IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISA MASON CONTAWE and GINO CONTAWE, h/w, MELANIE ROSH, and MARGARET MOLLOY, for themselves and all other similarly situated,	:	CIVIL ACTION
	:	No. 04-2304
Plaintiffs,	:	
v.	:	
CRESCENT HEIGHTS OF AMERICA, INC., et al,	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J. **December 21, 2004**

Via the motion now pending before this Court, Plaintiffs move for class certification, or, in the alternative, for intervention of additional plaintiffs. For the reasons outlined below, the motion shall be DENIED.

Facts and Procedural History

Plaintiffs, purchasers of condominium units in CityView Condominiums, located at 2001 Hamilton Street in Philadelphia, filed this action against developer Crescent Heights and several corporations and individuals involved in the conversion and sale of the CityView units. Plaintiffs allege that Defendants made a variety of misrepresentations in connection with the sale of these units, including false statements and promises regarding the condition of the units, the building's zoning status, and the

existence of deeded parking spaces. Among other allegations, Plaintiffs also claim that Defendants failed to disclose plumbing and structural defects in the CityView units, were negligent in hiring contractors to refurbish and repair the units, and failed to honor warranty obligations. The Amended Complaint sets forth eleven causes of action, including violations of RICO and RESPA, as well as common law claims of fraud, negligent misrepresentation, negligence, negligence per se, breach of contract, breach of implied warranty of habitability, breach of fiduciary duty, and unjust enrichment.

Plaintiffs now bring this motion to certify a class of "[a]ll persons who have purchased condominium units in CityView Condominium, 2001 Hamilton Street, Philadelphia." In the alternative, Plaintiffs propose the following six subclasses:

> (1) All owners who have suffered damages due to the condition of their units, including especially (but not limited to) all owners who have suffered as a result of leaks and/or non-working or defective HVACs;
>
> (2) All persons who purchased, directly from the condominium developer, the use of a parking space in CityView Condominium, and who received representations that they were or would be purchasing an actual, deeded parking space;
>
> (3) All owners to whom refunds were/are due from monies escrowed for payment of taxes, who ... did not receive timely refunds of said monies after payment of taxes;
>
> (4) All owners who purchased title insurance through SearchTec Abstract;
>
> (5) All owners who have incurred or will incur

> additional condominium fees, including but not limited to special assessments, due to the poor condition of the common elements at the time the condominium was/will be turned over to the condominium association;
>
> (6) All owners who have incurred or will incur additional condominium fees, including but not limited to special assessments, due to expenses improperly charged to, expenses paid by, or monies improperly diverted from, the condominium account.

Alternatively, Plaintiffs move the Court to allow intervention by twenty owners of CityView units as plaintiffs in this matter.

Standards for Class Certification

A party moving for class certification bears the burden of proving that the proposed class satisfies the requirements of Fed. R. Civ. P. 23(a) and can be maintained under at least one of the categories enumerated in Fed. R. Civ. P. 23(b). See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). For purposes of class certification, a court must accept the substantive allegations in the plaintiff's complaint as true. Thomas v. Smithkline Beecham Corp., 201 F.R.D. 386, 393 (E.D. Pa. 2001) (quoting Cullen v. Whitman Med. Corp., 188 F.R.D. 226, 228 (E.D. Pa. 1999)). However, it is inappropriate for a court to inquire into the merits of the case at the class certification stage. Forman v. Data Transfer, 164 F.R.D. 400, 403 (E.D. Pa. 1995)

Rule 23(a) imposes four prerequisites to class certification. The moving party must show that (1) the prospective class is so

numerous that joinder of all members would be impracticable, (2) there are questions of law or fact common to the class, (3) the class representatives' claims and defenses are typical of the claims or defenses of the class, and (4) the class representatives can fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

If the four elements of Rule 23(a) are satisfied, a class action is maintainable only if (1) the prosecution of separate actions would create a risk of inconsistent adjudications or adjudications prejudicial to the rights of non-party class members, (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, or (3) the court finds that the questions of law or fact common to the class members predominate, and finds that a class action is superior to other methods of adjudicating the controversy. Fed. R. Civ. P. 23(b).

Discussion

I. Rule 23(a) Prerequisites to Class Certification

A. Numerosity

Rule 23(a)(1) dictates that a potential class must "be so numerous that joinder of all members is impracticable." While no specific number of potential class members is required to satisfy the numerosity requirement, the Third Circuit has held that Rule

23(a)(1) is generally satisfied where the number of potential claimants exceeds forty. Stewart v. Abraham, 275 F.3d 220, 227-228 (3rd Cir. 2001). However, the numerosity test requires that a court evaluate the practicability of joinder by considering not only the size of the putative class, but also the geographic location of its members, and the relative ease of member identification. Graveley v. City of Philadelphia, No. 90-3620, 1997 WL 698171 at 4 (E.D. Pa. 1997); see, e.g., Browne v. Sabatina, No. 89-1228, 1990 U.S. Dist. LEXIS 95 (E.D. Pa. 1990) (denying certification of a class of 57 because members all lived in the same area of Philadelphia).

