LIBRARY

In re Tamara Shea

February 2007

§ 1500. Agreements required to be in writing.

The following agreements are unenforceable, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged:

(a) An agreement that by its terms is not to be performed within a year from the making thereof;

(b) A special promise to answer for the debt, default, or miscarriage of another;

(c) An agreement for the leasing of real property for a longer period than one year, or for the sale of real property or of an interest therein;

(d) An agreement that authorizes or employs a broker, for compensation or a commission:

1. To procure a purchaser or seller of real estate; or
2. To procure a lessee or lessor of real estate where the lease is for longer than one year; or

(e) An agreement that by its terms is not to be performed during the lifetime of the promisor.

Mather v. Bowen

Franklin Court of Appeal (1997)

This is an action to recover a broker's commission allegedly due plaintiff Karen Mather for her services in procuring defendant Crown Research Corporation (CRC) as a tenant for defendant William Bowen's commercial real property.

Mather's complaint alleged the following: Mather is a licensed real estate broker and Bowen is the owner of the property. In June 1995, Mather attended an open house conducted by Bowen at the property site for the purpose of soliciting real estate brokers to procure tenants for the property on a 10-year lease. At the open house, Bowen distributed an offering brochure stating that brokers and prospective tenants would be registered and including a schedule of brokers' commissions.

Mather further alleged that in December 1995, she advised Bowen by telephone that she wished to bring a prospective tenant, defendant CRC, to view the property. In the phone call, Bowen acknowledged that Mather would be entitled to a broker's commission if and when CRC leased the premises. Mather then brought a CRC representative to view the property and completed Bowen's client-broker registration form, identifying herself as the broker and CRC as the prospective lessee, with Bowen signing the form identifying himself as lessor. Two weeks later, CRC submitted a written lease offer that identified Mather as broker and CRC as prospective lessee, and which further provided that "Lessor agrees to pay all commissions due Broker arising out of or in connection with Lessee's offer to lease." Bowen rejected the lease offer. However, in March 1996, Bowen and CRC executed a written lease for the property at a lower cost, without Mather's knowledge.

After finding out about the lease and receiving no commission, Mather brought this action against Bowen and CRC. Mather's first cause of action was directed against Bowen for breach of contract, and alleged that the brochure and client-broker registration form collectively constituted a written agreement under which Bowen owed Mather a commission. Mather's second cause of action alleged that CRC interfered with her economic and contractual relationship with Bowen. The defendants' motions to dismiss the complaint were granted without allowing Mather leave to amend her complaint.

The function of a motion to dismiss is to test the sufficiency of a plaintiff's pleading by raising questions of law. The allegations in the complaint must be regarded as true and are to be liberally construed. On appeal, the court is not concerned with a party's possible difficulty or inability in *proving* the allegations of the complaint, but only that the party *may* be entitled to some relief. We apply these principles in reviewing the complaint.

1. The writings satisfy the statute of frauds and support the claim against Bowen for breach of contract.

The Franklin statute of frauds provides that an agreement to pay a commission to a real estate broker to procure a buyer or seller of real property, or to procure a lessee or lessor of property for a period of more than a year, must be in writing. Franklin Civil Code § 1500(d). The purpose of the statute of frauds is to protect real estate sellers and purchasers from false claims by brokers for commissions. As such, § 1500(d) is designed to protect consumers, and is strictly enforced.

For a writing to satisfy the statute of frauds, it need not contain all the terms of the contract. The principal requirements for a broker to satisfy the statute of frauds are: (1) the writing shows the authority of the broker to act for the party to be charged, and (2) the writing is subscribed (signed) by or on behalf of the party to be charged. When these requirements are met, the other terms, including the amount of the commission, and even the agreement to pay the commission, may be shown by extrinsic evidence. Such evidence may also show the circumstances that attended the writing's making, or explain ambiguities on the writing's face. Finally, where a plaintiff relies on multiple writings, the court must determine whether the writings as a whole constitute an enforceable agreement.

Bowen maintains the writings are insufficient because they do not show on their face the fact of Mather's employment as Bowen's real estate broker. We disagree. The brochure and registration form appear to be related to each other. Both were prepared by Bowen, and he signed the registration form. The registration form containing the reference to broker commissions did not appear in a vacuum, but supplemented the initial brochure, which set forth the amount of commission to be paid and further provided that "brokers will be protected." Moreover, Bowen's signature on the registration form is sufficient to satisfy the subscription requirement as to this set of writings.

