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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ANDY J. LEE, and
KWUN LEE CO., INC.,

) Civil Action No 96-349.

Plaintiffs

v.

) **ORDER RE MOTION TO DISMISS
SECOND AND THIRD CAUSES
OF ACTION OF COUNTERCLAIM**

TAC INTERNATIONAL
CONSTRUCTORS, INC.,
J.G. SABLAN ROCK QUARRY,
CMS CONSTRUCTION AND
MATERIAL SUPPLY, INC.,
CENTURY INSURANCE COMPANY,
INC., and WINZLER & KELLY

Defendants

TAC INTERNATIONAL
CONSTRUCTORS, INC.,
ANTONIO T. LIM

Counterclaimants

v.

KWUN KEE CO., INC.

Counterdefendant

I.

INTRODUCTION

Andy J. Lee and Kwun Kee Co., Inc. (collectively "KKCI") filed an action to collect damages for breach of a construction contract and of an express warranty of construction against

FOR PUBLICATION

1 TAC International Constructor's Inc., Antonio T. Lim (collectively "TAC"),^{1/} J.G. Sablan Rock
2 Quarry, CMS Construction and Material Supply, Inc., Century Insurance Co., Ltd. and Winzler &
3 Kelly.

4 TAC counterclaimed, alleging the following causes of action: (1) breach of contract; (2) claims
5 under the CNMI Consumer Protection Act; and (3) abatement of a public nuisance.

6 KKCI filed the present motion to dismiss the second and third causes of action. The motion
7 came before this Court on regularly scheduled hearing on November 6, 1996.

8 9 II.

10 FACTS

11 The facts relevant to this Motion are as follows:

12 In July 1994, TAC contracted with KKCI to construct a 3-story commercial and residential
13 building in Garapan, Saipan (the "Building"). The Building was to be constructed primarily of
14 concrete. The plans specified that the minimum strength of the concrete would be 3,000 pounds per
15 square inch ("psi") for all concrete floors, beams, columns, and the roof. The plans for the Building
16 were reviewed and approved by the Commonwealth Department of Building and Safety.

17 KKCI asserts that testing done on the concrete in early 1995, showed strengths of 2,830 psi
18 to 4,280 psi. In July 1995, additional testing was done on the concrete, however, no sample met the
19 3,000 psi strength requirement. In November 1995, KKCI occupied the Building and leased other
20 units to commercial and residential tenants. KKCI alleges that soon after moving in, it began
21 experiencing problems with the building - including a leaking roof, mold and mildew.

22 In March 1996, KKCI hired a concrete testing company to do additional testing. KKCI alleges
23 that these tests showed concrete strengths of between 1,662 psi and 2,163 psi; significantly below the
24 required 3,000 psi. In May 1996, KKCI had additional tests conducted. KKCI alleges that these tests
25 again demonstrated that the concrete was well below the required strength.

26
27 ^{1/} Antonio T. Lim filed a motion for summary judgment which was granted on January 3, 1997.

1 TAC retained the engineering firm of Winzler & Kelly to inspect the Building. In May 1996,
2 Winzler & Kelly issued an opinion letter in which it concluded that the Building design was deficient.
3 Winzler & Kelly also concluded that “the building represents a significant seismic hazard and should
4 not be occupied in its present condition.”

5 On June 24, 1996 the Commonwealth Department of Public Works issued a letter which stated
6 that because of defective building materials, the Building must be vacated and demolished.^{2/}

7

8

III.

9

ISSUES PRESENTED

10 1. Does TAC have standing to file a claim under the CNMI Consumer Protection Act against
11 KKCI?

12 2. Does TAC have standing to file a claim for the Abatement of a Public Nuisance?

13

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IV.

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ANALYSIS

16 A. Does TAC, the Building contractor, have standing to file a claim under the CNMI Consumer
17 Protection Act against KKCI, the Building owner?

18 TAC filed a counterclaim under the Consumer Protection Act, Title 4, Division 5, Chapter 1
19 of the Commonwealth Code. The basis of its claim is that:

20 25. KKCI, in continuing to rent out space in the Project, and allow members of the
21 public to visit the premises knowing that the Project is unsafe, is engaged in unfair
22 competition and unfair and unlawful business practices.

