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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAFFLANE HOLDINGS LTD., and
ROBERT WYLDE,

Plaintiffs,

-against-

GAGOSIAN GALLERY, INC.

Defendant.

No. 11 CIV 1679
(DLC)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GAGOSIAN GALLERY, INC.'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

In this action, plaintiffs Robert Wylde ("Wylde"), a sophisticated collector of fine art, and Safflane Holdings Ltd. ("Safflane"), for which Wylde acts as its "authorized representative," seek to blame defendant Gagosian Gallery, Inc. for decisions Wylde alone made on two separate occasions, to accept risks that were fully disclosed to Wylde *before* he decided he wanted to acquire two paintings.

The first such instance involved plaintiffs' purchase from Charles Cowles ("Cowles") of an iconic painting by Mark Tansey ("Tansey") entitled *The Innocent Eye Test* (the "Tansey Painting"). Cowles, a well-known art dealer, affirmatively (though as it later turned out, falsely) represented directly to Wylde *before* he bought the Tansey Painting that it was his (Cowles') to sell. Wylde, an avid collector of quality Tansey works, knew that the Tansey Painting had been on display at the Metropolitan Museum of Art (the "Met"). Thus, at Wylde's request, Gagosian Gallery, whom Cowles had enlisted to help him find a buyer for the Tansey Painting, arranged for Wylde to go to Cowles' gallery/residence to view the work to confirm the representations Cowles had made to Gagosian Gallery that the work was in Cowles' possession and was his to sell. As revealed in emails (referenced in the Complaint), Wylde conducted an internet search the next day that took him to the Met's permanent Collection Database, which listed the Tansey Painting as the "Partial and Promised Gift of Jan Cowles and Charles Cowles, in honor of William S. Leiberman, 1988."

Nonetheless, Wylde, having received the confirmation he had sought from Cowles concerning Cowles' right to sell the Tansey Painting, notified Gagosian Gallery that he (Wylde) had decided to proceed with the purchase of the work for $2.5 million. Though Cowles has recently admitted in a *New York Times* article that he just decided to sell it and this was all "his mistake," plaintiffs have not sued Cowles in this action, electing instead to pursue only Gagosian

Gallery, a deeper pocket but against which plaintiffs have stated no viable claim in respect of the Tansey Painting.

Indeed, as described in the Complaint, Gagosian Gallery was at most acting as Cowles' agent, and thus, cannot be liable as a matter of law for its principal, Cowles' failure to deliver good and unencumbered title. Plaintiffs' contract claims relating to the Tansey Painting (Causes 1-4) therefore should be dismissed. In any event, as Cowles made the same representations to Wylde that he had made to Gagosian Gallery, and Wylde, having taken it upon himself to do his own research on the work using publicly available resources, was on actual notice before he decided to proceed with the transaction that the Tansey Painting had been gifted to the Met. On the basis of those allegations, and the contemporaneous exchanges referred to in the Complaint, plaintiffs cannot state claims for fraud or negligent misrepresentation (Causes 5-6), and those claims are unavailing for the further reason that they are duplicative of plaintiffs' breach of contract claim (Cause 4). As there is no private right of action under New York Arts and Cultural Affairs Law § 13.03, plaintiffs' claim invoking this statute (Cause 7) also fails.

In the same way, plaintiffs have failed to state a viable claim against Gagosian Gallery in relation to its sale to a third party of a painting (the "Prince Painting") by Richard Prince, which Wylde wished to buy for himself. Wylde, having purchased at least 10 paintings from Gagosian Gallery since 2004, was familiar with, and accepted the terms of, the standard form of invoice Gagosian Gallery uses, which expressly states that: "TITLE DOES NOT PASS UNTIL PAYMENT IN FULL IS RECEIVED." As plaintiffs admit in their Complaint, this language conditions the passage of title on payment in full. As the parties expressly did not intend for a binding contract to exist until Wylde paid in full, there was no binding commitment to deliver the Prince Painting to Wylde until he had paid for the Prince Painting in full – a condition which

did not happen because Gagosian Gallery immediately advised Wylde that the sale was cancelled and before any payment was made. Accordingly, plaintiffs' contract "repudiation" claim must be dismissed as a matter of law.

