

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

GIESLER, ET. AL.,	:	November Term 2008
	:	
Plaintiffs,	:	
	:	
v.	:	No. 4301
	:	
1531 PINE STREET ASSOCIATION, L.P.,	:	
1531 PROPERTIES INC., LONG & FOSTER	:	COMMERCE PROGRAM
REAL ESTATE, INC.,	:	
	:	
Defendants,	:	Control Numbers 09122687/ 09122904
	:	
v.	:	
FRANK BALDWIN, ESQUIRE, MCELROY,	:	
DEUTSCH, MULVANEY & CARPENTER, LLP.	:	
And MONTEVERDE, MCALEE & HURD, P.C.,	:	
Additional Defendants.	:	

ORDER

AND NOW, this 2ND day of February 2010, upon consideration of third party defendants Frank Baldwin, Esquire and McElroy, Deutsch, Mulvaney & Carpenter, LLP and third party defendant Monteverde, McAlee & Hurd, P.C.'s Preliminary Objections to the Amended Joinder Complaint, all responses in opposition and Opinion attached hereto, it is **ORDERED** that the Preliminary Objections are **Sustained**. The amended joinder complaint is severed from this action for discovery and trial. The Defendants are directed to file a complaint against the attorney defendants within twenty (20) days from the date of entry of this Order. The new action shall be stayed pending disposition of the instant matter.

BY THE COURT,

ARNOLD L. NEW, J.

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FRANK BALDWIN, ESQUIRE, MCELROY,	:	
DEUTSCH, MULVANEY & CARPENTER, LLP.	:	
And MONTEVERDE, MCALEE & HURD, P.C.,	:	
Additional Defendants.	:	

OPINION

This action arises from a residential real estate transaction. The plaintiffs are owners, residents and the homeowner association of various condominium units located at 1531 Pine Street (collectively referred to as “Plaintiffs”). Plaintiffs purchased three of the four condominium units developed by 1531 Pine Street Association L.P. and 1531 Properties Inc. (hereinafter “defendant developers”) at the condominium complex located at 1531 Pine Street, Philadelphia, Pa.

The defendant developers marketed the condominium units as luxury units within the historically renovated 1531 Pine Street and further advertised state of the art soundproofing of the units which it installed well above the ‘minimum requirement’. Plaintiffs allege that after they moved into their units, they each discovered “an excessive amount of verbal sounds, noise, conversations, and impact sounds which could be heard coming directly from other units due to inadequate soundproofing between the ceilings and floors of the various units.” Despite plaintiffs’ complaints, defendant developers have taken no action to remedy the situation.

Plaintiffs further allege that defendant developers failed to deliver a public offering statement to them before their purchases and falsely represented to them that the monthly condominium fee would be \$200 per month, when in fact the monthly condominium fees are in excess of \$500.

Plaintiffs filed this action against the defendant developers and the realtor, Long and Foster Real Estate, Inc. seeking statutory damages under 68 Pa. Cons. Stat. Ann. Section 3406(a) for failure to deliver a prospectus, rescission of the condominium sales for failure to deliver a prospectus, breach of warranties against structural defects, failure to satisfy punch list items, violation of the UTPCPL and fraud in the inducement. The rescission claim was dismissed by the court.

On August 5, 2009, defendant developers filed a joinder complaint against Frank Baldwin, Esquire and McElroy, Deutsch, Mulvaney & Carpenter, LLP and Monteverde, McAlee & Hurd, P.C.'s (hereinafter collectively referred to as the "attorney defendants") which has been amended.¹ The amended joinder complaint alleges that the attorney defendants entered into certain contracts with the defendant developers to provide legal representation services with respect to matters related to the sale of the condominium units including the preparation and presentation and provision of a Public Offering Statement and monthly condominium association fee. The amended joinder complaint seeks contribution, indemnification and/or joint and several liability. Presently before the court are the attorney defendants' preliminary objections.

