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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

- x

PAMELA GOLDSTEIN, ELLYN AND TONY BERK, and PAUL BENJAMIN, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

HOULIHAN/LAWRENCE INC.,

Defendant.

- x

Index No. 60767/2018

DECISION AND ORDER

The following papers numbered 1 to 5 were read on this motion:

Paper	Number
Notice of Motion, Affidavits and Exhibits	1
Memorandum of Law	2
Affidavits, Affirmation, Exhibits and Memorandum of Law in Opposition	3
Reply Affidavit and Exhibit	4
Reply Memorandum of Law	5

The plaintiffs in this action allege that the defendant, Houlihan/Lawrence, Inc. ("Houlihan Lawrence") the real estate broker involved in three recent transactions, breached its

fiduciary duties to the plaintiffs, and because of such breach, defendant Houlihan/Lawrence has forfeited its right to a commission in connection with any transaction in which it breached its fiduciary duty and is subject to punitive damages. Behind these allegations are a one hundred and forty-seven-page complaint containing three hundred fifty-seven separate and mostly lengthy allegations.

While it may first appear to be a private dispute between the aggrieved plaintiffs and Houlihan Lawrence, it is abundantly clear that plaintiffs through their counsel are issuing an indictment against Houlihan Lawrence, criticizing its business practices, most particularly those involving the dual agency arrangement.

Confronted with this indictment, Houlihan Lawrence brings the instant application before this Court pursuant to Civil Practice Law and Rules Section 3211(a) (1), (3) and (7) seeking dismissal of each the causes of four causes of action asserted against. The basis for the instant motion is that none of the four causes of action states a claim upon which relief may be granted.

Although the facts of each transaction are very different, plaintiffs allege commonality between the plaintiffs by stating "that a real estate agent who acts for the homebuyer and seller in the same transaction is incapable of faithful performance of

these duties because the agent must necessarily be unfaithful to one client or the other." (Complaint para. 2).

Notwithstanding this Solomonic pronouncement, plaintiffs do admit that this practice is legal in New York, stating that New York "gives homebuyers and sellers the discretion, in specific limited circumstances, to retain a single real estate agent to act as an intermediary mediating between their conflicting interests." However, as alleged by plaintiffs this can be done "only after the agent fully and frankly discloses to each client the implications of its dual agency - including that both clients are forfeiting their fundamental right to the agent's duty of undivided and undiluted loyalty - and obtains each client's informed written consent." (Complaint para. 3). As a remedy, each of the plaintiffs seek, among other things, forfeiture of the commission paid to Houlihan Lawrence, (Complaint, p. 146).

Notwithstanding the plethora of allegations regarding the alleged nefarious dealings and practices of Houlihan Lawrence, the Court will consider this motion in the context in which it has been presented -- a dispute between four plaintiffs, Pamela Goldstein, Ellyn and Tony Berk, and Paul Benjamin and one defendant, Houlihan Lawrence.

The Forms

In the arguments presented to this Court, much is made of a certain disclosure forms which the plaintiffs allegedly executed, and a summary of the same is in order.

A review of the facts in this action shows that the circumstances surrounding the providing of the forms and the signing thereof are different for each of the three transactions. When plaintiff Goldstein, who was purchasing a home, received the form, her buyer's agent' s name, Daniel Cezimbra, was filled in as both the person providing the form to her and as the buyer's agent. The box stating that there was advanced informed consent to dual agency with designated sales agents was checked. The lines for the names of the two agents were blank (although Ms. Goldstein appears to have known that the seller's agent was Gino Bello, from Houlihan Lawrence, and her agent was Mr. Cezimbra). Ms. Goldstein signed the form and returned it on the same date, March 2017. The Executive Assistant for the team thereafter filled in both names.

With respect to the plaintiffs Berks' transaction, which was to sell their late mother's house, the form had Mr. Bella's name filled in as the person providing the form as the seller's agent. The box stating that there was advanced informed consent to dual agency with designated sales agents was checked. The names of the two agents were left blank on this form, which is

dated February 2014.[1]

Finally, with respect to plaintiff Benjamin's purchase, the form, dated April 2016, lists the name of the agent providing the form; has the names of the two agents typed in; and has "dual agent with designated sales agents" checked.

The Complaint

Four causes of action are alleged in the complaint. The first seeks damages for breach of fiduciary duty based on the alleged failure of the defendant to disclose all of the risks of dual agency and that defendant also breached its fiduciary duties to them by "financially incentivizing agents to steer buyers and sellers into dual-agent transactions, and by failing to disclose that financial incentive to Class members.". Defendant argues that as each of the plaintiffs signed a statutory disclosure form, there can be no breach of fiduciary duty.

The second cause of action seeks damages for the breach of Section 443 of the Real Property Law. This section requires real estate agents to provide a statutory disclosure form to clients at the outset of the relationship and obtain a signed

[1] There is a second version of this form, undated, with the names filled in. The Berks contend that they never signed this version of the document, and that their signatures were merely cut and pasted onto this form. Given this controversy, the Court disregards this version for purposes of this motion to dismiss.

acknowledgment from the client. Defendant asserts that there is no private cause of action under Real Property Law §443.

The third cause of action is for the alleged violation of General Business Law § 349, for deceptive acts aimed at the broader public. Defendant submits that there was no deception and furthermore this statute was not envisioned to provide protection for the acts complained of herein.

The final cause of action seeks damages for unjust enrichment. Defendant argues that it did not receive a benefit that came at the expense of the plaintiffs.

Discussion

On a motion to dismiss the function of the Court is to determine if the complaint states causes of action, and not if the plaintiffs can ultimately establish the same.

> In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.
> *Stinner v. Epstein*, 162 A.D.3d 819, 820, 79 N.Y.S.3d 212, 214 (2d Dept 2018).

"At the same time, however, allegations consisting of bare legal conclusions are not entitled to any such consideration." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141,

75 N.E.3d 1159, 53 N.Y.S.2d.3d 598 (2017) (citation omitted). Furthermore, on a motion to dismiss a court may consider evidentiary material and if it is shown that a material fact as claimed by the plaintiff to be one is not fact at all, such allegation made by the plaintiff can be ignored. *Lubonty v. U.S. Bank National Association*, 159 A.D.3d 962, 74 N.Y.S.3d 279 (2nd Dept. 2018).

The Berks

Preliminarily, the defendant argues that Dr. Berk and Mr. Berk do not have the capacity to assert claims herein as they are not denominated as the administrators of the estate of their late parents. They cite what they posit is well-settled law.

The Berks argue that administrators can sue in their own names and are not required to describe their representative capacity in the pleading, citing *Connery v. Sultan*, 129 A.D.3d 455, 9 N.Y.S.3d 576 (1st Dept. 2015). The *Connery* decision does not deal with an estate, the discussion therein is specifically limited to capacity to sue and a trust. This Court finds it inapplicable to this matter which, without question, deals with estate property. It is beyond cavil that only a named administrator or executor can sue to obtain recovery of estate property. *Stallsworth v. Stallsworth*, 138 A.D.3d 1102, 30 N.Y.S.2d 661 (2nd Dept. 2016).

Accordingly, the causes of action asserted by Dr. Berk and Mr. Berk are dismissed.[2]

Breach of Fiduciary Duty Claim

Defendant argues that this "claim fails as a matter of law because each Plaintiff executed the statutory disclosure form demonstrating consent to Houlihan Lawrence's dual agency." Defendant also contends that Ms. Goldstein knew about the dual agency relationship before she made an offer on the property.

Plaintiffs essentially discount the signed statutory disclosure forms, stating that "informed consent requires more than a pro forma signature on a form." Rather, they claim, defendant did not provide anything other than the form to their clients, let alone "fully disclose the risks, downsides, and options of dual agency 'at the onset of discussions concerning agency.'"

