

**Susan D. Fine Enter., LLC v Steele**

2008 NY Slip Op 32783(U)

October 7, 2008

Supreme Court, New York County

Docket Number: 101160/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JOAN A. MADDEN

PRESENT: J.S.C.

PART 11

Index Number : 101160/2008  
SUSAN D. FINE ENTERPRISES  
vs.  
STEELE, NORMAN  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is determined in accordance with the annexed decision and order.

**FILED**  
OCT 09 2008  
COUNTY CLERKS OFFICE  
NEW YORK

Dated: Oct 7, 2008

*[Signature]*  
HON. JOAN A. MADDEN S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X

SUSAN D. FINE ENTERPRISES, LLC,

Plaintiff,

INDEX NO. 101160/08

-against-

NORMAN STEELE, NEW YORK PROPERTIES, L.L.C.,  
ADAM STEELE, PRUDENTIAL DOUGLAS ELLIMAN,  
INC., DREW GLICK, MARGARET POLIMENI and  
VINCENT POLIMENI,

Defendants.

-----X  
JOAN A. MADDEN, J.:

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action to recover a real estate broker's commission in the amount of \$108,000, plaintiff moves for an order pursuant to CPLR 3211(a)(7), dismissing defendants' counterclaims for failure to state a cause of action, and for an order pursuant to Rule 130.1, awarding plaintiff sanctions in the amount of its reasonable attorneys fees, including the costs and disbursements of the instant motion. Defendants Prudential Douglas Elliman, Drew Glick, Norman Steele, New York Properties, LLC and Adam Steele (collectively the "Prudential defendants") oppose the motion. Defendant Vincent Polimeni also opposes the motion, and cross-moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against him.

The Prudential defendants assert a first two counterclaim for intentional interference with the real estate brokerage agreement between the real estate broker, defendant Prudential Douglas Elliman and the owner/seller of the property, defendant Norman Steele, and a second counterclaim for Rule 130.1 sanctions for plaintiff's allegedly frivolous claim. Defendant Polimeni, the purchaser of the property, asserts one counterclaim for deceptive business

practices, including punitive damages.

Where as here, plaintiff has made a motion to dismiss addressed to the sufficiency of defendants' pleadings, the counterclaims must be liberally construed, and the Court must accept all allegations as true and accord them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. See Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1<sup>st</sup> Dept 2005); DeMicco Bros, Inc. v. Consolidated Edison Co., 8 AD3d 99 (1<sup>st</sup> Dept 2004). In determining a motion to dismiss for failure to state a cause of action, the test is simply whether the proponent of the pleading has a cause of action, not whether they have stated one. See Leon v. Martinez, 84 NY2d 83, 88 (1994); Wiener v. Lazard Freres & Co., 241 AD2d 114 (1<sup>st</sup> Dept 1998).

In moving to dismiss the counterclaims on the grounds of failure to state a cause of action pursuant to CPLR 3211(a)(7), plaintiff argues that the counterclaims are all defective in failing to allege injury, and that on the face of the pleadings, defendants have no injury and no loss for which pecuniary or actual damages can be sought; as a result, the counterclaims are frivolous and "devoid of any legally cognizable purpose." The court agrees.

To properly plead a counterclaim for intentional or tortious interference with contractual relations, the Prudential defendants must allege four elements: 1) the existence of a valid contract; 2) plaintiff's knowledge of the contract; 3) plaintiff's intentionally procuring a breach of the contract; 4) actual breach of the contract; and 5) resultant damages to defendants. See Lama Holding Co. v. Smith Barney, Inc., 88 NY2d 413 (1996); Foster v. Churchill, 87 NY2d 744, 749, 750 (1996); Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.,

296 AD2d 103 (1<sup>st</sup> Dept 2002), lv app denied 2 NY3d 702 (2004).

In their first counterclaim for intentional interference with the brokerage agreement, the Prudential defendants allege that “plaintiff’s principal Susan D. Fine was on direct notice from the named defendants-purchasers Polimeni that they were the real estate brokerage customers and buyer-prospects of the of the defendant Prudential Douglas Elliman through its agent the defendant Drew Glick.” They also allege that Susan Fine and “her current counsel, as of the date hereof, were also on notice of the existence of a real estate brokerage agreement between the defendant Prudential Douglas Elliman and defendant New York Properties LLC as co-brokers with respect to the sale to the defendants Polimeni of condominium unit 52C in the building 301 West 57 Street owned by defendant Norman Steele.” The Prudential defendants further allege that “[n]otwithstanding that plaintiff and her counsel were on notice as aforesaid, they did intentionally interfere with the real estate brokerage agreement between defendant Prudential Douglas Elliman and defendant Norman Steele,” and that “[g]iven the Plaintiff, plaintiff’s principal and her counsel did persist in such interference as aforementioned, including the commencement of this action, notwithstanding the circumstances and manner of notice . . . plaintiff is therefore liable for punitive damages.” The Prudential defendants also allege that “by reason of the foregoing,” they are “entitled to judgment in such amount as may be proven at trial of this action including an award of punitive damages in the amount of \$350,000.”

