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COURT OF APPEALS DIV. I
STATE OF WASHINGTON
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No. 62902-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JOSEPH GRACE,

Appellant

v.

JAMES ALEKSON and JANE DOE ALEKSON,

Respondents

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Defendants Alekson urge this Court to affirm the trial court's dismissal of plaintiff's claim for tortious interference with a business expectancy by improperly asserting that plaintiff has not provided "sufficient evidence" of each element. Their argument ignores the long established standard for considering motions to dismiss pursuant to Civil Rule 12(b)(6), and improperly attempts to shift their burden to plaintiff.

Mr. Grace's complaint alleges a cause of action based upon Mr. Alekson's interference with his attempts to reserve a condominium unit for purchase. Mr. Alekson unlawfully obtained confidential information from Mr. Grace's agent, and used the information to prevent Mr. Grace from reserving and purchasing the condominium unit. The trial court's order dismissing the Alekson defendants must be reversed because the Aleksons have not carried their burden and shown beyond doubt that there are no facts that could exist to support Grace's claim for tortious interference. Because dismissal was improper, the court's order awarding sanctions pursuant to RCW 4.84.185 constitutes an abuse of discretion.

II. GRACE STATED A CLAIM FOR INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTANCY

A. Where Facts Exist Which Justify Recovery Dismissal Pursuant to Civil Rule 12(b)(6) is Improper.

In Washington, the test enunciated by the U.S. Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), applies to whether a Civil Rule 12(b)(6) motion to dismiss should be granted. To prevail on a Civil Rule 12(b)(6) motion, the defendant has the burden of establishing “beyond doubt that the plaintiff can prove no set of facts, consistent with the Complaint, which would entitle the plaintiff to relief.” *Fondren v. Klickitat County*, 79 Wn.App. 850, 854, 905 P.2d 928 (1995); *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). A complaint survives a Civil Rule 12(b)(6) motion if any set of facts could exist that would justify recovery. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988), *aff’d in part on recon.*, 113 Wn.2d 148, 776 P.2d 963 (1989); See e.g., *In re Coday*, 156 Wn.2d 485, 497, 130 P.3d 809 (2006). Civil Rule 12(b)(6) motions should be granted sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits. *Fondren*, 79 Wn.App. at 854.

B. Mr. Grace's Unequivocal Actions and Statements Regarding His Intent To Reserve The Unit Created A Business Relationship Susceptible to Interference.

The Aleksons allege that plaintiff's complaint fails because there is no evidence of the first element of a tortious interference claim, because no contract or expectancy exists. This assertion is directly contrary to allegations in plaintiff's third amended complaint, which states:

2.2 Plaintiff expressed interest in purchasing unit W001 (hereafter 'the unit') in 2200 Westlake. He discussed his interest in doing so with defendant Thomas on or about January 27, 2005. Although Mr. Thomas sought to dissuade plaintiff from purchasing or seeking to purchase the unit, *plaintiff made clear his desire to purchase the unit, made clear his financial ability to purchase the unit, and inquired of defendant Thomas regarding how to proceed to acquire the unit.*

2.3 Defendant Thomas assured plaintiff *that the method to use to obtain the right to purchase the unit was to place a 'reservation' for the unit. This required filling out a reservation form and placing a deposit with Coldwell Banker and/or Urban Realty and/or Urban Venture, LLC and/or defendant Thomas.* On January 27, 2005, plaintiff advised defendant Thomas that he was ready, willing and able to place such a reservation immediately.

2.4 The foregoing caused plaintiff to advise defendant Thomas that he wanted to reserve the unit. He advised defendant Thomas, in the early evening on January 27, 2005 that he would immediately place a reservation and could obtain a check the same evening and get it to defendant Thomas...

CP 84-85.

As set forth in Appellant's Opening Brief, the Restatement (Second) of Torts expressly includes within the scope of protected business relations "the opportunity of selling or buying land." Restatement (Second) of Torts § 766B comment c (1979). Appellant's Brief, p. 12. Mr. Grace's attempt to enter into a written agreement to "reserve" a condominium unit for purchase is an "opportunity" to purchase land.

Further, in defining the elements of the tort of intentional interference, Washington courts have made clear that the tort requires only "a relationship between parties contemplating a contract, *with at least a reasonable expectancy of fruition.*" *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971); *see also Broten v. May*, 49 Wn. App. 564, 569 (1987). In *Scymanski*, the court held that between parties contemplating a transaction, where "all that remained to be done to complete their transaction was the execution of the lease agreement..." a business relationship susceptible to interference existed. *Id.* at 85.

Here Mr. Grace was informed he had to "reserve" the Unit by completing a writing and paying a deposit. All that remained to be done was submit this "reservation" and a check for the deposit, which Mr. Grace did before the business opened the next day. CP 85 ¶2.5. Further, Mr. Grace's complaint alleges that if Mr. Alekson had not interfered and convinced another client to reserve the Unit, Mr. Grace would have

successfully reserved it when he delivered a deposit and signed reservation agreement the next day. *Id.* Thus, a business relationship susceptible to interference existed in this case.

C. Grace's Complaint Alleges That Mr. Alekson Was Aware of The Business Expectancy And That His Interference Was Intentional.

In urging the Court that Mr. Grace has failed to allege the second and third element of a tortious interference claim, the Aleksos allege that the complaint fails because “there is insufficient evidence of the second element” and “Grace fails to provide sufficient evidence of the third element: Intentional interference.” Respondent’s Brief, pp. 8, 9. However, it is the *defendant* that has the burden of establishing that the plaintiff can prove no set of facts, including hypothetical facts, consistent with the Complaint that would entitle the plaintiff to relief. *Fondren*, at 79 Wn.App. 854. It is not plaintiff’s burden to provide evidence to support the claims made.

With regard to the second element of Mr. Grace’s tortious interference claim, the complaint states that Alekson “...was aware of the business relationship between plaintiff and defendants Thomas and/or McAvoy, and was aware of plaintiff’s desire to reserve the unit.” CP 86 ¶3.1.2. The complaint alleges that despite knowing of Grace’s desire to buy, and despite knowing of Grace’s business relationship with

Thomas/McAvoy, Mr. Alekson interfered. Further, Mr. Grace's complaint states that "Defendant James Alekson stated that he assisted Mr. Thomas with reserving the unit for his other client," which is clear statement that the interference was intentional.

The Aleksons' reliance on *Roger Crane & Associates, Inc. v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994) as supporting dismissal of this case pursuant to Civil Rule 12(b)(6) is misplaced. In *Roger* the Court of Appeals was reviewing dismissal of a plaintiff's tortious interference complaint pursuant to Civil Rule 56. *Id.* at 773, 774. In *Roger* the court stated "The dispositive issue is whether there is a genuine issue of material fact that Mr. Brooks was a procuring agent in the sale of Mr. Felice's house." Here, the burden is on defendants to prove beyond doubt that no facts consistent with the complaint exist which would allow recovery. Even if Mr. Grace had not alleged that Alekson had knowledge of the business relationship, it could be reasonably inferred from plaintiff's complaint, which is sufficient to defeat a Civil Rule 12(b)(6) motion.

The Aleksons further allege that the interference cannot be intentional, because Mr. Alekson was an officer of the developer's corporation, and "[w]here an officer or director of a corporation has acted in good faith, he cannot be liable for interfering with a contract between his principal corporation and another party." Respondent's Brief, p. 11.

This argument cannot support dismissal pursuant to Civil Rule 12(b)(6). Grace has not alleged that Alekson was acting on behalf of the developer when he interfered with Mr. Grace's attempts to reserve the Unit. Further, alleging facts to suggest that Mr. Alekson acted in "bad faith" is not required. "Good faith" is a defense to a tortious interference claim. See Restatement (Second) of Torts, § 773, comment a (1979). Defendants' assertion of "good faith" does not cause plaintiff's complaint to fail at the pleading stage.

D. Mr. Alekson Used Improper Means To Interfere With Grace's Business Expectancy When He Used Confidential Information to Recruit Another Client To Reserve The Unit

The fourth factor requires an assertion of either improper motive or improper means, not both. Interference is for an improper purpose "if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession." *Newton Insurance Agency and Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wn.App. 151, 158, 52 P.3d 30 (2002). Improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, *misuse of inside or confidential information*, or breach of a fiduciary relationship. See *Top*

Service Body Shop v. Allstate Ins. Co., 283 Or. 201, 210 n. 11, 582 P.2d 1365 (1978).

Mr. Grace's complaint alleges that Mr. Alekson used confidential information improperly obtained from Mr. Thomas. CP 85-86 ¶¶2.6, 2.8. The use of confidential information is a sufficient allegation of improper means. Since Mr. Grace's complaint alleged that Mr. Alekson's used confidential information, his interference was through unlawful means. Thus, there is no requirement that Mr. Grace also allege an improper business purpose.

E. No Award of Attorneys' Fees is Appropriate

Mr. Grace demonstrates, above, why the trial court erred in dismissing his case. His case and its basis never warranted dismissal and cannot be characterized as frivolous in any event. It is curious that given the trial court's own confusion such strong claims of frivolousness are advanced. The trial court, over opposition, granted a motion to amend the complaint. Presumably this means the trial court believed the claim had merit despite the defendants' contention to the contrary. And then the trial court dismissed the complaint, without explanation.

Later, a different judge in the same department described plaintiff's 'amendment' as 'abandonment' of his claim, which is entirely incorrect. And, having concluded that plaintiff abandoned his claim (and after first

ruling that any decision regarding fees would await court of appeals treatment of the case) the trial court then awarded fees. Neither the reasoning of nor the action of the trial court is sustainable.

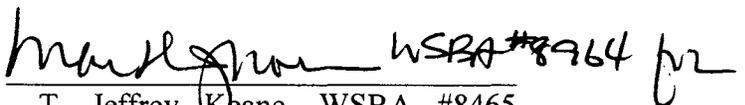
Plaintiff changed none of his factual allegations in moving to amend his complaint. Defendant was on notice of the same actionable facts before and after the amendment. That the nature of the claim was reframed is, in theory, one of the reasons leave to amend is freely granted, and why Civil Rule 12 (b)(6) motions to dismiss should rarely be granted.

III. CONCLUSION

Mr. Grace respectfully requests that this Court reverse the order of dismissal, vacate the award of attorney fees and costs pursuant to RCW 4.84.185, and remand the case for further proceedings.

Respectfully submitted this 10th day of August, 2009.

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JOSEPH GRACE,)
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 JAMES ALEKSON, et ux.,)
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**CERTIFICATE OF
SERVICE**

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The undersigned declares under penalty of perjury, under the laws of the State of Washington that the following is true and correct:

That on August 10, 2009 I sent, via facsimile and legal messenger, a true and correct copy of the Appellant's Reply Brief to:

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