

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

**MICHELLE GERMANO, DENNIS JACKSON,  
SHARON JACKSON, JASON DUNAWAY,  
LISA DUNAWAY, INDIVIDUALLY, AND  
ON BEHALF OF ALL OTHERS SIMILARLY  
SITUATED,**

**Plaintiffs,**

**v.**

**Civil Action No. 2:09cv202**

**TAISHAN GYPSUM CO. LTD. f/k/a  
SHANDONG TAIHE DONGXIN CO. LTD.,  
VENTURE SUPPLY, INC., HARBOR WALK  
DEVELOPMENT, LLC and THE PORTER-  
BLAINE CORP.,**

**Defendants.**

**BRIEF IN SUPPORT OF MOTION TO DISMISS  
PURSUANT TO RULE 12(b)(6) F.R.C.P.**

**Statement of the Facts**

The defendant, Harbor Walk, is the developer of a condominium project located in the Ocean View section of Norfolk, Virginia and sold the townhouse located at 8171 North View Boulevard, Norfolk, Virginia to the plaintiff, Michelle Germano. Contrary to the allegations of the First Amended Complaint, Harbor Walk Development, LLC did not build any of the structures located in the project and specifically did not purchase or install drywall in any of the homes located in the project, but rather contracted the work to Clark Whitehill Homes, LLC, an independent general contractor. Contrary to the naked allegations of the First Amended Complaint, Harbor Walk Development, LLC did not design, manufacture, export, import,

distribute, deliver, supply, inspect, market, sell or install the drywall involved in this litigation. It was solely the developer of the project. As a matter of law, the First Amended Complaint is fatally insufficient and otherwise fails to allege a cause of action for negligence, negligence per sé, breach of express and/or implied warranty, breach of contract, private nuisance, unjust enrichment, violation of the Consumer Protection Act and equitable relief as to this defendant.

### Argument

1. **AS A MATTER OF LAW COUNT I OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE A CAUSE OF ACTION FOR NEGLIGENCE BY REASON OF THE ECONOMIC LOSS RULE AND THE SOURCE OF DUTY RULE AS TO THIS DEFENDANT.**

The Supreme Court of Virginia has consistently ruled that losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts and that while the primary consideration underlying tort law is the protection of persons and property from injury, the major consideration underlying contract law is the protection of bargained for expectations. When a party alleges no more than disappointed economic expectation, the law of contracts, not the law of torts, provides the remedy for such economic losses. *Sensenbrenner v. Rust Orling & Neal Architects, Inc.*, 236 Va. 419, 424, 374 S.E. 2d 55, 58 (1988); *Rotunda Condo Owners v. Rotunda Associates*, 238 Va. 85, 90 (1989).

Further, the Supreme Court has strictly maintained a distinction between torts and contracts and has consistently held that in determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained, and if the act of omission or nonfeasance would not give rise to any cause of action in the absence of a contract, then the action is founded upon contract and not upon tort. While the Court has acknowledged that in

certain circumstances a party may show both breach of contract and a tortious breach of duty, the duty tortiously and negligently breached must be a common law duty, not one existing between the parties solely by virtue of contract. In its consistent refusal to turn every breach of contract into a tort, the Supreme Court of Virginia has established the rule that in order to recover in tort the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of contract. *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 207 S.E. 2d 344 (1998); *Filak v. George*, 267 Va. 612, 618 (2004); *Augusta Mutual Insurance Company v. Mason*, 274 Va. 199, 205 (2007).

The duties alleged in Count I as to this defendant, if they even exist as to this defendant, which is expressly denied, exist solely by virtue of contract and not common law, and accordingly, plaintiffs' sole cause of action for the economic losses alleged is for breach of contract. As a matter of law, the First Amended Complaint fails to allege a cause of action in tort for such losses. Further, as the First Amended Complaint alleges no factual basis for asserting that this defendant engaged in any activity with respect to the alleged defective drywall, as a matter of law, plaintiffs have alleged no cause of action as to this defendant for the damages and/or injuries alleged in Count I of the First Amended Complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 545, 570, 127 S.Ct. 1955, 167, L.Ed. 2d 929 (2007) (pleaded factual content must allow reasonable inference that defendant is liable for the misconduct alleged); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950, 173 L.Ed. 2d 868, 884 (2009) (legal conclusions must be supported by factual allegations that plausibly give rise to an entitlement to relief).

