

1
2 UNITED STATES COURT OF APPEALS
3
4 FOR THE SECOND CIRCUIT
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7
8 August Term 2006
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10 Argued: March 27, 2007 Decided: July 12, 2007
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12 Docket No. 05-6566-cv
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16 OLEG RIVKIN,
17
18 Plaintiff-Appellant,
19

20 - against -

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22 CENTURY 21 TERAN REALTY LLC, ANDREW PECK, CHLOE DRESSER and
23 JOSHUA LUBORSKY,
24

25 Defendants-Appellees,
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27 SUSAN MARTIN and ROBERT MARTIN,
28

29 Defendants.
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33 Before: FEINBERG, SOTOMAYOR, and KATZMANN,
34 Circuit Judges.
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36 Plaintiff-Appellant Oleg Rivkin appeals from an oral
37 decision and order of the United States District Court for the
38 Northern District of New York (Sharpe, J.) granting Defendants-
39 Appellees' motion for summary judgment and dismissing all
40 claims. Rivkin's claims implicate a question regarding the
41 nature of the fiduciary duty owed by a buyer's real estate
42 agent to a principal, which is a significant issue of New York
43 law for which there is no direct precedent.

1 Question certified to the New York Court of Appeals.

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3 ROBERT J. TOLCHIN, New York, NY, for Plaintiff-
4 Appellant.

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6 STEPHEN H. VOLKHEIMER, Hiscock & Barclay, LLP,
7 Albany, NY, for Defendants-Appellees.
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11 FEINBERG, Circuit Judge:

12 Plaintiff-Appellant Oleg Rivkin appeals from an oral
13 decision and order of the United States District Court for the
14 Northern District of New York (Sharpe, J.) granting Defendants-
15 Appellees' motion for summary judgment and dismissing Rivkin's
16 complaint. This case raises a significant issue of New York
17 law regarding the nature of the fiduciary duty a real estate
18 buyer's agent owes to the buyer (sometimes referred to
19 hereafter as the "principal"). For the reasons stated below,
20 we certify to the New York Court of Appeals the following
21 question: Did any or all of Defendants-Appellees breach a
22 fiduciary duty to Plaintiff-Appellant Rivkin by failing to
23 disclose, in any form, Defendants-Appellees' representation of
24 a competing buyer for the property Rivkin sought to buy?

25 I. BACKGROUND

26 A. Factual and Procedural History

27 The facts, recited below, are mostly undisputed.
28 Plaintiff Rivkin, who is a resident and citizen of New Jersey,
29 contacted Defendant Century 21 Teran Realty LLC ("Teran") on

1 May 25, 2004, regarding his interest in purchasing a particular
2 lake-front property in Ulster County, New York.¹ Teran is a
3 real estate brokerage firm in Woodstock, New York that is co-
4 owned by Defendants Andrew Peck and Chloe Dresser, who are both
5 real estate brokers licensed by the State of New York. Rivkin
6 was referred to Defendant Luborsky, a real estate associate
7 broker at Teran licensed by the State of New York. Luborksy
8 suggested to Rivkin a different property (hereafter "the
9 Property"), which was listed at \$100,000 and seemed to satisfy
10 all of Rivkin's requirements.² At that time, Luborsky told
11 Rivkin that he and Teran would like to act as Rivkin's "buyer's
12 agent."

13 The same day, and before Rivkin had seen the Property,
14 Rivkin told Luborsky to offer \$75,000 for the Property, sight
15 unseen. Luborsky said he thought this was a fair opening offer
16 and that he understood that lower offers had been made on the
17 Property and rejected. Luborsky communicated the offer to the

¹ There is some dispute, which we need not resolve, regarding whether Rivkin contacted Teran on May 24 or 25.

² Susanne Martin and Robert Martin eventually purchased the Property. They were dismissed as defendants from the case by stipulation of all parties, and are not parties to the appeal. They had contacted Dresser, another associate broker at Teran, and had expressed an interest in the Property five days earlier, on May 20, 2004.

