

IN THE SUPREME COURT OF OHIO

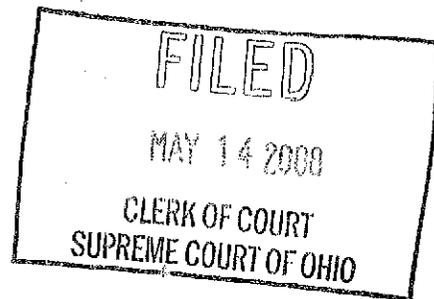
ROCKPORT REALTY INVESTMENTS,)
INC., et al.)
Appellees)
vs.)
NANCIANN RIEDEL a.k.a. NANCIANN)
KOBLER, et al.)
Appellants)

CASE NO. 2008-0699

On Appeal from the Erie County
Court of Appeals, Sixth Appellate
District

Court of Appeals Case No. E-07-042

**APPELLEE, ROCKPORT REALTY INVESTMENTS, INC.'S, MEMORANDUM IN
RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**



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**EXPLANATION OF WHY THIS CASE IS ONE OF
NO PUBLIC OR GREAT GENERAL INTEREST**

This case involves Appellee, Rockport Realty Investments, Inc.'s ("Rockport") claim that Appellants, Edward Heben and Hot Homes Ohio, Inc., tortiously interfered with Rockport's "Exclusive Right to Sell Listing Agreement" ("Listing Contract") with a third party. The trial court granted Appellants' motion for summary judgment. On appeal, the Sixth District Court of Appeals reversed the grant of summary judgment and held that genuine issues of material fact existed on Appellee's claim and remanded this case for an adjudication before the trial court.

Contrary to the Appellants' assertions, the Court of Appeals did not, as a matter of law, create or establish any new duties on behalf of real estate brokers or agents. Although the underlying case involved two real estate brokerages and their respective real estate agents, the Court of Appeals holding was strictly limited to whether genuine issues of material fact existed with respect to the tortious interference with contract claim. The Court of Appeals decision simply addressed (1) the elements of tortious interference with contract; and (2) applied the specific and underlying facts to the law. The Court followed past precedent and under no circumstances can it be argued or construed that this case involves a matter of public or great general interest.

The underlying case involves the sale of commercial property consisting of 39.12 acres of unimproved real property in Huron, Ohio and the Appellants' intentional interference with Rockport's Listing Contract. The seller of the property entered into a six-month Listing Contract with Rockport, a real estate brokerage. Pursuant to the Listing Contract, Rockport was entitled to a ten percent (10%) commission if the property was sold. The contract also contained a six-month survival or procurement clause which provided that Rockport was entitled to the commission if the property was sold within 180 days (six months) after its expiration "to anyone

with whom [Rockport] has had negotiations prior to expiration, provided [that the seller has] received notice in writing, including before or upon expiration of this listing contract ... The commission shall be deemed earned when a binding contract for sale has been executed and/or when [Rockport] has produced a purchaser, ready, willing and able to buy the Real Estate[.]”

The undisputed evidence presented in the trial court was that Appellants, Edward Heben and his real estate brokerage, Hot Homes Ohio, Inc. (of which he served as general counsel), submitted several written offers to purchase the property on behalf of their client, Chad Abell, to Rockport during the term and after Rockport’s Listing Contract expired. Rockport, in turn, presented the offers to the seller, who rejected them.

Evidence was presented in the trial court that Appellants were not only aware of the terms of Rockport’s Listing Contract vis-à-vis the multiple listing service (MLS) and orally, but they were also provided a copy of the contract by Rockport as well.

Evidence was further presented that Appellants thereafter contacted the seller directly, negotiated with her directly without the knowledge or consent of Rockport, and ultimately entered into a contract for the purchase of the property with the seller on behalf of their client, Chad Abell. Again, without the knowledge or consent of Rockport. Appellants effectively cut Rockport out of the deal, they never disclosed any of these negotiations with the seller to Rockport, nor the contract entered into, nor did they return Rockport’s numerous telephone calls. Rockport only learned of the sale of the property until well after it closed and only by happenstance.

Evidence was presented in the trial court that Rockport was paid no real estate commission even though one was due and owing to Rockport pursuant to the survival clause contained in its Listing Contract.

