

NOT FOR PUBLICATION -- FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Barry Mossman,

Plaintiff,

v.

Berenice Moran d/b/a The Real
Estate Shop, and Sea Horse
Cottages, Inc.,

Defendants,

J.P.K. Development, L.L.C.,

Intervener.

Civ. No. 2004-31

ATTORNEYS:

Joseph J. Mingolla, Esq.
St. Thomas, U.S.V.I.
For the plaintiff

Maria Tankenson Hodge, Esq.
St. Thomas, U.S.V.I.
For the defendants

Richard R. Knoepfel, Esq.
St. Thomas, U.S.V.I.
For the intervener

MEMORANDUM

Moore, J.

The defendants have filed a motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. After reviewing the plaintiff's complaint and the arguments presented by the parties regarding the motion

to dismiss, I agree that the plaintiff has failed to allege facts sufficient to support any of his allegations, and I will grant the motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 1, 2004, Mossman filed a complaint in this Court against Bernice Moran d/b/a The Real Estate Shop ["Moran"], and Sea Horse Cottages, Inc. Count I of the complaint alleges breach of contract against Sea Horse. Count II alleges that the actions of both defendants constitute the tort of bad faith. Count III alleges Intentional Interference with Business Affairs by Moran. Finally, Count IV demands specific performance of the alleged contract of sale.

Mossman's complaint arises from his attempt to purchase property owned by Sea Horse located at 2C Estate Nazareth, St. Thomas, Virgin Islands. On February 23, 2004, at 2:20 pm, Moran sent a one-page telefax to several local real estate agents, including Century 21 Real Estate of St. Thomas. (Compl. Ex. B.) The message on the one page telefax stated:

Please be advised that the sellers are willing to accept the first written offer received at the asking price of \$725,000.00 accompanied by 10% deposit payable to the brokers escrow account, closing 30 days. This fax is being sent to the six brokers who have submitted an offer.

(*Id.*) Apparently acting as Mossman's agent, Century 21 responded

twenty-one minutes later via telefax, allegedly in an attempt to accept Moran's offer on Mossman's behalf.¹ Century 21's response consisted of a one page telefax and a copy of a check for \$72,500.00 from Mossman to Century 21.² (Compl., Exs. C and D.) The one-page telefax was titled a "Contract of Sale" between Mossman and Sea Horse, and was inaccurately dated February 20, 2004. (Compl., Ex. D.) In describing the property, Century 21's telefax stated the following:

PROPERTY: Buyer hereby offers to purchase the following real estate from SELLER 2C Nazareth which consists of 3.26 acres, Tax Map # 1-07704-0136-00.

(*Id.*, emphasis added.) The telefax also listed the purchase price as \$725,000 and stated the price would be paid in the following manner:

- (a) \$1,000 which has been deposited in escrow with Realtor upon execution of this contract by Buyer as an earnest money deposit;

¹ At paragraph ten of his complaint, Mossman alleges that Century 21 "had a prospective purchaser, the Plaintiff herein," but does not specifically state Century 21 had authority to bind him to a contract for the sale of land. Given that Mossman argues Century 21 completed the purchase of sale on his behalf, I will assume Century 21 was acting as Mossman's agent.

² Attached to their memorandum in support of their motion to dismissed, the defendants have submitted an exhibit consisting of a multi-page document that they allege is a February 20, 2004 offer to purchase land from Mossman. The defendants argue that Mossman's February 23, 2004 offer was simply a revision of this February 20th offer, and therefore the February 23rd offer "may be construed to include by implication the remaining pages of his original offer." I reject this argument and will not consider this attachment in ruling on the defendant's motion to dismiss. As explained below, when ruling on a motion to dismiss I focus solely on the allegations in the complaint and exhibits attached to the complaint.

(b) \$71,500 within ten days of executed contract.

(c) Balance of funds to be paid at closing by cash or certified checks.

(*Id.*) The \$725,000 purchase price and the \$71,500 payment amount were hand-written onto the document, and lower amounts were crossed out. In the right margin was a notation that stated, "Deposit 10% \$72,500." Mossman's signature also appears at three different locations along the right margin, apparently approving the hand-written changes and the entire document. (*Id.*)

Following Century 21's transmission of its February 23, 2004 telefax in response to Moran's offer, Mossman allegedly received several oral assurances that he was the first to respond. First, a real estate agent associated with Century 21 allegedly spoke with Moran moments after sending the February 23, 2004 telefax and Moran responded that "everything looked good." (Compl. ¶ 13.) Second, on February 24, 2004, Mossman allegedly spoke with Moran and stated he would pay in cash and thus would be able to close within thirty days. (Compl. ¶ 14.) Third, at paragraphs fifteen and sixteen of his complaint, Mossman alleges that sometime in the afternoon on February 24, 2004, Rosemary Sauter, who apparently was an employee of Century 21,³ telephoned Moran

³ Mossman's complaint does not explain Rosemary Sauter's identity or specifically state that she was an employee of Century 21. Paragraph fifteen of his complaint, however, implies that she was an employee of Century 21. Paragraph fifteen states:

on Mossman's behalf and Moran again confirmed that Mossman was the first to respond to the offer. Mossman also claims at paragraph fifteen of his complaint, however, that Moran stated "she was waiting to hear from seller, but that 'everything looked good.'"

