

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**COLLIERS INTERNATIONAL DETROIT,
Plaintiff,**

v.

**Case No. 19-176186-CB
Hon. James M. Alexander**

**SOARING PINE CAPITAL REAL ESTATE
AND DEBT FUND II, LLC, and
VICTOR FAIZ SIMON,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' Motion for Summary Disposition.

According to Plaintiff's Complaint, Defendant Soaring Pine engaged in litigation over its secured interest, as a lender, in real property. This Court had the underlying litigation.¹ In the underlying litigation, a receiver was initially appointed over the real property on February 14, 2018. That receiver was subsequently replaced by Randal Toma on September 12, 2018.

Prior to the appointment of a receiver, on August 27, 2018, Defendant Simon, on behalf of Defendant Soaring Pine entered into an exclusive list agreement (Soaring Pine Agreement) with Plaintiff, a real estate broker, to sell the Eleven Mile Property. Pursuant to the Soaring Pine Agreement, Plaintiff was to receive a commission if the property was sold during the listing period, which expired on December 31, 2018.

¹ The litigation over the property was consolidated and assigned case numbers 2018-163290-CB and 2018-163525-CB.

After Toma was appointed as receiver, he, on behalf of Paramount Industrial Machining, Inc. entered into an exclusive listing agreement (Toma Agreement) with Plaintiff for the Eleven Mile Property, which would expire on January 31, 2019. Pursuant to both listing agreements, Colliers was to receive a commission if the Eleven Mile Property was sold during the listing period or within six months after the expiration of the listing period if the property was sold to anyone who was shown the property of informed of its availability during the listing period.

Plaintiff alleges that on or before December 31, 2018, Defendant Simon showed the property to JOLE, LLC. Plaintiff claims that Defendants never disclosed JOLE, LLC as a potential buyer in violation of both agreements. After the Soaring Pine Agreement listing period ended on December 31, 2018, Plaintiff alleges that Defendants instructed Toma to terminate the Toma Agreement. Based on the same, Toma requested the Toma Agreement be terminated on January 2, 2019. The termination was confirmed by Plaintiff on January 16, 2019.

On January 28, 2019, Toma filed a motion before the Court for approval to sell the Eleven Mile Property to JOLE, LLC. The Court approved the same on February 13, 2019. Plaintiff alleges that it was not notified of the sale and was not paid the \$79,5000 commission it was owed pursuant to both listing agreements.

On these general allegations, Plaintiff filed its Complaint on claims titled (Count I) breach of contract Soaring Pine; (Count II) fraudulent misrepresentation; (Count III) innocent misrepresentation; (Count IV) silent fraud; (Count V) tortious interference with contract; (Count VI) breach of the implied covenant of good faith and fair dealing; (Count VIII) common law conversion; and (Count IX) statutory conversion – MCL 600.2919A.²

² The Complaint does not include a Count VII.

As stated, Defendants now move for summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Such a motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5) (emphasis added).³

I. Count I – Breach of Contract

First, Defendants argue that Plaintiff’s breach of contract claim must be dismissed because (1) the Soaring Pine Agreement had expired by its own terms, and (2) the Court approved the sale of the property after the expiration of the agreement. Further, Defendants argue that The Michigan Uniform Receivership Act provides that a court-appointed receiver has full authority to “collect, control, manage, conserve, and protect” receivership property and full authority to “adopt or reject” all executory contracts that relate to the receivership property. MCL 554.1022.

Defendants argue that the receiver, Toma, entered into its own contract with Plaintiff to sell the property at issue, which included a merger clause. Defendants argues that, by operation of the merger clause, the Soaring Pine Agreement was superseded, and therefore, cannot be the basis for Plaintiff’s breach of contract claim. Further, Defendants argue that Plaintiff acknowledged that the

³ “When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633

Soaring Pine Agreement was cancelled prior to the sale of the property. As such, Defendants argue that Plaintiff has no further claim to commissions based on Soaring Pine Agreement.

In response, Plaintiff argues that both exclusive listing agreements are still in effect and that the merger clause in the Toma Agreement does not supersede the Soaring Pine Agreement because the agreements are between different parties. Plaintiff argues that even if the Soaring Pine Agreement expired at the time the Toma Agreement was executed, Soaring Pine would still be liable to Plaintiff for a commission from the sale. Plaintiff argues that pursuant to an exclusive listing agreement, a broker is still due a commission even if the broker did not procure the ultimate buyer. Plaintiff further argues that the termination of the Toma Agreement did not affect the Soaring Pine Agreement.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is also well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

Further, where the contract includes an express integration or merger clause within the agreement, “it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete ‘on its face’ and, therefore, parol evidence is necessary for the ‘filling of

(2003).

gaps.” *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998).

