UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SCOTT C. MUELLER,	X	
	X	
Plaintiff,	X	
	X	
-against-	X	No. 15-cv-04827 (NRB)
	X	
MICHAEL JANSSEN GALLERY PTE. LTD., MICHAEL JANSSEN, WILHELM SCHURMANN and MARISA NEWMAN PROJECTS, LLC,	X	
	X	
Defendants.	X	

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANT MARISA NEWMAN PROJECTS, LLC TO DISMISS THE AMENDED COMPLAINT

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In this diversity action, plaintiff Scott C. Mueller claims that a German art dealer, Michael Janssen Gallery Pte. Ltd., and its principal, Michael Janssen (together, "Janssen"), failed to honor a contractual commitment to buy back a contemporary sculpture that he purchased for $1.4 million, after the artist disclaimed the work. Not content, however, with simply suing the actual counterparty to the agreement, Mueller also names Marisa Newman Projects, LLC ("Newman"), an independent art advisor, as a co-defendant as well.

In his amended complaint, Mueller maintains that Newman recommended including the contractual buy-back provision that Janssen has breached. Based principally on this alleged recommendation, he asserts two claims against Newman, for breach of fiduciary duty and unjust enrichment. Both claims seek "disgorgement" of any fee that Newman received on the transaction from Janssen.

The amended complaint, however, alleges no facts suggesting that Newman's relationship with Mueller was closer than arm's length. Rather, the pleading acknowledges, echoing the words of the agreement itself, that Newman acted in the transaction as an "independent art advisor." Moreover, the advice allegedly given by Newman to Mueller does not establish any fiduciary relationship towards him as a matter of law. And the amended complaint does not allege how Newman could have breached any duty to Mueller, or caused the sole injury that he complains of, which is Janssen's failure to fully perform its buy-back obligation.

As for the claim of unjust enrichment, Newman received no enrichment that is "unjust," since it owed no duty to Mueller, and there was a valid and enforceable written agreement governing the purchase. In addition, Newman was not enriched at Mueller's expense, since it was concededly paid not by him, but rather by Janssen.

Finally, the written agreement that Mueller entered into expressly provided that, if the artist disclaimed the sculpture, then his "sole remedy" would be to cause Janssen to buy back the work. Thus, with respect to any claim, he cannot now look to Newman.

As a result, the amended complaint fails to state any claim against Newman as a matter of law, and should be dismissed.

Procedural and Factual Background

Procedural Background to the Amended Complaint

Plaintiff Scott C. Mueller commenced this action against Janssen and the other defendants on June 22, 2015. In his original complaint, Mueller asserted a single claim against Newman, for unjust enrichment. Three and one-half months after filing the complaint, on October 8, Mueller asked Newman to waive service of process, which it promptly agreed to do.

One month later, by letter dated December 10, 2015, Newman requested a pre-motion conference, in accordance with this Court's Individual Rule 2(B), in anticipation of filing a motion to dismiss the complaint pursuant to Rule 12(b)(6). In a response dated December 18, Mueller defended his claim of unjust enrichment, and requested leave to amend the complaint. By order dated December 23, the Court allowed Newman to bring the motion without the necessity of a pre-motion conference, but granted Mueller leave to file an amended complaint first.

Two weeks later, on January 8, 2016, Mueller filed a first amended complaint, this time adding a second claim against Newman, for breach of fiduciary duty. Once again, by letter dated January 20, Newman requested a pre-motion conference in anticipation of filing a motion to dismiss. Five days later, prior to any response by Mueller, the Court again entered an order allowing Newman to bring the motion without the necessity of a pre-motion conference.

