IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PATTERSON-WOODS & ASSOCIATES, LLC	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	05C-01-224-JOH
v.	)	
REALTY ENTERPRISES, LLC, HAPPY HARRY'S, INC., and **VALLEY-LIMESTONE DEVELOPMENT, LLC**	)	
Defendants	)	
v.	)	
ANTHONY B. BARIGLIO and **TODD W. BARIGLIO**	)	
Third-Party Defendants	)	

Submitted: February 28, 2008
Decided: May 21, 2008
Revised: May 27, 2008

MEMORANDUM OPINION

Upon Motion of Plaintiff for Summary Judgment - ***DENIED***

Upon Motion of Realty Enterprise for Summary Judgment as to Count III (Quantum Meruit) - ***GRANTED***

Upon Motion of Realty Enterprise for Summary Judgment as to Count I (Breach of Contract and Count II (Declaratory Judgment) and as to Third-Party Complaint - ***DENIED***

Upon Motion of Valley-Limestone Development for Summary Judgment as to Count I (Breach of Contract), Count II (Declaratory Judgment), and Count III (Quantum Meruit) - ***GRANTED***

Upon Motion of Valley-Limestone Development for Summary Judgment as to Counts IV (Intentional Interference) and Counts V (Civil Conspiracy) - ***DENIED***

Upon Motion of Happy Harry, Inc., for Summary Judgment against Patterson-Woods as to Counts IV (Intentional Interference) and Counts V (Civil Conspiracy) - ***DENIED***

Upon Motion of Happy Harry, Inc., for Summary Judgment against Valley-Limestone Development - ***DENIED***

Appearances:

Michael R. Robinson, Esquire, of Saul Ewing LLP, Wilmington, Delaware, attorney for plaintiff Patterson-Woods & Associates, LLC

Jonathan Layton, Esquire, of the Law Offices of Gary A. Bryde, P.A., Hockessin, Delaware, attorney for defendant Realty Enterprises, LLC

Seth J. Reidenberg, Esquire, of Young Conaway Stargatt & Taylor, LLP, of Wilmington, Delaware, attorney for defendant Valley-Limestone Development, LLC

Josiah R. Wolcott, Esquire, of Connolly Bove Lodge & Hutz, LLP, of Wilmington, Delaware, attorney for defendant Happy Harry's, Inc.

James S. Green, Esquire, of Seitz Van Ogtrop & Green, of Wilmington, Delaware, attorney for third-party defendants Anthony Bariglio and Todd Bariglio

HERLIHY, Judge

Plaintiff Patterson-Woods & Associates, LLC ("PW") moves for summary judgment on all claims made against all defendants contained in its amended complaint.[1] In addition, defendants Realty Enterprises, LLC ("Realty"), Valley-Limestone Development, LLC ("VL"), and Happy Harry's, Inc. ("HH") move for summary judgment on all claims made by PW against them.

This action arises from a contractual agreement entered between PW and Realty under which PW, though its agents Todd and Anthony Bariglio ("Bariglios"), were to provide broker services to Realty regarding property it owned located at 611 Valley Road, Hockessin, DE ("Property"). An additional defendant, VL, became involved by virtue of the fact that it was a created when Realty formed it by joining with another entity subsequent to the time it entered a contract with PW, and pertinently, before it had made any performance under the contract with PW. HH is a party because it entered two lease agreements regarding the Property. In its Answer, Realty brings a third party action against the Bariglios for a declaratory judgment that "Tony Bariglio and Todd Bariglio, fraudulently induced Realty into executing the Patterson-Woods Agreement."[2] The several issues presented by the motion are complex and will be addressed more fully herein.

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[1] Amended Complaint filed July 7, 2006. See docket # 32.

[2] See Docket # 11, Realty's Answer to Complaint, Counterclaim and Third Party Complaint.

For the reasons stated herein:

1. PW's Motion for Summary Judgment is **DENIED** as to all counts.

2. Realty's Motion for Summary Judgment is **GRANTED** as to Count III (quantum meruit) and **DENIED** as to Count I (breach of contract) and Count II (declaratory judgment), and as to its third-party complaint against Anthony and Todd Bariglio.

3. Valley-Limestone's Motion for Summary Judgment is **GRANTED** as to Count I (breach of contract), Count II (declaratory judgment), Count III (quantum meruit) and **DENIED** as to Count IV (intentional interference with contractual relations) and Count V (civil conspiracy).

4. Happy Harry's Motion for Summary Judgment against Patterson-Woods is **DENIED** as to Count IV (intentional interference with contractual relations) and Count V (civil conspiracy).

5. Happy Harry's Motion for Summary Judgment against Valley-Limestone is **DENIED**.

Factual Background

All of PW's claims, and the crux of this lawsuit, flow from the signing of an Exclusive Right to Sell, Lease or Sub-lease Listing Agreement ("Listing Agreement") on October 29, 2002. It is undisputed that the Listing Agreement was between Realty and PW whereby PW was "to procure a person, corporation or other entity to purchase, lease or sublease the ["Property" located at 611 Valley Road, Hockessin DE]."[3] At the time of the signing of the Listing Agreement, the Property was owned by Realty. Anthony Bariglio, vice-president of PW, signed as "agent" for PW.[4] Both Anthony and his brother Todd

[3] Wolcott Affidavit, Exhibit B, Listing Agreement ¶ 1.

[4] Anthony Bariglio signed the "Commission Rates" document attached to the Listing Agreement which is referenced in the Listing Agreement. None of the defendants dispute that Anthony Bariglio signed on behalf of PW.

Bariglio[5] performed services pursuant to the Listing Agreement. The relevant provisions of the Listing Agreement are as follows:

> 1. In consideration of the services of Patterson Woods & Associates, LLC…the undersigned (…hereinafter referred to as "Owner"), hereby engages Broker as Owner's sole and exclusive agent for a period of one year commencing 10/21/02 and ending at midnight 10/20/03 to procure a person, corporation or other entity to purchase, lease or sublease the above described property at the price and on the terms and conditions set forth above or under such other terms, price or conditions as Owner may accept. This Listing Agreement may be terminated in the event that either party gives certified letter to the other party within ten days of the expiration date above. If notice is not given this Listing Agreement shall automatically renew upon the same terms and conditions as set forth above.
>
> * * * * *
>
> In the event Owner does not refer any, and all inquiries for lease/sale, or transfer of any kind from his property, and if Owner shall attempt to finalize, or close an Listing Agreement with an undisclosed person or company, Broker shall still be paid a full commission in accordance with the Commission Schedule.
>
> * * * * *
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> 2. If the property is withdrawn from sale or lease, leased, subleased, or if any part of the ownership is transferred, gifted, conveyed, or sold, through any source (and whether or not the Owner does so directly) during the term of this Listing Agreement or any extension thereof, Owner agrees to pay Broker a fee in accordance with the attached Schedule of Commission Rates and Fees.
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> * * * * *
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> 20. If legal action is instituted by either party with respect to this Listing Agreement, the prevailing party shall be reimbursed immediately for all actual attorney's fees and expenses incurred by the other party.[6]

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[5] Todd was a real estate agent, and not a broker, at all times relevant herein. A real estate agent is not qualified to accept commissions. *See Eastern Commercial Realty Corp. v. Fusco*, 654 A.2d 833 (Del. 1995).

