



Preliminary Objection No. 2, pertaining to Count I of Plaintiffs' Third Amended Complaint, in the Nature of a Demurrer For Legal Insufficiency as to Plaintiffs' Breach of Contract Claim, is SUSTAINED.

Preliminary Objection No. 3, pertaining to Counts III and IV of Plaintiffs' Third Amended Complaint, in the Nature of a Demurrer For Legal Insufficiency as to Plaintiffs' Unjust Enrichment Claims, is SUSTAINED.

Preliminary Objection No. 4, pertaining to Count V of Plaintiffs' Third Amended Complaint, in the Nature of a Demurrer For Legal Insufficiency as to Plaintiffs' Third-Party Beneficiary Claim, is SUSTAINED.

Preliminary Objection No. 5, pertaining to Count VI of Plaintiffs' Third Amended Complaint, the Nature of a Demurrer For Legal Insufficiency as to Plaintiffs' Fraud Claim, is SUSTAINED.

Preliminary Objection No. 6, pertaining to Count IX of Plaintiffs' Third Amended Complaint, in the Nature of a Demurrer For Legal Insufficiency as to Plaintiffs' Breach of Contract Claim, is OVERRULED.

Preliminary Objection No. 7, pertaining to Count XI of Plaintiffs' Third Amended Complaint, for Insufficient Specificity in the Pleading as to Plaintiffs' Tortious Interference Claim, is SUSTAINED.

Preliminary Objection No. 8, pertaining to Count XII of Plaintiffs' Third Amended Complaint, for Insufficient Specificity as to Plaintiffs' Conspiracy Claim, is SUSTAINED.

Preliminary Objection No. 9, pertaining to Counts XIII and XIV, for Insufficient Specificity in the Pleading as to Plaintiffs' Defamation Claim, is SUSTAINED.

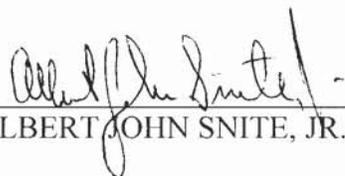
Preliminary Objection No. 10, in the Nature of a Demurrer for Legal Insufficiency as to Claims Asserted Against Improperly Named Defendants, is OVERRULED.

Preliminary Objection No. 11, in the Nature of a Demurrer for Legal Insufficiency as to Claims Asserted by Shaun M. Lyons, is SUSTAINED.

Counts I, III, IV, V, VI, IX, XI, XII, XIII, and XIV of Plaintiffs' Third Amended Complaint are HEREBY DISMISSED, in accordance with the accompanying memorandum opinion.<sup>1</sup>

Defendants shall file an Answer to Counts II, VII, VIII, and X of Plaintiffs' Third Amended Complaint within twenty (20) days from the docketing of this Order.

BY THE COURT:

  
ALBERT JOHN SNITE, JR., J.

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<sup>1</sup> As this is Plaintiffs' Third Amended Complaint, these counts are dismissed with prejudice.

**IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

<b>SHAUN M. LYONS, et al.,</b>	:	
	:	
<b>Plaintiffs</b>	:	<b>DECEMBER TERM, 2011</b>
	:	<b>No. 02915</b>
<b>v.</b>	:	
	:	<b>Control No. 12073257</b>
<b>KIMCO REALTY CORPORATION, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	

**MEMORANDUM OPINION**

**By: Honorable Albert John Snite, Jr.**

**PROCEDURAL HISTORY**

Before the court are the eleven (11) Preliminary Objections by Defendants Kimco Realty Corporation, Kimco Realty Services, Inc., KRS Center City Development, Inc., Kimco Realty Group/KRC Acquisitions, 1701 Walnut Street, LLC, 1628 Walnut Street LLC, 35 North 3<sup>rd</sup> LLC, 1401 Walnut Street LLC, 1831 Chestnut Street LLC, 1805-09 Walnut Street LLC, 1429 Walnut Street LLC, 242-244 Market Street LLC, and 118-122 Market Street (the “Kimco Defendants”) to the Third Amended Complaint of Plaintiffs Shaun M. Lyons (“Mr. Lyons”) and Precision Realty Group (“PRG”).