The Amended Complaint's Allegations Against Newman

In the amended complaint, Mueller, a private art collector, maintains that Janssen has failed to fully refund his purchase of a contemporary sculpture titled "Log Cabin," after the artist, Cady Noland, disapproved of a restoration that was made without her consultation. (Am. Cmplt. ¶¶ 15-16, 22-23.) Due to the artist's disapproval,

the parties' written agreement allegedly requires Janssen to buy back the undelivered work. (*Id*. ¶ 11.) Janssen, however, has repaid only $600,000 of the $1.4 million purchase price that Mueller wired directly to it. (*Id*. ¶¶ 10, 13, 20-23, 26, 49.)

As far as Newman is concerned, the amended complaint repeatedly states that, "[p]ursuant to the Agreement . . . , Newman acted as 'an independent art advisor to facilitate the sale of the work.'" (*Id*. ¶¶ 4, 31, 39 (quoting Agrmt. at 1).) (A copy of the purchase agreement, dated July 2, 2014, is annexed as an exhibit to the amended complaint.)

Initially, "Newman contacted Brett Shaheen ('Shaheen'), an art dealer located in Cleveland, Ohio, to inform him that 'Log Cabin' was available for purchase and to see if Shaheen's client, Mueller, might be interested." (*Id*. ¶ 8.) Throughout the transaction, Shaheen served as Mueller's "art buyer." (*Id*. ¶¶ 14, 40.) Newman, by contrast, was paid solely by Janssen. (*Id*. ¶¶ 10, 13, 26, 34, 49.)

As the amended complaint notes, "given the history of the artist," there were "concerns that the artist might disavow the work, rendering it materially less valuable." (*Id*. ¶ 11.) Specifically, 'the primary concern' [was] that the artist Noland might disavow or reject the artwork after sale because of certain repairs that had been made." (*Id*. ¶ 32.) According to the amended complaint, Newman, with the assistance of legal counsel that it retained to draft the purchase agreement, "recommended the

buy-back provision to address [these] concerns . . . ." (*Id*. ¶¶ 9, 11.) In particular, "Newman's recommendation was for a buy-back provision that would provide for the return of the full purchase price if the artist in fact later rejected the artwork." (*Id*. ¶ 32.)

Accordingly, Mueller and Janssen included in their written agreement a detailed buy-back provision. (Agrmt. § 6.) Among other things, it stipulated that, if the artist disclaimed the sculpture, then Mueller's "sole remedy . . . shall be . . . to cause the Vendor [*i.e.*, Janssen] to buy back the Work from the Purchaser [*i.e.*, Mueller] for a sum equal to the Purchase Price . . . ." (*Id*. § 6(b).) Although Newman is not a formal party to the agreement, it is mentioned repeatedly therein. (*Id.* Recitals & §§ 4(c), 8.)

Based principally on this alleged recommendation, the amended complaint asserts two claims against Newman, for breach of fiduciary duty and unjust enrichment. (Am. Cmplt. ¶¶ 38-46, 30-37.)

With respect to the first claim for breach of fiduciary duty, the amended complaint alleges that "Mueller and his art buyer, Shaheen, placed confidence and trust in Newman to advise Mueller in good faith during this transaction. In this capacity, Newman provided advice as to the artwork, the artist, and legal issues surrounding the transaction" (*id*. ¶ 40), including the alleged recommendation to include the buy-back provision (*id*. ¶¶ 11, 32). According to the amended complaint,

> Newman breached its fiduciary duty by refusing to return its share of the purchase price after the artist disavowed the work and after Mueller invoked the buy-back provision. This conduct is particularly inequitable because Newman provided guidance as to the "primary concern" that the artist would disavow the work and recommended the buy-back solution which failed.

(*Id*. ¶ 45.)

As for the second claim for unjust enrichment, the amended complaint alleges that, "[u]nder these circumstances, as a matter of equity and good conscience, it is unjust for Newman to retain the funds paid by Mueller when the artwork was never delivered to Mueller and Mueller validly exercised the buy-back option recommended by Newman." (*Id*. ¶ 36.)

On both claims, the amended complaint seeks "disgorgement" of any fee received by Newman from Janssen, as well as additional unspecified damages. (*Id.* ¶¶ 37, 46.)

