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COMMONWEALTH OF KENTUCKY  
KENTON CIRCUIT COURT  
DIVISION ~~NORTH DIV.~~  
CASE NUMBER: 97-CI- 00486

FILED  
KENTON CIRCUIT/DISTRICT COURT  
MAR 12 1997  
BY M.A. WOLTENBERG, CLERK D.C.

ROBERT SARGENT, et al

PLAINTIFFS

VS.

FINKE HOMES, INC.  
3180 Burlington Pike  
Burlington, Kentucky 41005

*issued e/m*

DEFENDANT

Serve Registered Agent:  
George Finke  
3180 Burlington Pike  
Burlington, Kentucky 41005

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COMPLAINT WITH JURY DEMAND

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Plaintiffs, ROBERT and MARY SARGENT, through counsel and for their cause of action states as follows:

PARTIES

1. The Plaintiffs, ROBERT and MARY SARGENT, are residents of Independence, Kenton County, Kentucky, and the owners of a single family dwelling located at 4914 Corn Row Court, Independence, Kentucky.

2. Defendant, FINKE HOMES INC., is a Kentucky Corporation, whose statutory agent is George Finke, 3180 Burlington Pike, Burlington, Kentucky 41005.

JURISDICTION

3. The Court has jurisdiction over this case under K.R.S. 23A.010 and 24A.120, since the amount in controversy exceeds the sum of \$4,000, exclusive of interest and costs, and because the Complaint seeks equitable relief.

## FACTS

4. On or about March 15, 1996, the Plaintiffs and Defendant Finke entered the agreement attached as Exhibit A, for the purchase of a residence to be located at 4914 Corn Row Court, Independence, Kentucky.

5. Defendant Finke Homes Inc., warranted in Attachment A and otherwise that the residence was constructed in a good and workmanlike manner, and warranted that the construction was free of defects in material and workmanship, and obligated itself to repair any defects not fulfilling the terms of the agreement.

6. The above referenced residence was not constructed in a good and workmanlike manner, the residence contained defects in material and workmanship, and otherwise constructed in breach of the parties agreement.

7. That Plaintiff has requested Defendant Finke Homes from time to time to repair the defects in material and workmanship, and the Defendant has refused these reasonable requests.

8. As a result of the extent of the defects in material and workmanship, and the refusal of Defendant Finke to honor its warranty contained in Exhibit A, the warranty contained in that agreement has failed in its essential purpose.

9. As finally constructed by the Defendant Finke, the residence described in Paragraph 6 contained several building code violations, including but not limited to failure to properly install the foundation drain pipe, which caused the drain for the foundation to function improperly, failure to seal between the basement floor and the wall joint, and failure to properly seal the basement walls to outside wall adjoining the living room wall to prevent water leakage.

10. In addition, the purchase agreement referred to the above Defendant, Finke Homes, would have a landscaping company plant a Trinity Pear Tree or a Cleveland Select Pear Tree on the said lot which the premises was constructed.

11. Defendant Finke has failed to fulfill this obligation to plant the above referenced tree on the lot which the premises was constructed.

12. That Defendant Finke, in developing other lots adjacent to and in the vicinity of the real estate owned by the Palintiffs, did cause an unnatural increase in the amount of water coming upon the Plaintiffs' property and, as a result has caused erosion and permanent damage to the Plaintiff's property.

13. In addition, following the purchase of the above premises by the Plaintiff's, Defendant Finke removed all the top soil from the premises and subsequently sold it, all without the Plaintiffs' consent.

**CLAIMS FOR RELIEF**

**COUNT ONE**

**PROPERTY DAMAGE**

14. By reason of the breach of the agreement and negligent construction of the premises as described above by the Defendant Finke Homes, the Plaintiffs have been damaged in excess of \$4,000, in an amount to be determined by the Court, consisting of the purchase price of the above residence, the loss of equity in its investment since the date of purchase, the cost of repairs since the date of purchase, and in other material respects.

