STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: December 1, 2014]

CHARLES E. FOGARTY	:	
Plaintiff,	:	
	:	
V.	:	
	:	**C.A. No. KB-2008-1073**
RALPH PALUMBO,	:	*Consolidated with:*
PILGRIM TITLE INSURANCE and	:	
JONATHAN SAVAGE	:	
Defendants.	:	
JAMES OTTENBACHER	:	
Plaintiff,	:	
	:	
V.	:	
	:	**C.A. No. KB-2008-1087**
RALPH PALUMBO,	:	
PILGRIM TITLE INSURANCE and	:	
JONATHAN SAVAGE	:	
Defendants.	:	

DECISION

STERN, J. Before this Court are Defendants'—Ralph Palumbo (Palumbo) and Jonathan Savage (Savage) (collectively, Defendants)—motions for summary judgment pursuant to Super. R. Civ. P. Rule 56(c). The Defendants have moved for summary judgment through four separate motions. This Decision will address all four of the Defendants' motions. In the first motion, the Defendants jointly move for summary judgment on all counts. Also, the Defendants jointly seek summary judgment on the tortious interference with contract claim and the tortious interference with prospective business advantage claim. Further, through two separate motions, Savage moves for summary judgment on the breach of contract claim, fraud claim, and civil conspiracy claim. Plaintiffs Charles Fogarty (Fogarty) and James Ottenbacher (Ottenbacher) (collectively,

Plaintiffs) object to these motions. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The current dispute between the parties involves a 360-acre tract of land located in Hopkinton, Rhode Island. The land, known as the Reserve at Brushy Brook (the Property), was owned originally by Fogarty in the 1970s. In 1994, Fogarty sold the Property from his Chapter 11 Bankruptcy estate. An entity called Stone Ridge, Inc. (Stone Ridge) purchased the Property from Fogarty's bankruptcy estate. Stone Ridge is comprised of four shareholders: Plaintiffs Fogarty and Ottenbacher; Grant Schmidt, M.D. (Schmidt); and William McComb (McComb) (collectively, Shareholders). In 2002, the Property was transferred from Stone Ridge to Brushy Brook Development, LLC (Brushy Brook). Brushy Brook's sole member was the Stone Ridge entity. Through Brushy Brook, the Shareholders intended to develop the Property and sought financing through Pioneer Bank.

In furtherance of its attempt to develop the Property, Brushy Brook began to obtain the necessary development approvals and financing. However, by late 2004, after losing the necessary development approvals and facing a potential foreclosure on the Property, the Shareholders agreed to try to sell the Property or to entertain shareholder buyouts. According to Ottenbacher and Fogarty, they planned to either purchase the Property from Brushy Brook or buy out the shares of McComb and Schmidt. To accomplish either of these objectives, the Plaintiffs allegedly sought the assistance of Palumbo as a tax and financial advisor and Savage to act as their attorney during the transaction. Savage denies having been the Plaintiffs' attorney during this time period.

Plaintiffs allege that an entity called CFJO, Inc. (Charles Fogarty James Ottenbacher) was

originally going to purchase the Property from Brushy Brook.[1] Adam Clavell (Clavell), an attorney allegedly representing Savage, originally drafted an agreement indicating CFJO as the purchaser of the Property. However, this agreement was never executed, and the plan was eventually abandoned. Thereafter, a new plan emerged wherein Savage, acting in his capacity as a buyer, would purchase the Property.

According to the Plaintiffs, the transaction was structured as follows: Savage—acting through an entity called Boulder Brook, LLC (Boulder Brook)—would purchase the Property from Brushy Brook for $5.5 million. After purchasing the Property, Boulder Brook would simultaneously enter into an Option Agreement with Stark Properties, Inc. (Stark), giving Stark the option to buy certain residential lots on the Property. Stark is an incorporated entity formed by the Plaintiffs. The Option Agreement was drafted by Mark Spangler, Esq. (Spangler) in his capacity as the attorney for the Plaintiffs.

To effectuate this transaction, Brushy Brook was required to obtain the approval of Stone Ridge's Shareholders. Therefore, in March of 2005, the Shareholders entered into what was known as the 2005 Stone Ridge Agreement, authorizing Brushy Brook to sell the Property. On April 6, 2005, Brushy Brook and Stone Ridge executed an asset purchase agreement (the April 2005 APA), agreeing to sell the Property to Boulder Brook. The April 2005 APA stated the closing would occur within thirty days. The Shareholders admit to knowing by March of 2005, at the latest, that Savage was a principal of Boulder Brook. Clavell was also involved in the drafting of the April 2005 APA.

Competing Deals

According to the Plaintiffs, the deal to sell the Property to Boulder Brook was never

[1] An important aspect of this proposed transaction is that CFJO, Inc. would then sell the Property to Savage.

consummated, and that the agreement had lapsed by the end of May of 2005—the time set under the agreement for Boulder Brook to close on the Property. As a result, in late July or early August of 2005, according to the Plaintiffs, Ottenbacher with a partner, Stephen Kaufman, made an offer to buy out Schmidt and McComb's shareholder interests in Stone Ridge for $4.1 million.[2] The terms of Ottenbacher's proposal included $3.6 million in cash at the time of closing, with the balance secured by a $500,000 mortgage payable within six months of the closing. Plaintiffs allege this deal was accepted by Schmidt, in his capacity as managing member of Brushy Brook. Realizing Schmidt may have been considering reviving the original deal with Boulder Brook, Ottenbacher instructed both Schmidt and Savage not to proceed with the Boulder Brook deal.[3]

The Plaintiffs claim that Schmidt and McComb had agreed to sell the Property to Ottenbacher and Fogarty, and a closing was set for August 15, 2005. In anticipation of the closing, $3.6 million was wired into the trust account of Spangler. However, on August 16, 2005, when Spangler searched the Land Evidence Records for the Town of Hopkinton, it was discovered that the Property had been transferred to Boulder Brook on August 15, 2005.[4] The salient terms of the Boulder Brook transaction consisted of cash considerations sufficient to pay all secured creditors, and a promissory note executed by Boulder Brook payable to Brushy Brook.

