No. 21-CV-612

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

LADONNA MAY, *et al*.,
APPELLANTS,

V.

RIVER EAST AT GRANDVIEW, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

*CARL J. SCHIFFERLE
Deputy Solicitor General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6624
carl.schifferle@dc.gov

*Counsel expected to argue

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Regulations

Other Authorities

STATEMENT OF THE ISSUES

Through its Housing Production Trust Fund, the District of Columbia provided financial assistance to private developers to build an affordable housing project—a 46-unit condominium complex on Talbert Street, SE. Plaintiffs purchased units in the complex from the developers, only to discover within weeks of moving in that their units needed significant repairs due to structural defects. With the problems worsening over time and the developers unable to remedy them, plaintiffs eventually brought this suit against the developers, the District's Department of Housing and Community Development ("DHCD"), and the condominium unit owners' association. Regarding plaintiffs' claims against the District, the issues presented are:

1. Whether the trial court properly dismissed the Consumer Protection Procedures Act claims where plaintiffs failed to provide proper and timely notice under D.C. Code § 12-309, the District is not a merchant or otherwise subject to liability under that act, and plaintiffs failed to adequately allege that the District engaged in an unlawful or deceptive trade practice.

2. Whether the trial court properly dismissed the D.C. Human Rights Act claims because plaintiffs have no plausible claim that the District had a practice of funding structurally unsound housing, let alone that such practice was based on the race and sex of residents.

3. Whether the trial court properly dismissed the breach of contract claims because the express language of the agreement between the developers and the District precluded plaintiffs' third-party beneficiary theory and, in any event, plaintiffs failed to adequately allege that the District breached the agreement.

4. Whether the trial court properly dismissed the intentional infliction of emotional distress claims because the claims are barred under Section 12-309 and the allegations do not rise to the level of extreme and outrageous conduct required to state such a claim.

STATEMENT OF THE CASE

Plaintiffs LaDonna May, Ade Adenariwo, Britney Bennett, Theresa Brooks, Davina Callahan, Denine Edmonds, Ciera Johnson, Robin McKinney, and Jaztina Somerville bring this suit arising from structural defects in new condominium units that they purchased. They sued the developers Stanton View Development, LLC ("Stanton") and its assignee RiverEast at Anacostia, LLC ("RiverEast"); DHCD; and the River East at Grandview Condominium Unit Owners' Association ("Owners' Association").[1] On August 19, 2021, the trial court dismissed the claims against DHCD and severed the claims against Stanton and RiverEast, which had both filed for

[1] The present case was consolidated with an earlier suit, *RiverEast at Anacostia, LLC v. SGA Companies, Inc.*, No. 2020 CA 4070, brought by Stanton and RiverEast against various contractors hired to work on the project. 3/31/21 Order.

bankruptcy. App. 235. On August 26, the court dismissed the claims against the Owners' Association. App. 253. Plaintiffs timely appealed on September 1.

STATEMENT OF FACTS

1. The Consumer Protection Procedures Act.

The Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq*., "creates a cause of action for consumers to seek redress of unlawful trade practices." *Snowder v. District of Columbia*, 949 A.2d 590, 598 (D.C. 2008). It covers "trade practices arising only out of consumer-merchant relationships." *Id*. at 599. A "merchant" means:

> a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice.

D.C. Code § 28-3901(a)(3). It is a violation of the CPPA "to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby," including by "represent[ing] that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another." *Id*. § 28-3904(d). The District's Attorney General is also authorized to bring suit and take other actions to enforce the CPPA. *Id.* § 28-3909. The statute "affords a panoply of strong remedies, including treble damages, punitive damages and attorneys' fees."

Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 717 (D.C. 2003); *see* D.C. Code § 28-3905(k)(2).

The Council of the District of Columbia recently enacted emergency legislation that, in relevant part, added a new subsection, D.C. Code § 28-3901(e), to the CPPA providing:

> Notwithstanding any other provision of this chapter, this chapter's application to landlord-tenant relations shall include the District of Columbia Housing Authority's activities as a landlord; *provided, that this subsection shall not be construed to otherwise apply this chapter to the District of Columbia or any agency thereof*.

Housing Authority Accountability Emergency Amendment Act of 2022, D.C. Act 24-629, § 3, 69 D.C. Reg. 14026, 14029 (Nov. 11, 2022) (emphasis added). As the Council explained, this subsection was not intended as a change to existing law. Housing Authority Accountability Emergency Declaration Resolution of 2022, Res. 24-650, § 2(j)-(k), 69 D.C. Reg. 13451, 13453 (Nov. 4, 2022). It merely "make[s] clear" that the D.C. Housing Authority was incorrect in contending, in pending litigation, that it is not subject to the CPPA. *Id*. Instead, the Housing Authority—an independent, sui juris agency and one of the District's largest providers of rental housing—"must follow the same consumer protection standards as all other landlords." *Id*.[2]

---

[2] The Council also just passed a temporary version of this legislation. Housing Authority Accountability Temporary Amendment Act of 2022, Bill 24-1050. The

2. The Housing Production Trust Fund.

The Housing Production Trust Fund ("HPTF") is a special revenue fund, administered by DHCD, that provides financial assistance to developers to build affordable housing in the District. D.C. Code § 42-2802. It receives funding from a dedicated portion of real property transfer and recordation taxes, as well as from other sources like the District's general fund. *Id.* § 42-2802. Although the funds must be spent on the production of housing for households earning up to 80 percent of the area median income ("AMI"), the vast majority of funds are to be targeted to very low income (between 30 and 50 percent of AMI) and extremely low income (less than 30 percent of AMI) households. *Id.* § 42-2802(b-1).

Periodically, DHCD announces the availability of HPTF assistance and the requirements for applying for such assistance. 10B DCMR § 4106.5. While both for-profit and non-profit developers may apply, priority is given to non-profit developers. *Id*. § 4106.3. Financial assistance often includes bridge loans or "gap financing," which covers the shortfall between other sources that developers use to build

---

applicable date of the new subsection, D.C. Code § 28-3901(e), is December 19, 2016, the effective date of the At-Risk Tenant Protection Clarifying Emergency Amendment Act of 2016, D.C. Act 21-576, 63 D.C. Reg. 15695 (Dec. 23, 2016), which was ultimately enacted as permanent legislation and "explicitly authorized both consumers and the Attorney General for the District of Columbia to initiate CPPA actions in the context of landlord-tenant relations." Res. 24-650, § 2(g), 69 D.C. Reg. at 13452 (citing D.C. Code §§ 28-3905(k)(6), 28-3909(d)); *see* D.C. Act 24-629, § 4, 69 D.C. Reg. at 14029.

affordable housing—including federal tax credits and subsidies—and the actual costs of building. D.C. Code § 42-2802(b)(4). However, loans or grants from the HPTF may not constitute more than 49 percent of the total development costs. 10B DCMR § 4104.4(a).

Developers may receive financial assistance to build rental housing as well as for-sale units. D.C. Code § 42-2802.02. In the case of for-sale units, they "shall be continuously affordable for a period of at least 15 years from the date of loan settlement." 10B DCMR § 4107.2(c)(1); *see* D.C. Code § 42-2802.02(b). DHCD is authorized to record restrictive covenants and liens on the properties to secure HPTF loans, thereby ensuring that loan recipients and owners of HTPF-funded housing units keep the housing affordable for the required time period. 10B DCMR §§ 4104.4(b), 4112.5.