Neither side cites any applicable New York case law to prove that its position is the correct one; plaintiffs cite trade industry publications and Secretary of State memoranda from 1991 to argue that "the form is 'the *beginning* of full disclosure,'" while defendant cites Massachusetts and Connecticut law to argue that if a client signs the statutory form, "'there shall be a conclusive presumption that a purchaser

[2] In light to this decision, the Court need not address the substantive claims raised by the Berks or the claim regarding the statute of limitations asserted against them regarding the claim based on RPL Section 443.

or seller has consented to a designated agency relationship...'" Neither argument is dispositive, and the Court is required to independently determine if the signing of the disclosure form insufficient and provides Houlihan Lawrence the safe harbor from breach of fiduciary claims it seeks.

In interpreting the statute this Court is guided by the well-traveled road of statutory interpretation that provides that one must begin with the very words of the statute.

"'[C]ourts must give effect to the wording of a statute without rejecting any words as superfluous, and must harmonize related provisions in a way that renders them compatible'" *Matter of Universal Metal & Ore, Inc. v. Westchester County Solid Waste Commission,* 145 A.D.3d 46, 56, 37 N.Y.S.3d 571 (2nd Dept. 2016) (quoting *Matter of Ebanks v. Skyline NYC, LLC,* 70 A.D.3d 943, 945, 896 N.Y.S.2d 369; *see* McKinney's Cons. Laws of NY, Book 1, Statutes §§ 98[a]; 231; *Kimmel v. State of New York,* 29 N.Y.3d 386, 406-407, 57 N.Y.S.3d 678, 80 N.E.3d 370; *Majewski v. Broadalbin-Perth Cent. School Dist.,* 91 N.Y.2d 577, 587, 673 N.Y.S.2d 966, 696 N.E.2d 978).

Section 443(4)(a) of the Real Property Law states:

> DUAL AGENT
>
> A real estate broker may represent both the buyer and the seller if both the buyer and seller give their informed consent in writing. In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the buyer and

> seller. The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent, and the buyer and seller. *An agent acting as a dual agent must explain carefully to both the buyer and seller that the agent is acting for the other party as well. The agent should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer and seller are giving up their right to undivided loyalty.* A buyer or seller should carefully consider the possible consequences of a dual agency relationship before agreeing to such representation. A seller or buyer may provide advance informed consent to dual agency by indicating the same on this form. *Id.* (emphasis added).

By these very words highlighted above, it appears that the mere signing of the form is insufficient, and the legislature required more. If the form was all that was necessary, there would be no need for this language, and it would be rendered superfluous.

Accordingly, this Court denies the motion to dismiss the first cause of action.

Section 443

Turning to the second cause of action for breach of Real Property Law Section 443, there is no dispute that on its face, this section fails to provide for a private right of action. "Real Property Law § 442-e sets forth the ramifications of violating Article 12-A of the Real Property Law. The only provision of RPL § 442-e that addresses the rights of private litigants to bring an action for violation of Article 12-A is

RPL § 442-e(3), [which] . . . is limited to suits against those that are not licensed under Article 12-A. Article 12-A of the Real Property Law does not contain any provision allowing a private right of action against licensed real estate brokers. Therefore, the statute does not provide for a private right of action against Defendants." *See also Domus Arbiter Realty Corp. v Bayrock.Group LLC,* 2018 WL 6248761, at *3 (N.Y. Sup. Ct. Nov. 28, 2018); *Talk of the Millenium Realty Inc. v. Sierra,* 12 Misc. 3d 1153(A), 819 N.Y.S.2d 213 (Civ. Ct. Rich. Co. 2006) ("The statute does not provide any penalty for the failure of the broker to complete the disclosure form in the manner required by the legislation."). This is the basis for defendant's motion to dismiss.

In response, plaintiffs claim that a private right of action "may be 'fairly implied' under Section 443." They argue that the statute should have an implied private right of action because it would be "consistent with the legislative scheme."

The inquiry into whether a private right of action should be implied "involves three factors: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Maimonides Med. Ctr. v. First United Am. Life Ins.* Co., 116 A.D.3d 207, 211, 981 N.Y.S.2d 739 (2d Dept. 2014) (the third factor is "generally the most critical").

