UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

EUGENE WALLACE, ELIZABETH GONSALVES, EUGENE WALLACE as Parent and Next Friend of MELAIN GONSALVES, EUGENE WALLACE as Parent and Next Friend of KINA GONSALVES, EUGENE WALLACE as Parent and Next Friend of TERRI GONSALVES, EUGENE WALLACE as Parent and Next Friend of LISA GONSALVES, EUGENE WALLACE as Parent and Next Friend of CORAN GONSALVES, and EUGENE WALLACE as Parent and Next Friend of JAYMIN WALLACE	)	
Plaintiffs,	)	
v.	)	C.A. No. 00-179S
THE UNITED STATES OF AMERICA, THE NORTH PROVIDENCE HOUSING AUTHORITY, and MICKI GOLD REALTORS,INC., d/b/a COLDWELL BANKER GOLD	)	
Defendants.	)	

DECISION AND ORDER

WILLIAM E. SMITH, United States District Judge

Plaintiffs Eugene Wallace ("Wallace"), individually and as parent and next friend of Melain Gonsalves, Kina Gonsalves, Terri Gonsalves, Coran Gonsalves, and Jaymin Wallace (the "Children"), and Elizabeth Gonsalves ("Gonsalves") initiated this action on September 8, 2000, alleging that Defendants United States of America (the "Government"), and Micki Gold Realtors ("Micki Gold") are liable under the Residential Lead-based Paint Hazard Reduction Act (the "Act"), 42 U.S.C.

§ 4851, et seq., for failing to notify Wallace of the possibility of the presence of lead paint prior to his purchase of real property located at 10 North Union Avenue in North Providence, Rhode Island (the "Property"). Plaintiffs also brought claims against Defendant North Providence Housing Authority ("NPHA") alleging that NPHA was negligent in performing or failing to perform an inspection of the Property.

This Court previously dismissed the tort claims contained in Counts I and III of the Amended Complaint because Wallace and Gonsalves failed to file administrative claims as required by the Federal Tort Claims Act, 28 U.S.C. § 2675(a). Additionally, this Court dismissed Wallace's breach of contract claim because the Tucker Act, 28 U.S.C. § 1491, vests exclusive jurisdiction over breach of contract claims alleged against the United States in the United States Court of Federal Claims. Accordingly, the only claim remaining against the Government is Count V of the Amended Complaint, which consists of the Plaintiffs' failure to warn claim.

This case is now before the Court on the Government's Motion to Dismiss Count V of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). The Government contends that the negligence claim brought against the United States is essentially a failure to warn claim barred by the

misrepresentation exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(h). Because this Court agrees that the FTCA's misrepresentation exception bars the Plaintiffs' claim, the Government's Motion to Dismiss is GRANTED.

I. Standard of Review

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the Court assumes that all material allegations set forth in the plaintiff's complaint are true. See Williams v. City of Boston, 784 F.2d 430, 433 (1st Cir. 1986). Factual averments in the complaint, as well as any reasonable inferences that might be drawn from them, are construed in favor of plaintiff. Id. at 433; see Campbell v. United States, 167 F. Supp. 2d 440, 443 (D. Mass. 2001). When ruling on a 12(b)(1) motion, "the court may consider whatever evidence has been submitted, such as depositions and exhibits submitted in this case." Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996).

II. Facts

Wallace was a resident of Providence, Rhode Island.[1] On September 3, 1996, Wallace signed a Purchase and Sale Agreement to purchase the Property, which was located at 10

[1] Wallace died during the pendency of this action and Plaintiffs have not made any substitution for him as a plaintiff.

Union Avenue in North Providence, Rhode Island. Wallace purchased the Property from the Government, which had listed the Property with Micki Gold, a real estate agent. The closing for the Property was held on September 25, 1996, and Wallace immediately began renovations on the Property. In late November 1996, Gonsalves leased the Property, and immediately thereafter moved into the Property with the Children. After Gonsalves and the Children had moved into the Property, Wallace continued making renovations.

A few months after moving into the Property, the Children were found to have unusually high levels of lead in their blood. Plaintiffs allege that the Government knew or should have known about the presence of lead paint at the Property, and failed to use due care in connection with the sale. Plaintiffs further allege that this duty included an obligation to inform Wallace about the possibility that the Property contained lead paint, a duty to recommend that Wallace test the Property for the presence of lead paint before leasing it to tenants, and a duty not to conceal information about the condition of the Property. Amended Compl. ¶ 21.

