

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LUCA R. CELLA	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-703
PAULINE PUCCIO, CENTURY-21 :	:	
FORRESTER REAL ESTATE and	:	
PAUL BORIELLO	:	
Defendants.	:	

MEMORANDUM-ORDER

GREEN, S.J.

June 16, 1999

Presently before the court is Defendants Paul Boriello and Century-21's Motion to Dismiss Plaintiff's Complaint, or in the alternative, for Summary Judgment and Plaintiff's Response thereto. For the following reasons, Defendants' Motion will be granted with respect to Plaintiff's claims against Defendants Boriello and Century-21 for breach of contract, deceit, fraud and intentional infliction of emotional distress. Defendants' Motion will be denied with respect to Plaintiff's claim for tortious interference with contractual relations and Plaintiff's claim for punitive damages.

I. FACTUAL BACKGROUND

Plaintiff alleges that on or about June 30, 1997, he commenced a business relationship with Defendant Puccio, which contemplated the sale of Defendant Puccio's property known as 3136 Uber Street, Philadelphia, PA to Plaintiff for a price of \$105,000.00. Plaintiff alleges that at all times relevant to this action, Defendant Puccio was an independent entity, unaffiliated with either Plaintiff or any other defendants in this matter. (Compl. ¶ 9.) Plaintiff claims that on or about the same day, Defendant Puccio informed him that her personal friend, Defendant Boriello, would represent her, prepare all paperwork and handle all communications leading up to the sale

of the property. (Compl. ¶ 10.) On or about the same date, Defendant Boriello contacted Plaintiff and informed him that all paperwork including the agreement of sale would be prepared, completed and finalized on or before July 21, 1997. (Compl. ¶ 11.)

From July 21, 1997 through July 24, 1997, Plaintiff attempted to contact Defendants Boriello and Century-21 to inquire as to when he would be receiving the paperwork and agreement of sale for the property, however, Defendants Boriello and Century-21 allegedly ignored the calls. Plaintiff alleges that on or about July 25, 1997, Plaintiff discovered that Defendants Boriello and Century-21 sold the property to another buyer at a higher price than that agreed upon by Plaintiff and Defendant Puccio as a means to satisfy a commission. (Compl. ¶15.) Plaintiff filed the instant action on February 5, 1999 bringing claims against all defendants for tortious interference with contract, breach of contract, deceit, fraud, and outrageous conduct causing severe emotional distress.

II. DISCUSSION

A motion to dismiss a complaint for failure to state a claim may not be granted unless it appears from the face of the complaint that the plaintiff can establish no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). The facts must be taken as true and reviewed in the light most favorable to the plaintiff. Id.

A. Tortious Interference with Contract

To establish a cause of action for tortious interference with contractual relations, the plaintiff must prove (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of

a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct. Triffin v. Janssen, 626 A.2d 571, 574 (Pa. Super. 1993).

Plaintiff alleges that he commenced a business relationship with Defendant Puccio which contemplated the sale of Puccio's property for a price of \$105,000.00 and at all times relevant to this action, Defendant Puccio was an independent entity. Plaintiff further alleges that Defendants Boriello and Century-21 intended to impair or destroy his business relationship with Defendant Puccio by selling the property to another buyer at a higher price than that agreed upon by Plaintiff and Defendant Puccio as a means to satisfy a commission. Plaintiff alleges that the actions of Defendants Boriello and Century-21 were not justified and resulted in Plaintiff's loss. (Compl. ¶¶ 15-19.) Taking the facts in the light most favorable to the Plaintiff, this court concludes that Plaintiff has stated a claim against Defendants Boriello and Century-21 for tortious interference with the alleged oral contract between Plaintiff and Defendant Puccio for the sale of Ms. Puccio's home. Therefore, Defendants' Motion to Dismiss with respect to this claim will be denied.

B. Breach of Contract

Defendants Boriello and Century 21 argue that Plaintiff's claim for breach of contract must fail as a matter of law due to the Statute of Frauds. The Statute of Frauds directs that agreements for the sale of real estate shall not be enforced unless they are in writing and signed by the seller. Empire Properties, Inc. v. Equireal, Inc., 674 A.2d 297, 302 (Pa. Super. 1996). The Statute of Frauds is to be used as a shield and not as a sword, as it was designed to prevent perjury and fraudulent claims, not to encourage them. Id. The Statute of Frauds does not void those oral contracts relating to land which fail to comply with the Statute's formal requirements,

therefore, even though an oral contract for the sale of real estate may not be specifically enforced, it may form the basis for an action to recover damages. Id.

In the present matter, the plaintiff is not seeking enforcement of the alleged oral agreement, but rather damages. Because the Statute of Frauds does not preclude a recovery of damages based on the alleged oral agreement, Plaintiff's claim for breach of contract against Defendants Boriello and Century-21 will not be dismissed on the basis of the Statute of Frauds. The breach of contract claim against Defendants Boriello and Century 21, however, will be dismissed because Plaintiff has failed to allege the existence of a contract between himself and these Defendants. In Pennsylvania, a person who is not a party to a contract cannot be held liable for a breach by one of the parties to a contract. Fleetway Leasing Co. v. Wright, 697 A.2d 1000, 1003 (Pa. Super. 1997).