At 4:28 pm on February 24, 2004, Century 21 received a telefax from the law firm of Hodge & Francois that stated "the owners have accepted an offer and the property is no longer for sale."

On April 27, 2004 the defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing Mossman's complaint fails to state a claim upon which relief can be granted. Below I will address the arguments presented by both parties.

III. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

According to the complaint, Mossman is a citizen and resident of Vermont, Moran is a citizen and resident of the United States Virgin Islands, and Sea Horse is a Virgin Islands

Pursuant to Plaintiff's instructions to Century 21, Ms. Rosemary Sauter called Defendant Moran and inquired whether the offer Plaintiff transmitted had been accepted, and she was assured by Defendant Moran that Plaintiff's was the first response and that she was waiting to hear from seller, but that "everything looked good."

Corporation with its principal place of business on St. Thomas, Virgin Islands. Mossman has alleged an amount in controversy in excess of \$75,000. Thus, this Court has diversity jurisdiction pursuant to section 22(a) of the Revised Organic Act of 1954⁴ and 28 U.S.C. § 1332.

B. Standard of Review For A Motion To Dismiss

The defendants have filed this motion to dismiss Mossman's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In considering the defendants' motion to dismiss under Rule 12(b)(6), I "may dismiss [the] complaint if it appears certain the plaintiff cannot prove any set of facts in support of [his] claims which would entitle [him] to relief." See *Bostic v. AT&T of the Virgin Islands*, 166 F. Supp. 2d 350, 354 (D.V.I. 2001) (internal quotations omitted); see also *Julien v. Committee of Bar Examiners*, 34 V.I. 281, 286, 923 F. Supp. 707, 713 (D.V.I. 1996); FED R. CIV. P. 12(b)(6). I must accept as true all well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor. See *Bostic*, 166 F. Supp. 2d at 354; *Julien*, 34 V.I. at 286-87, 923 F. Supp. at 713. In deciding a

⁴ Revised Organic Act of 1954 § 22(a); 48 U.S.C. § 1612(a). The Revised Organic Act of 1954 is found at 48 U.S.C §§ 1541-1645 (1995), reprinted in V.I. CODE ANN., Historical Documents, 73-177 (codified as amended) (1995).

motion to dismiss, I ordinarily may consider only the four corners of the pleadings. FED. R. CIV. P. 12(b). Attachments to the complaint may be considered to be part of the complaint. FED. R. CIV. P. 10(c); *Bostic*, 166 F. Supp. 2d at 354.

IV. ANALYSIS

A. The Virgin Islands Statute Regarding Security For Costs From Foreign Plaintiffs, 5 V.I.C. § 547, Does Not Apply To A Diversity Action In Federal Court

Before addressing the merits of the defendants' motion to dismiss, I first will address Mossman's argument that this matter must be stayed pending resolution of the defendants' demand for security and costs. On April 13, 2004, the defendants filed a demand that Mossman post \$1000.00 as security for costs pursuant to 5 V.I.C. § 547.⁵

On April 26, 2004, Mossman moved to quash or dismiss the defendants' demand for security and costs, arguing that section 547 is a procedural rule and is inapplicable to this diversity action. See *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1265 (3d

⁵ The Virgin Islands Code requires a non-resident litigant to protect local defendants:

If the plaintiff resides out of the Virgin Islands or is a foreign corporation, the defendant may serve a notice requiring security for the costs which may be awarded against the plaintiff. After the service of such a notice, all proceedings in the action shall be stayed until security is given by the plaintiff.

5 V.I.C. § 547.

Cir. 1991) ("a federal court sitting in diversity must apply the law of the forum state to questions that are 'substantive' but must use federal rules to govern 'procedural' matters") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). I agree and therefore reject his contrary position taken in his opposition to the defendants' motion to dismiss that section 547 is applicable to this matter and requires that I stay all proceedings until the he pays the demand for security.