2. **AS A MATTER OF LAW COUNT II OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE ANY CAUSE OF ACTION FOR NEGLIGENCE PER SÉ AS TO THIS DEFENDANT IN THAT IT WHOLLY FAILS TO ALLEGE ANY STATUTORY DUTY OR ANY VIOLATION OF THAT STATUTORY DUTY BY THIS DEFENDANT.**

For the reasons set forth in response to Count I of plaintiffs' First Amended Complaint, Count II fails as a matter of law to state a cause of action against this defendant for negligence per sé. In addition, the First Amended Complaint does not allege the violation of a legislative enactment giving rise to a negligence per sé claim. The doctrine of negligence per sé represents the adoption of the requirements of a legislative enactment as a standard of conduct of a reasonable person. *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E. 2d 121, 122 (1967). Negligence per sé is the violation of a statute enacted for public safety where the plaintiff belongs to the class of persons for whose benefit the statute was enacted, the harm suffered was of the type against which the statute was designed to protect, and the statutory violation was a proximate cause of the injury. *Halterman v. Radisson Hotel Corp.*, 259 Va. 171, 176-77, 523 S.E. 2d 823, 825 (2000). Count II, however, fails to identify any statute enacted to protect the health, safety and welfare of the plaintiff which was violated by Harbor Walk proximately causing damage to the plaintiffs. Accordingly, Count II fails to allege a claim for negligence per sé.

3. **AS A MATTER OF LAW COUNT III OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE A CAUSE OF ACTION AS TO THIS DEFENDANT FOR BREACH OF EXPRESS AND/OR IMPLIED WARRANTIES AS TO THIS DEFENDANT.**

Count III of plaintiff's First Amended Complaint asserts generally that "all defendants installed, utilized, supplied, inspected, sold and/or installed this drywall" and expressly or impliedly warranted the product to be fit for the use intended. Plaintiffs provide absolutely no

factual basis for such an allegation as to Harbor Walk. The First Amended Complaint alleges neither the substance nor the source of any express warranty made by Harbor Walk, nor facts giving rise to any implied warranty on the part of Harbor Walk, and as a matter of law, is insufficient to state a cause of action against this defendant for breach of express and/or implied warranty. *Iqbal*, 129 S.Ct. at 1949-50; 173 L.Ed. 2d at 884-85. Further, the law in the Commonwealth of Virginia is clear that the conveyance of real estate carries no covenants except those expressly made and there are no implied warranties in the sale of homes by vendors to initial buyers whether the sale occurs before or after construction is completed. *Bruce Farms, Inc. v. Coup*, 219 Va. 287, 247 S.E. 2d 400 (1976). In the absence of specific factual allegations as to this defendant Count III of plaintiffs' First Amended Complaint fails to state a cause of action as to this defendant.

4. **AS A MATTER OF LAW COUNT IV OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE A CAUSE OF ACTION FOR BREACH OF CONTRACT AS TO THIS DEFENDANT.**

Count IV attempts to allege a claim for breach of contract on the grounds that plaintiffs' home was not free of defects. The First Amended Complaint, however, fails to set forth any contractual obligation on the part of Harbor Walk to provide plaintiffs with a defect-free home. The purchase agreement is not an exhibit to the contract and no language or provisions of the agreement are set forth in the First Amended Complaint. Plaintiffs' allegations, because they are mere conclusions, are not entitled to the assumption of truth and are insufficient to state a claim showing that plaintiffs are entitled to relief. *Iqbal*, 129 S.Ct. at 1949-50; 173 L.Ed. 2d at 884-85.

5. **AS A MATTER OF LAW COUNT V OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE A CAUSE OF ACTION FOR PRIVATE NUISANCE AS TO THIS DEFENDANT.**

Plaintiffs' First Amended Complaint fails to allege that this defendant in any way used its own property to injuriously affect the plaintiffs' property. Accordingly, as a matter of law, Count V fails to allege the basic elements of a cause of action for nuisance as to this defendant and therefore, fails to allege a cause of action for private nuisance. *Virginia Railway Company v. London*, 114 Va. 334, 344 76 S.E. 2d 306, 308 (1912). *Iqbal*, 129 S.Ct. at 1949-50; 173 L.Ed. 2d at 884-85.

6. **AS A MATTER OF LAW COUNT VI OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE ANY CAUSE OF ACTION FOR UNJUST ENRICHMENT AS TO THIS DEFENDANT.**

Unjust enrichment is a judicially created rationale for implying a contract where no express contract exists. *Dade v. Anderson*, 247 Va. 3, 7, 439 S.E. 2d. 253 (1994). It is well settled in Virginia that an express contract defining the rights of the parties necessarily precludes the existence of an implied contract of a different nature containing the same subject matter. The right of the parties are to be determined by the provisions of the express contract, and the law will not imply an agreement otherwise. *Southern Biscuit Company, Inc. v. Holts Lloyd*, 174 Va. 29, 6 S.E. 2d 601 (1940). The First Amended Complaint expressly alleges a written purchase agreement. If plaintiffs prove a breach, they would be entitled to damages arising from the breach of the contract breach, however, as a matter of law, they can't recover for unjust enrichment.