[6] Wolcott Affidavit, Exhibit B.

Through the efforts of the Bariglios (acting as PW agents), Realty was introduced to Morgan Ventures, LLC ("Morgan"). According to Realty, the Bariglios never told them that Morgan was their business partner in multiple real estate ventures. Further, Todd Bariglio "fraudulently induced" Eileen DeFelice of Realty into executing promissory notes in favor of Morgan by falsely claiming "that the Colt Stream LLC Agreement required her to execute these notes." These claims, inter alia, form the basis of Realty's third party claim against the Bariglios.

In August 2003, Realty and Morgan formed a new entity, Colt Stream, LLC ("Colt Stream").[7] On January 13, 2004, again as a result of the efforts of the Bariglios,[8] Colt Stream signed a lease ("CS Lease") with Happy Harry's, Inc. ("HH"). The relevant portions of the CS Lease are as follows:

> [22.](G) Broker's Commission - Each of the parties represents that Todd Bariglio ("Bariglio") is the only broker involved in the consumation of this lease Listing Agreement and that there are no claims for brokerage commissions or finder's fees in connection with this Lease other than that due Bariglio.[9]
>
> * * * * *
>
> (B) This lease is contingent upon Landlord obtaining legal title to the Entire Premises.[10]

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[7] Curiously, Todd Bariglio is a witness to the signatures of the principals from the two formative entities. (The LLC Listing Agreement for Colt Stream is attached to a Chancery action referenced hereafter, *infra* p. 5.)

[8] It is undisputed that the Bariglios, as agents for PW, negotiated the terms of the CS Lease.

[9] Wolcott Affidavit, Exhibit H, CS Lease, ¶ 22(G).

[10] *Id.* at 31(B).

Before the Property was ever transferred to Colt Stream, Morgan and Realty's relationship deteriorated resulting in Morgan filing an action against Realty in the Court of Chancery.[11] Neither Todd or Tony Bariglio were parties to the action. Nor was PW a party that action.

In a letter dated July 12, 2004, Realty's counsel assured HH's counsel that Realty would honor the CS Lease "…in whatever form the real estate ownership might ultimately take - whether by Colt Stream or by Realty Enterprises, L.L.C. if Colt Stream is dissolved."[12]

On September 10, 2004, a settlement agreement was signed by the parties to the action which Morgan had filed in Chancery.[13] The relevant provision of that agreement is as follows:

> 14. Colt Stream, Eileen DiFelice, Buonamici, Realty, Dianne DiFelice and Susan DiFelice, on the one hand, and Morgan, Morgan Ventures, Tony Bariglio and Todd Bariglio [ ][14] on the other hand, will mutually release each

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[11] *Morgan Ventures, LLC v. Realty Enterprises, L.L.C. & Colt Stream, LLC*, C.A. No. 406-N (Del. Ch. April 29, 2004) (COMPLAINT).

[12] PW's Motion, Exhibit F.

[13] Specifically, the settlement was signed by Paul Morgan, on behalf of himself and Morgan Ventures, LLC, Eileen DiFelice, on behalf of herself and Realty Enterprises, L.L.C., Susan and Dianne DiFelice, as individuals, and Tony and Todd Bariglios (whether they signed as individuals or to bind PW is an issue in this litigation). Several people signed in their representative capacities but neither of the Bariglios did. It is less than clear why either signed the settlement agreement.

[14] The parenthetical phrase, originally in the agreement, "individually or as agents of Patterson Woods" is crossed out with the parties initials in the right margin next to (continued…)

> other from all claims other than as set forth herein, and other than for any claims that Todd Bariglio, Tony Bariglio or Patterson Woods may have for the commission stated in the Happy Harry's lease and any claim Colt Stream, Realty or Eileen may have with respect to non-payment of the commission as stated in the Happy Harry's lease.[15]

On October 8, 2004, a release was executed by the same parties. The pertinent provision of that document is as follows:

> 11. Pursuant to paragraph 14 of the Term Sheet, the DiFelice Parties, on the one hand, and the Morgan Parties, on the other hand, hereby mutually remise, release, and forever discharge each other from all manner of actions, causes of action, third-party actions, suits, claims or suits for contribution and/or indemnification, debts, sums of money, accounts, contracts, controversies, promises, damages, judgments, executions, claims and demands of whatever nature, in law or in equity, which they ever had or now have, whether known or unknown, anticipated or unanticipated, through the date of the Term Sheet, other than as set forth in the Term Sheet and this Release, and other than any claims that Todd Bariglio or Patterson-Woods may have for the commission stated in the Happy Harry's Lease and any claims that the DiFelice Parties may have with respect to non-payment of such commission.[16]

Three other relevant events took place on October 8, 2004. First, a Certificate of Cancellation was filed for Colt Stream.[17] Second, Realty and Cockeysville Partners, LLC ("Cockeysville") joined together to form Valley-Limestone Development, LLC. Third,

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[14](...continued)
paragraph 14.

[15] Wolcott Affidavit, Exhibit L, Terms of Settlement, ¶ 14.

[16] *Id*. Release, ¶ 11. Again, several of the signatories signed in their individual and representative capacities but the Bariglios signed only as individuals. Further, as noted above, Fn. 11, neither Bariglio was a party to the Chancery action.

[17] PW's Motion, Exhibit E.

Realty deeded the Property to VL.[18] Also occurring sometime during October 2004, Realty and Colt Stream assigned the CS Lease to VL.[19] That lease contained the broker's commission language quoted above.[20]

The Assignment to VL contained these provisions:

> Assignor [Realty and Colt Stream] represents and warrants to Assignee [Valley-Limestone] as follows:
>
> 1. The copies of the Leases delivered simultaneously herewith in the "Original Leases" binder at settlement are certified by Assignor as true and Correct.
>
> * * * * *
>
> 3. The Leases are in full force and effect, enforceable in accordance with their respective terms, and are the only leases, written or oral, affecting the Premises.[21]

In late 2004, early 2005, Simeone[22] of VL and Ralph Larson of HH began to discuss the creation of a new lease for the Property. On January 25, 2005, before a new lease was executed, PW filed its initial complaint in this Court naming only Realty as defendant and claiming commissions owed arising from the transfer of the Property to VL.