Finally, plaintiffs' attempt to morph their flawed "repudiation" claim into a violation of New York General Business Law § 349 also should be rejected because it is well-established that Section 349 does not apply to a single dealing between a private party and a merchant, such as the one here. As such, plaintiffs' scandalous allegation that Gagosian Gallery makes it a business practice of entering into agreements to sell art only to accept higher offers from someone else, can only be viewed as an attempt to malign the stellar business reputation of Gagosian Gallery. Accordingly, this allegation should be stricken from the Complaint.

STATEMENT OF FACTS

The claims alleged in the Complaint are premised on two discrete events, one involving the Tansey Painting, and the other involving the Prince Painting. In the case of the Tansey transaction, Wylde acted as the "authorized representative" for his principal, Safflane (Cpl. ¶ 11) in his dealings with Gagosian Gallery, which was known to plaintiffs to be "one of the most reputable and renowned contemporary art dealers in the world (Cpl. ¶ 19(ii)). In regards to the Prince claim, Wylde apparently acted on his own behalf. *See* Cpl. ¶ 29; Bart Aff. at Ex A (Prince invoice in Wylde's name only).[1] Accordingly, consideration of the legal theories advanced below in support of defendant's motion to dismiss must be viewed in the context of

[1] "Bart Aff." or "Bart Affidavit" refers to the Affidavit of Hollis Gonerka Bart and "Good Aff." or "Good Affidavit" refers to the Affidavit of John Good, each of which was sworn to on May 11, 2011. The exhibits attached to the affidavits and the statements in the Good Affidavit are referred to in the Complaint and are thus properly considered on this motion to dismiss. *See Field v. Trump*, 850 F.2d 938, 949 (2d Cir. 1998); *Perry v. Vanteon Corp.*, 192 F. Supp. 2d 93, 94 n. 1 (W.D.N.Y. 2002); *see also* Cpl. ¶¶ 14 (referring to oral and email communications), 17 (communications which "confirmed" representations), 24 (Tansey invoice) and 29 (Prince invoice).

Wylde's admitted knowledge and experience as a sophisticated collector of fine art, and the proactive and informed role he took in deciding to proceed with these two purchases, as detailed below.

A. Wylde, an Experienced Purchaser of Fine Art and "Active" Collector of Works by Tansey

Since 2004, Wylde, as Safflane's "authorized representative," has engaged "in no less than 10 transactions" with Gagosian Gallery, totaling $5,100,000, including the acquisition of a work by Tansey, a postmodern painter. *Id.* at ¶ 13, n.2; *see also id.* at ¶¶ 9, 11, 14 (plaintiffs are known for wanting to improve and complement their art collection). In this regard, plaintiffs have "actively collected the works of Tansey," whose works sell for millions of dollars. *Id.* at ¶¶ 9, 13.

B. Charles Cowles Enlists Gagosian Gallery to Find a Buyer for Tansey's Iconic Work, *The Innocent Eye Test*

In or about late July 2009, Cowles, a well-known New York City art dealer, contacted "one of Defendant's most senior and experienced sales persons," John Good. *Id.* at ¶¶ 11, 14(ii); *see also id.* at ¶ 14 (Tansey transaction spanned period July 20-31, 2009). Cowles, with whom Gagosian had previously done business without incident, allegedly informed Good that he was winding down his art dealership and was interested in selling Tansey's *The Innocent Eye Test*. *See, e.g.,* Cpl ¶ 19(iii). Cowles asked Good if Gagosian Gallery could help find him a buyer for the Tansey Painting. *See id.* at ¶ 19(iii); *see also id.* at ¶¶ 14(ii), 14(iv).

The Innocent Eye Test has attained an "iconic status" in the art world, and had been on display at the Metropolitan Museum of Art (the "Met"). *See* Cpl. at ¶ 16. Moreover, there is a scarcity of quality works by Tansey in the secondary market (*id.*), thus making the market for his works relatively small and easy to track (*see, e.g., infra* at Section C). Good thus asked Cowles whether the Met had an interest in the Tansey Painting. *See* Cpl. ¶¶ 14(iv), 19(i). In response,

Cowles is alleged to have represented to Good that due to a "spat" Cowles had with the Met's director, the Tansey Painting was no longer being exhibited at the Met, and as such, "the Tansey Painting had been properly returned to [Cowles] by the Met," that Cowles was "rightfully in possession of the Tansey Painting," and it "was now owned by [Cowles] and could be sold to Safflane." Cpl. ¶ 14(ii)-(iv). Knowing of Wylde's interest in, and knowledge of, Tansey and his works, Good contacted Wylde to determine whether he might be interested in purchasing Cowles' Tansey Painting. *See id.* at ¶¶ 9, 13.

C. Wylde Determines to Purchase Cowles' *The Innocent Eye Test*

During their discussion of the Tansey Painting, Good conveyed to Wylde exactly what Cowles had told him – namely, that Cowles owned and was in possession of the Tansey Painting, that "prior to [Cowles] having taken possession the Tansey Painting, [it] had been located and exhibited at The Metropolitan Museum of Art (the "Met")," that due to a "spat" that Cowles had with the Met's director, the Tansey Painting was no longer being exhibited at the Met, and that the Tansey Painting "was now owned by [Cowles] and could be sold to Safflane." *Id.* at ¶¶ 14, 19(i)(iii).

Plaintiffs do not allege that Wylde asked Good if he had contacted the Met to determine whether it had any ownership interest in the Tansey Painting, nor did Wylde request that Good do so. Instead, Wylde appears to have conducted his own due diligence, which confirms that he was fully aware of the Met's interest in the Tansey Painting *before* he decided to purchase it from Cowles. *See* Good Aff. at Ex A.

Specifically, the next day on July 28, 2009, Wylde sent an email to Good with the following subject line: "promised gift of charles cowles in honour of william s. lieberman."[2]

[2] As a quick Google search confirms, Wylde lifted the text which appears in the subject line from the webpage on the Met's website regarding the Cowles' promised gift of *The Innocent Eye Test*. *See* The Met Works of Art, Modern Collection Database, Mark Tansey, Innocent Eye Test, *available at* http://www.metmuseum.org/works_of_art/collection_database/modern_art/

Id.; *see also* Cpl. ¶ 18. As the email contained a link to an apartment, but nothing that would explain the subject line, Good responded: "Saw the listing for the loft but was there something else about the promised gift?" Good Aff. Ex. A. Wylde replied: "in honour of William S. Lieberman.... who was he?" Good answered, explaining, "Curator of 20th century art; now retired and replaced by Gary Tinterow." *Id.*

After Wylde conveyed his decision to purchase the Tansey Painting for $2.5 million, Gagosian Galley issued an invoice to plaintiff Safflane dated July 31, 2009 for the Tansey Painting. *See id.* at ¶ 24; *see also* Bart Aff. at Ex. C. As expressly stated on the Gagosian Gallery invoice, title passed when payment in full was made in or about August 5, 2009, and the Tansey Painting was delivered to plaintiff Safflane. Cpl. ¶ 24; Bart Aff. at Ex C.

In or about April 2010, Gagosian Gallery learned for the first time that Cowles in fact did not have the authority to sell the Tansey Painting, and that the Met, through gifts made by Cowles and his mother, held a 31% undivided interest in it. *Id.* ¶ 25.

Almost a year later, plaintiffs filed this action seeking to recover $6 million from Gagosian Gallery. Though Wylde clearly was sufficiently satisfied by the confirmation he received from Cowles when he viewed the Tansey Painting that it was Cowles' to sell, plaintiffs have not sued Cowles, even though Cowles has readily admitted in an article that was recently published in the *New York Times* discussing this lawsuit, that *he* misrepresented his ability to convey to Plaintiffs unencumbered title to the Tansey Painting, and that it was all *his* mistake:

[continued]
the_innocent_eye_test_mark_tansey/objectview.aspx?collID=21&OID=210005185; *see also* Bart Aff. at Ex B; *Muller-Paisner v. TIAA*, 289 Fed. Appx. 461, 466, 466 n.5 (2d Cir. 2008) (taking judicial notice of "defendants' website for the facts of its publications.").

> Mr. Cowles . . . said that he considered the whole dispute his mistake. He said that after the museum returned the painting to him "I didn't even think about whether the Met owned part of it or not." "And one day I saw it on the wall and thought, 'Hey, I could use money' and so I decided to sell it," he added. "And now it's a big mess."

See New York Times, Collector Sues Gagosian Gallery for Selling Him a Painting Partially Owned By Met, dated March 11, 2011. Bart Aff. at Ex D.