In an attempt to recover allegedly unpaid real estate broker commissions in the amount of \$211,725, Plaintiffs instituted this action by placing a lien on a property at 1701 Walnut Street,

Philadelphia, Pennsylvania on December 22, 2011, pursuant to Pennsylvania's Commercial Real Estate Brokers Lien Act ("CREBLA"), 68 P.S. §§ 1501-1063.<sup>1</sup>

Seeking to enforce the lien, Plaintiffs filed the Original Complaint on January 18, 2012. Kimco Defendants filed Preliminary Objections on February 27, 2012.

Without responding to the Preliminary Objections, Plaintiffs filed the First Amended Complaint on March 15, 2012. Kimco Defendants filed Preliminary Objections on April 17, 2012.

Without responding to the Preliminary Objections, Plaintiffs filed the Second Amended Complaint on May 7, 2012. Kimco Defendants filed Preliminary Objections on June 15, 2012.

Without responding to the Preliminary Objections, Plaintiffs filed the nearly identical Third Amended Complaint on July 5, 2012. Kimco Defendants filed these nearly identical Preliminary Objections on July 25, 2012. Plaintiffs filed an Answer in Opposition of Preliminary Objections on August 14, 2012.

### **FACTUAL HISTORY**

This case involves an action for money damages arising out of (a) allegedly unpaid broker commissions for the sale of various real estate properties, including, but not limited to 1701 Walnut Street, Philadelphia, Pennsylvania; 35 N. 3<sup>rd</sup> Street, Philadelphia, Pennsylvania; 1628 Walnut Street, Philadelphia, Pennsylvania; (b) allegedly unpaid broker commissions pursuant to a Leasing Agreement in connection with 1701 Walnut Street property; (c) alleged failure of Defendants to make payment under an Advertising Agreement; (d) alleged improper termination by Defendants of an Exclusive Representation Agreement; (e) alleged frustration of performance by Plaintiffs of duties and enjoyment of rights under nine Listing Agreements; (f) alleged tortious interference with various contracts of Plaintiffs'; (g) alleged conspiracy to tortiously interfere; and (h) alleged defamation of Plaintiffs.

On March 24, 2010, Kimco Defendants entered into an Exclusive Representation Agreement with PRG Plaintiffs in regard to nine properties. The Representation Agreement included compensation under a "Market Leasing Fee," for six (6%) on any direct lease and four (4%) on any year outside of lease term. The Representation Agreement also included

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<sup>1</sup> This lien was released by PRG on May 11, 2012.

compensation under a “Market Sale Fee,” for three (3%) of total sale price to be paid to PRG at settlement.

The Representation Agreement further stated: “This Agreement and the terms hereof constitute the entire agreement between KRG and PRG and no modification or amendment shall be effective unless and until made in writing and signed by both KRC and PRG.” (emphasis added).

The initial term of the Representation Agreement was one year, with an additional six (6) month “tail” period available after the expiration of the Agreement for all properties, offers and prospects presented to KRC during the Agreement term. Therefore, the Agreement term expired on March 24, 2011, and the six-month tail period expired on September 24, 2011.

Plaintiffs allege that there was a modification to the Representation Agreement after the March 24, 2011 expiration and that a representative of Kimco Defendants assured Plaintiffs that the Agreement survived, thus extending the duration of the Representation Agreement.<sup>2</sup>

After the March 24, 2011 expiration of the Representation Agreement, various properties included in the Agreement were sold or leased, for which Plaintiffs claim an entitlement for brokers’ commissions, under the “extended” Agreement. Relevant for discussion herein are an August 10, 2011 Agreement of Sale to Pearl Properties for the 1701 Walnut Street property; a December 2, 2011 lease to Benjamin’s Desk LLC for the 1701 Walnut Street property; a December 16, 2011 settlement of sale of the 35 N. 3<sup>rd</sup> Street property; a December 22, 2011 settlement of sale of the 1701 Walnut Street property; and a February 3, 2012 settlement for sale of the 1628 Walnut Street property, all of which the Plaintiffs assert they provided “extensive and continuous services” in connection therewith.

At issue here are Defendants’ eleven (11) Preliminary Objections to the Third Amended Complaint. Defendants object to ten (10) of the fourteen (14) counts of the Complaint. The court sustains all objections except for Preliminary Objection No.’s 6 and 11.

## **DISCUSSION**

I am sustaining the current Preliminary Objections in part, and denying in part.

### **I. Demurrer for Legal Insufficiency to Counts I, III, IV, V, VI**

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<sup>2</sup> Third Amended Complaint ¶ 26.

Count I of the Third Amended Complaint alleges breach of contract, based on the Exclusive Representation Agreement signed on March 24, 2010.<sup>3</sup> Count III alleges unjust enrichment, pursuant to oral modifications and/or extensions made to the Representation Agreement.<sup>4</sup> Count V alleges that Plaintiffs are the intended third party beneficiaries to Kimco Defendants' and Pearl Properties' Agreement of Sale.<sup>5</sup> Count VI alleges fraud (in the alternative) upon expiration of the Representation Agreement.<sup>6</sup> Essentially, all of these claims relate to the Exclusive Representation Agreement and a purported oral modification which would have extended the Agreement beyond the March 24, 2011 expiration, entitling defendants to various commissions. Defendants rightfully argue that claims under Counts I, III, V and VI are barred by the Pennsylvania Real Estate Licensing and Registration Act, 63 P.S. § 455.606a(b)(1) ("RELRA").

RELRA expressly prohibits licensed real estate brokers from collecting a commission unless the nature of the service and the fee to be charged are set forth in a written agreement between the broker and the consumer that is signed by the consumer. Section 455.606a(b)(1) continues, "this paragraph shall not prohibit a licensee from performing services before such an agreement is signed, but the licensee is not entitled to recover a fee, commission or other valuable consideration in the absence of such a signed agreement." (emphasis added).

As Defendants point out, in interpreting this provision of RELRA, the Pennsylvania Superior Court has expressly held that the duration of the agreement is a material term that must be in writing under RELRA.<sup>7</sup> Plaintiffs allege that they are owed broker's commission for the procuring of buyers/lesers for various properties. The applicable Exclusive Representation Agreement expired on March 24, 2011, which was prior to the sale of any property at dispute.

There is no written, signed agreement between PRG and KRC to modify the Representation Agreement, as clearly mandated by RELRA. Additionally, the alleged oral agreement is for an indefinite extension, as in Salove. As stated by the Superior Court, "since the agreement as orally modified fails to contain a written duration term it does not comply with the [RELRA] statute and [the] claim to a brokerage fee or commission is barred." Salove, 23 A.3d at 1069.

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<sup>3</sup> Third Amended Complaint ¶ 119

<sup>4</sup> Third Amended Complaint ¶ 149.

<sup>5</sup> Third Amended Complaint ¶ 167.

<sup>6</sup> Third Amended Complaint ¶ 176.

<sup>7</sup> Michael Salove Co. v. Enrico Partners, L.P., 23 A.3d 1066, 1069 (Pa. Super. Ct. 2011).

Plaintiffs assert that the Salove case is inapplicable, as RELRA does not prevent recovery under an orally modified agreement pertaining to a previously located buyer.<sup>8</sup> Plaintiffs do not, however, provide the court with any support for this interpretation of RELRA. Instead, RELRA and the Representation Agreement make it clear that Plaintiffs' cause of action for fees allegedly earned must be for sales that occurred during the year or sales that occurred within six months to buyers who were identified during the term of the Agreement.

Plaintiffs have not provided the court with any guidance in their pleadings as to dates or facts that demonstrate when, within the Agreement time period, Plaintiffs may have procured a "ready, willing, and able buyer" for the properties. Without such facts, the court cannot draw such an inference.<sup>9</sup> Based on the Complaint there were no known prospects within the year of the Agreement.

Therefore, Plaintiffs cannot assert a claim for commissions premised on the alleged oral modification of the Representation Agreement under any theory of recovery, as the terms of the Agreement expired on March 24, 2011.

As to Count I – the breach of contract claim – under RELRA, any modification to the Agreement, including an extension of duration, must have been in writing, and is thus legally insufficient.

As to Count III – the unjust enrichment claim – because the breach of contract claim is controlling and is being sustained, there can be no unjust enrichment claim, as this claim is based upon the terms of the parties' written Representation Agreement. Plaintiffs here are alleging that the Defendants have been unjustly enriched as the result of their failure to abide by the terms of the parties' (expired) agreement. The court is not voiding a contract, rather, there was in fact a valid contract, but the term expired on March 24, 2011. Plaintiffs are asserting this unjust enrichment claim pursuant to the Agreement, and this must be sustained as unjust enrichment is inapplicable when the relationship between parties is founded on a written agreement or express contract.

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<sup>8</sup> Plaintiffs' Opposition to Kimco Defendants' Preliminary Objections ¶ 34.

<sup>9</sup> Per the Third Amended Complaint, the only dates of any work performed during the tail-period time was the Agreement of Sale to Pearl Properties for 1701 Walnut Street, dated August 10, 2011. There are no references to work done in procuring buyers for the 35 North 3<sup>rd</sup> Street property or the 1628 Walnut Street property, which settled on December 12, 2011 and February 2, 2012, respectively (both far outside the Agreement period and the tail-period). This defeats Plaintiffs' argument that the Agreement was extended for individually, previously located buyers.

Similarly, Count IV is a legally insufficient unjust enrichment claim, as it is predicated on a signed contract of lease with retail tenant Benjamin Desk.

As to Count V – the intended third party beneficiary claim – a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself. Here, Plaintiffs argue that the Agreement of Purchase and Sale for 1701 Walnut Street, a contract between seller-Kimco and buyer-Pearl Properties, LLC, which listed Shaun Lyons of PRG as broker for Seller<sup>10</sup>, entitled PRG to a commission. However, any contract for entitlement and payment of commissions was separate from the contract between buyer and seller, and was instead the Representation Agreement between Kimco and PRG. Again, as the Representation Agreement had expired (without modification), there is no third party beneficiary claim here.

As to Count VI – the fraud claim – Plaintiffs’ claim is based on a promise to perform in the future.<sup>11</sup> This is a contract claim, and not a fraud claim. Plaintiffs have not pled that a contract was induced by fraud, but rather the claim relates to purported duties owed under the Representation Agreement as a contract, and is thus a legally insufficient fraud claim.

## **II. Insufficient Specificity to Counts XI, XII, XIII, XIV, and Claims Asserted by Shaun M. Lyons**

Count XI of the Third Amended Complaint alleges tortious interference with contract,<sup>12</sup> in relation to numerous agreements including the Representation Agreement and various Listing Agreements. Plaintiffs’ complaint fails to assert any facts to support the claim that Kimco interfered with Plaintiffs’ relationships, aside from a blanket statement that Defendants “knowingly, purposefully and maliciously interfered with Plaintiffs’ relationships with their counter-parties to the several agreements.”<sup>13</sup> The four elements of a cause of action for intentional interference with contract are: (1) the existence of a contractual relationship, (2) an intent to harm the plaintiff by interfering with that contractual relationship, (3) the absence of a

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<sup>10</sup> Sec. 9.1 Agreement of Sale

<sup>11</sup> Third Amended Complaint ¶ 176 (“Upon expiration of the one year term of the Representation Agreement, Kimco Defendants persuaded Plaintiffs to work tirelessly on their behalf to effectuate the sale of certain properties in exchange for a promise of payment which Kimco Defendants never intended to make.”) (emphasis added).

<sup>12</sup> Third Amended Complaint ¶¶ 220-223.

