THE COVE AT ST. CHARLES CONDOMINIUM ASSOCIATION,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
JWEST CORP., JAWEST CORP. F/K/A JWEST CORP., J. WEST CORPORATION, AND FREDERICK J. BAEHR, III A/K/A/ FRITZ BAEHR T/A F.J. BAEHR ARCHITECTS,	:	
Appellees	:	329 WDA 2013

Appeal from the Order Entered February 6, 2013,
in the Court of Common Pleas of Allegheny County,
Civil Division at No(s): GD 11-012910

BEFORE: PANELLA, ALLEN, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: February 13, 2014

The Cove at St. Charles Condominium Association (the Association)[1] appeals from the grant of summary judgment against it and in favor of JWest Corp., JAWEST Corp., and JWest Corporation (JWest).[2] Upon review, we affirm.

[1] The Association is a condominium association for The Cove at St. Charles (the Condominium) and was created under the Pennsylvania Uniform Condominium Act, 68 Pa.C.S. §§ 3101-3414 (the Act). In the Association's complaint, it avers it is bringing this lawsuit on behalf of itself as an association organized under the Act as well as on behalf of the individual unit owners.

[2] JWest is the developer and builder of the Condominium.

* Retired Senior Judge assigned to the Superior Court.

The situation that gave rise to the instant matter, as set forth in the complaint, is as follows. The Condominium consists of three separate buildings and a total of 23 individual units. All of the units were sold to individual owners between April 2002 and March 2006. In early 2008, one of the units at the Condominium was sold from its original buyer to a new buyer. The new buyer conducted a home inspection, removed a portion of fiber cement siding on the ground level porch privacy screen, and discovered wood rot caused by water infiltration in the wall and column structures. The Condominium's architect[3] then inspected the unit, observed the wood rot, and JWest repaired it. JWest then sent a letter to the secretary of the Association about the situation. JWest performed some additional work to repair the areas discovered to have wood rot in the spring of 2008. These areas included the decks connected to individual units, and are defined as common elements of the Condominium for which the Association is responsible for maintenance and repair.

In 2011, the Association entered into an agreement with a contractor to perform maintenance and repair work at the Condominium. That contractor alerted the Association that there was serious deterioration of wood that was hidden from view by wood trim and fiber cement siding, and advanced that the deterioration presented a safety hazard.

[3] Frederick J. Baehr a/k/a Fritz Baehr, and F.J. Baehr Architects (Baehr) is a licensed architect and was the architect for the Condominium. He is also a party to this action.

The Association gave JWest and Baehr notice of the latent construction defects, but JWest and Baehr refused to correct the problems themselves or pay for their correction. Thus, the Association filed the instant complaint against Baehr and JWest in August 2011 asserting causes of action for breach of contract, breach of warranty, negligence and misrepresentation against JWest, as well as negligence against Baehr.

Both JWest and Baehr filed preliminary objections to the complaint.[4] Notably, as to the Association's complaint against JWest, JWest asserted that the trial court should dismiss the tort claims under the gist of the action doctrine. In an order dated September 28, 2011, the trial court sustained JWest's preliminary objections and dismissed the negligence and misrepresentation counts of the Association's complaint.

After the pleadings were closed and discovery completed, JWest filed a motion for summary judgment against the Association. In that motion, JWest asserted that there was a two year warranty for these defects pursuant to the agreements of sale signed by individual unit owners upon purchasing these units. The agreements of sale between JWest (Declarant) and each Purchaser provided the following:

> 19. **WARRANTIES**
>
> a) At Closing Declarant will deliver to Purchaser Declarant's Unit Owners' Limited Warranty. A copy of the Unit Owners' Limited Warranty is contained in the Public Offering Statement supplied or to be supplied to Purchaser. Purchaser agrees to be bound by the terms and conditions of the Unit Owners' Limited Warranty.

[4] Baehr's preliminary objections were overruled on September 28, 2011.

b) Declarant will also provide a limited warranty on structural defects and common elements which is required by statute. The details of this warranty are set forth in the Unit Owner's Limited Warranty which is contained in the Public Offering Statement supplied or to be supplied to Purchaser.

c) THE FOREGOING WARRANTIES ARE EXPRESSLY IN LIEU OF ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BY WAY OF ILLUSTRATION AND NOT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, HABITABILITY, WORKMANSHIP, OR OF FITNESS FOR A PARTICULAR PURPOSE. DECLARANT NEITHER ASSUMES NOR AUTHORIZES ANY PERSON TO ASSUME FOR IT ANY OTHER LIABILITY IN CONNECTION WITH THE SALE OR USE OF THE UNIT SOLD HEREUNDER, AND THERE ARE NO AGREEMENTS OR WARRANTIES, EITHER ORAL OR WRITTEN, COLLATERAL TO OR AFFECTING THIS AGREEMENT.

