DISTRICT COURT, COUNTY OF ROUTT, COLORADO 1955 Shield Drive P.O. Box 773117 Steamboat Springs, CO 80477 (970)879-5020	
Plaintiffs: **JOHN and JENNIFER COSOMANO** v. Defendants: **ALPINE GROUP, LLC**	**COURT USE ONLY**
	Case Number: 11CV60
ORDER REGARDING DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT	

THIS MATTER comes before the court upon Defendant Alpine Group, LLC's First Motion for Summary Judgment filed September 19, 2011. Plaintiffs John and Jennifer Cosomano filed a Response on October 20, 2011 and Alpine Group filed its Reply on November 3, 2011. The court, upon being fully apprised of the facts and law, enters the following order:

Statement of Facts

In 2006, Plaintiffs and Alpine Group entered into a contract wherein Plaintiffs purchased from Alpine Group two pieces of real property in Moffat County, Colorado described as Condominium Units 27 and 28, Alpine Condominiums. The parties' contract and consideration for the sale of the units included a provision that required Alpine Group, at the election of the Plaintiffs, to repurchase the units at the end of the Plaintiffs' third year of ownership for a price equal to the original purchase price. Alpine Group did not repurchase the units and Plaintiffs commenced this action on April 1, 2011. As part of Plaintiffs' claims against Alpine Group, Plaintiffs allege in paragraph 8 of their Complaint as follows:

> Additionally Defendant interfered with Plaintiffs' contractual relations when on January 1, 2010 the Defendant caused a tenant in Unit 27 Alpine Condominium, who was paying the sum of $600.00 per month for the right to occupy such Unit to vacate such Unit and not pay his contractual obligation to Plaintiffs.

This allegation forms the basis for a tort claim of interference with contractual relations. To establish tortious interference with a contract requires that:

> (1) the plaintiff had a contract with another party;
> (2) the defendant knew or should have known of such contract's existence;
> (3) the defendant intentionally and improperly induced the other party to the contract not to perform the contract with the plaintiff; and
> (4) the defendant's actions caused the plaintiff to incur damages.

Lutfi v. Brighton Cmty. Hosp. Ass'n, 40 P.3d 51, 58 (Colo. App. 2001).

Alpine Group seeks summary judgment on Plaintiffs' tortious interference with contract claim arguing that Plaintiffs have failed to demonstrate two important elements: (1) the Plaintiffs had no contract with the third party (tenant Daryl Scott) and (2) Alpine Group did not act improperly.

Standard of Review

C.R.C.P. 56(b) allows for a party against whom a claim, counterclaim, or cross-claim is asserted to move for summary judgment in the defending party's favor as to all or any part thereof. The district court may enter summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. "In the context of a summary judgment proceeding, an issue of material fact is one the resolution of which will affect the outcome of the case." *Krane v. Saint Anthony Hosp. Systems*, 738 P.2d 75, 77 (Colo. App. 1987).

The moving party has the initial burden of "informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which demonstrate the absence of a genuine issue of material fact." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id*. "Once the movant has made a convincing showing that genuine issues of fact are lacking, the non-moving party must demonstrate by admissible facts that a real controversy exists." *Hauser v. Rose Health Care Systems*, 857 P.2d 524, 527 (Colo. App. 1993).

"Where the undisputed evidence permits of offsetting inferences, the party against whom a motion for summary judgment is made is entitled to all favorable inferences which may be reasonably drawn from the evidence and if when so viewed reasonable men might reach different conclusions the motion should be denied." *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 397 P.2d 227, 231 (Colo. 1964). If any doubt exists, the motion should be denied. *Id.* at 172.

Issues Presented

I. IS THERE A GENUINE ISSUE OF MATERIAL FACT ABOUT WHETHER A CONTRACT EXISTS BETWEEN THE PLAINTIFFS AND THE THIRD PARTY TENANT, DARYL SCOTT?

II. IS THERE A GENUINE ISSUE OF MATERIAL FACT ABOUT WHETHER ALPINE GROUP ACTED IMPROPERLY?

Analysis and Order

Under Colorado law, the tort of intentional interference with contract is premised on the existence of a contract between a plaintiff and a third party. *Colorado National Bank v.*

Friedman, 846 P.2d 159, 170 (Colo. 1993). The tortious conduct occurs when the defendant, not a party to the contract, induces the third party to breach the contract, or interferes with the third party's performance of the contract. *Id*. The tort exists to protect parties to a contract; accordingly, it is the conduct of the third person who is not a party to the contract that is punished for inducing a breach of performance of the contract. *Id.* Under Colorado law, a party cannot be liable for interfering with his or her own contract. *Vinton v. Adam Aircraft Industries*, 232 FRD 650 (D.Colo. 2005).

In this case, Alpine Group submits copies of two lease agreements between Alpine Group and tenant Daryl Scott. The first lease term is from October 1, 2009 for a period of 6 months and applies to Unit 27. The second lease commences October 1, 2010 on a month to month basis for Unit 5. Alpine Group also submits an affidavit from Sara Foland, the Property Manager for Alpine Group, who attests that she personally executed the leases and that Daryl Scott and Alpine Group are the only parties to the leases.

In their Response, Plaintiffs argue that they succeeded to or were assigned the Unit 27 lease obligations and rights of Alpine Group on December 14, 2009. To support this allegation, they submit email correspondence between Ms. Foland and James Black, who Plaintiffs describe as a managing member for Alpine Group. In a December 14, 2009 email, Mr. Black states that management of the Plaintiffs' units will be transferred to Plaintiffs' agent, Sandra King of ReMax, and requests that copies of the current leases and deposits be transferred to Ms. King. He indicates that Ms. King would be responsible for the management of these units and she will be dealt with as the owner of the condominium units. Plaintiffs also cite language within the Unit 27 lease agreement with Mr. Scott dated September 19, 2009 that "[t]his Lease Agreement shall be binding upon and inure to the benefit of the heirs, personal representatives, successors and assigns of the parties hereto." The emails indicate that a tenant was still living in Unit 27 at the time of the alleged assignment.

In its Reply, Alpine Group concedes that Plaintiffs have raised a plausible issue of fact related to whether they are a party to the contract by virtue of assignment. To rebut this, Alpine Group presents testimony from John Cosomano at his October 18, 2011 deposition in which he states he has no evidence to support the interference with a contract claim, and that there was never a lease between the Cosomanos and the tenant in Unit 27. Instead, Mr. Cosomano states that the contract at issue was between the "tenant and Alpine because they were handling the management." John Cosomano Deposition at 78:9-79:4.

Viewing the facts in a light most favorable to Plaintiffs, it is possible that the lease agreement for Unit 27 was assigned from Alpine Group to the Plaintiffs on December 14, 2009. Therefore, a genuine issue of material fact exists about whether the Plaintiffs had a contract with Mr. Scott in Unit 27 at the time Mr. Scott moved into Unit 5.

A "cause of action for tortious interference with contract does not arise every time a third party negotiates with one of the contracting parties on the subject matter of the contract." *Baker v. Carpenter*, 516 P.2d 459, 461 (Colo. App. 1973). Instead, an actionable claim for intentional interference of contract requires improper conduct inducing a breach. *Lufti*, 40 P.3d 51.

Alpine Group argues that Plaintiffs have presented no evidence that Alpine Group acted improperly to induce a breach. Alpine Group also relies on an affidavit from Sara Foland to demonstrate that Alpine Group executed a new lease agreement with Mr. Scott in a good faith response to Mr. Scott's desire to move to a ground floor unit.

> Some time after moving into Unit 27, Mr. Scott expressed his desire to move his family to a first floor apartment if one became available. His desire to move from the third to the first floor was for family reasons and accessibility. Foland Affidavit, ¶10.

The Plaintiffs challenge the admissibility of Ms. Foland's testimony as inadmissible hearsay.

> Affidavit supporting motion for summary judgment must contain evidentiary material, which, if affiant were in court and testifying on witness stand, would be admissible as part of his testimony, and thus affidavits based on inadmissible hearsay are insufficient to support summary judgment. *People v. Hernandez and Associates, Inc.*, 736 P.2d 1238 (Colo. App. 1986); C.R.C.P. 56(e); C.R.E. 802.

Alpine Bank argues that Ms. Foland's statement is not offered for the truth of what Mr. Scott did, but for establishing Alpine's conduct. Although perhaps the statement is offered to demonstrate how Alpine Bank's representative reacted, it seems to the court it is really offered for the truth of what Mr. Scott did and would not be admissible. However, the court does not find the statement about why Mr. Scott wanted to move to a new unit necessary for determining whether summary judgment should be granted.

The court focuses instead on other information contained within Ms. Foland's affidavit. Ms. Foland explains that in October 2009 she "approached Mr. Scott and informed him that Alpine Group would have Unit 5 soon available for rent." Foland Affidavit at ¶11. She then attests that the existing tenants moved out of Unit 5 around the first week in December 2009 and Mr. Scott moved in shortly thereafter. *Id*. Plaintiffs offer no counter averment otherwise.

Significantly, Ms. Foland approached Mr. Scott in October 2009 to inform him Unit 5 would soon be available for him. According to Plaintiffs, the lease agreement for Unit 27 was not assigned to the Plaintiffs until December 14, 2009. Therefore, no contract existed between the Plaintiffs and Mr. Scott when Ms. Foland informed Mr. Scott that he could move out of Unit 27 and into a ground floor apartment. Logically, this evidence demonstrates that Alpine Group was responding to the wishes of a tenant which were made well before the December 14 assignment. Due to circumstances, it appears Mr. Scott was unable to move until after or around December 14. Even when viewing the facts in a light most favorable to Plaintiffs, the court can no infer any improper conduct from this set of facts.

Finally, Plaintiffs argue that Alpine Group tortiously interfered with the Plaintiffs' contract by "allowing" Mr. Scott to move from Unit 27 to Unit 5. This argument fails as a matter of law. When a defendant's activities are limited to contracting with the third party with knowledge that the contract could not be performed if the first contract continued to exist, there is no issue of unwarranted or intentional interference with the contract." *Zelinger v. Uvalde Rock*

Asphalt Co., 316 F.2d 47, 51 (10th Cir. 1963)(applying Colorado law). Such is the circumstance in this case. Plaintiffs have not provided any evidence that Alpine Group's conduct was improper in any way.

Cast in a light most favorable to Plaintiffs, the facts as argued by the Plaintiffs do not indicate Alpine Group intentionally and improperly induced Mr. Scott not to perform the contract with the Plaintiff. "If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 713 (Colo. 1987). There exists no genuine issue of material fact about whether Alpine Group intentionally and improperly induced Mr. Scott to not perform his contract with Plaintiffs. Plaintiffs are unable to prove the necessary elements for their tort claim of interference with contractual relations. Alpine Group is entitled to summary judgment as a matter of law.

WHEREFORE, the court grants Defendant Alpine Group, LLC's First Motion for Summary Judgment. Plaintiffs' claim of tortious interference with contractual relations is dismissed with prejudice.

SO ORDERED, this 23rd day of November, 2011.

BY THE COURT:

Shelley A. Hill
District Court Judge

This document constitutes a ruling of the court and should be treated as such.

Court:	CO Routt County District Court 14th JD
Judge:	Shelley A Hill
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Court Authorizer:	Shelley A Hill

/s/ Judge Shelley A Hill