

Bongiovanni v Core Group Mktg. LLC

2009 NY Slip Op 30039(U)

January 8, 2009

Supreme Court, New York County

Docket Number: 100612/08

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**

PART **57**

Justice

Index Number : 100612/2008
BONGIOVANNI, JOSEPH C.
VS.
CORE GROUP MARKETING LLC.,
SEQUENCE NUMBER : # 001
DISMISS (VERIFIED AMENDED) COMPLAINT

INDEX NO. 100612-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for dismiss

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 as per*
decision/order dated 1-8-09.

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

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1-8-09

[Signature]
MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

JOSEPH BONGIOVANNI,

Plaintiff,

- against -

CORE GROUP MARKETING LLC., al.,

Defendants.

Index No.: 100612/08

DECISION/ORDER

FILED

JAN 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

_____ x

In this action, plaintiff Joseph Bongiovanni, a licensed real estate salesperson, seeks damages from defendant Core Group Marketing LLC (“Core”), a real estate broker, for commissions for the sale of various properties. Defendant Core and the individual defendants, who were officers or employees of Core, moved to dismiss the complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action. In response to the motion, plaintiff withdrew his seventh cause of action for retaliation and all causes of action against the individual defendants.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].)

Plaintiff’s complaint alleges that prior to joining defendant firm, he was employed as a

sales agent for Corcoran and acquired a “substantial and prestigious client base.” (Complaint, ¶ 10.) The complaint further alleges that “it was agreed that plaintiff had exclusive rights to any client that he brought with him to the defendant firm,” and that “any client which plaintiff procured either prior or subsequent [to] his joining the defendant firm was his and his only with respect to the ability to earn commissions from the sale of real property.” (Id., ¶¶ 12, 18.)

The first four causes of action of the complaint plead “tortious interference with economic relations,” based on allegations that defendant “went to contract” on deals with plaintiff’s clients and deprived him of commissions for the deals. The sixth cause of action pleads breach of contract for failure to pay plaintiff commissions for the same deals.

The breach of contract cause of action is barred by the statute of frauds. (See Zupan v Blumberg, 2 NY2d 547 [1957]; Guterman v RGA Accessories, Inc., 196 AD2d 785 [1st Dept 1993].)

The tortious interference causes of action duplicate the breach of contract cause of action. Moreover, interference with prospective economic relations is maintainable only “when the alleged means employed by the one interfering were wrongful.” Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 194 [1980].) “‘Wrongful means’ include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.” (Id. at 191.) Wrongful means also include “conduct for the sole purpose of inflicting intentional harm” on the plaintiff. (Carvel Corp. v Noonan, 3 NY3d 182, 190 [2004] [internal quotation marks and citation omitted]; Hoesten v Best, 34 AD3d 143 [1st Dept 2006]; Miller v Mount Sinai Med. Ctr., 288 AD2d 72 [1st Dept 2001].) Plaintiff’s

complaint does not allege any such wrongful means.

The fifth cause of action alleges fraud, based on the allegations that defendant agreed that plaintiff would be entitled to all commissions emanating from any client plaintiff procured before joining defendant firm, in order “to induce plaintiff to leave his prior firm and so that [defendant] could utilize plaintiff’s contacts in the real estate field.” (Complaint, ¶¶ 76, 78.)

It is well settled that “[a] fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.” (First Bank of the Americas v Motor Car Funding, Inc., 257 AD2d 287, 291 [1st Dept 1999]. Accord Manas v VMS Assocs., LLC, 53 AD3d 451 [1st Dept 2008].) Put another way, “a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet his contractual obligations.” (Rocanova v Equitable Life Assur. Soc’y of the United States, 83 NY2d 603, 614 [1994]; Krantz v Chateau Stores of Canada Ltd., 256 AD2d 186, 187 [1st Dept 1998]; Hudson v Greenwich I Assocs., 226 AD2d 119 [1st Dept 1996], lv dismissed 89 NY2d 860.) “By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. . . . For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff’s breach of contract claim.” (First Bank of the Americas, 257 AD2d at 291-292. See generally Deerfield Communications Corp. v Chceseborough-Ponds, Inc., 68 NY2d 954 [1986].)

Here, the complaint alleges that defendant never intended to honor its agreement to pay plaintiff commissions on sales to clients plaintiff brought to defendant firm. (See Complaint, ¶

77.) While this allegation would not be sufficient to support a fraud cause of action, the complaint also alleges that defendant's misrepresentation that it would pay the commissions was the inducement for plaintiff's agreement to join the firm. (See id., ¶78.) Even assuming arguendo that the latter allegations are sufficient to plead fraud, the cause of action must be dismissed for the independent reason that it does not allege that plaintiff sustained damages different than those sought in the breach of contract cause of action.

Causes of action for breach of contract and fraud "are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant to place the nonbreaching party in as good a position as it would have been had the contract been performed; the damages recoverable for being fraudulently induced to enter a contract are meant to indemnify for the loss suffered through the inducement, c.g., damages for foregone opportunities." (Manas, 53 AD3d at 454 [internal quotation marks and citations omitted].) Plaintiff's fraud cause of action must be dismissed as it alleges damages only for past lost commissions and therefore duplicates the breach of contract cause of action.

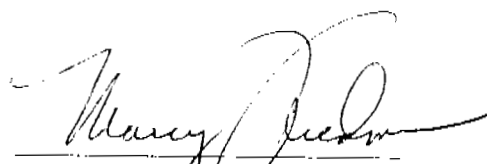
The eighth cause of action for breach of contract is maintainable. Issues of fact exist as to whether there are writings sufficient to evidence an agreement to pay commissions.

It is accordingly hereby ORDERED that defendants' motion is granted to the following extent: All causes of action are dismissed as against the individual defendants. The seventh cause of action (retaliation) is dismissed on consent against defendant Core. The first through fourth (tortious interference), fifth (fraud), and sixth (breach of contract) causes of action are dismissed as against defendant Core; and the eighth cause of action (breach of contract) is severed and shall continue; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on February 19, 2009 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
January 8, 2009


MARCY FRIEDMAN, J.S.C.

FILED
JAN 13 2009
COUNTY CLERKS OFFICE
NEW YORK