

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AHMED M. NAMOURY, : Docket No. 3:04 CV 599 (WWE)
Plaintiff :
 :
-against- :
 :
ALFRED P. TIBBETTS, TIBBETTS :
KEATING & BUTLER, LLC; WINI :
B. MOLA and WINI MOLA :
REALTORS, LLC, :
Defendants : January 11, 2005

RULING ON DEFENDANTS' MOTION TO DISMISS

This action concerns an allegation of legal malpractice and real estate brokerage malpractice arising out of defendants' Alfred P. Tibbetts; Tibbetts Keating & Butler, LLC; Wini Mola Realtors, LLC and Wini B. Mola's representation of plaintiff Ahmed N. Namoury regarding a series of real estate transactions involving a conveyance of property owned by plaintiff. Plaintiff has filed a ten-count complaint alleging, as to all defendants, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty and violation of CUTPA and, as to defendants Tibbetts and Tibbetts Keating & Butler, LLC, negligence/legal malpractice and, as to defendants, Wini Mola Realtors, LLC and Wini B. Mola, negligence/real estate brokerage malpractice.

Defendants Tibbetts and Tibbetts Keating & Butler, LLC timely filed a motion to dismiss counts against them: count one (breach of contract); count two (breach of the covenant of good faith and fair dealing) and count five (CUTPA). Defendants Wini

Mola Realtors, LLC and Wini B. Mola timely filed their motion to dismiss counts against them: count six (breach of contract), count seven (breach of the covenant of good faith and fair dealing), and count ten (CUTPA). For the following reasons, the Court will deny defendants Tibbetts and Tibbetts Keating & Butler, LLC's motion as to count one and will grant their motion as to count two and five. Additionally, the Court will deny defendants Wini B. Mola and Wini Mola Realtors, LLC's motion to dismiss count six and will grant their motion as to counts seven and ten.

I. Background

Consistent with the standard of review for a motion to dismiss, the Court considers all of the factual allegations to be true.

In early October, 2001, plaintiff entered into a transaction whereby he planned to sell a parcel of property located at 79 Valley View Drive, Stamford, Connecticut ("the property") to Nettie and Samuel Thomas ("the Thomases"). Plaintiff engaged Alfred P. Tibbetts ("Tibbetts"), a partner in the law firm of Tibbetts Keating & Butler, LLC, to represent him for this sale. At all times relevant to this action, Tibbetts represented plaintiff.

Wini Mola Realtors, LLC ("WMR") is a limited liability company licensed to act as a real estate brokerage and Wini B.

Mola ("WBM") is the operative broker thereof. WMR and WBM acted as the real estate brokerage and broker, respectively, for plaintiff's sale of the property to the Thomases. WMR and WBM brought the Thomases to plaintiff for the Thomases purchase of plaintiff's property and were paid a brokerage fee of \$37,000.00.

The purchase price of the property was \$740,000.00 with the sum of \$724,000.00 payable toward the purchase secured by a note and purchase money mortgage. The Thomases were the grantees/mortgagors and plaintiff was the designated mortgagee. In addition to the note and mortgage, the Thomases paid \$16,000.00 in cash to plaintiff. Prior to the closing, in early July, 2001, Tibbetts produced a personal financial statement of the Thomases that indicated that they were financially able to purchase the property and pay the note and mortgage pursuant to schedule.

Unbeknownst to plaintiff, there were tax liens and other judgments against Nettie Thomas prior to and at the time of the closing, which took place in early October, 2001. In mid-January, 2002, Nettie Thomas died and Samuel Thomas, as survivor, became the sole owner of the property. Prior to her death, the Thomases had individually filed for bankruptcy and both had tax liens and judgments filed against them. Upon Nettie's death, the liens against her became liens against the entire property. Thereafter, Samuel Thomas failed to make payments and the mortgage went into default. In July, 2002, in lieu of foreclosure, Thomas reconveyed the property to plaintiff, who

became the holder of the purchase money mortgage.

