STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

LEONARDO HARPER, LLC, a
Michigan Limited Liability Corporation,

Plaintiff,

vs. Case No. 2014-805-CK

LANDMARK COMMERICAL REAL
ESTATE SERVICES, INC., a Michigan
Corporation, JOHN KELLO, and CLINTHARP,
LLC, a Michigan Limited Liability Company,

Defendant.
_____/

OPINION AND ORDER

Plaintiff Leonardo Harper, LLC ("Plaintiff") has filed a motion for summary disposition as to Counts I and IV-VII. Defendants have filed a joint response and request that the motion be denied.

In addition, Defendants have filed a motion for summary disposition as to all of Plaintiff's claims. Plaintiff has filed a response and requests that the motion be denied.

Facts and Procedural History

In or around June 2005, Plaintiff purchased two vacant parcels of real property in Clinton Township Michigan, commonly known as 35090, 35110 Harper & 35099 Klix, for $275,000.00 ("Parcels").

On September 13, 2011, Defendant John Kello ("Defendant Kello"), on behalf of Defendant Landmark Commercial Real Estate Services, Inc. ("Defendant Landmark"), and Nicholas Lavdas, on behalf of Plaintiff, entered into an agreement pursuant to which Defendant

Landmark stated that it represents and had procured Family Dollar Stores ("FDS") as a prospective client for the Parcels, and in exchange Plaintiff agreed to pay Defendant Landmark certain commissions in the event that Plaintiff was able to lease the Parcels to FDS ("Commission Agreement"). (*See* Plaintiff's Exhibit 6, Defendants' Exhibit 2.)

On September 19, 2011, Defendant Kello sent Plaintiff an email enclosing FDS' proposed letter of intent ("LOI") for the development and lease of the Parcels. (*See* Defendants' Exhibit 3, Plaintiff's Exhibit 5.) In the email, Defendant Kello stated that he had spoken to the architect, and that the architect said it would be too difficult to put a building with more than 8,000 square feet, adequate parking, three dumpsters, and proper circulation for semi-trucks on the Parcels. (Id.) As a result, Defendant Kello requested that Plaintiff confer with its architect to attempt to come up with a layout that satisfied those requirements. (Id.) In response to the September 19, 2011 letter, Plaintiff retained Michael Gordan as its architect.

On September 20, 2011, Defendant Kello sent Plaintiff an email containing FDS' plans for their prototypical store. (*See* Defendants' Exhibit 5, Plaintiff's Exhibit 7.) Mr. Gordan subsequently advised Defendant Kello that the Parcels were too small for a store with DHS' prototypical layout. As a result, Defendant Kello asked Plaintiff to prepare a site plan using the Parcels as well as an additional parcel adjacent to the parcels. (*See* Defendants' Exhibit 5, Plaintiff's Exhibit 7.)

From October 2011 to November 9, 2011, Mr. Gordan and Defendant Kello sent various emails back and forth regarding the proposed site plan and Plaintiff's efforts to acquire an additional parcel. (*See* Defendants' Exhibits 10-15.)

On November 14, 2011, David Jose from FDS sent an email to Plaintiff, Defendant Kello, and Plaintiff's builder, Joe Caradonna, advising that progress needed to be made quickly

if a deal was going to happen. (*See* Defendants' Exhibit 16.) On November 15, Mr. Caradonna sent an email advising that Plaintiff was still attempting to acquire an additional parcel. (Id.) On November 17, Defendant Kello sent an email requesting an update regarding Plaintiff's efforts to obtain an additional parcel. (Id.)

From December 7, 2011 to December 8, 2011, Defendant Kello, Mr. Caradonna and Mr. Gordan exchanged emails regarding a revised site plan, which culminated in Defendant Kello advising Mr. Gordan that the parties could move forward with a building that was 80'x 100'. (*See* Defendants' Exhibits 19-21.)

