

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

**MY REALTY SELECT, LLC, and
SAM HABBO,
Plaintiffs,**

v.

**Case No. 15-148579-CB
Hon. James M. Alexander**

**MID-AMERICA REAL ESTATE-MICHIGAN, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ motion for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

Plaintiffs brought this case on claims that Defendants tortiously interfered with Plaintiffs’ entitlement to commissions earned when former business partners purchased certain commercial real property.

Specifically, Plaintiffs claim that, in February 2013, they entered into a “Non-Circumvention and Non-Disclosure Agreement” with non-party Basil Bacall. The stated purposed of said Agreement was “to safeguard the business relationships and confidential information of the Parties [thereto].”

Subsequent to this Agreement, Plaintiffs claim that they actively pursued real estate investment opportunities on Mr. Bacall’s behalf. Plaintiffs allege that one such opportunity was property located at 33096 Northwestern in West Bloomfield (“the Property”).

The Property was owned by non-party the Robert L. Schmalzried Marital Trust and SIA, LLC. Defendants Mid-America (a real estate sales brokerage firm) and Lormax (a real estate development firm) were retained by the owners of said property to assist in marketing and selling the same. And Defendants Jack Uhazie and Daniel Stern are the respective agents/representatives who marketed the Property for Mid-American and Lormax.

Eventually, Plaintiffs claim that they submitted two Purchase Agreements for the Property on Mr. Bacall's behalf – one dated February 22, 2013 for \$1.9 million, and one dated March 13, 2013 for \$2 million. Each Purchase Agreement provided that Plaintiff My Realty Select was to receive a 3% commission on the sale. But it is undisputed that neither Purchase Agreement was accepted.

Plaintiffs claim that, sometime after the March 13 Purchase Agreement, Mr. Bacall and Defendants had direct communication about the Property. Plaintiffs claim that when they tried to inquire about the Property during this time, Defendants ignored them. Ultimately, Plaintiffs claim that Defendants consummated the Property sale directly with Mr. Bacall and without Plaintiffs' involvement – squeezing them out of their 3% commission (\$60,000).

On these claims, Plaintiffs filed a two-Count Complaint on claims of (Count I) tortious interference with advantageous business relations or expectancy and (Count II) tortious interference with a contract.

Defendants now seek dismissal of said claims under MCR 2.116(C)(8) and (C)(10), which respectively test the legal and factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendants argue that they are entitled to summary disposition of Plaintiffs' claims for two reasons. First, Plaintiffs did not have any commission agreement with Mr. Bacall that

Defendants could have interfered with. And second, Plaintiffs have failed to plead, and cannot prove, that Defendants acted in an inherently wrongful or unjustifiable way.

A. Lack of written contract to support Plaintiffs' claims.

In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy.

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, . . . (3) an unjustified instigation of the breach by the defendant [and (4) damages].

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted) (paragraph breaks added for clarity).

Defendants first claim that they are entitled to summary disposition of Plaintiff's claims because Plaintiffs can identify no valid contract on which to base a tortious interference with a contract claim.

Initially, the Court will note that both parties appear confused about the nature of Plaintiffs' claims. For example, Defendants' primary argument is that no contract existed that could form the basis for Plaintiffs' tortious interference with a contract claim.

And in their response brief, Plaintiffs oddly claim that their "cause of action is for Tortuous Interference with Advantageous Business Relationship or Expectancy and not for Tortuous Interference with a Contract." (emphasis in original).

But despite this argument, as stated, Plaintiffs' Complaint alleges **two, separate claims:** (Count I) tortious interference with advantageous business relations or expectancy and (Count II) tortious interference with a contract.

In fact, the nature of Plaintiffs' response appears to concede that they do not have any valid claim for tortious interference with a contract. This is so because their entire argument is centered on the claim that Defendants' attack on the lack of a written contract is misplaced because no contract is necessary to their (apparently sole) claim for tortious interference with advantageous business relations or expectancy.

Despite this primary argument, however, Plaintiffs also argue that they "did have a valid contract" – claiming "the Non-Circumvention and Non-Disclosure Agreement between Plaintiffs and Basil Becall is a valid contract, and survives the statute of frauds." And Plaintiffs claim that "[m]erely because it does not supply the terms of a commission does not make it invalid."

Defendants base their argument that Plaintiffs do not have any enforceable commission agreement on MCL 566.132(1)(e), which provides:

In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

...

(e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

Because Plaintiffs can identify no writing that entitles them to a commission for Mr. Bacall's purchase of the Property, Defendants argue that Plaintiffs fail to establish the first element of their tortious interference with a contract claim – "the existence of a contract."

Indeed, our appellate courts have repeatedly dismissed claims for breaches of alleged non-written contracts to pay a real estate commission. See e.g., *Krause v Boraks*, 341 Mich 149,

155-157; 67 NW2d 202 (1954); *Ekelman v Freeman*, 350 Mich 665, 667-668; 87 NW2d 157 (1957).

Because Plaintiffs cannot produce any contract entitling them to a commission, Defendants argue that they cannot establish the first element necessary to succeed in their claim. The Court agrees. The lack of any written agreement entitling Plaintiffs to a commission on Mr. Bacall's purchase of the property is fatal to their claim for tortious interference with a contract (Count II), which is appropriately DISMISSED.

And Plaintiffs' suggestion that the Non-Circumvention and Non-Disclosure Agreement can be the basis of their tortious interference with a business relationship claim ignores that the subject of said agreement is not for payment of commissions on real estate transactions.

Rather, the stated purpose of said agreement is "to safeguard the business relationships and confidential information of the Parties [thereto]." This was not a commission agreement. Had the parties to it wished the Non-Circumvention Agreement to cover commissions, they could have easily so provided.

Instead, Plaintiffs and Mr. Bacall contracted that they wouldn't "circumvent or attempt to circumvent each other . . . with any of the real estate transactions that are conducted by the Parties." But the **negotiations** on the property never became a "**transaction**[]" that [was] conducted by the Parties." So it's unclear if Bacall ever breached said agreement – much less that Defendants instigated or induced the same.

Plaintiffs' response focuses heavily on the argument that there doesn't need to be a written contract for a claim of tortious interference with advantageous business relationship. While true, Plaintiffs' argument ignores that, in order for there to be an enforceable commission agreement, the same needs to be in writing. Since there was no written commission agreement,

Plaintiffs could not have had an expectancy of any commission. In other words, any expectancy of a real estate commission necessarily requires a contract.

The Court will note that Plaintiffs argue that summary disposition is premature because it has yet to depose the individual Defendants. Indeed, summary disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

But, in this case, the critical issue is whether Plaintiffs had a contract for commission on the sale of real property. It is undisputed that Plaintiffs had no such contract, and no amount of discovery will change that dispositive fact.

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, the Court GRANTS Defendants' motion for summary disposition of Plaintiffs' Counts I and II under (C)(10), and Plaintiffs' Complaint is DISMISSED in its entirety.

B. Per se wrongful act.

Although the Court has ruled that Defendants are entitled to summary disposition for the above reasons, Defendants' next argument is similarly (and independently) fatal to Plaintiffs' claims. As a result, the Court will address the same as an alternative basis to dismiss Plaintiffs' Complaint.

As stated, Defendants also argue that Plaintiffs cannot succeed on their claims because they failed to allege any specific inherently wrongful or unjustifiable acts on the part of Defendants.

Indeed, it is well settled that “one who alleges **tortious interference with a contractual or business relationship** must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984) (emphasis added); *CMI Intern, Inc v Internet Intern Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002).

“A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.” *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that “defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship].” *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986). See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”).

Plaintiffs allege that Defendants tortiously interfered with its relationship with Mr. Bacall by acting as seller agents and selling the Property directly to Mr. Bacall. But, even accepting these allegations as true, Plaintiffs have failed to allege any actions by Defendants other than those “motivated by legitimate business reasons” – namely, selling their clients’ property.

Simply, Plaintiffs allegations fall far short of alleging “an act that is inherently wrongful

or an act that can never be justified under any circumstances.” As a result, Plaintiffs fail to allege a necessary element to support either of their tortious interference claims.

For the foregoing reasons and viewing all well-pled allegations as true and construing them a light most favorable to the Plaintiffs, the Court finds that Plaintiffs’ tortious interference claims (Counts I and II) are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. As a result, Plaintiff’s Complaint is DISMISSED in its entirety.

Defendants’ request for costs under 2.114 is DENIED.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

February 8, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge