

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

(FILED: September 10, 2014)

VINCENT MARCELLO

V.

RI CORE INVESTMENTS, LLC and
80 RHODE ISLAND AVENUE LLC

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C.A. No. NC 2014-0242

DECISION

STONE, J. Before the Court is Defendant 80 Rhode Island Avenue LLC's (80 Rhode Island LLC) motion to dismiss Plaintiff Vincent Marcello's (Marcello) breach of contract cause of action pursuant to Super. R. Civ. P. 12(b)(6).

I

Facts and Travel¹

This case involves the management of property located at 80 Rhode Island Avenue in the City of Newport (the property) and owned by 80 Rhode Island LLC. The following facts are alleged in the Complaint. On March 24, 2006, 80 Rhode Island LLC entered into an agreement with Defendant RI Core Investments, LLC (RI Core) authorizing RI Core to hire professionals and consultants for the development of the property. Subsequently, on or about April 1, 2006, RI

¹ Although 80 Rhode Island LLC cites to exhibits in its Memorandum of Law in Support of Motion to Dismiss, this Court looks solely at the Complaint. When a hearing justice considers evidence not incorporated in the final pleadings, a motion to dismiss under Super. R. Civ. P. 12(b)(6) is automatically transformed into one for summary judgment pursuant to Super. R. Civ. P. 56. Tangleridge Dev. Corp. v. Joslin, 570 A.2d 1109 (R.I. 1990). This Court—aware that Super. R. Civ. P. 12(b) *permits*, but does not require, the Court to go outside of the pleadings—refrains from doing so.

Core entered into a management contract with Bellevue Realestators, Inc.² (Bellevue Realtors). Marcello is a licensed real estate broker and sole principal of Bellevue Realtors. The management contract between Bellevue Realtors and RI Core included a provision making Bellevue Realtors the sole and exclusive agent to lease and manage the property and granted Bellevue Realtors the exclusive right to represent the owner of the property in connection with any future sale of the property. In reliance on RI Core's representation that it was the lawful owner of the property, and on the exclusivity provision, Bellevue Realtors spent considerable time and money in connection with the potential sale and/or development of the property. RI Core was continuously authorized by 80 Rhode Island LLC to hold itself out as owner of the property before planning and zoning boards, in tenant leases, and in legal proceedings pertaining to the eviction of tenants.

For a period of approximately three years, Marcello took orders from Marc Fantasia (Fantasia), the President of the managing member of 80 Rhode Island LLC, concerning sale and development matters affecting the property. On several occasions, Fantasia acknowledged and affirmed Bellevue Realtors' exclusive right of representation in connection with any sale of the property. However, in September 2013, Fantasia informed Marcello that the property was going to be listed for sale with another brokerage firm. Despite having been informed by Marcello that such action would constitute a breach of contract, Fantasia repudiated Bellevue Realtors' right to act as exclusive representative that next month. The remaining terms of their agreement are still in effect according to the Complaint. Marcello has recently learned that the property is in the process of being sold as a result of a listing with another brokerage firm.

² Bellevue Realestators, Inc. was formerly named Bellevue Realtors, Inc.

Marcello filed a five-count Complaint against both RI Core and 80 Rhode Island LLC, primarily focused on his breach of contract cause of action. Marcello alleges 80 Rhode Island LLC was RI Core's undisclosed principal. He seeks compensatory damages in the reasonable amount he would have received as commission from the sale of the property—he estimates this figure to be approximately \$250,000.³ Additionally, he seeks to recover the fair value of development-related consulting services he performed on the theory of quantum meruit. This Court granted Marcello's motion for the issuance of writ of attachment on the property following a hearing on the motion.

Subsequently, 80 Rhode Island LLC filed a motion to dismiss relying on two distinct arguments. First, it claims that because there was no written management or agency agreement between 80 Rhode Island LLC and Marcello, nor any mention that Marcello was an intended beneficiary of any agreement between 80 Rhode Island LLC and RI Core, Marcello cannot assert a breach of contract claim against 80 Rhode Island LLC because there was no privity of contract. Second, 80 Rhode Island LLC argues that any oral agreement between itself and Bellevue Realtors for commission based on the sale of the property is unenforceable because such an agreement violates the statute of frauds.

II

Standard of Review

In ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure, the Court looks to the allegations in the complaint in the light most favorable to plaintiff and assumes them to be true. Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (citing Ellis v. R.I. Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)). “[T]he sole

³ Five percent of the \$4.9 million original listed price.

function of a motion to dismiss is to test the sufficiency of the complaint” and review is, therefore, confined to the four corners of that pleading. Id. (quoting R.I. Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). “The grant of a Rule 12(b)(6) motion to dismiss is appropriate ‘when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff’s claim.’” Id. (quoting Ellis, 586 A.2d at 1057).

Although the Supreme Court of the United States arguably raised the bar for sufficiency by requiring plaintiffs to allege a set of plausible, rather than possible, facts showing an entitlement to relief in Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009), our jurisdiction has not expressly adopted (or rejected) this new precedent. The Rhode Island Supreme Court continues to ascribe to the notice pleading standard. See Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (avoiding Iqbal and Twombly by applying the standard that a “motion to dismiss is appropriate ‘when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff’s claim’”). Under Rhode Island’s notice pleading standard, “[a]ll that is required is that the complaint give the opposing party fair and adequate notice of the type of claim being asserted.” Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992).

III

Analysis

In a claim for breach of contract, a plaintiff must prove the existence and breach of a contract and that the defendant’s breach thereof caused it damages. Petrarca v. Fid. and Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005). The elements of a contract are offer, acceptance,

consideration, mutuality of agreement and mutuality of obligation. See Smith v. Boyd, 553 A.2d 131 (R.I. 1989); Lamoureux v. Burrillville Racing Assn., 91 R.I. 94, 161 A.2d 213 (R.I. 1960). The court must make “the predicate findings of offer, acceptance, consideration and breach requisite to determining a breach of contract claim.” Gorman v. St. Raphael Acad., 853 A.2d 28, 33 (R.I. 2004). A party establishes a breach of contract claim when that party demonstrates a “violation of a contractual obligation, either by failing to perform one’s promise or by interfering with another party’s performance.” Demicco v. Med. Assocs. of R.I., Inc., No 99-2512, 2000 WL 1146532 (D.R.I. July 31, 2000) (citing Black’s Law Dictionary, 182 (7th ed. 1999)).

An agent can bind his principal to a contract. Restatement (Second) Agency § 140 (1958). An agent may have either actual or apparent authority to bind his principal. Id. Generally, implied authority of an agent may be characterized as “actual authority, circumstantially proven, which the principal is deemed to have actually intended the agent to possess.” 3 Am. Jur. 2d Agency § 75 at 578 (1986). “Implied authority embraces authority to do whatever acts * * * are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.” Id. at 579; McBurney v. Roszkowski, 875 A.2d 428, 437 (R.I. 2005).

Apparent authority to contract on behalf of a principal “arises from the principal’s manifestation of such authority to the [third party].” 731 Airport Assocs. v. H & M Realty Assocs., LLC ex rel. Leef, 799 A.2d 279, 283 (R.I. 2002) (quoting Menard & Co. Masonry Bldg. Contractors v. Marshall Bldg. Sys., Inc., 539 A.2d 523, 526 (R.I. 1988)). Such apparent authority can come from “indicia of authority given by the principal to the agent” and does not have to be direct communication to the third person. Id. Additionally, the third party with whom the agent is dealing must “believe that the agent has the authority to bind its principal to the

contract.” Id. Furthermore, even where an agent acts without expressed or implied authority, “a principal, with full knowledge of the facts, may ratify the actions of an agent when the principal accepts a benefit it otherwise would have no right to retain.” UST Corp. v. Gen. Rd. Trucking Corp., 783 A.2d 931, 939 (R.I. 2001) (citing Newport Oil Corp. v. Viti Bros., Inc., 454 A.2d 706, 708 (R.I. 1983)).

The arguments of 80 Rhode Island LLC that the claims should be dismissed are without merit. Marcello has alleged sufficient facts—mainly that 80 Rhode Island LLC was the principal of RI Core— that could bind 80 Rhode Island LLC to the terms of the management agreement between Bellevue Realtors and RI Core rendering both 80 Rhode Island LLC’s privity of contract and statute of fraud arguments misplaced.

If the facts in the Complaint are taken to be true, as they should be in considering this motion, RI Core entered into a contract with Bellevue Realtors containing a provision giving Bellevue Realtors exclusive rights to represent the owner of the property in connection with any future sale of the property. See Palazzo, 944 A.2d at 149. This contract was breached when another brokerage firm was hired to sell the property, and the facts alleged implicate several agency theories for holding 80 Rhode Island LCC liable (e.g. 80 Rhode Island LCC may have expressly permitted RI Core to contract with third parties on its behalf, or such authority may have been implied by the terms of their agreement). In addition, Marcello claims that in several instances Fantasia, on behalf of 80 Rhode Island LLC, acknowledged and affirmed Bellevue Realtors’ exclusive rights.

Thus, a view of the facts alleged in the Complaint in the light most favorable to Marcello leads this Court to one conclusion: the motion to dismiss must be denied. In summary, the Complaint alleges RI Core—acting as an agent for 80 Rhode Island LLC—failed to perform its

express promise of granting Bellevue Realtors the exclusive right to represent the owner of the property in connection with any future sale of the property. Thus, it is not “clear beyond a reasonable doubt” that Marcello would not be entitled to relief from 80 Rhode Island LLC under any set of facts that could be proven in support of Marcello’s claim. See Palazzo, 944 A.2d at 149-50 (quoting Ellis, 586 A.2d at 1057).

IV

Conclusion

For the foregoing reasons, 80 Rhode Island LCC’s motion to dismiss is denied. The allegations in the Complaint, taken in the light most favorable to Marcello, state a claim upon which relief may be granted.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Marcello v. RI Core Investments, LLC, et al.**

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COURT: **Newport County Superior Court**

DATE DECISION FILED: **September 10, 2014**

JUSTICE/MAGISTRATE: **Stone, J.**

ATTORNEYS:

For Plaintiff: **Joseph R. Palumbo, Jr., Esq.**

For Defendant: **John T. Precobb, Esq.**