In June 2012, after month of negotiating, and Plaintiff unsuccessfully attempting to acquire property adjoining the Parcels, Defendant Kello discussed with Plaintiff a potential sale of the Parcels to another party that was interested in attempting to enter into a lease with FDS. Plaintiff allegedly expressed interest in the proposal. Defendant Kello then introduced Plaintiff to Isam Yaldo, Defendant Clintharp, LLC's ("Clintharp") principal.

On August 6, 2012, Plaintiff sold the Parcels to Clintharp for $320,000.00. The sale was memorialized in an August 6, 2012 Purchase Agreement ("Purchase Agreement"). In addition, the Purchase Agreement provided, in part, "[Plaintiff shall be responsible for paying a broker commission of six percent of the gross sales price at closing to [Defendant Landmark] who represents only [Clintharp]." (*See* Defendant's Exhibit 2.) Further, pursuant to the Purchase Agreement, Clintharp had 180 days to inspect the Parcels and the sale was to be closed 30 days after Clintharp provided written notice that it was going to purchase the Parcels. (Id.)

During the inspection period Clintharp sought variances from the Clinton Township Board of Appeals in an attempt to build a Family Dollar Store utilizing only the Parcels. On December 12, 2012, Defendant Kello sent an email to Plaintiff and advised it that Clintharp was

seeking a variance. (*See* Defendants' Exhibit 7.) On January 17, 2013, Defendant Kello emailed Plaintiff and advised it that the variance had been approved (*See* Defendant's Exhibit 9.)

On January 31, 2013, Clintharp exercised its right to close the Purchase Agreement, and the closing was completed on February 27, 2013.

On March 6, 2014, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff purports to state the following claims: Count I- Fraud/Misrepresentation against Defendant Landmark and Clintharp, Count II- Respondent Superior against Defendant Landmark, Count III- Negligent Supervision against Defendant Landmark, Count IV- Fraud in the Inducement against all Defendants, Count V- Silent Fraud against Defendant Landmark and Defendant Kello, Count VI- Breach of Fiduciary Duties against Defendant Landmark and Defendant Kello, Count VII- Tortious Interference with a Business Relationship or Expectancy against all Defendants, Count VIII- Statutory and/or Common Law Conversion against all Defendants, and Count VIII- Civil Conspiracy and/or Concert of Action.

On March 20, 2015, Defendants filed their instant motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied.

On March 23, 2015, Plaintiff filed its instant motion for partial summary disposition. Defendants have filed a response and request that the motion be denied. In addition, Plaintiff has filed a reply in support of its motion.

On April 13, 2015, the Court held a hearing in connection with the motion and took the matters under advisement.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court

considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

The initial issue presented by the parties' pleadings is the question as to whether Defendant Kello acted as Plaintiff's agent in connection with Plaintiff's attempted lease relationship with FDS. It appears undisputed that there is no express agency agreement between Plaintiff and Defendant Kello and/or Defendant Landmark. However, Michigan courts recognize that an agency relationship may, where no express agreement exists, also arise from acts and events that reflect acquiescence to or recognition of an agency relationship. *Meretta v Peach*, 195 Mich App 695, 687-98; 491 NW2d 278 (1992). The existence and scope of an agency relationship are questions of fact for the trier of fact. *Whitemore v Fabi*, 155 Mich 333, 338; 399 NW2d 520 (1986).

In its motion, Plaintiff contends that there is no genuine issue of material fact that Defendant Kello was its agent. In support of its position, Plaintiff asserts that Defendant Kello/Defendant Landmark: (1) Accepted service when FDS set the LOI to Plaintiff; (2) Was the exclusive intermediary between Plaintiff and FDS; (3) Recommended intermediaries for Plaintiff and received and accepted payment on its behalf; (4) Was the only party that was to receive a commission; (5) Distributed and provided assistance to Plaintiff with respect to preparing

budgets and forms; (6) Represented Plaintiff's interests during prospective acquisition and negotiation phases of the adjacent parcels.