In Plaintiff's breach of contract claim, he states that "Plaintiff entered into an oral contract with Defendants for sale of the property." (Compl. ¶ 21.) Plaintiff's inclusion of all defendants in this allegation, however, is not supported by the previous allegations in which Plaintiff states that he commenced a business relationship with Defendant Puccio that contemplated the sale of the property, and at some later point in time, Defendant Boriello merely informed Plaintiff that an agreement of sale would be completed. (See Compl. ¶ 11.) Plaintiff explicitly states in his Answer to Defendants' Motion that "Plaintiff and Ms. Puccio had an oral agreement to purchase the Uber Street Property for \$105,000.00 and Century-21 Forrester was only asked to prepare the written agreement of sale for Ms. Puccio and Plaintiff." (Pl.'s Answer ¶ 6.) Again, in Plaintiff's brief, he reiterates the fact that "Plaintiff began negotiations and came to an oral agreement with Defendant Puccio for sale of her home . . . before Defendant Century-

21 Forrester Real Estate and/or Paul Boriello were contacted to prepare a written agreement of sale of the property and well before they became the listing agents for the property.” (Pl.’s Brief at 1.) Thus, as Plaintiff has not alleged the existence of a contract between himself and Defendants Boriello and Century 21 and as Plaintiff clarifies in his brief that the oral contract was only between himself and Defendant Puccio, Defendants Boriello and Century-21's Motion to Dismiss Plaintiff's claim for breach of contract in Count II of the Complaint will be granted.

C. Fraud and Deceit

The essential elements of a cause of action for fraud or deceit are a misrepresentation, a fraudulent utterance thereof, an intention to induce action thereby, justifiable reliance thereon and damage as a proximate result. Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315-16 (Pa. Super. 1991). Pursuant to Rule 9 of the Federal Rule of Civil Procedure, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). “It is well-established that the breach of a promise to do something in the future is not actionable in fraud.” Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa. Super. 1997).

In the present case, Plaintiff alleges that “Defendant Boriello contacted Plaintiff and informed him that all paperwork including an agreement of sale would be prepared, completed and finalized on or before July 21, 1997.” (Compl. ¶ 11.) Plaintiff further alleges that “Defendants knowingly, intentionally, recklessly and/or maliciously misled Plaintiff into believing that they would exchange ownership of said property described herein in exchange for payments upon completion of contract.” (Compl. ¶ 33.) Taking the facts in the light most favorable to Plaintiff, Plaintiff has failed to plead an action for fraud. Defendant Boriello’s

representation that he would prepare the paperwork was a promise to do something in the future, and Defendant Boriello's failure to act according to his promise, without more, cannot form the basis of a cause of action for fraud. As Plaintiff has not alleged any other fraudulent misrepresentation on the part of Defendant Boriello or Century-21, Defendants' Motion to Dismiss will be granted with respect to Plaintiff's claim for Fraud and Deceit in Counts III and IV of the Complaint.

D. Outrageous Conduct Causing Severe Emotional Distress

In order to recover for intentional infliction of emotional distress, the defendant's "conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized society." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)(quoting Buczek v. First National Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. 1987)). As a preliminary matter, it is for the court to determine if the defendant's conduct is so extreme as to permit recovery. Id. Taking the facts in the light most favorable to the plaintiff, this court concludes that Plaintiff has failed to allege any facts that, if proven, would rise to the level of outrageousness necessary to recover on a claim for intentional infliction of emotional distress. Therefore, Defendants Boriello and Century-21's Motion to Dismiss will be granted with respect to Plaintiff's claim for intentional infliction of emotional distress in Count V of the Complaint.

E. Punitive Damages

Plaintiff has requested punitive damages against all Defendants. In Pennsylvania, to establish a basis for punitive damages, a defendant's conduct must have been committed willfully, maliciously or so carelessly as to indicate wanton disregard for the rights of the injured

party. Estate of Moran v. G & W.H. Corson, Inc., 586 A.2d 416, (Pa. Super. 1991). The court cannot say at this stage of the litigation whether any conduct on the part of Defendants Boriello and Century-21 would warrant the imposition of punitive damages. Therefore, Defendants' Motion to Dismiss Plaintiff's claim for punitive damages will be denied.

III. CONCLUSION

For the reasons stated above, Defendants Boriello and Century-21 's Motion to Dismiss Plaintiff's Complaint will be granted with respect to Plaintiff's claims for breach of contract, deceit, fraud and intentional infliction of emotional distress. Defendants' Motion to Dismiss will be denied with respect to Plaintiff's claim for tortious interference with contractual relations and punitive damages. With respect to Plaintiff's claim for tortious interference, Defendants' Motion, in the alternative, for Summary Judgment will also be denied without prejudice to raise again once discovery is complete.

An appropriate Order follows.

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Plaintiff	:	
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PAULINE PUCCIO, CENTURY-21 :	:	
FORRESTER REAL ESTATE and	:	
PAUL BORIELLO	:	
Defendants.	:	

ORDER

AND NOW, this 16th day of June 1999, upon consideration of Defendants Paul Boriello and Century-21 Forrester Real Estate's Motion to Dismiss Plaintiff's Complaint, or in the alternative, for Summary Judgment and Plaintiff's Response thereto, IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss is GRANTED with respect to Plaintiff's claim for Breach of Contract in Count II of the Complaint;
2. Defendants' Motion to Dismiss is GRANTED with respect to Plaintiff's claim for Deceit in Count III of the Complaint;
3. Defendants' Motion to Dismiss is GRANTED with respect to Plaintiff's claim for Fraud in Count IV of the Complaint;
4. Defendants' Motion to Dismiss is GRANTED with respect to Plaintiff's claim for Intentional Infliction of Emotional Distress in Count V of the Complaint;
5. Defendants' Motion to Dismiss is DENIED with respect to Plaintiff's claim for tortious interference with contractual relations in Count I of the Complaint;

6. Defendants' Motion, in the alternative, for Summary Judgment with respect to Plaintiff's claim for tortious interference with contractual relations will be DENIED WITHOUT PREJUDICE to raise again at the close of discovery; and

7. Defendants' Motion to Dismiss is DENIED with respect to Plaintiff's claim for punitive damages.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.