



1998). Because the plaintiff insists that this motion be considered under Rule 12(c), the moving defendants having filed an answer, Plaintiff's Objection to Motion to Dismiss of Defendants Janet S. Moore and Janet S. Moore Real Estate, LLC ("Objection") (Docket No. 21) at 6, my recommendation is that judgment be entered for these defendants.

## **II. Factual Background**

The amended complaint, filed after the motion to dismiss was filed, includes the following factual allegations relevant to the claims asserted against the moving defendants. The plaintiff, a resident of Virginia, brings this action in his capacity as trustee of the Roger Diemmer White Inter Vivos Trust ("the Trust"). First Amended Complaint (Docket No. 22) ¶ 1. Defendant Moore is a resident of Mount Desert, Maine, and defendant Janet S. Moore Real Estate, LLC, is a Maine limited liability company with its principal place of business in Mount Desert, Maine. *Id.* ¶ 4.

In 1989, the Trust acquired two acres of oceanfront property in the town of Bar Harbor, Maine from a testamentary trust of which the plaintiff was the sole beneficiary. *Id.* ¶ 7. In August 1990 the plaintiff had constructed a house on the property, which he and his family have used for vacation purposes. *Id.* ¶ 10. In or about June 2000 a house was built on an abutting lot which adversely affected the driveway to the plaintiff's house. *Id.* ¶ 11. Defendant Joyce, a real estate broker, suggested that the plaintiff sell the property. *Id.* ¶¶ 9, 12. Joyce stated that she was aware of a potential buyer, who later was identified as defendant Meador. *Id.* ¶ 13. The plaintiff listed the property for sale with Joyce during the period July 1, 2000 to January 1, 2001. *Id.* ¶ 15. The property was not sold during this period. *Id.* ¶ 22.

The plaintiff again listed the property for sale with Joyce during the period March 1 to December 1, 2001. *Id.* ¶ 23. After a series of offers and negotiations, Meador agreed to purchase the property for \$1.1 million. *Id.* ¶¶ 25-27. The plaintiff signed a purchase and sale agreement on May 2,

2001. *Id.* ¶ 30. Closing was to take place on or before June 15, 2001. *Id.* ¶ 31. On or about May 16, 2001 Moore, who was Meador's real estate broker, arrived at the property with an appraiser. *Id.* ¶ 32. Moore stated that she had a right under the purchase and sale agreement to be on the property for purposes of an appraisal. *Id.*

The plaintiff asked Moore if she knew of any recent property sales in the area of his property, and Moore replied that she did not. *Id.* ¶ 33. The plaintiff asked Moore if oceanfront property was selling and she replied that it was not. *Id.* Moore made a reference to radon test results and the difficulty the plaintiff would have in selling his property if the radon test results were unfavorable. *Id.* On or about May 18, 2001 Joyce provided the plaintiff with the results of a radon test showing a level of radon that was of some concern. *Id.* ¶ 34. In late May and early June of 2001 the plaintiff saw several advertisements for property for sale in the Bar Harbor area that led him to believe that the agreed sale price for his property was not reflective of the fair market value. *Id.* ¶ 37.

Closing took place on June 15, 2001. *Id.* ¶ 39. A commission of \$33,000 was paid to Moore. *Id.* ¶ 41.

Moore's representations that oceanfront property in the Bar Harbor area was not selling, that no sales of property in the area of the plaintiff's property had occurred within the year prior to the sale of the property and that the radon test results meant that no other buyer could be found were false. *Id.* ¶ 51.

### **III. Discussion**

The amended complaint alleges fraud, conspiracy to commit fraud, unjust enrichment and breach of 32 M.R.S.A. § 13274(2) against Moore (Counts I, II, IV and VI) and breach of the same statute against Janet S. Moore Real Estate, LLC (Count VI). The Moore defendants seek dismissal of all of these claims.

## A. Fraud

Under Maine law,

a defendant is liable for fraud or deceit if he (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to her damage. . . . Reliance is unjustified only if the plaintiff knows the representation is false or its falsity is obvious to her.

*Francis v. Stinson*, 760 A.2d 209, 217 (Me. 2000) (citation and internal punctuation marks omitted).

The Moore defendants challenge the second and fifth elements of this claim. Motion at 3-5.

