STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: March 11, 2016)

STUART MACINTOSH HEBB and ELIZABETH DOUGHERTY HEBB, as Trustee, *Plaintiffs,*	:	
V.	:	**C.A. No.: NC-2013-0442**
36 CLIFF AVENUE LLC, TRADEMARK PROPERTIES, INC., GREG COE, Individually, and GREG COE as Agent of 36 CLIFF AVENUE LLC, MICHAEL C. KENT, PETER SANTILLI and THOMAS SANTILLI, Individually *Defendants.*	:	

DECISION

STONE, J. On December 11, 2015, Defendants 36 Cliff Avenue LLC (Cliff LLC), Trademark Properties, Inc. (Trademark), Greg Coe (Coe), individually, and Greg Coe as an agent of Cliff LLC, Michael C. Kent (Kent), Peter Santilli (P. Santilli) and Thomas Santilli (T. Santilli) (collectively, Defendants) jointly moved for summary judgment against Plaintiffs Stuart Macintosh Hebb and Elizabeth Dougherty Hebb, as trustee of the subject property, (jointly, Plaintiffs or the Hebbs) on their claims for breach of contract, fraud and deceit, breach of the duty of good faith and fair dealing, slander of title, and violation of Rhode Island's Deceptive Trade Practices Act (DTPA). Plaintiffs filed a timely objection, and, on March 7, 2016, the Court heard oral arguments from the parties. Jurisdiction in this Court is pursuant to G.L. 1956 § 8-2-14 and Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure. After

reviewing the parties' submissions and considering their arguments at the hearing, the Defendants' motion is granted in part and denied in part, as set forth below in further detail.

I

Facts and Travel

The Plaintiffs are a married couple with a primary residence in Coral Gables, Florida. Mrs. Hebb is the trustee of the property that is the subject of this lawsuit. Cliff LLC is a Rhode Island Limited Liability Company engaged in real estate development and operating out of Narragansett, Rhode Island. Coe, Kent, T. Santilli, and P. Santilli are all members of Cliff LLC. Additionally, Coe is the owner and principal of Trademark, which is a real estate brokerage firm. Here, Trademark represented Cliff LLC as the real estate sales agent and broker in the sale of the subject property.

On July 27, 2012, Cliff LLC purchased the property located at 36 Cliff Avenue, Newport, Rhode Island, further designated as Tax Assessor's Plat 34, Lot 1.4 for $1,350,000. Sometime thereafter, Cliff LLC received approval from the City of Newport to subdivide that lot into three smaller lots. Of those three new parcels, which the City of Newport designated one as "Lot 2," was given the address of 4 Faxon Green, Newport, Rhode Island (the Property).

Cliff LLC listed the Property for sale—through Landmark—with an asking price of $589,900. The Plaintiffs were interested in purchasing property to build a summer home in Newport, and they showed interest in the Property. They came to Newport on multiple occasions to view the Property. On October 14, 2013, the Hebbs had their real estate agent, Pila Pexton (Pexton) reach out to Coe, in his capacity as the listing real estate sales broker. Coe indicated that he had another potential buyer for all three of the lots, which spurred the Hebbs to make an offer of $500,000 on the Property. After some negotiations, the parties agreed to the

purchase and sale of the Property for the sum of $525,000. On October 23, 2013, the parties entered into a Purchase and Sales Agreement for the Property, with a closing scheduled for November 22, 2013.

On the following day, Coe met with Pexton. Coe apparently believed he was only collecting the initial $3000 deposit and receiving a copy of the fully executed Purchase and Sales Agreement. However—as she believed she had communicated to Coe— Pexton gave Coe three "clean" copies of the Purchase and Sales Agreement for him to execute, in his capacity as a general member of Cliff LLC. Coe indicated that he needed the signature of a second member of Cliff LCC to make the contract binding.[1] Coe assured Pexton that he would get the signature and send the clean copies to Hebb by overnight courier for him to sign.

