NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4693-13T3

BEST BERGEN HOMES, INC., A
NEW JERSEY CORPORATION T/A
CONCORD REALTY GROUP,

Plaintiff-Appellant,

v.

FRANKLIN NUNEZ and AMELIA
NUNEZ,

Defendants,

and

JASON CYRULNIK, RACHEL
CYRULNIK and J.P. MORGAN
MORTGAGE ACQUISITION CORP.,

Defendants-Respondents.

Argued December 16, 2015 – Decided February 4, 2016

Before Judges Fuentes, Koblitz and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5835-12.

Robert A. Vort argued the cause for appellant.

Owen L. Cyrulnik (Grais & Ellsworth, LLP) of the New York bar, admitted pro hac vice, argued the cause for respondents Jason and Rachel Cyrulnik (Jason I. Flynn, and Mr. Cyrulnik, attorneys; Mr. Cyrulnik, on the brief).

Cristina Z. Sinclair argued the cause for respondent J.P. Morgan Mortgage Acquisition Corp. (Bertone Piccini, LLP, attorneys; Ms. Sinclair, on the brief).

PER CURIAM

This dispute arises from the sale of a home located in Teaneck. The seller, Franklin Nunez, sold the property to defendants Jason and Rachel Cyrulnik.[1] The property was sold by means of a short-sale, and defendant J.P. Morgan Mortgage Acquisition Corp. (J.P. Morgan) held the original note and mortgage while Nunez owned the property. Diane Thurber-Wamsley, the owner of plaintiff Best Bergen Homes, Inc. (Best Bergen), is a real estate broker. Best Bergen appeals from the January 10, 2014 order denying its motion to amend the complaint to substitute the unjust enrichment claim against J.P. Morgan with a claim for tortious interference, as well as the April 4, 2014 order granting summary judgment to the Cyrulniks. We affirm the dismissal of all claims as to all defendants because plaintiff had no right to a commission under the terms of the listing agreements she had prepared.

[1] Although Amelia Nunez is a named party in the complaint, her name does not appear on any of the listing agreements or contracts in the record on appeal.

In February 2008, Thurber-Wamsley executed a listing agreement with Nunez to sell his Teaneck property. The listing agreement had a duration of six months, expiring in August 2008. It contained a clause allowing Best Bergen to obtain a commission for a sale that was consummated with any person to whom Thurber-Wamsley showed the property during the duration of the listing agreement or for a set period of time, a "protection period," following the expiration of the agreement. That clause in the listing agreement had a blank line where a length of time should be filled in, but Thurber-Wamsley purposely left the line blank, believing this afforded her more rights under the agreement. The clause reads:

> In the event that the property, or any part of it, described in this agreement becomes subject to a written or other agreement by the buyer and seller or their designees or is sold, conveyed, leased or in any way transferred within _____ after the expiration of this Agreement to anyone to whom the Seller, Broker or the Broker's salesperson, sub-agent (participating Broker/cooperating Broker) or a Buyer's Broker/Buyer's Agent or a Transaction Broker/Transaction Agent had introduced the property during the term of this Exclusive Listing, the compensation as indicated above shall be earned by the Broker and payable to the Broker by the Seller, unless the Seller executes a new Exclusive Right to Sell Listing Agreement during the protection period.

During the duration of the listing agreement, Thurber-Wamsley showed the house to the Cyrulniks. They made an offer to Nunez at that time, which he rejected.

Sometime in 2009, Nunez put the property up for sale again "by owner." The Cyrulniks were alerted to this by a friend who lived in Teaneck, and they came to see the property again in April 2009. In July 2009, Thurber-Wamsley became aware that Nunez was selling the property without a broker to avoid paying a commission, and contacted Jason Cyrulnik to inform him that the property was again for sale. In November 2009, Nunez told the Cyrulniks that he would accept their new purchase offer. The Cyrulniks obtained financing and, in December 2009, executed a contract to purchase the home. The purchaser in the contract was listed as "Rachel Horn," Rachel Cyrulnik's maiden name. The transaction was a short-sale transaction,[2] which required the approval of the mortgage company, J.P. Morgan.

