ROBERTY J. TARLECHY, LENTZ,	:	
CANTOR & MASSEY, LTD,	:	
HISTORICAL PROPERTIES, INC., FOX	:	
& ROACH, LP, LINDA SCHAAL, KISE,	:	
STRAW & KOLODNER, INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

COHEN, J......

This matter arises from the sale of condominium units to individual unit owners. Plaintiff Greencort Condominium Association (“Plaintiff”) instituted suit against numerous defendants including Kise, Straw & Kolonder, Inc.(“ KSK”) and Fox & Roach d/b/a Prudential Fox and Roach and Linda Schaal (“F&R”). Specifically, Plaintiff asserts claims against KSK for fraud, misrepresentation and nondisclosure (Count IX), conspiracy (Count XI) and violations under the Uniform Trade Practices Consumer Protection Law (“UTPCPL”). Plaintiff also asserts claims against F&R for fraud, misrepresentation and nondisclosure (Count X), conspiracy (Count XI) and the UTPCPL (Count XII). Presently before the court are two sets of Preliminary Objections filed respectively by defendants KSK and F&R. For the reasons set forth below, the court

sustains the preliminary objections raised by the respective defendants and grants defendants' motion to strike the claim for attorneys' fees.

DISCUSSION

A. KSK Preliminary Objections To Count X (Fraud) Are Sustained.

Count X purports to state a claim for fraud and negligent misrepresentation with general and shifting averments of negligence and intentional misrepresentation.

Pennsylvania Rule of Civil Procedure 1020 requires each cause of action and any special damage related thereto to be stated in separate counts containing a demand for relief. Pa. R. Civ. P. 1020. The court finds Count X to be inappropriate due to its failure to present separate causes of action in separate counts as required by Pa. R. Civ. P. 1020.

Count X not only fails to comply with Pa. R. Civ. P. 1020, but also fails to allege sufficient facts to state a claim for fraud and/or negligent misrepresentation. With respect to the fraud claim, the Rules require that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R. Civ. P. 1019(a). The Rules also require that averments of fraud or mistake shall be pleaded with particularity. Pa. R. Civ. P. 1019 (b).

In order to maintain a cause of action for fraud, a plaintiff must allege the following elements: (1) a representation; (2) which is material to the transaction at hand;(3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999). Here, absent from the complaint are any allegations that KSK made any material misrepresentations of

fact with fraudulent intent and knowledge to induce plaintiff to act to its own detriment and that Plaintiff relied upon said misrepresentations.

Additionally, the complaint also fails to plead sufficient facts to state a claim for negligent misrepresentation. In order to state a claim for negligent misrepresentation, a plaintiff should allege (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Kramer v. Dunn, 749 A.2d 984, 991 (Pa. Super. 2000). As stated above, Plaintiff fails to allege misrepresentations of a material fact, which KSK knew or should have known, were false and that Plaintiff relied upon said misrepresentations to its detriment. Accordingly, the preliminary objections of defendant KSK are sustained. Plaintiff is granted leave to amend Count X within twenty (twenty) days from the date of the Order entered contemporaneously with this Opinion.

B. Defendant F&R's Preliminary Objections to Count IX (Fraud) are Sustained.

Similar to Count X, Count IX also purports to state a claim for fraud and negligent misrepresentation against defendant F&R. Notwithstanding, Plaintiff's failure to present separate causes of action in separate counts as required by Pa. R. Civ. P. 1020, Count IX also fails to plead the necessary facts to state causes of action for fraud and negligent misrepresentation against F&R.

With respect to the fraud claim, Plaintiff fails to allege fraudulent intent to mislead another to rely upon misrepresentations, justifiable reliance on the misrepresentations and resulting injury. Additionally, with respect to the negligent

misrepresentation claim, the complaint also fails to allege sufficient facts to state a claim. Absent from the complaint are any allegations of harm suffered by Plaintiff arising from Plaintiff's reliance upon F&R's misrepresentation. Accordingly, the preliminary objections of defendant F&R are sustained. Plaintiff is granted leave to amend Count IX within twenty days from the date of the Order entered contemporaneously with this Opinion.¹

C. Defendants' Preliminary Objection to Count XI (Conspiracy) is Sustained.

Count XI alleges civil conspiracy against all defendants. To state a claim for conspiracy, plaintiff must allege: (1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose; (2) an overt act done in furtherance of the common purpose; and (3) actual legal damage. Czech v. Gordon, 2003 WL 22455078, * 3 (2003) (Cohen, J.) (citing Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498, 506 (1974)). Therefore, a complaint for conspiracy must allege direct or circumstantial facts which demonstrate combination and intent.