The proposed class in this action encompasses all persons who have purchased condominium units in the 534-unit CityView Condominiums. While all potential class members live in the same building complex and are easily identifiable, joinder would indeed be impracticable if all 534 unit owners chose to participate in this litigation. We find that Plaintiffs have satisfied the numerosity requirement of Rule 23(a)(1).

B. Commonality

Rule 23(a)(2) requires that a plaintiff seeking class certification show that there are questions of law or fact common to the proposed class. Common questions are those which arise from a "common nucleus of operative facts." Thomas, 201 F.R.D. at 392. However, the factual underpinnings of the class members'

claims need not be identical; the commonality requirement is easily met, and will be satisfied if the named plaintiffs share even one common question with the grievances of each member of the prospective class. Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 184 (3rd Cir. 2001); Stewart, 183 F.R.D. at 195. Where the plaintiff has shown a common nucleus of operative facts, commonality will not be defeated simply because "individual facts and circumstances" are important to the resolution of the class members' claims. Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 57 (3rd Cir. 1994); see also Thomas, 201 F.R.D. at 392; Forman, 164 F.R.D. at 403-04 (where "common questions" can only be resolved by making independent factual determinations for each class plaintiff, there is no common nucleus of operative fact, and thus no Rule 23(a)(2) commonality).

Plaintiffs contend that the commonality requirement is satisfied in this action because the Defendants "engaged in standardized conduct of making misrepresentations to generate sales at inflated prices," hired an unqualified contractor to repair and refurbish buyers' condominium units, and breached statutory warranties through a "common course of conduct." We note initially that there can be no commonality in Plaintiffs' misrepresentation claim, because it is grounded in multiple occasions of varied and unscripted oral misrepresentations, rather than a common factual underpinning. See In re LifeUSA

Holding, 242 F.3d 136, 144-46 (3rd Cir. 2001); compare with In re Prudential Insurance Co. of America Sales Practices Litigation, 962 F. Supp. 450, 514-15 (D. N.J. 1997), aff'd, In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 310 (3rd Cir. 1998). However, commonality may be found in the allegations of faulty repair and construction, which Plaintiffs' counsel avers are common to all proposed class members. See Plaintiff's Motion, p. 8, FN 2. This single issue is sufficient to satisfy the commonality requirement of Rule 23(a)(2).

C. Typicality

The typicality requirement of Rule 23(a)(3) is closely related to the commonality requirement, as both criteria seek to assure that the interests of absentee parties will be fairly and adequately represented by the named plaintiffs. In re Ikon Office Solutions, 191 F.R.D. 457, 462 (E.D. Pa. 2000). The named representatives' claims are considered "typical" if proof of their claims will necessarily prove all the class members' claims. Am/Comm Sys., Inc. v. Am. Tel. & Tel. Co., 101 F.R.D. 317, 321 (E.D. Pa. 1984); Forman, 164 F.R.D. at 403-04. As with commonality, however, the class members' claims need not be identical; generally, factual differences will not render a claim atypical if the claim arises from the same event, practice, or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory. Newton v.

Merrill, Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 184 (3rd Cir. 2001). Thus, typicality will not be satisfied where "the named plaintiffs' individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." Johnston, 265 F.3d at 184 (quoting Eisenberg v. Gagnon, 766 F.2d 770, 786 (3rd Cir. 1985)) (emphasis added).

Inasmuch as a finding that Defendants failed to properly repair and refurbish the CityView condominium units would tend to prove the class representatives' claims as to this issue, we find that the typicality requirement is satisfied.

D. Adequacy of Representation

Finally, Rule 23(a)(4) provides that a class action may only be maintained if "the representative parties will fairly and adequately protect the interests of the class." To satisfy this requirement, the plaintiff must establish that class counsel is qualified and will serve the interests of the entire class, and that the interests of the named plaintiffs are not antagonistic to those of the class. Georgine v. Amchem Prods., 83 F.3d. 610, 630 (3rd Cir. 1996).

Defendants have not challenged class counsel's qualifications, and the record does not indicate any obvious antagonism between the named plaintiffs and the class generally.

Therefore, we find that Plaintiffs have satisfied their burden of showing that the interests of the class will be adequately represented.

