

Limitations on a Realtor's Duty to Warn in New Jersey

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Clawing back on the ever-expanding duties imposed on those selling real estate in New Jersey, the Third Circuit Court of Appeals recently ruled that there is no affirmative duty by a developer's sales agent to warn a potential home buyer of a "neighbor from hell."

In *Phoenix v. U.S. Homes*, 628 Fed. Appx. 825 (3d Cir. 2015), the Third Circuit upheld the dismissal of a home buyer's lawsuit alleging that a developer, through its sales agent, failed to alert her, prior to her purchase of a house, about a troublesome neighbor. The buyer, Cydnee Phoenix ("Phoenix"), visited a property built by Lennar Homes ("Lennar") in September of 2013. While being shown the property by Lennar's sales agent, a neighbor from across the street, Kevin Potter ("Potter"), approached the pair and warned Phoenix not to let Lennar treat her as he had been treated. After the encounter, Phoenix inquired with the sales agent if there was an issue with Potter. The sales agent replied that there was no problem and implied that Potter was no longer eligible for warranty repair services as a result of the time that had passed since he purchased. Phoenix later learned that Potter was no longer receiving services as a result of his allegedly harassing, hostile and volatile interactions with Lennar's employees.

On September 12, 2013, Phoenix signed an agreement to purchase the property from Lennar. On October 1, 2013, before Phoenix closed on the property, Lennar sent a letter to Potter's wife demanding that Potter stop parking his cars in front of Phoenix's property and driveway. The letter also demanded that Potter cease and desist from taking any further actions which would interfere with Lennar's business or which could be considered an invasion of privacy of any new home owner.

Phoenix later alleged that Lennar's letter instigated Potter to retaliate against her by engaging in a pattern of harassment. In November of 2013, due to Potter's behavior, Phoenix filed a criminal complaint for harassment against him and hired a security guard for her family's protection. Phoenix filed suit against Potter in December of 2013, alleging that Lennar fraudulently concealed and misrepresented Potter's harassing, hostile and volatile behavior. Phoenix asserted claims for fraud, equitable fraud, negligent misrepresentation and omission, violation of the New Jersey Consumer Fraud Act ("CFA"), violation of the Planned Real Estate Development Full Disclosure Act ("PREDFDA") and negligent infliction of emotional distress. Phoenix claimed that once Lennar, through its sales agent, elected to speak to Phoenix, Lennar assumed a duty to speak truthfully about the irascible neighbor.

Upon considering Lennar's motion to dismiss, the District Court ruled that Phoenix's fraud, CFA and PREDFDA claims based upon Lennar's affirmative misrepresentations failed because she did not establish that the sales agent made a statement of fact that was false. The Third Circuit Court of Appeals upheld the decision.

The Third Circuit found that the sales agent's comment—that there was no problem with Potter—left Phoenix with the impression that she should not be concerned about Potter, but that the comment was not an expression of fact. At most, it was an idle comment conveying the sales agent's opinion about Potter and the degree of risk he posed. In addition, the Court found that Lennar's advertisements about the "wonderful lifestyle" and integrity of the development were not actionable because they were mere "puffery," not misrepresentations of fact.

The Third Circuit Court of Appeals further agreed that Phoenix's nondisclosure claims failed because Lennar had no duty to disclose off-site social conditions, such as the personality traits of a neighbor. As the developer, Lennar had a duty to disclose off-site conditions that were material to the transaction, but it had no duty to investigate or disclose transient social conditions in the community that arguably could affect the value of the property. Moreover, the duty to disclose extends only to off-site physical conditions known to the seller and unknown and not readily observable by the buyer. The Third Circuit found that Lennar's sales agent did not know Potter was going to be hostile to his neighbors and that Potter's behavior was also readily observable to Phoenix when she visited the property. Since Lennar did not owe Phoenix a duty of care to disclose information regarding Potter's conduct, her claims for negligent misrepresentation/omission and negligent infliction of emotional distress also failed.

Phoenix is a victory for home developers and their sales agents. While the case did not discuss real estate professionals, in general, the same logic applied by the District Court and Third Circuit can be applied to defending claims against realtors for negligent

misrepresentation, common law fraud, and CFA violations. Phoenix also illustrates the minefield through which real estate professionals must walk when attempting to balance commercial interests and professional obligations.

The attorneys at Kaufman Dolowich & Voluck, LLP are experienced in handling professional negligence, common law fraud and statutory fraud claims asserted against realtors, developers, contractors and their respective insurers.

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