

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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7 August Term 2006
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9 Argued: March 27, 2007 Decided: July 23, 2008

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11 (Question certified to New York Court of Appeals: July
12 12, 2007.
13 Question answered by New York Court of Appeals: April
14 24, 2008.)
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16 Docket No. 05-6566-cv
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20 OLEG RIVKIN,

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22 *Plaintiff-Appellant,*

23
24 - against -

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26 CENTURY 21 TERAN REALTY LLC, ANDREW PECK, CHLOE DRESSER and
27 JOSHUA LUBORSKY,

28
29 *Defendants-Appellees,*

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31 SUSANNE MARTIN and ROBERT MARTIN,

32
33 *Defendants.*
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37 Before: FEINBERG, SOTOMAYOR and KATZMANN, Circuit Judges.
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39 Plaintiff-Appellant Oleg Rivkin appeals from an oral decision and
40 order of the United States District Court for the Northern
41 District of New York (Sharpe, J.) granting Defendants-Appellees'
42 motion for summary judgment and dismissing all of Rivkin's
43 claims. This Court certified to the New York Court of Appeals the
44 question whether Defendants-Appellees, acting as buyer's agents,
45 breached a fiduciary duty to Plaintiff-Appellant by failing to

1 disclose the representation of a competing bidder for the
2 property Plaintiff-Appellant sought to purchase. The Court of
3 Appeals having answered that question in the negative, the
4 decision of the district court is now affirmed.
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7 ROBERT J. TOLCHIN, New York, NY, for Plaintiff-
8 Appellant.
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10 STEPHEN H. VOLKHEIMER, Hiscock & Barclay, LLP, Albany,
11 NY, for Defendants-Appellees.
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14 FEINBERG, Circuit Judge:

15 Plaintiff-Appellant Oleg Rivkin appeals from an oral
16 decision and order of the United States District Court for the
17 Northern District of New York (Sharpe, J.). The district court
18 (1) granted summary judgment to Defendants-Appellees Century 21
19 Teran Realty LLC (hereafter "Teran"), its owners, Andrew Peck and
20 Chloe Dresser, and Joshua Luborsky, a real estate broker
21 associated with Teran, and (2) dismissed Rivkin's complaint.
22 Plaintiff-Appellant argues that we should reverse the district
23 court and remand. We assume the parties' familiarity with the
24 underlying facts and procedural history of this case, as set
25 forth in our prior opinion, see Rivkin v. Century 21 Teran Realty
26 LLC, 494 F.3d 99, 100-103 (2d Cir. 2007) ("Rivkin I").

27 In July 2007, we decided in Rivkin I that this case raised
28 a significant issue of New York law regarding the nature of the
29 fiduciary duty a real estate buyer's agent owes to the buyer.
30 Since the issue had public policy implications for the State of

1 New York and there was no direct state law precedent on that
2 question, we certified to the New York Court of Appeals the
3 following question: "Did any or all of Defendants-Appellees
4 breach a fiduciary duty to Plaintiff-Appellant Rivkin by failing
5 to disclose, in any form, Defendants-Appellees' representation of
6 a competing buyer for the property Rivkin sought to buy?" Id. at
7 108.

8 The New York Court of Appeals accepted certification and in
9 a unanimous opinion, filed in April 2008, answered the certified
10 question "in the negative." See Rivkin v. Century 21 Teran Realty
11 LLC, 10 N.Y.3d 344, 357 (2008) ("Rivkin II"). The Court of
12 Appeals upheld a buyer's agent's duties of "undivided loyalty . .
13 . [and] full disclosure" owed to the buyer under the common law
14 of agency, id. at 355 (quoting Real Property Law § 443(3)(c) &
15 (4)(a)), but the court ruled that only "the buyer's individual
16 agent" is subject to these fiduciary duties -- not "the agent's
17 firm," id. at 356 (emphasis in the original). The court reasoned
18 that, when two or more real estate brokers, affiliated with the
19 same firm, represent different bidders on the same property, they
20 "have every reason to negotiate in their clients' best interest,"
21 consistent with their fiduciary duties, because they "only earn
22 commissions for sales to their own clients." Id. Therefore,
23 although the court acknowledged that "[a]n individual agent . . .
24 may not represent multiple buyers bidding on the same property

1 without making disclosure and obtaining consent" from the
2 multiple prospective buyers involved, id. at 357, it concluded
3 that "unless a real estate brokerage firm and principal
4 specifically agree otherwise, the firm is not obligated to insure
5 that its affiliated licensees forgo making offers on behalf of
6 other buyers for property on which the principal has already
7 bid." Id. at 356. It was clear from the record that Rivkin's
8 individual agent (Luborsky) did not represent multiple buyers in
9 the transaction, thus fully complying with his duties to
10 Plaintiff-Appellant. Id. at 350-51.

