IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOSEPH GRACE, a single individual, Appellant, v. SUSAN ELIZABETH HAGY d/b/a COLDWELL BANKER BAIN, INC., JULIE MCAVOY and JOHN DOE MCAVOY, and the marital community composed thereof, DAMON THOMAS and JANE DOE THOMAS, and the marital community composed thereof; JAMES ALEKSON AND JANE DOE ALEKSON, and the marital community composed thereof, URBAN VENTURE, LLC, a Washington limited liability company, URBAN REALTY GROUP, LLC, a dissolved Washington Limited Liability Company, Respondents.	)	No. 62902-6-I UNPUBLISHED OPINION FILED: November 16, 2009

Schindler, C.J. — A court considering a motion to dismiss under CR 12(b)(6) is not required to accept as true allegations in the complaint that state only legal conclusions. Joseph Grace alleged only legal conclusions and failed to allege facts to support a necessary element of his claim for tortious interference with a business expectancy against James Alekson. We affirm the trial court's dismissal of Grace's third amended complaint as to Alekson, affirm the award of attorney fees to Alekson for defending a frivolous action, and award fees on appeal.

FACTS

Developers Urban Venture, LLC and Milliken Development, LLC jointly offered residential condominiums in "Development 2200" for sale by public advertisement and listings. The developers engaged real estate agents Damon Thomas and Julie McAvoy at Urban Realty to assist them in selling the properties. In January 2007, Grace attempted to purchase a particular residential unit at the development by placing a reservation with Thomas. He was ultimately unable to do so when the unit was sold to another buyer.

Grace filed suit against Thomas, McAvoy and three others, including James Alekson,[1] raising several different theories arising out of his overall claim that Thomas acted improperly by arranging the sale of the property to another purchaser rather than to him. Alekson filed a motion to dismiss under CR 12(b)(6), arguing that Grace had alleged no facts that could support a recovery against him under any of the theories identified in the complaint. Grace responded by filing a third amended complaint that withdrew all prior theories as to Alekson and substituted a new theory of tortious interference with business expectancy. Alekson replied by arguing that Grace's new theory was also appropriately dismissed under CR 12(b)(6).

The trial court granted the motion to dismiss and later granted Alekson's request for attorney fees for being required to defend a frivolous suit.

Grace appeals.

[1] The lawsuit names as defendants James and Jane Doe Alekson and their marital community. We refer to these defendants collectively as Alekson. James Alekson is identified in the complaint as an agent or representative of Milliken Development, one of the two developers of the condominium project. Milliken Development, however, is not one of the named defendants in the suit.

ANALYSIS

Under CR 12(b)(6), a complaint can be dismissed for "failure to state a claim upon which relief can be granted." Whether such a dismissal is appropriate is a question of law an appellate court reviews de novo. Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). A dismissal under CR 12(b)(6) is appropriate only if "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting Bowman v. John Doe Two, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)). In this setting, "a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record." Tenore, 136 Wn.2d at 330. A CR 12(b)(6) motion should be granted "'sparingly and with care'" and "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Tenore, 136 Wn.2d at 330, (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). "'[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.'" Bravo v. Dolsen Companies., 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). The reviewing court, however, is not required to accept the complaint's legal conclusions as true. Haberman, 109 Wn.2d at 120, appeal dismissed, 488 U.S. 805, 109 S. Ct. 35, 102 L.Ed.2d 15 (1988).

To state a claim of tortious interference with a contractual relationship or

business expectancy, the plaintiff must allege facts showing:

> (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). A plaintiff must establish all of the essential elements to support a claim of tortious interference. See Boyce v. West, 71 Wn. App. 657, 665, 862 P.2d 592 (1993) ("a complete failure of proof concerning an element necessarily renders all other facts immaterial.")

The parties dispute whether Grace's third amended complaint sufficiently alleged facts that could establish any of the necessary elements of the tortious interference claim against Alekson. Because facts must support every element of the claim, we need address only the fourth element, the requirement that Alekson interfered with Grace's business expectancy by improper means.[2]

Most of the complaint addressed behavior by Thomas and McAvoy, the listing agents. Grace alleged that he contacted Thomas about purchasing a particular residential unit in the development. Although Thomas tried to dissuade him, he also told Grace that Grace could obtain the right to purchase the unit by placing a reservation. Grace alleged that when he indicated he definitely wanted to reserve the unit, Thomas stated that he, Thomas, would place a reservation for Grace immediately, but instead contacted another purchaser. Grace further alleged that Thomas, "using

[2] Grace does not contend that the third amended complaint contains any allegation that Alekson acted with an improper purpose.

the confidential information provided by plaintiff regarding plaintiff's desire to purchase the unit," contacted the other purchaser to urge him to reserve the unit quickly and helped the other purchaser hurriedly prepare a faxed reservation to deprive Grace of the unit.