While plaintiffs are correct that they are among the class for whose benefit the statute was enacted, the Court finds that the recognition of a private right of action would not promote the legislative purpose or be consistent with the legislative scheme. The legislature "entrusted enforcement only to the Attorney General." A review of the legislative history of the statute does not reveal that the issue of a private right of action was ever raised in the Legislature.

There is no reason for the Court to read into this statute a private right of action, when one was never even contemplated by the Legislature. Accordingly, the Court grants the motion to dismiss this cause of action.

General Business Law Section 349

The third cause of action seeks damages under General Business Law § 349. The Court of Appeals has explained that section 349 is directed at wrongs against the consuming public:

> [A]s a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented, by having a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute.

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 24-25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995).

> "Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior. The

> statute itself does not require recurring conduct… instead [Plaintiff] must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for an example would not fall within the ambit of the statute." *Id.* at 25.

The allegations of a deceptive practice or omission as they pertain to the two remaining plaintiffs center around disclosure and the alleged lack thereof. Plaintiffs do admit that dual agency is permissible under New York law, but assert that they were not properly informed of the risks involved as well as the compensation that would be received. Logically, if proper disclosure was in fact made, then no breach would have occurred.

To analyze the ultimate efficacy of each claim, this Court will be called upon to determine what was said and what disclosure, if any, were made to each plaintiff during the relationship had with Houlihan Lawrence. Each of these transactions are separate, different people were involved, and undoubtedly different things were said and communicated. While the alleged commonality between these plaintiffs may be alleged non-disclosure, the ultimate resolution of the claims can only be determined by individual analysis of each transaction, and to a certain extent each transaction can be considered unique.

The decision in *Silverman v. Household Finance Realty Corporation of New York*, 979 F. Supp. 313 (E.D.N.Y. 2013) is illustrative. In *Silverman*, the Court was confronted with a

borrower who claimed the lender ignored their loan to income ratio in giving them a loan. Plaintiffs argued that these actions were deceptive and claimed a violation under GBL §349.

The Court granted the defendant's motion to dismiss stated that the conduct was not consumer-oriented as required by law. The Court held:

> Plaintiffs' allegations are specific to them and their individual real estate transaction. Their claims derive for the particular circumstances of loan, namely, whether their unique debt to income ratio was appropriate, and whether the nature of any advice allegedly given them regarding how to proceed during the loan modification application process was misleading…. *Id.* at 318. *See generally Hayrioglu v. Granite Capital Funding, LLC*, 794 F. Supp. 2d 405 (E.D.N.Y. 2011).

Plaintiffs cite the decision in *North State Autobahn, Inc. v. Progressive Ins. Grp.*, 102 A.D.3d 5, 953 N.Y.S.2d 96 (2d Dept. 2012) in support of their position. In *North State*, the Court was confronted with allegations that the defendants had mischaracterized and were deceptive in the recommendation and/or selection of certain auto repair shops and stated:

> Parties claiming the benefit of General Business Law § 349 (h) must, at the threshold, charge conduct that is consumer oriented. Private contract disputes, unique to the parties do not fall within the ambit of the statute" The "single shot transaction" which is tailored to meet the purchaser's wishes and requirements does not, without more, constitute consumer-oriented conduct for the purposes of this statute.
>
> On the other hand, conduct has been held to be

> sufficiently consumer-oriented to satisfy the statute where it involved an extensive marketing scheme where it involved the multi-media dissemination of information to the public and where it constituted a standard or routine practice that was consumer-oriented in the sense that it potentially affected similarly situated consumers. Simply put, the defendant's acts or practices must have a broad impact on consumers at large. *Id.* at11-12. (citations omitted).

In reviewing the case law surrounding the issue of whether an alleged deceptive practice is "consumer-orientated" -- which would allow the GBL Section 349 to go forward -- or is unique involving private parties or can be characterized as a "single shot deal" -- which would mandate dismissal -- there is no bright line test.