11 Thereafter, we gave the parties an opportunity to comment
12 in letter briefs on the opinion in Rivkin II. Plaintiff-
13 Appellant, in his letter-brief, argued that we should still
14 reverse the district court's ruling and remand. He claimed that,
15 even though Teran owed him no fiduciary duty of loyalty and full
16 disclosure under New York law, as defined by the New York Court
17 of Appeals in Rivkin II, Teran had assumed such duties by
18 contract. In Plaintiff-Appellant's view, Rivkin II did not
19 address his theory of a contract-based fiduciary relationship
20 between Teran and himself. Consequently, Plaintiff-Appellant
21 argues, the New York Court of Appeals' opinion is not dispositive
22 of all the issues on appeal. Plaintiff-Appellant reiterates his
23 claim, originally made to us in his appeal from the district
24 court, that apart from the legal duties to which Teran's

1 employees are subject on an individual basis a number of
2 circumstances in this case indicate the existence of a
3 contractually-created fiduciary duty of loyalty and disclosure
4 owed by Teran itself.¹ At the very least, Plaintiff-Appellant
5 urges us to find that triable issues of fact remained as to the
6 existence and scope of such a contractually-created duty,
7 warranting reversal of the district judge's grant of summary
8 judgment for Defendant-Appellees.

9 We are unpersuaded by Plaintiff-Appellant's arguments
10 before us now and decline his invitation to remand the case to
11 the district court. We remind Plaintiff-Appellant that the
12 certified question specifically asked whether "any or all of
13 Defendants-Appellees breach[ed] a fiduciary duty to Rivkin."
14 Rivkin I, 494 F.3d at 108 (emphasis added). Our framing the
15 question in this broad manner allowed the Court of Appeals to
16 explore different theories pursuant to which a fiduciary
17 relationship might have existed under the facts of the case. When
18 certifying, we explicitly stated that "the certified question may
19 be deemed expanded to cover any further pertinent question of New

¹ In his original brief to us, Plaintiff-Appellant raised the issue of the voluntary assumption by Teran of fiduciary duties by agreement. We note that his brief, as well as the entire record of the case filed with this Court, was transmitted to the New York Court of Appeals, along with our certification opinion. See Rivkin I, 494 F.3d at 108. The New York Court of Appeals was therefore aware of the parties' arguments to this Court leading to our decision in Rivkin I. If Plaintiff-Appellant had any doubts about the completeness of the New York Court of Appeals' review of his arguments, he could certainly have petitioned that court for a rehearing of the case, but apparently did not do so.

1 York law involved in this appeal that the Court of Appeals
2 chooses to answer." Id. In the end, that court clearly answered
3 the certified question in the negative, thus finding that Teran
4 (1) had *no* fiduciary duty to Rivkin; and (2) did not commit any
5 fiduciary breach by failing to disclose the representation by a
6 different agent of the firm of a competing buyer for the property
7 Rivkin sought to buy. Rivkin II, 10 N.Y.3d at 357.

8 The New York Court of Appeals expressly recognized that
9 there could be an agreement between a real estate brokerage firm
10 and a prospective buyer, through which the firm could undertake
11 fiduciary duties otherwise not imposed by law. Id. at 356
12 ("unless a real estate brokerage firm and principal specifically
13 agree otherwise, the firm is not obligated to insure that its
14 affiliated licensees forgo making offers on behalf of other
15 buyers")(emphasis added). The New York Court of Appeals also took
16 into account and quoted the statutorily-mandated terms of the
17 disclosure form entitled "Disclosure Regarding Real Estate Agency
18 Relationship" which Defendant Luborsky, as Rivkin's buyer's
19 broker, presented to his client and which Rivkin himself signed.
20 Rivkin II, 10 N.Y.3d at 353 (quoting former N.Y. Real Property
21 Law § 443(4) which prescribed the content of the disclosure
22 form). Accordingly, in deciding that there was no fiduciary
23 breach by Teran, the court was obviously not satisfied that this
24 form was tantamount to an agreement giving rise to contractual

1 duties not prescribed by the common law of agency. Rivkin
2 additionally relies on the language in the Buyer Agency Agreement
3 form published on Teran's website. But that model agreement, as
4 Rivkin himself concedes, was never signed by either Luborsky or
5 Rivkin; his reliance is, therefore, misplaced. Before responding
6 to the certified question in the negative, the New York Court of
7 Appeals assessed the parties' allegations against the factual
8 record and in the most categorical terms concluded that Teran's
9 conduct did not amount to violation of any duty, legal or
10 contractual, owed to Rivkin.

11 We cannot revisit the conclusions of the New York Court of
12 Appeals. Plaintiff asks us to disregard the decision of New
13 York's highest court on a determinative substantive issue that
14 requires us to interpret and apply New York law. This we cannot
15 do. "[T]he interpretation placed by the highest court of the
16 state upon its statutes is conclusive here." Smiley v. Kansas,
17 196 U.S. 447, 455 (1905).

18 For the foregoing reasons, we AFFIRM the ruling of the
19 district court.