These allegations do not sufficiently state a claim for intentional interference with contract. Defendants fail to allege that the interference by Susan Fine resulted in the actual breach of the a contract. See Lama Holding Co. v. Smith Barney, Inc., supra; Joan Hansen & Co., Inc. v. Everlast World’s Boxing Headquarters Corp., supra. To the contrary, it appears that

the sale was successfully consummated. Defendants' unspecific allegations as to damages are likewise insufficient. See Lama Holding Co. v. Smith Barney, Inc., supra.

In the second counterclaim, the Prudential defendants seek Rule 130.1 sanctions for frivolous conduct, alleging that "given the facts that plaintiff's cause of action will be shown to be patently frivolous and intended to waste the time and money of the defendants on a meritless claim with the intent to force payment of monies which are known not to be legally due." This counterclaim is without merit, as New York does not recognize an independent cause of action for sanctions pursuant to Rule 130.1. See Richardson v. Pascarella, 15 Misc3d 1143(A) (Sup Ct, Onondaga Co. 2007); Aurora Loan Services, LLC v. Cambridge Home Capital, LLC, 12 Misc3d 1152(A) (Sup Ct, Nassau Co. 2006); Murphy v. Smith, 4 Misc3d 1029(A) (Sup Ct, NY Co, 2004); Yankee Trails, Inc. v. Jardine Insurance Brokers, Inc., 145 Misc2d 282 (Sup Ct, Rensselaer Co, 1989).

As to Polimeni's counterclaim, although his answer does not reference General Business Law §349, at best, it appears that he is asserting a cause of action for deceptive business practices in violation of that statute. The elements of such a cause of action are: 1) a deceptive consumer-oriented act or practice which is misleading in a material way; and 2) actual damages or injuries resulting from such act. See Stutman v. Chemical Bank, 95 NY2d 24, 29 (2000).

Here, Polimeni alleges that he owns an apartment in the building know as 301 West 57<sup>th</sup> Street, and that he informed defendant Drew Glick, the real estate agent employed by Prudential Douglas Elliman, that he was interested in purchasing an apartment on a higher floor and that Glick told that apartment 52C was "on the market." Polimeni alleges that "[w]hile in the building," he asked the concierge "if there was some way he could see apartment 52C," and the

“conciierge pointed in the direction of another woman standing in the lobby and stated that the woman could show him the apartment.” Polimeni alleges that the woman, Susan Fine, “never identified herself as a real estate broker,” and that she “acted in a devious manner and did not deal fairly with anyone in this transaction and employed deceptive practices in order to fraudulently induce” him “to have Susan Fine act as the broker.” Polimeni also alleges that he did not authorize Fine to act on his behalf as a broker at any time, and that she “acted in a devious manner and tried to inject herself wrongfully in this transaction in order to collect an unwarranted and unjustified commission.” He further alleges that by bringing this “frivolous lawsuit” against him, Fine “is employing deceptive business practices,” and that Fine’s “wrongful acts have caused damage to [him] in the sum of \$100,000,” that her “actions are detrimental to the public at large,” and that he is entitled to punitive damages in the amount of \$300,000.

These allegations are insufficient to state a claim for deceptive business practices in violation of General Business Law §349. Neither the institution of the instant lawsuit, nor Fine’s allegedly “devious” injection of herself into sale of the apartment, constitutes a deceptive business practice within the meaning of the statute. See Stutman v. Chemical Bank, *supra*; Edelman v. O’Toole-Ewald Art Assocs Inc., 28 AD3d 250 (1<sup>st</sup> Dept 2006). Moreover, the vague and conclusory allegations as to damages are not sufficient to support actual or pecuniary harm. See Stutman v. Chemical Bank, *supra*; Edelman v. O’Toole-Ewald Art Assocs Inc., *supra*; Smith v. Chase Manhattan Bank, USA, N.A., 293 AD2d 598 (2<sup>nd</sup> Dept 2002).

That portion of plaintiff’s motion for an award of sanctions pursuant to Rule 130.1 is denied.

Turning to the cross-motion, defendant Polemini seeks summary judgment dismissing the complaint as against him. The cross-motion is denied as Polemini fails to make a sufficient showing as to non-liability as a matter of law. While Polemini submits an affidavit asserting that plaintiff's claim against him for a brokerage commission is "erroneous" since he "never agreed to work with plaintiff, nor did I authorize plaintiff to negotiate for the apartment on my behalf at any time," he does not address plaintiff's allegations, *inter alia*, that Polimeni tortiously interfered with plaintiff's agreement with Norman Steele to serve as the co-broker for the sale of the apartment, which deprived plaintiff of the commission on the sale. In any event, summary judgment at this early stage in the action, is premature, as discovery has not yet commenced. See CPLR 3212(f); Global Minerals & Metals Corp. v. Holme, 35 AD3d 93 (1<sup>st</sup> Dept 2006).

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss pursuant to CPLR 3212(a)(7) is granted to the extent of dismissing the counterclaims of all defendants, and the motion is denied to the extent plaintiff seeks an award of Rule 130.1 sanctions; and it is further

ORDERED that defendant Vincent Polimeni's motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on October 30, 2008 at 9:30 a.m. in Part 11, Room 351, 60 Centre Street, NY, NY.

DATED: October 7, 2008

ENTER:

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

J.S.C.