1 sellers' agent, Deborah Mills.³ Several days later, on May 28,
2 Rivkin visited the Property in person for the first time, and
3 at that point signed a written "binder," or offer to purchase
4 the Property, for \$75,000.⁴

5 During the visit to the Property on May 28, Luborsky
6 presented to Rivkin a "Disclosure Regarding Real Estate Agency
7 Relationship," which stated, among other things, that a buyer's
8 agent "acts solely on behalf of the buyer" and has a fiduciary
9 duty of "undivided loyalty ... [and] full disclosure" to the
10 buyer. At Luborsky's request, Rivkin signed an acknowledgment
11 that he had received the disclosure form; Luborsky⁵ also signed
12 the acknowledgment.⁶

13 During the same conversation on May 28, Rivkin told
14 Luborsky that he was willing to raise his offer to the asking

³ The sellers' agent was associated with Century 21 Cherrytown Associates, presumably a franchise of Century 21. Teran is also a franchise of Century 21. However, neither party has made any allegation on the basis of this commonality.

⁴ Memorial Day that year fell on Monday, May 31.

⁵ On this form Luborksy was listed as the real estate licensee "of" the firm Teran.

⁶ The parties agree that Luborsky did not give Rivkin a "Buyer Agency Agreement," which is referred to on Teran's website. However, neither party appears to ascribe any importance to Teran's failure to give Rivkin this form. Rivkin does, however, rely upon the form to bolster his argument regarding the fiduciary duty a buyer's agent owes.

1 price of \$100,000. Luborsky advised Rivkin to wait for a
2 counter-offer from the sellers.⁷

3 The Martins bid \$100,000 for the Property on May 30, two
4 days after Rivkin made his \$75,000 bid. Unbeknownst at that
5 time to Rivkin and Luborksy, the Martins' bid, which was
6 ultimately successful, was submitted on their behalf by
7 Dresser, another Teran agent.

8 Rivkin contacted Luborsky on May 30 and May 31 to inquire
9 about the status of his offer. Both times, Luborksy responded
10 that he had not heard anything from the sellers' agent and
11 urged Rivkin to wait until after the Memorial Day weekend.
12 When Rivkin contacted Luborsky again on June 1, Luborksy told
13 him he had learned from the sellers' agent that there had been
14 other offers on the Property over the weekend. Rivkin
15 reiterated that he wanted the opportunity to raise his offer
16 and that he was prepared to do so. Luborsky said he would try
17 to find out from the sellers' agent whether the sellers were
18 going to make a counter-offer or whether they wanted to receive
19 "best and final" offers from all bidders.

20 Later that day (June 1), Luborsky called Rivkin and said
21 that the sellers had accepted another offer and Rivkin was out

⁷ According to Luborksy, he contacted the sellers' broker on May 29 to confirm that the offer had been received. The broker stated that the sellers were traveling over the weekend so it would be difficult to reach them that weekend. The broker also said that the property might be shown over the weekend.

1 of the running for the Property. Rivkin asked Luborsky to
2 contact the sellers, presumably in hopes of convincing them to
3 at least hear what Rivkin's best offer was. On June 2, Rivkin
4 called Luborsky, who said that he was unable to get any
5 information from sellers' agent and that the sellers were
6 apparently not entertaining any more offers.

7 The same day (June 2), Rivkin himself contacted the
8 sellers' agent, who said the sellers had orally accepted a full
9 price offer on the Property. According to the amended
10 complaint, she further stated: "I don't know if I should be
11 telling you this, but I think you should know that the full-
12 price offer came from your own broker's office." When Rivkin
13 asked Luborksy about this, Luborsky confirmed that the full
14 price offer came from Teran. Rivkin then called one of the
15 sellers directly and asked her if she was aware of Rivkin's
16 offer. The seller responded that she was aware of the offer,
17 that it was too low, and that Rivkin should deal with her
18 broker and should not call her again. Rivkin then also called
19 the other seller.

20 Shortly thereafter, Rivkin told Luborsky to offer
21 \$101,000, contingent only on a water well inspection.
22 According to Luborksy, he advised Rivkin that under the
23 circumstances he should consider raising his offer to \$105,000
24 or \$110,000. After contacting the seller with Rivkin's offer

1 of \$101,000 on June 2, Luborsky told Rivkin that the sellers
2 were not entertaining his offer and that the full price offer
3 had no conditions attached. On the same day, Rivkin instructed
4 Luborsky to offer \$105,000 with no contingencies. Still on
5 June 2, Rivkin again called one of the sellers to personally
6 relay his \$105,000 offer. The seller indicated to Rivkin that
7 he would consider his offer.

8 At this stage, according to their respective testimony,
9 Dresser did not know Luborsky's client was bidding on the
10 Property,⁸ and Peck did not know that two agents associated
11 with Teran were bidding on the same property.