Together, these documents show that Bowen, in writing, actively solicited and engaged the cooperation of real estate brokers *en masse* in an effort to lease the property, with assurances that the brokers would be protected and compensated. Relying on these written representations, Mather brought CRC as a prospective tenant, and registered herself and CRC on Bowen's registration form, in accordance with Bowen's advertised procedure, with Bowen himself subscribing the document. As no other conceivable purpose could be served by Bowen's having Mather register CRC as a prospective tenant, the writings warrant the inference that Bowen authorized Mather to procure CRC as a tenant for the property.[1] Therefore,

1. Because the writings satisfy the statute of frauds, evidence of the December 1995 telephone conversation between Bowen and Mather (in which Bowen allegedly confirmed that Mather would receive a commission if CRC leased the property) may be admitted to explain any ambiguity in the registration form's purpose or function, as well as to show the circumstances that attended its making.

Mather properly alleged a cause of action against Bowen for breach of contract.

Bowen's reliance on *Phillip v. Carter Industries* (Franklin Ct. App. 1991) is misplaced. There, the broker sued his client for breach of contract, alleging that an exchange of letters between the broker and client showed that the client had retained the broker to act on its behalf and had agreed to pay the broker's commission. However, the only writings that related to the broker's commission were *from the broker to the client*, not from the client to the broker. Thus, the writings did not satisfy the statute of frauds, as they were not subscribed by the party to be charged.

2. Mather's interference claims against CRC also withstand a motion to dismiss.

Mather pleaded one cause of action against CRC, labeling it "interference with economic advantage and contract." As such, Mather inartfully combined two distinct torts, interference with prospective economic advantage and interference with contractual relations, into one claim. Although these two torts are closely related and share many of the same elements, liability for interference with contractual relations requires an *existing valid and enforceable contract*. In contrast, a cause of action for interference with prospective economic advantage necessarily assumes that a contract has not yet been formulated (e.g., where the relationship is based on pending negotiations) or that the contract involved is unenforceable (e.g., due to lack of consideration or violation of the statute of frauds). The two torts, however, involve basically the same conduct on the part of the tortfeasor. In one case, the interference takes place when a valid contract is already in existence, in the other, when either a contract likely would have been consummated but for the conduct of the tortfeasor or where the plaintiff would otherwise have received an economic benefit but for the defendant's interference.

We note initially that even though these two torts are distinct, some plaintiffs may be able to state causes of action for both torts. Thus, a plaintiff who believes that she has a contract but who recognizes that the trier of fact might conclude otherwise, might bring claims for both torts so that, in the event of a finding of no contract, the plaintiff might prevail on a claim for interference with prospective economic advantage. Where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's rights and defendant's liability depends on facts not known by the plaintiff, the pleading may properly state alternative theories in separate, inconsistent causes of action. However, where there is no existing enforceable contract for whatever reason, only a claim for interference with prospective economic advantage may be maintained.

We conclude that Mather pleaded both theories in the alternative, and will consider each claim against CRC in turn. The elements of the tort of interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and a third party containing the probability of future economic

benefit to the plaintiff, (2) the defendant's knowledge of the existence of the relationship, (3) intentional *and* improper acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff proximately caused by the defendant's acts.

As stated above, the tort of interference with prospective economic advantage is not dependent on compliance with the statute of frauds. The wrong complained of in this cause of action is that CRC interfered in Mather's advantageous relationship with Bowen. Specifically, Mather alleged that she had an economic relationship with Bowen containing the probability of future economic benefit (i.e., payment of her broker's commission); that CRC had knowledge of the relationship, as evidenced by the commission provision contained in CRC's lease offer; that CRC intentionally excluded Mather from the lease negotiations, knowing and intending that such conduct would disrupt the relationship between Mather and Bowen; that CRC secured the lease at a lower price than it would have if Mather's commission had been paid; and that Mather was therefore damaged in an amount at least equal to the commission. These allegations are sufficient to state a cause of action for interference with prospective economic advantage. *See, e.g., Howard v. Youngman* (Franklin Ct. App. 1985) (defendant real estate broker's economic interest in getting a higher commission if seller sold home to a different buyer did not give broker legal right to interfere with ongoing negotiations for sale of home).

Turning to Mather's second claim against CRC, to state a cause of action for interference with contractual relations, a plaintiff must allege: (1) a valid and enforceable contract between the plaintiff and a third party, (2) the defendant's knowledge of the existence of the contractual relationship, (3) intentional *and* improper acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, (5) economic harm to the plaintiff proximately caused by the defendant's acts.