<sup>13</sup> Third Amended Complaint ¶ 221.

privilege or justification for such interference, and (4) damages resulting from the interference.<sup>14</sup> Plaintiffs have plead no such facts.

Count XII alleges conspiracy.<sup>15</sup> Plaintiffs simply state that “Defendants have conspired with one and other and maliciously and intentionally have acted together with the sole, actual and common purpose of tortiously interfering with the Agreements between Plaintiffs and Defendants, thereby denying Plaintiffs the benefits of their several contracts with same.”<sup>16</sup> A party asserting a civil conspiracy claim is required to plead material facts that support a claim for conspiracy, namely (1) the persons combined with a common purpose to do an unlawful act or to do a lawful act by unlawful means or unlawful purpose, (2) an overt act in furtherance of the common purpose has occurred, and (3) the plaintiff has incurred actual legal damage.<sup>17</sup> As Plaintiffs’ Complaint fails to allege an underlying act of wrongdoing (see above regarding insufficiently plead tortious interference) or a particular unlawful act, there can be no cause of action for conspiracy to commit the act. Plaintiffs have not plead facts from which the court can infer the necessary elements to establish a conspiracy claim.

Counts XIII and XIV allege defamation claims, both per se and per quod.<sup>18</sup> In Pennsylvania, in a cause of action claiming defamation, a plaintiff must establish: (1) the defamatory character of the communication, (2) its publication by defendant, (3) its application to the plaintiff, (4) an understanding by the reader or listener of its defamatory statement, (5) an understanding by the reader or listener of an intent by the defendant that the statement refers to the plaintiff, (6) special harm resulting to the plaintiff from its publication, and (7) abuse of a conditionally privileged position.<sup>19</sup> Claims based on oral defamation are slander.

Slander actions are divided into two classifications, per se and per quod. “Per se” and its “per quod” were common law pleading devices used to indicate whether the plaintiff’s cause of action depended on general or special damages.<sup>20</sup> Counts XII and XIV plead identical facts, but fail to plead with particularly the content of the defamatory statements, as well as the harm (either general or special) resulting from the alleged defamatory statements with any sufficient

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<sup>14</sup> Triffin v. Janssen, 626 A.2d 571, 573, 985 (Pa. Super. Ct. 1993).

<sup>15</sup> Third Amended Complaint ¶ 225.

<sup>16</sup> Id.

<sup>17</sup> Weaver v. Franklin County, 918 A.2d 194, 202 (Pa. Commw. Ct. 2007) (citing McKeeman v. Corestates Bank, N.A., 751 A.2d 655 (Pa. Super. 2000)).

<sup>18</sup> Third Amended Complaint ¶¶ 228-239, 241-252.

<sup>19</sup> Agriss v. Roadway Express, Inc., 483 A.2d 456, 461 (Pa. Super. Ct. 1984).

<sup>20</sup> Id. at 470.

specificity. The allegations in the Complaint fail to allege neither the content of the statements (aside from a statement that Plaintiffs “formed a partnership” with Defendants<sup>21</sup>), nor the third-party’s understanding of the defamatory character. Therefore, Plaintiffs failed to sufficiently plead the elements of defamation, or more appropriately, slander.

Lastly, each cause of action asserted by Shaun M. Lyons in an individual capacity and Precision Realty Group are not separate causes of action. Any rights or claims available to Mr. Lyons are available to PRG, and not in an individual capacity.

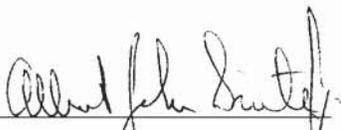
### CONCLUSION

In conclusion, I am sustaining Defendants’ Preliminary Objections 1, 2, 3, 4, 5, 7, 8, 9, and 11 to the Third Amended Complaint.

I am denying Defendants’ Preliminary Objections 6 and 10 as they are sufficiently plead.

BY THE COURT:

DATE: October 3, 2012

  
ALBERT JOHN SNITE, JR., J.

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<sup>21</sup> Third Amended Complaint ¶¶ 229, 241