d) DECLARANT SPECIFICALLY EXCLUDES ALL WARRANTIES OF MERCHANTABILITY, HABITABILITY, WORKMANSHIP, AND FITNESS FOR A PARTICULAR PURPOSE AND NEITHER MAKES OR ADOPTS ANY WARRANTY, EXPRESS OR IMPLIED, AS THE ITEMS OF PERSONAL PROPERTY BEING SOLD TO PURCHASER PURSUANT TO THIS AGREEMENT (OR AS TO ANY "CONSUMER PRODUCT" AS SUCH TERM IS DEFINED IN 15 U.S.C. SECTION 2301(1), WHICH MAY BE CONTAINED IN THE UNIT), EXCEPT THAT NO DISCLAIMER IS INTENDED AS TO ANY WARRANTY REQUIRED BY MUNICIPAL STATUTES, REGULATION OR ORDINANCES. WHEN NEW CONSUMER PRODUCTS ARE COVERED BY A MANUFACTURER'S WARRANTY, DECLARANT SHALL, SUBJECT TO THE PROVISIONS OF THIS SECTION, ASSIGN SAID MANUFACTURER'S WARRANTY TO PURCHASER.

e) The Warranty set forth herein shall not apply if the defective part of the Unit or Common Elements has been subject to misuse or damage by accident or has not been afforded reasonable care. The liability of Declarant under this warranty or for negligence or other breach of this Agreement is limited to replacing or repairing any defective parts or materials which do not comply with this Warranty and in no event shall the liability exceed the replacement cost of said defective parts or materials. In no event shall Declarant be liable to Purchaser for consequential damages arising from any reach of this Warranty or for the negligence of Declarant or other breach of this

> Agreement by Declarant. Declarant shall have the sole right to determine whether the defect will be corrected by repair or replacement, and Purchaser shall make every reasonable effort to make the Unit available to Declarant and its agents or invitees during normal business hours in order to permit such repair or replacement to be made.
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> f) No claim arising out of any of the foregoing Warranties may be brought, unless, prior to the expiration of the Warranty set forth herein, Purchaser shall have delivered written notice to the Declarant of all alleged breaches of this Warranty that would give rise to such a claim.

Agreement of Sale, Exhibit B to JWest's Motion for Summary Judgment, 7/23/2012, at ¶ 19 (capitalization in original).

The Unit Owner's Limited Warranty referenced in the agreement of sale provides the following, in relevant part.

> Except for this Limited Warranty, there is no express warranty of any kind given by JWEST in connection with the construction or sale of the UNIT or relating to the quality or condition of any part of the UNIT except as otherwise set forth in the Agreement of Sale. No officer, employee or agent of JWEST is authorized to grant any other express warranty or representation beyond the provisions of this Limited Warranty at any time.
>
> ***
>
> 2. One Year Limited Warranty on the Unit:
>
> JWEST warrants that the UNIT will be free from defects in workmanship and materials which appear at any time within one (1) year after the Settlement Date.
>
> 3. Statutory Warranties:
>
> JWEST hereby warrants against structural defects in each of the Units for two (2) years from the date each is conveyed to a bona fide Purchaser. JWEST also warrants against structural defects in the Common Elements for two (2) years. The two (2) years shall begin as to each of the Common Elements whenever the Common Element has been completed or, if later, at the time

> the first Unit in the Condominium has been conveyed to a bona fide purchaser. As used in this paragraph, the term "structural defects" means those defects in components constituting any Unit or Common Element which reduce the stability or safety of the Building in which the Unit is located below acceptable standards or restrict the normal intended use of all or part of the Building. Nothing in this paragraph shall be construed to make JWEST responsible for any items of maintenance relating to the Units or Common Elements. No action to enforce this warranty shall be commenced later than six (6) years after the warranty begins.
>
> ***
>
> **EXCEPT AS SET FORTH ABOVE, THE UNIT, THE COMMON ELEMENTS, AND ALL PERSONAL PROPERTY ARE BEING SOLD "AS IS" WITHOUT WARRANTY OR REPRESENTATION OF ANY KIND, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR HABITABILITY.**

Unit Owner's Limited Warranty, Exhibit B to JWest's Motion for Summary Judgment, 7/23/2012 (bold and capitalization in original).

With respect to summary judgment on the breach of contract claim, JWest argued that there was no contract between JWest and the Association; rather, the only contracts were between the individual unit owners and JWest. JWest argued in the alternative that even if the Association was a party to the contract, any lawsuit would be barred by the statute of limitations as it was commenced more than 4 years after the last unit was sold. As to the breach of warranty claim, JWest argued that a cause of action for breach of warranty had to have been filed by October 12, 2010, which was six years after the last unit was sold. JWest also argued that as a matter of law, no other warranties, express or implied, existed

outside of those in the agreements of sale and Unit Owner's Limited Warranty documents.

In an order dated September 5, 2012, the trial court granted summary judgment in favor of JWest and against the Association. On September 6, 2012, The Association moved for reconsideration of that order, and on September 10, 2012, the trial court granted reconsideration, continued the trial date, and permitted additional briefing. The trial court granted reconsideration limited to two issues: "1) whether the implied warranties were properly disclaimed and waived, and 2) whether the [Association's] negligence and misrepresentation claims could be revived at this point." Trial Court Opinion, 1/23/2013, at 1. On January 23, 2013, the trial court reinstated the grant of summary judgment in favor of JWest and against the Association. Upon request of the Association, on February 6, 2013, the trial court amended the order to be a final order pursuant to Pa.R.A.P. 341(c). The Association filed a timely notice of appeal to this Court.[5]

The Association first argues that the trial court erred in sustaining the preliminary objections in the nature of a demurrer on the negligence and misrepresentation claims or failing to revive those claims once the contract claims were dismissed. Specifically, the Association asserts that the "separate, voluntary, and later undertaking to repair on the part of" JWest

[5] On February 6, 2013, the trial court granted the Association's motion to certify those orders as final orders pursuant to Pa.R.A.P. 341(c), thereby making them appealable immediately. Those orders would not have been appealable as final orders otherwise because they did not dispose of all claims against all parties. Specifically, claims still remain against Baehr.

brought the claims outside the scope of the original agreements of sale. The Association's Brief at 17. Thus, it contends that it was error to conclude that these claims were included as part of the original agreements of sale. However, because the Association did not make this argument to the trial court, we conclude that it is waived. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In the Association's response to JWest's preliminary objections in the nature of a demurrer as to the negligence and misrepresentation claims, the Association argued only that James A. West, Jr. individually owed a separate duty to the Association. Response to Preliminary Objections, 9/28/2011, at 5-6.[6] Thereafter, in its attempt to revive these negligence claims after the trial court granted summary judgment with respect to the contract claims, the Association argued that because the Association cannot bring a contract claim against JWest, negligence claims could not be barred by the gist of the action doctrine. Motion for Reconsideration, 9/10/2012, at 5-6. Neither of these arguments suggests the concept that the separate undertaking to repair the defects by JWest created a separate cause of action for

[6] James A. West, Jr. is not a party to this lawsuit as he was not sued in his individual capacity.

negligence.[7] Accordingly, it would be improper to address that issue for the first time on appeal.

We now turn to the Association's contention that the trial court erred in granting summary judgment as to the warranty claims because the individual unit owners did not effectively waive the implied warranties set forth in the agreements of sale. The Association's Brief at 20-24. We set forth our well-settled standard of review from the grant of summary judgment.

> A motion for summary judgment should only be granted if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. An appellate court may reverse an order granting summary judgment where there is an error of law or an abuse of discretion. Because the question of whether a genuine issue of material fact exists is one of law, appellate review is de novo. In undertaking such review, the record is viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue exists are resolved against the moving party.

Smith v. Township of Richmond, __ A.3d __, 2013 WL 6598713 (Pa. 2013) (citation omitted).

Instantly, the trial court determined that the implied warranties were effectively disclaimed and waived by the unit owners because "the waiver

[7] This issue was mentioned briefly in one paragraph in the Association's "Response and Brief on Reconsideration in Opposition to the West Defendant's Motion for Summary Judgment" filed on October 2, 2012. In that brief, the Association asserted that a "reasonable jury could also find that these implied warranties extended to the work that West undertook in 2008 to reconfigure, repair and/or replace elements of the limited common elements." ***Id***. at 8. However, this sentence was briefed in the context of the breach of warranty claim, not an assertion that there was a separate cause of action for negligence or misrepresentation.

language was not buried or non-specific[.]" Trial Court Opinion, 1/23/2013, at 2. We agree.

> Pennsylvania law recognizes an implied warranty of habitability in contracts where builders-vendors sell new homes to residential purchasers. 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. Although the implied warranty may be waived by clear and unambiguous contract language, such language must be sufficiently particular to inform the home purchaser of the right he or she is waiving. 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.

Pontiere v. Dinert, 627 A.2d 1204, 1206 (Pa. Super. 1993) (internal quotations and citations omitted).

Instantly, the Association, relying on ***Pontiere***, ***supra***, as well as ***Tyus v. Resta***, 476 A.2d 427 (Pa. Super. 1984), contends that the waivers at issue in this case were legally insufficient in that they did not refer specifically to "latent defects." The Association's Brief at 22.

