

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

RE/MAX OF ELK RAPIDS, a Michigan corporation,

Plaintiff,

v

File No. 02-7820-CK
HON. PHILIP E. RODGERS, JR.

RONALD GRAMMAR and DENNIS GRAMMAR,
jointly and severally,

Defendants/Third-Party Plaintiffs,

v

ROBERT TERRY and MARIA TERRY,
husband and wife,

Third-Party Defendants.

Deborah Lynch (P33418)
Attorney for Plaintiff

Richard J. Zerafa (P22717)
Attorney for Defendants/Third-Party Plaintiffs

pc: Robert Terry and Maria Terry

DECISION AND ORDER REGARDING
PLAINTIFF'S SECOND MOTION FOR SUMMARY DISPOSITION,
DEFENDANTS/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION
AND MOTION TO ADD/AMEND AFFIRMATIVE DEFENSES
AND
CANCELING OCTOBER 23, 2002 HEARING

This is a tortious interference with a contract or business relationship action. The undisputed facts are these. Plaintiff Re/Max of Elk Rapids ("Re/Max") entered into an exclusive listing agreement with the Sellers of certain property, Robert Terry and Maria Terry, ("Sellers") for a term commencing on November 29, 2000 and extending to September 19, 2001.¹ The Defendants purchased the property. The Sellers refused to pay the commission fee allegedly due pursuant to the listing agreement. On October 31, 2001, Re/Max filed suit against the Sellers in the District Court

¹On June 26, 2002, the Court granted the Defendants' request to file a third-party action against Sellers.

for breach of contract.² The Defendants delivered a false affidavit to the Sellers stating that they “never discussed the property nor the purchase of it with Donald Fedrigon, Jr. or anyone else from Re/Max.” The affidavit was executed on November 13, 2000. This action was filed on January 10, 2002. The closing on the purchase by the Defendants took place on January 25, 2002. The Sellers gave the false affidavit to the closing agent so that no funds would be disbursed to Re/Max to cover the real estate commission. On February 19, 2002, the District Court action was dismissed with prejudice by stipulation of the parties.

On May 8, 2002, Re/Max filed a motion for summary disposition pursuant to MCR 2.116(C)(10) claiming that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. Re/Max relied upon the deposition testimony of Defendant Dennis Grammar in which he admits that the affidavit stating that he never discussed the property nor the purchase of it with anyone from Re/Max was false. Based on Dennis Grammar’s deposition testimony, he gave the affidavit to the Sellers because they were being sued by Re/Max and he assumed it would be used in the Court proceeding. The Court heard the oral arguments of counsel on June 16, 2002 and denied the motion without prejudice finding that there were disputed issues of material fact.

On August 26, 2002, Re/Max filed a second motion for summary disposition on the same grounds. Re/Max filed a copy of the transcript of the deposition testimony of attorney Jonathan Moothart (“Moothart”) who represented the Sellers in the District Court action. Re/Max claims that Moothart’s deposition testimony supports their contention that “the Defendants signed the false affidavits to eliminate the need to pay a commission to the Plaintiff and would cause third parties to breach their contract without justification.” Attorney Moothart testified, however, that the affidavit was never used in the District Court action. Re/Max claims nonetheless that, by delivering this affidavit to the Sellers, these Defendants tortiously interfered with its contractual relationship with the Sellers. Re/Max relies upon the undisputed fact that the affidavit was produced at the closing and no commission was paid to Re/Max.

On September 16, 2002, the Court heard the oral arguments of counsel. Counsel were given additional time to file supplemental briefs. That time would have expired on October 7, 2002. On

²*Re/Max of Elk Rapids, a Michigan corporation v Robert Terry and Maria Terry, jointly and severally*, File No. 01-6323F-3-GC, in the 86th Judicial District Court for the County of Antrim.

September 30, 2002, however, the Defendant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (10) and a Motion to Add/Amend Affirmative Defenses. The Defendant claims that the prior judgment of dismissal with prejudice entered in Antrim County District Court File No. 01-6323-3-GC is res judicata and precludes the Plaintiff from pursuing this case.

On October 1, 2002, the Court issued a Briefing Schedule Order giving the Plaintiff 14 days from the date of the Order to file a supplement brief in support of its Motion for Summary Disposition *and* a response to the Defendant's Motion for Summary Disposition and giving the Defendant 21 days from the date of the Order to file a reply to the Plaintiff's response. On October 9, 2002, the Plaintiff filed its Supplemental Brief in Support of Motion for Summary Disposition, Response to Defendants' Motion for Summary Disposition and Response to Defendants' Motion to Add/Amend Affirmative Defenses.

These pending motions are scheduled to be heard on Wednesday, October 23, 2002. The Court, in its discretion, dispenses with any further briefing and oral argument on the motions, pursuant to MCR 2.119(E)(3), and issues this written Decision and Order.

ISSUE

The question presented is whether, as a matter of law, the Defendants tortiously interfered with the contractual relationship between Re/Max and the Sellers.

LAW

In *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989), the Court said:

The elements of tortious interference with a contractual relationship are (1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant. The arguments on appeal focus upon the third element. In *Formall Inc v Community National Bank of Pontiac*, we stated the following with regard to the third element:

[O]ne 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.

In *Meyering v Russell*, 53 Mich App 695, 704-705; 220 NW2d 121 (1974), the Court discussed the third element of tortious interference: instigation of the breach without justification and stated:

Appellants concede that damages may be awarded where a tortious interference with another's contractual rights occurs, but assert that the rule requires the intentional doing of a wrongful act or other conduct indicating malice. Early cases did hold that malice was a prerequisite to liability but, as the law evolved, malice became less and less important. Today, liability may be found if the interference is by inducement or is purposeful interference. See 4 Restatement Torts, s 766, pp 49-63.

Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby. * * *

* * * d. Induces or otherwise purposely causes. The word "induces" refers to the situations in which A causes B to choose one course of conduct rather than another. Whether A causes the choice by persuasion or by intimidation, B is free to choose the other course if he is willing to suffer the consequences.

See also, *Weitting v McFeeters*, 104 Mich App 188, 199-200; 304 NW2d 525 (1981).

In *Hutton v Roberts*, 182 Mich App 153; 451 NW2d 153 (1990), the vendor and purchasers appealed from a judgment for the signatories to a previous purchase agreement in an action for breach of contract to sell a home and for tortious interference with contractual relations. The Court of Appeals held that the purchasers were not liable for tortious interference with contractual relations, absent sufficient evidence they acted with illegal, unethical, or improper purpose to induce vendor's breach of a previous purchase agreement. The Court of Appeals said:

The nature of the illegal, unethical, or improper purpose requisite to tortious interference with a contract was set forth definitively and, in our view, correctly in *Feldman v Green*, 138 Mich App 360; 360 NW2d 881 (1984), lv den 422 Mich 961; 372 NW2d 323 (1985):

We hold, consistently with prior rulings by the Supreme Court of this state, 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 intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship. Under the latter instance, plaintiff necessarily must demonstrate, with specificity, affirmative

acts by the interferor which corroborate the unlawful purpose of the interference. *Id* at 369-370.

The plaintiff in *Feldman* was aggrieved by the defendant's purchase of certain nursing homes in contravention of the plaintiff's preexisting option to acquire the same properties. In affirming summary judgment for the defendants, this Court, relying on *Meyering, supra*, observed that mere competition between parties for the right to acquire the same property from the same owner was not a basis for liability.

The conclusions reached in *Feldman* were based in part on *Wilkinson v Powe*, 300 Mich 275; 1NW2d 539 (1942), where the plaintiff was engaged in the business of taking milk from the farmers producing it and delivering it to a creamery. To that end, the plaintiff entered into written agreements with the producing farmers located on the plaintiff's milk routes. After the creamery decided to assume the delivery function itself, its representatives sent letters directly to the farmers apprising them of the discontinuance of the business relationship between the creamery and the plaintiff. The creamery was successful in forcing the plaintiff out of business. In its affirmance of a verdict for the plaintiff, the Supreme Court reiterated that the theory of tort relied upon by the plaintiff required, in addition to mere persuasion of a person to break a contract, a showing that the interference sprung from the purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff. *Id* at 282; 1 NW2d 539. This improper purpose, which was described in terms of "malice" or "the intentional doing of a wrongful act without legal or social justification," is to be inferred from some act done intentionally and without just cause or excuse. *Id* at 283; 1 NW2d 539. The improper or malicious purpose must be corroborated by an objective manifestation:

If the defendants in the instant case had merely refused to accept further delivery of milk by plaintiff, they would have been clearly within their legal rights, although this would have resulted in a breach of contract between plaintiff and the farmers. But defendants did more. Their letters of May 29th and June 1st show active solicitation of a breach of the contract and their refusal to accept delivery of milk was merely another step in bringing about the breach. *Id* at 300; 1 NW2d 539.