3. The Factual Allegations.

On September 12, 2014, the District, though DHCD, and RiverEast, as the assignee of Stanton, agreed that the District would loan about $6.3 million in HPTF funds for RiverEast to build 46 affordable housing units at 1260-1272 Talbert Street, SE. App. 6 (¶¶ 16-17), 91, 97. Under the terms of the loan agreement, those units—originally intended as rental units—had to be reserved for households earning up to 80% of AMI. App. 93. The loan agreement was evidenced by a note and secured by a deed of trust. App. 92.

The loan agreement had a "no third party beneficiaries" provision, stating the agreement's terms and provisions "are for the benefit of the parties hereto, and no other person shall have any right or cause of action on account hereof." App. 112. The agreement further provided:

> All acts, including any failure to act, relating to the Property by any agent, representative or designee of the [District] are performed solely for the benefit of the [District] to assure repayment of the Loan and are not for the benefit of [RiverEast] or for the benefit of any other person, including without limitation, HPTF eligible tenants or other occupants.

App. 106.

On April 6, 2017, the District and RiverEast modified the deed of trust, note, and loan agreement. App. 127. Under the modification, the units would be homeownership units, with 43 units reserved for households not exceeding 80% of AMI and three units for households up to 50% of AMI. App. 130-31. After selling the units, RiverEast would repay the District nearly $1.9 million of the approximately $6.3 million loan. App. 131; *see* App. 147. To ensure that the housing remained affordable during the requisite 15-year period, the remainder of the loan would be proportionately divided into DHCD Homebuyer Loans. App. 133-34. At the closing of each sale, the purchaser would execute a note evidencing the Homebuyer Loan, secured by a second deed of trust. App. 134. The Homebuyer Loan would be an interest-only loan, at zero percent interest, for a 15-year term. App. 134. At the end of each year of the loan, 1/15 of the original principal would be forgiven. App. 134.

In other words, over time, the remaining portion of the loan would essentially become a grant to the homeowner, helping them to afford the unit.

Around the same time, RiverEast adopted bylaws to provide for the self-government of the condominium and establish the Owners' Association. App. 298-369.

Plaintiffs—black, female, first-time homebuyers—purchased their newly constructed condominium units from Stanton and/or RiverEast between July 2017 and January 2019. App. 6-47. At the time of purchase, each plaintiff executed a note and second deed of trust reflecting the DHCD Homebuyer Loan. App. 156-70. Under the terms of the note, if the purchaser resold the unit within the 15-year loan period or it ceased being her primary residence, the District could demand payment of the outstanding balance unless the subsequent purchaser was also income eligible. App. 157-58.[3] Plaintiffs also acknowledged the HPTF Program's Affordability Covenants between RiverEast and the District, as amended in June 2017, similarly reflecting that the units "shall remain affordable to and owned by an Eligible Purchaser for a period of fifteen (15) years." App. 171, 180, 182. As first-time homebuyers with low-to-moderate incomes, plaintiffs received additional assistance from DHCD's Home

---

[3] The subsequent purchaser would be required to assume the note and second deed of trust, or execute new ones for the remaining balance of the note. App. 157. Allowance would be made if the current owner desired to resell the property but was unable to secure an income-eligible buyer. App. 157-58.

Purchase Assistance Program ("HPAP"), which provides interest-free loans and helps pay closing costs for qualified purchasers. *E.g.*, App. 7 (¶¶ 22-23); *see* D.C. Code § 42-2601 *et seq*.

Plaintiffs allege that, "within days or weeks of moving into their brand new home," they "realized that there were substantial issues related to the units." App. 6 (¶ 19). They state that Stanton and/or RiverEast repeatedly told them "that the issues were the result of normal and standard settling and to wait until the end of their one-year warranty period for the repairs to be completed." App. 6-7 (¶ 19). Nevertheless, plaintiffs continued to "suffer from severe and exacerbated structural and foundational defects that existed at the time of purchase and were never adequately corrected or repaired." App. 6-7 (¶ 20). These defects caused "large openings and gaps in the walls, cracks in the floors, slanted floors, leaking pipes, water damage, mold, raw sewage odor, and defective windows and doors." Br. 16-17 (citing App. 7-54).

In March 2019, plaintiff May made a warranty claim with DHCD for the structural defects in her unit. App. 13 (¶ 43); *see* D.C. Code § 42-1903.16(b) (requiring a condominium developer to "warrant against structural defects in each of the units for 2 years from the date each unit is first conveyed to a bona fide purchaser, and all of the common elements for 2 years"). She then "learned that neither Stanton nor River[E]ast had posted the requisite warranty security." App. 13 (¶ 44); *see* D.C. Code § 42-1903.16(e) (requiring condominium developer to secure its warranty

obligations by posting a bond in the amount of 10 percent of the estimated construction costs). In July, the Owners' Association submitted its warranty claims. App. 13 (¶ 47). The next month—"over two years *after* the construction" had been completed—the developers posted the required warranty bond valued at $436,937. App. 13 (¶ 46). On review, DHCD awarded the full amount of the security bond to the Owners' Association. App. 264-65; Owners' Association Supp. Mem. Regarding Mot. to Dismiss, Ex. C.

Plaintiff May alleges that, around October 2019, she "reached out to" the District's Department of Consumer and Regulatory Affairs ("DCRA") for assistance with her housing problems. App. 13 (¶ 49). A DCRA inspector visited her unit and cited her for violations of the Property Maintenance Code for failing to repair the structural defects. App. 13-14 (¶¶ 50-52). The inspector explained that if May had been a tenant, then the landlord/owner would have been the one cited "for an uninhabitable property." App. 14 (¶ 51). When May challenged the citations before the Office of Administrative Hearings, DCRA voluntarily dismissed the citations with prejudice. App. 15 (¶ 56); Mot. for Prelim. Inj., Ex. D.

In July 2020, plaintiff May, through counsel, sought the assistance of the District's Office of the Attorney General ("OAG"), writing that "residents have repeatedly reported these [structural] issues to the owner/builder with no relief." App. 194-95; *see* App. 15 (¶ 57). Stating that the residents "deserve to have the

owner/builder held responsible," she requested that the Attorney General use "the power of your office" to address the issue. App. 194-95. The Chief Deputy Attorney General promptly responded, detailing OAG's ongoing efforts to engage with the developers, who had already reported spending substantial sums on repairs. App. 196-97. As the Chief Deputy Attorney General explained, OAG was "not pursuing an enforcement action at this time because cooperation has proven productive and there are some legal barriers to filing a lawsuit." App. 197. He further noted that plaintiff May's unit "raises serious health and safety concerns beyond what any other resident is facing" and encouraged her "to consider a private lawsuit under the CPPA." App. 15 (¶ 57); *see* App. 197.

4. Plaintiffs' Claims And DHCD's Motion To Dismiss.

Plaintiffs filed their complaint in January 2021. Claiming violations of the CPPA, plaintiffs asserted "Stanton and/or River[E]ast misrepresented to [them] the quality of the condominium units' construction, the cause and remedy for the defects from the poor quality of construction, misled and/or deceived [them] regarding the quality and standards of the construction and/or renovation," and made "other misleading and unfair representations." App. 54 (¶ 358). Plaintiffs further asserted that DHCD had committed unspecified "unfair and deceptive trade practices" under the CPPA because it had "funded, promoted, and facilitated the substandard construction of the Grand View Condominiums by Stanton and/or River[E]ast." App.

