

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: West Bath
DOCKET NO. BCD-WB-RE-08-20

DENNIS KANE, ET AL,

Plaintiffs

v.

ORDER ON DEFENDANTS' MOTION
TO DISMISS COUNTS II, VI and VII

FRED POTTER, ET AL

Defendants

Before the court is the motion of Defendants Fred and Mertie Potter (“the Potters”), Rangeley Ventures, LLC and Rangeley Holdings, LLC (collectively “Defendants”) to dismiss Counts II, VI and VII of Plaintiffs’ Complaint. Defendants’ Motion is brought pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

BACKGROUND

This case involves a dispute over an Option to purchase real estate located in Rangeley, Maine. The facts central to Plaintiffs’ claims and to the pending Motion to Dismiss are as follows:

Plaintiffs Dennis and Mary Kane (“the Kanes”) reside in Alexandria, Virginia but vacation in Maine. The Kanes own property located in Rangeley, near Rangeley Lake. The Potters reside in Concord, New Hampshire and also own property located near Rangeley Lake. Rangeley Ventures, LLC and Rangeley Holdings, LLC are Maine limited liability companies owned and controlled by the Potters.

In July 2000 the Kanes purchased approximately 20 acres on the shore of Rangeley Lake. The Kanes then subdivided that 20-acre lot into two smaller lots: (1) a waterfront lot comprising 5 acres ("Waterfront Lot") and; (2) a lot consisting of the remaining 15 acres ("Judkins Road Lot"). The Kanes built a house on the Waterfront Lot and then hired a surveyor and prepared plans for an 11-lot subdivision of the Judkins Road Lot. In December 2004 the Kanes listed both lots for sale.

In May 2005 the Kanes and the Potters entered into a Purchase and Sale Agreement ("P&S") pursuant to which the Potters purchased the Waterfront Lot and obtained an Option to buy the Judkins Road Lot at a future time. The Option states that it must be exercised on or before March 1, 2007, with a closing no more than 90 days thereafter. In order to retain the Option, the Potters were required to deposit \$50,000 of earnest money in escrow along with an easement deed benefiting the Judkins Road Lot and providing water access over the Waterfront Lot. The easement deed was to be provided to the Kanes in the event the Potters did not exercise the Option. The Potters subsequently placed both the earnest money deposit and the easement deed in escrow.

On February 23, 2007 Mr. Potter sent the Kanes an email in which he stated that the Potters had "elected to exercise the option." However, according to the Kanes, Mr. Potter also indicated a desire to exercise the Option under new terms. Over the course of the next couple of months the parties continued to negotiate the terms of the sale, including the details of proposed seller financing. The parties did not reach an agreement by the May 30, 2007 deadline. In mid-June the Potters declared the parties' contract to be breached and demanded the return of the \$50,000 deposit. In response, the Kanes

sought to keep the deposit and requested the delivery of the easement deed. Both the deposit and the deed remain in escrow.

The Complaint alleges the following claims: (Count I) Declaratory Judgment regarding the P&S; (Count II) Specific Performance seeking to unwind the P&S transaction; (Count III) Breach of the Option Agreement; (Count IV) Breach of the Easement Agreement; (Count V) Declaratory Judgment regarding the Easement; (Count VI) Interference with Prospective Business Relations; (Count VII) Violation of Maine's Unfair Trade Practices Act, 5 M.R.S. §§ 205-A-214; and (Count VIII) Unjust Enrichment.

Defendants have moved to dismiss Counts II, VI and VII pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

DISCUSSION

I. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) “tests the legal sufficiency of the complaint and, on such a challenge, ‘the material allegations of the complaint must be taken as admitted.’” *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines “the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only “when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Id.* (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me.

1985)). "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law." *Bean v. Cummings*, 2008 ME 18, ¶ 7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

II. Count II: Specific Performance.

Count II of the Kanés's Complaint is styled as a claim for "specific performance." The Kanés seek to "unwind" the P&S transaction so that they may "return the purchase price of the Waterfront Lot to Defendants in return for deeded title to the Waterfront Lot." Pls.' Compl. at 8. Defendants seek dismissal of Count II on the grounds that specific performance "is intended to produce nearly as is practicable the same effect that the *performance* due under the contract would have produced," and is not intended to undo a contract. Defs.' Mot. at 4 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 357). Because the Kanés seek to undo the P&S rather than to compel its performance, Defendants argue that the Kanés have failed to state a claim for specific performance upon which relief can be granted and Count II should be dismissed. In response, the Kanés suggest that the court may appropriately regard Count II as one for rescission or, in the alternative, permit the Kanés to amend their Complaint in order to formally recast Count II. As such, it appears as though the Kanés have conceded that they do not, in fact, seek specific performance of the contract.¹ Instead, they seek to rescind it.