After the Property was transferred to Boulder Brook, Brushy Brook was placed into involuntary bankruptcy. Stone Ridge was also later petitioned into bankruptcy by Brushy

[2] Fogarty was also a partner in this buying group, but would not contribute any money to purchase the Property. The Court will refer to this group as the Ottenbacher purchasing group.
[3] According to the Defendants, after executing the April 2005 APA, the Plaintiffs engaged in a series of conversations with Savage encouraging him to close on the Property.
[4] Plaintiffs state that Savage and Palumbo were Boulder Brook's principals.

Brook's Chapter 7 Bankruptcy Trustee, Charles Pisaturo, Esq. (Pisaturo). During the bankruptcy proceeding, Pisaturo brought adversary proceedings on behalf of Stone Ridge and Brushy Brook against Schmidt and his attorney, Gerald Vande Werken (Vande Werken), for breach of fiduciary duties. These cases were eventually settled.

The Plaintiffs allege to have suffered damages as a result of the Property's transfer to Boulder Brook, and not to the Ottenbacher purchasing group. Plaintiffs contend their losses consist of losing their respective share of the land, as well as the profits which could have been made by developing the Property. Specifically, the Plaintiffs point to lost profits from condominium sales, house lots, and revenues generated by a golf course, exercise facility, and restaurant. Real estate appraiser James Houle (Houle) was retained to testify as to the amount of damages sustained by the Plaintiffs. In response, the Defendants move for summary judgment on the grounds that the Plaintiffs have failed to provide proof, to a reasonable degree of certainty, as to the amount of lost profits actually incurred as a result of their offer not being accepted. By failing to introduce sufficient evidence regarding their damages, the Defendants claim this controversy is ripe for summary judgment.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a

light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of the pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in the light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Industrial Nat'l Bank v. Peloso, 121 R.I. 305, 306, 397 A.2d 1312, 1313 (1979). "[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise, they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit. Id.

III

Analysis

A

Damages Claimed

The Defendants contend that summary judgment should be granted since the Plaintiffs

have failed to provide adequate evidence pertaining to their claim for damages. The Defendants argue that summary judgment is appropriate because the evidence offered by the Plaintiffs makes it impossible for a trier of fact to determine the extent of the Plaintiffs' lost profits with reasonable certainty. In opposing the Defendants' motion for summary judgment, the Plaintiffs claim to have sustained damages in two ways. The Plaintiffs first claim that if Brushy Brook sold the Property to them, the Shareholders of Stone Ridge would have received "some return" of their initial investment.[5] The Plaintiffs argue that the superiority of their offer, as outlined in the Bankruptcy Trustee's Motion for Approval of Compromise, supports their initial claim for damages. See Pls.' Ex. BB to Mem. in Obj. to Mot. Summ. J. Alternatively, the Plaintiffs contend that their expert, Houle, has produced substantial evidence relating to the amount of profit the Plaintiffs would have made if able to purchase and develop the Property.

1

Standing

Initially, this Court must address whether the Plaintiffs have standing to bring certain claims for damages. The Plaintiffs claim to have sustained damages essentially in two separate ways. First, the Plaintiffs allege that by Brushy Brook selling the Property to Boulder Brook, there was no money left over to reimburse the initial capital contributions of Stone Ridge's Shareholders. To prove the existence of damages, the Plaintiffs allege that if their deal been accepted, the Shareholders—including Ottenbacher and Fogarty—would have received some return of their initial contribution. According to the Plaintiffs, this amount not returned to the Shareholders supports their first claim for damages. Second, the Plaintiffs claim lost damages in

[5] The Court uses the phrase "some return" since the Plaintiffs failed to provide what amounts each Shareholder originally contributed and how much each Shareholder stood to receive under their offer.

the form of lost profits. The Plaintiffs contend that if the opportunity to purchase and develop the Property was not taken from them, they would have been able to develop a golf course and residential community on the Property, and in doing so, to make a substantial profit.

Regarding their first claim for damages, this Court finds that the Plaintiffs lack standing to argue that, if their deal had been accepted, they would have received compensation since they were Shareholders of Stone Ridge. Whether a cause of action is derivative is a question for the Court. Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1113 (D.R.I. 1990). A derivative suit "permits an individual shareholder to bring suit to enforce a corporate cause of action against officers, directors, and third parties." Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991). "[I]f the injury in question is one sustained by the shareholders, directly, they may sue on their own behalf." Dowling, 735 F. Supp. at 1113. To determine if a suit is derivative or personal to the shareholder, the court considers "the nature of the harm inflicted and the nature of the rights violated." Id. The Court must determine the nature of the suit, regardless of the designation given by the plaintiff. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1069-70 (Del. Ch. 1985).

In this case, if the Ottenbacher purchasing group offer to purchase the Property was accepted, any money left over after creditors were paid would be distributed to Stone Ridge's Shareholders. It is inappropriate for this Court to consider the amount of money a Stone Ridge Shareholder would have received if Ottenbacher's offer had been accepted when determining if the Plaintiffs in this case have adequately made a claim for damages. The Plaintiffs' argument—that the Shareholders would have received more money if Brushy Brook accepted their offer—is a claim that Stone Ridge or its Shareholders ought to make. See Takian v. Rafaelian, 53 A.3d 964, 973 (R.I. 2012) (holding a lost corporate opportunity claim is a wrong against the

corporation; therefore, an action must be brought by the corporation, or derivatively by the shareholders); Albany Plattsburgh United Corp. v. Bell, 763 N.Y.S.2d 119, 122 (2003) (stating shareholders have no individual cause of action to recover damages for a wrong against a corporation). Furthermore, Stone Ridge's petition into involuntary bankruptcy precludes the Plaintiffs from being able to assert this claim as a derivative action. See In re Gen. Dev. Corp., 179 B.R. 335, 338 (S.D. Fla. 1995) (holding the bankruptcy estate includes all derivative actions brought by shareholders). Therefore, when reviewing the Plaintiffs' claim for damages, this Court will not consider the argument that, as Shareholders of Stone Ridge, the Plaintiffs suffered damages when Brushy Brook sold the Property to Boulder Brook.

2

Lost Profits

Regarding their next claim for damages, the Plaintiffs attempt to demonstrate the existence of lost profits through their designated expert, Houle. The Plaintiffs contend that Houle is qualified to testify as to the value of the Property at the time it was transferred to the Defendants, as well as to the anticipated profit the Plaintiffs were to receive from developing the Property. The Defendants argue that the amount of damages sustained by the Plaintiffs is overly speculative, and Houle's testimony demonstrates how the Plaintiffs cannot articulate to a reasonable degree of certainty the amount of lost profits suffered.

Every count of the Plaintiffs' amended complaints alleges that the actions of the Defendants have resulted in the Plaintiffs suffering damages. Upon reviewing the complaints and papers submitted by the parties, the Court is left with the conclusion that the Plaintiffs are seeking, as damages, lost profits. Each claim raised by the Plaintiffs centers around the lost opportunity to develop and to sell the Property. Therefore, absent additional evidence, this Court

will treat the Plaintiffs' claim for damages as one for lost profits.

Generally, "the law is always concerned that [an] injured party shall be fully compensated for whatever injury he [or she] may have sustained." Hernandez v. JS Pallet Co., Inc., 41 A.3d 978, 984 (R.I. 2012) (quoting DeSpirito v. Bristol County Water Co., 102 R.I. 50, 53-54, 227 A.2d 782, 784 (1967)). In a claim for negligence, the burden is on the plaintiff to prove damages by a preponderance of the evidence. Perrotti v. Gonicberg, 877 A.2d 631, 636 (R.I. 2005). Further, to recover lost profits in a breach of contract claim, the plaintiff must establish such loss with reasonable certainty. Guzman v. Jan-Pro Cleaning Systems, Inc., 839 A.2d 504, 508 (R.I. 2003); Long v. Atlantic PBS, Inc., 681 A.2d 249, 252-53 (R.I. 1996); Smith Dev. Corp. v. Bilow Enterprises, Inc., 112 R.I. 203, 212, 308 A.2d 447, 482 (1973). Although a plaintiff does not have to demonstrate lost profits with mathematical certainty, the court should be provided with a rational model of how lost profits are computed. Abbey Medical/Abbey Rents, Inc. v. Mignacca, 471 A.2d 189, 195 (R.I. 1984); see Butera v. Boucher, 798 A.2d 340, 350 (R.I. 2002) (finding that damages must be based on reasonable and probable estimates). In addition, the anticipated expenses should be taken into account and deducted from anticipated revenues when determining lost profits. Guzman, 839 A.2d at 508.

The measure of the damages amount is determined by the loss to the plaintiffs. Long, 681 A.2d at 253. The degree of proof necessary to establish the reasonable certainty of profits depends "upon the circumstances of the particular case." Smith Dev. Corp, 112 R.I. at 212, 308 A.2d at 482. Reasonably certain lost profits are such damages that are not based "wholly on speculation and conjecture." UST Corp. v. General Road Trucking Corp., 783 A.2d 931, 942 (R.I. 2001); see also 22 Am. Jur. 2d Damages § 340. Therefore, it is well settled that no claim for damages may stand d if '"not supported by the required degree of proof, or is

speculative . . . .'" Perrotti, 877 A.2d at 636 (quoting Andrews v. Penna Charcoal Co., 55 R.I. 215, 222, 179 A. 696, 700 (1935)); see also Sanders v. Flanders, 564 F. App'x 742, 745 (5th Cir. 2014) (holding damages cannot be established through speculation or conjecture). Therefore, if the offered evidence does not demonstrate that reasonably certain lost profits exist, summary judgment may be entered against the nonmoving party. See Zink v. Mark Goodson Productions, Inc., 689 N.Y.S.2d 87, 88 (App. Div. 1999) (finding summary judgment appropriate when plaintiffs' claim for lost profits was not based on a reasonably certain assessment, but rather assumptions, speculation and conjecture).

In this case, the Plaintiffs rely on Houle's testimony to demonstrate the existence of lost profits. By profession, Houle is a real estate appraiser. In his deposition testimony, Houle asserts the value of the Property fully developed would exceed $10,000,000. Based on these figures, Houle concluded that at the price offered by the Plaintiffs to purchase the Property, Ottenbacher and Fogarty would have made a profit once the Property was developed. However, Houle's testimony demonstrates the amount of conjecture involved in formulating the Plaintiffs' amount of potential lost profits. In order to obtain a profit in this venture, Houle first assumed that certain construction permits from the Town of Hopkinton and the Rhode Island Department of Environmental Management (DEM) would be renewed within a short amount of time after the Plaintiffs purchased the Property. See Houle Dep. 24:22-25 – 25:1-5. In the absence of any additional evidence that demonstrates the necessary permits could easily be renewed, Houle's later determination of the Property's value—which assumes all permits will be in place—is highly speculative. UST Corp., 783 A.2d at 942. Further, Houle's testimony regarding the amount of damages relies on several inferences. One such inference includes the Plaintiffs being able to obtain financing to complete development. See Houle Dep. 75:9-23; 80:6-14; 82:17-21.

Also, the Plaintiffs have not presented evidence, beyond conjecture, regarding what the costs of construction would be to fully develop the Property. Without evidence pertaining to construction costs and financing, Plaintiffs' lost profits cannot be proven with reasonable certainty. See Troutbrook Farm, Inc. v. DeWitt, 611 A.2d 820, 824 (R.I. 1992) (stating plaintiff must establish with reasonable certainty the net lost profits suffered).

Although Houle states that he is willing to testify as to the amount of profits a generic developer could make on this project, his assumption of a 20% profit is based on unsupported documentation. See Houle Dep. 72:11-20. In fact, the underlying information used by Houle in creating his appraisal for the Property's value once fully developed has been destroyed. Consequently, Houle's testimony regarding the estimated profits to be made from developing the Property was made from his memory and recollection. See Houle Dep. 35:1-16. Therefore, the Court is unable to ascertain whether Houle's estimates are based on articulated facts or mere speculation. See Franco v. Latina, 916 A.2d 1251, 1258 (R.I. 2007) (stating expert opinion must be based on facts to allow the Court to determine if opinion is not merely speculative). Standing alone, this testimony cannot support a finding that damages have been established with a reasonable degree of certainty. See Restatement (Second) Contracts § 352 (1981) (damages not recoverable beyond amounts not reasonably certain); 22 Am. Jur. 2d Damages § 456 (in both tort and contract actions, lost profits must be proven with a reasonable degree of certainty).

Further, when viewing all facts in a light most favorable to the Plaintiffs, the evidence does not support a finding of a genuine issue of material fact. See Cayer v. Cox Rhode Island Telecom, LLC, 85 A.3d 1140, 1143 (R.I. 2014). The Plaintiffs have not expanded upon, nor have they supported their expert's assertions through affidavit or otherwise. In further support of their claim of damages, Ottenbacher testified in his deposition that an opportunity was taken

from him, which he could have turned into a $20 or $30 million operation. See Ottenbacher Dep. 109:5-11. However, without additional evidence, assertions by a party involved in the litigation are insufficient to create an issue of material fact to survive a summary judgment motion. See Laurence v. R.I. Dep't of Corrections, 59 A.3d 1182, 1184 (R.I. 2013) (self-serving statements do not create a genuine issue of material fact for summary judgment purposes).

In summary, the Plaintiffs have not presented sufficient evidence to raise a factual issue of whether lost profits existed. Houle's testimony, the sole source relied on by the Plaintiffs, does not create a factual issue regarding lost profits. To testify to lost profits, Houle would have to assume the price paid by the Plaintiffs for the Property, the terms of any financing to develop the Property, and lastly, the ability to sell all the developed residential lots. See Houle Dep. 80:1-25 – 81:1-20. It is clear that absent further evidence, the testimony of Houle regarding lost profits is heavily grounded in a series of speculative events occurring. See Schonfeld v. Hilliard, 218 F.3d 164, 173 (2d Cir. 2000) (holding series of assumptions made by expert to determine lost profits could not establish lost profits to a degree of reasonable certainty). Therefore, the evidence presented by the Plaintiffs fails to demonstrate the existence of reasonable certain lost profits. See 22 Am. Jur. 2d Damages § 340 (reasonably certain does not require mathematical exactitude; but rather, only sufficient evidence to make damages not speculative).

Since the Plaintiffs' claims for damages are entirely based on lost profits and the Plaintiffs have failed to elicit evidence regarding lost profits to a reasonable degree of certainty, the entirety of the Plaintiffs' claims must be dismissed. See Long, 681 A.2d at 252 (precondition for recovery of lost profits is that such loss be established with reasonable certainty).

B

Counts IV and V

Although the Plaintiffs' claims are dismissed, this Court will continue to review the Defendants' additional summary judgment motions. In both complaints, the Plaintiffs allege claims for tortious interference with contractual relations (Count IV), and tortious interference with prospective business advantage (Count V). The Defendants argue that the Plaintiffs never had an agreement to purchase the Property, and thus Count IV must fail. The Defendants contend that the Plaintiffs do not possess a business expectancy associated with developing the Property, and that therefore, Count V should also be dismissed.

1

Tortious Interference with Contractual Relationship

To prove a tortious interference with contractual relationship, the plaintiff must establish: '"(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom."' Bossian v. Anderson, 69 A.3d 869, 877 (R.I. 2013) (quoting IMS v. Town of Portsmouth, 32 A.3d 914, 925-26 (R.I. 2011)). A party who interferes with a plaintiff's rights under a contract may be susceptible to tort liability if such interference "causes the plaintiff to lose a right under the contract or makes the contract rights more costly or less valuable." Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 752 (R.I. 1995) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129 at 978 (5th ed. 1984)). Certain elements must be present in order for the Court to find a valid enforceable contract. The essential elements for contract formation are '"competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation."' Rhode Island Five v. Medical Assocs. of Bristol Cnty., Inc., 668 A.2d 1250, 1253 (R.I. 1996)

(quoting Black's Law Dictionary 322 (6th ed. 1990)).

The Defendants allege that the Plaintiffs never entered into a contract to purchase the Property. Since a valid contract was never finalized with Brushy Brook, the Defendants contend that the Plaintiffs cannot satisfy the first element of a tortious interference with contract claim. To demonstrate the existence of a contract, the Plaintiffs point first to the CFJO agreement drafted by Clavell. See Pls.' Exs. I, AA to Mem. In Obj. to Defs.' Mot. Summ. J. As drafted, the CFJO agreement was between Brushy Brook, the four individual shareholders of Stone Ridge, and CFJO as the purchasing entity. This agreement was created in December of 2004, but there is no proof that the sellers ever signed the agreement. Therefore, this document cannot be relied upon by the Plaintiffs to demonstrate the existence of a contract for the purchase of the Property between Brushy Brook and the Plaintiffs.

Next, the Plaintiffs contend that an email, sent by Ottenbacher and received by Schmidt in July or August of 2005, represents Brushy Brook's acceptance of an offer, made by Ottenbacher, to purchase the Property from Brushy Brook. However, to form an enforceable bilateral contract, the offeree "must communicate his acceptance to the offeror before any contractual obligation can come into being . . . . The acceptance must be transmitted to the offeror in some overt manner." Ardente v. Horan, 117 R.I. 254, 258-59, 366 A.2d 162, 165 (1976). The email provided by the Plaintiffs cannot be considered an acceptance of an offer. The response by Dr. Schmidt states he "in principle, would agree to sell for $4.1 million" but also discusses that certain issues needed to be resolved before an agreement could be signed. See Pls.' Ex. L to Mem. In Obj. to Defs.' Mot. Summ. J. Therefore, it is clear that the seller did not intend to enter a contract at that precise moment through his reply. Smith v. Boyd, 553 A.2d 131, 133 (R.I. 1989) (stating an offer and acceptance are indispensable to contract formation, and

"without such assent a contract is not formed").

Further, the document relied upon by the Plaintiffs clearly demonstrates that material terms had to still be negotiated before a contract could be finalized. Although Schmidt stated he could consider selling at $4.1 million, by acknowledging the fact that additional issues still had to be resolved makes it clear that Schmidt never intended to bind himself to such a deal. See 17A Am. Jur. 2d Contracts § 37 (The intentions of the parties, demonstrated by their conduct and the surrounding circumstances, are extremely significant when determining whether a preliminary agreement created a binding obligation). Furthermore, evidence exists that any offer made by the Plaintiffs to purchase the Property was rejected by Brushy Brook. See Defs.' Exs. M, N to Mem. in Supp. of Mot. Summ. J. In further support of the fact that there seemed to be no contract between the Plaintiffs and Brushy Brook, the appointed Chapter 7 Trustee for Brushy Brook and Stone Ridge, Charles Pisaturo, claims to have never seen an executed purchase and sale agreement whereby the Property would be sold to the Plaintiffs. See Pisaturo Dep. 35:4-17.

Additionally, the email relied upon to demonstrate the existence of a contract between the sellers and the Plaintiffs may not even constitute competent evidence to defeat a summary judgment motion. "[u]nauthenticated documents . . . are not usually 'competent evidence' worthy of consideration by the court in ruling on a motion for summary judgment." McGovern v. Bank of America, N.A., 91 A.3d 853, 860 (R.I. 2014). When confronted with a motion for summary judgment, "the task [of authentication] can be accomplished in the usual course by submitting an affidavit of a person with personal knowledge of the documents who can attest to their authenticity and qualify them as admissible evidence." Id. at 860-61. The email has not been authenticated, and no affidavit has been provided by the Plaintiffs allowing this Court to consider this exhibit as admissible competent evidence. Therefore, this Court finds that a

contract for the sale of the Property to the Plaintiffs has not been established by the evidence, and thus, Plaintiffs are not entitled to relief under Count IV of their complaints.

2

Tortious Interference with Prospective Contractual Relations

To prevail on a claim of tortious interference with prospective contractual relations, the plaintiff must prove the same elements as tortious interference with contractual relations, except for having to demonstrate the existence of a contract. Mesolella v. City of Providence, 508 A.2d 661, 670 (R.I. 1986). To be successful, a plaintiff must prove the following elements: (1) the existence of a business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional act of interference; (4) proof that the interference caused the harm sustained; and (5) damages to the plaintiff." Avilla v. Newport Grand Jai Alai LLC, 935 A.2d 91, 98 (R.I. 2007). "The element of intentional interference requires a showing of legal malice—meaning an intent to do harm without justification—or that he acted for an improper purpose." Greensleeves, Inc. v. Smiley, 68 A.3d 425, 434 (R.I. 2013) (quoting Belliveau Bldg. Corp. v. O'Coin, 763 A.2d 622, 627, 628 (R.I. 2000) (internal quotation marks omitted) and citing Page Keeton et al, Prosser and Keeton on the Law of Torts ch. 24, § 129 at 978-79 (5th ed. 1984)). Several factors are considered when determining whether a party engaged in improper interference. The Court should consider: "(1) the nature of the actor's conduct; (2) the actor's motive; (3) the contractual interest with which the conduct interferes; (4) the interests sought to be advanced by the actor; (5) the balance of the social interests in protecting freedom of action of the actor and the contractual freedom of the putative plaintiff; (6) the proximity of the actor's conduct to the interference complained of; and (7) the parties' relationship." Avilla, 935 A.2d at 98 (citing Restatement (Second) Torts § 767 at 26-27 (1979)).

In order to analyze the other elements in this cause of action, the Plaintiffs first must demonstrate the existence of a business relationship or expectancy. Plaintiffs argue that they had plans to develop the Property which were thwarted by the actions of the Defendants, constituting improper interference. In this case, the Plaintiffs cannot establish an expectancy of a business relationship. See 24 Causes of Action 2d 571 § 8 (2004). Plaintiffs can meet this burden by demonstrating a probability of future economic benefit stemming from this transaction. Id. However, the Plaintiffs are unable to prove that an economic benefit existed. The Plaintiffs' offer to purchase the Property had been rejected by Brushy Brook. See Defs.' Ex. M to Mem. in Supp. of Mot. Summ. J.

Although not binding on this Court, other justices of the Superior Court have held a plaintiff, in order to recover on this tort theory, must demonstrate "the relationship with the third party had proceeded beyond the point of 'mere anticipation' of entering into a contract." Miller v. Metropolitan Property and Cas. Ins., No. 09-0924, September 7, 2010 (Order), Carnes, J. (quoting Laura Krohn, J.D., Annotation, Cause of Action for Interference with Prospective Business Advantage, 16 Causes of Action § 5 (2009)). In this case, the Plaintiffs have not demonstrated the existence of ongoing business negotiations associated with the development of the Property. Therefore, besides mere hopes, it does not appear that the Plaintiffs had a definitive business expectancy.

Further, McComb, through deposition testimony, testified that an agreement was never entered into to sell the Property to the Plaintiffs' buying group. See McComb Dep. 28:11-20. Also, this Court finds critical the timing of events surrounding the sale of the Property. Plaintiffs contend that the Defendants interfered with their negotiations to purchase the Property. However, the Plaintiffs' buying group only became interested as buyers in or around June or July

of 2005. Ottenbacher Dep. 169:9-25 – 170:1-25. The agreement to sell the Property to Boulder Brook had already been executed as of April 5, 2005, preceding the Plaintiffs' involvement as potential buyers. It is clear that these two parties competed in their attempts to acquire the Property, with the Defendants being ultimately victorious. Competition alone is not enough to demonstrate tortious interference, however. The Plaintiffs have testified to their hopes of developing the Property, but have failed to show a reasonable likelihood of actually acquiring the Property. 24 Causes of Action 2d 571 § 8 (2004). Therefore, for these reasons, this Court grants the Defendants' Motion for Summary Judgment pertaining to Count V of each of Plaintiffs' amended complaints.

C

Counts III, VI, and VIII

Savage also moves for summary judgment on Breach of Contract (Counts III), Fraud (Count VI), and Civil Conspiracy (Count VIII) of both Plaintiffs' amended complaints. In his first motion, Savage contends that the statute of limitations has expired, thereby barring the Plaintiffs from bringing these three claims. Alternatively, if the Plaintiffs' claims fall within the statute of limitations, Savage's next motion argues that this Court should still find summary judgment appropriate on Counts III, VI, and VIII since no attorney-client relationship existed between Savage and the Plaintiffs.

First, this Court must determine whether these three counts should be considered as a single claim for legal malpractice. Although multiple causes of action are raised against Savage, the Plaintiffs' claims all relate to Savage's conduct as their alleged attorney. In Count III, the Plaintiffs allege that Savage was hired to assist them in the purchase of, or in securing a purchaser for, the Property, and that Savage breached the covenant of good faith and fair dealing

when he bought the Property for himself. In Count VI, Plaintiffs contend that the Defendant made false representations and failed, as a fiduciary, to disclose Schmidt's plan to defraud Fogarty and Ottenbacher. Further, Count VI also states Savage was a participant in the fraud. Finally in Count VIII, Plaintiffs allege Savage took part in an unlawful enterprise to defraud the Plaintiffs of ownership of the Property.

Other state courts view the claims as a whole to determine "the gravamen of an action." Alken-Ziegler, Inc. v. George Bearup, Smith, Haughey, Rice & Roegge, P.C., No. 264513, 2006 WL 572571, at *3 (Mich. Ct. App. Mar. 9, 2006). In Rhode Island, the gravamen of an action for attorney malpractice is "the negligent breach of [a] contractual duty" which can be brought in tort or in contract. Church v. McBurney, 513 A.2d 22, 24 (R.I. 1986). Instead of calling their claims against Savage legal malpractice, the Plaintiffs are attempting to characterize each one of their claims as separate intentional torts. By themselves, these claims depict separate intentional torts; however, the Plaintiffs' basis for bringing such actions stem from Savage's alleged breach of his fiduciary duty. See Bowen Court Assocs. v. Ernst & Young, 818 A.2d 721, 727 (R.I. 2003) (finding that when separate claims against a professional defendant challenge the quality and nature of the services rendered, such claims are viewed as one for malpractice, subject to the applicable malpractice statute of limitations). Therefore, since the Plaintiffs' claims arise solely from Savage's alleged breach, it is appropriate for this Court to consider the claims against Savage as one for legal malpractice. See Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App. 1998) (finding multiple alleged causes of action were a "means to an end" to achieve a complaint for legal malpractice).

1

Statute of Limitations

The applicable statute of limitations in a particular case is one of law to be decided by the trial judge. Kougasian v. Davol, Inc., 687 A.2d 459, 461 (R.I. 1997). Since this Court has determined the gravamen of the Plaintiffs' case involves Savage's alleged improper conduct in his role as their attorney, the Rhode Island statute for legal malpractice is applicable here. G.L. 1956 § 9-1-14.3 states that "an action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the action." § 9-1-14.3. Rhode Island has also adopted the "discovery rule" which has been codified in § 9-1-14.3(2). The "discovery rule" provision states:

> "In respect to those injuries due to acts of legal malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered." § 9-1-14.3.

This rule protects "individuals suffering from latent or undiscoverable injuries who then seek legal redress after the statute of limitations has expired for a particular claim." Sharkey v. Prescott, 19 A.3d 62, 66 (R.I. 2011).

When applying the discovery rule, this Court uses an objective standard. Therefore, the standard requires only that a plaintiff "be aware of facts that would place a reasonable person on notice that a potential claim exists." Id.; (citing Riemers v. Omdahl, 687 N.W.2d 445, 449 (N.D. 2004)). The Court draws "'all reasonable inferences' in plaintiff's favor to determine whether, in the exercise of reasonable diligence, plaintiff should have discovered the alleged act of malpractice." Canavan v. Lovett, Schefrin and Harnett, 862 A.2d 778, 784 (R.I. 2004) (citing Richmond Square Capital Corp. v. Mittleman, 689 A.2d 1067, 1069 (R.I. 1997) (mem.)). Thus,

the statute of limitation period begins not when a party has actual knowledge of alleged acts of malpractice, but rather when one "becomes aware of facts or by exercising reasonable diligence could discover facts that would place a reasonable person on notice that a potential claim exists." Zanni v. Voccola, 13 A.3d 1068, 1071 (R.I. 2011).

Savage argues that the Plaintiffs' claims are barred by the legal malpractice statute because the Plaintiffs were aware of the alleged fraudulent transfer on August 16, 2005, but did not bring suit against him until March of 2010—five years after the fact. Savage contends that, as of August 16, 2005, the Plaintiffs were aware of his involvement and his potential wrongdoing at that time. Further, Savage asserts that both the Plaintiffs' March 2010 complaints, where he was first named as a defendant, do not relate back to the Plaintiffs' original filing date since the amended complaints raise new facts, theories of law, and a new cause of action. Since the amended complaints are drastically different from the original complaints, Savage contends that relation back is inappropriate and should not be applied to allow the Plaintiffs to circumvent the statute of limitation period. Therefore, Savage alleges that since the Plaintiffs' claims against him are time-barred, the claims must be dismissed.

The Plaintiffs argue that they did not become aware of Savage's malpractice until Palumbo produced certain documents on August 24, 2008. The Plaintiffs argue that due to the secretive nature of the transaction, which was designed to prevent Fogarty and Ottenbacher from acquiring the Property, the discovery rule should be applied to toll the running of the statute of limitations.

In this case, the Plaintiffs cite two cases in support of their argument that the discovery rule should be applied: Canavan, 862 A.2d 778; and Richmond Square Capital Corp., 689 A.2d at 1067. These cases involve the factual issue of when a party reasonably should have been

aware of the defendant's wrongdoing. However, this issue does not need to be addressed by this Court. In this case, the problem with the Plaintiffs' argument for why the discovery rule is applicable is the fact that Fogarty and Ottenbacher were aware of Savage's involvement in the alleged fraud. As early as August 16, 2005, both Plaintiffs believed that the Property had been fraudulently conveyed without permission, and that Savage was, in some capacity, a party who had wronged them. See Ottenbacher Dep. 213:11-21; Fogarty Dep. 67:19 – 68:5. When viewing such facts in a light most favorable to the nonmoving party, there is no dispute that the Plaintiffs were aware of Savage's involvement with the transfer of the Property by August 16, 2005. Therefore, although the Plaintiffs argue it was impossible to discover the details of the fraudulent transaction until 2008, the Plaintiffs were clearly aware of their injury—the Property being improperly sold to Savage—in August of 2005.

As it has been applied in Rhode Island, the discovery rule concerns the ability to discover that one has suffered an injury, not the party responsible. Renaud v. Sigma-Aldrich Corp., 662 A.2d 711, 715 (R.I. 1995). Once injured, a plaintiff is under an affirmative duty to investigate diligently all of his potential claims. Kelly v. Marcantonio, 187 F.3d 192, 201 (1st Cir. 1999); Benner v. J.H. Lynch & Sons, 641 A.2d 332, 338 (R.I. 1994). A plaintiff cannot use the discovery rule to postpone the running of the statute of limitations. Benner, 641 A.2d at 338. Further, once it is apparent that a cause of action exists, the statute of limitations begins to run even if the plaintiff has not completely investigated his claims. Smith v. O'Connell, 997 F. Supp. 226, 240 (D.R.I. 1998). It is the plaintiff's responsibility to completely investigate his or her claim against certain defendants; however, this does not lead to a tolling of the statute of limitations. Id.; see Arnold v. R.J. Reynolds Tobacco Co., 956 F. Supp. 110, 117 (D.R.I. 1997).

Here, when Plaintiffs' attorney Spangler searched the Land Evidence Records on August

16, 2005, it was apparent that the Plaintiffs were the victims of fraud. As stated above, the Plaintiffs even believed Savage and Palumbo were involved. Upon such belief, the Plaintiffs had an obligation to investigate potential claims against Savage and bring such appropriate claims within the statute of limitations. See Arnold, 956 F. Supp. at 117. Plaintiffs have failed to provide a reason why, through reasonable diligence, such claims against Savage could not have been brought within the required statute of limitations. Since the Plaintiffs waited to file claims against Savage until 2010, close to five years from the date of the alleged wrongdoing, such claims are barred by the statute of limitations.

a

Relation Back

The Plaintiffs, in a final attempt to circumvent the statute of limitations period, argue that their claims against Savage relate back to the filing date of their original complaint. To support this claim, the Plaintiffs contend that the claims against Savage arise from the same conduct and transaction set forth in its original complaint. Savage contends that relation back is not appropriate in this case because the amended complaint introduces additional causes of actions not found in the original complaint; therefore, relation back is inappropriate.

Rule 15(c) of the Super. R. Civ. P. states:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing or adding a plaintiff or defendant or the naming of a party relates back if the foregoing provision is satisfied and within the period provided by Rule 4(1) for service of the summons and complaint, the party against whom the amendment adds a plaintiff, or the added defendant (1) has received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that but for a mistake the action would have been brought

by or against the plaintiff or defendant to be added."

If the amended pleading alleges a matter arising from the same "conduct, transaction, or occurrence" of the original complaint, the party seeking relation back must satisfy two additional conditions. Mainella v. Staff Builders Indus. Services, Inc., 608 A.2d 1141, 1143 (R.I. 1992). First, the new party must have "received notice of the institution of the action before the limitations period expired[.]" Second, the new party "must have known or should have known that but for a mistake the action would have been brought against him or her." Id.

In this case, the claims against Savage arise from the disputed transfer of the Property, which also gave rise to the original cause of action against Palumbo. Therefore, the Plaintiffs satisfy the preliminary condition for relation back. Rule 15(c) applies even though an entirely new cause of action is raised since Rhode Island courts favor the relation back principle to amended pleadings, even if it changes the theory of recovery or relief sought. Manocchia v. Narragansett Capital Partners Television Investments, 658 A.2d 907, 910 (R.I. 1995). However, it must next be shown that Savage received notice of the institution of the action, and knew or should have known that but for a mistake, the action would have been brought against him. Savage was the purchaser of the Property in question and was aware that the transfer would not be received with unanimous approval by Stone Ridge's Shareholders. It can be inferred that Savage would have expected those Shareholders protesting the transfer to institute legal action. However, through his affidavit, Savage argues that he was only involved in the transaction as a buyer and did nothing wrong. The evidence presented does not support a finding that Savage should have anticipated that a lawsuit filed by the aggrieved Shareholders would have been directed at him as a bad faith actor. Therefore, it cannot be shown that Savage should have known that the Plaintiffs' lawsuit should have originally been brought against him for his alleged misconduct.

Additionally, the "burden of knowledge on the part of the party to be brought in by amended pleading is on the plaintiff." Laliberte v. Providence Redevelopment Agency, 109 R.I. 565, 577, 288 A.2d 502, 509 (1972). Here, the Plaintiffs fail to provide any evidence for why Savage was not originally named as a defendant, even though the Plaintiffs were aware of Savage's involvement. Without the showing of a mistake for why Savage was not named as a defendant, the Plaintiffs' claims cannot relate back to the date of their initial filing. See Grande v. Almac's, Inc., 623 A.2d 971, 972 (R.I. 1993) (stating absent a showing of mistake for why a defendant was not named, the amended complaint cannot relate back). Therefore, since the Plaintiffs' amended complaint does not relate back, the remaining claims brought against Savage fall outside the three year statute of limitations.

2

Attorney-Client Relationship

Even if the remaining claims against Savage fall within the appropriate statute of limitations, the Court still must review the merits of its legal malpractice claim. Savage argues that the remaining claims against him must be dismissed since an attorney-client relationship never existed between him and the Plaintiffs. In the absence of an attorney-client relationship, Savage contends that no legal duty was ever owed to the Plaintiffs. As the basis for their objection, the Plaintiffs rely on the conduct between themselves and Savage to demonstrate the existence of an attorney-client relationship.

To prevail on a legal malpractice claim, a plaintiff must prove by a fair preponderance of the evidence: the defendant's duty of care, a breach of that duty, and damages actually and proximately sustained by the plaintiff as a result of such breach. Richmond Square Capital Corp. v. Mittleman, 773 A.2d 882, 886 (R.I. 2001). Failure to prove all three of these required

elements acts as a matter of law to bar relief or recovery. Vallinoto v. DiSandro, 688 A.2d 830, 836 (R.I. 1997). An attorney-client relationship arises "by reason of agreement between the parties. The relationship is essentially one of principal and agent." DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 766 (R.I. 2000). Although the agreement creating the attorney-client relationship "need not be a formal contract, a contract at least must be implied by the conduct of the parties." State v. Cline, 122 R.I. 297, 309, 405 A.2d 1192, 1199 (1979). The relationship exists through a showing that "the advice and assistance of the attorney are sought and received in matters pertinent to the attorney's profession." Id.

Here, the Plaintiffs rely on the CFJO agreement, drafted by Clavell, to demonstrate that the Plaintiffs had an attorney-client relationship with Savage. The Plaintiffs argue Clavell drafted this document at the request of Savage, who they allege is his employer. Savage relies on numerous deposition testimonies which support the fact that an attorney-client relationship had not been established. See Ottenbacher Dep. 47:8-16, 49:17-25 – 50:1-8. With respect to the transfer of the Property, Ottenbacher's testimony shows Savage initially tried to obtain financing for Ottenbacher and Fogarty to give them the ability to purchase the Property. At a later point in time, Savage took on the role of buyer of the Property, but never acted as the lawyer for the Plaintiffs. Further, the other shareholders of Stone Ridge have all affirmatively stated Savage was not the Plaintiffs' attorney. See Schmidt Dep.39:24 – 40:5, 72:21 – 73:4; McComb Dep. 24:16-18; Vande Werken Dep. 48:1-6.

A written contract never existed between Savage and the Plaintiffs establishing an attorney-client relationship. However, the conduct of the parties can signify the existence of an attorney-client relationship. Cline, 122 R.I. at 309, 405 A.2d at 1199. Plaintiffs assert that Savage was their attorney since he aided Clavell in the drafting of the CFJO agreement. This

assertion is contradicted by the Plaintiffs' own deposition testimony, which states they viewed Savage as a buyer of the Property. See Fogarty Dep. 72:3-23. Even if the CFJO agreement was executed, the understanding of the parties underlying that transaction was that the CFJO group would eventually sell the Property to Savage anyway. Id. at 73:4-19. In light of this information, it has not been demonstrated by the Plaintiffs that, with respect to the transaction involving this Property, Savage had any other role besides becoming the eventual owner. The Plaintiffs have not shown what legal advice Savage offered them, or if such advice was even sought. See Cline, 122 R.I. at 309, 405 A.2d at 1199. Further, it was the Defendants' counsel, Clavell, who drafted the CFJO agreement. See Clavell Dep. 27:2-7 (stating, to his knowledge, Savage never provided legal assistance to the Plaintiffs). This Court finds that the Plaintiffs have failed to raise a genuine issue of material fact. The Plaintiffs' mere allegation that Savage was their attorney without other corroborating evidence does not prevent the granting of a summary judgment motion. Gallo v. Nat'l Nursing Homes, Inc., 106 R.I. 485, 488, 261 A.2d 19, 21 (1970). Sufficient evidence has not been offered demonstrating that Savage acted as Plaintiffs' counsel. Therefore, the Defendants' Motion for Summary Judgment is granted.

IV

Conclusion

For the reasons stated herein, this Court grants all four of the Defendants' Motions for Summary Judgment. The Defendants shall prepare the appropriate order and final judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Charles E. Fogarty v. Ralph Palumbo, et al. James Ottenbacher v. Ralph Palumbo, et al
CASE NO:	KB 2008-1073 (*consolidated with*) KB 2008-1087
COURT:	Kent County Superior Court
DATE DECISION FILED:	December 1, 2014
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
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