12 On June 3, Rivkin contacted the sellers' broker regarding
13 his offer; he also sent a follow-up letter confirming the
14 substance of the conversation. That day, Rivkin terminated his
15 relationship with Luborsky and Teran.

16 Between June 6 and June 11 there was some suggestion that
17 the Martins' offer might not go through. However, on June 11
18 the Martins signed a written contract for the purchase of the
19 Property and they closed on the Property on August 18.

20 Luborsky never spoke with Dresser regarding the Property
21 before it was sold. However, Teran had no system to check if

⁸ According to the testimony of Dresser (the competing buyer's agent), she learned for the first time on June 4 that Luborsky's client was one of the other parties interested in the Property.

1 its agents were representing multiple buyers bidding on the
2 same property.

3 Following the Martins' purchase of the property, Rivkin
4 filed this suit, in which he bases subject matter jurisdiction
5 on diversity of citizenship, 28 U.S.C. § 1332(a)(1), and
6 advances 10 claims. For our purposes, the most pertinent is
7 the first, against all Defendants-Appellants, for breach of
8 fiduciary duty.⁹ After the completion of discovery, the
9 parties filed summary judgment motions. Rivkin moved for
10 partial summary judgment on the issue of liability, seeking a
11 holding that Teran had breached its duties to him. The
12 Defendants sought to dismiss Rivkin's entire case.

13 The district court granted Defendants' motion, entered
14 judgment in Defendants' favor and dismissed the case. The
15 judge framed the issue as "whether or not ... [there should be]
16 a per se rule that under circumstances like this, two employees
17 of the same agency cannot, absent full disclosure, represent
18 competing buyers for a piece of property." The judge noted

⁹ The 10 claims are: (1) breach of fiduciary duty; (2) fraud and fraudulent concealment; (3) fraud under § 349 of New York General Business Law; (4) aiding and abetting fraud; (5) unjust enrichment; (6) under the faithless agent doctrine; (7) tortious interference with prospective economic advantage and pre-contractual relations; (8) breach of contract; (9) injunction; and (10) constructive trust. The first seven claims are against all Defendants-Appellees; the eighth is against Teran only. All damages alleged stem from Rivkin's loss of the Property.

1 there was no New York case holding that facts similar to those
2 here amounted to a violation of law. The court "decline[d] to
3 hold that on these facts ... there is any per se rule that
4 would preclude representation by two employees of the same
5 agency." He further stated that "[i]t is also true ... that it
6 [was] probably unnecessary for [the court] to even reach that
7 issue, because on the facts, as everybody concedes them, there
8 simply is no basis whatsoever to associate the harm in the
9 representation from Luborsky to the harm to the plaintiff from
10 losing the [P]roperty."

11 Rivkin then filed this timely appeal.

12 B. Buyer's Agents

13 The use of a real estate agent exclusively by a potential
14 buyer of property -- rather than by (1) a seller or (2) a
15 seller and buyer together -- is apparently a somewhat new
16 phenomenon in the real estate industry in New York. For
17 example, Defendant Peck advertised in an article posted on
18 Teran's website that Teran was "the first firm in Ulster County
19 to begin, in 2001, to work with buyers only as their agents,
20 never as subagents for sellers." See "Why Consider a Buyer's
21 Agent Agreement?", <http://www.teranrealty.com/advice.htm> (last
22 visited on July 5, 2007). Nationwide, the trend towards the
23 use of buyer's agents in residential real estate apparently
24 began in the mid-1980's. See Ronald Benton Brown, Joseph M.

1 Grohman, Manuel R. Valcarcel, "Real Estate Brokerage: Recent
2 Changes in Relationships and a Proposed Cure," 29 Creighton L.
3 Rev. 25, 42 & 67 (1995). New York's agency disclosure law,
4 which includes provisions for buyer's agents, was passed in
5 1991 and took effect in 1992. See *id.* at 67; see also Roy T.
6 Black, "Proposed Alternatives to Traditional Real Property
7 Agency: Restructuring the Brokerage Relationship," 22 Real Est.
8 L.J. 201, 209 (1994); N.Y. Real Prop. Law § 443 (McKinney's
9 2004).

10 In contrast to the more commonly-used "seller's agent," a
11 buyer's agent represents individuals who are interested in
12 purchasing property. Among other services, a buyer's agent
13 finds property that a purchaser may be interested in, advises
14 the purchaser regarding price, and negotiates on behalf of the
15 purchaser. New York's Real Property Law dictates various
16 requirements for buyer's agents. In particular, a buyer's
17 agent is required to give the buyer a disclosure form, which
18 states in part that a buyer's agent "has, without limitation,
19 the following fiduciary duties to the buyer: reasonable care,
20 undivided loyalty, confidentiality, full disclosure, obedience
21 and duty to account."¹⁰ N.Y. Real Prop. Law § 443 (McKinney's
22 2004).

¹⁰ As noted above, Luborsky gave Rivkin this form on May 25.

1 II. DISCUSSION

2 A. Standard of Review

3 We review the determination of a district court on a
4 motion for summary judgment de novo. See *Cellular Tel. Co. v.*
5 *Town of Oyster Bay*, 166 F.3d 490, 492 (2d Cir. 1999). Summary
6 judgment will be granted if the moving party shows that there
7 is no genuine issue of material fact and that the moving party
8 is entitled to that judgment as a matter of law. See *Celotex*
9 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also Fed. R.
10 Civ. P. 56(c). This Court must view the evidence in the light
11 most favorable to Rivkin, and draw all reasonable inferences in
12 his favor, because he is the party opposing the summary
13 judgment motion granted below. See *United States v. Diebold,*
14 *Inc.*, 369 U.S. 654, 655 (1962); see also *Hemphill v. Schott,*
15 *141 F.3d 412, 415 (2d Cir. 1998).*

16 However, "it is well-established that the controlling
17 interpretation of state laws should normally be given by state
18 rather than federal courts." *Yoon v. Fordham Univ. Faculty &*
19 *Admin. Ret. Plan*, 263 F.3d 196, 203 (2d Cir. 2001).

20 B. The Parties' Central Arguments

21 On appeal, Rivkin argues that a real estate broker is a
22 fiduciary with a duty of loyalty and full disclosure to the
23 principal. Quoting New York law, Rivkin contends that if "a
24 broker's interests or loyalties are divided due to ...

1 representation of multiple parties, the broker must disclose to
2 the principal ... the material facts illuminating the broker's
3 divided loyalties." *Dubbs v. Stribling*, 96 N.Y.2d 337, 340
4 (2001).

5 Rivkin further argues that Defendants-Appellees breached
6 this duty by representing both Rivkin and the Martins on the
7 same property without disclosing, in some form, this dual
8 representation. Rivkin notes that even Teran co-owner Peck
9 testified in his deposition that if Teran represented competing
10 buyers who were given confidential information regarding the
11 other's past and future bids, Teran would be "unable to fulfill
12 that portion of [its] function as a buyer's agent which
13 involves discussion of what a fair price for the property would
14 be." As summarized at oral argument, Rivkin contends that "the
15 very people you hired to work for you" should not be "the ones
16 who are working against you."

17 Although Rivkin does not discuss the exact contours of the
18 fiduciary duty owed, nor the scope and timing of any requisite
19 disclosure, he argues that like a law firm, a real estate firm
20 should at least be required to have a "conflict checking
21 system," and if the brokerage firm represents more than one
22 principal bidding on a single property, the firm must disclose
23 this "completely" to the principals. Rivkin acknowledges that
24 there is no New York case law regarding buyer's agents, but he

1 thinks the case can be decided under the well-established real
2 estate agency rule that a "broker must not represent any
3 interests adverse to those of his or her principal in
4 transactions [that] involve the subject matter of the agency
5 relationship, without the principal's full knowledge and
6 consent, nor may the broker act as agent for both parties in a
7 transaction without the full and free consent of both parties,"
8 12 C.J.S. Brokers § 124 (2007).

9 Rivkin insists, moreover, that his agency relationship was
10 with Luborsky and Teran. He points out, for example, that
11 Teran repeatedly referred to Rivkin as a "client of the firm,"
12 that Defendants-Appellees admitted in their Answer that
13 "Luborsky is employed by" Teran, and that Luborsky admitted
14 that he told Rivkin that he "and his company, Teran" would like
15 to act as Rivkin's buyer's agent. Teran, Rivkin argues, had a
16 duty to know of and disclose any conflicts of interest between
17 its brokers.