As outlined above, at the motion to dismiss stage this court reviews the allegations in the Complaint "in relation to any cause of action that may reasonably be

¹ Such a concession is prudent. As one authority has explained, "[s]pecific performance of contracts is an equitable remedy available when the legal remedy of damages is inadequate or impracticable. It consists of the court ordering a party to perform obligations under a contract." Horton & McGehee, *Maine Civil Remedies* § 6-1 at 144 (4th ed. 2004) (citations omitted). As outlined above, in this case, the Kanés do not seek to enforce the P&S but, rather, to undo it.

inferred from the Complaint.” *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832. Accordingly, to the extent that the Kanes’s Complaint asserts facts that would support a claim for rescission, the initial description of Count II as one for “specific performance” is immaterial and that claim will survive.

Rescission is essentially the “unmaking” of a contract. The contract can be rescinded by mutual agreement of the parties, by one of the parties declaring rescission of contract without the consent of the other if a legally sufficient ground for doing so exists, or by either party applying to court for a decree of rescission. It is an equitable remedy available only on justifiable grounds such as fraud, mistake, mental incapacity or . . . [one party’s] failure to perform.

Maine Civil Remedies §§ 14-3(a) & 14-5(b) at 290-91 & 299 (citations omitted).

The Kanes have alleged the existence of a contract as well as a material breach of that contract by Defendants. The Kanes have also, in effect, sought a decree of rescission by virtue of their request that the land transactions contemplated by the P&S be “unwound.” In the court’s view, these allegations sufficiently set forth a claim for rescission.²

III. Count VI: Interference with Prospective Economic Advantage³.

Count VI of the Kanes’s Complaint alleges that Defendants “continue to assert a property right to the Judkins Road Lot, which right expired on May 30, 2007.” According to the Kanes, Defendants’ “refusal to cede a right that expired” many months ago has “prevented the Kanes from engaging in business development on that lot.

² Plaintiffs’ theory of recovery for Count II is that the P&S and the Option were the same contract and breach of the Option warrants rescission of the P&S. Although the viability of that theory seems less than clear, the court cannot conclude that it appears beyond a doubt that the plaintiffs are entitled to no relief under any set of facts that they might prove in support of this claim. Thus, Count II, as alleged, is sufficient to withstand the 12(b)(6) motion.

³ Although the Kanes have styled Count VI as a claim for “Interference with Prospective Business Relations,” the claim made in that count is more frequently referred to as one for “tortious interference with a prospective economic advantage.” The court will use the more traditional reference in this order.

Specifically, the Kanes intended to subdivide the Judkins Road Lot” or sell it to “a commercial developer for that purpose.” Pls.’ Compl. at 11. According to the Kanes, the Defendants alleged refusal to cede a property right was done intentionally for the purpose of preventing the Kanes from selling or otherwise developing the Judkins Road Lot. *Id.*

Defendants move to dismiss Count VI arguing that, under Maine law, the assertion of a property right does not constitute tortious interference with a prospective economic advantage. The court agrees.

In order to state a claim for tortious interference with a prospective economic advantage, a plaintiff must allege: “(1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages.” *Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110 (citing *James v. MacDonald*, 1998 ME 148, ¶ 7, 712 A.2d 1054, 1057). In this case, the Kanes appear to have alleged interference by both fraud and intimidation. *See* Pls.’ Opp. at 8.

In order to sufficiently plead tortious interference by fraud, a plaintiff must include allegations that a defendant:

(1) made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or refrain from acting in reliance on it, and (5) the other person justifiably relie[d] on the representation as true and acted upon it to the damage of the plaintiff.

Rutland, 2002 ME 98, ¶ 14, 798 A.2d at 1111 (citations omitted).

The Kanes have alleged that Defendants intentionally continued to assert a property right in the Judkins Road Lot after the expiration of the Option in order to interfere with the Kanes’s intentions to sell or develop that land. Even if proven true,

Defendants' alleged conduct is not actionable. Under Maine law, the assertion of a legal right does not constitute fraud. As the Law Court explained in *Rutland*, "[t]he assertion of a legal right . . . is by itself insufficient as a matter of law to support a finding of interference by fraud." *Id.* 2002 ME 98, ¶ 15, 798 A.2d at 1111.

The Kanes's allegations of interference by intimidation fail for similar reasons.

According to the court in *Rutland*,

Interference by intimidation involves unlawful coercion or extortion. Again, a person who claims to have, or threatens to lawfully protect, a property right that the person believes exists cannot be said to have intended to deceive or to have unlawfully coerced or extorted another simply because that right is later proven invalid.

Id. at ¶ 16 (citations omitted).

Although the court is mindful of the indulgent standard of review applicable at the 12(b)(6) stage, the Kanes's Complaint fails to sufficiently state a claim for tortious interference.

Moreover, the court notes that the Kanes have not sufficiently alleged the existence of a "prospective economic advantage." According to the Kanes, the economic advantage with which the Defendants' allegedly interfered was the Kanes's "intent" to "market and sell the Judkins Road Lot" Pls.' Compl. at 11. Nowhere in the Complaint do the Kanes identify a potential buyer or allege the existence of any potential land transaction. Indeed, the Kanes do not allege that the Judkins Road Lot had been listed for sale or that they had done anything at all to act upon their "intentions" to sell the property. *See generally* Pls.' Compl. While a claim for tortious interference may not

require that a future economic expectancy be reduced to a present contract,⁴ it certainly does require the existence something more than a vague intention to take action in the future. Accordingly, the court concludes that the Kaness's Complaint fails to state a claim for tortious interference upon which any relief may be granted.

IV. Count VII: Violation of Maine's Unfair Trade Practices Act.

Count VII of the Complaint alleges that Defendants Rangeley Ventures, LLC and Rangeley Holdings, LLC engaged in unfair and deceptive trade practices in violation of section 207 of Maine's Unfair Trade Practices Act (the "UTPA").

Defendants move to dismiss Count VII, arguing that the UTPA does not provide a private right of action to the *sellers* of property. According to Defendants, because the UTPA provides a private right of action to a purchaser or lessee of property, and because the Kaness were the would-be sellers rather than the purchasers of the Judkins Road Lot, the Kaness may not maintain an action under the UTPA. The Kaness counter that Defendants' construction of the UTPA is "shortsighted and conservative." Pls.' Opp. at 9. According to the Kaness, Rangeley Holdings "by holding itself out as the rightful owner of the Judkins Road Lot is both engaged (or, more appropriately put, attempting to engage) in the business of owning and managing property and, by asserting invalid title, violating the Maine Unfair Trade Practices Act." *Id.* at 10.

Section 213 of the UTPA, the section of the statute that provides a private right of action, reads, in relevant part:

Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result

⁴ See Simmons, Zillman, & Gregory, *Maine Tort Law* § 11.09, at 11-19 (2004 ed.) (citing *DiPietro v. Casco N. Bank*, 490 A.2d 215, 218 (Me. 1985); *James v. MacDonald*, 1998 ME 148, ¶ 7, 712 A.2d 1054, 1057; and *Barker v. Int'l Paper Co.*, 993 F. Supp. 10, 17-19 (D. Me. 1998)).

of the use or employment by another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207, subsection 2 may bring an action either in the Superior Court or District Court for actual damages, restitution and for such other equitable relief, including an injunction, as the court determines to be necessary and proper.

Id. (emphasis added).

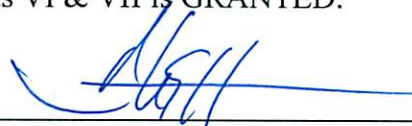
Based on the express language of section 213, the court agrees with Defendants that Maine's UTPA affords a private right of action only to a purchaser or lessee of property or services used for household purposes. In this case, the Kanes do not allege that they are the purchasers or lessees of any property. Instead, they are the owners of the property. Moreover, the allegedly unfair conduct by Defendants relates to the Judkins Road Lot, which has been neither sold nor leased. Under the language of section 213(1), a private right of action is available only when property has, in fact, been sold or leased and harm to the purchaser or lessee has resulted. *See* 5 M.R.S. § 213(1). Accordingly, the court concludes that the Kanes do not have a private right of action under the UTPA and therefore have not stated a claim under the UTPA for which relief may be granted.

DECISION

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

Defendants' Motion to Dismiss as to Count II is DENIED; and
Defendants' Motion to Dismiss as to Counts VI & VII is GRANTED.

Dated: October 31, 2008



Thomas E. Humphrey
Chief Justice, Superior Court