Besides Newman, the amended complaint asserts claims against the Janssen gallery for breach of contract (*id*. ¶¶ 24-29), Janssen personally for conversion (*id*. ¶¶ 47-50), and the original owner, Wilhelm Schurmann, for unjust enrichment (*id*. ¶¶ 51-55). Although the action was commenced nearly nine months ago, none of the other defendants, all of which reside in Germany, has apparently yet been served.

Argument

I.

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY

"The elements of a claim for breach of a fiduciary obligation are: (i) the existence of a fiduciary duty; (ii) a knowing breach of that duty; and (iii) damages resulting therefrom." *Johnson* v. *Nextel Communications, Inc.*, 660 F.3d 131, 138 (2d Cir. 2011) (citations omitted).

Here, the amended complaint does not sufficiently allege any of these three elements.

A. Newman Owed No Fiduciary Duty to Mueller

"When parties deal at arm's length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances." *In re Mid-Island Hospital, Inc.*, 276 F.3d 123, 130 (2d Cir.) (internal quotation marks and citation omitted), *cert. denied*, 537 U.S. 882 (2002).

Here, the amended complaint alleges no facts suggesting that Newman's relationship with Mueller was closer than arm's length. Rather, the pleading acknowledges, echoing the words of the agreement itself, that Newman acted in the transaction as an "independent art advisor." Moreover, the advice allegedly given by

Newman to Mueller does not establish any fiduciary relationship towards him as a matter of law.

1. Newman Acted as an "Independent Art Advisor"

The amended complaint repeatedly acknowledges that, "[p]ursuant to the Agreement . . . , Newman acted as 'an independent art advisor to facilitate the sale of the work.'" (Am. Cmplt. ¶¶ 4, 31, 39 (quoting Agrmt. at 1).)

"[T]he existence of a consulting relationship does not automatically establish a fiduciary relationship." *VTech Holdings Ltd.* v. *Pricewaterhouse Coopers LLP*, 348 F. Supp. 2d 255, 268 (S.D.N.Y. 2004) (holding that advisor did not have fiduciary relationship with client); *accord TPTCC NY, Inc.* v. *Radiation Therapy Services, Inc.*, 784 F. Supp. 2d 485, 506 (S.D.N.Y.) (no fiduciary duty arises from advice given by consultant to client), *rev'd on jurisdictional grounds*, 453 Fed. Appx. 105 (2d Cir. 2011).

Here, Newman acted only as a nonfiduciary "art advisor." Indeed, Mueller was not even its client; to the contrary, as the amended complaint concedes, Newman was an "independent" art advisor, unlike Mueller's own "art buyer," Shaheen. (Am. Cmplt. ¶¶ 14, 40.) Nor does the amended complaint claim that Mueller ever retained or compensated Newman, but rather concedes that Newman was paid solely by Janssen. (*Id*. ¶¶ 10, 13, 26, 34, 49.)

In short, Newman's acknowledged role as an "independent art advisor," one unretained by Mueller and compensated only by Janssen, belies any fiduciary relationship with Mueller. *See Mechigian* v. *Art Capital Group*, 612 F. Supp. 1421, 1431 (S.D.N.Y. 1985) (art advisors had no fiduciary relationship with purchaser); *Ravenna* v. *Christie's Inc.*, 289 A.D.2d 15, 16, 734 N.Y.S.2d 21, 21 (1st Dep't 2001) (no special relationship with art specialist who was not retained or paid by purchaser).

2. Newman's Alleged Advice to Mueller Does Not Establish a Fiduciary Relationship

Notwithstanding Newman's role as an "independent art advisor," the amended complaint alleges that Newman nevertheless owed a fiduciary obligation to Mueller because it "provided advice as to the artwork, the artist, and legal issues surrounding the transaction," including the recommendation to include the buy-back provision. (Am. Cmplt. ¶¶ 11, 32, 40, 45.)

"Advice alone, however, is not enough to impose a fiduciary duty." *EBC I, Inc.* v. *Goldman Sachs & Co.*, 91 A.D.3d 211, 216, 936 N.Y.S.2d 92, 96 (1st Dep't 2011) (citing *Citibank, N.A.* v. *Silverman*, 85 A.D.3d 463, 466, 925 N.Y.S.2d 442, 445 (1st Dep't 2011)). Rather, "[a] fiduciary relationship arises when one person is *under a duty* to act for or to give advice for the benefit of another within the scope of the relation." *Levitin* v. *PaineWebber, Inc.*, 159 F.3d 698, 707 (2d Cir. 1998) (emphasis added; internal quotation

marks and citations omitted), *cert. denied*, 525 U.S. 1144 (1999). Thus, "a mere expression of confidence in [the defendant]'s expertise [is] wholly insufficient . . . . A fiduciary duty cannot be imposed unilaterally." *EBC I*, 91 A.D.3d at 216, 936 N.Y.S.2d at 96.

Here, the amended complaint does not allege how Newman was under any duty to give the advice that it allegedly did. If, as the pleading asserts, "Mueller and his art buyer, Shaheen, placed confidence and trust in Newman to advise Mueller" (Am. Cmplt. ¶ 40), then such confidence and trust was reposed entirely unilaterally.

Similarly, the fact that lawyers retained by Newman drafted the agreement and allegedly offered "legal guidance" (Am. Cmplt. ¶¶ 41, 44) no more establishes any fiduciary obligation by Newman. "Often one party will draft the agreement or legal document for parties in a business relationship, without creating a fiduciary relationship." *Coast to Coast Energy, Inc.* v. *Gasarch*, 2013 WL 753898, at *11 (Sup. Ct. N.Y. Cty. 2013). Notably, the amended complaint does not allege that Mueller was ever represented by Newman's lawyers, either in the transaction or at any other time.

As a result, the advice allegedly given by Newman and its lawyers does not establish any fiduciary obligation towards Mueller. *See Petrello* v. *White*, 412 F. Supp. 2d 215, 224-25 (E.D.N.Y. 2006) (legal advice given to plaintiff and enlistment of counsel to assist him does not give rise to fiduciary obligation), *aff'd*, 344 Fed. Appx. 651 (2d Cir. 2009); *Coast to Coast Energy*, 2013 WL 753898, at *11 (legal advice given to plaintiff and

preparation of legal documents does not create fiduciary relationship where defendant did not formally act as attorney or advisor to plaintiff).

B. Newman Breached No Duty

In addition, the amended complaint does not allege how Newman could have breached any duty to Mueller.

With respect to Newman's asserted breach of duty, the amended complaint alleges in full as follows:

> Newman breached its fiduciary duty by refusing to return its share of the purchase price after the artist disavowed the work and after Mueller invoked the buy-back provision. This conduct is particularly inequitable because Newman provided guidance as to the "primary concern" that the artist would disavow the work and recommended the buy-back solution which failed.

(Am. Cmplt. ¶ 45.)

The first sentence of this allegation, however, is wholly circular: It claims, in effect, that Newman breached its fiduciary duty by refusing to give Mueller the remedy that he seeks for breaching its fiduciary duty. Clearly, though, Newman had no duty to forfeit its fee absent some anterior breach of duty by it.

Furthermore, the second sentence is equally insufficient, to the extent that it suggests that Newman breached its fiduciary duty by "provid[ing] guidance as to the 'primary concern' that the artist would disavow the work and recommend[ing] the buy-back solution which failed."

This allegation does not specify what "guidance" Newman wrongfully provided in this respect, other than by allegedly "recommend[ing] the buy-back solution." And to the extent that this "solution" may be said to have "failed," a collector who is prepared to pay $1.4 million for a contemporary sculpture, assisted by his own "art buyer," hardly needs anyone to tell him that a contractual buy-back provision, by itself, will not guarantee that he will actually get his money back, if the seller ultimately proves unwilling or unable to pony up.