Section 547 is clearly a rule of procedure rather than substance and does not apply to this diversity proceeding in federal court. See *Erie*, 304 U.S. at 78-79; see generally *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945).

Accordingly, I will address the merits of the defendants' motion.

B. Mossman Cannot Allege Facts Sufficient To Support His Claim That He Has A Binding Contract

Construing the allegations in the light most favorable to Mossman, his complaint fails to allege sufficient facts to support a claim that the parties reached a binding contract. Mossman argues that the February 23, 2004 telefax from Moran was an offer and the Century 21 telefax twenty-one minutes later was an acceptance that created a binding contract. The allegations in Mossman's complaint and the exhibits attached to his complaint, however, contradict this argument. By its own terms,

Moran's February 23, 2004 telefax was a request for offers rather than an offer itself, stating that "the sellers are willing to accept the first written offer received at the asking price of \$725,000.00 accompanied by 10% deposit payable to the brokers escrow account, closing 30 days." (Compl. Ex. B, emphasis added.) Century 21's response twenty-one minutes later by telefax was, by its own terms, an offer. Even assuming Mossman was later told he was the first to respond, the allegations of his complaint, together with the attachments, cannot support a claim that his offer was accepted. Unable to allege an acceptance, Mossman has no claim that he had a contract to purchase the property or for breach of contract.

Mossman ignores the language of Moran's request for offers and his responding offer, and instead argues Moran's February 23, 2004 telefax was an offer and Century 21's telefax in response was an acceptance that created a binding contract between the parties. Even if I were to ignore the terms of both telefaxes and agree that Century 21's response was an attempt to accept an offer from Moran, Mossman's claim would still be utterly without factual support. First, the purported acceptance did not satisfy all the conditions of Moran's telefax. Moran's telefax specifically requested that the buyer close within thirty days. The Century 21 telefax sets no date for the closing or even that

Mossman would close within thirty days. Thus even if the Century 21 telefax were construed as an acceptance, it did not satisfy the seller's conditions and there was no meeting of the minds through an offer and acceptance.

Second, the exchange of telefaxes between Moran and Century 21 could not have created a contract that would satisfy the Virgin Islands Statute of Frauds.⁶ The Virgin Islands Code provides:

Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority.

28 V.I.C. § 242 (emphasis added). As Mossman has not alleged that Moran was an agent with power to bind the owner or Sea Horse as the owner signed any document, he has failed to allege the existence of a valid, enforceable contract.⁷ Accordingly, I will

⁶ Mossman argues I may only consider the defendants' arguments regarding the statute of frauds if I convert their motion to dismiss into a motion for summary judgment. This argument is without merit, as in ruling on the defendants' motion to dismiss I am required to consider the legal sufficiency of Mossman's claim that he has an enforceable contract to purchase Sea Horse's property. Such consideration necessarily and properly involves analysis of the statute of frauds.

⁷ Mossman attempts to avoid the signature requirement by relying on section 134 of the Restatement (Second) of Contracts. Section 134 provides:

The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer.

Comment a to section 134 explains:

dismiss Count I of the complaint.

Mossman argues in the alternative that if the alleged contract violates the statute of frauds, the doctrine of part performance renders the contract valid. The doctrine of part performance can be used to prevent an inequity to a person who has been induced or by acquiescence permitted to rely upon an agreement which would violate the Statute of Frauds. See *Henderson v. Resevic*, 262 F.Supp. 36, 39 (D.V.I. 1967). As this Court has explained:

Part performance takes the case out of the [S]tatute [of Frauds] not because it furnishes proof of the contract, or because it makes the contract any stronger, but because it would be intolerable in equity. . . . [T]he doctrine is based on the prevention of fraud. It operates to accomplish that purpose on the theory of estoppel.

Resevic, 262 F.Supp. at 38 (quoting 49 AM. JUR. *Statute of Frauds* § 442).

The doctrine of part performance applies only when two parties reach an agreement that, although not legally valid, can be enforced in equity. Mossman and the seller never reached an

The traditional form of signature is of course the name of the signer, handwritten in ink. But initials, thumbprint or an arbitrary code sign may also be used; and the signature may be written in pencil, typed, printed, made with a rubber stamp, or impressed into the paper. Signed copies may be made with carbon paper or by photographic process.

Mossman argues that the letterhead on Moran's telefax amounted to the signature of the owner. It is preposterous to suggest that Moran's letterhead on this standard facsimile cover sheet, sent to six real estate brokers, could possibly be construed to satisfy the statute of frauds.

agreement, legally valid or otherwise. Instead, as detailed above, Mossman telefaxed a document to Moran on February 23, 2004 that, according to its own terms, was an "offer." Mossman received notice a day later that his offer had not been accepted. Thus, there was no agreement upon which the doctrine of part performance could operate. Everything Mossman claims he did was in preparation for and in hope that he would get the contract, not in reliance on a non-existent agreement. Mossman's actions were nothing more than the routine organization of finances in preparation for a potential transaction and not in part performance of any contract.