22

23

24 ^{2/} The Court is concerned that the general public is being exposed to a potentially unsafe building.
25 The evidence before this Court indicates that as of the writing of this Order, the Building is still being
26 used for retail and residential purposes in spite of the June 24, 1996 directive from the Commonwealth
27 Department of Public Works to vacate and demolish the Building. To insure that the CNMI
Government is being adequately apprised of the situation, the Court is faxing copies of this Order to the
CNMI Department of Building and Safety and to the CNMI Department of Public Works. The Court
is confident that the appropriate public officials will keep public safety as the tantamount concern when
dealing with this situation.

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1 26. KKCI is placing TAC at risk of suit should the building collapse and people be
2 injured or killed.

3 27. This unfair, unlawful and unsafe business practice should be enjoined. Civil
4 penalties and attorney fees should be awarded to the conterclaimaint TAC.

5 Counterclaim at ¶¶25 - 27.

6 TAC argues that it is aggrieved and has standing to sue under the Consumer Protection Act
7 because:

8 TAC has been shorted \$130,000.00 on the construction contracted (sic), yet Kwun Kee
9 continues to collect rent. Kwun Kee's refusal to pay is directly related to the condition
10 of the building (or so Kwun Kee alleges). This is a direct relationship sufficient to
11 qualify TAC as aggrieved under the Consumer Protection Act.

12 Opposition at p. 11. Additionally, TAC argues that it is aggrieved because its "reputation as a builder
13 will be harmed" as being the builder of an unsafe building. Opposition at p. 11.

14 The intent of the Consumer Protection Act is to protect consumers:

15 The public interest requires that consumers be protected from abuses in commerce
16 which deprive them of the full value and benefit of their purchases of goods and
17 services or which deprive them regarding the availability and nature of goods or
18 services for sale.

19 4 CMC, Div. 5 § 5102.

20 Pursuant to § 5112 of the CNMI Consumer Protection Act "[a]ny person aggrieved as a result
21 of a violation of" the Act has standing to file suit. 4 CMC, Div. 5 § 5112. Section 5104(e) defines
22 a person as "natural persons, corporations, firms, partnerships, joint stock companies, and
23 associations or other organizations of persons." 4 CMC, Div. 5 § 5104(e). Thus, TAC, as a
24 corporation has standing to sue for violations of the Consumer Protection Act if it is a consumer.
25 Because consumer is not defined by the Act, its common meaning applies. Black's Law Dictionary
26 defines consumer as "one who uses economic goods and so diminishes or destroys their utilities;
27 opposed to producer." Black's Law Dictionary 389 (Revised 4th ed. 1968). Likewise, Webster's
28 Dictionary defines consumer as "one that utilizes economic goods." Webster's Third New
International Dictionary 490 (1966).

1 The cases reviewed by this Court, unanimously hold that a party must be a consumer before
2 it can have standing to sue under the respective state's Consumer Protection Act. *See, for example,*
3 *First National Bank of Anthony v. Dunning*, 855 P.2d 493 (Kan. 1993)(Consumer Protection Act not
4 available to plaintiff who was not a party to the loan contract in dispute), *Love v. Pressley*, 239 S.E.2d
5 574,583 (N.C. 1977)(apartment tenants within the term "consuming public"); *Commonwealth v.*
6 *Monumental Properties, Inc.*, 329 A.2d 812, 829 (Pa. 1974)(housing lessees are consumers), *Woods*
7 *v. Littleton*, 554 S.W.2d 662, 667 (Tex. 1977) (purchasers of house consumers within meaning of
8 Act.), *Bourland v. State*, 528 S.W.2d 350, 358 (Tex.1975) (Investors in a resort and retirement
9 community held to be consumers within the Act.) Likewise, in all of the cases cited by TAC, being
10 a consumer is a prerequisite to filing suit under a Consumer Protection Act. *See Harstad v. Frol*, 704
11 P.2d 638, 643 (Wash.1985)(Property owner had standing to sue broker who fraudulently induced
12 owner to sell property), *McRae v. Bolstad*, 676 P.2d 496 (Wash.1984)(Home buyer is a consumer),
13 *Wade v. Jobe*, 818 P.2d 1006, 1015 (Utah 1991)("Tenant is a consumer of housing."), *Holeman v.*
14 *Neils*, 803 F.Supp. 237 (D.Ariz. 1992)(Real estate investor a consumer) *Mason v. Mortgage America,*
15 *Inc.*, 792 P.2d 142 (Wash. 1990)(Buyers of mobile home are consumers), *Masure v. Donnelly*, 962
16 F.2d 128 (1st Cir. 1992)(Buyers of home are consumers), *Ai v. Frank Huff Agency, Ltd.*, 607 P.2d
17 1304, 1310-11 (Hi. 1980)(Debtor and signator to promissory note is a consumer; "Plaintiffs [must]
18 allege that injury occurred to personal property through a payment of money wrongfully induced),
19 *Peery v. Hansen*, 585 P.2d 574, 577 (Az. 1978)(Purchaser of bicycle shop is a consumer).