Finally, evidence was presented in the trial court and genuine issues of material fact existed as to (1) the existence of Rockport's Listing Contract which provided for a commission if certain circumstances were met; (2) Appellants' knowledge of this contract; (3) Appellants' intentional procurement of the contract's breach by the seller; (4) Appellants' lack of justification; and (5) Rockport's damages. *See Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St. 3d 171, 707 N.E. 2d 853, paragraph one of syllabus.

While other claims involving other parties were raised in the trial court, they were either settled or disposed of by the court and are not before this Court on appeal. The trial court granted summary judgment on behalf of the Appellants and the Court of Appeals reversed, holding that there existed genuine issues of material fact with respect to Rockport's claim of intentional interference with contract.

Contrary to the Appellants' arguments in its Memorandum in Support of Jurisdiction, the Court of Appeals did not hold or establish any special or new duty owed by the Appellants to Rockport. Instead, it simply applied this Court's adoption of Section 766 of the Restatement of the Law 2d, Torts (1979) as well as multiple decisions by both this Court and appellate courts regarding the standard for granting a motion for summary judgment.

The Court of Appeals did not explicitly or implicitly create or establish any new duty owed as between real estate brokers and agents. Rather, this case was specifically limited to an analysis of the elements of tortious interference with contract consistent with *Fred Siegel Co., L.P.A. v. Arter & Hadden, supra* (which, in turn, did not establish any new duties owed by one lawyer to another); and *Kenty v. Transamerica Premium Insurance Company* (1995), 72 Ohio St.3d 415, 650 N.E.2d 863 (which, in turn, did not establish any new duties owed by a lender to a borrower).

As in *Fred Siegel Co., L.P.A.* and *Kenty*, the Court of Appeals merely held that upon viewing the facts in a light most favorable to the non-moving party, there existed issues of material fact as to whether Edward J. Heben, Jr. and Hot Homes Ohio, Inc. intentionally and tortiously procured the breach of Rockport's contract.

It is undisputed that although Rockport's Listing Contract was with the seller of the property, Appellants had both constructive and actual knowledge of the contract, were provided a copy of the contract, and most importantly, were aware that Rockport was entitled to a commission pursuant to the contract. Further, Appellants acknowledge that Edward Heben, on behalf of his straw buyer, negotiated directly with the seller, drafted and presented the offer to purchase to the seller, facilitated the execution of the contract for his client and oversaw the closing of this sale. These actions were taken without the knowledge and consent of Rockport. Edward Heben was also aware that Rockport was paid no commission from the sale despite his knowledge of Rockport's Listing Contract and the terms contained therein. In short, Appellants cut Rockport out of the deal, failed to disclose its negotiations and subsequent contract with the seller, refused to return Rockport's telephone calls and had no further contact with Rockport.

The issue before the trial court was whether the Appellants intentionally and tortiously interfered with Rockport's contract. Specifically, whether there existed *any genuine issues of material fact* as to the elements of this tort. This question does not present anything new, nor is it one of any public or great general interest.

In their Memorandum in Support of Jurisdiction, the Appellants misstate both the position of this case and the ruling by the Court of Appeals. If the Court of Appeals had held, as a matter of law, that the Appellants had tortiously interfered with Rockport's contract, or if the Court of Appeals had held, as a matter of law, that Appellants owed an absolute duty to

Rockport, it may well be the case that the Court of Appeals created duties not otherwise or previously existing. While such a situation may or may not be one of public or great general interest, it is not the situation addressed by the Court of Appeals and is not presently before this Court.

STATEMENT OF THE CASE AND FACTS

For purposes of this Memorandum in Response, Rockport does not dispute the Appellants' statement of the case and will not restate the same herein. With respect to the facts, Rockport states as follows:

The basis for Appellee's Complaint was an "Exclusive Right to Sell Listing Agreement" ("Listing Contract") executed on February 27, 2002 by Nanciann Riedel, also known as Nanciann Kobler ("Kobler"), as seller and George A. Schied as real estate agent on behalf of the real estate brokerage, Rockport. Regan Lutzko ("Lutzko") was the broker for Rockport. Pursuant to the terms of the Listing Contract, Kobler granted Rockport the exclusive right to sell 39.192 acres of unimproved real property located in Huron, Ohio for a period of six months from February 27, 2002 until August 27, 2002 at the list price of \$550,000.00. Kobler further agreed to pay Rockport a commission of ten (10) percent of the selling price "when a binding contract for sale has been executed and/or when Realtor has produced a purchaser, ready, willing and able to buy the Real Estate". This is commonly referred to as a procurement or survival clause.

