STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

HAT TRICK, LLC and
HAT TRICK II, LLC,
Plaintiffs,

v. **Case No. 14-142368-CZ**
Hon. James M. Alexander

COLLIERS INTERNATIONAL DETROIT, LLC, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant Colliers International's motion for summary disposition and Defendants Peter Jankowski and Metro Detroit Property Management's motion for more definite statement or summary disposition.

Plaintiffs are two single-purpose entities formed by their sole shareholder, Leo Lee, for purposes of acquiring and owning commercial real estate. Plaintiffs generally allege that Defendants concealed and misrepresented information regarding two Detroit-area properties in order to induce Plaintiffs to purchase them. As a result, Plaintiffs claim that they were damaged "by purchasing the . . . properties for more money than what the properties were actually worth."

Plaintiffs filed the present Complaint on claims of: (1) fraudulent misrepresentation, (2) negligent misrepresentation, (3) silent fraud, (4) breach of fiduciary duty, (5) conversion, (6) embezzlement, (7) breach of contract, (8) unjust enrichment, and (9) conspiracy.

Defendants now seek summary disposition of certain claims under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. All well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). A motion under this subrule may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

I. Defendant Colliers' Motion

Defendant Colliers moves for summary disposition of Plaintiffs' claims for fraudulent misrepresentation, silent fraud, negligent misrepresentation, breach of fiduciary duty, and conspiracy. Defendant Jankowski joins in this motion.

Colliers first argues that Plaintiffs' fraud claims fail because they failed to plead such claims with particularity. Under MCR 2.112(B)(1), "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." Colliers argues that Plaintiffs' claims should be rejected because their fraud allegations "lump[] all defendants together" – without differentiating exactly what Colliers allegedly did.

In their Complaint, Plaintiffs claim that Mr. Lee posed "specific questions related to the value of [the two properties]." In response to Mr. Lee's direct inquiries, Plaintiffs allege that "Colliers, Jankowski and Schwartz" made nine specific false representations relative to the value of the properties. (Complaint at paragraph 20). Plaintiffs further allege that these Defendants knew the representations were not true and intended Plaintiffs to rely on them.

Colliers argues that "[t]here is no allegation that Colliers itself did anything with respect to the claim that Colliers should be responsible for the acts of Jankowski and Schwartz." In other words, Colliers argues that any alleged representations made by Jankowski and Schwartz should not be attributed to it because they are not its agents. Without differentiating what statements were made by Colliers, Jankowski or Schwartz, Colliers argues Plaintiffs have inappropriately lumped these Defendants together and their fraud claims fail as a matter of law

Plaintiffs respond that they have identified nine distinct, particular misrepresentations that "Colliers, Jankowski and Schwartz represented to Lee." Further, these allegations establish all elements to support their fraud claims. Indeed, accepting all well-pled allegations as true, Plaintiffs' Complaint adequately alleges each element required in such claims.

Plaintiffs further argue that the basis of Colliers' liability can be established through a theory of vicarious liability. In support, Plaintiffs cite to *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005), overruled on other grounds, 478 Mich 891; 732 NW2d 108 (2007), for the proposition that "It is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort." *Id*. at 549.

Plaintiffs claim that they pled that "Schwartz and Jankowski identified themselves as agents affiliated with Colliers" and cite to paragraph 11 of their Complaint in support. Said paragraph alleges: "At the time of their introduction, Jankowski and Schwartz held themselves out as licensed commercial real estate salespersons affiliated with Colliers."

Colliers responds, however, that "Agency was not pleaded at all, let alone properly pleaded." Further, Colliers argues that Plaintiffs' Complaint merely alleges a "purported

association" with Jankowski and Schwartz, which "is insufficient to support a claim for fraud against Colliers."

While it is apparent that Plaintiffs' Complaint intended to allege that Jankowski and Schwartz were agents of Colliers, perhaps it should have been done more clearly. But, as is the case in any summary motion brought under (C)(8), the Court Rules provide that the Court "shall give the parties an opportunity to amend their pleadings." MCR 2.116(I)(5).

As a result, Plaintiffs are directed to amend their Complaint to adequately plead that Jankowski and Schwartz are agents of Colliers – such that Colliers' liability may be established through vicarious liability – as permitted by Michigan law. See *Hartman & Eichhorn*, 266 Mich App 545. Plaintiffs have ten days to so amend.