In ***Tyus***, ***supra***, this Court was asked for the first time to determine whether "builder-vendors can limit or disclaim the implied warranties." ***Tyus***, 476 A.2d at 431. The purpose of the implied warranties is to cover latent defects, those "which would not be apparent to an ordinary purchaser as a result of a reasonable inspection[.]" ***Id***. at 433. The disclaimer at issue in ***Tyus*** did not make any references to the implied warranties or latent defects. Thus, this Court held that the disclaimer was not effective because

it did "not refer to its impact on specific, potential latent defects and so does not notify the Buyers of the implied warranty protection they are waiving by signing the contract supplied by the Vendors." ***Id***. at 434.

The Association reads this case, as well as others, to say that the disclaimer must specifically refer to "latent defects." The Association's Brief at 23 ("At the very least, the Agreements of Sale and Limited Warranties **needed to use the phrase 'latent defect'** and **needed to define latent defect as a defect that would not be apparent by visual inspection**.") (emphasis in original). That is a misreading of these cases. The implied warranties of habitability, workmanship, and fitness for a particular purpose, are designed only to apply to latent defects. Thus, the disclaimer of these implied warranties is effective to disclaim liability for the latent defects these warranties cover. The Association makes no argument that the language used to disclaim these warranties was either buried in the contract or did not adequately put the buyers on notice that they were disclaiming these implied warranties. Thus, the trial court did not err in concluding that the disclaimers were legally sufficient, and the Association is not entitled to relief.

We next consider the Association's contention that the trial court erred in failing to "acknowledge the important public policy reflected in the rulings of the Supreme and [Superior Courts] on the recognition and enforcement of implied warranties of habitability and workman like construction." The Association's Brief at 24-26.

We observe that the Association did not raise this issue in its motion for reconsideration, and referred to it nominally in one sentence in its brief in support. ***See*** Response and Brief on Reconsideration in Opposition to the West Defendant's Motion for Summary Judgment, 10/2/2012, at 13 ("Such warranties … are imposed as a matter of public policy."). Thus, once again, we will not consider it for the first time on appeal. ***See*** Pa.R.A.P. 302(a).

Finally, the Association argues that the trial court erred in concluding that the Association itself could not bring a breach of warranty claim against JWest. The Association's Brief at 27-28. The trial court reasoned that a breach of warranty claim was not available to the Association as it was not a party to any of the agreements of sale. Trial Court Opinion, 9/4/2012, at 2. We agree.

The Association relies on this Court's holding in ***Spivack v. Berks Ridge Corporation***, 586 A.2d 402, 405 (Pa. Super. 1991) for the proposition that "[p]rivity of contract is not required to assert a breach of warranty claim against the builder of a new residential unit." In that case, the builder sold the unit first to a vendor, who then sold the unit to the first user. This Court held that "[w]here the builder knows or should know that that particular purchaser will not be the first user, as in the instant matter, any implied warranties must necessarily extend to the first user-purchaser[.]" ***Id***. Thus, this Court extended the implied warranties to the first user of the unit even though there was no privity of contract between that user and the builder. The Association asks this Court to extend that

holding to imply that the Association should be permitted to maintain a breach of warranty contract. We decline to do so.

We recognize that in ***Conway v. Cutler Group, Inc.***, 57 A.3d 155 (Pa. Super. 2012) *appeal granted*, 77 A.3d 1257 (Pa. 2013), a panel of this Court, for the first time, extended the implied warranty of habitability to a second or subsequent purchaser. This Court offered the following rationale for this extension.

> For example, if a given structural defect does not materialize until a home is five-years old, and the original purchaser is still occupying the home, he or she may recover under the implied warranty of habitability. However, if the same defect materializes when a home is five-years-old, but the original purchaser sold the home after the third year, the current homeowner cannot recover. We conclude that allowing such divided recovery based on whether the home is sold, a factor that is immaterial to whether a [d]efect ... [would be] apparent to the ordinary purchaser as a result of a reasonable inspection[,] would be inherently unfair.

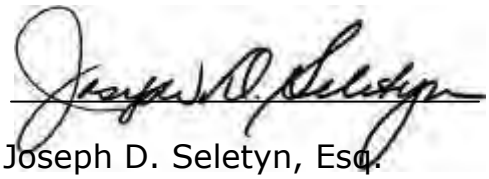
Conway, 57 A.3d at 162 (quotation omitted).

However, this rationale does not apply in the current situation. The Association itself is not a purchaser of a unit. Therefore, the implied warranty never applied to the Association in the first place and does not apply now. Accordingly, we hold the trial court did not err in concluding that the Association could not bring a cause of action for breach of warranty.

Having concluded that none of the Association's arguments afford it relief, the trial court did not err in granting summary judgment in favor of JWest.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/13/2014