On March 29, 2005, Richard Levin, counsel for HH sent an email to Larson proposing the following language regarding brokers to be contained in the new lease with VL:

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[18] *Id.* at Exhibit J.

[19] *Id.* at Exhibit L (document does not contain specific date).

[20] *Supra* p. 4.

[21] PW's Motion, Exhibit L.

[22] Members of the Simeone family own Cockeysville.

> Each party represents to the other that no broker has been involved in this transaction. It is agreed that if any claims for brokerage commissions of fees are ever made against LANDLORD or TENANT in connection with this transaction, all such claims shall be handled and paid by the party whose actions or alleged commitments form the basis of such claim. It is further agreed that each party agrees to indemnify and hold harmless the other from and against any and all such claims or demands with respect to any brokerage fees or agents' commissions or other compensation asserted by any person, firm, or corporation in connection with this Listing Agreement or the transactions contemplated hereby.[23]

In September 2005, VL and HH executed a new lease for the Property for a term of 25 years with five possible extensions of 10 years. The terms contained on the VL lease are very similar to those contained in the CS Lease,[24] with one significant difference. The "Broker's Commission"[25] provision contained in the CS Lease does not appear in the VL lease. That provision was replaced by the above quoted language proposed by HH's counsel.[26]

On July 7, 2006, PW filed its amended complaint containing the following claims:

- Count I - Breach of Contract against Realty and VL.
- Count II - Declaratory Judgment against Realty, VL and HH.[27]

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[23] PW's Motion, Exhibit M.

[24] Compare Wolcott Affidavit, Exhibit H with Exhibit N.

[25] *Supra* p. 4. (Paragraph G).

[26] Wolcott Affidavit, Exhibit N, VL lease ¶ 33.1.

[27] On September 11, 2004, the Court dismissed Count II as it related to HH. See Docket #34.

- Count III - Quantum Meruit against Realty and VL.
- Count IV - Intentional Interference with Contractual Relations against VL and HH.
- Count V - Civil Conspiracy against VL and HH.[28]

In 2006, HH began constructing a building on the Property. In January 2007, HH began to pay rent to VL under the VL lease.

Parties' Contentions

Patterson-Wood's Motion for Summary Judgment

In its Motion, PW argues that under the undisputed facts it has met each of the elements of all claims against each of the defendants and, therefore, it is entitled to judgment as a matter of law against each. First, PW contends that it has met the elements of its breach of contract claim against Realty and VL. To establish a claim for breach of contract a plaintiff must show (1) the existence of a valid contract, express or implied, (2) breach by defendant of that contract, and (3) damages to them as a result of the breach.[29]

PW argues that the following facts establish its breach of contract claim as a matter of law: (1) it is undisputed that PW and Realty signed a "binding"[30] Listing Agreement,

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[28] Amended Complaint filed July 7, 2006. See docket # 32.

[29] *McCoy v. Cox*, 2007 WL 1677536 (Del. Super.).

[30] My first year professor in Contracts said the phrase "binding contract" is redundant. If it is a contract, *a fortiori*, it is binding. If it is not a contract there is nothing "binding."

(2) neither of the parties gave notice as required by the contract to effectively terminate the Listing Agreement, (3) PW performed services pursuant to it, and (4) neither Realty or VL has paid PW commissions owed under the Listing Agreement. Therefore, PW contends, the elements of this claim have been met and PW is entitled to judgment in its favor against defendants Realty and VL.

Second, PW contends that it has met the elements of its declaratory judgment claim against Realty and VL. The four elements to be met for a declaratory judgment to be deemed appropriate are (1) the controversy must involve a claim of right or other legal interest of the party seeking declaratory relief; (2) the claim of right or other legal interest must be asserted against one who has an interest in contesting the claim; (3) the conflicting interest must be real and adverse; and (4) the issue must be ripe for judicial determination.[31]

PW argues that it has performed all its obligations under the Listing Agreement. Further, PW argues that VL is obligated to pay the commissions because the CS Lease was assigned to it. Therefore, it is entitled to a declaratory judgment that "it is owed the lease commission from both Realty and VL and the transfer commission from Realty plus attorney's fees and costs."[32]

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[31] *XO Communications, LLC v. Level 3 Communications, Inc.*, 2007 WL 3301025 (Del. Ch.).

[32] PW's Motion ¶ 23.

Third, PW contends that the undisputed facts meet the elements of its claim for Quantum Merit against Realty and VL.[33] "To prevail on such a claim, a plaintiff must show that it performed services with an expectation that the defendant would pay for them, and that the services were performed under circumstances which should have put the defendant on notice that the performing party expected to be paid by the defendant."[34]

PW contends that the Bariglios, as PW agents, performed services for which it expected to be paid. Additionally, both Realty and VL, by receiving the benefits of such services, should have known that PW expected to be paid for them.

Fourth, PW argues that it has met the elements against VL and HH of its Intentional Interference with Contractual Relations ("intentional interference") claim. "One who intentionally and improperly interferes with the performance of a contract ... 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."[35]

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[33] In PW's Motion, it states that this claim was made against all defendants. However, in its Amended Complaint, PW only claims Quantum Meruit against Realty and VL.

[34] *State ex rel. Structa-bond, Inc. v. Mumford & Miller Concrete*, 2002 WL 31101938 (Del. Super.).

[35] *Smith v. Hercules, Inc.*, 2002 WL 499817 (Del. Super.).

According to PW, it is undisputed that all defendants knew about the Listing Agreement between it and Realty. Additionally, it contends that HH knew of the brokerage services contract by virtue of the "Broker Commission" provision contained in the CS Lease which was assigned to VL. Further, in executing the VL lease, VL and HH intentionally eliminated the commission provision in an attempt to release Realty's obligation to pay PW the commissions owed. PW also contends that the fact that the VL lease was to supercede the CS Lease was a significant factor in causing Realty to breach the contract.

Fifth, PW contends that the undisputed facts meet the elements of its claim for civil conspiracy against VL and HH. Under Delaware law, to state a claim for civil conspiracy, a plaintiff must plead facts supporting (1) the existence of a confederation or combination of two or more persons; (2) that an unlawful act was done in furtherance of the conspiracy; and (3) that the conspirators caused actual damage to the plaintiff.[36]

PW asserts that the elements of this claim have been met because HH and VL acted in concert and "unlawfully by fraudulently and intentionally interfering with the Listing Agreement and they did so with the intent to deprive Patterson-Woods of the commission owed to it."[37]

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[36] *Allied Capital Corp. v. GC-Sun Holdings*, L.P., 910 A.2d 1020 (Del. Ch. 2006).

[37] PW's Motion ¶ 34.

Realty's Motion for Summary Judgment[38]

In its Motion, Realty contends that it is not obligated to PW under the Listing Agreement by virtue of the release signed by the Bariglios on October 8, 2004. Realty contends that PW is bound by the release because the Bariglios signed as agents for PW. That release, they contend, rendered the Listing Agreement null and void. Therefore, Realty should be granted summary judgment on Counts I (breach of contract), II (declaratory judgment) and III (quantum meruit) of the amended complaint.

Realty argues the "Broker Commission" language in the CS Lease does not provide PW a basis to collect commissions. First, because the only person entitled to commission according to that provision is Todd Bariglio. Realty contends that he is not qualified to accept any commissions because he is a real estate agent and not a broker. Second, Realty argues that the language in the "Broker Commission" provision merely clarifies between the parties in the lease and who is obligated to pay commissions. The provision does not, however, create a legal basis upon which PW can collect commissions.

Realty contends that the VL lease does not give PW a basis to recover commissions. To support its argument, it points out the provision in the VL lease in which VL and HH represent that no broker was involved in the lease transaction.[39] The plain

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[38] The arguments contained in Realty's response to PW's Motion are incorporated into this section.

[39] *Supra* p. 8.

language contained in that provision, according to Realty, precludes PW from recovering commissions under that lease.

Realty also contends that even if the Listing Agreement is still in effect, the amount of commission owed to PW is in dispute. This is because the Listing Agreement contained two options for calculating commissions in the event of a lease on the Property. Realty contends that none of the parties involved with this litigation have been able to state with certainty which one of the options was ultimately selected. Additionally, Realty contends that there is a dispute as to whether PW can recover a commission for both the lease and the transfer of the Property.

Realty also argues that PW's claim for commissions are based upon speculation and are therefore, unenforceable. To support this contention, Realty points to the fact that although HH has a 25 year lease term under the VL lease, there is no guarantee that they will stay for the entire duration of the lease. Moreover, even if HH stays for the entire original lease term, there is no guarantee that it will exercise any of the five option periods under the lease. Therefore, the amounts claimed by PW, which are based upon the entire lease term and 50 years of option periods, are "speculative, at best, and [are] therefore unenforceable."[40]

Third-Party Defendants Bariglios Response to Realty's Motion

The Bariglios briefly respond to Realty's Motion because that motion requests summary judgment on all "claims now pending against Realty, and as to all counterclaims,

[40] Realty's Response p. 8.

crossclaims and third-party claims filed by Realty against other parties to the litigation." The Bariglios point out that Realty filed a third-party complaint against them for fraud. Realty does not, however, argue the substance of this claim or why it should be granted summary judgment on it in its motion. Therefore, summary judgment would be inappropriate on this claim as Realty has failed to present any arguments to support it.[41] The Court agrees, therefore, summary judgment on Realty's third-party claim against the Bariglios is **DENIED**.

Patterson-Wood's Response to Realty's Motion

PW responds that the release did not extinguish its right to claim the commissions owed under the Listing Agreement. First, it was not a party to the Chancery action, settlement or the release. It points out that PW is not identified as a party in the introductory paragraph nor listed as a signatory. Second, PW responds that it is not bound to the release by virtue of the signatures the Bariglios on the release. PW argues that the Bariglios were not acting as agents of PW when they signed the document. To support this argument, PW points out that the language in the settlement originally defining the Bariglios "individually or as agents of Patterson-Woods" was struck and initialed by the parties. Additionally, PW points out that the signature lines do not reflect that the Bariglios were signing on behalf of PW. This is contrasted to the fact that Paul Morgan and Eileen DiFelice signature lines do reflect that they were signing on behalf of their respective entities.

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[41] See *In re Asbestos Litigation*, 2007 WL 2410879 (Del. Super.) at *4.

PW contends that even if it was bound by the release, the terms of the release do not preclude it from seeking payment of the commissions from Realty. To support this contention, it points to the language in the release which specifically carves out claims relating to the "Happy Harry's Lease."[42] PW argues that the claims arising from that lease "necessarily arise" from the Listing Agreement. Therefore, the clear terms of the release negate Realty's argument that the release extinguished the Listing Agreement entirely.

PW next responds that it is entitled to a commission under both the CS and VL leases. According to PW, it is undisputed that paragraph 22(G)[43] clearly sets forth PW's entitlement to commission under the lease. In a footnote, PW addresses the fact that Todd Bariglio is designated in the lease as the only person to receive a commission. PW states that his name was used in error and that since Realty's lawyers drafted the CS Lease any ambiguity must be construed against them. Additionally, PW argues that the Delaware Supreme Court has acknowledged that where a "long-term lease expressly recognized the broker's entitlement to compensation, the broker may maintain an action based on quantum meruit."[44] Finally, PW contends that it is entitled to commissions under the VL lease because that lease contained material terms that were identical to those in the CS Lease. Therefore, PW can recover commissions under that lease on the bases of quantum meruit.

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[42] *See Supra* p. 6.

[43] *Supra* p. 4.

[44] PW's Response ¶ 13 *citing Petrosky v. Peterson*, 859 A.2d. 77, 78 (Del. 2004).

Valley-Limestone's Motion for Summary Judgment[45]

In its Motion, VL contends that it is entitled to summary judgment on Counts I, II, III, IV, and V of the amended complaint. As to PW's breach of contract claim, VL makes several arguments that it is not obligated under the Listing Agreement. First, VL argues that PW cannot assert a claim for breach of contract against it because there is no privity of contract between the parties. Second, VL contends that PW's claim must fail because VL is not a "successor-in-interest" to Realty. Third, VL argues that it cannot be liable for breach of contract because it did not execute any contract with PW. Fourth, VL argues that it cannot be held liable by virtue of the fact that PW is bound to the October release.

As to Count II (declaratory judgment), VL argues that PW lacks standing to assert any rights under the CS Lease because PW was not a party to that contract. Further, VL argues that PW cannot recover under the third-party beneficiary theory because the material purpose of the lease was not to convey a benefit to PW, it was to create a landlord/tenant relationship between VL and HH. VL also argues that the CS Lease, alone, cannot be a basis under which PW can collect commissions. To support this argument, VL cites to the testimony of PW's expert Colin McGowan who testified that the right to leasing commissions is entirely dependant on the existence of a valid listing agreement between

[45] The arguments set forth in VL's response to PW's Motion are also included in this section.

the parties.[46] VL contends that PW is not entitled to lease commission because Section 22(G) of the CS Lease is unenforceable. This is because Todd Bariglio is not a real estate broker qualified to accept commission.

Defendant VL contends that it is entitled to summary judgment on PW's quantum meruit claim. This is because, it argues, to allow a broker to recover commissions without a valid listing agreement would undermine the purpose and intent of the regulation requiring such an agreement.[47]

VL argues that PW cannot satisfy the third element of its intentional interference claim - that VL performed an intentional act that was a significant factor in causing the breach of the contract. This inability to make this clam arises because, VL contends, PW's initial complaint alleges that Realty breached the Listing Agreement when it transferred the property to VL. Therefore, the execution of the VL lease, which occurred months later, could not have been a significant cause of the breach.

As to PW's claim for civil conspiracy, VL contends that summary judgment should be granted in its favor. This is because, VL contends, a claim for civil conspiracy cannot lie without an underlying, independent tort. As argued above, since PW's intentional interference claim fails as a matter of law, therefore, PW's civil conspiracy claim must also fail.

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[46] See VL's Motion, Exhibit N, pp. 114-120.

[47] *Century 21*, 1999 WL 463776 at *3 citing *Amato & Stella Assoc., Inc. v. Florida North Investments, Ltd.*, 678 F. Supp. 445, 449 (D. Del. 1988).

Finally, VL contends that if PW can collect any commissions, it cannot collect commissions beyond those owed for the initial 25 year lease term. According to VL, to allow any recovery beyond that would be too speculative. Further, VL argues that PW cannot recover future lost profits without reducing them to present value. VL additionally contends that PW cannot recover any attorney's fees from it because no contract requiring such exists between the parties.

Patterson-Wood's Response to VL's Motion

PW responds that it has never argued that VL is liable as a successor in interest to Realty. PW clarifies that it is asserting VL is liable by virtue of the fact that it is a successor in interest to the Property. According to PW, it is undisputed that Realty assigned the Property, which was subject to the Listing Agreement, to VL. PW also notes that Realty is a 50% owner of VL and that its obligations under the Listing Agreement did not end when it formed a new entity.

PW next contends that the Listing Agreement between the parties is in full force and effect.[48] PW also contends that it is entitled to commissions under both the CS and VL leases.[49]

PW responds that the undisputed facts establish its intentional interference claim. According to PW, VL's argument that Realty had already breached misinterprets what the

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[48] PW incorporates the arguments made in its Response to Realty's Motion. *See Supra* pp. 15-16.

[49] *Id.*

third element of this claim requires. Specifically, PW contends that the act of VL need only be a "significant" factor in causing the breach, not the "sole" factor. Therefore, VL's action could have been a significant factor in causing Realty to breach the Listing Agreement, even though it was not the sole factor. Because its intentional interference claim is viable, PW argues that its civil conspiracy does not fail for lack of an underlying tort.

Happy Harry's Motion for Summary Judgment[50]

In its Motion, HH contends that summary judgment should be granted on PW's claims for Intentional Interference and civil conspiracy. HH contends that PW has failed to satisfy the elements of intentional interference as a matter of law. First, HH argues that since no contract exists between VL and PW, HH could not have interfered with it. Second, HH argues that PW has not satisfied the second element of intentional interference because "it is undisputed that HH was not provided and did not know of the terms of Realty's Listing Agreement."[51]

HH also contends that PW cannot establish the third element of intentional interference. It argues that in order to satisfy that element, PW must show that HH acted "so as to bring about the breach." The undisputed facts show, according to HH, that the

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[50] The arguments made in HH's response to PW's motion are included in this section.

[51] HH's Response, fn. 10.

VL lease was signed months after Realty allegedly breached the Listing Agreement by transfering the property. Additionally, Realty, HH asserts, had already "manifested an intent" to breach the Listing Agreement by virtue of entering the October 4 release. Therefore, HH's entering the lease with VL could not have been "a significant factor in causing the breach."

HH next contends that PW has failed to meet element four of its intentional interference claim, specifically because HH's act of entering into the lease with VL was completely justified, since the "undisputed" facts show that it only wanted to enter a valid lease for the Property because of the prime location. Further, it claims that its motive was to establish its lease on the Property to prevent any competitors from securing a lease.

HH also contends that PW cannot establish element five of intentional interference because no act of HH caused PW injury. It claims that it could not have caused injury because it was under no duty to ensure that the VL lease contained a provision entitling PW to commission. That obligation rested with Realty and/or VL. Additionally, HH did not cause injury because it never had any duty to pay commissions under either a listing agreement or the CS Lease. First, it is undisputed that HH never had a listing agreement with PW. Second, under the CS Lease, commissions were to be paid by the landlord, and not the tenant of the Property. Therefore, HH should be granted summary judgment on this claim.

Nor, HH asserts, can PW establish its civil conspiracy claim. First, PW's civil conspiracy claim cannot lie without an underlying tort. Since, as argued above, PW's intentional interference claim fails as a matter of law, so must its civil conspiracy claim as the underlying tort is then absent. Second, HH contends that entering into the VL lease does not constitute an "unlawful act," a required element of the claim.

HH also filed a separate summary judgment against VL. In that motion, HH relies on an indemnification provision in the VL lease which states that "[b]oth Happy Harry's and VL further agreed that, in the event that either is held liable for the brokerage commissions, then each party will indemnify and hold harmless the other from and against any and all such claims…"[52] According to HH, and pursuant to the that language, "[i]n the event that Happy Harry's is held to be liable in any way to Plaintiff Patterson-Woods & Associates, LLC, VLD shall indemnify Happy Harry's for the full amount of the award."[53]

Patterson-Wood's Response to HH's Motion

PW responds that the first element of intentional interference is established because of its contract with Realty. Further, PW has established element two because HH knew of the existence of the Listing Agreement and "the obligations imposed upon Realty to pay a commission to Patterson-Woods on a transfer and lease of the Property."[54]

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[52] HH's Motion for summary judgment against VL ¶ 12.

[53] *Id.* at ORDER.

[54] PW's Response ¶ 2.

PW also responds that it has met element three because it was HH which proposed and insisted on the inclusion of the "no broker" language contained in the VL lease. PW points out it is that very provision upon which Realty relies upon in arguing that it is not obligated to pay commission pursuant to the VL lease.[55] Further, PW points out that Mr. Larson of HH testified that the terms contained in the CS Lease were simply transferred to the VL lease.

PW next addresses HH's argument that their actions did not cause Realty to breach because, as asserted in PW's complaint, Realty had already breached by transferring the Property. This argument also fails because this element requires HH's action to be a *significant* factor causing the breach, not the *sole* factor, as contemplated by HH's argument. Finally, PW states that HH's arguments that it had no motive and received no benefit are irrelevant because neither is an element of intentional interference.

PW responds that HH's proposed justification for its actions is not compelling. This is because it ignores the fact that HH's already had a lease for the property by virtue of the assignment of the CS Lease to VL. PW also argues that the contingencies in the CS Lease were satisfied when the Property was transferred to VL. Lastly, PW responds that since the VL lease was simply the CS Lease reincarnate, the only benefit to HH in executing the VL lease was "the exclusion of the obligation to pay Patterson-Woods a commission on the lease."[56]

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[55] *See Supra* p. 8.

[56] PW's Response ¶ 8.

PW responds that HH's argument that they did not cause injury to PW fails by virtue of the fact that it was HH who "insisted on excluding" the "No Broker Commission" language contained in the CS Lease. Additionally, PW states that the injury to them is that they were never paid any commissions.

As to civil conspiracy, PW simply responds that because its intentional interference claims is viable, its civil conspiracy claim continues to be viable as well.

Applicable Standards

In order for a party to be entitled to summary judgement, that party has the burden of showing there is no genuine issue of material fact and he or she is entitled to judgement as a matter of law.[57] When, as here, cross motions for summary judgment are filed, the Court must consider whether there is a genuine issue of material fact.[58] When considering a motion for summary judgement, a court is required to examine the present record, all pleadings, affidavits and discovery.[59] The motion for summary judgement will be denied if the Court finds any genuine issues of material fact.[60]

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[57] *Grasso v. First USA Bank*, 713 A.2d 304, 307 (Del. Super. 1998).

[58] *State ex rel Mitchell v. Wolcott*, 83 A.2d 759 (Del. 1951).

[59] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973).

[60] *Hoechst Celanese Corp. v. Certain Underwriters of Lloyd's of London*, 673 A.2d 164, 170 (Del. 1996).

Discussion

The core question presented by these motions is whether or not the Listing Agreement was extinguished by the settlement and release. To this question, there are two sub-issues (1) whether the signatures of the Bariglios bound PW to the terms of the release, and (2) if PW is bound to the terms of the release, what effect do those terms have on the Listing Agreement? To determine the former, the Court must decide whether the Bariglios were acting as agents of PW who PW had authorized to sign the release when they signed it, so as to bind PW.

Defendants Realty and VL argue that the Bariglios bound PW to the release because they signed as agents of PW. PW argues that the Bariglios were not empowered or authorized to sign it as their agents. To support this argument, PW points out that (1) PW was not a signatory to the document, (2) PW is not named as a party in the preamble paragraph of the document, and (3) that, unlike the other signatories who signed in an individual and representative capacity, the Bariglios never signed in a representative capacity. Further, PW was not ever a party to the Chancery action which prompted the release. If the Bariglios did not sign the release as PW's agents, PW may seek to enforce the terms of the Listing Agreement.

Under Delaware law, the role of the Court is to determine the intent of the parties to a contract by looking to the words used by the parties therein.[61] "Clear and

[61] *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 739 (Del. 2006).

unambiguous language" contained in a contract should be given its ordinary and usual meaning.[62] "When the language of a contract is clear and unequivocal, a party will be bound by its plain meaning."[63] A contract will only be considered ambiguous if the provision in controversy is susceptible to two different meanings.[64]

In the present case, PW was not a party to the settlement and release documents. The clear and unambiguous language in those documents indicate just that. PW is not mentioned as a party in the introductory paragraphs of the release or the settlement. Although the Bariglios signed the document in their individual capacities, they did not sign on behalf of PW. The intent not to bind PW is evidenced by the fact that both Eileen DiFelice and Paul Morgan signed the document twice: once as individuals and once on behalf of their respective entities as indicated underneath their signatures. The Bariglios, by contrast, signed only once without any language underneath their signatures. Moreover, the stricken language indicates an intent not to bind PW. These facts can only lead to the conclusion that the Bariglios did not bind PW to the terms of the settlement and release. Therefore, the Court finds that the Listing Agreement is still an enforceable document by PW.

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[62] *Id.*

[63] *Id.*

[64] *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

It should also be noted that since the Listing Agreement is in effect, the contention of Realty/VL that the CS Lease "Broker Commission" provision is unenforceable has become moot. This is because the only document required for PW to receive commissions is the Listing Agreement itself. Under the Listing Agreement, if PW "procure[s] a person, corporation, or other entity to…lease" the Property, PW is owed commission, with or without an additional provision in the lease itself. Therefore, a lease commission may be owed, notwithstanding the fact that Todd Bariglio was not entitled to receive any commission.[65]

The analysis, of course, cannot end there. The next question is whether, based on the undisputed facts, any liability for commissions arose, and in turn are now owed to PW, under the Listing Agreement. It is undisputed that the Listing Agreement, if in effect, constitutes a valid listing agreement between the parties.[66] Therefore, the Court will look to that document and apply Delaware contract interpretation principles[67] to determine this question.

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[65] "An unlicenced person is ordinarily not entitled to collect a commission arising out of a real estate transaction." *Fusco*, 654 A.2d 833 (Del. 1995).

[66] See also *Century 21 Schaeffer Assoc. Realtors, Inc. v. Elsmere Realty Co.*, 1999 WL 463776 (Del. Super.)(holding that a listing Listing Agreement must be in writing and defining one as "an Listing Agreement between an owner of real property and a real estate agent, whereby the agent agrees to attempt to secure a buyer or tenant for specific property at a certain price and terms in return for a fee or commission.").

[67] *Supra* pp. 25-26.

The Listing Agreement dictates that PW is "to procure a person, corporation or other entity to purchase, lease or sublease the above described property." Further the Listing Agreement states "if any part of the ownership is transferred … through any source (and whether or not the owner does so directly) during the term of this listing agreement… owner agrees to pay Broker a fee in accordance with the attached schedule of Commission Rates & Fees."[68] In its motion, PW asks the Court to grant summary judgment against Realty; requiring Realty to pay commissions for the transfer and lease of the property. Realty, however, disputes that the Listing Agreement obligates it for *both* a transfer and a lease. Based on the language of the contract, namely the use of the word "or," it is clear to the Court that commissions arise from either the transfer *or* the lease of the property, and not both.[69]

The question remains whether, under the circumstances, commissions are indeed owed for the transfer or lease of the property. It is undisputed that PW, through the efforts of the Bariglios, obtained a lessee for the Property - HH. It is also undisputed that those efforts resulted in the signing of a lease between Colt Stream and HH on January 13, 2004 - the CS Lease. That lease, however, was contingent on Colt Stream receiving title to the property, which never occurred. It is clear to the Court that the only reasonable

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[68] *Supra* p. 3.

[69] This interpretation is also supported by the definition of a listing agreement noted in footnote 66 which also uses the language "agent agrees to secure a buyer *or* tenant."

interpretation of the meaning of the word "lease" as used in the Listing Agreement, is a valid, enforceable lease. Therefore, at the time the CS Lease was signed, it is arguable whether any commissions were owed to PW. That conclusion does not stop or end the analysis or determine that none of the defendants owe any kind of commission.

The next relevant factual occurrence, which may or may not trigger liability for commissions, was the assignment of the CS Lease from Colt Stream to VL. And in that assignment, Colt Stream warranted that the lease it had with HH was in full force and was enforceable.[70] Neither Realty nor VL disputes the validity of this assignment, in fact both completely omit its occurrence from their briefs.[71] On October 8, 2004, Realty deeded the Property to VL. PW contends that this transfer satisfied the contingency in the CS Lease thereby also rendering it valid. Therefore, according to PW, it was then owed commissions under the lease. PW also contends that commissions are owed for the transfer itself. As mentioned above, PW is only entitled to collect commissions for the transfer or the lease of the Property.

The Court finds that the Listing Agreement can be reasonably interpreted to require commissions for both the transfer and the lease. First, the transfer of the property from Realty to VL falls under paragraph 2 of the Listing Agreement which requires commission

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[70] See complete language *Supra* p. 7.

[71] Since the Court has not been presented with any evidence to suggest the assignment was somehow invalid, it will presume it valid.

to be paid "…if any part of the ownership is transferred…during the term of this listing agreement or any extension thereof." This provision applies whether or not PW was involved in negotiating the transfer of the property. Second, in light of the valid assignment of the lease, the Court agrees with PW that the contingency in the CS Lease was satisfied at the time of the transfer of the Property to VL. As the CS Lease was rendered valid at that time, commissions were then triggered under the Listing Agreement for the lease of the Property.

The problem arises in determining for which, the transfer or the lease, PW is owed commissions. This is due to the fact that both the transfer of the Property and the validating of the lease occurred at the same time, namely at the time the Property was transferred from Realty to VL. Premised upon these unique factual circumstances, the Listing Agreement is rendered ambiguous. The fact that commissions arise for both the transfer and the lease of the property cannot be reconciled with the use of "or" in the Listing Agreement. Reasonably, it gives rise to liability for commissions to be paid for both the transfer and the lease. Also reasonably, the Listing Agreement only requires commissions for one or the other. Therefore, the Listing Agreement is rendered ambiguous because of the simultaneous transfer of the Property and the satisfaction of the ownership contingency in the CS Lease. A determination for which occurrence PW is entitled commission payments, and in turn whether Realty has breached for not paying such commissions, must be left to the jury. This question must also be resolved before any

declaratory judgment regarding commissions owed, or not owed, can be rendered. Therefore, both Realty and PW's motions for summary judgment on breach of contract and declaratory judgment are **DENIED**. As material issues of fact exist, PW's motion is also **DENIED** on Counts I (breach of contract) and II (declaratory judgment) as they pertain to Realty.

In addition to Realty, PW has also requested summary judgment on its breach of contract and declaratory judgment claims against VL. These claims are premised on the contention that VL is the "successor" to the Property. Therefore, according to PW, the Listing Agreement follows the Property to bind VL. VL contends that it cannot be a "successor-in-interest" to Realty because there was no merger of the two companies. VL, in addition, argues that it is not obligated under the Listing Agreement because there was no privity of contract between VL and PW and it was not a signatory to that contract.

To support its contention that it is not a successor-in-interest, VL relies upon *Del. Ins. Guaranty Assoc. v. Christiana Care Heath Srvcs., Inc.*[72] In that case, the Supreme Court held that a successor corporation became an "insured" within the meaning of a statutory mandate which entitled Guaranty Association to reimbursement from "any insured" with a certain net worth. Christiana, although not an "insured" under the policy, was an "insured" for purposes of the statute.[73] Specifically, the court found Christiana was an insured under the statute because it formed as a result of a merger of Riverside, the

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[72] 892 A2d 1073 (Del. 2006).

[73] *See* 18 *Del. C.* § 4211(a)(2).

named insured. In finding so, however, the court's main purpose was to effectuate the intent and purpose of that statute.[74]

The *Guaranty Association* case is inapposite. In that case, the court's decision was based on a liberal construction of the purpose of the statute to "provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment…"[75] Its holding that Christiana was a "successor-in-interest" and therefore an "insured" was not premised on the fact that Riverside, the named insured, had merged into Christiana. In contrast, declaring Christiana a successor-in-interest was obviously an ancillary to this overarching goal. Therefore, this Court does not find this case, particularly the fact that Riverside merged with Christiana, determinative of whether or not VL is a successor-in-interest to Realty.

PW further offers the definition of successor-in-interest contained in Black's Law Dictionary as support for its contention. PW, however, fails to include the entire definition, which, had it, would defeat its position. That definition is a follows:

> **successor in interest.** One who follows another in ownership or control of property. In order to be a "successor in interest", a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance, *and transferee is not* a "successor in interest."[76]

It is undisputed that Realty transferred the Property to VL. Therefore, VL is not a

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[74] *Guaranty Assoc.,* 892 A.2d 1073.

[75] *Id.*

[76] Black's Law Dictionary 1431-32 (6th ed.1990)(emphasis added).

successor-in-interest under that definition. Moreover, as discussed above, VL is not a successor-in-interest under *Christiana*. PW does not offer any other premise upon which VL is somehow a "successor-in-interest" to Realty or the Property. Therefore, the Court holds that it is not.

VL is a separate entity from Realty, it did not sign the Listing Agreement, and in fact was not even in existence at the time it was signed. Further, VL is not a successor-in-interest to Realty or the Property. Basically, there is no contract between PW and VL that VL could have breached. Therefore, PW's claims for breach of contract and declaratory judgment against VL cannot be sustained. For these reasons, VL's motion for summary judgment against PW is **GRANTED** with regards to Counts I (breach of contract) and II (declaratory judgment) of the Complaint. PW's motion is **DENIED** with regard to these Counts.

PW next contends that it should be granted summary judgment on its quantum meruit claim (Count III) against Realty and VL. "To recover in quantum meruit, the performing party under a contract must establish that it performed services with an expectation that the receiving party would pay for them, and that the services were performed under circumstances that should have put the recipient on notice that the performing party expected the recipient to pay for those services."[77] However, where an enforceable contract exists between the parties, recovery on a theory of *quantum meruit*

[77] *Olsen v. T.A. Tyre General Contractor, Inc.*, 2006 WL 2661140 (Del.). at *3.

is inapplicable.[78] As discussed above, the Listing Agreement is enforceable between PW and Realty, therefore, PW cannot maintain its quantum meruit claim against Realty. For these reasons, Realty's motion for summary judgment is **GRANTED** with regard to Count III (quantum meruit) of the complaint. PW's motion is **DENIED** as to that Count.

As it pertains to VL, the claim does not fail by virtue of the enforceable contract. As discussed above, the Listing Agreement is not enforceable against VL because VL was not a party to the contract. There is, however, another basis upon which this claim must fail. Under Delaware law, a broker may only recover a commission where a written listing agreement exists between the parties.[79] Further, courts will not allow recovery under a theory of quantum meruit because "allowing a plaintiff to recover for services rendered, despite non-compliance with Regulation [VII.A], would significantly undercut the purpose and intent of the regulation."[80] In *Century 21*, the court disallowed enforcement of an oral listing agreement.[81] However, the rule clearly encompasses a situation where, as here, the parties do not have a listing agreement, oral or otherwise. For these reasons, VL's motion for summary judgment is **GRANTED** with regards to Count III (quantum meruit) of the

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[78] *Commonwealth Const. Co. v. Cornerstone Fellowship Baptist Church*, 2006 WL 2567916 (Del. Super.) at f.n. 1.

[79] *Hursey Porter & Assoc. v. Bounds*, 1994 WL 762670 (Del. Super.) at *9.

[80] *Century 21*, 1999 WL 463776 at *3 citing *Amato & Stella Assoc., Inc. v. Florida North Investments, Ltd.*, 678 F. Supp. 445, 449 (D. Del. 1988).

[81] *Id.*

complaint. Accordingly, PW's motion is **DENIED** as to that Count.

PW has requested summary judgment on its intentional interference claim against VL and HH. The elements of tortious interference with contact are: (1) a valid contract, (2) about which the defendant has knowledge, (3) an intentional act by defendant that is a significant factor in causing the breach of the contract, (4) without justification, and (5) resultant injury.[82] VL and HH both contend that PW cannot as a matter of law establish element three.[83] This is because, they contend, the contract between Realty and PW was already breached by Realty by virtue of its transfer of the Property to VL, at the time they executed their lease. The Court agrees with PW that the element requires the act by the defendant to be a "significant" factor in causing the breach and not the "sole" factor. Therefore, the Court cannot say, as a matter of law, the acts of VL and HH were not significant in causing Realty to breach. The determination of whether the facts and circumstances in this case establish intentional interference is properly left to the jury. For these reasons, both VL and HH's motions for summary judgment regarding Count IV (intentional interference) of the complaint are **DENIED**. As material fact question exist, PW's motion for summary judgment as to Court IV of the complaint is also **DENIED**.

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[82] *Faraone v. Rammuno*, 2005 WL 1654589 (Del. Super.).

[83] HH also contends that PW has not met elements one and two. These arguments do not persuade the Court to grant summary judgment in HH's favor. The Listing Agreement is in effect, therefore, a valid contract exists. It is also undisputed that HH knew of the contract between PW and Realty.

PW requests summary judgment with regard to Count V of the complaint alleging civil conspiracy against VL and HH. Under Delaware law, to state a claim for civil conspiracy, a plaintiff must plead facts supporting (1) the existence of a confederation or combination of two or more persons; (2) that an unlawful act was done in furtherance of the conspiracy; and (3) that the conspirators caused actual damage to the plaintiff.[84] In addition, a claim for civil conspiracy must be predicated on an underlying tort.[85] Both HH and VL contend that this claim must fail because there is not underlying tort, since PW's intentional interference claim fails as a matter of law. The Court, however, has determined PW's intentional interference claim survives summary judgment. Therefore, PW's civil conspiracy claim against VL and HH will not be dismissed on this basis.

HH additionally contends that civil conspiracy must fail PW cannot prove any act of HH constitutes an "unlawful act." Specifically, HH contends that its act of signing a lease with VL is not unlawful. In this case, however, there is more than just the innocent signing of a lease. There is enough in the record to, at least, suggest that actions of HH and VL tortuously interfered with Realty and PW's contract. If intentional interference is proven by PW, HH action would clearly qualify as "unlawful." This determination, as with intentional interference, is fact driven. Therefore, both HH and VL's motions for summary judgment are **DENIED** with regard to Counts V (civil conspiracy) of the

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[84] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020 (Del. Ch. 2006).

[85] *Anderson v. Airco, Inc.*, 2004 WL 2827887 (Del. Super.) at f.n. 17.

complaint. Accordingly, PW's motion is also **DENIED** at to that Count.

Lastly, HH has filed a motion for summary judgment against VL for indemnification "[i]n the event that Happy Harry's is held to be liable in any way to Plaintiff Patterson-Woods & Associates, LLC"[86] The indemnification provision contained in the lease, however, only pertains to HH or VL being held liable to PW for brokerage commissions.[87] PW has not brought any claims for brokerage commissions against HH, only two tort claims. Therefore, the Court cannot grant HH's motion premised on the indemnification provision in the VL lease. Therefore, HH's motion for summary judgment against VL is **DENIED**.

Conclusion

In conclusion, the Court's disposition on the motions presented is as follows:

1. Patterson-Wood & Associates, LLC's Motions for Summary Judgment against each of the defendants are **DENIED**.

2. Realty Enterprises, LLC's Motion for Summary Judgment against Patterson-Woods is **GRANTED** as to Count III (quantum meruit) and **DENIED** as to Count I (breach of contract) and Count II (declaratory judgment), and as to its third-party complaint against Anthony and Todd Bariglio.

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[86] *Id.* at ORDER.

[87] *Supra* p. 22.

3. Valley-Limestone Development's Motion for Summary Judgment against Patterson-Woods is **GRANTED** as to Count I (breach of contract), Count II (declaratory judgment), and Count III (quantum meruit), and **DENIED** as to Count IV (intentional interference with contractual relations) and Count V (civil conspiracy).

4. Happy Harry, Inc.'s Motion for Summary Judgment against Patterson-Woods is **DENIED** as to Count IV (intentional interference with contractual relations) and Count V (Civil Conspiracy).

5. Happy Harry, Inc.'s Motion for Summary Judgment against Valley-Limestone is **DENIED**.

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J.