7. **AS A MATTER OF LAW COUNT VII OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE A VIOLATION OF THE CONSUMER PROTECTION ACT AS TO THIS DEFENDANT.**

Plaintiffs' First Amended Complaint fails to allege that this defendant had actual knowledge of any alleged defect at the time of settlement or possession of the premises by plaintiffs and fails to allege the date, the circumstances and the substance of any misrepresentation made by this defendant to the plaintiffs with respect to the drywall which is the subject of this litigation. Indeed, plaintiffs do not and cannot specifically allege that this defendant made any representations with respect to the drywall installed in their homes and accordingly, as a matter of law, plaintiffs' First Amended Complaint fails to allege facts plausibly entitling them to relief for a violation of the Virginia Consumer Protection Act as to this defendant. *Iqbal*, 129 S.Ct. at 1949-50; 173 L.Ed. 2d at 884-85.

8. **AS A MATTER OF LAW COUNT VIII OF PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS TO ALLEGE ANY ENTITLEMENT TO EQUITABLE OR INJUNCTIVE RELIEF OR MEDICAL MONITORING AS TO THIS DEFENDANT.**

Plaintiffs' First Amended Complaint seeks recovery of money damages for alleged injuries both present and future. The First Amended Complaint fails to allege that any such recovery would not provide a full and adequate remedy at law which is a prerequisite to injunctive relief. Further, as plaintiffs' First Amended Complaint fails to allege a cause of action against this defendant, it fails as a matter of law to allege any basis for the relief demanded.

WHEREFORE, the defendant, Harbor Walk Development, LLC, moves the Court for an order sustaining its Motion to Dismiss and dismissing this action as to this defendant.

/s/  
\_\_\_\_\_  
John Franklin, III, Esquire  
Virginia State Bar No. 13267  
James E. Brydges, Jr., Esquire  
Virginia State Bar No. 4420  
Brian N. Casey, Esquire  
Virginia State Bar No. 26710  
Attorneys for Harbor Walk Development,  
LLC  
TAYLOR & WALKER, P.C.  
Post Office Box 3490  
Norfolk, Virginia 23514-3490  
(757) 625-7300  
(757) 625-1504 (fax)  
[jfranklin@taylorwalkerlaw.com](mailto:jfranklin@taylorwalkerlaw.com)  
[jbrydges@taylorwalkerlaw.com](mailto:jbrydges@taylorwalkerlaw.com)  
[bcasey@taylorwalkerlaw.com](mailto:bcasey@taylorwalkerlaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of June, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Richard Serpe, Esquire  
Attorney for Plaintiffs  
Crown Center, Suite 310  
580 East Main Street  
Norfolk, Virginia 23510  
(757) 233-0009  
(757) 233-0455 (fax)  
[rserpe@serpefirm.com](mailto:rserpe@serpefirm.com)

Mark C. Nanavati, Esquire  
Virginia State Bar No. 38709  
Kenneth F. Hardt, Esquire  
Virginia State Bar No. 23966  
Attorneys for Venture Supply, Inc.  
and The Porter-Blaine Corporation  
Sinnott, Nuckols & Logan, P.C.  
13811 Village Mill Drive  
Midlothian, Virginia 23114-4365  
(804) 378-7600  
(804) 378-2610 (fax)  
[mnanavati@snllaw.com](mailto:mnanavati@snllaw.com)  
[khardt@snllaw.com](mailto:khardt@snllaw.com)

/s/ \_\_\_\_\_  
John Franklin, III, Esquire  
Virginia State Bar No. 13267  
James E. Brydges, Jr., Esquire  
Virginia State Bar No. 4420  
Brian N. Casey, Esquire  
Virginia State Bar No. 26710  
Attorneys for Harbor Walk Development,  
LLC  
TAYLOR & WALKER, P.C.  
Post Office Box 3490  
Norfolk, Virginia 23514-3490  
(757) 625-7300  
(757) 625-1504 (fax)  
[jfranklin@taylorwalkerlaw.com](mailto:jfranklin@taylorwalkerlaw.com)  
[jbrydges@taylorwalkerlaw.com](mailto:jbrydges@taylorwalkerlaw.com)  
[bcasey@taylorwalkerlaw.com](mailto:bcasey@taylorwalkerlaw.com)