III. Analysis

A. The FTCA's Misrepresentation Exception

The FTCA is a limited waiver of the federal government's sovereign immunity. See Shansky v. United States, 164 F.3d 688, 690 (1st Cir. 1999). It permits civil actions against the United States for

> the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA initially sweeps broadly, but is subject to numerous exceptions including one that immunizes the United States from liability "for '[a]ny claim arising out of . . . misrepresentation, deceit, or interference with contract rights.'" Muniz-Rivera v. United States, 326 F.3d 8, 13 (1st Cir. 2003)(quoting 28 U.S.C. § 2680(h)). Though not explicitly set forth in the FTCA, courts have widely held that the misrepresentation exception bars claims based on negligent misrepresentations, as well as deliberate misrepresentations. See United States v. Neustadt, 366 U.S. 696, 702, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961); Muniz-Rivera, 326 F.3d at 13 ("The exception extends to a wide range of communicative activity (including failures of communication)."); see also JBP Acquisitions, LP v. United States, 224 F.3d 1260, 1263

(11th Cir. 2000) (holding that the misrepresentation exception applies to situations in which the federal government has a duty to provide information, but fails to do so). Moreover, a plaintiff cannot skirt the effect of any exception by drafting a complaint to allege a tort that is not barred by the FTCA. See Turner v. United States, 595 F. Supp. 708, 710 (W.D. La. 1984) ("One cannot escape [the misrepresentation exception] to the waiver of sovereign immunity under 28 U.S.C. § 2680(h) by merely labeling the cause of action something which it is not."); see also 35A Am. Jur. 2d Federal Tort Claims Act § 212 (2001).

Defendants rely on Mullens v. United States, 976 F.2d 724 (1st Cir. 1992)[2], aff'g Mullens v. United States, 785 F. Supp. 216 (D. Me. 1992) to bolster their argument that a negligence claim based on a failure to warn falls within the misrepresentation exception to the FTCA. In Mullens, the plaintiffs purchased a home from the Farmers Home Administration ("FHA"). After the plaintiffs' child was diagnosed with lead poisoning, they filed suit against FHA for negligence and negligent misrepresentation contending that FHA failed to inspect the home, and failed to warn the

[2] Mullens is an unpublished decision, and therefore is not binding precedent upon this Court. See First Circuit Local Rule 32.3. Judge Brody's decision at the district court level is highly persuasive, however, due to the similarity of Mullens' facts to the circumstances of this case.

plaintiffs of the presence of lead paint. The court held that the Mullens' claims for negligence and negligent misrepresentation were barred by the FTCA's misrepresentation exception. Id. at 220. In so ruling, the court reasoned that the crux of the Mullens' negligence claims was their reliance on FHA's failure to notify them that the home contained lead-based paint. Id. at 219. The court then found that the tort of misrepresentation, like the Mullens' negligence claims, includes the "'essential element of . . . reliance.'" Id. (quoting Jimenez-Nieves v. United States, 682 F.2d 1, 3-4 (1st Cir. 1982)). The court therefore dismissed the Mullens' claims because it found them to be based on the alleged misrepresentations.

The Plaintiffs attempt to distinguish Mullens based on the fact that it was decided prior to the passage of the Act. Plaintiffs contend that, unlike in Mullens, the Government had a duty under the Act to disclose any known lead-based hazards associated with the Property, as well as a duty to provide the Plaintiffs with a written statement recommending a risk assessment for lead paint prior to purchase. See 42 U.S.C. § 4852d(a)(3). Because the Government failed to take such action, the Plaintiffs argue that a duty was breached - not that a misrepresentation occurred - and that their claims are therefore rooted in negligence.

The Plaintiffs cite a distinction without a difference. This case is nearly identical to Mullens, and the Court finds that the reasoning of Mullens should apply in this case. Moreover, while the Act may post-date Mullens, that does not insulate the Plaintiffs' claims from the effect of the misrepresentation exception. That argument was specifically rejected by the Supreme Court in Neustadt.

> To say . . . that a claim arises out of 'negligence,' rather than 'misrepresentation,' when the loss suffered by the injured party is caused by the breach of a 'specific duty' owed by the Government to him, i.e., the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely . . ., is only to state the traditional and commonly understood legal definition of the tort of 'negligent misrepresentation,' . . . which there is every reason to believe Congress had in mind when it placed the word 'misrepresentation' before the word 'deceit' in § 2680(h).

366 U.S. at 706-07. When all is said and done, Count V amounts to a negligent misrepresentation claim, which clearly falls under the FTCA's misrepresentation exception. Therefore, the Government's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) is granted, and Count V of the Plaintiff's Amended Complaint is dismissed for lack of subject matter jurisdiction.

III. Conclusion

For the reasons stated above, the United States' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) is GRANTED.[3]

IT IS SO ORDERED,

William E. Smith
United States District Judge

Dated: January , 2004

[3]Accordingly, the following claims remain pending in this action: (1) common law negligence and breach of 42 U.S.C. § 4852d brought by Gonsalves against Micki Gold (Count IV); (2) common law negligence and breach of 42 U.S.C. § 4852d brought by Wallace, as next friend of the Children, against Micki Gold (Count VI); (3) common law negligence brought by Wallace, as next friend of the Children, against NPHA (Count VII); (4) common law negligence brought by Wallace against NPHA (Count VIII); (5) common law negligence brought by Gonsalves against NPHA (Count IX); and (6) breach of R.I. Gen. Laws § 5-20.6-1, et seq. brought by Wallace against Micki Gold (Count X). The parties will be directed to address the Court as to whether Plaintiff Elizabeth Gonsalves, as only a lessor of the Property, has standing under the Act to assert the claim contained in Count IV against Defendant Micki Gold.