18 Furthermore, Rivkin argues, the breach caused him harm
19 because had he been told the full story he would have been able
20 to protect his own position.¹¹ He would have known that he

¹¹ Defendants-Appellees argue that Rivkin has not preserved the issue of causation for appeal because he did not address this aspect of the district court's holding in his opening brief. We note that Rivkin did address causation, if not explicitly by name, by advancing the argument noted above about how he would have acted if given what he terms full disclosure. In addition, to the extent his opening brief can be construed to have omitted

1 should immediately increase his bid rather than wait for a
2 counter-offer as Luborsky recommended. He would have known not
3 to rely on anybody at Teran for advice. And he would not have
4 found himself in the position of hassling the sellers after
5 they had orally agreed to accept another offer, which
6 understandably made him an unattractive purchaser in the
7 sellers' eyes. Finally, Rivkin argues, in the alternative,
8 that whether his damage was caused by Defendants-Appellees is
9 an issue of fact that is unsuitable for summary adjudication.

10 Defendants-Appellees respond, in part, that Rivkin's claim
11 fails because even assuming a breach of fiduciary duty
12 occurred, any breach could not have caused him harm. Luborsky
13 did not discuss the sale with Dresser before it was final; he
14 also followed all of Rivkin's directions with respect to the
15 Property. Rivkin has not established any active collusion by
16 Defendants-Appellees to steer the Property to the Martins. Nor
17 has Rivkin shown, Defendants-Appellees say, that Rivkin would
18 have acted differently (thus affecting whether the sellers of
19 the Property would have accepted his bid) had he known that

the issue, and in light of the ample argument devoted to the question of causation in the opposition and reply briefs, we exercise our discretion and decline to deem the issue waived for purposes of appeal. See Fed. R. App. P. 2 (giving a Court of Appeals the discretion to overlook a failure to raise an issue on appeal if manifest injustice otherwise would result); see also *United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997).

1 Teran was simultaneously representing another principal bidding
2 on the Property. Thus, Defendants-Appellees argue, even if
3 they breached a fiduciary duty in this case by representing
4 competing buyers on the Property without full disclosure, the
5 breach was not a "substantial factor" see *Milbank, Tweed,*
6 *Hadley & McCloy v. Chan Cher Boon*, 13 F.3d 537, 543 (2d Cir.
7 1994), in causing an identifiable loss to Rivkin.

8 In addition, Defendants-Appellees counter that an
9 associate broker is an independent contractor, not an employee,
10 of the brokerage firm. The clients of one associate broker
11 are, they argue, unrelated to the clients of another broker in
12 the same firm. Peck testified to this relationship, noting
13 also that associate brokers do not receive a wage from Teran
14 but are paid a commission related to specific transactions.¹²
15 In other words, real estate brokers are not comparable to
16 lawyers in a firm: they are more like a franchiser and
17 franchisee, and the only fiduciary duty that is owed is between
18 the associate broker and the principal. Luborsky, they say,
19 did not breach this duty because he did not disclose
20 confidential information that Rivkin provided to him, he worked

¹² Peck also testified that he supervises the associate brokers, and that the associate brokers cannot work unless they work under a licensed broker and that for Teran he is the licensed broker.

1 in Rivkin's best interests (given the information he had), and
2 he gave Rivkin undivided loyalty.

3 Finally, Defendants-Appellees argue that it would damage
4 the real estate industry in New York to hold that a broker
5 breaches his fiduciary duty if two brokers in that brokerage
6 firm represent clients bidding on the same property without
7 full disclosure.

8 C. Certification

9 *General Certification Law*

10 Certification is appropriate "[w]henver it appears . . .
11 that determinative questions of New York law are involved in a
12 [pending case] for which no controlling precedent of the [New
13 York] Court of Appeals exists." N.Y. Comp. Codes R. & Regs.
14 tit. 22, § 500.27(a) (2006)¹³; see also Local Rules of the
15 United States Court of Appeals for the Second Circuit § 0.27¹⁴.

¹³ This statute reads, in relevant part:

Section 500.27 Discretionary proceedings to review certified questions from Federal courts and other courts of last resort.

(a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.

¹⁴ The Rule reads, in full:

Certification of Questions of State Law

1 In other words, certification may be proper if existing state
2 law is "so uncertain that we can make no reasonable prediction"
3 as to how the New York Court of Appeals would resolve the
4 question. *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir.
5 2005).