**COUNT TWO**

**CONSUMER PROTECTION**

15. The property described above was purchased by the Plaintiffs primarily for personal, family and household purposes.

16. The conduct of the Defendant Finke described above constitutes a violation of KRS 367.110, et seq., for which Plaintiffs are entitled to actual damages, costs, and attorneys fees.

**COUNT THREE**

**MISREPRESENTATION**

17. As a result of the misrepresentations described above, Defendant Finke has caused Plaintiffs damages in excess of \$4,000, in an amount to be determined by the Court, consisting of the

difference between the value of the property as purchased and the value of the property as represented by the Defendant.

**COUNT FOUR**

**TRESPASS**

18. The conduct of Defendant Finke described in paragraphs 12 and 13 above constitute a trespass to the Plaintiffs' property, causing damages in excess of \$4,000, in an amount to be determined by the Court.

**COUNT FIVE**

**RESCISSION**

19. In addition to the above damages, the parties were induced to enter the contract by the false and misleading representations of the Defendant, and as a consequence of those representations, there was no agreement between the parties, the contract was void, and the Plaintiffs are entitled to rescission of the purchase contract and consequential damages by virtue of the misrepresentations.

**COUNT SIX**

**EMOTIONAL DISTRESS**

20. In addition to the damages to the property described above, Defendant Finke has caused the Plaintiffs' severe emotional distress as a result of living in the above premises in uninhabitable conditions for a period of approximately one year.

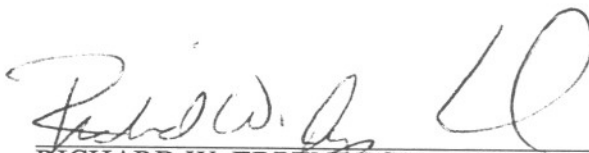
**COUNT SEVEN**

**PUNITIVE DAMAGES**

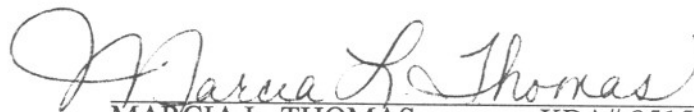
21. All of the conduct of the Defendant Finke described above was performed with oppression, fraud and malice toward the Plaintiffs. As a result of all of the above, the Plaintiffs are entitled to an award of punitive damages in an amount to be determined by the Court.

WHEREFORE, the Plaintiffs pray for compensatory and punitive damages to be determined by the Court, for an award of attorneys fees and costs, and for any and all other relief to which they may be entitled and demand a trial by jury.

Respectfully Submitted,



RICHARD W. ERPENBECK KBA# 84140  
333 Scott Street, Suite 300-C  
Covington, Kentucky 41011  
(606) 261-3779  
Attorney for Plaintiffs



MARCIA L. THOMAS KBA# 85157  
27 East Fourth Street  
Covington, Kentucky 41011  
(606) 291-8200  
Attorney for Plaintiffs

# Burlington Estates INC.

A Kentucky Corporation



## SALES AGREEMENT

AGREEMENT between Burlington Estates, Inc., hereinafter called "Seller" and

MARY A. MILLER Robert M. SARGENT  
of 4102 FARMWOOD CT. 757 Meadowview Dr  
ERLANGER KY. 41018 Villa Hills KY 41017

1. **Basis of Agreement.** For the considerations hereinafter set forth, Seller agrees to sell and convey and Buyer agrees to purchase, upon the terms and conditions set forth

in this Agreement. (a) the land described as follows: Lot # 6

Block # \_\_\_\_\_ Subdivision Harvest Hill

as recorded on a plat filed among the records of Kenton

County, State of KY, in Plat Book \_\_\_\_\_, Page \_\_\_\_\_,

together with (b) a home to be built thereon by Seller according to Seller's Custom plan

Plan, Set # 3,000 Alternate custom  
in a workmanlike manner substantially in accordance with plans and specifications which have been reviewed by Buyer (collectively called "property").

Model homes, if any, and any advertising or promotional materials used or displayed by Seller are for display purposes only and are not the basis of the bargain between Seller and Buyer. The obligations of Seller under this Agreement shall be determined solely by reference to the plans and specifications (referred to above) and the terms of this Agreement.

2. **Sales Price and Schedule of Payments.** The price of the house and lot including all optional items listed below is pd 1000.00 7-10-95 \$ 194,790

The sales price is payable as follows:

(a) Cash earnest money due upon signing of this Agreement the receipt of which is hereby acknowledged by July 8, 1995 \$ 1,000

(b) Additional cash payment on or before or closing of 4102 Farmwood five days after receipt of loan approval \$ 7,000

(c) Other upon closing provisional pd 9100 \$ 25,000

(d) Balance due upon settlement to be paid by a cashier's check or a check from a title company approved by Seller \$ 156,790

3. **Optional Items:** Optional Items Included in the sales price are:

- Subject to Guaranteed Sales Plan.
- Subject to Buyers obtaining financing with hold account

shall be provided by Seller. Seller agrees that such uncompleted items shall be completed as soon as weather conditions permit.

- (c) Any items determined to require corrective action as a result of the Pre-settlement inspection conducted by Seller and Buyer will be completed as soon as is practical, but is not cause for delaying settlement if all other conditions of this contract have been fulfilled.
- (d) In the event that Seller is unable to obtain the materials specified on the plans or specifications or the items shown on the selection sheets through reasonable sources of supply, Seller shall have the right to substitute materials of similar pattern and design and substantially equivalent quality.
- (e) The location and ground elevation of the home on the lot and the necessity, if any, to reverse the plan of the home to conform to the existing lot contours are to be determined by Seller at its sole discretion.
- (f) Seller may remove such trees from the lot as it deems necessary to construct the home and it shall not be responsible for any damage to or destruction of remaining trees during or resulting from the process of construction.
- (g) Seller reserves the right to make changes in plans and specifications solely for the purposes of mechanical installations, building code requirements, and normal architectural design improvements subsequent to the date of this Agreement.

6. **Closing Costs/Settlement Charges/Prepays.** All closing costs/settlement charges including but not limited to all conveyance fees, transfer taxes, recording fees) prepaid items (including but not limited to mortgage insurance premiums, prepaid fire and hazard insurance premiums, prepaid real estate taxes, and prepaid interest on the mortgage), and all other lender-required fees and charges shall be paid by Buyer except the following items, if any, to be paid by Seller:

Seller to pay 2% in options  
or pts. Buyers choice

7. **Settlement.** After completion of construction in accordance with this Agreement settlement shall take place on a date and at a place to be selected by Seller on not less than ten (10) days notice to Buyer. Upon payment by Buyer of the balance due Seller and expenses of settlement and all proper fees and charges in connection with it, Seller shall convey the property to Buyer by general warranty deed, title to be good and marketable, free of liens, encumbrances, easements (except for utility easements and any other easements which may be observed by an inspection of the property, assessments, and restrictions running with the land and common to the subdivision). Possession shall be given to Buyer when Seller receives the balance of the purchase price and, prior thereto, Buyer shall have no right to enter upon or occupy the property without the written approval of Seller. In the event that Buyer refuses to settle at the date specified by Seller in accordance with this paragraph, Seller may, at its option, hold the Buyer in default under paragraph 9, or Seller may elect, at its discretion, to extend the time for settlement for successive periods of 30 days beyond the previously established date, provided that Buyer pays to Seller a fee of 1% of the sales price in advance for each such 30 day extension. Should Buyer not settle within an extension period, Buyer shall be in default of this Agreement under paragraph 9.

8. **Cancellation by Seller.** In the event items 4(d) and 4(e) cannot be obtained in thirty days or in the event that Seller shall determine, in good faith and for reasons beyond its control, including any cause specified in Paragraph 5(a) and including any pending or declared governmental moratorium, that the home purchased hereunder cannot be completed and made available for occupancy prior to the time provided for settlement

COMMONWEALTH OF KENTUCKY  
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ROBERT SARGENT, et al

PLAINTIFFS

v.