Colliers next claims that "[Plaintiffs'] remaining claims . . . negligent misrepresentation, silent fraud, and breach of fiduciary duty, hinge on the premise that Colliers owed [Plaintiffs] a duty." And Colliers claims that Plaintiffs "failed to demonstrate" any action or agreement by Colliers to enter into a broker-client or other relationship to establish the same.

In support of its argument, Colliers cites to caselaw establishing that claims alone cannot establish a duty. But the cases cited relate to either (C)(10) motions or findings following a trial. And Colliers' motion is one brought under (C)(8). Under (C)(8), the court considers only the pleadings, and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.

In their Complaint, Plaintiffs allege that "Colliers, Jankowski and Schwartz agreed to act as buyers' agents for Lee and began working to identify specific opportunities for Lee to purchase commercial real estate." (Complaint at paragraph 13). Accepting this statement as true,

Plaintiffs have pled a duty sufficient to survive a (C)(8) summary motion on their negligent misrepresentation, silent fraud, and breach of fiduciary duty claims.

Colliers next argues that Plaintiffs' Complaint fails to allege that their reliance on Defendants' alleged misrepresentations was reasonable – as required to establish negligent misrepresentation. The Court agrees. Again, however, Plaintiffs must be permitted with an opportunity to amend and are directed to amend their Complaint to adequately plead that their reliance was reasonable to support their negligent misrepresentation claim.

Finally, the Court rejects Colliers' request with respect to Plaintiffs' conspiracy claim because this request is founded on the premise that all underlying tort claims would be dismissed, and the Court has not done so.

For all of the foregoing reasons, Colliers' motion for summary disposition under (C)(8) (joined by Defendant Jankowski) is DENIED.

II. Defendants Jankowski and Detroit Property's Motion

Defendants Jankowski and Metro Detroit Property also move for summary disposition of additional claims not alleged against Colliers.

First, Metro argues that it is entitled to summary of Plaintiffs' breach of contract claim because Plaintiffs failed to attach a written contract. And Jankowski and Metro argue that they are entitled to summary of Plaintiffs' unjust enrichment, conversion, and embezzlement claims.

Generally, with respect to these claims, Plaintiffs alleges that "following the sale of the properties . . . , Jankowski, Metro and Schwartz entered into a separate agreement for [them] to provide property management services for [the same]." This agreement allegedly broke down

when "Metro, Jankowski and Schwartz could not account for over $60,000 that Defendants entrusted to them."

Defendants' motion is founded on the argument that Plaintiffs failed to produce a written agreement that serves as the basis for each of these claims. Initially, Defendants cite to MCR 2.113(F)(1), which provides that "If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit."

In response, Plaintiffs argue that they never claimed "that they are making a claim on a written instrument." Further, "Plaintiffs do not allege that the agreement was memorialized or in writing." As a result, Defendants' request based on MCR 2.113(F)(1) is inapplicable. The Court agrees, and Defendants' motion on this basis is DENIED.

For the same reasons, Defendants' summary request with respect to Plaintiffs' conversion and embezzlement claims based on a lack of a written agreement is likewise rejected. Plaintiffs have adequately pled such claims.

Finally, Defendants argue that Plaintiffs' unjust enrichment claim must fail if there an express contract covering the same subject matter. But, as stated, Plaintiffs claim no express contract. As a result, Plaintiffs are permitted to plead breach of contract and unjust enrichment in the alternative pursuant to MCR 2.111(A)(2)(b), and Defendants' motion on this basis is also DENIED.

III. Summary/Conclusion

For all of the above reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court cannot conclude that Plaintiffs' claims are "so clearly

unenforceable as a matter of law that no factual development could possibly justify recovery." As a result, Defendants' motions for summary disposition under MCR 2.116(C)(8) are DENIED.

Plaintiffs, however, must amend their Complaint within 10 days to adequately plead that: (1) Jankowski and Schwartz are agents of Colliers – such that Colliers' liability may be established through vicarious liability – as permitted by Michigan law; and (2) their reliance was reasonable to support their negligent misrepresentation claim. MCR 2.116(I)(5).

Defendants Jankowski and Metro Detroit Property's motion for more definite statement or summary disposition is similarly DENIED.

IT IS SO ORDERED.

December 17, 2014 __ /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge