Lyons v Menoudakos & Menoudakos, P.C.
2007 NY Slip Op 33786(U)
November 14, 2007
Supreme Court, Nassau County
Docket Number: 8852-05/
Judge: Anthony L. Parga
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA
Justice

PART 13

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LAURA LYONS and ARLENE LYONS,

Plaintiffs,

-against-

MENOUDAKOS & MENOUDAKOS, P.C. and PETER MENDOUDAKOS, JR., Individually,

Defendants.

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MOTION DATE: 9/19/07
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Upon the foregoing papers, it is ordered that the motion by defendants for summary judgment dismissing the Complaint is granted in part and denied in part. Defendants' motion is granted as to all causes of action except for tortious interference with prospective contractual relations. There are no punitive damages for this remaining claim.

This is an action for tortious interference with a real estate transaction. In September 2004, plaintiffs Arlene Lyons and her stepdaughter, Laura, were interested in buying a house located at 232 Ribbon Street in Franklin Square. The home was owned by an 86 year old man, who is now deceased, Ernest Ott. The house was not

listed with a real estate broker, but Laura learned that it was for sale through Mr. Ott's daughter. Plaintiffs allege that they offered to buy the house for $245,000 and Mr. Ott orally accepted the offer. Plaintiffs then retained an attorney, Joseph Misk, to represent them in connection with the transaction. Mr. Ott retained the defendant, Peter Menoudakos.

According to Menoudakos, upon being retained, he advised his client that the price of $245,000 was "too low." Menoudakos, who is not only an attorney but also a licensed real estate broker, determined that the "appraised value" of the home was between $259,000 and $324,000. Based upon Menoudakos' advise, Ott determined to raise the price to $265,000. Menoudakos also informed Ott that if plaintiffs refused to pay $265,000 for the house, he would buy the house for that price himself, if Ott was unable to find another buyer. However, plaintiffs agreed to the increased price, and Menoudakos then drafted a proposed contract and forwarded it to the attorney for the purchasers.

The contract, as drawn by Menoudakos, called for the purchasers to make a down payment of $26,500, upon signing of the contract.[1] According to Menodoukas, when he did not receive the signed contract back from Misk after two weeks, he spoke with the attorney and was informed that plaintiffs had not submitted a check for the down payment. Nonetheless, on September 29, 2004, Menoudakos received the signed contract back from Misk with a down payment check in the amount of $20,000, rather than $26,500, the amount which had been specified in the proposed

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[1]The purchasers under the contract were apparently Arlene, Laura, and Dennis Lyons, who is Arlene's husband and Laura's father. Although defendant purports to submit a copy of the proposed contract as exhibit A to his motion, the contract actually submitted is the contract which Menoudakos and his wife subsequently entered into to purchase the property. However, there appears to be no dispute as to the terms of the original contract prepared by Menoudakos.

contract. The check was drawn on an account of Dennis and Laura Lyons and was signed by Dennis. According to Menoudakos, he advised his client that the purchasers' tender of a down payment check in a reduced amount was "nothing to be concerned with." Nevertheless, Ott insisted on a down payment of $26,500, the amount specified in the contract. While plaintiffs claim that they were prepared to increase the down payment to $26,500, they do not appear to have ever tendered a check for the amount specified in the contract. Menoudakos claims that Misk, the purchasers' attorney, proposed that if Ott would accept a down payment of $20,000, the purchasers would waive their right to a mortgage contingency clause in the contract. Menoudakos further claims that he advised Ott to accept these terms because a firm contract would be in the seller's best interest. Nevertheless, Ott reported to him that, much to his distress, Laura and Dennis Lyons had appeared at his home "unannounced" on several evenings. Whether the purpose of these visits was to inspect the premises or to encourage Ott to accept the reduced down payment is unclear. In any event, by letter dated October 13, 2004, Menoudakos advised Misk that the seller had elected not to proceed with the transaction.

Two days later, on October 15, 2004, Ott entered into a written contract to sell the property to defendant and his wife, Athena, for $265,000. The contract called for a down payment of $26,500 upon signing of the contract but did not contain a mortgage contingency clause. Plaintiffs allege that less than a year later, Menoudakos and his wife sold the property for over $400,000.

This action for tortious interference with contract or prospective economic relations was commenced on November 29, 2005. Plaintiffs also assert claims for slander and breach of fiduciary duty. In essence, plaintiffs allege that while the decision not to enter into the contract may have been Mr. Ott's, defendant

"manipulated the situation for his own advantage." Plaintiffs seek compensatory damages, apparently their lost profit on the transaction, as well as punitive damages of $250,000. Claiming that he acted as an attorney, giving "proper and competent advice," defendant is moving for summary judgment dismissing the complaint.

In order to establish a claim for tortious interference with contractual relations, plaintiff must show: 1) the existence of a valid contract between plaintiff and a third party, 2) defendant's knowledge of that contract, 3) the defendant's intentional procuring of the breach of that contract by the third party, and 4) damages(*Israel v. Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). Thus, where there is an existing, enforceable contract and defendant's deliberate interference results in a breach of that contract, plaintiff may recover damages for tortious interference with contractual relations even if defendant was engaged in lawful behavior(*NBT Bancorp. Inc. v. Fleet/Norstar Financial Group*, 87 NY2d 614, 621 [1996]). In those circumstances, respect for individual contract rights outweighs the public benefit to be derived from unfettered competition(Id at 622). An oral contract within the statute of frauds is not an enforceable contract for the purposes of a tortious interference action(*Pappell v. Calogero*, 114 AD2d 403 [2d Dep't 1985]).

Where there has been no breach of an existing contract, but only interference with prospective contract rights, plaintiff must show "more culpable" conduct on the part of the defendant(*NBT Bancorp. Inc. v. Fleet/Norstar Financial Group*, supra, 87 NY2d at 621). Where plaintiff and defendant are "business competitors," defendant will be permitted to interfere with plaintiff's prospective contractual relationships, provided no unlawful restraint of trade is effected and the means employed are not wrongful(*Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190 [1980]). Wrongful conduct includes physical violence, fraud or misrepresentation,

abuse of process, and some degree of economic pressure(Id at 191). Persuasion alone is not wrongful(Id). As a general rule, defendant's conduct must amount to a crime or an independent tort to be culpable(*Carvel Corp. v. Noonan*, 3 NY3d 182, 190 [2004]).

In *Carvel Corp.*, a majority of the Court of Appeals extended the wrongful means standard for interference with prospective contractual relations to any business context regardless of whether the parties are "competitors." The court noted that the existence of competition may be relevant to the issue of wrongful means because competition provides a motive for interference other than a mere desire to injure, that is "legitimate economic self-interest"(Id at 191). The court also noted that the parties may be in competition for a particular acquisition even if they are not competitors in their everyday business(Id).

In her concurring opinion, Judge Graffeo states that the standard of wrongful means is too restrictive in an interference with prospective contractual relations case where the parties are not market competitors. According to Judge Graffeo, the proper standard in such a case is whether defendant engaged in improper conduct(Id at 194). In determining whether defendant's conduct was improper, the factfinder may consider the relationship between the parties, the motive and interest of the one who interferes, the social interest in protecting defendant's freedom of action, the interests of the plaintiff with which defendant interferes, and the proximity or remoteness of the interference to the non-performance of the contract(Id at 196).

Because the contract between plaintiffs and Mr. Ott concerned real property, it was within the statute of frauds and was unenforceable without a writing signed by Ott(General Obligations Law § 5-703). Since the contract was never signed by Ott,

defendant's motion for summary judgment is granted as to plaintiffs' claim for tortious interference with contract.

Not surprisingly, there are very few cases where an attorney has been sued for tortious interference for counseling a client to refrain from entering into contractual relations or to breach an existing contract. If the attorney's conduct is within ethical bounds, the social interest in protecting the attorney's freedom of action, as well as the importance of the attorney-client relationship itself, will ordinarily render the attorney's conduct proper(See *Sumitomo Bank v. DiBenedetto*, 256 AD2d 89 [1st Dep't 1998]). However, because Menoudakos has not established that his conduct was in compliance with attorney disciplinary rules, he has not made a prima facie showing that he did not wrongfully interfere with plaintiffs' prospective contractual relations.

DR 5-101 provides that a lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client may reasonably be effected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected and the client consents to the representation after full disclosure. DR 5-104 further provides that a lawyer shall not enter into a business transaction with a client if they have differing interests and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless the terms are fair and reasonable, the lawyer advises the client to seek independent counsel, and the client consents in writing after full disclosure.

The court notes that Mr. Ott was ultimately represented by independent counsel when he sold the house to Menoudakos. However, as soon as Menoudakos expressed interest in buying the home for $265,000, his professional judgment on

behalf of Ott was reasonably likely to be affected by his own financial and business interests. Thus, Menoudakos was required to disclose to his client the potential conflict of interest and to obtain Mr. Ott's consent in order to continue representing Ott during the remainder of the negotiations with the plaintiffs. If Ott did not consent to the representation after full disclosure, Menoudakos was in violation of DR 5-101, regardless of whether Ott "got his price" or Menoudakos' conflict actually operated on the representation. In this regard, the court notes that Menoudakos' personal interests may well have influenced Ott's decision to terminate the deal notwithstanding the attorney's assurances with regard to the down payment.

Because Menoudakos has not established that his conduct was in compliance with the Code of Professional Responsibility, the court proceeds to consider whether his conduct was "wrongful." While Menoudakos and plaintiffs were competing for the same property, it was not true free market competition because of the attorney's "position of dominance" with regard to the seller(*Carvel Corp. v. Noonan*, supra, 3 NY3d at 195 [Graffeo, J. concurring]). Thus, the court concludes that the appropriate criterion is improper conduct rather than the more restrictive crime or independent tort standard. In determining whether Menoudakos' conduct was improper, the factfinder must consider whether he was in compliance with attorney disciplinary rules, i.e. whether he acted in "legitimate" economic self-interest. However, the factfinder must also consider the legitimacy of plaintiffs' interests, including the age of Mr. Ott and the potential for overreaching. Thus, ultimately the issue "depends upon a judgment and choice of values in [the particular] situation"(*Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, supra, 50 NY2d at 190). However, because, as will be discussed below, there is no evidence that defendant acted with actual malice,

punitive damages will not be available(*Burdick v. Shearson American Express*, 160 AD2d 642 [1st Dep't 1990]).

Plaintiffs allege that Menoudakos slandered them through the utterance of false and untrue statements concerning their "intentions, ability to meet financial obligations, character, and maturity." The court notes that pursuant to CPLR 3016, in an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally. It is clear that the amended complaint does not comply with the particularity requirement in a defamation action.

Nonetheless, even aside from the deficiency in pleading, it is clear that plaintiffs do not have a cause of action for slander. Statements made by attorneys in the course of legal proceedings are absolutely privileged if they are at all pertinent to the litigation(*Lacher v. Engel*, 33 AD3d 10, 13 [1st Dep't 2006]). Menoudakos' statements concerning plaintiffs would not be covered by this absolute privilege because they were made in the course of a real estate transaction rather than legal proceedings.

However, in actions for defamation, there is a qualified "common interest" privilege extending to communications made by one person to another upon a subject in which both have a common interest(*Lieberman v. Gelstein*, 80 NY2d 429, 437 [1992]). The rationale for applying the privilege is that the "flow of information" between persons sharing a common interest should not be impeded(Id). Thus, words spoken to a person with whom the speaker shares a common interest are privileged unless the defendant spoke with malice, that is spite or ill will(Id).

Where an attorney communicates with a client concerning the matter in which the client is being represented, the attorney and client have a common interest in the

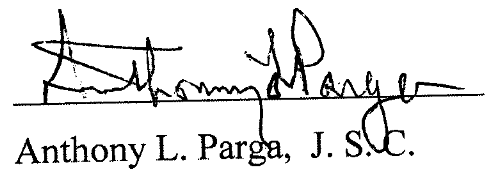
matter, regardless of whether the attorney's personal interests are also impacting upon the representation. Any statements made by Menoudakos to Ott, concerning plaintiffs' qualifications as prospective purchasers, clearly related to the real estate transaction in which Ott was being represented. Since Menoudakos' statements were covered by the common interest privilege, defendant has established prima facie that they were not defamatory. Plaintiffs have come forward with no evidence that Mendoukos' statements concerning their qualifications as purchasers were motivated by malice as opposed to economic self-interest, legitimate or otherwise. Defendants' motion for summary judgment is granted as to plaintiffs' claim for slander.

Finally, plaintiffs purport to state a cause of action for breach of fiduciary duty on the theory that defendant breached his fiduciary duty to "his own client." As plaintiffs seem to recognize, an attorney's fiduciary duty is owed not to any third party, but rather to the attorney's client(*Matter of Boulanger*, 61 NY2d 89 [1984]). Since plaintiffs were not in privity with Ott, or in "any relationship approaching privity" with the seller, they cannot maintain an action for breach of the fiduciary duty which defendant owed to his client(*Briarpatch Ltd v. Frankfurt, Garbus, Klein & Selz*, 13 AD3d 296 [1st Dep't 2004]). Defendants' motion for summary judgment as to plaintiffs' claim for breach of fiduciary duty is granted.

This shall constitute the decision and order of the court.

The parties shall appear as scheduled on December 11, 2007 in the DCM Trial Part.

Dated: November 14, 2007.



Anthony L. Parga, J. S.C.

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