Here, Plaintiff argues that the merger clause within the Toma Agreement does not supersede the Soaring Pine Agreement because there are different parties to both contracts. The Court disagrees. When the Soaring Pine Agreement was executed on August 27, 2018, Soaring Pine was the “Lessor/Seller.” (Plaintiff’s Response, Exhibit B). That contract gave Colliers the “exclusive right to finds tenant(s) or purchaser(s) for the Property.” *Id.* When the Toma Agreement was executed on October 9, 2018, Soaring Pine was no longer the “lessor/seller.” (Plaintiff’s Response, Exhibit A). Pursuant to the Toma Agreement, Paramount Industrial Machining, Inc. was the “lessor/seller,” and again, Plaintiff had an exclusive right to sell the property. *Id.*

The Toma Agreement’s merger clause that stated, “[t]his agreement represents the entire agreement between the parties, and supersedes any and all other prior or contemporaneous agreements, understandings, and negotiations, written or oral, between the parties.” *Id.*

As stated, the Michigan Uniform Receivership Act provides that a court-appointed receiver has full authority to “collect, control, manage, conserve, and protect” receivership property and full authority to “adopt or reject” all executory contracts that relate to the receivership property. MCL 554.1022. As such, the receiver had full authority to execute his own listing agreement to sell the property. By executing the Toma Agreement, with a valid merger clause, the receiver necessarily was rejecting the prior contract for the sale of the property.

The Court finds that as a matter of law that the Toma Agreement was fully integrated and that the Toma Agreement superseded the Soaring Pine Agreement. Specifically, upon the execution of the Toma Agreement on October 8, 2018, Soaring Pine was not longer the seller of the property.

Here the seller of the property entered into a subsequent agreement with the broker, Plaintiff. That subsequent agreement contained a valid merger clause, and as such, became the controlling contract for subject matter.

Further, Black's Law Dictionary (11th ed.) defines exclusive as being "limited to a particular group, entity, or thing" and "whole; undivided." Here, Plaintiff alleges and argues that it entered into two exclusive listing agreements and is owed a commission under both. By definition, an exclusive right cannot be divided. Said other way, there can only be one exclusive right for the same piece of property. As such, Plaintiff could not have been in two "exclusive" contracts for the same piece of property from two different sellers.

Based on the foregoing, the Court finds that, as a matter of law, Plaintiff has failed to state a claim for breach contract, and Defendants' motion for summary of the same is GRANTED. Plaintiff's breach of contract claim is DISMISSED.

II. Counts II-IV – Fraudulent, Innocent, and Silent Misrepresentation

According to Plaintiffs' Complaint, their claims for fraudulent, innocent, and silent misrepresentation all predicated on the allegations that Defendants made or failed to make material representations regarding interest in the Eleven Mile Property during the Colliers listing period. (Complaint, at ¶49, 58). Plaintiff further alleges that Defendants concealed and failed inform Plaintiff of the JOLE, LLC negotiations and purchase agreement. (Complaint, at ¶¶53, 55, 60, 68). As a result of Defendant's intentional misrepresentation or concealment, Plaintiff confirmed the termination request and did not record a Broker's lien for commission. (Complaint, at ¶¶53, 54, 62,

63, 70). As a result, Plaintiff suffered damages in the amount of \$79,500. (Complaint, at ¶56).

In their motion, Defendants argue that Plaintiffs have failed to state their fraud claims with the requisite particularity as required to maintain a claim for fraud. Specifically, Defendants argue that there are no allegations explaining what actions were taken by Defendants, and when or how the actions were taken. Additionally, Defendants argue that Plaintiffs fraud claims must be dismissed because each claim fails to assert a duty that is distinct from a contractual obligation. Defendant argues that Plaintiff's fraud claims are all based on the same alleged wrongs as its breach of contract claim.

In response, Plaintiff argues that its fraud claims are viable and alleges that Defendants took action to deceive Plaintiff into confirming Toma's termination notice without providing any notice that the Property was under contract with JOLE, LLC. This act, Plaintiff argues, was intended to induce Plaintiff to confirm the termination notice and not pursue a lien on the Property. Further, Plaintiff argues that its fraud claims are not barred by the economic loss doctrine because the doctrine only applies to contracts for goods, not for services as is the contract in this case. Plaintiff also argues that Defendants' fraudulent conduct bars the application of the economic loss doctrine.