In their response, Defendants contend that Plaintiff's assertions are either unsupported or support a finding that Defendant Landmark/Defendant Kello were not Plaintiff's agent(s). While Defendants concede that the LOI was sent to Plaintiff, in care of Defendant Kello, Defendants contend that Defendant Kello was FDS' agent, and that it is common for a principal to deliver items through their agents. Likewise, with respect to Defendant Kello's role as the sole intermediary between Plaintiff and FDS, Defendants contend that it is commonplace for a principal to have all correspondence go through its agent.

With regards to Defendant Kello recommending intermediaries to Plaintiff, that allegation relates to Mr. Boomer. The only evidence with regards to the facts surrounding how Mr. Boomer was retained is Defendant Kello's testimony. Both sides rely on page 260 of Defendant Kello's deposition. Specifically, Defendant Kello testified that due to Mr. Gordan's slow work, he asked Plaintiff's principal, Nick Lavda, whether he wanted someone different to do the work that could expedite and get a plan turned around. (*See* Deposition Transcipt of Defendant Kello, Defendants' Exhibit 32, p 260.) Defendant Kello also testified that Mr. Lavda answered in the affirmative, and that as a result he contacted Mr. Boomer. (Id.) In their response, Defendants contend that Mr. Kello's offer to find Plaintiff a faster architect was in FDS' best interests, which is consistent with the fact that Defendant Kello was FDS' agent.

In terms of Plaintiff's allegation that Defendant Kello received and accepted payment on its behalf, the only evidence cited in support of the assertion is an email chain in which Defendant Kello sent Plaintiff Mr. Boomer's invoice and asked for it to be paid. (*See* Plaintiff's Exhibit 18.)

Plaintiff also contends that a finding of implied agency is supported by the fact that it was the only party to pay Defendant Landmark a commission. The commission was provided pursuant to the Purchase Agreement. (*See* Defendants' Exhibit 36.) However, the Purchase Agreement provides that "[Plaintiff] shall be responsible for paying a broker commission of six percent of the gross sales price at closing to [Defendant Landmark] who represents only the buyer [Clintharp] in this transaction." (*See* Defendants' Exhibit 2, Plaintiff's Exhibit 6.) Accordingly, Plaintiff's position is contradicted by the unambiguous language of the document governing the commission at issue.

Based on the above, the Court is convinced that there is no genuine issue of material fact that Defendant Kello was not Plaintiff's agent. The Commission Agreement provides that Defendant Kello was acting as FDS' agent. (*See* Plaintiff's Exhibit 6, Defendants' Exhibit 2.) Moreover, all of the actions identified by Plaintiff as bases in support for its assertion that Defendant Kello was its agent are either unsupported or are consistent with Defendant Kello acting as FDS' agent. Delivering material on FDS' behalf (basis 1), acting as FDS' contact person (basis 2), and referring individuals to Plaintiff in connection with a deal that FDS has an interest in (basis 3) are all activities which are consistent with Defendant Kello being FDS' agent. Further, the Purchase Agreement, which is basis for the commission at issue, specifically provides that Defendant Kello/Landmark is only Clintharp's agent. Moreover, Plaintiff's remaining bases are unsupported. For these reasons, the Court is convinced that Defendant Kello and Defendant Landmark were not Plaintiff's agent(s).

Based on the Court's holding that Defendant Landmark and Defendant Kello were not Plaintiff's agent(s), Defendants are entitled to summary disposition of Counts II, III and VI of Plaintiff's complaint. Counts II and III of Plaintiff's complaint are based the premise that

Landmark/Defendant Kello were its agent. However, for the reasons discussed above, Defendant Landmark and Defendant Kello were not Plaintiff's agents. Consequently, Defendants are entitled to summary disposition of Counts II and III.

Count VI (Breach of Fiduciary Duty) of Plaintiff's complaint is based on Plaintiff's allegation that Defendant Landmark/Defendant Kello acted as Plaintiff's real estate agent and broker. However, for the reasons set forth above, the Court is convinced that Defendant Landmark/Defendant Kello was/were not Plaintiff's agent(s). Consequently, Defendants are entitled to summary disposition of Count VI.

