SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

RICHARD SHEALY, SHERRY SHEALY, LAUREN SHEALY, EMILY SHEALY, and ASHLEY TURNER,	)
Plaintiffs,	)
vs.	) CASE NO. ST-09-CV-619
WEST INDIES MANAGEMENT CO., INC., d/b/a WIMCO, McANDERSON REAL ESTATE INC., d/b/a McLAUGHLIN ANDERSON LUXURY VILLAS, ALABAMA WORLD TRAVEL INC., CORAL GARDENS LLC, VILLA CORAL GARDENS LLC, SANZABAL LLC, JOHN DOE 3, JOHN DOE 4,	)
Defendants.	)

MEMORANDUM OPINION

Pending before the Court is Defendant West Indies Management Company, Inc.'s ("WIMCO") renewed motion for summary judgment.[1] For the following reasons, Defendant's motion will be granted.

FACTUAL AND PROCEDURAL HISTORY

On April 1, 2002, Villa Coral Gardens, LLC hired McAnderson Real Estate, Inc., d/b/a McLaughlin Anderson Luxury Villas, to "carry on the management and rental of [a private villa] known as Coral Gardens,[2] located at 9-2-25 Estate Peterborg"[3] on St. Thomas. Also in April of 2002, Villa Coral Gardens, LLC entered into an almost identical contract with McLaughlin to "carry on the management and rental of [a private

[1] WIMCO filed its motion on May 20, 2011; Plaintiffs filed their opposition on August 30, 2011; and WIMCO filed a reply on September 16, 2011.
[2] There is evidence that Coral Gardens, LLC is the record owner of Coral Gardens, which is located at 9-2-24 Estate Peterborg. See Werner Scott deposition, at pages 21 and 22.
[3] Vacation Rental Management Agreement, at page 1.

villa] known as Secret Gardens, located at 9-2-25 Estate Peterborg."[4] McLaughlin engaged Defendant WIMCO to "arrange rentals of," as well as promote and advertise, both properties.[5] WIMCO is a Rhode Island company that markets and arranges reservations for vacations in private homes and villas. Bernice Young, a relative of Plaintiffs, used Alabama World Travel ("AWT") to book a vacation on St. Thomas on behalf of Plaintiffs. AWT contacted WIMCO to reserve the two private villas.[6] On January 3, 2008, Plaintiffs and their family members, fourteen in all, gathered on the deck of the Coral Gardens villa for a family photograph. At that moment, the deck collapsed hurtling Plaintiffs to the rocks below and causing extensive injury to them. On December 30, 2009, Plaintiffs filed a Complaint against Defendants, which was amended on June 3, 2010. On November 30, 2010; August 4, 2011; and October 4, 2011, the Court issued orders dismissing Plaintiffs' claims against Defendants McLaughlin, AWT, Coral Gardens LLC, Villa Coral Gardens LLC, and Sanzabal LLC, which left WIMCO as the lone Defendant remaining in this case.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Rule 7 of the Rules of the Superior Court, provides that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

[4] There is evidence that Villa Coral Gardens, LLC is the record owner of Secret Gardens. See Werner Scott deposition, at pages 21 and 22
[5] Nancy Anderson affidavit, at 1 and 2.
[6] WIMCO memorandum of law, at 4.

judgment as a matter of law." In considering a motion for summary judgment, a court must "draw … all reasonable inferences from the underlying facts in the light most favorable to the non-moving party." *Battaglia v. McKendry*, 233 F.3d 720, 722 (3d Cir. 2000). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

ANALYSIS

Plaintiffs assert that Defendant owed them a duty of care on several grounds: as a lessor under Restatement (Second) of Torts § 359; as an agent of the possessor of the property under Restatement (Second) of Torts § 383; as an entity that negligently performed an undertaking under Restatement (Second) of Torts § 324A; and as an entity that made intentional or negligent misrepresentations under Restatement (Second) of Torts § 552.

Pursuant to Restatement (Second) of Torts § 359, a lessor:

> who leases land for a purpose which involves the admission of the public is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession, if the lessor (a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and (b) has reason to expect that the lessee will admit them before the land is put in safe condition for their reception, and (c) fails to exercise reasonable care to discover or to remedy the condition, or otherwise to protect such persons against it.

Section 359 is an exception to the general rule that a lessor is "not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." Restatement

(Second) of Torts § 356. Under sections 359 and 356, a transfer of possession of the property from the lessor to the lessee is involved. A possessor of land is defined as:

> (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Restatement (Second) of Torts § 328E.

As a manager of the property, McLaughlin was obligated to "arrange and oversee, *as required by Owner*, periodic inspection of the Property." (emphasis added). (*Id.*, at page 3). The owner was obligated to "pay all costs and charges for maintenance, goods, replacement, and repairs and/or services provided to the Property." *Id.* The Rental Management Agreement lists Defendant as one of the "travel wholesalers & major companies presently working directly with McLaughlin." (Vacation Rental Management Agreement, Addendum A). Defendant's representative Michael Bowers indicated that "wholesalers are a group of distribution partners for hotels, cruise lines, villa companies … who market to the travel agency community." (Bowers deposition, at page 26). In exchange for their services, wholesalers get a "wholesale commission." *Id.*

The terms of the agreement do not indicate that the owner of the property had relinquished complete control of the property to McLaughlin. Assuming, *arguendo*, that the owner effectively transferred possession and control of the property to McLaughlin so that McLaughlin would qualify as a possessor of the property, there is no indication that McLaughlin in turn transferred possession and control of the property to Defendant. Plaintiffs have only presented invoices from Defendant stating that Bernice Young had a reservation with WIMCO/McLaughlin Anderson Villas and have provided testimony that Defendant's employees inspected the property on two occasions. Plaintiffs have presented no evidence that Defendant had the ability to invite or exclude people, including Plaintiffs, from the premises, two essential rights that reflect control and possession of property. Rather, Defendant contacted McLaughlin to request a reservation for the property, which suggests McLaughlin, not Defendant, controlled the property. (Nancy Anderson affidavit, at page 2). In this sense, Defendant acted as a middleman between McLaughlin, the property manager, and AWT, the travel agent. Defendant received payment for the vacation trip, arranged transportation for Plaintiffs, and recommended chefs to Plaintiffs, among other things. (Richard Shealy affidavit, at page 3). Construing the facts in the light most favorable to Plaintiffs, there is no evidence that Defendant possessed the property, and the Court finds that Defendant did not owe Plaintiffs a duty of care under Restatement (Second) of Torts § 359.

Plaintiffs also assert Defendant is subject to liability under Restatement (Second) of Torts § 383. Pursuant to that section:

> one who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

An agent must "exercise reasonable care to avoid injuring persons whom the possessor has, without his knowledge, invited or permitted to enter if the place in which he carries on his activities is one to which the possessor is likely to admit licensees and the activity is carried on at a time during which it is likely that licensees will be admitted." *Id.*, comment b.

Young's reservation with WIMCO/McLaughlin Anderson Villas and the Agreement listing Defendant as a wholesaler suggest an agency relationship between Defendant and McLaughlin. A mere agency relationship between McLaughlin and Defendant, however, does not subject Defendant to liability under Restatement (Second) of Torts § 383. See *Schwartz v. Hilton Hotels Corp.*, 639 F.Supp.2d 467, 473 (D.N.J. 2009) (an agent is not "subject to liability for torts committed by the agent's principal that do not implicate the agent's own conduct; there is no principle of 'respondeat inferior'").

Section 383 only applies "to harm done by some act done or activity carried on upon the land." *Id.*, comment c. There is no evidence that Defendant collected rental fees from Plaintiff, arranged transportation for Plaintiffs, or recommended chefs to Plaintiffs while on the premises, nor could have those activities created the dangerous condition that caused Plaintiffs' injuries. The record reflects that the only activities Defendant carried out on the property were visits on two occasions to familiarize its employees with the layout and amenities of the villa. Plaintiffs argue that Defendant's visits were inspection visits, and Defendant's failure to discover any dangerous conditions in the villa's deck constitutes negligence.

In this instance, *Esposito v. Emery*[7] is instructive. In that case, a student was injured when a bank of lockers fell on him while on school premises. The court found that the school's principal and head custodian did not have a duty to inspect the lockers reasoning that the maintenance supervisor and the supervising principal of the school district were the people tasked with discovering and correcting dangerous conditions on

[7] 266 F.Supp.219 (E.D.Pa. 1967) aff'd 402 F.2d 878 (3d Cir. 1968).

the school premises. The Court noted that the functions of the school principal and head custodian were to "administer the teaching program" and to "keep the premises clean," respectively. *Id.*, at 222. Therefore, despite their managerial positions at the school, the school principal and head custodian had functions separate and distinct from the functions of the maintenance supervisor and the supervising principal. Moreover, the court found there was no evidence that the maintenance supervisor and supervising principal delegated their authority to inspect and maintain the school premises to the school principal or head custodian or sought advice or information from them with respect to maintenance issues. *Id.*, at 221.

There is no evidence that either McLaughlin or the owner of the property delegated to Defendant its authority to inspect and maintain the property or that either entity relied on Defendant to notice dangerous structural conditions on the premises when Defendant visited the property on two occasions. Instead, the record reflects that Defendant occupied a marketing or travel agent role on the premises. Accordingly, Defendant did not owe Plaintiffs a duty of care under Restatement (Second) of Torts § 383.

Plaintiffs also contend Defendant is subject to liability under Restatement (Second) of Torts § 324A, which indicates that:

> one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The Third Circuit has determined that Restatement (Second) of Torts § 324A(a) requires a showing of a "sin of commission" rather than a "sin of omission." *Turbe v. Government of the Virgin Islands*, 938 F.2d 427, 432 (3d Cir. 1991). In *Turbe*, the Court found that the Virgin Islands Water and Power Authority's failure to inspect and repair a street light did not increase the risk of harm to the victim because the risk of harm would have been the same if WAPA had not provided the street light to begin with. Similarly, Defendant, during its visits to the property, did not increase Plaintiffs' risk of harm through its failure to discover the dangerous condition of the deck. Accordingly, Plaintiffs have not presented evidence showing there is a genuine issue of material fact as to a duty Defendant purportedly owed to them under Restatement (Second) of Torts § 324A(a).[8]

When interpreting Restatement (Second) of Torts § 323(b), a companion section to Restatement (Second) of Torts § 324A(c), the *Turbe* court also determined that a plaintiff must show actual reliance on a defendant's actions and an indication that the plaintiff forewent other protective measures in response to the defendant's actions. *Turbe, supra*, at 431. The Court noted that in "suits alleging negligent inspection by public entities '[r]eliance on the inspection in general is not sufficient. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves.'" *Id.*, (quoting *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 807 (Minn. 1979)).

[8] Although representations could be considered "sins of commission" as they are affirmative acts, it appears that the Restatement (Second) of Torts § 324A does not treat representations as undertakings that, if negligently performed, increase a risk of harm to a third person. Instead, Restatement (Second) of Torts § 324A(c) specifically covers representations in circumstances where reliance is induced.

Plaintiff Richard Shealy asserts that the "leasing agents told" Plaintiffs that the "Villas held 24 people." (Richard Shealy affidavit, at page 1). He also asserts that the reservation for Plaintiffs' trip "stated the capacity of the listed property on the reservation had a maximum capacity of 24 guests." (*Id.*, at 4). The invoice itself lists "Coral Gardens Beach Estate + Secret Gardens" as having a maximum capacity of twenty-four people. (Plaintiffs' opposition, exhibit 10). AWT employee Marrilee Foukal submits an affidavit indicating Defendant told her that the properties were "suitable" for fifteen people. (Foukal affidavit, at page 2). Shealy also points out that Defendant's website indicates that Defendant's "inspection process of visiting and evaluating each villa guarantees that a match is made for each client's expectation of value." (Richard Shealy affidavit, exhibit 1). The website also indicates that "as well as providing accommodation and destination information, [Defendant] can tailor make the villa holidays to suit each client's need." (*Id.*). A USA Today review of Defendant listed on Defendant's website also states that Defendant's "customer support includes agents who help make the right villa match, inspectors who make sure each villa is up to snuff and on-island personnel who are available for help during a rental." (Richard Shealy affidavit, exhibit 2).

Plaintiffs have not alleged or provided evidence that they forewent other protective measures in response to Defendant's representations. Accordingly, Plaintiffs have not raised a genuine issue of material fact concerning a duty owed to them by Defendant under Restatement (Second) of Torts § 324A(c).

Plaintiffs may establish a prima case of liability under Restatement (Second) of Torts § 324A(b) by showing:

> (1) that defendant ... affirmatively undertook to render services for [a third party], which [the third party] was required to perform for [plaintiff]; (2) that [defendant] should have recognized that these services were necessary for the protection of [plaintiff]; (3) that [defendant] failed to exercise reasonable care in performing these services; and (4) that this failure caused physical harm to [plaintiff].

Thompson v. Hanna Mining Co., Inc., Civ. A. No. 86–5726, 1987 WL 10123, at *1 (E.D. Pa. 1987).

Without a showing that Defendant assumed McLaughlin and/or the owner of the property's duty to maintain the premises, or that Defendant was delegated that authority, Plaintiffs cannot recover under Restatement (Second) of Torts § 324A(b). See *West v. U.S.*, 361 U.S. 118, 123 (1959) ("[i]t appears manifestly unfair to apply the requirement of a safe place to work to [a party who] has no control over the [premises] or the repairs"). Construing the facts in the light most favorable to Plaintiffs, Defendant's representations on its website only indicate that Defendant's inspection process was done for the purpose of meeting a "client's expectation of value." Granted, a client's expectation of value could include the expectation that the premises are safe. A vacation villa that is unsafe is arguably worthless despite all of its luxurious amenities. Nevertheless, Plaintiffs have not presented prima facie evidence showing that Defendant inspected the premises for the benefit of the possessor of the property, McLaughlin and/or the owner of the property, who is obligated to ensure the premises are properly maintained. As a result, there is no genuine issue of material fact concerning Defendant's purported duty to Plaintiffs under Restatement (Second) of Torts § 324A(b).

Finally, Plaintiffs argue that Defendant owed them a duty under Restatement (Second) of Torts § 552(1), which provides that a person who:

> in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552 is a "restricted rule of liability" applicable in situations when "the harm that is caused is only pecuniary loss." *Id.*, comment a. Restatement (Second) of Torts § 525 indicates that Chapter 22 of the Second Restatement, which includes both sections 525 and 552, only applies to:

> pecuniary loss resulting from a fraudulent misrepresentation, and not physical harm resulting from the misrepresentation. As to the latter, see § 557A, which also covers economic loss deriving from the physical harm.

Id, comment h. Considering that Plaintiffs are seeking economic damages deriving from physical harm, Plaintiffs cannot recover under Restatement (Second) of Torts § 552(1).

Assuming, *arguendo*, that Plaintiffs were mistaken in their reliance on Restatement (Second) of Torts § 552(1) and intended to rely on Restatement (Second) of Torts § 557A in support of their theory of liability, section 557A provides that a person who:

> by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other.

Comment a to Section 557A indicates that the rule for fraudulent misrepresentation is more particularly described in Restatement (Second) of Torts § 310. Section 310 provides that:

> an actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third

> person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.

Construing the facts in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have not presented prima facie evidence that Defendant is subject to liability under Restatement (Second) of Torts § 557A. As described with more particularity with respect to Plaintiffs' argument under Restatement (Second) of Torts § 324A(c), the chief representations Defendant made were that the properties had a maximum capacity of twenty-four guests, that the properties were suitable for fifteen people, that Defendant inspected each property for value, and that Defendant makes sure each villa is "up to snuff." Plaintiffs have not presented any evidence that Defendant had actual knowledge that the Coral Gardens deck would likely collapse if fourteen people stood on it. In addition, no reasonable jury could conclude that Defendant should have known that its statements "involved an unreasonable risk of harm or that the physical safety of others depended on the accuracy of the information [Defendant] gave." *Lempert v. Singer*, 766 F.Supp. 1356, 1367 (D.V.I. 1991). A statement about the maximum number of people permitted on the premises is not, in and of itself, a statement that expresses knowledge of the safety of the premises. See *Id.*, at 1367 ("misrepresentations concerning the condition … of a piece of real property, without more, are not the sort that ordinarily involve an unreasonable risk of bodily harm"). Had Defendant certified that the deck could withstand the weight of a specific number of people, this type of statement could be considered a misrepresentation if Defendant did not have knowledge of the statement expressed. However, in this case, the representations Defendant made about the number of people on the property related to the entire property and were not certifications that each portion of the property, no matter how small, could accommodate and withstand the weight of fifteen to twenty-four people.

Similarly, had Defendant specifically represented that the property was safe, Defendant could be subject to liability under Restatement (Second) of Torts § 557A for professing knowledge it did not have. Here, however, Defendant's statements about the inspections on the property relate to a client's "expectation of value" and do not express knowledge about the safety of the premises. Defendant's statements, when combined, also cannot be construed to express knowledge of the safety of the premises.

Defendant could also be subject to liability under Restatement (Second) of Torts § 557A if Defendant did not disclose a fact which Defendant had a duty to disclose. In order to show that Defendant is liable under this portion of section 557A, Plaintiffs needed to present prima facie evidence showing that Defendant knew the deck was structurally impaired but did not disclose this information, which Plaintiffs have failed to do.

Construing the facts in the light most favorable to Plaintiffs, Plaintiffs have not presented prima facie evidence indicating that Defendant is subject to liability under Restatement (Second) of Torts §§ 359, 383, 324A, 552(1) and 557A. As a result, Defendant is entitled to judgment as a matter of law with respect to Counts I, II, III and IV of Plaintiffs' Complaint.

In Count V, Plaintiffs brought a claim for breach of contract. In order to prevail on a claim for breach of contract, a plaintiff must establish: "(1) the existence of a contract between the parties; (2) that the defendant breached a material duty imposed by that contract; and (3) that damages resulted from the breach." *George v. V.I. Lottery Comm'n*, S.Ct. Civ. No. 2009-0066, 2010 WL 5156652, at *3 (V.I. 2010).

Plaintiffs assert that confirmation letters addressed to Bernice Young[9] constitute a contract between Defendant and Young of which Plaintiffs were third party beneficiaries. Assuming, *arguendo*, that the letters created a valid contract, the letters do not contain any contractual provisions that would obligate Defendant to inspect and maintain the Coral Gardens villa. Although Plaintiffs rely on statements on Defendant's website as evidence of a duty to inspect and maintain the premises, these statements are not incorporated by reference into the letters. "With a contract, the document to be incorporated must be referred to and described in the contract in such a way that the document's identity is clear beyond doubt." *TDY Industries, Inc. v. National Freight Transp., Inc.*, Civ. No. 07-984, 2009 WL 691947, at *20 (W.D. Pa. 2009) (quoting Black's Law Dictionary (8th ed. 2004)). In addition, even if the Court were to assume that the confirmation email[10] is a document that is part of the agreement between Defendant and Young, the "24 guest max" language in the email is not an ambiguous statement that would require the Court to look beyond the four corners of the contract and review other extrinsic material, such as the contents of the website. See *Elbrecht v. Carambola Partners, LLC*, Civ. No. 1:08-cv-00021, 2010 WL 2813614, at *4 (D.V.I. 2010) ("[i]t is

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[9] Exhibit 2 to Nancy Anderson's affidavit.
[10] Exhibit 1 to Nancy Anderson's affidavit. The email does not indicate who sent the email and who received the email.

axiomatic that where the language of a contract is clear and unambiguous, it must be given its plain meaning"). The plain meaning of the "24 guest max" phrase does not impose a contractual duty upon Defendant to maintain the premises. Accordingly, Plaintiffs have not presented any evidence of breach of contract, and Count V must be dismissed on this ground.

In addition, Count V is barred by the gist of the action doctrine, which "maintain[s] the barrier between tort and contract claims." *DiPietro v. Glidewell Laboratories*, Civil No. 1:CV–07–1591, 2011 WL 5403568, at *2 (M.D. Pa. 2011). See also *Craig v. Amateur Softball Ass'n of America*, 951 A.2d 372, 377 (Pa. Super. Ct. 2008) (applying the gist of action doctrine to a situation where a party was recasting his negligence claim as a contract claim); *Kerlinsky v. Main Line Hospitals, Inc.*, Civ. No. 10–04404, 2011 WL 3497303, at *3 (E.D. Pa. 2011) ("where an implied contract claim duplicates the negligence claim in a medical-malpractice case, the court must strike the contract action"). Plaintiffs' attempt to re-characterize their negligence claims as a contract claim "does not, in of itself, create a genuine issue of material fact appropriate for a jury's consideration." *Craig,* 951 A.2d at 377. Accordingly, Defendant is entitled to judgment as a matter of law on Count V.

An Order consistent with this Opinion shall follow.

Dated: December 5, 2011

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:
Donna D. Donovan 12/6/11

SUPERIOR COURT OF THE VIRGIN ISLANDS

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Defendants.	)	

ORDER

Upon consideration of the premises, it is hereby

ORDERED that Defendant West Indies Management Company, Inc.'s renewed motion for summary judgment is GRANTED; and it is

ORDERED that the parties shall advise the Court in writing of any other issues outstanding in this matter by December 16, 2011, failing which this case is dismissed with prejudice; and it is

ORDERED that copies of this Order shall be directed to counsel of record.

Dated: December 5, 2011

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court 12/6/11

by: Donna D. Donovan 12/6/11