CRC moved to dismiss this cause of action solely on the ground that there was no valid and existing contract between Mather and Bowen. Because the brochure and registration form were sufficient to satisfy the statute of frauds, we hold that Mather properly pleaded a claim for interference with contractual relations against CRC.

Accordingly, the trial court's judgment of dismissal is reversed and the case is remanded for further proceedings.

Downey & Co. v. Sierra Growers

Franklin Court of Appeal (2000)

Plaintiff Downey & Co. (Downey) appeals from the trial court's judgment dismissing its action against defendant Sierra Growers (Sierra). The facts stated in Downey's complaint reveal that commencing in 1990, Downey entered into a series of contracts with Margaret Livingston, the sole proprietor of Villa D'Oro Olive Oil Company, an olive oil processing plant located in Butte County, Franklin. The Downey-Livingston contracts, which are incorporated into the complaint, provided for the sale of certain olive products to Downey.

Following execution of the contracts, a legal dispute arose between Downey and Livingston. As a result, in September 1993, Livingston advised Downey in writing that she intended to rescind and cancel the contracts on grounds of material breach and fraudulent misrepresentation by Downey. Downey filed an action in Cleveland County seeking declaratory and related relief against Livingston. While the Cleveland County action was pending, Livingston sold the Villa D'Oro processing plant to Sierra. Thereupon, Downey brought the present action against Sierra, purporting to state causes of action on the dual tort theories of interference with contractual relations and interference with prospective economic advantage. The district court granted Sierra's motion to dismiss the complaint and entered judgment against Downey. We affirm.

The gist of Downey's grievance is that, by buying the processing plant from Livingston, Sierra improperly interfered with and induced the breach of the Downey-Livingston contracts and also interfered with Downey's prospective economic advantage. It is well established that one who intentionally and improperly interferes with the contractual relations between the plaintiff and a third party is liable to the plaintiff for the harm caused thereby. It is likewise settled that the elements of the torts of interference with contractual relations and interference with prospective economic advantage are identical except that the former requires the existence of a legally binding agreement. Both torts require a showing of the defendant's knowledge of the existence of the plaintiff's relationship with a third party, intentional and improper acts by the defendant designed to disrupt the relationship, actual disruption of the relationship, and resulting economic harm to the plaintiff.

When tested against the foregoing standards, the challenged causes of action are facially deficient. Downey's complaint alleges that Sierra acquired knowledge of the Downey-Livingston contracts the day *after* it purchased the processing plant from Livingston. It is elementary that interference with contractual relations and interference with prospective economic advantage are intentional torts.

The interference is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action. Intent may be established by inference as well as by direct proof. In addition, a plaintiff must show either that the defendant had actual knowledge of the existence of the relationship or knowledge of facts and circumstances that would lead a reasonable person to believe in the existence of the relationship and plaintiff's interest in it. If the defendant had no knowledge of the existence of the relationship or if his actions were not intended to interfere with the relationship, he cannot be held liable even if an actual breach results from his acts.

Downey's complaint not only fails to allege that Sierra intentionally interfered with Downey's relationship with Livingston, but also fails to allege that at the time of purchasing the plant Sierra was even aware of the existence of the Downey-Livingston contracts, rendering Downey's claims against Sierra fatally defective. Liability will not be imposed for unforeseeable or unknown harm, since a plaintiff must prove that the defendant knew that the consequences were substantially certain to occur.

Similarly, Downey has failed to allege that Sierra's conduct was improper. Impropriety can be established by showing the defendant's bad motive or bad conduct. Absent such motive or conduct, a defendant's acts will not be deemed improper. Downey's novel proposition that Sierra acted improperly by failing to rescind or cancel its contract to purchase the plant after learning about the Downey-Livingston contracts is supported by neither reason nor law. While the law rightly prohibits an intentional interference with contractual rights or economic relations existing between others, there is no equivalent duty to rescind a contract lawfully entered into on the ground that it might offend the legal rights of others. To the contrary, no impropriety exists where, as here, the defendant's conduct consists of something that it had an absolute right to do. As such, this case stands in stark contrast to those cases finding the defendant's actions improper.

A plaintiff seeking to hold a defendant liable for improperly inducing another to breach a contract must allege that the contract would otherwise have been performed and that it was breached by reason of the defendant's conduct. Here, performance of the Downey-Livingston contracts had been abandoned by Livingston several months prior to Sierra's acquisition of the plant. Under these circumstances, proximate causation, a vital element of both causes of action, was lacking as a matter of law. Thus, Downey failed to allege a valid cause of action under either tort.

Affirmed.