

informed Cullen that any agreement must exclude certain buyers that already offered on the property.

On September 27, 2013, Binswanger entered into the Exclusive Right to Sell or Lease Agreement (“exclusive broker agreement”) with TSG for the property located at 1400 Welsh Road, North Wales, Pennsylvania 19454. The exclusive broker agreement provided in pertinent part as follows:

...Except with respect to any transaction, sale or exchange involving the Excluded Entities, Agent is hereby given the sole and exclusive right to list and offer for sale and lease for Owner’s account the land and buildings owned by Owner situated in NORTH WALES, PENNSYLVANIA...provided that Agent agrees by listing and otherwise, to use its best efforts to sell and lease the Property until this Agreement is terminated as herein provided.

EXCEPT WITH RESPECT TO THE EXCLUDED ENTITIES, IF THE PROPERTY, OR ANY PART THEREOF, IS SOLD OR LEASED, OR IF A PURCHASER OR TENANT WILLING TO BUY OR LEASE ON TERMS SATISFACTORY TO OWNER IS PROCURED PRIOR TO THE TERMINATION AS HEREINAFTER SET FORTH), NO MATTER BY WHOMSOEVER THE PROPERTY MAY BE SOLD, TRANSFERRED, CONVEYED, EXCHANGED OR LEASED OR SUCH PURCHASER OR TENANT PROCURED, WHETHER BY AGENT OR BY OWNER DIRECTLY OR BY ANY OTHER ENTITY WHATSOEVER, THEN, IN ANY SUCH EVENT, OWNER AGREES THAT AGENT SHALL HAVE EARNED A COMMISSION AND OWNER AGREES TO PAY TO AGENT A SALE OR LEASE COMMISSION AS FOLLOWS.....

The Excluded Entities referred to in the exclusive broker agreement were identified as Ancillare, Inc., TWA Holdings, LLC, and Jerry McBride, or any other entity owned by, controlled by or associated with them. As it pertained to the excluded entities, the exclusive broker agreement carved out a period of time wherein commissions would not be due and owing to Binswanger (“carve out period”). Specifically, the exclusive broker agreement provided as follows:

Notwithstanding anything in this Agreement to the contrary, a commission shall not be earned by, or be payable to, Agent in connection with: ...

- (c) sales, exchanges, or other transfers to Ancillare, Inc., TWA Holdings, LLC, Jerry McBride, or any other entity owned by, or associated with any of the foregoing (the “Excluded Entities”), to the extent that such sale, exchange or transfer is completed on or before January 5, 2014.

Hence, Binswanger would not be entitled to a commission if the sale, exchange or transfer was completed on or before January 5, 2014. The exclusive broker agreement was for a term of one (1) year. TSG had the right to terminate the agreement after six (6) months with thirty (30) days prior written notice to Binswanger at TSG’s sole or absolute discretion.

Agreement of Sale between TSG and TWA Holdings Inc.

On January 3, 2014, TSG and TWA Holdings, Inc. (“TWA”) executed an Agreement of Sale for the Welsh Road property, two days before the expiration of the carve out period. The Agreement of Sale identified April 10, 2014 as the settlement date whereupon legal title to the property would pass. The Agreement also required the satisfaction of certain conditions precedent prior to settlement. The sale was conditioned upon TWA obtaining a mortgage within sixty (60) days from the signing of the Agreement of Sale. TWA was required to obtain a mortgage commitment at no greater than seven percent (7%) and with an amortization period of twenty (20) years in the aggregate of no less than Two Million Dollars (\$2,000,000.00) based on the property being the sole collateral. Additionally, per the Agreement, TWA was required to apply for a mortgage in writing to a responsible mortgage lending institution within fifteen (15) days after execution of the agreement. The Agreement did not foreclose TSG from continuing to market the property to any prospective buyers during the sixty (60) day due diligence period.

Upon learning of the Agreement of Sale, Binswanger requested TSG to pay the commission per the exclusive brokerage agreement since the sale, exchange or transaction was not completed during the carve out period. TSG refused to pay Binswanger a commission

claiming the Agreement of Sale completed the sale, exchange or transaction prior to the expiration of the carve out period and no commission was due. On January 16, 2014, TSG exercised its option and terminated the exclusive broker agreement effective March 26, 2014.

On February 4, 2014, Binswanger filed a commercial real estate broker's lien against the property in the Court of Common Pleas of Montgomery County. On March 25, 2014, TSG commenced a proceeding to strike the Binswanger Lien by filing a Petition to Strike off Security improperly filed. In response, Binswanger withdrew the lien.

On February 10, 2014, Binswanger commenced this action by filing a complaint. An amended complaint was filed asserting causes of action for declaratory relief, breach of contract and breach of the duty of good faith and fair dealing. Binswanger alleges it is entitled to a commission equal to \$170,000.00 which is five percent of the \$3.4 million sale price for the property. On April 11, 2014, TSG filed an answer with new matter and counterclaims. The counterclaims sought a declaration that TSG was not required to pay a commission to Binswanger. On April 24, 2014, the sale of the property to TWA was completed and TSG transferred the property's deed to TWA.

Binswanger filed preliminary objections to TSG's counterclaim seeking to dismiss counts III through XII. On July 16, 2014, the court sustained Binswanger's preliminary objections and dismissed counts III through XII. On October 1, 2014, the court entered an order granting leave to Binswanger to file an amended complaint per the parties' stipulation. In January 2015, the parties filed their respective motions for summary judgment. On June 11, 2015, the court granted in part and denied the motions. Specifically, the court granted in part the motion for summary judgment finding that Binswanger was entitled to a commission per the exclusive listing agreement and that TSG was entitled to collect one third of the commission, \$56,666.67.

All other aspects of the motion were denied. On July 8, 2015, TSG filed an appeal of the July 11, 2015 order granting in part and denying in part the motions for summary judgment and the July 16, 2014 order sustaining preliminary objections and dismissing counts. On July 22, 2015, Binswanger filed a cross appeal. On July 27, 2015, the court entered an order requiring the parties to file with the court a statement of matters complained of on appeal. The parties timely submitted their statements.

DISCUSSION

I. Preliminary Objection Order

TSG counterclaimed against Binswanger with fourteen counterclaims. Binswanger preliminarily objected to twelve of the fourteen counterclaims which were sustained by the court for the following reasons.

A. Counts III and IV failed to state a claim for breach of contract.

In counts III and IV of the counterclaim, TSG purported to state a claim for breach of contract. Specifically, TSG alleged the following breaches: wrongfully demanding a commission upon the sale of the Property; filing the Commercial Real Estate Broker's Lien against the property and filing the underlying declaratory judgment complaint. Said alleged breaches however do not constitute breaches of any contractual obligations arising under the exclusive broker agreement. On the contrary, the alleged breaches were nothing more than Binswanger's attempts to compel TSG's payment of a commission it was allegedly entitled to receive. Moreover, in addition to TSG's failure to allege any breaches, TSG also failed to allege any damages resulting from the alleged breaches. Although TSG is not required to plead the exact amount of damages, it is required to specifically plead the harm caused by said alleged breaches. No such allegations were pled. Based on the foregoing, the court found that TSG

failed to allege a claim for breach of contract and sustained Binswanger's preliminary objections to counts III and IV of the counterclaim.

B. Count VI failed to state a claim for slander of title.

In count IV of the counterclaim, TSG purported to state a claim for slander of title. In order to state a claim for slander of title, the following elements must be pled: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity.¹ TSG's claim for slander of title failed for two reasons, a failure to allege damages and absolute judicial privilege. First, TSG, despite its representations in its papers, failed to allege that it suffered any damages as a result of the lien or this complaint being filed. The property at issue was sold to the intended buyer. As such, there were no damages which arose from the filing of the lien and the complaint.

Moreover, any alleged false statements attributed to Binswanger, such as TSG owed a commission upon the sale of property, were made in the context of a judicial proceeding. Specifically, the statements were made in the lien pleading and in this action. Since these statements were made in judicial proceedings, the statements were afforded absolute judicial privilege.² It has long been the law of Pennsylvania that statements made by judges, attorneys, witnesses and parties in the course of or pertinent to any stage of judicial proceedings are

¹ *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 246, 809 A.2d 243, 246 (2002).

² The privileges available in defense of an action in pure defamation are also available in an action for disparagement of title. See, *The Restatement (Second) of Torts* § 635 (1977).

absolutely privileged and, therefore, cannot form the basis for liability for defamation.³ The absolute privilege cannot be destroyed by abuse.⁴ Since the statements complained of by TSG in the lien proceedings and in this action were part of pleadings filed with the respective courts, the absolute judicial privilege was applied and the claim for slander of title was dismissed.⁵

C. The claims for tortious interference with contract, wrongful use of civil process and for abuse of process were properly dismissed for failure to allege damages.

In counts V (tortious interference with contract), VIII (abuse of process) and IX (wrongful use of civil process), TSG purports to allege that the act of filing the lien interfered with TSG's contract with its buyer, was wrongfully filed without probable cause and was filed for an improper purpose. Although separate torts, each of these causes of action require allegations of damage and actual harm.⁶ Here, TSG failed to plead the necessary element of actual harm and damage. TSG alleges that the lien was withdrawn; the Conditional Agreement of Sale was not cancelled and the prospective buyer did not walk away from the transaction because of Binswanger's conduct. As such, the claims for tortious interference of contract, wrongful use of civil process and abuse of process were dismissed since TSG failed to allege actual damages and the preliminary objections were sustained.⁷

³ See *Richmond v. McHale*, 35 A.3d 779, 784 (2012); *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53 (1971); *Post v. Mendel*, 510 Pa. 213, 507 A.2d 351 (1986); *Triester v. 191 Tenants Association*, 272 Pa.Super. 271, 415 A.2d 698 (1979).

⁴ *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56 (1971).

⁵ Whether a privilege exists is a question of law for the court. *Smith v. Griffiths*, 327 Pa. Super. 418, 423, 476 A.2d 22, 25 (1984).

⁶ *Strickland v. University of Scranton*, 700 A.2d 979, 985 (Pa.Super.1997)(elements of tortious interference with contract); 42 Pa. C. S. § 8354 (elements for Dragonetti claim) and *Lerner v. Lerner*, 954 A.2d 1229, 1238 (Pa. Super. 2008)(elements for abuse of process).

⁷ Moreover, the claim for wrongful use of civil process was also dismissed because the complaint failed to allege lack of probable cause, a necessary element to state such a claim. The counterclaim's allegations demonstrate that Binswanger believed it was entitled to a commission for the sale and hence filed the lien. Similarly, the claim of

D. The claims for fraudulent misrepresentation (count X), negligent misrepresentation (count XI) and fraud (count XII) were properly dismissed.

In counts X, XI and XII, TSG alleges claims in fraud and negligence regarding certain representations about Binswanger's intention to seek a commission from the sale of the property to an excluded entity. TSG's claims for fraudulent misrepresentation, fraud and negligent misrepresentation were dismissed since they were barred by the gist of the action doctrine. Under Pennsylvania law, the gist of the action doctrine maintains the conceptual distinction between contract law and tort law.⁸ The Pennsylvania Supreme Court recently issued a published opinion clarifying the appropriate analytical framework for applying the gist of the action doctrine.⁹ In *Bruno*, "the Court discussed the doctrine at length and observed that '[it] has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract.'¹⁰ The Pennsylvania Supreme Court explained,

In this regard, the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract-i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract-then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader

abuse of process was dismissed since the allegations failed to demonstrate an improper purpose for filing the lien. Binswanger believed that it was entitled to a commission for the sale.

⁸ *eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 14 (Pa.Super.Ct.2002).

⁹ *See Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa.2014).

¹⁰ *Bruno*, 106 A.3d at 68).

social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.¹¹

Here, the substance of the allegations in counts X, XI and XII establish that the duties allegedly breached were the duties created by the Exclusive Listing Agreement. TSG alleged Binswanger breached certain promises regarding commission payments which exist only by virtue of the Exclusive Listing Agreement. As such, the claims were based in contract and the gist of the action doctrine was properly asserted to bar the claims for fraud and negligence in counts X, XI and XII.¹²

E. TSG's lacked standing to bring a claim under the UTPCPL.

Count VII of the counterclaim purports to state a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa.C.S.A. § 201-1 et. seq. TSG lacked standing to raise said claim. The limited circumstances under which a private person may bring a claim under the UTPCPL are specifically set forth in Section 9.2(a), which provides in relevant part, that:

Any 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, as a result of the use or employment by any person of a method, act or practice declare unlawful by section 3 of the UTPCPL, may bring a private action to recover actual damages or one hundred dollars (\$100.00), whichever is greater.¹³

This statute unambiguously permits only persons who have purchased or leased goods or services to sue. Here, TSG was not a purchaser as intended by the UTPCPL. Hence, it is

¹¹ *Bruno*, 106 A.3d at 68.

¹² Moreover, the exclusive broker agreement is an integrated document and therefore any parole evidence of representations inducing TSG to enter into the agreement are barred. See *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 437 n. 25 (Pa. 2004).

¹³ *Bowers v. T-Netix*, 837 A.2d 608, 613 (Pa.Cmwlth.2003) citing 73 P.C. S.A. § 201-9.2(a).

statutorily precluded from bringing a private cause of action under the UTPCPL. Accordingly, count VII was dismissed.

II. Summary Judgment Order

A. Binswanger was owed a commission since execution of the Agreement of Sale was not a complete sale, exchange or transaction.

A broker's right to a commission is a matter of contract, whether express or implied.¹⁴ Binswanger argued it was entitled to a commission on the sale of the property because the sale, exchange or transfer was completed after expiration of the carve out period. TSG, on the other hand, argued that a fully executed agreement of sale constitutes a completed sale, exchange or transaction and no commission was due Binswanger since the agreement of sale was executed prior to the expiration of the carve out period. A careful review of the exclusive broker agreement executed by Binswanger and TSG and the Agreement of Sale executed by TSG and TWA as well as the applicable law demonstrates that execution of the Agreement of Sale on January 3, 2014 did not constitute a completed sale, exchange or transfer and therefore a commission is due Binswanger.

The longstanding precedent in this Commonwealth provides that from the moment an agreement of sale for real estate is executed and delivered, it vests in the purchaser equitable title to the real estate.¹⁵ The seller is considered a trustee of the real estate for the purchaser and the latter becomes a trustee of the balance of the purchase money for the seller. The seller's title which he retains until final conveyance is but a security title and the risk of loss or advantage is

¹⁴ *Coldwell Banker Phyllis Rubin Real Estate v. Romano*, 422 Pa. Super. 319, 325, 619 A.2d 376, 379 (1993), citing *Solis-Cohen v. Phoenix Mutual Life Ins. Co.*, 413 Pa. 633, 198 A.2d 554 (1964).

¹⁵ *Payne v. Clark*, 409 Pa. 557, 561, 187 A.2d 769, 770 (1963).

borne by the buyer.¹⁶ This notion of transferring equitable title at the execution of the agreement of sale applies only to the parties to the contract, i.e. the agreement of sale, and cannot be extended so as to affect the interests of others.¹⁷ Moreover, equitable title is transferred only when the contract for the sale of land is free from conditions which are beyond the control of the parties.¹⁸

TSG argued emphatically that because equitable title passes at the signing of the agreement of sale, the sale, exchange or transaction is complete and therefore no commission is due Binswanger. However, this reasoning was misplaced for two reasons. First, the Agreement of Sale contained a mortgage contingency. Applying and procuring a mortgage was beyond the control of TSG and TWA. As such, equitable title did not transfer at the time the Agreement of Sale was executed and therefore the sale, exchange or transaction for the property was not complete prior to the termination of the carve out period as required by the broker agreement.¹⁹ Secondly, the rights and obligations of TSG and TWA, those with an interest in the property, were not in issue. Here, the rights and obligations at issue did not involve the subject real estate and the applicable agreement of sale. Instead, the rights and obligations at issue were those pertaining to the exclusive broker agreement between Binswanger and TSG, a third party transaction distinct from the Agreement of Sale. Based on the foregoing, the court found that

¹⁶ *Id.*

¹⁷ *Dubin Paper Co., v. Insurance Co. of North America*, 361 Pa. 68, 63 A.2d 85 (1949).