Although most of Grace's complaint addresses the defendants other than Alekson, Grace contends that it stated sufficient claim that Alekson used improper means to interfere with his purchase because, he asserts, it "clearly alleges that Mr. Alekson used confidential information that was improperly obtained from Mr. Thomas for his own advantage." See Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 210 n.11, 582 P.2d 1365 (1978) (for purposes of tortious interference claim, misuse of confidential information can establish the requisite improper means).

There is, however, no such language in the third amended complaint. It appears, rather, that Grace is relying upon two particular paragraphs of the complaint for his assertion that Alekson misused confidential information to deprive him of the unit:

> Defendant James Alekson stated that he assisted Mr. Thomas with reserving the unit for his other client. Mr. Alekson worked with Mr. Thomas to contact the other client and helped convince that client to reserve the unit before plaintiff did. Mr. Alekson improperly used his influence and position to interfere with plaintiff['s] attempts to obtain the unit.
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> . . .
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> Defendant James 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. Defendant Alekson intentionally and improperly interfered in that relationship inducing or causing plaintiff to be unable to reserve the unit. This conduct constitutes tortious interference with business expectancy.

With respect to the necessary element of interference by improper means, however, this language does no more than state legal conclusions, which, unlike factual allegations, the court does not accept as true. See Haberman, 109 Wn.2d at 120. First, Grace's initial contention that Thomas misused confidential information is entirely conclusory. He alleges no facts that could show how Thomas, as a seller's listing agent, had any form of confidential relationship with Grace when the very nature of Thomas's role would necessarily require him to communicate Grace's desire to purchase the property to the seller. Moreover, even if the complaint sufficiently alleged facts that could support a conclusion that Thomas had improperly used confidential information, there are no facts alleged to show Alekson would have known the normally nonconfidential business relationship between Grace, as a prospective purchaser, and Thomas, as a seller's agent, had somehow turned into a confidential relationship.

Grace nonetheless cites the rule that a hypothetical factual scenario may defeat a motion to dismiss under CR 12(b)(6). See Bravo, 125 Wn.2d at 750. He does not present any set of hypothetical facts, however, that could do so here. We conclude that Grace's suit was properly dismissed for failure to state a claim upon which relief could be granted under CR 12(b)(6).

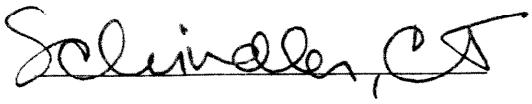
Grace next challenges the court's award of attorney fees to Alekson under RCW 4.84.185. RCW 4.84.185 allows the trial court to order the nonprevailing party to pay the prevailing party's reasonable expenses, including attorney fees, when the action as a whole is frivolous and advanced without reasonable cause. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). A lawsuit is frivolous

under RCW 4.84.185 when it cannot be supported by any rational argument on the law or facts. Smith v. Okanogan County, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). "The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite." Skimming v. Boxer, 119 Wn. App. 748, 756, 82 P.3d 707 (2004) (citing Suarez v. Newquist, 70 Wn. App. 827, 832-33, 855 P.2d 1200 (1993)). We review a trial court's award under RCW 4.84.185 for an abuse of discretion. Koch v. Mut. of Enumclaw Ins. Co., 108 Wn. App. 500, 510, 31 P.3d 698 (2001).

Here, Alekson initially filed his CR 12(b)(6) motion to dismiss Grace's second amended complaint that had alleged different theories against Alekson, including negligence, conflict of interest, abuse of fiduciary duty, and consumer protection act violations. Grace responded by amending that complaint to withdraw those claims, effectively conceding Alekson's argument that they lacked any debatable merit, and replaced them with the new, equally meritless tortious interference claim addressed above. We find no abuse of discretion on the part of the trial court in imposing sanctions after that claim was dismissed as well.

Alekson requests attorney fees for defending a frivolous appeal under RCW 4.84.185 and RAP 18.1. Considering the lack of colorable merit to Grace's claim, fees are appropriate. Subject to his compliance with RAP 18.1, we award Alekson his attorney fees on appeal in an amount to be determined by a commissioner of this court.

Affirmed.



WE CONCUR:

Leach, J.

Cox, J.