On May 10, 2011, the Met filed a lawsuit against plaintiffs in the Southern District of New York for a declaratory judgment that the Met is the sole and exclusive owner of the Tansey Painting and for its immediate return. *Id.* at Ex. E.

D. The Sale of Prince's *Millionaire Nurse*

A few months after plaintiffs purchased the Tansey Painting, Gagosian Gallery showed Wylde, on or about October 15, 2009, a painting by Prince entitled, *Millionaire Nurse,* and the next day provided a fact sheet to him concerning the work. Cpl. ¶¶ 26- 27. Upon learning that Wylde wished to purchase the Prince Painting, Gagosian Gallery issued its standard form of invoice to Wylde on or about October 23, 2009 in the amount of $2.2 million. Cpl. ¶¶ 28-29. The invoice expressly provided in capital letters that "TITLE DOES NOT PASS UNTIL PAYMENT IN FULL IS RECEIVED." *See* Cpl. ¶ 24; Bart Aff. at Ex A. As plaintiffs readily concede in their Complaint, this language expressly conditions the passage of title upon receipt of payment in full. Cpl. ¶ 24; *see also id.* at ¶ 50 (conceding that payment is required "on its part to be performed") and ¶ 68 (title passes "when payment in full [is] received.").

On or about October 25, 2009, before Wylde paid for the Prince or took possession of it, Good advised Wylde that the sale was cancelled. Cpl. ¶ 30. In the Complaint, plaintiffs seek to recover damages of $1,000,000 on the theory that by repudiating the sale before they had paid for the Prince Painting, Gagosian Gallery wrongfully repudiated the parties' alleged agreement. Cpl. ¶¶ 74-75.

ARGUMENT

A complaint will be dismissed if a plaintiff fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, factual allegations must raise a right to relief that is above the speculative level, on the assumption that all of the complaint's allegations are true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also ATSI Commc'ns, Inc. v. Shaar Fund Ltd.*, 493 F.3d 87 (2d Cir. 2007). While a court, on a motion to dismiss, must accept the truth of the allegations in a complaint, the court need not accept as true bald assertions and legal conclusions, or legal conclusions masquerading as facts. *See Twombly*, 550 U.S. at 555-56. Nor must a court accept allegations that are contradicted by other allegations in a complaint. *See In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 585 (S.D.N.Y. 2007).

POINT I

BECAUSE GAGOSIAN GALLERY WAS AT MOST MERELY AN AGENT OF A DISCLOSED PRINCIPAL IN THE TANSEY TRANSACTION, ALL OF PLAINTIFFS' CONTRACT CLAIMS MUST BE DISMISSED AS A MATTER OF LAW

Plaintiffs seek to hold Gagosian Gallery responsible on breach of contract and warranty theories, alleging that it is liable for Plaintiffs' inability to obtain full title to the Tansey Painting. As demonstrated below, those allegations, even if accepted as true (which is not conceded), fail to state a claim because, as evident from the allegations in the Complaint, Gagosian Gallery was at most acting as an agent for the actual seller of the Tansey Painting – Cowles – and as such, cannot be held responsible for Cowles' failure to deliver good and unencumbered title.

It is well-established that an agent who enters into a contract with a third party on behalf of a disclosed principal "is not a party to the contract unless the agent and the third party agree otherwise." *Man Diesel A/S v. Seahawk N. Am. LLC*, 2009 U.S. Dist. LEXIS 87648, *6 (S.D.N.Y. Sept. 22, 2009), *quoting* Restatement (Third) of Agency § 6.01 (2006). Thus, absent such agreement (and none is alleged here), an agent for a disclosed principal is not liable to such

third party in the event the principal breaches the contract. *Id.; see also Van Damme v. Gelber*, 2008 N.Y. Misc. LEXIS 203, at **4-7 (N.Y. Sup. Ct. Jan. 23, 2008).