As the Second Department recognized in the decision of *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 630 N.Y.S.2d 769 (2d Dept. 1995), a Court can be presented with a case that exhibits characteristics of a single-shot, unique transaction as well as a consumer-oriented transaction, and the Court is necessarily required to balance the interests in making its decision.

Underlying this dichotomy is the concern and protection of the consuming public for which GBL Section 349 was enacted. On the other hand, disputes involving private parties who have entered into separate arrangements should not have to be held answerable to the remedies afforded in GBL § 349. *See Oswego,*

supra ("In explicating the legislative objective behind section 349, we are mindful of the potential for a tidal wave of litigation against businesses that was not intended by the Legislature").

Ultimately, as the Second Department has dictated, this Court is to consider whether the alleged acts or practices have a broad impact on consumers at large.

The allegations made by the plaintiffs, which this Court must accept as true at this stage of the litigation, state that the practices of Houlihan Lawrence are pervasive, have and will affect many others, and Houlihan Lawrence has promoted its practices. *See, e.g., Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 725 N.E.2d 598, 704 N.Y.S.2d 177 (1999); *Karlin v. IVF Am.*, 93 N.Y.2d 282, 712 N.E.2d 662, 690 N.Y.S.2d 495 (1999). Of course, if discovery in this matter proves otherwise, this Court will certainly revisit this issue upon the proper application.

Defendant further argues that GBL § 349 does not apply to real estate transactions or to transactions involving the sums presented herein. The Court believes that real estate transactions are not excluded from the protections of the statute. *See Polonestsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 760 N.E.d2d 1274, 735N.Y.S.2d 479 (2001). Furthermore, this Court is not prepared to dismiss this matter in its present

context because the amounts in question may be more than "modest". There is no such test contained in the statute, and the case law presented by defendants is unconvincing. The amount at issue, however, will certainly be a factor in determining, at the proper time, whether the transaction was unique.

The motion to dismiss the third cause of action is denied.

Unjust Enrichment

Finally, with respect to the last cause of action, for unjust enrichment, the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.

"A plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC*, 114 A.D.3d 888, 889, 981 N.Y.S.2d 135, 137 (2d Dept. 2014).

As for the buyer plaintiffs, which are the only remaining defendants in this case, defendant argues that they paid no commission, as it came from the sellers, and thus there can be no unjust enrichment claim. Plaintiffs respond by arguing that the sales price was designed to include the commission, so the

buyer plaintiffs implicitly did bear this expense.

Ms. Goldstein and Mr. Benjamin's allegations are devoid of any assertions that they contractually agreed to pay a commission, and the Court can infer that if the buyer did not pay the commission, and assuming Houlihan Lawrence is not an eleemosynary association, it is the sellers who paid the commission.

Apparently recognizing this potential issue, the plaintiffs make prophylactic allegations to circumvent this issue. Ms. Goldstein asserts that as the buyer of the property and without any contractual obligation to pay any commissions "Houlihan Lawrence collected a 5% sales commission on Ms. Goldstein's purchase of 6 Wellington Terrace. Houlihan Lawrence's sales commission was paid out of the proceeds of the sale of the property. Ms. Goldstein paid at least a portion of the commission collected by Houlihan Lawrence on the transaction, including because it was incorporated with the price she agreed to pay for the house and the owner agreed to accept." (citation omitted) (Complaint, para. 279). Mr. Benjamin makes a similar allegation. (Complaint, para. 323).

These allegations really beg the question. It is the seller who is contractually obligated to pay the commission -- just because the seller receives funds from the consummation of the transaction and may applies those funds to the payment of

the commission, the payment was not made at the "plaintiff's expense". *See IDT Corporation v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009) (plaintiff could not recover fees that it did not pay).

Accordingly, the fourth cause of action based on unjust enrichment is dismissed.

Conclusion

Accordingly, the Court grants the motion to dismiss as it applies to the claims of Ellyn and Tony Berk, with leave to replead. The motion to dismiss the first and third causes of action are denied. The motion to dismiss the second and fourth causes of action are granted.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 8, 2018

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Justice of the Supreme Court

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