Mueller and his "art buyer" could easily have employed any number of common methods to ensure that Janssen's buy-back obligation would be fulfilled, such as an escrow arrangement, a personal guaranty, or a security interest in other property. Newman could hardly have breached any fiduciary duty by failing to point out such obvious techniques.

C. Mueller's Damages Do Not Result from Any Breach of Duty by Newman

Finally, Mueller's damages do not result from any breach of duty by Newman.

The sole injury alleged in the amended complaint is Mueller's inability to recover the full purchase price back from Janssen. That failure owes entirely to Janssen alone, rather than any asserted breach of duty by Newman, and Newman is not alleged

to have any power or influence to affect it.

II.

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

"In order to succeed on a claim for unjust enrichment under New York law, a plaintiff must prove that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Diesel Props S.R.L.* v. *Greystone Business Credit II LLC*, 631 F.3d 42, 55 (2d Cir. 2011).

Here, Newman received no enrichment that is "unjust," such that "equity and good conscience militate against" it, since Newman owed no duty to Mueller, and there was a valid and enforceable written agreement governing the purchase. In addition, Newman was not enriched "at plaintiff's expense," since it was concededly paid not by him, but rather by Janssen.

A. Newman Owed No Duty to Mueller

"[T]here are no indicia of an enrichment that was unjust where the pleadings fail[ ] to indicate a relationship between the parties that could have caused reliance or inducement." *Mandarin Trading Ltd.* v. *Wildenstein*, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 472 (2011).

As discussed above, Newman is not alleged to have any relationship with Mueller justifying his reliance on its alleged advice. As a result, any enrichment by Newman could not have been "unjust." *See Mandarin Trading Ltd.*, 16 N.Y.3d at 182, 919 N.Y.S.2d at 472 (dismissing claim of unjust enrichment against art expert that had no fiduciary relationship with buyer); *Seung* v. *Fortune Cookie Projects*, 28 Misc. 3d 1226(A), 958 N.Y.S.2d 63 (Table), 2010 WL 3310254, at *6 (Sup. Ct. N.Y. Cty. 2010) (same where purchaser could not reasonably rely on art dealer's advice).

B. <u>There Was a Valid and Enforceable Written Agreement</u>

One of the "well-settled principles of New York law" is the "rule that generally bars a finding of unjust enrichment in the face of a valid and enforceable written agreement." *In re First Central Fin. Corp.*, 377 F.3d 209, 213 (2d Cir. 2004) (citing, *inter alia*, *Clark-Fitzpatrick, Inc.* v. *Long Island R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 656 (1987)). This principle now applies "even if one of the parties to the claim is not a party to that contract." *Vista Food Exchange, Inc.* v. *Champion Foodservice, LLC*, 2015 WL 5000863, at *8 (S.D.N.Y. 2015); *Ellington Credit Fund, Ltd.* v. *Select Portfolio Servicing*, 837 F. Supp. 2d 162, 202 (S.D.N.Y. 2011) (collecting cases).

> At one time, courts in this district allowed litigants to bring unjust enrichment claims against non-signatories to a contract even when the validity of the contract was not in dispute. The law has,

> however, unmistakably tacked in the other direction. Today, the existence of a valid and binding contract governing the subject matter at issue in a particular case *does* act to preclude a claim for unjust enrichment even against a third party non-signatory to the agreement.

Network Enterprises, Inc. v. *Reality Racing, Inc.*, 2010 WL 3529237, at *7 (S.D.N.Y. 2010) (emphasis in original; internal quotation marks and citations omitted). *Accord Hildene Capital Mgmt., LLC*, v. *Friedman, Billings, Ramsey Group, Inc.*, 2012 WL 3542196, at *10 (S.D.N.Y. 2012); *Viable Mktg. Corp.* v. *Intermark Communs., Inc.*, 2011 WL 3841417, at *3 (E.D.N.Y. 2011).