A principal is disclosed if, at the time the agent and third party enter into the contract, "the third party has notice that the agent is acting for [the] principal and has notice of the principal's identity." *Man Diesel A/S*, 2009 U.S. Dist. LEXIS 87648, at *7, *quoting* Restatement (Third) of Agency § 1.04(2)(a). The key to such disclosure is whether the third party has "sufficient information to distinguish the principal from all others." *Id.*, *quoting Deutsche Bank Sec. Inc. v. Rhodes*, 578 F. Supp. 2d 652, 666 (S.D.N.Y. 2008) (citation omitted). The third party is deemed to have "sufficient information" of the principal's identity when it "knows, has reason to know, or should know of such identity." *Id.* Based on the allegations in the Complaint, it is clear that plaintiffs knew or should have known that Gagosian Gallery was acting at the behest of Cowles who sought its assistance for the purpose of finding a buyer for the Tansey Painting. *See, e.g.,* Cpl. at ¶¶ 14, 19.

Van Damme, 2008 N.Y. Misc. LEXIS 203, is instructive in this regard. In *Van Damme*, plaintiff sought enforcement of a contract to buy a painting from defendant, a gallery, who was acting as the agent for the owner/seller of the painting. The gallery moved to dismiss the causes of action for breach of contract, specific performance and conversion, arguing that it could not be held liable since it was a mere agent in the transaction. *Id.* at **4-7. The court agreed that the specific performance and conversion claims must be dismissed, because the gallery was acting as the agent of the painting's owner in the transaction, and the gallery did not have ownership or control of the painting. *Id.* at 4. As for the breach of contract claim, that court stated that "[i]t is established law that an agent of a fully disclosed principal cannot be personally liable under a contract, unless the agent separately assumes individual liability." *Id.* at 5.

Here, the allegations of the Complaint are clear that Cowles was a fully disclosed principal, and that Gagosian Gallery was at most merely acting as Cowles' agent in connection with the sale of the Tansey Painting to plaintiffs. As alleged in the Complaint, Wylde was specifically and repeatedly informed that "Cowles [was] the owner of the Tansey Painting." Cpl. ¶ 14, 18, 19. Moreover, Wylde admits that he even met with Cowles and confirmed that Cowles, not Gagosian Gallery, was in possession of the Tansey Painting, when he viewed it hanging in Cowles' residence. Cpl. ¶ 17. In addition, when Wylde, the "authorized representative" of Safflane (Cpl. ¶ 11), met with Cowles, he directly asked Cowles whether the Tansey Painting was Cowles' to sell, and Cowles responded yes.[3] *See* Cpl. ¶ 17; Good Aff. ¶ A.

In sum, plaintiffs cannot dispute that they were aware that Cowles was the seller, and thus principal, in the sale of the Tansey Painting to them. As such, there simply is no basis to hold Gagosian Gallery liable for the alleged breaches of contract or warranty by Cowles, a fully disclosed principal. *See Man Diesel A/S v. Seahawk N. Am. LLC*, 2009 U.S. Dist. LEXIS 87648, *6 (S.D.N.Y. Sept. 22, 2009) (dismissing plaintiff's claims against agent where its principal was disclosed).

In light of these specific allegations, plaintiffs' speculative and vague allegation that they "*believed*" that Gagosian Gallery was acting as a principal during the negotiations and ultimate sale of the Tansey Painting should be rejected. Cpl. ¶ 20. Indeed, given the admissions in their Complaint that Wylde was repeatedly informed by all involved that Cowles was the owner of the Painting and the person selling it – not Gagosian Gallery – their assertion that they "believed" Gagosian Gallery to be the principal is not plausible and is contradicted by their other more specific allegations concerning Cowles' ownership. Thus, plaintiffs' vague belief should be rejected by the Court. *See In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d at 585 (a court

[3] Moreover, plaintiffs fail to make any allegation (nor was it the case) that Gagosian Gallery ever accepted individual liability that would subject them to contract liability as an agent of Cowles.

should not accept allegations that are contradicted or undermined by other more specific allegations in the complaint); *see also Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 47713, *27 (S.D.N.Y. 2011) ("Conclusory pleadings on information and belief are inadequate as a matter of law to survive a motion to dismiss"). For the foregoing reasons, Gagosian Gallery cannot be held liable for the failure of its fully disclosed principal, Cowles, to deliver good title, and Plaintiffs' first four causes of action relating to the sale of the Tansey Painting must therefore be dismissed.