II. Maintaining a Class Action Under Rule 23(b)

Plaintiffs contend that the proposed class is certifiable under any of the three grounds set forth in Rule 23(b). However, we find that Rules 23(b)(1) and 23(b)(2) are inapplicable to this case. We further find that certification is inappropriate under Rule 23(b)(3), because the claims against Defendants are not predominantly grounded in common questions of law and fact.

A. Rule 23(b)(1)

Plaintiffs contend that certification under Rule 23(b)(1) is appropriate because the prosecution of separate actions by prospective class members might jeopardize future claims on the basis of collateral estoppel. However, Rule 23(b)(1)(A), which seeks to prevent "incompatible standards of conduct," is not meant to apply where the risk of inconsistent results in individual actions is merely the possibility that the defendants will pay damages to some claimants but not to others, as would be the case here. See Casper v. Cunard Line, 560 F. Supp. 240, 244 (E.D. Pa. 1983). Furthermore, a judgment in the instant action will not predetermine the rights of other potential plaintiffs, who, as non-participants in the original adjudication, cannot be

bound by collateral estoppel. See ITT Corp. v. Intelnet Int'l Corp., 366 F.3d 205, 216 (3rd Cir. 2004); Resolution Trust Corp. v. KPMG Peat Marwick, No. 92-1373 1992 U.S. Dist. LEXIS 16670 at 8, 1992 WL252784 (E.D. Pa. 1992); Casper, 560 F. Supp. at 244. As Plaintiffs have offered no evidence to support their assertion that individual actions would interfere with the interests of those who do not file suit, they have not met their burden of showing that this matter should be certified pursuant to Rule 23(b)(1).

B. Rule 23(b)(2)

Certification under Rule 23(b)(2) is likewise inappropriate because the primary relief sought in this matter is not injunctive or declaratory. See Miller v. Hygrade Food Prods., Corp., 198 F.R.D. 638, 640 (E.D. Pa. 2001). Ten of Plaintiffs's eleven claims demand compensatory or other damages as the primary form of relief. Rule 23(b)(2) is not intended to apply where plaintiffs request primarily monetary damages, because any award of damages requires case-by-case examination of individual claims, a process best suited to individual adjudications rather than class action lawsuits. Miller, 198 F.R.D. at 641.

C. Rule 23(b)(3)

Certification pursuant to Rule 23(b)(3) requires a showing that common issues predominate over individual questions ("predominance") and that the class action is a superior method

of adjudicating the controversy ("superiority"). The predominance inquiry, which is a more demanding iteration of the 23(a) commonality requirement, tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. In re Life USA, 242 F.3d at 144. To find predominance, the court must ascertain the existence of a group "which is more bound together by a mutual interest in the settlement of common questions than it is divided by the individual members' interest in the matters peculiar to them." Stewart, 183 F.R.D. at 197. While the plaintiff need not show unanimity of common questions, he must demonstrate that any individual differences are "of lesser overall significance than the common issues," and that the individualized questions of fact and law are manageable in a single class action. Sanneman v. Chrysler Corp., 191 F.R.D. 441, 449 (E.D. Pa. 2000); Barabin v. ARAMARK Corp., 210 F.R.D. 152, 161-62 (E.D. Pa. 2002).

In this action, Plaintiffs bring eleven claims, ranging from common law fraud to negligence to federal RESPA claims, against fifteen defendants, including CityView's developers, a mortgage lender, a title insurance broker, and a flooring contractor, among others. The crux of Plaintiffs' complaint is that "the developer breached its warranty obligations to the plaintiffs and actively misled them - both by means of representations made in the engineering reports provided to buyers and by more casual

oral and written misrepresentations - as to the condition of the buildings and the quality of ownership in parking spaces they purchased." See Plaintiffs' Memorandum, p. 10. While not denying the existence of individualized issues of fact, Plaintiffs identify the predominant issues as "the condition of the buildings, the developers' knowledge of that condition, steps taken to correct and/or conceal the condition, and whether the developer and/or other parties misrepresented parking spaces as deeded property." See Plaintiffs' Memorandum, p. 10.

We find that the common issues identified by Plaintiffs do not predominate over the factual intricacies of each plaintiff's individual situation and the legal defenses available to Defendants with respect to each plaintiff. First, as noted above, the Third Circuit has expressly rejected certification of fraud actions where such actions are based on a heterogenous assortment of unscripted misrepresentations. In re LifeUSA, 242 F.3d at 144-46; compare with In re Prudential, 962 F.Supp. at 514-15. Plaintiffs, who support their motion by citing only the overturned decision at Benevento v. LifeUSA Holding, 190 F.R.D. 359 (E.D. Pa. 2000), cannot satisfy the burden of commonality or typicality with respect to any of the misrepresentation claims in their Complaint, which vary significantly from plaintiff to plaintiff. The alleged misrepresentations are by no means uniform, and include appraisals of individual units; oral

representations to some plaintiffs regarding refurbishment, warranties, and common elements; a letter to CityView resident Carl Elliott regarding mold removal; assurances to Plaintiff Mason regarding HVAC quality and deeded parking; representations to Plaintiff Rosh regarding plumbing problems, deeded parking, and the availability of a computer lab; and representations regarding insurance to proposed intervenor Steven Nathans. Across this range of misrepresentations, there will necessarily be further variety as to the extent of each proposed class member's reliance and damages.

Furthermore, even the claims unrelated to these allegedly fraudulent misrepresentations depend heavily on resolution of issues unique to each class member. Plaintiffs have identified a set of common issues relating to building conditions, but these issues pale in comparison to the individual differences among the potential litigants, including:

- Whether each class member's purchase agreement included an "as-is" clause;
- Whether each class member purchased his unit before or after CityView's zoning issues were resolved;
- The age and condition of the appliances, flooring, plumbing, and construction in each class member's unit;
- Whether each class member suffered water damage in his unit, and the source of this damage;

- The extent of each class member’s warranty coverage and any representations made regarding such coverage;
- Whether each class member purchased use of a parking space;
- Whether each class member purchased title insurance through SearchTec Abstract;
- Whether each class member escrowed monies with the seller;
- Whether some class member’s claims may be barred by the statute of limitations.

An individualized analysis of each of these variables will be necessary to determine both Defendants’ liability with respect to each class member, and the extent of each class member’s damages. It is clear to this court that this matter is more divided by individual members' interest in the matters peculiar to them than “bound together by a mutual interest in the settlement of common questions.” Stewart, 183 F.R.D. at 197.

Because the factual and legal questions common to the proposed class do not predominate over each class member’s individualized circumstances, this matter is not sufficiently cohesive to warrant certification pursuant to Rule 23(b)(3).

III. Plaintiffs’ Motion for Certification of Subclasses

While Plaintiffs have identified six subclasses for

certification in the event that this Court rejects the proposed class, Plaintiffs have not met their burden of showing that these subclasses satisfy the requirements of Rule 23(a) and 23(b).

Fed. R. Civ. P. 23(c)(4) establishes that the provisions of Rule 23 shall "be construed and applied accordingly" where a plaintiff wishes to treat a subclass as a class. In other words, each subclass must independently meet the requirements of Rule 23 for the class action to be maintained. Williams v. Philadelphia Hous. Auth., No. 92-7072, 1993 U.S. Dist. LEXIS 8826 at 6, 1993 WL 246086 (E.D. Pa. 1993). In this motion for class certification, Plaintiffs have made no effort to show that the six proposed subclasses satisfy the requirements of Rules 23(a) and 23(b). As it is Plaintiff's burden to make this showing, this failure alone is sufficient grounds for this Court to deny the motion for subclass certification. We will comment on the three most glaring problems of the proposed subclasses below.

A. Independent Definition of the Subclasses

Most significantly, Plaintiffs have not met the minimum requirement of defining every subclass in a way that enables the court to determine whether a particular individual is a class member without addressing the merits of the claims. See Kline v. Sec. Guards, Inc., 196 F.R.D. 261, 266-67 (E.D. Pa. 2000). In Kline, for example, this Court rejected certification of a class comprising "all persons whose communications were intercepted by

electronic surveillance" on the grounds that the class would have required an individual examination of each alleged class member to determine whether there was an interception, and, if so, whether the interception was of an oral communication (and thus unlawful under the Wiretap Act). This Court refused to certify the class because it would have required an inquiry into the merits of the case and resolution of the "central issue of liability." Kline, 196 F.R.D. at 266-67. Where determining a membership in a class or subclass would require "a mini-hearing on the merits of each class member's case," a class action is inherently inappropriate for addressing the claims at issue. Sanneman, 191 F.R.D. at 446; Kline, 196 F.R.D. at 266-67. The proposed subclasses in this action suffer from this very problem. Because it would be impossible to definitively identify subclass members without individualized fact-finding, many of the proposed subclasses fail to satisfy one of the basic requirements for a class action under Rule 23. See Sanneman, 191 F.R.D. at 446.