FINKE HOMES, INC.

DEFENDANT

ANSWER

Comes now the Defendant, FINKE HOMES, INC., by and through Counsel, and for its Answer to Plaintiffs' Complaint filed herein, respectfully state as follows:

FIRST DEFENSE

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

2. That this answering Defendant admits the allegations contained in paragraphs 1, 2, 3 and 4 of the Complaint filed herein.

3. That this answering Defendant admits the allegations contained in paragraph 5 of the Complaint filed herein, in that a warranty is contained in the contract, the language of which is set out in the contract.

3. That this answering Defendant denies the allegations contained in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of the Complaint filed herein.

### THIRD DEFENSE

4. That this answering Defendant specifically raises and relies upon the affirmative defenses of accord and satisfaction, contributory negligence, estoppel, failure of consideration, laches, payment, release, statute of fraud, statute of limitations and waiver.

5. That this answering Defendant expressly reserves the right to raise and rely upon additional affirmative defenses, should same be known to exist through ongoing discovery and investigation conducted herein.

### FOURTH DEFENSE

6. That Plaintiffs' claim for breach of contract is expressly barred by the Doctrine of Merger.

### FIFTH DEFENSE

7. That Plaintiffs' claims based upon alleged violations of the applicable building code are expressly prohibited, inasmuch as Plaintiffs have refused and continue to refuse to permit Defendant the opportunity to enter the premises, inspect the purported building code violations and to repair and/or replace said alleged violations.

### SIXTH DEFENSE

8. That the damages complained of by the Plaintiffs, if any, which this answering Defendant specifically deny, were proximately caused by the negligence of the Plaintiffs and/or a third party, and not that of the Defendant, and by reason thereof, the



Plaintiffs are barred from any recovery from this answering Defendant.

SEVENTH DEFENSE

9. That the Plaintiffs herein have relied upon and asserted alternative remedial rights, inconsistent and not reconcilable with each other, by virtue of conflicting claims for recovery of damages, as well as for rescission of the Purchase Contract. Therefore, Plaintiffs should be directed to elect one (1) of these inconsistent remedies under which to proceed herein.

EIGHTH DEFENSE

10. That at no time relevant hereto did this answering Defendant act, either intentionally or with willful disregard for the well-being of the Plaintiffs, in such a manner as to cause Plaintiffs emotional harm and/or distress, nor did this answering Defendant act with such negligence so as to cause such emotional harm and/or distress. Therefore, Plaintiffs' cause of action for emotional distress should be dismissed.

NINTH DEFENSE

11. That at no time did this answering Defendant unreasonably, seriously or significantly invade or interfere with Plaintiff's use, benefit and enjoyment of their residence. Therefore, Plaintiff's cause of action for nuisance should be dismissed.

TENTH DEFENSE

12. That at no time relevant hereto did this answering Defendant act with oppression, fraud and/or malice toward the

Plaintiffs, nor have the Plaintiffs' alleged facts with sufficient specificity to support any cause of action as to such contentions. Therefore, any claim by Plaintiffs for punitive damages herein should be dismissed.

WHEREFORE, this answering Defendant prays as follows:

1) That the Plaintiffs' Complaint be dismissed, with prejudice.

2) For all of its costs and attorneys fees incurred herein; and

3) For any and all other relief to which it may appear entitled.

Respectfully submitted,

ADAMS, BROOKING, STEPNER,  
WOLTERMANN & DUSING ✓  
8100 Burlington Pike  
P.O. Box 576  
Florence, Kentucky 41042

  
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JAMES G. WOLTERMANN

CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of March, 1997, a true and correct copy of the foregoing was mailed, by regular U.S. Mail, postage pre-paid to the following counsel: Richard W. Erpenbeck, Esq., 333 Scott Street, Suite 300-C, Covington, Kentucky 41011; and Marcia L. Thomas, Esq., 27 E. Fourth Street, Covington, Kentucky 41011.

  
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JAMES G. WOLTERMANN