In January 2010, Nunez called Thurber-Wamsley, stating that he needed her assistance in renting a property because he had

[2] A short-sale is a real estate transaction where the sale of the property is subject to the approval of the seller's mortgage lender because the sale requires that the mortgage lender accept less than what is owed on the original mortgage, and release the seller from any remaining debt not paid through the sale. See Bradford P. Anderson, Robbing Peter To Pay For Paul's Residential Real Estate Speculation: The Injustice Of Not Taxing Forgiven Mortgage Debt, 36 Seton Hall Legis. J. 1, 4 n.8 (2011).

sold the Teaneck property to a "Rachel Horn." According to Thurber-Wamsley, Nunez was also concerned about the way the sale was progressing and asked her to procure another buyer. She obtained an offer from another individual, but the contract was never completed because J.P. Morgan continued to work on the Cyrulnik deal. Thurber-Wamsley also stated that, in April 2010, in response to a request from Nunez, she provided him with a new listing agreement, which he sent to J.P. Morgan.

In June 2010, the Cyrulniks and Nunez completed the sale of the Teaneck property. Prior to the closing, Thurber-Wamsley discovered that the Cyrulniks were purchasing the property and attempted to collect a commission. These attempts were rebuffed and Best Bergen brought this action alleging claims for tortious interference with a contract and interference with prospective economic advantage against the Cyrulniks; and a claim for unjust enrichment against J.P. Morgan. The trial court granted J.P. Morgan's summary judgment motion, dismissing the unjust enrichment claim, and denied Best Bergen's motion seeking an amendment to include a claim for tortious interference against J.P. Morgan. The trial court also granted the Cyrulniks' motion for summary judgment, dismissing the tortious interference claims.

As an initial matter, "[w]hen reviewing an order granting summary judgment, we apply the same standard as that applied in the trial court." Gray v. Caldwell Wood Prods., Inc., 425 N.J. Super. 496, 499 (App. Div. 2012). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "'[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference[,]' and, hence, an 'issue of law [is] subject to de novo plenary appellate review.'" Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010) (second and third alterations in original) (quoting City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010)).

To establish a claim of tortious interference with a contract, a plaintiff must demonstrate that the defendant "intentionally and improperly interfere[d] with the performance of a contract . . . between [the plaintiff] and a third person by inducing or otherwise causing the third person not to perform the contract." Nostrame v. Santiago, 213 N.J. 109, 122 (2013) (quoting Restatement (Second) of Torts § 766 (1979)). While

"contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, still afford a basis for a tort action when the defendant interferes with their performance," there must be "actual interference with a contractual relationship" for a plaintiff to succeed on his or her claim. Cox v. Simon, 278 N.J. Super. 419, 432 (App. Div. 1995).

A claim for tortious interference also requires a finding of malice, which is "defined to mean that the harm was inflicted intentionally and without justification or excuse." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989). "Interference with a contract is intentional 'if the actor desires to bring it about or if he [or she] knows that the interference is certain or substantially certain to occur as a result of his [or her] action.'" Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003) (quoting Restatement (Second) of Torts § 766A, cmt. e (1977)). Further, "the complaint must allege facts leading to the conclusion that the interference caused the loss of the prospective gain" and that the injury caused damage to the plaintiff. Printing Mart-Morristown, supra, 116 N.J. at 751-52. Lastly, "[i]t must be shown that there was a reasonable likelihood the victim of the interference

would have received the anticipated economic benefit but for the defendant's wrongful conduct." Cushman & Wakefield of N.J., Inc. v. Alexander Summer Co., 295 N.J. Super. 173, 182 (App. Div. 1996), certifs. granted, 149 N.J. 142, and 149 N.J. 143 (1997).

Best Bergen's argument is predicated on the Cyrulniks interfering with its right to a commission as a broker pursuant to the February 2008 listing agreement. As a general principle, "a real estate broker's claim to a commission depends on a valid contract." Harper-Lawrence, Inc. v. United Merchs. & Mfrs., Inc., 261 N.J. Super. 554, 577 (App. Div.), certif. denied, 134 N.J. 478 (1993). "A realty broker only earns his [or her] commission when, pursuant to a written agreement, he [or she] produces a buyer, able and willing to purchase on terms satisfactory to the owner." Brenner & Co. v. Perl, 72 N.J. Super. 160, 165 (App. Div. 1962).

"[F]or a broker to earn a commission from a seller or buyer he must establish that he [or she] was the 'efficient producing cause' in bringing about the sale." De Benedictis v. Gerechoff, 134 N.J. Super. 238, 242 (App. Div. 1975) (emphasis in original). However, if the transaction is not completed during the period delineated in the agreement, the broker's entitlement is predicated on the transaction being "consummated without a substantial break in the ensuing negotiations." Ibid.