C. Bad Faith

In Count II of his complaint, Mossman alleges that the defendants' actions support a claim of bad faith. Count II of the complaint states, in relevant part:

22. Upon information and belief, Defendant Sea Horse Cottages, Inc., breached the contract which is the subject of this action for monetary gain, after a clear process of negotiation in which Defendant Sea Horse's agent, Defendant Moran, made clear and unambiguous representations as to what person or entity was the first to respond to her fax of February 23, 2004.
23. The actions of the Defendants, and each of them, constitute the tort of bad faith, for which Plaintiff should be awarded compensatory and punitive damages in amounts to be determined by the trier of fact in this action.

Count II is no more than a badly drafted attempt to recast the

breach of contract alleged in Count I as a tort. It does not state a separate claim and will be dismissed as duplicative of Count I. See *Moore v. A.H. Riise Gift Shops*, 659 F. Supp. 1417, 1426, 23 V.I. 227 (D.V.I. 1987); see also *Pourzal v. Marriott International Inc.*, 305 F.Supp.2d 544, 548 (D.V.I. 2004).

D. Intentional Interference With Business Affairs

In Count III of the complaint, Mossman alleges Moran interfered with the contract between Sea Horse and Mossman "for the purpose of personal monetary gain." He characterized her actions as constituting the "tort of Intentional Interference with Business Affairs." Although I can find no authority for the tort of intentional interference with business affairs, I will give Mossman the benefit of the doubt and construe his opaque pleading as alleging the tort of intentional interference with prospective contractual relation described in section 766B of the Restatement (Second) of Torts⁸:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

- (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
- (b) preventing the other from acquiring or continuing the prospective relation.

⁸ I will even ignore Count III's allegation that Moran interfered with the contract between Sea Horse and Mossman.

Mossman has alleged nothing improper about Moran's conduct. Obviously, Moran as the Real Estate Shop was in the real estate business for the purpose of monetary gain. See *Skopbank v. Hyatt Corporation*, 955 F.Supp. 441, 452 (D.V.I. 1997). Mossman has made no attempt to allege how Moran's conduct might be improper under the seven factors listed in the Restatement for determining whether the alleged interference was improper. See Restatement (Section) of Torts § 767; *Skopbank*, 955 F.Supp. at 452.

To make a valid claim under section 766B, Mossman has the burden of proving a *prima facie* case of the alleged tortfeasor's improper conduct. None of the facts asserted by Mossman, together with all reasonable inferences therefrom, support his conclusory assertion that Moran's alleged acts of interference were improper. He does not allege any independently wrongful conduct on the part of Moran, i.e. "conduct that is either illegal or tortious." *Skopbank*, 955 F.Supp. at 453. Count III simply asserts that Moran did the following: (a) she requested an offer from Century 21 and several other real estate brokers; (b) minutes after receiving Mossman's offer she said Mossman was the first to respond and that "everything looks good"; and (c) the day after receiving Mossman's offer she again confirmed that Mossman was the first to respond but specifically warned that she had not received a response on the offer from the seller. As

Moran's actions do not constitute illegal or tortious conduct, Mossman has failed to allege facts sufficient to support a claim of intentional interference with a prospective contractual relation. Accordingly, I will dismiss Count III.

E. Specific Performance

Finally, in Count IV of his complaint, Mossman claims he is entitled to a decree of specific performance. As Mossman has alleged insufficient facts to support a claim that his offer to buy land from Sea Horse ripened into a contract, there is nothing to be specifically performed. Accordingly, I will dismiss Count IV of his complaint as failing to state a claim upon which relief can be granted.

V. CONCLUSION

For the reasons stated above, I find that Mossman has failed to allege facts sufficient to support any of the claims levied in his complaint. Accordingly, I will grant the motion to dismiss. An appropriate order follows.

ENTERED this 1st day of June, 2004

FOR THE COURT:

_____/s/____

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Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copies to:
Hon. G.W. Barnard
Joseph J. Mingolla, Esq.
Maria Tankenson Hodge, Esq.
Richard R. Knoepfel, Esq.
Ms. Jackson
Jeffrey Corey

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For the intervener

MEMORANDUM

Moore, J.

For the reasons stated in the accompanying memorandum of

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even date, it is hereby

ORDERED that the defendants' motion to dismiss is **granted**.

ENTERED this 1st day of June, 2004

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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