Here, the written agreement between Mueller and Janssen included a detailed buy-back provision. Among other things, it stipulated that, if the artist disclaimed the sculpture, then Mueller's "sole remedy . . . shall be . . . to cause [Janssen] to buy back the Work from [Mueller] for a sum equal to the Purchase Price . . . ." (Agrmt. § 6(b).) Although Newman is not a formal party to the agreement, it is mentioned repeatedly therein. (*Id.* Recitals & §§ 4(c), 8.) Clearly, if the parties had wished for Newman to forfeit its fee in the event that the artist disavowed the work, they could easily have so provided in the agreement.

C. Newman Received Payment Only from Janssen

"Nor can [an] unjust enrichment claim support the disgorgement of any profits [a defendant] obtained from . . . other companies . . . ." *IDT Corp*. v. *Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 361 (2009). With respect to such sums, the plaintiff "does not, and cannot, allege that [the defendant] has been unjustly enriched at [the plaintiff]'s expense, because [the plaintiff] did not pay the alleged fees." *Id.* In short, "Unjust enrichment does not apply to the disgorgement of fees paid by another." *Zimmerman* v. *Kohn*, 2014 WL 1490936, at *3 (Sup. Ct. N.Y. Cty. 2014), *aff'd*, 125 A.D.3d 413, 2 N.Y.S.3d 462 (1st Dep't 2015), *leave denied*, 25 N.Y.3d 907, 10 N.Y.S.3d 526 (2015). *See also In re Optimal U.S. Litigation*, 813 F. Supp. 2d 383, 402 (S.D.N.Y. 2011) (dismissing claim of unjust enrichment for payments received from others); *Wolf* v. *Escala*, 2015 WL 2403106, at *21 (D.N.J. 2015) (same).

As the amended complaint acknowledges, Mueller himself paid nothing to Newman, but rather wired the full purchase price directly to Janssen. (Am. Cmplt. ¶¶ 10, 13, 26, 34, 49.) As a result, Mueller has no greater claim to any monies paid by Janssen to Newman than he would to payments made to Janssen's creditors, employees or dry-cleaner.

III.

BOTH CLAIMS ARE BARRED BY THE "SOLE REMEDY" PROVIDED IN THE AGREEMENT

"Contract provisions limiting remedies are enforceable unless they are unconscionable." *Biotronik A.G.* v. *Conor Medsystems Ireland, Ltd.*, 22 N.Y.3d 799, 805 n.4, 988 N.Y.S.2d 527, 530 n.4 (2014) (citation omitted).

> Contracting parties are generally free to limit their remedies, and courts applying New York law routinely enforce such limitations according to their terms. This reflects the fact that "[a] limitation on liability provision . . . represents the parties' [a]greement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor."

Ace Securities Corp. v. *DB Structured Products, Inc.*, 5 F. Supp. 3d 543, 553 (S.D.N.Y. 2014) (quoting *Metropolitan Life Ins. Co.* v. *Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 436, 618 N.Y.S.2d 882, 885 (1994) (ellipsis in original; internal citation omitted)).

Here, the written agreement that Mueller entered into expressly provided that, if the artist disclaimed the sculpture, then his "sole remedy . . . shall be . . . to cause [Janssen] to buy back the Work from [him] for a sum equal to the Purchase Price . . . ." (Agrmt. § 6(b).)

Thus, under the express terms of the agreement, the "sole remedy" available to Mueller under these circumstances is to look to Janssen alone to buy back

the sculpture. If the parties had instead wished for Newman, in effect, to guarantee part of Janssen's buy-back obligation, then they could easily have so provided in the agreement.

Conclusion

For the foregoing reasons, the amended complaint should be dismissed, pursuant to Rule 12(b)(6), for failure to state a claim.

Dated: New York, New York
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