In late April, 2003, plaintiff sought to sell the property to another individual. In order to provide the buyers with a title free of encumbrances, plaintiff had to pay off the lien then attached to the property.

II. Discussion

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Count One: Breach of Contract as against Tibbetts and the Law Firm

Plaintiff's breach of contract claim alleges that, as his attorneys for the conveyance of property, Tibbetts and the law firm were obligated to fulfill their responsibilities in concert with the prevailing custom and practice in Connecticut.

Plaintiff's allegations against defendants are based on their alleged failure to perform their duties as per the contractual agreement they had established. As part of this duty, it was Tibbet's and the law firm's responsibility to protect plaintiff's interests and take all steps reasonably necessary in order to facilitate the real estate transaction. In order to do so, plaintiff alleges, it was necessary to ascertain that the buyers of the property were, indeed, capable of such purchase and that the property, once conveyed, would be free and clear of all liens and judgments.

Specifically, plaintiff claims that defendant Tibbetts should have performed a title search and obtained an actual credit report of the Thomases, which would have alerted plaintiff as to the Thomases' inability to perform pursuant to the mortgage.

Furthermore, plaintiff claims that defendants breached their contractual obligations in that they failed to reveal to plaintiff that the tax liens and judgments levied against Nettie Thomas attached to the property following her death. Upon Samuel Thomas' default, the liens were attached to the property and plaintiff was liable for the debt in order to sell the property with clear title to a subsequent buyer. In consideration of the contractual obligations owed to plaintiff, plaintiff paid reasonable fees to defendants.

The Second Circuit has instructed that in order to prevail on a claim for breach of contract, one must specify what is the

actual breach. In Breiner v. Stone, 1997 WL 416942 *2 (2nd Cir. (Conn.)), the court stated that it is not sufficient to allege broad "misrepresentation" or even "legal malpractice." If plaintiff has failed to allege a specific, expressed undertaking or promise by the defendant, the claim does not sound in "breach of contract." Instead, the claim is an allegation of negligence. "When a plaintiff alleges only that the defendant failed to perform legal services with the requisite level of care, the complaint sounds in negligence rather than contract. This is so even if the plaintiff also alleges that he 'retained' or 'engaged' the services of the lawyer."

This line between negligence and breach of contract, however, is often blurred. In Rosato v. Mascardo, 82 Conn. App. 396, 410-411 (2004), the court stated:

Whether the plaintiff's cause of action is one for malpractice depends upon the definition of that word and the allegations of the complaint. Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. The elements of breach of contract are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages.

In the complaint, plaintiff describes the contours of the agreement established between him and defendants. Therein, plaintiff specifies what comprises defendants' breach of contract. Plaintiff claims defendants did not fulfill specific obligations inherent to the representation of a seller of

property: a thorough title search and a credit report of the potential buyers. As a result of this breach, plaintiff suffered monetary damages: the assumption of the Thomases mortgage and note following the Samuel Thomas default and the payment of the tax lien and other judgments against the property.

Defendants argue that a breach of contract claim must allege that a defendant promised a specific result, as opposed to a general statement that the result will be successful. Defendants claim that no specific result was ever promised. However, plaintiff does not allege that one was promised. Instead, plaintiff alleges that he contracted with defendants to aid him in the sale of his property and that in order to do so, it is of base necessity to conduct a title search and obtain a credit report on the potential buyers. This is not a promise that the transaction will be successful. It is a contractual arrangement to take the practical steps necessary to undertake the transaction. Specifying the steps not undertaken by defendants, plaintiff is not making a general statement regarding a level of care expected of all attorneys. It is a specific articulation of the breach of the existing contract and the resulting damages thereof.

For these reasons, defendants' motion to dismiss count one of plaintiff's complaint will be denied.

B. Count Two: Breach of the Covenant of Good Faith and Fair Dealing as against Tibbetts and the Law Firm

Defendants also move to dismiss count two of the complaint, namely, that the defendants acted in bad faith when they breached the contract. For the following reasons, the Court will grant defendants' motion to dismiss count two.