55 (¶¶ 363-65). As part of their CPPA claim, plaintiffs also contended that Stanton, RiverEast, and DHCD "failed to ensure compliance with applicable codes and regulations related to the construction of the subject properties." App. 55 (¶ 364).

As to their other claims against DHCD, plaintiffs contended that the agency "discriminated against [them] on the basis of their race, sex, and/or income status" in violation of the D.C. Human Rights Act ("DCHRA"). App. 56 (¶ 373). In particular, DHCD allegedly "den[ied] them affordable quality housing that was safe and structurally sound as was provided to" others who were white, male, or "not required to seek housing through affordable housing programs." App. 56 (¶¶ 373-77). Plaintiffs also brought a breach of contract claim, asserting that DHCD "failed to enforce or implement" its contractual provisions with the developers, including "the warranty against structural defects security bond, property inspections, and/or certificates of occupancy." App. 61 (¶ 411). Plaintiffs claimed that they were third-party beneficiaries of these provisions. App. 62 (¶ 412). Finally, plaintiffs claimed intentional infliction of emotional distress as a result of the structural defects and plaintiff May's receipt of citations for failing to make repairs to her unit. App. 67-69 (¶¶ 460-69).

DHCD moved to dismiss the complaint, arguing that it is non sui juris and that substitution of the District would be futile because plaintiffs had no viable claim against the District. DHCD argued that plaintiffs could not assert a CPPA claim

against the District because it is not a "merchant" under the act and, even if it were, plaintiffs identified no unlawful trade practice by the District. Mot. to Dismiss 8-9. DHCD further contended that plaintiffs provided no facts to support their conclusory allegations of discrimination in violation of the DCHRA; their breach of contract claim foundered on the express language of the loan agreement precluding third-party beneficiaries; and they failed to allege the "outrageous conduct" required to support an intentional infliction of emotional distress claim. Mot. to Dismiss 10-14.

DHCD's motion also argued that plaintiffs failed to provide notice of their claim under D.C. Code § 12-309. The motion included an affidavit from the District's Office of Risk Management that it had no record of a notice related to any of the plaintiffs' claims in this case. Mot. to Dismiss, Ex. D. As DHCD argued, the failure to comply with the statutory notice requirement independently barred plaintiffs' claims under the CPPA and for intentional infliction of emotional distress. Mot. to Dismiss 12-13; Reply 5.

Responding to the argument that DHCD was non sui juris, plaintiffs' opposition requested that the District be substituted for DHCD or, "[i]n the alternative," that plaintiffs be given leave to file an amended complaint. Opp. 2. Regarding Section 12-309, plaintiffs offered evidence that they had notified DHCD of the structural issues as early as August 2018. Opp. 16 (citing App. 201). They also noted that, on January 9, 2019, plaintiff May, through counsel, emailed DHCD for assistance after

the developers' ineffective attempts to correct the issues with her unit; two days later DHCD responded that it was "looking into the issues" and "consulting with DHCD counsel." Opp. 16 (citing App. 210-12).

To further support compliance with Section 12-309, plaintiffs claimed that plaintiff Johnson emailed an investigator in OAG's Office of Consumer Protection on October 8, 2019 with a structural engineering report stating that "the root of [residents'] problems stem from the foundation of the property." App. 217-18; *see* Opp. 17.[4] At the time, the OAG investigator was scheduling a walk-through of the property to assist the residents in getting the developers to fix the issues. App. 219-20. The investigator also advised that he "always tell[s] homeowners or associations" to "take the necessary steps to preserve their rights and consult their private attorney in case the remedies that state agencies [sic] aren't to their liking." App. 220. Plaintiffs' opposition further relied on the email exchange between plaintiff May and the Chief Deputy Attorney General in July 2020. Opp. 18 (citing App. 194-97).

---

[4] OAG's Office of Consumer Protection "investigates complaints from consumers in the District regarding potential violations of District consumer protection laws, and when appropriate files suits against businesses that are taking advantage of District residents" and "also helps consumers resolve disputes with merchants without legal action." OAG Consumer Protection, https://oag.dc.gov/consumer-protection.

5. The Order Dismissing DHCD.

By omnibus order of August 19, 2021, the Superior Court dismissed the claims against DHCD. It found that DHCD is non sui juris and declined to substitute the District as a defendant because plaintiffs "have failed to state a claim for which they could recover from the District." App. 241. Relying on *Snowder*, 949 A.2d 590, the court concluded that the "law is clear that the District is not a 'merchant' under the CPPA." App. 242. It reasoned that DHCD "did not create a merchant-customer relationship with Plaintiffs" but "simply loaned them money and funded the construction of the condominium units." App. 243.

The court dismissed the DCHRA claim against DHCD. App. 243-44. As the court explained, plaintiffs' complaint lacked factual support for the allegation that DHCD "provides safer and more structurally sound construction, as well as substantively timelier responses and repairs to individuals in other areas of the District that are [] substantially more white, higher income, and with male heads of households." App. 244 (quoting App. 57 (¶ 377)). The court also noted that "each Plaintiff received funding" through DHCD to purchase her property and that "no Plaintiff was denied any services by DHCD." App. 244.

The court found that plaintiffs also failed to state a breach of contract claim against DHCD. App. 245-46. Although plaintiffs insisted that DHCD "failed to enforce or implement the contractual provisions" that it had with the developers, the

court found the plaintiffs' argument that they were third-party beneficiaries "unconvincing." App. 245. The court noted the express language of the loan agreement between DHCD and the developers that there were no third-party beneficiaries. App. 245. Although plaintiffs claimed this was "boilerplate" language contradicted by other language in the agreement, they "d[id] not identify any specific contradictory language." App. 245-46. The court also concluded that "plaintiffs have failed to [plead] facts showing that DHCD breached any terms of the contract." App. 246.

With respect to the intentional infliction of emotional distress claim against DHCD, the court first concluded that "Plaintiffs have not provided notice to the Mayor as required under [Section 12-309]." App. 247. Even assuming sufficient notice, the court found that plaintiffs still "have not pled facts showing . . . outrageous and atrocious conduct." App. 247. Citing a property owner for failing to repair her property—as in the case of plaintiff May, whose citations were later dismissed—"cannot be considered utterly intolerable in a civilized society." App. 247.[5]

[5] Plaintiffs had also moved for a preliminary injunction against the District, but the court denied the motion as moot given its dismissal of the claims against the District. *See* 8/24/21 Order.

6. Post-Complaint Developments.[6]

Meanwhile, on August 16, 2021—shortly before dismissal of plaintiffs' complaint—structural engineers from the Falcon Group, hired by the Owners' Association, advised that their preliminary investigation found damage "consistent with differential building settlement, which may occur when building foundation systems and/or founding soils become compromised." Mot. for Prelim. Inj., Ex. F at 1. Falcon Group recommended that most residents vacate their condominium units due to safety concerns. River East at Grandview Condominium Property Tax Exemption Emergency Declaration Resolution of 2022, Res. 24-649, 69 D.C. Reg. 13449 (Nov. 4, 2022). "The District government developed multiple assistance programs in response to the displacement of these homeowners," including cash assistance payments to each homeowner, housing certificates to pay the rent for homeowners who relocate to rental properties, and "other resources to ease the transition into temporary residence until appropriate repairs are made." Res. 24-649, 69 D.C. Reg. at 13449. In addition, the District exempted the homeowners from property taxes. *Id.*; River East at Grandview Condominiums Property Tax Exemption

---

[6] The following facts were introduced by the plaintiffs below and are also contained in legislative enactments, of which the Court may take judicial notice. *See Bostic v. District of Columbia*, 906 A.2d 327, 332 (D.C. 2006) (explaining that the Court may take judicial notice of "laws, statutes, and other matters of public record").

Emergency Amendment Act of 2022, D.C. Act 24-636, 69 D.C. Reg. 14181 (Nov. 18, 2022).

STANDARD OF REVIEW

This Court "review[s] *de novo* a trial court's dismissal of a complaint for failure to state a claim upon which relief can be granted." *Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 99 (D.C. 2018). To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *id.* (internal quotation marks omitted), and "the factual allegations must be enough to raise a right to relief above the speculative level," *id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (brackets omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "When there are well-pleaded factual allegations, a court should assume their veracity," *id.* (quoting *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011)); however, "that tenet does not extend to 'a legal conclusion couched as a factual allegation,'" *id*. (quoting *Iqbal*, 556 U.S. at 678). "Bare allegations of wrongdoing that are no more than conclusions are not entitled to the assumption of truth, and are insufficient to sustain a complaint." *Id.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of the claims against the District.[7]

1. The trial court properly dismissed the CPPA claims on any of three independent grounds. First, plaintiffs failed to provide notice of their claims under D.C. Code § 12-309. Their purported notices to OAG were deficient because the statute requires that notice be provided to the Mayor or her designee, the Office of Risk Management. In addition, those communications with OAG did not give notice of any potential claim against the District, as opposed to the developers who built and sold the units with structural issues. The purported notices were also untimely, being provided well over six months after plaintiffs were aware of serious structural defects in their units.

Second, the District is not a merchant to which the CPPA applies. This Court has expressly held as much, and the Council confirmed that holding in recent emergency legislation. Specifying that the D.C. Housing Authority—an independent, sui juris agency—is subject to the CPPA, the emergency legislation clarified that the CPPA "shall not be construed to otherwise apply . . . to the District of Columbia or any agency thereof." D.C. Act 24-629, § 3, 69 D.C. Reg. at 14029. Even apart from

---

[7] For ease of reference, this brief will hereafter refer to the government defendant as the District rather than DHCD, which is non sui juris.

this precedent and statutory text, the District would not be a merchant simply by dispensing government funds in carrying out a governmental function.

Third, even if those other obstacles to a CPPA suit could be overcome, the complaint fails to adequately allege that the District engaged in an unfair or deceptive trade practice. Plaintiffs' conclusory allegation that DHCD "funded, promoted, and facilitated" the developers' substandard construction of the housing units—based on the mere use of government funds to help create affordable housing—provides no basis to infer an unlawful trade practice by the District.

2. Plaintiffs also fail to state a claim under the D.C. Human Rights Act. Their conclusory allegation that the District has a practice of denying quality affordable housing based on race, sex, and other protected characteristics lacks any factual support in the complaint. The assertion that the District has a practice of funding unsafe and structurally unsound housing is implausible in itself, and the further assertion that the District bases such a practice on the race and sex of residents simply adds another layer of implausibility. Plaintiffs' complaint offers no examples, comparisons, or any factual allegations whatsoever to support its bare-bones claims of discrimination. Although plaintiffs allege that OAG failed to assist them in remedying the problems with their units, they introduced facts that OAG (and the District generally) *did* provide such assistance, and nothing suggests that OAG's

failure to bring its own CPPA action against the developers was the product of discrimination rather than legitimate enforcement discretion.

3. Plaintiffs' breach-of-contract claim similarly lacks merit. The express terms of the agreement between the developers and the District foreclose the theory that plaintiffs are intended third-party beneficiaries. For example, the "no third party beneficiaries" provision states that the agreement's terms "are for the benefit of the parties hereto, and no other person shall have any right or cause of action on account hereof." Moreover, plaintiffs fail to identify a specific contractual provision at issue or how it was breached. Even if the allegations could otherwise suffice, plaintiffs are asserting at most that the District failed to enforce the *developers'* obligations under the contract, but that would permit a claim only against the developers as the parties in breach. It would not permit suit against the District.

4. Finally, the trial court properly dismissed the intentional infliction of emotional distress claims. Those claims are barred under Section 12-309 for essentially the same reasons as the CPPA claims. Alternatively, the allegations against the District do not rise to the level of extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress.

ARGUMENT

I. The Superior Court Properly Dismissed The Claims Against The District Under The Consumer Protection Procedures Act.

A. Plaintiffs' failure to comply with Section 12-309 bars the Consumer Protection Procedures Act claims.

Plaintiffs' CPPA claims against the District first fail under D.C. Code § 12-309. That provision bars an action against the District "for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given written notice to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage." D.C. Code § 12-309. Since 2004, the Mayor has delegated the function of receiving notice to the District's Office of Risk Management. Mayor's Order 2004-10, 51 D.C. Reg. 1455 (Feb. 6, 2004); *see* Mayor's Order 2004-77, 51 D.C. Reg. 5280 (May 21, 2004). Section 12-309 further provides: "A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section." As this Court has explained, "compliance with the statutory notice requirement is mandatory," and the statute is "to be construed narrowly against claimants." *Owens v. District of Columbia*, 993 A.2d 1085, 1088 (D.C. 2010) (noting

that Section 12-309 broadly applies to all claims for unliquidated damages "without making any distinction between common law and statutory claims").[8]

1. The purported notice was deficient as to recipient, contents, and timeliness.

Here, plaintiffs did not provide written notice of their claims to the Mayor or the Office of Risk Management prior to filing suit. They nevertheless argue that they satisfied Section 12-309 through communications with OAG seeking its assistance in holding the developers responsible for fixing the structural problems with their units. Br. 42-44. This argument is misplaced for at least three reasons: the notice was not received by the Mayor or her designee, did not provide a basis for District liability, and was untimely in any event.

First, the purported notice "was not sent to the proper authority, the Mayor, as the section requires." *Braxton v. Nat'l Cap. Hous. Auth.*, 396 A.2d 215, 217 (D.C. 1978). Although plaintiffs cite earlier case law that "written notice to the Corporation Counsel" suffices "because he defends such actions for the District," *Hirshfeld v. District of Columbia*, 254 F.2d 774, 776 (D.C. Cir. 1958), the Mayor has since delegated a different agency (the Office of Risk Management) to receive notice, *see* Mayor's Order 2004-10. This renders such prior case law inapplicable here. Moreover, as this Court has repeatedly emphasized, "police reports are the only

[8] Subsequently, the Council amended Section 12-309 to exclude claims under the D.C. Human Rights Act. D.C. Code § 12-309(b).

acceptable alternatives to a formal notice" to the Mayor, and the Court "is not free to go beyond the express language of the statute and authorize any additional documents to meet its requirements." *Doe by Fein v. District of Columbia*, 697 A.2d 23, 28 (D.C. 1997) (holding that police reports could not be supplemented by information in the files of the Office of the Corporation Counsel); *see, e.g.*, *District of Columbia v. Ross*, 697 A.2d 14, 19 n.6 (D.C. 1997) (rejecting home visit questionnaire as alternative notice); *Campbell v. District of Columbia*, 568 A.2d 1076, 1078 (D.C. 1990) (same for fire department report).[9]

Second, the purported notice to OAG did not provide any warning of the District's liability. Requiring "specificity with respect to the cause and circumstances of the injury," this Court has held that the notice must "describe[] the injuring event with sufficient detail to reveal, *in itself,* a basis for the District's potential liability." *Chidel v. Hubbard*, 840 A.2d 689, 696 (D.C. 2004) (quoting *Doe*, 697 A.2d at 27); *accord Snowder*, 949 A.2d at 601. Here, the email communications with OAG provided no basis for holding the District liable and never sought to advise the District of any potential claim against it. Rather, those emails requested OAG's assistance in

[9] Although plaintiffs also rely on *Shehyn v. District of Columbia*, 392 A.2d 1008 (D.C. 1978), that case involved a suit against the District "for breaching its *contractual duty* to restore a leased property to its original condition." *Chidel v. Hubbard*, 840 A.2d 689, 695 (D.C. 2004) (emphasis added). Because this Court has since made clear that Section 12-309 does not apply to breach of contract claims, *see District of Columbia v. Campbell*, 580 A.2d 1295, 1301-02 (D.C. 1990), any notice that the District had in *Shehyn* was unnecessary to the result.

enforcing the District's consumer protection laws against the developers. In particular, plaintiff Johnson wrote an investigator in OAG's Office of Consumer Protection in October 2019—attaching a structural engineering report—in response to the investigator's attempt to schedule a walk-through of the units to help get the developers to fix the issues. App. 216-18. Likewise, plaintiff May's email and the Chief Deputy Attorney General's response concerned May's request for OAG to use its enforcement authority to "have the owner/builder held responsible." App. 194; *see* App. 197.

These communications were clearly insufficient to notify the District of its *own* potential liability. In *Chidel*, for example, the Court found a notice insufficient to permit a claim against the District for negligently operating a public health clinic. 840 A.2d at 696-97. Although the notice identified the negligence of a clinic doctor and asserted that the District was liable as his employer, it made "no mention of the District's negligent operation" of the clinic. *Id.* at 697. As the Court concluded, the District thus "could not have 'reasonably anticipated' that it would be sued" for the clinic's negligence. *Id*.; *see Doe*, 697 A.2d at 27-29 (police reports of a child burned by hot water in a bathtub were insufficient notice because they omitted the basis for the District's potential liability, i.e., failing to intervene to protect the child before she was injured); *Braxton*, 396 A.2d at 217-18 (police report that thieves broke into a public housing tenant's apartment was insufficient notice that the District could be

liable to the tenant for allowing the thieves to steal a skeleton key that gave access to the apartment). The same result follows here, where the notice gave no indication at all that any liability might lie with the District.[10]

Third, the purported notice to OAG was untimely as well. "[A]ny doubt as to the proper timing for the giving of notice should be resolved in favor of earlier notice." *Farris v. District of Columbia*, 257 A.3d 509, 516 (D.C. 2021). "Claimants ordinarily must give notice as soon as they discover damage, even if they are not fully cognizant of its seriousness." *Id*.; *see Ross*, 697 A.2d at 18 (holding that injury occurred "at least when the harmful material entered [claimant's] body, was discovered, and resulted in significant medical procedures," but before any neuropsychological damage was confirmed); *DeKine v. District of Columbia*, 422 A.2d 981, 986-88 (D.C. 1980) (holding that "[t]he injury from false arrest occurs at the first moment of detention"; the injury from impoundment of property is measured from the date of seizure, not its release; and the injury for tortious interference with

---

[10] Plaintiffs cite *Pitts v. District of Columbia*, 391 A.2d 803 (D.C. 1978), where this Court found that a police report of a child's injuries "recites facts from which it could be reasonably anticipated that a claim against the District might arise," *id*. at 809. Br. 43-44. But there, the report was of a child falling through a guard rail on a stairway of a public housing project—clearly suggesting the District's liability for a defective condition on property that it owned and operated. *See* 391 A.2d at 809-10. *Pitts* has no bearing here.

contractual relations is sustained, not when the business is ultimately forced to close, but when the tortious acts first caused "actual and immediate damage").[11]

Plaintiff Johnson's purported notice to OAG in October 2019 was well outside the six-month period. When purchasing the brand new property back in June 2018, she learned that there had been a "cave in" on the first floor of her unit. App. 37 (¶ 223). Upon moving in, Johnson reported to Stanton a crack on her balcony "large enough to fit her hand through." App. 37 (¶ 225). Then, in October 2018, Johnson reported to Stanton that there were "major openings and gaps in the floors and walls throughout [her] Property"; "the tiles in the master bathroom were inexplicably cracking"; her kitchen floor was slanted; "the ceiling above the staircase swelled and bulged to the point where [she] feared that it would cave in"; a sewage odor was coming from her sinks; and her downstairs hallway smelled of mildew. App. 38-41. At least by that point—still one year before Johnson purportedly gave notice—she was aware that she had suffered an injury.

---

[11] Plaintiff also cites *Brown v. District of Columbia*, 853 A.2d 733 (D.C. 2004), which involved the failure to diagnose a medical condition. There, the Court held that, because "patients in these types of cases generally suffer from an ailment when they first seek treatment," the injury "is the worsening or deterioration of the plaintiff's condition that results from the physician's failure to diagnose." *Id.* at 739. Notably, the Court rejected the argument that the injury in *Brown* did not occur until the patient's death. *Id*. at 738, 740.

Plaintiff May's purported notice to OAG in July 2020 was even more untimely. In September 2017, two months after May moved into her property, she informed Stanton of "large wall and ceiling openings, windows no longer closing completely and separation of bathtub and floor throughout the unit." App. 8 (¶ 26). That same month an employee of Stanton's contractor told her that the foundation of the unit underneath her needed work "because they failed to place rebars down." App. 9 (¶ 30). In April 2018, May agreed to vacate her unit so that Stanton "could perform substantial repairs" and learned from a third-party inspection of her unit of "likely structural defects that were causing the walls and floors to become separated." App. 9 (¶¶ 34-36). The six-month clock for her CPPA claims had therefore clearly started more than two years before the July 2020 email exchange with the Chief Deputy Attorney General.

Farris does not support plaintiffs. *See* Br. 40-42. To be sure, the Court suggested in *Farris* that the notice requirement might not be triggered by an injury that was "relatively trivial" when compared to its worsening effects later in time. 257 A.3d at 516. The Court there was hesitant to accept that the notice period was triggered by "mere water seepage" from a public alley into the adjoining homeowner's basement "with no immediate structural consequences." *Id*. Here, however, plaintiffs were aware of *structural* damage to their units—which might give rise to a CPPA claim—more than six months before any purported notice was given. Notably, the

Farris Court clarified that notice *was* required once Mr. Farris became aware of structural damage, and the Court rejected the argument that the six-month clock started running only once the damage reached the point that the foundation wall collapsed. *Id*. Thus, even if the damage in plaintiffs' units continued to worsen over time, notice was still untimely.[12]

2. "Actual notice" is not a substitute for proper notice under the statute.

