

Puffery

vs.

DTPA



COUNSEL'S CORNER

Paul Kramer builds houses in Tarrant County. Expensive houses. He built a \$2 million house for Melissa and Scot Hollmann.

As construction progressed, the house developed a moisture leak. Kramer sent an email to the Hollmanns telling them not to worry because it had been fixed.

After the Hollmanns moved into the house, it developed additional moisture problems involving the windows, HVAC and roof. The Hollmanns continued to receive assurances from Kramer, but when mold moved in the Hollmanns moved out.

And then in 2010 the lawsuits started.

Hollmanns asserted claims against the architect and several subcontractors, and then added Kramer for violations of the Texas Deceptive Trade Practices Act, breach of contract, breach of warranty and negligence. Most of the parties settled before trial, but not Paul Kramer.

The jury awarded approximately \$1 million in damages to the Hollmanns after finding that Kramer engaged in false, misleading or deceptive acts. The trial court rendered judgment for the plaintiffs. Paul Kramer appealed.

Kramer's appeal was primarily based on the theory of "*puffery*." That is, that the statements he made and emails he sent contained merely his own opinions, not factual representations.

The trial court found that Kramer told the Hollmanns that the house would be a "*magnificent home with a quality level rarely seen in Tarrant County*," that it would be a "*kick butt house*," that "*this is going to be a really great house*," that it would be "*one of the finest homes in the city*" and that the Hollmanns would be "*pleased as punch*."

The Court of Appeals, perhaps after checking with Urban Dictionary or their 13-year old children, decided quickly that the term "*kick butt house*" and "*pleased as punch*" are slang terms comprising opinions, not statements of fact or factual representations.

The Court further advised that Kramer's claim that the house will be "*really great*" is too indefinite to constitute an actionable misrepresentation.

Then the Court took a hard look at the other two statements made by Kramer: "*magnificent home with a quality level rarely seen in Tarrant County,*" and "*one of the finest homes in the city.*"

Careful evaluation and consideration of previous Texas appellate decisions led the Court of Appeals to decide that these statements were also subjective impressions and did not contain specific representations. Consequently and according to Texas law, all five statements were mere puffery and expressions of opinion – not representations of fact.

But wait there's more. Kramer made other statements such as "*Please don't worry about the leak that was recently fixed,*" and "*We feel very strongly we have now identified the problem. Moisture in the walls by the leak will be handled immediately and will not pose a future problem . . . [T]he sills are the culprit*" and "*You can be sure that any nonsense associated with the resolution of all open issues will cease as of this moment.*"

I think it was Kramer's claim that "*there is nothing inherently wrong with the house*" that likely put the Hollmanns over the edge, after the house had been infested with mold. The Hollmanns vacated one month later.

The jury found that the latter statements were actionable under the DTPA. The trial court agreed, as did the Court of Appeals.

Hollmanns win. Kramer loses.

See *Kramer v. Hollmann*; 02-22-00136-CV; Texas Court of Appeals 2nd District, Fort Worth; November 21, 2012.

Lessons learned:

1. There is a thin line between statements of opinion and statements of fact or representations.
2. Although not part of this case, TREC agents and brokers can be held liable and accountable for their statements of fact and misrepresentations, as can Texas property owners, builders, developers, contractors, sellers and landlords.
3. Paul Kramer filed for bankruptcy protection on December 31, 2012, in Case Number 12-46996-DML-11, US Bankruptcy Court Northern District of Texas, Fort Worth Division. So, sometimes even when you are sure you have won . . . you haven't really.

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