STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SNYDER, KINNEY, BENNETT AND KEATING, LLC d/b/a SIGNATURE SOTHEBY'S INTERNATIONAL REALTY, et al.,

Plaintiffs,

v

Case No. 16-153300-CB
Hon. Wendy Potts

REAL ESTATE ONE, INC. d/b/a MAX BROOCK REALTORS, et al.,

Defendants.
_____/

OPINION AND ORDER RE: DEFENDANTS REAL ESTATE ONE, INC. d/b/a MAX BROOCK REALTORS, ROBERT GLEASON, JON SWORDS, JOSEPH A. KEENAN, AND FRAN SCHLESINGER'S MOTION FOR SUMMARY DISPOSITION AS TO PLAINTIFFS' FIRST AMENDED COMPLAINT UNDER MCR 2.116(C)(8) AND MCR 2.116(C)(10)

At a session of Court
Held in Pontiac, Michigan
On
NOV 04 2016

This matter is before the Court on Defendants Real Estate One, Inc., d/b/a Max Broock Realtors, Robert Gleason, Jon Swords, Joseph A. Keenan, and Fran Schlesigner's Motion for Summary Disposition of Plaintiffs' First Amended Complaint under MCR 2.116(C)(8) and (C)(10). A motion under MCR 2.116(C)(8) tests the legal basis of a complaint and a motion under MCR 2.116(C)(10) tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

For purposes of background, Plaintiffs brought this case on claims for tortious interference with a contract, tortious interference with a business relationship or expectancy, silent fraud, negligence, civil conspiracy, and vicarious liability related to Reinhard and Lisa Eschbach's search for and purchase of a home in Bloomfield Hills. The parties appeared for oral argument on the motion on November 2, 2016, at which time the Court took the matter under advisement.

Defendants first assert that Plaintiffs cannot maintain an action either for tortious interference with a contract or tortious interference with a business relationship because Plaintiffs have not alleged the existence of a contract with which Defendants allegedly interfered and such a contract does not exist. Defendants further argue that Plaintiffs have not pled that Defendants committed an intentional per se wrongful act or a lawful act with malice and unjustified in law for the purpose of invading Plaintiffs' contract rights or business relationship.

"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).

In their response, Plaintiffs assert that Keating had an implied contract with the Eschenbachs. Plaintiffs further assert that Keenan lured the Eschenbachs away from taking further steps toward buying the Vaughn home that Keating had shown to them, and for which Keating had been instructed to prepare an Offer to Purchase. Plaintiffs further argue that their claim for tortious interference with a business relationship or expectancy is based on the fact that Keenan's actions allegedly are evidence of a per se violation of the National Association of Realtors Code of Ethics. It is undisputed that Keating did not have a written contract with the Eschenbachs for the purchase of property. Plaintiffs have not identified a writing that entitles them to a commission for the Eschenbach's purchase of the Lone Pine property, and they have not identified a signed contract regarding the Vaughn property.

MCL 566.132(1)(e) 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 are unable to identify a writing that entitles them to a commission, Defendants argue that Plaintiffs fail to establish the first element a claim for of tortious interference with 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). The lack of any written agreement is fatal to Plaintiffs' claim for tortious interference with a contract, which is appropriately dismissed.

Defendants further argue that Plaintiffs' claim for tortious interference with a business relationship or expectancy should also be dismissed because Plaintiffs have not pled that any of the Defendants committed an intentional per se wrongful act or a lawful act with malice unjustified in law for the purpose of invading Plaintiffs' contractual rights or business relationship. Additionally, Defendants assert that Plaintiffs claim for tortious interference with a business relationship fails because there exists no private cause of action for an alleged breach of the Code of Ethics and Standards of Practice of the National Association of Realtors. In order for there to be an enforceable commission agreement, the same needs to be in writing. Since there was no agreement, Plaintiffs could not have had an expectancy of any commission. In other words, any expectancy of a real estate commission related to the Eschbach's search to purchase a high-end home necessarily requires a contract. Because the critical issue is whether Plaintiffs had a contract for commission, and it is undisputed that Plaintiffs did not have any such contract, the Court finds—viewing all evidence in a light most favorable to Plaintiffs—that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law on this claim. Thus, Plaintiffs' claim for tortious interference with a business relationship or expectancy is dismissed.

Defendants assert that Plaintiffs' silent fraud claim fails because the first amended complaint fails to allege any misrepresentations or misleading actions and because Keenan had no duty to disclose anything to Keating. To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, "a plaintiff must show some type of representation by words or actions that was false or misleading and was

intended to deceive." *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013); quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008).

Defendants argue that Plaintiffs cannot establish that Keenan had a legal or equitable duty of disclosure or that Plaintiffs have not alleged that Keenan made a misrepresentation that was false or that he engaged in misleading actions. In response, Plaintiffs conclude that Keenan was required to be honest about his relationship to the parties in a real estate transaction and that Keenan is held to a higher standard, but fail to identify or describe the source of that duty. Michigan law is clear that "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Because Plaintiffs fail to produce evidence to demonstrate a genuine issue of material fact concerning Keenan's legal or equitable duty of disclosure, summary disposition of Plaintiffs' silent fraud claim is appropriate and that claim is dismissed.

Defendants assert that Plaintiffs' negligence, conspiracy, and vicarious liability claims all fail. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Whether a duty exists is generally a question of law for the Court. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). To determine whether a duty exists, the Court considers several factors including (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the burden on the defendant, and (4) the nature of the risk presented. *Id.* at 661. The first two factors – relationship and foreseeability – are the most important and no duty can be imposed if these two factors are absent. *Id.* Plaintiffs have not established that Defendants owed Plaintiffs a duty

with regard to the claims Plaintiffs make in the first amended complaint. Since they are unable to establish a duty, those claims fail.

Further, Defendants argue that Plaintiffs' claim for civil conspiracy must be dismissed because there is no underlying tort. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569, 580 (2003). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort. As previously discussed, plaintiffs simply failed to establish the underlying tort because they failed to establish any unlawful purpose or unlawful means in defendants' actions. Because plaintiffs failed to establish any actionable underlying tort, the conspiracy claim must also fail." *Id.* (citations and quotations omitted). As in *Advocacy Organization for Patients & Providers, supra,* where the court found that the conspiracy claim failed because plaintiffs failed to establish an underlying tort, this Court finds that Plaintiffs have failed to establish any underlying tort. Accordingly, Plaintiffs' claim for conspiracy is dismissed.

Defendants lastly argue that Plaintiffs' claim for vicarious liability also fails. "Vicarious liability thus rests on the imputation of the negligence of an agent to a principal." *Al-Shimmari v Detroit Med. Ctr.*, 477 Mich 280, 294; 731 NW2d 29 (2007). Since the Court has dismissed the negligence claim, there can be no imputation of the negligence of an agent to the principal. *Id.* Accordingly, Plaintiffs' claim for vicarious liability is dismissed.

For all of the reasons stated above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) is granted and Plaintiffs' claims are dismissed in their entirety. Defendants' request for costs and attorneys' fees is reserved and Defendants may

file a motion and brief in support thereof if they wish to proceed with that request. This opinion and order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated:

NOV 04 2016

Hon. Wendy Potts