Plaintiffs alternatively argue that their noncompliance with Section 12-309 should be excused because "the District had actual notice of the Property's condition and injury therefrom." Br. 45. They contend that, based on their communications with DHCD as early as August 2018, the District knew that the property "was subject to serious structural issues and concerns." Br. 45. But this still falls short of showing that the District knew that plaintiffs intended to hold it liable for the developers' failings. In any event, "[w]hether the District had actual notice of [a plaintiff's] potential claim is not an appropriate consideration under section 12-309." *Doe*, 697

---

[12] Assuming plaintiff Johnson or May's purported notice to OAG could overcome all of these deficiencies regarding the recipient, content, and timeliness, the other plaintiffs' claims would still be barred. Notice from one claimant does not suffice for others even if the injuries arise from the same incident or cause. *See District of Columbia v. Arnold & Porter*, 756 A.2d 427, 436-37 (D.C. 2000) (rejecting firm's argument, in its suit for damages arising from a ruptured water main, that notice letters from other affected businesses satisfied its notice obligation); *Snowder*, 949 A.2d at 601-02 (holding that notice by two plaintiffs was not sufficient for an entire class claiming unlawfully imposed towing and storage fees).

A.2d at 29. Only notice that satisfies the requirements of the statute will suffice. *Id*. This is true even if plaintiffs' communications prompted DHCD to "look[] into these [structural] issues." Br. 45 (citing App. 212); *see Washington v. District of Columbia*, 429 A.2d 1362, 1367 (D.C. 1981) (en banc) ("The fact that the District investigated the incident as a result of the letter is irrelevant to the question whether the letter itself was 'notice in writing' within the meaning of § 12-309.").[13]

3. This Court should reject plaintiffs' belated request for a remand to amend their complaint.

Plaintiffs cannot avoid dismissal under Section 12-309 by asking to relitigate the issue before the trial court. Plaintiffs suggest that the court improperly denied them an opportunity to amend their complaint and that, if the court had permitted the case to proceed to discovery, they would have submitted evidence of additional injuries and additional notice. Br. 45-46, 50-51. They note that, after filing their complaint, they provided the District written notice of their claims in April 2021 and that Falcon Group structural engineers recommended evacuation of their properties in

---

[13] As before (*see supra* n. 9), plaintiffs invoke *Shehyn* to excuse their failure to give notice, this time to assert that notice is unnecessary when the District itself, rather its employees, commit the tortious acts or when the District itself breaches a duty and is aware of the consequent injury. Br. 45 (citing *Shehyn*, 392 A.2d at 1013-14). This is essentially an argument that actual notice satisfies Section 12-309. As just explained, this Court has squarely rejected that argument. Again, *Shehyn* involved a breach of contract claim and is best understood in light of this Court's subsequent clarification that Section 12-309 does not apply to such claims. *See supra* n.9.

August 2021 due to increasing structural instability. Br. 46. But plaintiffs offer no justification for a remand, which would be futile in any event.

First, plaintiffs forfeited the opportunity to amend their complaint. They could have sought to add these new allegations of additional injuries and additional notice, but they simply failed to do so before or after dismissal of their complaint. *See City of Harper Woods Emps. Ret. Sys. v. Olver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009) ("When a plaintiff fails to seek leave from the [trial court] to amend its complaint, either before or after its complaint is dismissed, it forfeits the right to seek leave to amend on appeal."); *Oparaugo v. Watts,* 884 A.2d 63, 75 (D.C. 2005) ("Points not raised and preserved in the trial court will not be considered on appeal, except in exceptional circumstances[.]"). To be sure, plaintiffs' opposition to the motion to dismiss briefly suggested, as an alternative to substituting the District for DHCD as a defendant, that an amended complaint be permitted. Opp. 2. But this request did not suggest any amendment beyond naming the District in lieu of DHCD. Opp. 2. This was plainly inadequate to preserve the request that plaintiffs now make on appeal. *See City of Harper Woods*, 589 F.3d at 1304 ("A bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion to amend." (brackets and internal quotation marks omitted)).

Second, the requested remand would be futile because even if otherwise proper written notice had been given in April 2021, such notice would be even more untimely than the earlier purported notices. *See supra* pp. 26-29. In addition, the further structural deterioration of the property, resulting in the recommendation in August 2021 that most of the units be vacated, would be a continued worsening of the significant structural damage that had manifested long before. It would not restart the Section 12-309 clock. *See supra* pp. 28-29. Plaintiffs allude to the possibility that they might be able to show "qualitatively different" types of injuries, Br. 46 (quoting *Farris*, 257 A.3d at 516 n.19), but they offer no support or explanation for that assertion. The request to remand should be denied.

B. Alternatively, this Court's precedent and the plain statutory text preclude the CPPA's application to the District.

The CPPA is a "comprehensive statute designed to provide procedures and remedies for a broad range of practices which injure consumers." *Dist. Cablevision*, 828 A.2d at 723 (quoting *Atwater v. D.C. Dep't of Consumer & Regul. Affs.*, 566 A.2d 462, 465 (D.C. 1989)). It is to be "construed and applied liberally to promote its purpose," D.C. Code § 28-3901(c), but it "does not cover all consumer transactions," *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015). Instead, it addresses only those trade practices arising out of "consumer-merchant relationships." *Id*. The CPPA defines a "merchant" in relevant part "as a person who, in the ordinary course

of business, sells or supplies consumer goods or services." *Id.*; *see* D.C. Code § 28-3901(a)(3).

This Court's precedent, and the plain statutory text, make clear that the District can never be subject to the CPPA. In *Snowder*, this Court expressly held that the District "is not a merchant for purposes of the CPPA." 949 A.2d at 599. Simply put, "the District is not a commercial enterprise." *Id.* at 600. Although the Council has since amended the CPPA's definition of merchant to omit any distinction between those "organized or operating for profit or for a nonprofit purpose," D.C. Code § 28-3901(a)(3), it has not expanded the definition to include the District. In fact, just the opposite. In recent emergency legislation, the Council added Section 28-3901(e) to clarify that the CPPA applies to the D.C. Housing Authority, a sui juris agency that has a corporate existence independent of the District. D.C. Act 24-629, § 3, 69 D.C. Reg. at 14029. In doing so, the Council included a proviso "that this subsection shall not be construed to otherwise apply [the CPPA] *to the District of Columbia or any agency thereof*." *Id.* (emphasis added). The express statutory text thus now confirms what this Court said in *Snowder*: the District is never a merchant subject to liability under the CPPA.[14]

---

[14] The recent emergency amendment, as relevant here, is thus a clarification rather than a change in the law. In any event, the Council provided that Section 28-3901(e)

Even if, contrary to this statutory text and precedent, the District could be a "merchant" in some conceivable scenario, it is not one here. As occurred in this case, the District provides government funds to developers and new homeowners to encourage the creation and preservation of affordable housing. It did not build, own, or sell the affordable housing that plaintiffs purchased. While the District provided each plaintiff a Homebuyer Loan to assist with the purchase, secured by a second deed of trust, this was an interest-free loan with the principal to be forgiven over the course of 15 years. App. 133-34, 157-58.[15] The loan was not designed to be repaid, but simply to ensure that the affordable housing created with government funds remained affordable for that 15-year period. App. 133-34, 157-58. Thus, the District was not acting as a merchant who "in the ordinary course of business" sells or supplies consumer goods or services. D.C. Code § 28-3901(a)(3). Instead, it was acting as "a conduit of government funds" expended in carrying out a governmental function. *Bd. of Regents of Univ. of Wis. Sys. v. Mussallem*, 289 N.W.2d 801, 807 (Wis. 1980) (cited with approval in *Snowder*) (holding that a state university, as "an arm of the

---

would be applicable as of December 19, 2016, *see* Act 24-629, § 4, 69 D.C. Reg. at 14029, well before plaintiffs purchased their units.