* * *

Moreover, Michigan law appears to be in accord with the Restatement position, which is stated as follows:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person **by inducing or otherwise causing the third person not to perform the contract**, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. [4 Restatement Torts, 2d, § 766, p 7.] [Emphasis added.]

Although § 766 requires an improper interference instead of the more conventional terminology requiring an act done “with malice and unjustified in law,” *Feldman, supra* at 369; 360 NW2d 881, it is clear that the term “improper” is meant to encompass and subsume traditional notions of malice, lack of justification, and improper purpose. See 4 Restatement Torts, 2d, ch. 37, introductory note, pp 5-7 and § 767, pp 26-27. The Restatement does not alter the state of the law in this regard.

Thus, in order to succeed on its claim of tortious interference, Re/Max must prove that the Defendants’ **induced or caused the Sellers to breach their contract with Re/Max** by providing them with false affidavits.

ANALYSIS

According to Defendant Dennis Grammar’s deposition testimony, he admits giving a false affidavit to the Sellers, but he does not admit that he did so in order to interfere with the Sellers’ contract with Re/Max. The deposition testimony of Moothart conclusively establishes that these Defendants did not give the false affidavits to the Sellers in order to induce or cause them to breach their contract with Re/Max because the breach had already occurred before the affidavits were prepared and executed.

After the listing agreement expired and the Sellers had agreed to sell the property to the Defendants, the Sellers refused to pay the commission called for by the listing agreement with Re/Max. Re/Max initiated the District Court action against the Sellers for breach of contract on October 31, 2001. The affidavits were prepared and executed on November 13, 2001, almost two weeks after the District Court action was filed. Thus, by the time the false affidavits were prepared and executed, the Sellers had already refused to pay the commission and were litigating whether they

breached their contract with Re/Max in the District Court. The breach, if any, had already occurred by the time the false affidavits were prepared and executed. The Defendants' signing and delivering false affidavits to the Sellers after the Sellers had already allegedly breached their contract with Re/Max could not possibly have *induced or caused* the breach.³

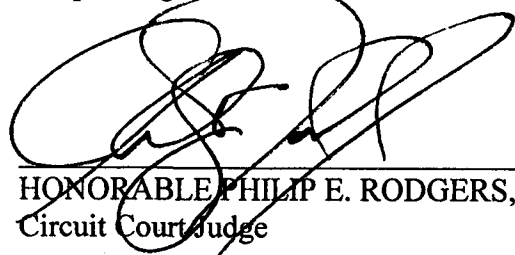
CONCLUSION

The signing of a knowingly false affidavit is a wrongful act which may have civil or criminal consequences. Here, however, it was not an act that induced or caused the Sellers to breach their contract with Re/Max. The alleged breach had already occurred prior to the Defendants' signing and delivering the false affidavits to the Sellers as evidenced by the fact that Re/Max had already filed a breach of contract lawsuit against the Sellers. For this reason Plaintiff's Motion for Summary Disposition should be and hereby is denied. The Defendants are entitled to judgment, pursuant to MCR 2.116(I)(2). Based on the Court's ruling on the Plaintiff's motion, the Defendants' Motion for Summary Disposition and Motion to Add/Amend Affirmative Defenses are rendered moot. The third-party action by the Defendants against the Sellers is also rendered moot.

The hearing on pending motions scheduled for October 23, 2002 is canceled. This entire action is dismissed with prejudice. Each party will bear his own costs. Counsel for the Defendants shall, within 14 days of the date of this Decision and Order, prepare and submit a proposed Judgment, pursuant to MCR 2.602(B)(3).

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/10/02

³Even though the affidavits could not have caused the breach for which Re/Max was already suing the Sellers in District Court, it is unclear whether the affidavits may have been used to fraudulently induce the resolution of the District Court action. Obviously, if the settlement of that action was induced by fraud, grounds may exist to set aside the dismissal of the District Court action.