Count XI of the complaint is insufficiently specific to satisfy the requirements of Pa. R. Civ. P. 1019 (a). Plaintiff merely alleges bald conclusions without alleging facts of a combination or intent to conspire. Such allegations alone are insufficient to support a claim for conspiracy. Moreover, in order to state a claim for conspiracy, plaintiff must allege an unlawful act or an unlawful purpose. Id. Since the court sustained KSK and F&R's preliminary objections to Counts IX and X alleging fraud, the court must also sustain the preliminary objections to the conspiracy claims based on the failure to allege

¹ In Count IX and X, since the court finds that the claims for fraud and negligent misrepresentation are factually insufficient, the court did not address whether Plaintiff's claim for fraud is barred by the gist of the action doctrine and whether the negligent misrepresentation claim is barred by the economic loss doctrine. The court cautions the parties to be mindful of these doctrines if an amended complaint is filed.

an unlawful act or unlawful purpose. Accordingly, defendants' preliminary objections to Count XI are sustained. In the event, Plaintiff is capable of setting forth sufficient facts to state a claim for conspiracy, Plaintiff is granted leave to amend Count XI within twenty (20) days from the date of the Order filed contemporaneously with this Opinion.

D. Defendants' Preliminary Objections to Count XII (UTPCPL) Are Sustained.

Count XII of the complaint purports to state a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. C. S.A. § 201-1 et. seq. Without reaching the merits of defendants' contentions, the court finds that the UTPCPL claim must be dismissed since the Plaintiff lacks standing to raise said claim. The limited circumstances under which a private person may bring a claim under the UTPCPL are specifically set forth in Section 9.2 (a), which provides in relevant part, that:

Any person who **purchases or leases goods or services** primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declare unlawful by section 3 of the UTPCPL, may bring a private action to recover actual damages or one hundred dollars (\$100.00), which ever is greater.

Bowers v. T-Netix, 837 A.2d 608, 613 (Pa. Cmwlth. 2003) (citing 73 P.C. S. A. § 201-9.2(a)). This statute unambiguously permits only persons who have purchased or leased goods or services to sue. Balderston v. Medtronic Sofamor Danek, Inc., 285 F.3d 238, 241 (3rd Cir. 2002) (citing Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 55 (3rd Cir. 1992)).

Here, Greencort Condominium Association is responsible for administering the affairs and interests of the unit owners of Greencort Condominium (Compl. ¶ 2) and is not a purchaser as intended by the UTPCPL. Hence, it is statutorily precluded from bringing a private cause of action under the UTPCPL. See Balderston v. Medtronic

Sofamor Danek, Inc., 285 F.3d 238, 241 (3rd Cir. 2002) (citing Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 55 (3rd Cir. 1992)). Accordingly, Count XII is dismissed since the court finds that the allegations within the complaint fail to establish Plaintiff's standing to bring a claim against defendants KSK and F&R pursuant to the UTPCPL.²

E. Defendants' Motion to Strike Plaintiff's Claim for Attorney's Fees Must Be Granted.

The *ad damnum* clause to Counts IX, X and XI contain a request for attorneys' fees. Under the "American Rule", a party may not recover attorneys' fees from its adversary absent an express statutory or contractual provision allowing for the recovery of such attorneys' fees. Mosaica Academy Charter School v. Com.Dept. of Educ., 572 Pa. 191, 206-7, 813 A.2d 813, 822 (Pa. 2002). Since Plaintiff has not identified any applicable contractual or statutory provision that permits it to recover attorneys' fees from defendants, plaintiffs request for such relief must be dismissed.³

CONCLUSION

For the foregoing reasons, the court sustains the respective Preliminary Objections of KSK and F&R and grants the Motion to Strike Attorneys' Fees as follows:

1. Defendants' Preliminary Objections to Counts IX, X and XI are **Sustained**. Plaintiff is Granted leave to amend said counts within twenty (20) days from the date of this Order.
2. Defendants' Preliminary Objection to Count XII is **Sustained**. Count XII is dismissed against Defendants Kise, Straw & Kolodner and Fox & Roach d/b/a Prudential Fox & Roach and Linda Schaal.

² The defendants did not raise the issue of standing as it pertains to the UTPCPL. However, where a cause of action is created by statute and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite to an action. Bowers v. T-Netix, 837 A.2d 608, 614 (Pa. Cmwlth. 2003)(citing Beverly Healthcare-Murrysville v. Dep't of Pub. Welfare, 828 A.2d 491 (Pa. Cmwlth. 2003). Accordingly, a court may raise the issue *sua sponte*. See Grom v. Burgoon, 448 Pa. Super. 616, 672 A.2d 823, 824 (Pa. Super. 1996).

³ The court recognizes that under the UTPCPL a plaintiff is entitled to attorney's fees; however such claim is moot since the court has dismissed the claim for lack of standing to sue.

3. Defendants' Motion to Strike Plaintiff's Request for Attorneys Fees in Counts IX, X and XI is **Granted**.
4. Defendants' remaining Preliminary Objections are **Moot**.

BY THE COURT,

GENE D. COHEN, J.

Dated: April 30, 2004