20 TAC's reliance on the CNMI Consumer Protection Act to assert a claim in this contractual
21 dispute is misplaced. TAC does not allege, nor do the facts support a finding, that it is a consumer
22 under the terms of the Consumer Protection Act. TAC is not a former, current or prospective tenant
23 of the Building; TAC is the building contractor responsible for constructing the building.
24 Consequently, the Court finds that TAC does not have standing to bring a suit under the CNMI
25 Consumer Protection Act.

26
27 B. Does TAC have standing to file a claim for the Abatement of a Public Nuisance?

1 In its Counterclaim, TAC asserts as its third cause of action the abatement of a public nuisance.
2 A public nuisance is defined by the RESTATEMENT (SECOND) OF TORTS § 821B as any
3 unreasonable interference with a right common to the general public.^{3/} KKCI cites numerous cases
4 for the proposition that an individual must allege special damages to maintain a public nuisance claim.
5 TAC cites no cases to counter KKCI's position. Instead of citing authority, TAC alleges that "it
6 would be absurd if a builder could do nothing to protect the public, when it discovers that . . . it has
7 built an unsafe structure." Opp. at 12.

8 The authorities cited by KKCI demonstrate that an individual has no standing to sue for a
9 public nuisance unless the individual suffered damages from the alleged nuisance distinctive from the
10 damages suffered by the general public. As explained in *Armory Park v. Episcopal Community*
11 *Servs.*, 712 P.2d 914, 918 (Ariz. 1985):

12 [t]he rationale behind this limitation was two-fold. First, it was meant to relieve
13 defendants and the courts of the multiple actions that might follow if every member of
14 the public were allowed to sue for a common wrong. Second, it was believed that a
harm which affected all members of the public equally should be handled by public
officials. RESTATEMENT [(SECOND) OF TORTS] § 821C comment a.

15 Thus, in *Armory Park*, the court held that a residents' group had standing to sue a community center
16 on a public nuisance theory because the property rights of the individual resident group members were
17 impacted more directly than the property rights of the general public. *Id.* See also, *Smicklas v. Spitz*,
18 846 P.2d 362, 366 (Okl. 1992)("[Plaintiff] argues that when a private person seeks abatement of a
19 public nuisance, it must be shown that the injury is specifically injurious to the person's rights before
20 an injunction will issue. We agree."); *Hay v. Dept. of Transportation*, 719 P.2d 860, (Or. 1986)(No
21 public nuisance because "plaintiffs did not allege injuries special to their property beyond any injury
22 to the general public."); *Erickson v. Sorensen*, 877 P.2d 144, 149 (Utah 1994)(A public nuisance
23 action by an individual is appropriate only "when the private plaintiff has suffered damages different
24 from those of society at large.")

25
26 ^{3/} In contrast, a private nuisance is strictly limited to an interference with an individual's interest
27 in the enjoyment of real property. The Restatement defines a private nuisance as "a nontrespassory
invasion of another's interest in the private use and enjoyment of land." RESTATEMENT, *supra*,
§ 821D.

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In its Counterclaim TAC alleges:

29. The Project Building is unsafe and inhabitable(sic) primarily because of its design defects and is in danger of injuring tenants, passersby and members of the public, including counterclaimants, who visit the premises and pass it by.

30. The building should be repaired or remediated immediately and in the meantime there should be no tenants and no members of the public allowed in or near the building.

31. Counterdefendant has refused and failed to take reasonable steps to remediate the building, to abate the public nuisance, or to protect tenants, passersby and visitors despite warnings from counterclaimant and others to do so. This failure and refusal puts the public, including counterclaimants, at risk of physical reputational, and emotional harm.


Counterclaim at ¶¶ 29-31.

TAC does not allege that it has suffered any special damages distinctive from the alleged damages suffered by the general public. Consequently, the Court finds that TAC has no special interest in any alleged or perceived potential injury from the Building and thus, TAC has no standing to maintain a claim for public nuisance.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

KKCI's Motion to Dismiss the Second and Third Causes of Action is **GRANTED**.

So ORDERED this 14th day of January, 1997.


ALEXANDRO C. CASTRO, Presiding Judge