In order to prevail on a claim of bad faith, it is necessary for the complaint to allege a specific act that was performed purposefully, with a sinister intent. In Buckman v. People Express, Inc., 205 Conn. 166, 170 (1987), the court stated that

Bad faith is defined as the opposite of good faith, generally implying a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties . . . Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.

Here, no facts are alleged that would suggest any bad faith on the part of defendants. Even if it was found that there was a breach of contract, not all contracts are breached with a sinister intent. Even though plaintiff alleges specific examples of defendants' breach of contract, he does not suggest that any of these acts were performed purposefully or with ill intent.

Within the contours of the complaint, therefore, it is not possible to read bad faith into plaintiff's allegations. Defendants' motion to dismiss count two of the complaint will be granted.

C. Count Five: CUTPA as to Tibbetts and the Law Firm

Count five of plaintiff's complaint alleges a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), as set forth in Conn. Gen. Stat. Section 42-110b(a). CUTPA provides penalties for any person or entity that engages in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. In order to determine what constitutes a violation under CUTPA, Connecticut has adopted the "cigarette rule:" "(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, competitors or other business men." A-G Foods, Inc. V. Pepperidge Farm, Inc., et al. 216 Conn. 200, 215 (1990). It is not necessary to meet all three prongs of the test. Instead, the test contemplates the degree to which one satisfies one factor. Fabri v. United Technologies International, Inc., 387 F.3d 109, 120 (2004).

In the present case, plaintiff does not introduce any allegations of defendants' behavior that satisfy the prongs of the "cigarette rule." Plaintiff does not allege any fundamental "unfairness," "immorality," or "substantial injury to consumers"

beyond the monetary damages he suffered solely as a result of defendants' breach of the contract. As the Court does not find that there is any bad faith inherent to defendants' conduct, there is no expansive indication of unfair or deceptive acts that could involve the public. Plaintiff cannot allege the breach specific and limited to the narrow, individual circumstances of his contract with defendants, as he does in count one of the complaint, and then prevail on a CUTPA claim, which necessarily involves an overarching negative detriment that affects the public at large. Defendants' failure to conduct the searches necessary to conduct a personal real estate transaction do not touch upon the interests of the public. Therefore, defendants' motion to dismiss count five of the complaint will be granted.

**D. Counts VI, VII and X
as against Defendants WBM and WMR**

For the reasons set forth in the preceding sections involving identical claims against Tibbetts and the law firm, the Court will deny count six of plaintiff's claims against defendants WMR and WBM. WMR and WBM's motion to dismiss counts seven and ten will be granted. As these defendants argue in their brief, "Traditionally, a Broker's obligation consists of and is limited to procuring a buyer ready, willing and able to purchase upon terms acceptable to the plaintiff." As is evident here, defendants failed to fulfill this obligation. Despite their representation to the contrary, they specifically failed to

produce a buyer "able" to purchase plaintiff's property in that they neglected to find out if the Thomases were, indeed, "able." Thus, defendants breached their contractual obligation to plaintiff. However, there is not an indication of bad faith or sinister intent, nor is there any evidence of any CUTPA violation.

Accordingly, the Court will deny the dismissal of count six (breach of the contract) and grant the dismissal of counts seven (breach of the covenant of good faith and fair dealing) and ten (CUTPA).

III. Conclusion

Defendants Alfred P. Tibbetts and the Tibbetts Keating & Butler, LLC's Motion to Dismiss [Doc. #12] is DENIED as to count one and GRANTED as to counts two and five. Defendants Wini Mola Realtors, LLC and Wini B. Mola's Motion to Dismiss [Doc. # 11] is DENIED as to count six and GRANTED as to counts seven and ten.

SO ORDERED this __11th_ day of January, 2005 at Bridgeport, Connecticut.

_____/s/_____
Warren W. Eginton
United States District Judge