To identify the class members in Subclass 1, for example, this Court would have to identify all owners who suffered damages as a result of "defective" HVACs. An inquiry into these circumstances would come close to resolving the central issues of liability for Count VII of Plaintiffs' Amended Complaint. In Count VII, Plaintiffs seek relief for breach of contract for Defendant American Home Shield's failure to repair or replace

defective appliances during the warranty period. A finding that a proposed subclass member suffered damages as a result of a defective HVAC system would essentially resolve the merits of his claim, unless the defect and damages occurred beyond the warranty period.

Likewise, Subclass 2 requires a finding that each subclass member purchased a parking space from the developer, and received representations that the parking spaces were deeded. As Defendants do not deny that the parking spaces were not deeded, the identification of class members would effectively require this Court to make a determination on the merits of their misrepresentation and/or fraud claims (subject, of course to any available defenses).

B. Numerosity

Furthermore, there is no evidence to support a finding of numerosity for any of these proposed subclasses. While a plaintiff does not have to allege a class or subclass' exact size or identity, “mere speculation” does not satisfy Rule 23(a)(1). Gillis v. Hoechst Celanese Corp., No. 90-5542, 1992 U.S. Dist. LEXIS 4984 at 14, 1992 WL 68333 (E.D. Pa. 1992). Plaintiffs have made no showing that the proposed subclasses will be so numerous that joinder of their members would be impracticable. In fact, the materials submitted in support of Plaintiffs’ motion suggest that joinder would be relatively simple with respect to at least

some of the subclasses. For example, fourteen of the proposed intervenors appear to fall within the description of Subclass 1, nine appear to fall within Subclass 2, and fifteen appear to fall within Subclass 4. Absent a showing that significantly more CityView owners fall within these subclasses, we must deny certification.

C. Adequacy of Representation

Finally, Plaintiffs have failed to satisfy the 23(a)(4) requirement of adequacy of representation. A plaintiff cannot represent a subclass of which he is not a member. First Eastern Corp. by Friedman v. Mainwaring, No. 92-1176, 1993 U.S. Dist. LEXIS 8383 at 7, 1993 WL 223607 (E.D. Pa. 1993). Because Plaintiffs have not identified the class representatives for each of these subclasses, it is impossible for this court to determine whether the representation will be adequate.

IV. Plaintiffs' Motion for Intervention

Alternatively, Plaintiffs move this Court to allow intervention of twenty additional plaintiffs pursuant to Fed. R. Civ. P. 24. A non-party to existing litigation may intervene as of right pursuant to Rule 24(a) where he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless his interest is adequately represented by existing parties. Intervention is

permitted pursuant to Rule 24(b) where an applicant's claim or defense and the main action have a question of law or fact in common.

Plaintiffs have made no attempt to justify intervention under either provision beyond conclusory assertions that "the proposed intervenors have claims involving common questions of law or fact as those already in litigation," and that "the intervenors are situated so that their rights against defendants may as a practical matter be impaired or impeded if [they are] not made a party to the suit." See Plaintiff's Memorandum, pp. 12-13. Conclusory statements such as these do not satisfy the Third Circuit's requirement that an asserted interest be legal in nature and not of a "general and indefinite character," and that the applicant "do more than show that his or her interests may be affected in some incidental manner." Harris v. Pernsley, 820 F.2d 592, 601 (3rd Cir. 1987); see also School Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd., 160 F.R.D. 66, 68 (E.D. Pa. 1995). This Court has rejected similar applications for intervention where the movant did not adequately explain the interest of the intervenor which was allegedly at stake. School Dist. of Philadelphia, 160 F.R.D. at 68.

Furthermore, Plaintiffs have failed to satisfy the procedural requirements of Rule 24(c), which require that the person seeking to intervene (1) file a motion, (2) state the

grounds upon which intervention is sought, and (3) attach a pleading setting forth the claim for which intervention is sought. As neither Plaintiffs nor the proposed intervenors have complied with these requirements, we must deny the motion for intervention. See School Dist. of Philadelphia, 160 F.R.D. at 67 (denying motion to intervene for failure to attach pleading of proposed intervenor); Lexington Ins. Co. v. Caleco, Inc., No. 01-5196, 2003 U.S. Dist. LEXIS 1318 at 21, 2003 WL 21652163 (E.D. Pa. 2003) (same).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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v.	:	
	:	
CRESCENT HEIGHTS OF AMERICA, INC., et al,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 21st day of December, 2004, upon consideration of the Plaintiffs' Motion for Class Certification and to Add Additional Class Representatives, or, in the Alternative, Motion to Allow Intervention of Additional Plaintiffs (Doc. No. 40) and all responses thereto (Docs. No. 49, 50, 57, 71), it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

S/J. Curtis Joyner

J. CURTIS JOYNER, J.