DISCUSSION

Pennsylvania Rule of Civil Procedure 2252 provides in pertinent part as follows:

- (a) Except as provided by Rule 1706.1, any party may join as an additional defendant any person not a party to the action who may be

¹ Attorney Baldwin was an attorney and a partner at the law firm of Monteverde McAlee & Hurd, P.C. McElroy, Deutsch, Mulvaney & Carpenter, LLP is a law firm that merged with Monteverde McAlee & Hurd in July 2006. The firm is now known as McElroy, Deutsch, Mulvaney & Carpenter, LLP. (Amended Joinder Complaint ¶¶ 3-5).

- (1) solely liable on the underlying cause of action against the joining party, or ²...
- (4) liable to or with the joining party on any cause of action arising out of the transactions or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based.

This rule is to be “broadly construed to effectuate its purpose of avoiding multiple lawsuits by settling in one action all claims arising out of the transaction or occurrence on which plaintiff’s cause of action is based.”³ However, joinder is permitted only as long as the additional defendant’s alleged liability is related to the claim which the plaintiff asserts against the original defendant.⁴ Liability must be premised upon the same cause of action alleged by plaintiffs in their complaint.⁵

A party may be joined as an additional defendant if it can be solely liable on the underlying cause of action against the joining party. The term “underlying cause of action” refers to the cause of action set forth in the plaintiff’s complaint or the defendant’s counterclaim.⁶ Here, the attorney defendants can not be solely liable to plaintiffs. Plaintiffs’ complaint alleges claims for construction defects and marketing misrepresentations in addition to the claims for failing to provide a public offering statement and improper calculation of the monthly assessment. The allegations regarding construction defects and marketing misrepresentations are asserted against the defendant developers not the attorney defendants. The only allegations against the attorney defendants involve the sale of the units. Consequently,

² Subparts (2) and (3) of Pa. R. Civ. P. 2252 (a) have been rescinded.

³ Garrett Electronics Corp. v. Kampel Enterprises, Inc., 382 Pa. Super. 352, 555 A.2d 216, 217 (1989).

⁴ Olson v. Grutza, 428 Pa. Super. 378, 631 A.2d 191, 197 (1993).

⁵ Svetz v. Land Tool Co., 355 Pa. Super. 230, 513 A.2d 403, 404-405 (1986).

⁶ Note to 2252 (a)(1).

the attorney defendants can not be solely liable to plaintiffs since there are no allegations made against them regarding any duty owed to the plaintiffs or any involvement in the construction and marketing of the units. As such, the attorney defendants' preliminary objections are sustained.

Defendant developers allege the attorney defendants are liable to defendant developers or jointly and severally liable with the defendant developers because they (1) advised defendant developers as to the monthly condominium fee and (2) failed to prepare and distribute a public offering statement to the purchasers of the condominium units. Defendant developers' claim sounds in legal malpractice.

One of the elements for legal malpractice is proof of actual loss.⁷ At this time, the defendant developers have not been found liable to plaintiffs and therefore have not suffered any loss. Unless the defendant developers are actually found liable to plaintiffs on the issues of failing to provide a public offering statement and improper calculation of the monthly assessment and until a judgment becomes enforceable against them, the defendant developers cannot sue the attorney defendants for legal malpractice. Consequently, the claims alleged in the amended joinder complaint are premature. As such, the claims contained within the amended joinder complaint are severed.⁸ Defendant developers shall file the amended joinder complaint as a separate action within twenty (20) days from the date of this action. The new action will be stayed pending the disposition of the instant matter.

⁷ Kituskie v. Corban, 552 Pa. 275, 281, 714 A.2d 1027, 1030(1998).

⁸ Pa. R. Civ. P. 213 (b) permits a court in furtherance of convenience or to avoid prejudice on its own motion to order a separate trial of any cause of action, claim, or counterclaim, set off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits or issues.

Conclusion

For the foregoing reasons, the attorney defendants' preliminary objections are sustained. Defendant developer shall file the amended joinder complaint as a separate action within twenty (20) days from the date of this order. The new action will be stayed pending disposition of the instant action.⁹

BY THE COURT,

ARNOLD L. NEW, J.

⁹ This ruling does not preclude the defendant developers from filing a separate legal malpractice claim at a later time.