After leaving Pexton's office,[2] Coe proceeded to accept a competing offer for the Property—and the other two lots associated with it—later that same day from Mr. John H. Manice (Manice). Coe claimed that because he was not in possession of the $3000 deposit, he believed that the Purchase and Sales Agreement with Plaintiffs was not binding. He did not inform Pexton or the Plaintiffs of the meetings he had with Manice or his real estate agent about the parcels, including the Property.

The following day, October 25, 2013, Coe informed Pexton that he had accepted an offer on the Property. As a result, Hebb retained counsel to ascertain and protect his rights under the Purchase and Sales Agreement. Thereafter, through Pexton, Plaintiffs represented to Coe that they believed him to be in breach of their October 23, 2013 Purchase and Sales Agreement, and, on November 4, 2013, they filed a lis pendens against the Property. In the meantime, Defendants

[1] The parties disagree as to whether this was a good faith representation.
[2] There appears to be a dispute over exactly when Coe met with and signed a Purchase and Sales Agreement with another buyer.

attempted to negotiate with Manice to facilitate an agreement that would provide for the Plaintiffs and Manice to receive Lot 2 and lots one and three, respectively.

On November 15, 2013, the Defendants sent Plaintiffs a letter entitled "Notice of Intent to Perform" indicating that the Defendants, as seller, intended to perform, consistent with the terms and conditions of the disputed October 23, 2013 Purchase and Sales Agreement. Three days later, Plaintiffs wired the full deposit—of $26,250—to the Defendants.[3] The parties were unable to complete the closing on November 22, 2013, as provided for in the October 23, 2013 Purchase and Sales Agreement, and rescheduled the closing for December 6 of that year. Although on December 6 the Property still needed to undergo certain inspections, the parties negotiated and agreed to the terms and conditions of an Escrow Agreement so that the sale of the Property could close and the remaining inspections could be completed post-closing.[4] For its part, Cliff LLC delivered good, clear, marketable, and insurable title to the Property.

On November 4, 2013, Plaintiffs filed the instant action in Newport County Superior Court. Thereafter, on December 11, 2015, Defendants moved for summary judgment. Interestingly, on December 28, 2015, the Plaintiffs filed their Third Further Amended Complaint in the matter to overcome a procedural defect. In their Reply Memorandum, filed after the then-latest[5] version of the Complaint was filed, Defendants allege that: 1) Plaintiffs' breach of contract claim is barred by the merger of deed doctrine; 2) any alleged claim for fraud or deceit fails as Plaintiffs never relied on any such statements from Defendants; 3) their count for breach of the duty of good faith and fair dealing fails as a matter of law and the Plaintiffs have waived

[3] This included the initial $3000 deposit that Defendants were yet to receive.
[4] Mr. Hebb transferred the property to Mrs. Hebb, as Trustee of The Elizabeth Dougherty Hebb Revocable Trust Dated October 23, 2006.
[5] On March 8, 2015, Plaintiffs sought permission from the Court to file another Further Amended Complaint.

it; 4) the Plaintiffs have insufficient evidence to maintain their action for slander of title or it is barred by the merger of deed doctrine; 5) as it relates to the DTPA claim, it must fail because Coe and Trademark are exempt and the Plaintiffs have insufficient evidence against the other Defendants; and 6) the Plaintiffs have no damages. The Court heard oral arguments from the parties on March 7, 2016.

II

Standard of Review

The procedure by which a trial justice reviews a motion seeking summary judgment has been well documented by our Supreme Court and need not be exhaustively discussed here. See, e.g., Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008). Summary judgment "is a harsh remedy and must be applied cautiously." Mallette v. Children's Friend and Serv., 661 A.2d 67, 69 (R.I. 1995); see also McPhillips v. Zayre Corp., 582 A.2d 747, 749 (R.I. 1990). "A hearing justice who passes on a motion for summary judgment 'must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion.'" Estate of Giuliano, 949 A.2d at 391 (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)). Furthermore, "[t]he hearing justice may grant the motion for summary judgment only if, after conducting that required analysis, he or she determines that 'no issues of material fact appear and the moving party is entitled to judgment as a matter of law . . . .'" Id. (quoting Steinberg, 427 A.2d at 340). Therefore, the only task of a trial justice in reviewing a motion for summary judgment is whether there is any genuine issue concerning a material fact. See Gliottone v. Ethier, 870 A.2d 1022, 1027 (R.I. 2005) ("[I]f no issues of material fact appear and the moving party is entitled to

judgment as a matter of law, the trial justice may enter an order for summary judgment." (Internal quotation marks omitted.)).

III

Analysis

After hearing arguments from the parties, the Plaintiffs made it clear to the Court that they only wished to pursue their DTPA claim and their slander of title claim.[6] The Plaintiffs waived their claims for breach of contract, fraud and deceit, breach of the duty of good faith and fair dealing, and violation of the DTPA as it related to Coe. Accordingly, the Court grants the Defendants' motion for summary judgment as it relates to those claims. As a result, only the DTPA claim and the slander of title claim remain before the Court. Each of those claims is addressed below in seriatim.

A

DTPA

Pursuant to the DTPA, "unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." G.L. 1956 § 6-13.1-2. "To redress such unlawful practices, the DTPA provides a private right of action to '[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal . . . .'" Long v. Dell, Inc., 93 A.3d 988, 1000 (R.I. 2014) (quoting § 6–13.1–5.2(a)). "[A] plaintiff must establish that he or she is a consumer, and that defendant is committing or has committed an unfair or deceptive act while

[6] Despite apparently not including their DTPA claim in the December 2015 version of the Amended Complaint, Plaintiffs represented to the Court that they had incorporated their previous versions of the Complaint—which included the DTPA claim—in the most recent version of the Complaint.

engaged in a business of trade or commerce." Kelley v. Cowesett Hills Assocs.. 768 A.2d 425, 431 (R.I. 2001). In determining what constitutes a deceptive practice, courts should look to:

> "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Long, 93 A.3d at 1000 (quoting Ames v. Oceanside Welding and Towing Co., 767 A.2d 677, 681 (R.I. 2001)).

Here, Plaintiffs allege that by intentionally breaching the contract with them and entering into a Purchase and Sales Agreement with Manice for the Property, Coe—and the rest of Cliff LLC—engaged in exactly the type of conduct that the statute was meant to deter. Contrarily, Defendants maintain that because the Plaintiffs waived their count for fraud and deceit they cannot now further a claim under the DTPA. The Court believes that although the Plaintiffs waived those causes of action, they are not necessarily precluded from making a claim pursuant to the DTPA. Indeed, while not arising to the level of fraud, an act may nonetheless satisfy the triumvirate of factors provided by the Supreme Court in Ames. 767 A.2d at 681 (describing the three areas a court should look to in determining whether an act constitutes a deceptive practice).

Making all reasonable inferences on Plaintiffs' behalf, the Court cannot say, as a matter of law, that the acts alleged to have been taken by Coe are not unfair, unethical, and injurious to the real estate market in general. If proven to be true, the course of conduct described here would remove any level of trust that two parties entering into a real estate contract would expect out of one another. However, many genuine issues of material fact remain to be resolved

between the parties regarding those actions.[7] Accordingly, the Defendants' motion for summary judgment is denied as it relates to Cliff LLC and its members.

However, the DTPA "does not apply to any transactions or actions that are subject to the supervision of either Rhode Island's Department of Business Regulation or some federal regulatory body or official." Doyle v. Chihoski, 443 A.2d 1243, 1244 (R.I. 1982). Indeed, private actions under the DTPA are "precluded when the complained of activity is subject to regulation by a government agency." Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 670 (R.I. 2004).

In the present matter, the actions of Defendants Trademark and Coe are subject to regulation by the Department of Business Regulation. See G.L. 1956 §§ 5-20.5-1(4) and 5-20.5-14 (providing that real estate brokers—which include individuals and corporations—are subject to supervision by the Director of the Department of Business Regulation). They are therefore exempt from private actions under the DTPA. Chavers, 844 A.2d at 670. Accordingly, as to Coe in his professional capacity and Trademark, summary judgment on the DTPA claim is granted.

B

Slander of Title

To prevail on a claim for slander of title, a plaintiff must show by a preponderance of the evidence: "(1) that the alleged wrongdoer uttered or published a false statement about the plaintiff's ownership of real estate[;] (2) that the uttering or publishing was malicious[;] and (3)

[7] For example, the parties dispute the perceived validity of the original Purchase and Sales Agreement, whether the Defendants engaged in deceptive trade practices, and the sincerity of Coe's belief that another signature was required to bind Cliff LLC or that the initial deposit was needed to validate the October 23, 2013 Purchase and Sales Agreement.

that the plaintiff suffered a pecuniary loss as a result." Beauregard v. Gouin, 66 A.3d 489, 494 (R.I. 2013); see also Carrozza v. Voccola, 90 A.3d 142, 151–52 (R.I. 2014). The Rhode Island Supreme Court has stated that "express malice need not be proved . . . and may properly be inferred from the language used or the character of the act committed." Peckham v. Hirschfeld, 570 A.2d 663, 667 (R.I. 1990) (internal quotation marks omitted). Damages include "'the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement,'" including attorney's fees. Id. at 669 (emphasis in original) (quoting Restatement (Second) Torts § 633 (1977)).

Here, Plaintiffs claim that Coe published a false statement to Manice by failing to identify that the Hebbs were the equitable owners of the Property.[8] By signing a Purchase and Sales Agreement with Manice, Coe was representing that no one else had contracted to buy the Property. Those misrepresentations created a hostile environment for the Hebbs, as they were now at odds with Cliff LCC—including Coe—and Manice. In response, the Plaintiffs claim they had to incur legal fees to protect their interest in the Property from Coe's false publication. Defendants respond by arguing that there was no publication and, even if there was, Plaintiffs suffered no damages. Alternatively, Defendants also posit that Coe did not act with malice because he believed that the previous contract was not binding.

As it relates to the publication, there can be little question that Coe must have made a false statement or representation to Manice regarding the Hebbs' interest in the Property. Otherwise, if Manice knew that someone else had already purchased Lot 2, he would not have entered into a Purchase and Sales Agreement with Cliff LLC for all three lots. Although the

[8] In his deposition testimony, Coe claims that he cannot recall whether he spoke to Manice about his dealing with the Hebbs, who at that point had contracted to buy the land.

Defendants claim there was no actual malice, it can be inferred from the actions of Coe that he was acting to the detriment of the Hebbs' interest in order to secure a higher profit margin for Cliff LCC—of which he was a member. See Peckham, 570 A.2d at 667. Lastly, although Defendants claim that the Hebbs suffered no damages, it is clear that they incurred attorney's fees in protecting their interest. Despite Defendants' argument that the attorney's fees were not reasonable, that is not a proper question for the Court to answer at the summary judgment stage. See id. at 669. Rather, to what extent those fees were reasonable should be decided by the ultimate trier of fact.

To rule for the Defendants on this count, the Court would have to either determine the credibility of Coe or weigh the reasonableness of the Plaintiffs' actions, neither of which is appropriate at this stage in the litigation. Therefore, as genuine issues of material fact permeate the resolution of the slander of title claim, this Court must deny Defendants' motion for summary judgment.

IV

Conclusion

Plaintiffs have set forth a prima facie case as it relates to the slander of title and DTPA counts, and they have established that genuine issues of material fact exist as to the essential elements of those claims. However, with regard to the remaining counts, they fail as a matter of law. Accordingly, Defendants' motion for summary judgment is granted in part and denied in part. Specifically, Defendants are granted summary judgment on all of the counts in the Complaint except for the slander of title and DTPA counts. Counsel shall confer and prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Hebb v. 36 Cliff Avenue LLC, et al.**
CASE NO:	**NC 2013-0442**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**March 11, 2016**
JUSTICE/MAGISTRATE:	**Stone, J.**
ATTORNEYS:	
For Plaintiff:	**Brian R. Cunha, Esq.**
For Defendant:	**J. Russell Jackson, Esq.**