It is well-established that "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1).

The Michigan Court of Appeals has held:

To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing

Candler v Heigho, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Michigan law is also clear that “to sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation.” *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008) (emphasis in original), citing *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); and *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). Further, “an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud.” *Hi-Way Motor Corp v Int’l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, “a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.” *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013); quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008)

In contrast to fraudulent misrepresentation and silent fraud, the essence of an innocent misrepresentation claim is that the plaintiff need not prove that the defendant knew or should have known that the representation was false. Likewise, contrary to fraudulent misrepresentation and silent fraud, a plaintiff asserting an innocent misrepresentation claim need not prove that the defendant intended to deceive the plaintiff into relying on the false or misleading representation. Indeed, under the theory of innocent misrepresentation, false statements the claimant relied on are actionable irrespective of whether the person making them acted in good faith in making them *Roberts v Saffell*, 280 Mich App 397, 405; 760 NWd2 715 (2008) (internal citations and quotations omitted).

To establish a claim for innocent misrepresentation, a plaintiff has the burden of proving (1) Defendant made a representation of a material fact; (2) the representation was made in connection with the making of a contract between plaintiff and defendant, (3) the representation was false when

it was made; (4) plaintiff would not have entered into the contract if defendant had not made the representation; (5) plaintiff had a loss as a result of entering into the contract; and (6) plaintiff's loss benefited the defendant. (M Civ JI 128.04 Innocent Misrepresentation).

As it relates to the economic loss doctrine, *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956) provides that “[t]he economic loss doctrine bars a plaintiff from prevailing on a claim for tort liability where the relationship of the parties is entirely governed by a contract between them.”⁴ Our Supreme Court has also applied this doctrine to a contract for services. See *Rinaldo's Constr v Mich Bell Tel Co*, 454 Mich 65, 84-85, 559 NW2d 647 (1997).

Although Plaintiff argues that the economic loss doctrine only applies to contracts for goods, it is clear that the doctrine has also been applied to contracts for services, such as the one here. Beyond that, Plaintiff argues that Defendants' fraudulent conduct bars the application of the economic loss doctrine. The Court of Appeals has explained what type of fraud does, in fact, bar the application of the economic loss doctrine.

With regard to the specific intentional tort of fraud, courts generally have distinguished fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine. We believe this distinction is warranted in light of the rationale of the economic loss doctrine:

The distinction is critical, for the essence of the “economic loss” rule is that contract law and tort law are separate and distinct, and the courts should maintain that separation in the allowable remedies. There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions. Once the contract has been made, the parties should be governed by it.

Fraud in the inducement, however, addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is,

⁴ “The economic loss doctrine, simply stated, provides that “[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only ‘economic’ losses.” *Neibarger v Universal Coops*, 439 Mich 512, 520; 486 NW2d 612 (1992).

under the law, a recognized tort. *Huron Tool & Eng'g Co v Precision Consulting Servs*, 209 Mich App 365, 371; 532 NW2d 541 (1995).

Plaintiff, however, has not plead fraud in the inducement. As such, Plaintiff's fraud claims are subject to the economic loss doctrine. Here, as stated above, Plaintiff alleges that Defendants engaged in fraud by failing to inform or concealing the fact that JOLE, LLC was interested in the property and that JOLE, LLC negotiated and entered into a purchase agreement for the property. . (Complaint, at ¶49, 53, 55, 58, 60, 68). In its breach of contract claim, Plaintiff alleges that Defendants breached the contract by, among other things, failing to notify Plaintiff that JOLE, LLC had expressed interest in the property and negotiated a purchase agreement for the same. (Complaint, at ¶46). Both Plaintiff's fraud and breach of contract claims are predicated on the same alleged wrongs.

Plaintiff's fraud claims are merely a restatement of its breach of contract claim. Here, Plaintiff's alleged damages arise from and are a result from alleged breached of the contract. Since the relationship between the parties is governed by the contract between them, the economic loss doctrine bars Plaintiff from prevailing on its claims for fraud.

Based on the foregoing, Plaintiff has failed to state a claim for fraudulent, innocent, silent misrepresentation. As such, Defendants' motion for summary disposition pursuant to (C)(8) of Plaintiff's fraud claims are GRANTED, and the same are DISMISSED.