All agree that Best Bergen initially showed the Cyrulniks the Teaneck property when the February 2008 listing agreement was in effect. Best Bergen maintains that the protection period in that listing agreement, with no time-period inserted, entitled it to a commission on the eventual sale. Best Bergen cites no authority for its assertion that the protection period clause in the listing agreement was of an indefinite nature. Nunez had negotiated the original term of the listing agreement with Best Bergen, and clearly had no intention of continuing the contract after it had expired based on his inability to pay a commission.

Further, it is evident that Best Bergen could not establish that it was the efficient procuring cause of the sale or that there was no substantial break in the negotiations. See Leadership Real Estate, Inc. v. Harper, 271 N.J. Super. 152, 185 (Law Div. 1993). Thurber-Wamsley testified at her deposition that, after the Cyrulniks and Nunez failed to consummate a sale during the effective period of the February 2008 listing agreement, no further negotiations took place. See Murray Apfelbaum, Inc. v. Bernstein, 104 N.J.L. 664, 665 (E. & A. 1928) (holding that a broker was not the efficient cause in the sale after a seven-and-one-half month hiatus in negotiations). The Cyrulniks did not make their second offer resulting in a sale

until prompted by Nunez himself in November 2009. Best Bergen, thus, did not have any entitlement to a commission under the February 2008 listing agreement.

Best Bergen also failed to establish that the Cyrulniks acted with malicious intent in interfering with the listing agreement. Printing Mart-Morristown, supra, 116 N.J. at 756. In assessing the malicious conduct required for a tortious interference claim, "the standard must be flexible and must focus on a defendant's actions in the context of the case presented." Id. at 757. Best Bergen argues that it suffered a loss of its commission by virtue of the "sneaky way in which the Cyrulniks — having been alerted to the property by Thurber-Wamsley — concealed their interest . . . by placing the contract in the maiden name of Rachel Cyrulnik so no one would connect Rachel Horn with Rachel Cyrulnik." According to Jason Cyrulnik's deposition, the reason that the name "Rachel Horn" was used was due to the pre-approval letter from the mortgage company, which had generated her name from a credit report. Further, Jason Cyrulnik testified that the sole reason for only having Rachel on the mortgage was to attempt to qualify for certain tax credits. The use of the name does not suggest an intentional interference on the part of the Cyrulniks as to Best Bergen's right to a commission. See Kurtz v. Oremland, 33 N.J.

Super. 443, 460-61 (Ch. Div. 1954) ("Unless there is proof that but for the conduct of the defendants, in either manner complained of by the plaintiffs, they would have had the benefit of that bargain . . . they have failed in a vital respect in carrying the burden cast upon them."), aff'd, 16 N.J. 454 (1954).

Best Bergen also argues that the trial court erred in finding that there was no issue of material fact as to whether J.P. Morgan secured a benefit from Best Bergen's April 2010 listing agreement. Best Bergen asserts that J.P. Morgan acted with malice in circumventing the April 2010 listing agreement, prepared after the contract for sale of the Teaneck property was executed in 2009. This assertion is unreasonable on its face and requires no further elaboration.

The trial court denied Best Bergen's motion to amend the complaint to include that cause of action. Once the time has passed for a party to amend its complaint as a matter of right, that party "may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice." R. 4:9-1. Importantly, "the granting of a motion to file an amended complaint always rests in the court's sound discretion." Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998). A two-step

process controls the exercise of that discretion, the first step requiring a determination of "whether the non-moving party will be prejudiced" by the amendment. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). The second step of the process requires a determination of "whether [the amendment] is futile, that is, whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor." Ibid. "Thus, while motions for leave to amend are to be determined 'without consideration of the ultimate merits of the amendment, those determinations must be made in light of the factual situation existing at the time each motion is made.'" Ibid. (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997)). "In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Ibid. (quoting Interchange State Bank, supra, 303 N.J. Super. at 256-57).

The trial court found that allowing the amendment would be futile as Best Bergen had failed to demonstrate the existence of a contract to be interfered with at the time that the Cyrulniks and Nunez entered into the December 2009 contract to purchase the home, and that Best Bergen had failed to demonstrate evidence in the record that J.P. Morgan acted with malice. Further, the trial court found that Best Bergen could not

establish that it had any expectation of an economic benefit from the 2010 listing agreement as it pertained to the December 2009 contract between the Cyrulniks and Nunez. The trial court properly denied the amendment, as any claim of tortious interference would have been futile. Notte, supra, 185 N.J. at 501.

Affirmed.