The Court will now address the remaining portions of the parties' motions.

(1) Plaintiff's Motion for Partial Summary Disposition

In its motion, Plaintiff seeks summary disposition of Counts I, IV, V, VI, and VII of its complaint. For the reasons discussed above, Defendants are entitled to summary disposition of Count VI of the complaint. Consequently, the portion of Plaintiff's motion related to Count VI must be denied.

The remainder of Plaintiff's motion relate to its fraud based claims, Count I- Fraudulent Misrepresentation, Count IV-Fraud in the Inducement and Count V- Silent Fraud, and Tortious Interference Claim (Count VII).

A. Fraudulent Misrepresentation and Fraud in the Inducement

To assert an actionable fraud claim, the plaintiff must demonstrate that: (1) the defendant made a material representation; (2) it was false; (3) when the defendant made it, the defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) the defendant made it with the intention that it should be acted upon by the plaintiff; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff thereby suffered injury.

Cooper v Auto Club Ins Association, *supra*; *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Trial courts must carefully examine whether alleged fraudulent statements are "statements of past or existing fact, rather than future promises or good-faith opinions" and whether the alleged statements "are objectively false or misleading." *Cooper, supra* at 416.

In this case, Plaintiff fraud claim is based on the following allegations: (1) that Defendant Kello told it that an additional parcel was needed in order to accommodate FDS' development specs, and (2) Defendant's statement that he had a buyer who was willing to develop the Parcels along with a third parcel for FDS for a long-term lease.

With respect to the first statement, Plaintiff asserts that Defendant Kello told it that it could not accommodate FDS' specs without a third parcel. In support of its contention, Plaintiff relies on an email from Defendant Kello to Plaintiff in which he states:

> "[FDS' architect] felt it would be too difficult to provide for a building of 8,000+ sf, along with adequate parking, 3 dumpsters, and proper circulation for a full semi to deliver. Before we get too far ahead of ourselves, I would like to get a plan from your architect showing how a store can be laid out with the aforementioned. There won't be a need to get the [LOI and other forms] filled out unless we can get the layout correct.
>
> (*See* Plaintiff's Exhibit 5.)

In addition, Plaintiff relies on a September 20, 2011 email in which Defendant Kello provides the plans for FDS' prototypical store, encourages Plaintiff to prepare a site plan incorporating a third parcel, and representing that FDS is very particular about its layouts. (*See* Plaintiff's Exhibit 7.)

Further, Plaintiff relies on various pages of Defendant Kello's deposition transcript, and a November 2011 email chain in which Defendant Kello requests an update from Mr. Caradonna

and advises Plaintiff that progress needs to be made quickly if a deal is to be reached. (*See* Plaintiff's Exhibits 3 and 17.)

While Plaintiff alleges that Defendant Kello told it that an additional parcel was needed, none of the evidence presented by Plaintiff establishes that Defendant Kello made an affirmative statement to that effect. At best, Defendant Kello's statements indicated that FDS was particular about its specs and that a proposed plan must satisfy certain specs in order to satisfy FDS. While Plaintiff complains that FDS ultimately approved Clintharp's plan that only called for 26 parking spaces and a store of 8,320 sq ft, Plaintiff has failed to establish that such specifications were not permitted under FDS' prototype plans. Indeed, the prototype plans Defendant Kello provided state that FDS only requires a minimum of 25 parking spaces (*See* Defendants' Exhibit 6), and Defendant Kello's statement merely represents that the store needed to be at least 8,000 sq ft. (*See* Plaintiff's Exhibit 5.) Plaintiff has failed to present any evidence that the statements made by Defendant Kello were false.