All of the misrepresentations alleged in the amended complaint to have been made by Moore were made after the plaintiff had executed the purchase and sale agreement. Under Maine law, a purchase and sale agreement may be specifically enforced by the buyer. *See, e.g., O'Halloran v. Oechsle*, 402 A.2d 67, 70 (Me. 1979). The plaintiff contends that the statements “caused Plaintiff to take actions he otherwise would not have taken,” based on a contingency in the purchase and sale agreement that allowed the buyer to void the sale if the result of the radon test was unsatisfactory to him. Objection at 7-8. But only the buyer could have voided the contract. The amended complaint alleges that the plaintiff gave Meador \$2,000 “in exchange for which Meador would agree that he was satisfied with the results of all inspections.” First Amended Complaint ¶ 36. This is apparently the action that the plaintiff “otherwise would not have taken.” However, the amended complaint does not allege that Meador demanded the payment or that he would in fact have voided the contract if the payment were not made. The plaintiff’s memorandum offers only speculation that Meador “may have voided” the purchase and sale agreement if he had not offered the \$2,000. Objection at 10. Under these circumstances, the amended complaint does not allege that Moore’s misrepresentations were material, and Moore is entitled to dismissal of this claim.

## **B. Conspiracy to Commit Fraud**

Moore contends that a claim of civil liability for conspiracy “is not recognized by any accepted theory of liability in Maine law.” Motion at 5. Maine law does require “the actual commission of some independently recognized tort” in order to support a claim for civil conspiracy. *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998). The plaintiff contends that he has alleged fraud as the independent tort. Objection at 11. It is the tort, “and not the fact of combination,” that is the foundation of civil liability. *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972). A case cited by the plaintiff, *McNally v. Mocarzel*, 386 A.2d 744, 748 (Me. 1978), actually supports Moore on this issue: “In Maine, conspiracy is not a separate tort but rather a rule of vicarious liability.” Accordingly, Moore may only be liable for her own fraudulent activity, a claim that has not been adequately pleaded, or vicariously for the fraud of someone else. The amended complaint does not allege vicarious liability on the part of Moore in this regard. First Amended Complaint ¶¶ 59-63. Therefore, she is entitled to dismissal of the claim asserted against her in Count II.

## **C. Unjust Enrichment**

Moore contends, in somewhat conclusory fashion, that “[t]he facts alleged in the complaint . . . fail to meet even a minimal standard of purported injustice or unfairness” and that she is therefore entitled to dismissal of the claim asserted against her in Count IV of the amended complaint. Motion at 6. There are three elements to a claim for unjust enrichment under Maine law:

One[,] a benefit conferred upon the defendant by the plaintiff; two[,] an appreciation or knowledge by the defendant of the benefit; and three[,] the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

*Bowden v. Grindle*, 651 A.2d 347, 350 (Me. 1994) (citation and internal punctuation marks omitted). Here, the plaintiff identifies Moore's commission as the benefit conferred. First Amended Complaint ¶ 70. Because he has not adequately pleaded fraudulent activity by Moore, and because the only activity alleged in the amended complaint that could possibly provide a basis for a finding of inequitable retention of the commission occurred after the plaintiff had incurred an enforceable obligation to close on the sale of the property and therefore to pay the commission, the plaintiff has not pleaded a cause of action for unjust enrichment against Moore. She is entitled to dismissal of the claims asserted against her in Count IV of the amended complaint.

#### **D. Statutory Violation**

The amended complaint alleges that the Moore defendants violated 32 M.R.S.A. § 13274(2), First Amended Complaint ¶¶ 79-81, which provides, in pertinent part:

**Duty to seller.** The duty of a buyer agent to a seller is governed by the following.

**A.** A real estate brokerage agency engaged by a buyer shall treat all prospective sellers honestly and may not knowingly give them false information including material facts about the buyer's financial ability to perform the terms of the transaction.

The Moore defendants contend that a materiality requirement must be read into this statute, and that Moore's alleged misrepresentations could not have been material to the sale of the property. Motion at 7. They also argue that the plaintiff was no longer a "prospective" seller by the time the alleged misrepresentations were made. *Id.* I agree with the latter argument. The misrepresentations alleged in the amended complaint to have been made by Moore all took place after the plaintiff had executed the purchase and sale agreement. Upon executing that contract, the plaintiff became legally bound to sell the property. While this statute has not yet been interpreted by the Maine Law Court in a reported decision, I am confident that that court would not impose liability under the statute for the provision of false information to the seller by a buyer's agent only after the seller has become legally committed to



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