¹⁸ *Bauer v. Hill*, 267 Pa. 559, 562, 110 A. 346, 347 (1920). See also, *In re Governor Mifflin Joint School Authority*, 401 Pa. 387, 164 A.2d 221 (1960)(equitable conversion was said not to have taken place where the land purchase agreement was conditioned upon the passage of certain zoning changes.).

¹⁹ The Agreement of Sale provided “Seller shall have the right to continue to market the Property to prospective buyers during the Due Diligence Period, but shall have no right to terminate this Agreement as set forth herein.” In accordance to this provision, the agreement remained conditional until the passage of the due diligence period, which was after the carve out period contained within the Exclusive Agreement to Sell or Lease. See, Agreement of Sale Article Due Diligence Period section (d).

since the executed Agreement of Sale was a conditional agreement and was not a completed sale, exchange or transaction at the time of its execution, and since the sale, exchange or transaction was completed after the expiration of the carve out period, Binswanger was due a commission for the sale of the property.

B. TSG's termination of the Agreement of Sale was not effective.

In the alternative, TSG argued that no commission was due to Binswanger because title to the property passed after the exclusive broker agreement terminated. This argument was not persuasive.²⁰ The exclusive broker agreement provided as follows:

This Agreement shall be for a term of one (1) year, beginning from the date set forth above; provided, however, that Owner shall have the right to cancel this Agreement after six (6) months with thirty (30) days prior written notice to agent.

The term of the exclusive broker agreement began on September 27, 2013. The exclusive broker agreement unambiguously prohibited cancellation of the agreement until after six months from the date it commenced. Since TSG forwarded notices of termination on January 16, 2014 and February 14, 2014, the notices of termination were ineffective. Even assuming that Binswanger was on notice of TSG's intent to terminate the exclusive broker agreement, the earliest date the termination would be effective was after March 28, 2014. Based on the foregoing, the court found that the efforts made by TSG to terminate the exclusive broker agreement were ineffective and invalid and a commission was due and owing to Binswanger.²¹

²⁰ Moreover, a commission was due notwithstanding any efforts by TSG's to terminate the exclusive broker agreement since the Agreement of Sale, although conditional, was signed during the term of the agreement.

²¹ As for plaintiff's remaining claim for breach of the duty of good faith and fair dealing, it was unnecessary to address same claim since it was pled as an alternative cause of action to the claims for declaratory judgment and breach of contract.

Although Binswanger was entitled to a commission under the exclusive brokerage agreement, it was not entitled to the full commission, \$170,000.00. The exclusive brokerage agreement provided in part as follows:

...In the event a purchaser or tenant is procured by another broker other than Agent, Agent agrees to split any sale or lease commission with the other broker.

Here, it was clear from the record that TWA was not procured by Binswanger. As such, pursuant to the terms of the agreement, the commission should be split between Binswanger and the other two brokers involved in the transaction.²²

For the foregoing reasons, the parties' respective motions for summary judgment were granted in part and denied in part as follows: Plaintiff Binswanger of Pennsylvania's Motion for Summary Judgment was granted in part and Binswanger was entitled to a commission per the exclusive broker agreement. Defendant TSG Real Estate LLC's Motion for Summary Judgment was granted in part and Binswanger of Pennsylvania, LLC was only entitled to collect one third of the commission, \$56,666.67. All other aspects of the motions were denied.

CONCLUSION

Based on the forgoing this court's orders dated July 15, 2014 sustaining preliminary objections to TSG's counterclaims and June 10, 2015 granting in part and denying in part cross motions for summary judgment should be affirmed.

Date: Sept 1, 2015

BY THE COURT,


PATRICIA A. McINERNEY, J.

²² The Agreement of Sale identified two brokers, Hart Corporation and Gelcor Realty.