With respect to Defendant Kello's alleged statement that that he had a buyer who was willing to develop the Parcels along with a third parcel for FDS for a long-term lease, Plaintiff relies on pages 207-208 of Defendant Kello's deposition transcript and pg. 205 of Nick Lavdas' deposition transcript. However, pages 207-208 of Defendant Kello's deposition transcript do not address whether Defendant Kello made a statement that he had a buyer who was willing to develop the Parcels and a third parcel. (*See* Plaintiff's Exhibit 3, at 207-208.) Moreover, page 205 of Mr. Lavdas' deposition transcript relates to his interpretation of a specific provision of the Purchase Agreement rather than a statement by Defendant Kello. (*See* Plaintiff's Exhibit 2, at 205.) Accordingly, the evidence Plaintiff has cited fails to establish that Defendant Kello made the alleged statement.

For the reasons stated above, the Court is convinced that Plaintiff has failed to establish that Defendant Kello made a materially false statement to it that he knew was false at the time he made it. Consequently, Plaintiff has failed to establish that, at a minimum, a genuine issue of material fact exists with respect to the elements of its actual fraud and fraud in the inducement claims. Accordingly, Defendant's motion for summary disposition of Counts I and IV must be granted.

B. Silent Fraud

To prove silent fraud, also known as fraudulent concealment, a plaintiff must establish (1) that the defendant suppressed the truth with the intent to defraud the plaintiff and (2) that the defendant had a legal or equitable duty of disclosure. *Lucas v Awaad*, 299 MichApp 345, 363–364; 830 NW2d 141 (2013). Further, "[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.' " *Id.* at 364, quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009) (internal citation omitted).

In its motion, Plaintiff asserts that Defendant Kello's position as a broker subjected him to a legal duty to disclose that a building of 8,320 sq ft with only 26 parking spaces was acceptable to FDS. However, as discussed above, Defendant Kello was not Plaintiff's agent. Consequently, Plaintiff's position is without merit and Defendants are entitled to summary disposition of Plaintiff's silent fraud claim.

C. Tortious Interference

In order to maintain a tortious interference claim, a plaintiff must establish: "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on

the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Cedroni Association, Inc. v Tomblinson, Harburn Associates, Architects & Planners Inc.*, 492 Mich 40, 45–46; 821 NW2d 1 (2012).

In this case, Plaintiff's tortious interference claim is based on its allegation that Defendants tortiously interfered with its expected relationship with FDS by misleading it into thinking that it could not obtain a lease with FDS without obtaining a third parcel. However, for the reasons discussed above, Defendants did not represent that a third parcel was needed in order to satisfy FDS; rather, Defendant Kello encouraged Plaintiff to obtain a third parcel when it became apparent that Plaintiff was unable to come up with a plan that would satisfy FDS only utilizing the Parcels. While Defendant Kello provided Plaintiff with the prototype plans and provided a list of certain prerequisites that a proposed plan must include, Defendant Kello was not Plaintiff's agent and he was not required to instruct Plaintiff as to how to develop a sufficient site plan only using the Parcels. For these reasons, the Court is satisfied that Defendants are entitled to summary disposition of Plaintiff's tortious interference claim.

(2) Defendants' Motion for Summary Disposition

Plaintiff's remaining claims are Count VII - Statutory and Common Law Conversion against all Defendants, and Count VIII- Civil Conspiracy and/or Concert of Action.

In Count VII of its complaint, Plaintiff alleges that Defendants converted the Subject Property and potential business opportunity by making false representations. However, for the reasons discussed above, the Court is convinced that Defendants did not make false representations to Plaintiff. Consequently, the basis for Plaintiff's conversion claims is without merit, and Defendants are entitled to summary disposition of Count VII.

Finally, with respect to Count VIII, for both civil conspiracy and concert of action, the plaintiff must establish some underlying tortious conduct. *Urbain v Beierling,* 301 Mich App 114, 131–132; 835 NW2d 455 (2013). In this case, the Court has found that Defendants are entitled to summary disposition of Plaintiff's underlying tort claims. Consequently, Defendants are also entitled to summary disposition of Plaintiff's conspiracy claim/concert of action claim.

Conclusion

Based upon the reasons set forth above, Defendants' motion for summary disposition is GRANTED. Plaintiff's motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Visiting Circuit Court Judge

Dated: May 27, 2015

JCF/sr

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