6 However, questions are not to be routinely certified
7 "simply because a certification procedure is available," *Kidney*
8 by *Kidney v. Kolmar Labs., Inc.*, 808 F.2d 955, 957 (2d Cir.
9 1987). Factors justifying certification include "the absence
10 of authoritative state court interpretations of the state
11 statute, the importance of the issue to the state and the
12 likelihood that the question will recur, and the capacity of
13 certification to resolve the litigation." *Green v. Montgomery*,
14 219 F.3d 52, 60 (2d Cir. 2000). This Court may also consider
15 whether the question implicates issues of state public policy.

Where authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court. Such certification may be made by this Court sua sponte or on motion of a party filed with the clerk of this Court. Certification will be in accordance with the procedures provided by the state's legislature or highest state court rules, e.g., Conn. Public Act No. 85-111; New York Court of Appeals Rule 500.7. Certification may stay the proceedings in this Court pending the state court's decision whether to accept the certification and its decision of the certified question.

1 See Krohn v. New York City Police Dep't, 341 F.3d 177, 180 (2d
2 Cir. 2003).

3 *The Appropriateness of Certification Here*

4 This case turns on an "unsettled" question of state law
5 for which there is "no direct precedent." See Alexander &
6 Alexander Servs., Inc. v. Lloyd's Syndicate 317, 902 F.2d 165,
7 169 (2d Cir. 1990) (certifying to the New York Court of Appeals
8 a question with "no direct precedent ... rather than having the
9 only precedent on point be that of a federal court, which may
10 be mistaken"); Israel v. State Farm Mut. Auto. Ins. Co., 239
11 F.3d 127, 136 (2d Cir. 2000) (certifying a case in which the
12 Court found "no Connecticut precedent directly addressing the
13 questions presented").¹⁵

14 The issues here concern the nature and extent of a buyer's
15 agent's obligation to avoid or mitigate conflicts of interest
16 among its principals. It is clear that buyer's agents owe
17 various fiduciary duties to their clients under New York's

¹⁵ At oral argument before us, Rivkin argued that certification would be appropriate in this case. The district court, without addressing certification, noted in its oral decision that there is no New York case "on these facts that has held that that kind of conduct in the real estate industry violates the law." Defendants, for their part, acknowledged at oral argument that there is no New York Court of Appeals case describing the nature of a buyer's agent's fiduciary duty, but argued that *Sonnenschein v. Douglas Elliman-Gibbons & Ives*, 96 N.Y.2d 369 (2001), should apply by analogy. They argued, further, that certification was inappropriate because any lack of disclosure did not cause any harm to Rivkin.

1 property law. N.Y. Real Prop. Law § 443 (McKinney's 2004);
2 see also Dubbs, 96 N.Y.2d at 340; see also section I.B., above.

3 As noted above, Rivkin points to Dubbs, 96 N.Y.2d 337, for
4 support. Although in that case the New York Court of Appeals
5 made the general statement that "it is well settled that a real
6 estate broker is a fiduciary with a duty of loyalty and an
7 obligation to act in the best interests of the principal," *id.*
8 at 340, Dubbs addressed the duties of seller's agents rather
9 than buyer's agents.

10 Indeed, it appears that no New York case deals with a
11 buyer's -- rather than a seller's -- agent's duties. The real
12 estate marketplace may, for various reasons, dictate different
13 duties for these two kinds of agents. In addition, even if we
14 were to presume that sellers' and buyers' agents owe identical
15 fiduciary duties, the facts of the New York cases that deal
16 with sellers' agents' duties are materially different from
17 those here: Dubbs, for example, involved allegations of an
18 improper "personal stake" in the transaction, and Sonnenschein
19 addressed whether a seller's broker may offer the properties of
20 all of its principals to a potential customer. Thus, these
21 cases neither answer the questions in this case nor can be used
22 with confidence to reasonably predict the answer.

23 The question certified in this case is also
24 "determinative," N.Y. Comp. Codes R. & Regs. tit. 22, §

1 500.27(a) (2006). This Court will ultimately need to decide
2 whether Rivkin has raised a triable issue of fact regarding
3 whether Teran's alleged breach of fiduciary duties caused his
4 injury. However, the causation analysis will turn on the type
5 of disclosure that New York law requires a buyer's agent to
6 make.

7 First, assume Teran's duty was to wall off the two agents
8 to ensure that they did not communicate confidential
9 information to one another. Because Rivkin does not contend
10 that Luborsky actually divulged confidential information about
11 his representation to Dresser, or vice versa, Teran's failure
12 to screen off the two agents or otherwise prevent them from
13 exchanging confidential information, even if a breach of its
14 duties, could not have resulted in any injury to Rivkin.

15 If Teran's duty of disclosure required it to disclose only
16 the fact of a conflict (and not any particular information
17 about the competing client's bids), then there may or may not
18 be a triable question on causation. On the one hand, it is
19 undisputed that Rivkin knew that the property was being shown
20 to other prospective buyers. Rivkin knew he had a competitor
21 for the property and decided to stay with his opening bid. It
22 is not clear how the knowledge that one of those buyers was
23 also represented by Teran would have affected Rivkin's choices.
24 The proximate cause of his failure to prevail in the bidding,

1 then, could be seen as the sellers' apparent decision to accept
2 the first reasonable offer. On the other hand, if Rivkin had
3 been told at the outset that Teran was representing another
4 buyer interested in the Property, perhaps (as Rivkin argues),
5 Rivkin would have chosen not to rely on Teran for advice
6 regarding how much to bid (or he might have ended his
7 relationship with the firm altogether, as he did on June 3).
8 Luborsky indisputably agreed with Rivkin that \$75,000 was a
9 reasonable opening bid. Perhaps, then, there would be a
10 triable issue regarding whether, absent a breach of duty so-
11 defined, Rivkin would have submitted a higher, successful,
12 initial bid on May 25, which would have been two days before
13 the Martins' first (and successful) bid.

14 Meanwhile, if Teran's duty of disclosure required Luborsky
15 to disclose to Rivkin the amount and terms of a competing
16 client's bid, and to do so before placing Rivkin's bid, Rivkin
17 could have a triable issue of fact on causation given his
18 testimony that he was prepared to make an initial bid at the
19 asking price and told this to Luborsky. In other words, this
20 information might have led him to raise his bid rather than
21 wait for a counteroffer; and the sellers might have accepted
22 the higher offer or begun a bidding war. Similarly, even if
23 this disclosure would have been required only after placing
24 Rivkin's bid, there might be a triable question whether Rivkin

1 would have been able to make a counterbid quickly enough to
2 dissuade the sellers from accepting the Martins' bid.

3 In sum, we can only speculate regarding whether there is a
4 triable issue regarding causation because resolution of the
5 issue is directly tied to the nature of Teran's fiduciary duty
6 to Rivkin. The substance of the fiduciary duty owed in this
7 case is thus determinative.

8 Because this issue relates to the relationship between
9 real estate agents and their clients and affects the real
10 estate market in New York, the question is significant,
11 implicates important public policy for the State of New York
12 and is likely to be repeated. See Local Rules of the United
13 States Court of Appeals for the Second Circuit § 0.27. For the
14 reasons detailed above, we believe that the New York Court of
15 Appeals can best resolve the issue of real estate law that we
16 are certifying and we solicit its views "rather than having the
17 only precedent on point be that of a federal court, which may
18 be mistaken." Alexander & Alexander, 902 F.2d at 169.

19 III. Conclusion

20 Because of the absence of authoritative state court
21 precedent, the fact that the question is important, likely to
22 recur and determinative, and because of the policy implications
23 for the State, we hereby respectfully certify the following
24 question to the New York Court of Appeals: Did any or all of

1 Defendants-Appellees breach a fiduciary duty to Rivkin by
2 failing to disclose, in any form, Defendants-Appellees'
3 representation of a competing buyer for the property Rivkin
4 sought to buy?

5 The certified question may be deemed expanded to cover any
6 further pertinent question of New York law involved in this
7 appeal that the Court of Appeals chooses to answer. This panel
8 retains jurisdiction and will consider any issues that may
9 remain on appeal once the New York Court of Appeals has either
10 provided us with its guidance, or declined certification.

11 It is therefore ordered that the Clerk of this Court
12 transmit to the Clerk of the Court of Appeals of the State of
13 New York a Certificate, as set forth below, together with a
14 complete set of briefs, appendices, and record filed by the
15 parties with this Court. The parties are further ordered to
16 bear equally such fees and costs, if any, as may be required by
17 the New York Court of Appeals.

18 Certificate

19 The foregoing is hereby certified to the Court of Appeals
20 of the State of New York, pursuant to 2d Cir. R. § 0.27 and
21 N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27, as ordered by
22 the United States Court of Appeals for the Second Circuit.