III. Count V – Tortious Interference with Contract

Next, Defendants argue that Plaintiff's tortious interference with a contract claim fails because Toma, as the Court-appointed receiver was entitled to sell the property and received Court

approval to do the same. As such, Defendant argues that Defendants' actions were justified by a legitimate business purpose, and therefore, Defendant's actions cannot constitute tortious interference. Further, Defendants argue that they were not an intervening and proximate cause of Plaintiff's alleged damages.

In response, Plaintiff argues that it has properly plead tortious interference. Plaintiff argues that Defendants interfered with the Toma Agreement by intentionally and improperly instructing Toma to prematurely terminate the contract in violation of the termination provision. In its Complaint, however, Plaintiff alleges that Defendants' conduct caused Toma to breach the Toma Agreement by (1) failing to notify Colliers that JOLE, LLC, was interested in the Eleven Mile Property and negotiated for the purchase, (2) failing to provide a copy of the written purchase offer, (3) failing to provide notice of the hearing to approve the sale, (4) failing to notify Colliers of the closing, and (5) failure to pay Plaintiff commissions. (Complaint, at ¶77).

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted).⁵

Further, Michigan Courts have long held that “defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship].” *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988). See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d

⁵ Further, “[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.” *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”).

Here, Plaintiff has failed to allege how an instruction by the Defendants caused Toma to breach the Toma Agreement by failing to provide the above-stated information. Further, Plaintiff’s response does not address the alleged breaches as stated in its Complaint. Rather, Plaintiff argues that the tortious interference was the premature termination of the agreement.

Additionally, the Court finds that the sale of the property was motivated by a legitimate business purpose, to sell the property to recoup its costs. In the underlying case, Toma, as receiver, filed a motion to approve the sale of the property. The Court approved the sale to JOLE, LLC on February 13, 2019. Since Defendants actions were motivated by a legitimate business purpose, Defendants are shielded from liability for tortious interference with a contract.

Based on the foregoing, Plaintiff has failed to state a claim for tortious interference with a contract. As such, Defendants’ motion of Plaintiff’s tortious interference claim pursuant to (C)(8) is GRANTED, and the same is DISMISSED.

IV. Count VI – Implied Covenant of Good Faith and Fair Dealing

As it relates to Plaintiff’s breach of the implied covenant of good faith and fair dealings, it is well-settled that “[u]nlike some other jurisdictions, ‘Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing.’” *In re Leix Estate*, 289 Mich App 574, 591; 797 NW2d 673, 683 (2010); citing *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 13; 730 NW2d 29 (2006).

Based on the same, and because such a claim is not recognized as a separate cause of action, Defendants' motion for summary of Plaintiffs' Count VI is GRANTED under (C)(8), and Plaintiff's implied covenant of good faith and fair dealing claim is DISMISSED.

V. Counts VIII and IX – Conversion

Next, Defendants argue that Plaintiff's conversion claims fail because Michigan, generally, does not recognize a cause of action for conversion of money. Specifically, Defendants argue that Plaintiff has failed to identify that Defendants had an obligation to return specific, identifiable money.

In response, Plaintiff argues that Defendants had an obligation to pay Plaintiff commission from the sale of the Eleven Mile Property. Plaintiff argues that Defendants had an obligation to pay \$79,500 from the closing proceeds. As such, Plaintiff argues that it has identified a specific identifiable sum of money.

Michigan law provides that “[t]he tort of conversion is ‘any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.’” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

“Statutory conversion, by contrast, consists of knowingly “buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.” *Head*, 234 Mich App at 111; quoting MCL 600.2919a.

In *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), the Court of

Appeals reasoned, “[t]o support an action for conversion of money, the defendant must have obtained the money without the owner’s consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care.” *Lawsuit Fin*, 261 Mich App at 591 (internal quotations and citations omitted).

Here, although Plaintiff has identified a sum that it believes it is owed, Plaintiff has failed to allege or identify the specific money that Plaintiff claims it is owed. Alleging that it is owed commissions from the closing proceeds is too general to maintain an action for conversion of money. As such Defendants’ motion for summary of Plaintiff’s conversion claims is GRANTED, and the same are DISMISSED.

VI. Conclusion

Defendants’ motion for summary disposition of Plaintiff’s Complaint pursuant to (C)(8) is GRANTED in its entirety, and Plaintiff’s Complaint is DISMISSED.

This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

November 20, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge