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February 2007 New Mexico Bar Exam

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1)

MEMORANDUM

To: Laura Levine
From: Applicant
Date: February 27, 2007
Re: Tamara Shea

In response to your memorandum dated February 27, 2007, I submit to you this memorandum regarding whether or not our client Tamara Shea may maintain a cause of action against either Ann Remick or Dan Anderson as a result of her failure to receive a commission for the sale of Remick's property to Anderson. For the reasons that follow, I believe that we will not be able to maintain an action against Remick for breach of contract. However, we may establish a cause of action against Anderson for interference with prospective economic advantage, but likely will not be able to establish a cause of action against Anderson for interference with contractual relations.

I. Can Shea Maintain a Breach of Contract Claim Against Remick?

The simple answer to this question is that Shea will not likely be able to maintain a breach of contract action against Remick. The reason she would not be able to do so is that her listing agreement had expired, and thus any implied contract that our client thought she may have had to continue listing the property for sale after would not be enforceable under the Statute of Frauds.

According to the information obtained from our client in your interview with her yesterday, February 26, 2007, she had a written listing agreement in place with Remick to sell a 20-acre undeveloped property in Briarwood Township, Cleveland County. The listing agreement was signed in early November, allowing our client to advertise, list, and present the property to potential buyers in an attempt to sell the property for Renick. Further, the agreement provided that our client would receive "a brokerage commission of 10 percent of the agreed-upon sale price if, prior to the expiration of this Agreement, Broker procures a buyer..." The agreement was for a period of 60 days, and expired on January 8, 2007.

Our client was unable to deliver a buyer prior to the expiration of the agreement. Then, on January 10, 2007, after receiving a phone call from Mr. Dan Anderson expressing interest in the property, our client attempted to contact Renick in order to extend the agreement. She was unable to directly speak to her, but received a voicemail from Remick stating that she was out of town due to a family emergency and was not sure how long she would be gone, and also told our client that she would extend the listing agreement as soon as she returned and that our client should continue showing the property in the meantime. As a result, our client sent a confirmation letter to Renick for her signature, but it was never returned to her with Renick's signature affixed.

A. The Oral Extension of the Listing Agreement is Likely Unenforceable Due to Failure to Comply with the Statute of Frauds

§ 1500 of the Franklin Civil Code, which lists what agreements are required to be in writing, provides in pertinent part:

The following agreements are unenforceable, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged:

.....
(d) An agreement that authorizes or employs a broker, for compensation or commission:

1. To procure a purchaser or seller of real estate

The purpose of this statute is to protect real estate sellers and purchasers from false claims by brokers for commissions, and because it is designed to protect consumers, it is strictly enforced. *Mather v. Brown* (Franklin Ct. App. 1997). For a writing to satisfy the statute of frauds, the principle requirements are: (1) the writing shows the authority of the broker to act for the party to be charged, and (2) the writing is subscribed (signed) by or on behalf of the party to be charged. *Id.* The original listing agreement between our client and Renick clearly satisfies each of these required elements. However, the oral extension of the agreement is our main concern here, and it does not appear to meet each element as required to be enforceable.

In *Mather*, the court was confronted with a similar issue as the one faced here. In that case, a broker obtained a lease offer from a prospective lessee, only to have it rejected by the lessor that the broker had an agreement with. However, two weeks later, the broker discovered that the prospective lessee that she originally obtained had subsequently signed a lease agreement directly with the lessor, the result leaving the broker without a commission. According to the court, because there was a written and clearly valid brokerage agreement in place, the broker properly alleged a cause of action for breach of contract and allowed the broker to pursue her case to trial.

The *Mather* case is distinguishable on its facts from our client's predicament. Here, our client did not have an enforceable extension to the listing agreement that would comply with the Statute of Frauds. Our client's situation is more like the one the court faced in *Phillip v. Carter Industries* (cited in *Mather*), where the court rejected the broker's attempt to show that a valid and enforceable brokerage agreement existed because the only writings offered were from the broker to the client, and not from the client to the broker. Here, because the letter sent to Renick was from our client, and was not signed, it is likely that the court will reject any attempt to assert a breach of contract claim against Renick because the listing agreement had expired, and the extension failed to comply with the Statute of Frauds.

II. Can Shea Maintain a Claim for Interference With Contractual Relations Against Anderson?

Because the extension to the listing agreement is likely not enforceable, it is doubtful that our client can maintain an interference with contractual relations claim against Anderson.

Tort liability for interference with contractual relations requires an existing valid and enforceable contract. *Mather* (emphasis in original). To state a proper cause of action and prevail for interference with contractual relations, a plaintiff must plead and prove: (1) a valid and enforceable contract between the plaintiff and a third party, (2) the defendant's knowledge of the existence of the contractual relationship, (3) intentional and improper acts on the part of a defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff proximately caused by the Defendant's acts.

From the facts ascertained from our client at your meeting with her yesterday, there is reason to believe that we could offer facts that would meet elements 2-5 of a claim for interference with contractual relations. Of course, as discussed above, we may not be able to meet the threshold of proving a valid and enforceable contract. For reasons that will be discussed below in the conclusion, it may be prudent for us to plead alternative theories of recovery against Anderson, should we be able to prove a valid and enforceable contract with Remick.

III. Can Shea Maintain a Cause of Action for Interference with Prospective Economic Advantage Against Anderson?

Unlike the previous two questions asked, the answer to this question is a likely yes. Unlike the breach of contract claim and interference with contractual relations claim, this tort is not dependent on compliance with the Statute of Frauds. *Mather*. Thus, even if we are unable to establish a valid and enforceable contract, our client would still be able to proceed based on this cause of action.

To establish and prevail on a claim for interference with prospective economic advantage, we must plead and prove, an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff, (2) defendant's knowledge of the existence of the relationship, (3) intentional and improper acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff proximately caused by the defendant's acts.

This is an intentional tort that can only be established if Anderson had knowledge of the relationship between our client and Remick. See *Downey & Co. v. Sierra Growers* (Franklin Ct. App. 2000). Given that we can proffer evidence of an offer to purchase Remick's property signed on January 13, 2007, I believe that we can clearly establish that Anderson had full knowledge of the relationship between our client. The question then becomes if we can establish to the trier of fact's satisfaction that Anderson committed intentional and improper acts designed to disrupt the relationship between our client and Remick. According to our client, Remick admitted to her that Anderson made statements regarding the inability to trust realtors, amongst other things, in conjunction with inducing her to deal with him directly in order to save the commission. (Of course, there may be hearsay concerns in getting testimony of this nature admitted at trial, but that is beyond the scope of this memorandum). And, there is little doubt we could establish the other elements to the court's satisfaction, that there was an actual disruption and economic harm.

CONCLUSION

It is unlikely that a breach of contract action against Remick would succeed due to the failure of the extension of the listing agreement to comply with the Statute of Frauds. In addition, because we would likely not be able to establish a valid and enforceable contract, we would not be able to maintain a claim for interference with contractual relations against Anderson. However, because there is no need to show a valid and enforceable contract, our client would likely be able to maintain an action for interference with prospective economic advantage against Anderson. For reasons of prudence, if we were to file an action against Anderson, it would be best to plead both theories in the alternative in case other evidence comes to light that would establish a valid and enforceable contract between Remick. This type of alternative pleading was implicitly recognized as proper in *Mather*.

If you have any questions, please let me know.

- Applicant

END OF EXAM