The procurement or survival clause provided:

Such fee shall be paid if said property is sold or exchanged within 180 days after the expiration of this listing contract (or any extension thereof) to anyone with whom Realtor has had negotiations prior to expiration, provided I have received notice in writing, including the names of the prospective purchasers, before or upon expiration of this listing contract (or any extension thereof). The Commission shall be deemed earned when a binding contract for sale has been executed and/or when Realtor has produced a purchaser, ready, willing and able to buy the Real Estate pursuant to the terms of this contract.

During the term of the Listing Contract, Edward Heben, acting in his capacity as real estate agent for the real estate brokerage, Hot Homes Ohio, Inc., represented Chad Abell, and submitted written offers to purchase to Rockport. In December of 2002, after the expiration of the Listing Contract, Edward Heben, on behalf of Chad Abell, made another offer to purchase the property with a real estate commission to be paid to Rockport. This offer was presented to Kobler by Rockport and was rejected by Kobler.

On December 15, 2002, Edward Heben contacted Regan Lutzko and asked to speak directly with Kobler. Although Lutzko permitted him to do so, there was a dispute as to what Lutzko did or did not agree to. Thereafter, Lutzko never heard from Heben again despite the fact that he placed no less than ten (10) telephone calls to him. The same is true with Kobler.

In January of 2003, Lutzko first learned of the sale from Kobler to Abell for the purchase price of \$300,000.00. After a Complaint was filed, Appellee learned through discovery the nature and extent of Edward Heben's dealings with Kobler, particularly of the sale of the property from Kobler to Abell, and that no commission was paid to Rockport.

Many factual issues were in dispute as between Edward Heben and Regan Lutzko. What was undisputed is that Appellants were aware of Rockport's Listing Contract and that it was entitled to a commission, that Appellants cut Rockport out of any negotiations and that his client, Abell, purchased the property from Kobler with no commission to Rockport.

The trial court focused on whether Edward Heben and Hot Homes Ohio, Inc., intentionally procured Kobler's breach of the Listing Contract by offering to purchase the property with no commission to Rockport and ultimately entering into a contract and sale of the property from the seller. The parties dispute what led to the procurement of the breach. Regan Lutzko with Rockport avered that he never waived a commission owed to Rockport; Edward

Heben claimed that he did. The Court of Appeals recognized this dispute and held that this constituted an issue of fact to be resolved by the jury. The question before the Court of Appeals was not, as alleged by the Appellants, whether a new duty should be established as between real estate brokers and agents. The question was simply whether there was an issue of material fact.

In their Memorandum, Appellants attempt to marginalize Edward Heben's actions before and after the sale of the property by stating that "all that Heben and Hot Homes did was present an Offer to Purchase Agreement to the seller which did not contain a real estate commission payment clause". Page 6, Paragraph 2 of Memorandum in Support of Jurisdiction. This statement stands in stark contrast to the overwhelming evidence and testimony presented to the trial court record that, at minimum, raise issues of fact that Appellants intentionally cut Rockport out of the deal and a commission.

Edward Heben's conduct before and after the contract are replete with conflicts of interest. It should also be noted that Edward Heben wore several hats throughout this transaction, including real estate agent and attorney for Chad Abell, general counsel for Hot Homes of Ohio and attorney for the real buyer, James Murray. In addition, his wife's title company, National Title Agency, Inc., which operated out of his law office, acted as the escrow and title insurance agent for the Kobler to Abell sale. Even more remarkable is what occurred after the sale of the property. National Title Agency, Inc., the escrow agent for the sale, refused to distribute the \$190,000.00 sales proceeds to Kobler from escrow. As a result, Kobler retained Heben as her attorney to present a claim against National Title and recover her money. It was later discovered that these sales proceeds were embezzled by Heben's secretary and paralegal and that Heben failed to disclose to Kobler his relationship with National Title and that he had check signing authority with National Title. Kobler discharged Heben and subsequently sued

him for legal malpractice and fraud which was resolved in an undisclosed settlement. Edward Heben indeed wore many hats throughout this transaction and by all accounts is a sophisticated real estate attorney.

In short, this case was not amenable to a motion for summary judgment and the Court of Appeals properly reversed and remanded for further process.

ARGUMENT AGAINST APPELLANTS' PROPOSITIONS OF LAW

Response to Appellants' Proposition of Law No. 1.

A real estate broker or agent is not exempt from the holding of the Supreme Court in *Kenty v. Transamerica Premium Insurance Company* (1995), 72 Ohio St.3d 415, 650 N.E.2d 863, and is not permitted to tortiously interfere with another broker's contract.

The Appellants argue in their first proposition of law that "there is no legal requirement that a real estate agent or broker representing the buyer of real property has the duty to protect and secure the payment of the listing real estate broker's commission by the seller. . ." Page 6 of Memorandum in Support of Jurisdiction. In other words, and based on the factual background of this case, Appellants appear to argue that a real estate broker or agent should be held to a different standard and cannot be held liable for tortious interference with contract. The Appellants state no support for this argument and Rockport submits that none exists.

In *Kenty v. Transamerica Premium Insurance Company* (1995), 72 Ohio St.3d 415, 418-419, 650 N.E.2d 863, this Court stated as follows:

[T]his court conforms to the trend of other Ohio courts and holds that the tort of tortious interference with a contractual relationship is recognized in Ohio.

We must also determine the elements of tortious interference with a contract. For guidance we look to the Restatement of the Law 2d, Torts (1979), which has been cited by the Franklin County Court of Appeals in *Developers Three v. Nationwide Ins. Co.* (1990), 64 Ohio App.3d 794, 798, 582 N.E.2d 1133, 1133. Section 766 of the Restatement provides:

“Intentional Interference with Performance of Contract by Third Person.

“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.”

This section of the Restatement has been adopted in other states. [Citations omitted]. We too adopt the analysis of the Restatement and hold that in order to recover for a claim of intentional interference with a contract, one must prove (1) the existence of a contract, (2) the wrongdoer’s knowledge of the contract, (3) the wrongdoer’s intentional procurement of the contract’s breach, (4) lack of justification, and (5) resulting damages.

Notably, with the exception of a contract to marry, this Court did not limit the application of its ruling to only certain types of contract, certain classes of contractual parties or certain professions. The Appellants’ argument is that this Court should now hold that as a matter of law a real estate broker or agent cannot be held liable for tortious interference with another broker’s contract. This argument is flawed. The Court on Appeals correctly found to the contrary and implicitly held that a real estate broker who intentionally interferes with a third party’s contract shall not be treated any differently than any other party or profession.

Response to Appellants’ Propositions of Law No. 2.

A motion for summary judgment must be denied where there are material issues of disputed fact, and the trier of fact could reasonably find in favor of the non-moving party.

The Appellants argue in their second proposition of law that they cannot be held liable for simply presenting an offer to purchase real estate without including a clause requiring payment of a commission. Rockport does not necessarily disagree with this assertion, and if the trier of fact agrees, judgment should be properly issued in Appellants’ favor. However, the Appellants’ proposition of law does not apply to the present set of facts.

Appellants failed to acknowledge or reference the various material issues of fact in dispute. The record demonstrates that many issues, particularly Heben’s procurement of

Kobler's breach, were, at minimum, in dispute. Appellee was not required to adjudicate the merits of their claim, only demonstrate that issues of fact precluded judgment.

Evidence was presented showing that Abell had submitted written offers, by and through Appellants, to Rockport prior to the expiration of the Listing Contract. As a result, Rockport was due a commission on the sale of the property in accord with the Agreement; yet, it was paid nothing. Evidence exists that the Appellants had actual knowledge of the terms of the Listing Agreement and actual knowledge that Rockport was due a real estate commission. There was evidence presented that after having an offer rejected, Appellants made a new offer to purchase the property to the seller with no sale commission to be paid. Finally, there was disputed evidence that the Appellants made this new offer (without Rockport's knowledge and consent) with the particular purpose of inducing the seller to breach the terms of the Listing Contract.

The Court of Appeals did not hold that the Appellants were liable simply for presenting an offer to Kobler, the seller of the property. In fact, the Court of Appeals did not hold anyone liable. Rather, the Court of Appeals solely addressed the narrow issue of whether there existed material issues of fact concerning whether the Appellants purposely and tortiously interfered with Rockport's contract. The Court stated as follows:

"The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages. (*Kenty v. Transamerica Premium Ins. Co.* [1995], 72 Ohio St.3d 415, 650 N.E.2d 863, paragraph two of the syllabus, affirmed and followed.)" *Fred Siegel Co., L.P.A. v. Arter & Hadden*, paragraph one of syllabus.

* * *

There remains the tortious interference with contract claim of Rockport against Heben and against HotHomesOhio.com.¹ The trial court concluded that the key issue on this claim was "whether Heben intentionally procured breach of the obligation of Kobler to

¹ Evidence was presented in the trial court that HotHomesOhio.com was a tradename for Hot Homes Ohio, Inc.

pay Rockport a commission (which obligation extended beyond the expiration of the listing agreement since Abell was procured * * * prior to its termination).” The parties have focused their arguments to this element in their arguments both in the trial court and on appeal. Construing the facts most favorably to Rockport, we disagree, however, with the trial court’s conclusion that there is no dispute of material fact on the issue of procurement of the breach of the listing contract.

Lutzko and Heben dispute whether Lutzko withdrew or abandoned the listing contract or waived any entitlement to commission . . .

* * *

Accepting Lutzko’s contentions as true, Heben’s representations to Kobler in proposing the new sale contract and the change of terms are significant. The proposal removed a contract provision (contained in the proposal that was rejected four days before) that required payment of a real estate commission to Rockport, by name. In proposing the new contract, Heben wrote: “Enclosed is a new Real Estate Purchase Agreement with no real estate commission being charged and the buyer paying all the closing costs.”

The change in contract language and the representation that no real estate commission was being charged for the sale could reasonably be interpreted by a trier of fact as an intended inducement by Heben for Kobler to sell the property without payment of the real estate commission to Rockport. Under the facts, Heben had knowledge that Rockport was owed a commission for such a sale under the listing contract.

Rockport Realty Investments, Inc. et al. v. Nanciann Riedel, Court of Appeals No. E-07-042,

¶¶24, 28-29, 32-33. (Footnote added).

As shown above, Appellants incorrectly assert that the Court of Appeals found them to be liable as a matter of law. Instead, the Court simply found that disposition by summary judgment was improper. Rockport submits that the standard for granting a motion for summary judgment is well established and need not be examined by this Supreme Court once again.

Response to Appellants' Proposition of Law No. 3.

Where the non-moving party presented evidence that the Appellants intentionally procured a breach of contract, a motion for summary judgment is properly denied.

In their third proposition of law, Appellants argue that Rockport was required to present evidence that Appellants intentionally procured the breach of the Listing Contract by Kobler. Again, Rockport does not necessarily disagree, and if the trier of fact finds the same to be true, the Appellants should prevail at trial. As with Proposition of Law No. 2, however, the Appellants are arguing that based on the disputed facts they were entitled to judgment as a matter of law.

As previously noted, the evidence demonstrated that Appellants knew about Rockport's contract, and knew Rockport was entitled to a real estate commission. The evidence showed that the Appellants first made an offer to Kobler with the payment of a commission. The evidence further showed that almost immediately upon the rejection of this offer, the Appellants made a second offer without the payment of any commission. While Rockport will not restate the facts at length, it would note that the determination of whether the Appellants intentionally induced Kobler to breach her contract with Rockport will rest on the credibility of the witnesses. The determination will rest on whether the jury believes Edward Heben's testimony that he had no intention of inducing Kobler to breach the contract; it will rest on whether the jury believes Heben's testimony that Rockport had waived its right to receive a commission.

In short, the determination of whether judgment is rendered for the Appellants or for Rockport will largely come down to credibility and whose set of facts are accepted by the jury. This is the province of the jury as trier of fact and cannot and should not be decided as a matter of law. Rockport submits that the Court of Appeals correctly found there to be material issues of

fact, issues that must be resolved by the jury and not the court. There is no need for the Supreme Court to review this decision and the Appellants' request for jurisdiction should be denied.

CONCLUSION

This presents a straightforward issue regarding the standard for granting summary judgment and whether a trial court should grant such a motion when there exist material issues of fact. It appears that Appellants brought this appeal to further delay the inevitable of a trial upon remand. For the reasons set herein, as well as were stated by the Court of Appeals, the Appellee, Rockport Realty Investments, Inc., submits that the case presents no issue of public or great general interest and jurisdiction should be denied.

Respectfully submitted,



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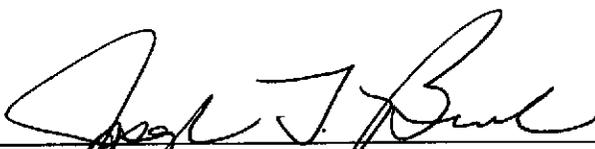
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Memorandum in Response of Appellee, Rockport Realty Investments, Inc., to Appellants' Memorandum in Support of Jurisdiction" has been served upon the following this 13th day of May, 2008 by ordinary U.S. mail delivery:

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