[15] In addition to the HPTF-funded Homebuyer Loans, the District also provided plaintiffs interest-free loans and closing cost assistance through its separate Home Purchase Assistance Program, *e.g.*, App. 7 (¶¶ 22-23), which is not restricted to designated affordable housing units or the HPTF's household income limit (80% of AMI). *See* D.C. Code § 42-2601 *et seq*.

state," is "certainly not a private commercial business" subject to that state's consumer protection laws when it extends credit and loans to its students).

C. Even if the CPPA could apply to the District, the complaint fails to allege that the District engaged in an unfair or deceptive trade practice.

Plaintiffs' conclusory allegation that DHCD committed unspecified "unfair and deceptive trade practices," App. 55 (¶ 365), without any elaboration of what those practices were, is insufficient to state a claim, even assuming that the District were a merchant subject to liability under the CPPA. Such "[b]are allegations of wrongdoing . . . are insufficient to sustain a complaint." *Bereston*, 180 A.3d at 99 (internal quotation marks omitted).

The complaint lacks any factual basis for a plausible claim against the District. Plaintiffs allege that DHCD violated the CPPA because it "funded, promoted, and facilitated the substandard construction of the Grand View Condominiums by Stanton and/or River[E]ast." App. 55 (¶¶ 363-65). But this conclusory allegation rests on the simple fact that the District loaned money to the developers to help finance the costs of constructing affordable housing. Merely lending money to a developer to build housing, or to a homebuyer to purchase the home, does not make the lender liable under the CPPA if the developer's construction of the home turns out to be substandard. The homebuyer would still have to allege, and ultimately prove, that the lender "engage[d] in an unfair or deceptive trade practice." D.C. Code § 28-3904.

Plaintiffs' complaint lacks any well-pleaded factual allegations of an unfair or deceptive trade practice in which the *District* engaged.

Likewise insufficient is plaintiffs' allegation that DHCD "failed to ensure compliance with applicable codes and regulations related to the construction of the subject properties." App. 55 (¶ 364). This is not an allegation of an unfair or deceptive trade practice; rather, it is an allegation that the District failed to enforce generally applicable laws, such as the Construction Code, D.C. Code § 6-1401 *et seq.*, and perhaps the statutory requirement for condominium developers to post warranty bonds, *id*. § 42-1903.16(e). As broad as the definition of "trade practice" might be, *id*. § 28-3901(a)(6), it surely does not include the government's enforcement (or non-enforcement) of the law. Plaintiffs' allegations offer no viable basis for the District's liability under the CPPA.

II. Plaintiffs Failed To State A Claim Against The District Under The D.C. Human Rights Act.

Plaintiffs argue, without merit, that their complaint alleges "non-conclusory facts [that] show a plausible claim of discriminatory intent and treatment" based on race and sex, as well as "familial status" and "source of income." Br. 33. As a preliminary matter, a claim of discrimination based on "familial status" was not raised in their complaint, and it is based on an allegation, also absent from the complaint, that the "majority of [plaintiffs] are single mothers." Br. 32-33. It is thus forfeited. *See Oparaugo*, 884 A.2d at 75. Similarly, there is no allegation concerning plaintiffs'

"source of income." Br. 33. Although the complaint did allege discrimination based on "income status," App. 56 (¶ 373)—namely that plaintiffs were low- to moderate-income individuals, App. 6 (¶ 18) —this is not a protected class under the DCHRA. *See* D.C. Code § 2-1401.01 *et seq*. Plus, the affordable housing that the District funds *favors* plaintiffs' income status—it is only available to persons at or below their income level. *Id.* § 42-2802(b-1); App. 130-31. Accordingly, the District focuses here on plaintiffs' claims of race and sex discrimination (though its arguments would apply to the other types of discrimination as well).

Plaintiffs argue that the District has a "practice" of "denying . . . quality affordable housing" based on race and sex. Br. 33; App. 56 (¶¶ 373-77). But this is a conclusory allegation without any factual support in the complaint. Of course, a court must take as true plaintiffs' allegation that their affordable housing development, which was funded in part by DHCD but built by private developers, had major structural issues. *See* App. 6-7 (¶¶ 17-20). However, plaintiffs do not allege that the District knew, or had reason to know, that the developers would build condominiums that would have structural defects. Further, there is no factual basis to suggest that, more generally, the District adopted a practice of lending money to developers to build unsafe and structurally unsound housing. Indeed such an alleged practice would be contrary to the whole purpose of the District dedicating public funds for the construction of affordable housing.

The implausibility of the District adopting a practice of using its affordable housing funds to build structurally defective housing is apparent enough. On top of that, though, there is no plausible basis to conclude that the District further tailored such an alleged practice to target black and female homebuyers. Though they baldly assert that the District's practice of funding structurally unsound housing does not extend to homebuyers who are white or male or who live in "predominantly white-populated wards," App. 56 (¶ 374), plaintiffs offer no facts to support their conclusory allegation of discrimination. They make no attempt, for example, to identify any other District-funded affordable housing developments occupied exclusively or predominantly by black or female homebuyers that also had major structural issues. Nor do they identify a similarly situated, District-funded development as a comparator, where a reasonable inference for the absence of such structural issues was that the occupants were white or male. Although plaintiffs claim entitlement to discovery "to ascertain the types of other similarly-situated District-funded projects," Br. 35, the rules of civil procedure "do[] not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Potomac Dev. Corp.*, 28 A.3d at 545 (quoting *Iqbal*, 556 U.S. at 678-79).[16]

---

[16] In an even more extreme version of their argument, plaintiffs contend that the District has denied them housing altogether or at least forced them to either "reside in unsafe housing (after the mandatory evacuation order is lifted) for a 15-year

On appeal, plaintiffs claim that this alleged discriminatory practice included OAG's alleged failure to provide residents assistance in remedying the issues with their units. Br. 33-34. But based on the allegations and facts that plaintiffs introduced below, OAG *did* directly engage with the developers and the residents in efforts to get the developers to fix the defects. App. 15 (¶ 57), 196-97, 215-27. OAG also advised residents to consider appropriate legal action against the developers. App. 197, 220. While OAG's assistance did not include its own CPPA enforcement action against the developers—in part because OAG believed that those cooperative efforts had been productive, App. 197—this does not raise a plausible inference of race or sex discrimination, but is simply the ordinary exercise of prosecutorial and enforcement discretion. *See Tucci v. District of Columbia*, 956 A.2d 684, 692 (D.C. 2008) (explaining that "decisions about whether and when to institute enforcement

---

compliance period, or otherwise repay the prorated HPAP funding in full." Br. 36. There is no allegation or plausible suggestion of any such thing. The 15-year period before the Homebuyer Loan is completely forgiven is a standard requirement to ensure that the newly created housing remains affordable to individuals like plaintiffs. *See* D.C. Code § 42-2802.02(b). The District would not require plaintiffs to live in unsafe housing; indeed, it has provided "multiple assistance programs" to enable the homeowners to rent temporary residences "until appropriate repairs are made." Res. 24-649, 69 D.C. Reg. at 13449. And there is no claim that, given the current circumstances, the District has even hinted at demanding payment on any balance on any loan.

proceedings against a specific individual . . . are committed to agency discretion" (internal quotation marks omitted)).[17]

III. Plaintiffs Failed To State A Breach Of Contract Claim Against The District.

The trial court correctly dismissed plaintiffs' breach of contract claims. First, contrary to plaintiffs' assertion, they are not intended third-party beneficiaries to the contract between the District and the developers—the only relevant contract to which the District was a party. *See* Br. 38. "Third-party beneficiary status requires that the contracting parties had an express or implied intention to benefit directly the party claiming such status." *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.,* 944 A.2d 1055, 1064 (D.C. 2008). In contrast to an intended beneficiary, an "incidental beneficiary is a person who will be benefitted by performance of a promise but who is neither a promisee nor an intended beneficiary." *Id.* at 1064-65 (quoting Restatement (Second) of Contracts, § 315, cmt. (a)). This Court starts with the premise that "third party beneficiaries of a Government contract are generally assumed to be merely

---

[17] Plaintiffs' brief on appeal asserts other acts that were part of the alleged discriminatory practice: namely, that the District allowed the developers to forgo the requirement of posting a warranty bond for the property and that DCRA cited plaintiff May for failing to repair the structural defects in her unit. Br. 33. Plaintiffs offer no factual support that these alleged actions were based on unlawful discrimination. In any event, the issues of the warranty bond and the DCRA citations are discussed later in the context in which the complaint actually raises them: the claims of breach of contract and intentional infliction of emotional distress, respectively.

incidental beneficiaries, and may not enforce the contract absent clear intent to the contrary." *Id.* at 1065 (quoting *Moore v. Gaither*, 767 A.2d 278, 287 (D.C. 2001)).

Far from clearly intending any third-party beneficiaries, the contract here expressly precludes them. The loan agreement between the District and the developers has a specific "no third party beneficiaries" provision. App. 112. It provides that the agreement's terms "are for the benefit of the parties hereto, and no other person shall have any right or cause of action on account hereof." App. 112. If that were not clear enough, the agreement further states:

> All acts, including any failure to act, relating to the Property by any agent, representative or designee of the [District] are performed solely for the benefit of the [District] to assure repayment of the Loan and are not for the benefit of [RiverEast] or for the benefit of any other person, including without limitation, HPTF eligible tenants or other occupants.

App. 106. This language is dispositive. *See Fort Lincoln Civic Ass'n*, 944 A.2d at 1069 (holding that contractual language stating that "no person other than a party to the Agreement . . . shall have any right to enforce the terms of this Agreement against a party" precluded a third-party beneficiary claim); *Moore*, 767 A.2d at 287-88 (holding that a third party had no right to sue under an agreement that stated that its provisions "are for the sole benefit of the Parties hereto and shall not be construed as conferring any rights on any other person" (emphasis omitted)).

Even if the parties to the contract had intended third-party beneficiaries notwithstanding this plain language, plaintiffs have no viable claim against the

District. They allege that the District failed to "enforce or implement the contractual provisions between it and the Developers," including "enforcement of the warranty against structural defects security bond, property inspections, and/or certificates of occupancy." Br. 39 (citing App. 61). Plaintiffs, however, do not identify any such contractual provisions, let alone how they might have been breached. *See* App. 61 (¶ 411), 91-127. At best, plaintiffs might be referring to the developers' delay in posting a warranty bond. *See* App. 13 (¶¶ 43-47); D.C. Code § 42-1903.16. But again, they point to no contractual requirement, and even if they had, the District's alleged failure to enforce the developers' promise to post such a bond would permit plaintiffs to bring a third-party claim only against the promisor, i.e., the developers. *See District of Columbia v. Campbell*, 580 A.2d 1295, 1302-03 (D.C. 1990). Such failure would not permit a third-party claim against the District, who would be the promisee. *Id.* (holding that the District could not be liable under a third-party beneficiary theory "for its failure to insist that [its contractor] obtain a payment bond" because the contractor was the party in breach); App. 106.[18]

IV. The Superior Court Properly Dismissed Plaintiffs' Claims Of Intentional Infliction Of Emotional Distress Against The District.

The trial court properly dismissed plaintiffs' claims for intentional infliction of emotional distress. Plaintiffs allege "extreme emotional suffering and stress" as a

[18] Plaintiffs also claim a right to sue to enforce a "contract between the [District] and themselves." Br. 39. But they never allege any breach of any such contract.

result of the structural defects and, in plaintiff May's case, being cited for failing to make repairs to her unit. App. 67-69 (¶¶ 460-69). As the court concluded, Section 12-309 bars these claims because plaintiffs failed to provide proper and timely written notice. App. 247. The trial court was correct for the reasons already discussed. *See supra* pp. 22-29. To the extent plaintiff May's claim is distinctly based on being cited around October 2019 for failing to maintain her property, she did not give timely notice of this injury—or indeed any purported notice at all. Even setting the other deficiencies of her July 2020 email to the Attorney General aside, it would have still been months too late and did not mention any citation. *See* App. 194-95.

The trial court also correctly found, in the alternative, that the allegations failed to state a claim of intentional infliction of emotional distress. App. 247. To establish such a claim, "a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) either intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Smith v. District of Columbia*, 882 A.2d 778, 794 (D.C. 2005). "The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* (internal quotation marks omitted).

Plaintiffs' allegations fall well short of the mark. They do not support that the District intentionally or recklessly engaged in any extreme or outrageous conduct. The developers built the condominium development, and there is no allegation of how

the District was responsible for the structural defects, or the emotional distress that they caused, when the District simply provided public funds to help make the housing affordable. Indeed, as plaintiffs acknowledge, OAG worked with residents and the developers to identify problems and to try to have them addressed, resulting in the developers expending substantial sums on repairs. App. 196-97, 215-27. As for the citations issued to plaintiff May, DCRA dismissed them with prejudice before the Office of Administrative Hearings. App. 15 (¶ 56); Mot. for Prelim. Inj., Ex. D. As the trial court explained, citing a property owner for failure to maintain her property—even if it turns out to be in error—"cannot be considered utterly intolerable in a civilized society." App. 247; *see, e.g.*, *Smith*, 882 A.2d at 793-94 (holding that the evidence was insufficient to constitute "extreme and outrageous conduct" even though sufficient to support a battery claim against an officer who put plaintiff in a choke hold and fractured his jaw).[19]

CONCLUSION

This Court should affirm the judgment below.

---

[19] Plaintiffs conclude their brief with a generic request for an "opportunity to replead." Br. 51. As previously discussed, plaintiffs forfeited the opportunity by not seeking leave to amend their complaint in the trial court, either before or after dismissal. *See supra* pp. 30-31. Nor have they have proffered any new facts or allegations that would alter the disposition of this case. *See* Br. 50-51.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

/s/ Carl J. Schifferle
CARL J. SCHIFFERLE
Deputy Solicitor General
Bar Number 463491
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6624
(202) 730-1472 (fax)
carl.schifferle@dc.gov

November 2022

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Carl J. Schifferle
Signature

21-CV-612
Case Number

Carl J. Schifferle
Name

November 22, 2022
Date

carl.schifferle@dc.gov
Email Address

CERTIFICATE OF SERVICE

I certify that on November 22, 2022, this brief was served through this Court's electronic filing system to:

Je Yon Jung
LaRuby May
Counsel for Appellants

Robert L. Ferguson
Timothy J. Dygert, Jr.
Counsel for Appellee River East at Grandview Condominium Unit Owners Association, Inc.

/s/ Carl J. Schifferle
CARL J. SCHIFFERLE