POINT II

WYLDE'S ACTIVE ROLE AND DIRECT COMMUNICATIONS WITH COWLES CONCERNING A CONTRACT TO BUY THE TANSEY PAINTING FORECLOSE PLAINTIFFS' FRAUD CLAIM AS A MATTER OF LAW

As detailed in the Complaint and in the contemporaneous communications referenced therein (Cpl. ¶ 18) Wylde, acting as Safflane's "authorized representative," took an active role in conducting such due diligence as he deemed necessary to represent his principal's interests in the purchase of the Tansey Painting, including speaking directly to Cowles to obtain "confirmation" of the representations Cowles had made to Gagosian Gallery; and he made the decision to purchase the Tansey Painting from Cowles, knowing that the work was listed on the Met's website as a promised gift from Cowles and his mother to the Met. *See* Cpl. at ¶¶ 11, 14, 17, 18, 19, 24, Good Aff. at Ex. A; Bart Aff. at Ex. B. Thus, plaintiffs' fraud claim against Gagosian Gallery, alleging that the Gallery knew or should have known that Cowles did not have the right to sell the Tansey Painting, but deceived and defrauded and induced plaintiff Safflane to purchase it anyway (Cpl. at ¶ 55), is frivolous and should be dismissed on this ground alone.

But, even accepting this allegation as true, plaintiffs have not stated a claim for fraud because, as demonstrated below, (i) plaintiffs have not sufficiently alleged that they justifiably relied on any statement Gagosian Gallery (as opposed to Cowles) allegedly made to Wylde

concerning Cowles' claim of ownership of the Painting, and (ii) plaintiffs' fraud claim clearly is duplicative of their breach of contract claim, which seeks the very same relief.

A. Plaintiffs Have Not Sufficiently Alleged Justifiable Reliance

To establish a claim for fraud, plaintiffs must show "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, *justifiable reliance* of the other party on the misrepresentation or material omission, and injury." *Joseph v. NRT Inc.*, 18 Misc. 3d 296, 299 (N.Y. Civ. Ct. 2007) (emphasis added). A party is not justified in relying on any alleged misrepresented facts if such facts were "not peculiarly within the other party's knowledge and the party had the means to discover the truth by the exercise of ordinary intelligence." *See id.*; *see also Seung v. Fortune Cookie Projects*, 2010 N.Y. Misc. LEXIS 3991, at *12 (N.Y. Sup. Aug. 9, 2010) (*internal citations and quotations omitted*) (dismissing plaintiff's fraud claim and holding that plaintiff failed to show justifiable reliance on defendant's assessment of the painting's value because the painting's value was not peculiarly within the defendants' knowledge); *Dallas Aerospace, Inc., v CIS Air Corp.*, 352 F.3d 775, 785-86 (2d Cir. 2003) (where alleged misrepresented facts were not peculiarly within the defendants' knowledge and plaintiff had available means of ascertaining the truth, including asking the defendant to procure the requested information, a claim for fraudulent misrepresentation is defeated); *Amusement Indus., Inc. v. Stern*, 2011 U.S. Dist. LEXIS 15887, at *34 (S.D.N.Y. Feb. 17, 2011) (finding that "courts have granted motions to dismiss because of a failure to adequately plead reasonable reliance . . . where a plaintiff failed to examine readily available information, relied on oral representations of information when it could easily have asked for additional information, or failed to properly investigate a transaction.") (citation omitted).

Here, Wylde similarly fails to allege that he justifiably relied on any of Gagosian Gallery's statements, because any alleged misrepresentation of facts were not peculiarly within Gagosian Gallery's knowledge, and more tellingly, plaintiffs concede in their Complaint and in contemporaneous communications referenced therein, that Wylde conducted his own due diligence, which confirms that he was fully aware of the Met's potential interest in the Tansey Painting *before* he decided to purchase it from Cowles. *See* Cpl. ¶ 17; Good Aff. at Ex A. Good also openly exchanged emails with Wylde before he decided to purchase the Tansey Painting about Wylde's discovery that the work appeared on the Met website as a gift to the Met from Cowles and his Mother.[4] Good Aff. Ex A.

Thus, Wylde, having met directly with Cowles, seen the Tansey Painting hanging on the wall in Cowles' gallery/residence, and conducted research on the Met website, was nonetheless sufficiently satisfied with Cowles' representations about his ownership of the Tansey Painting when he (Wylde) made the decision to buy it from Cowles. By plaintiffs' own account, then, Wylde, the "authorized representative of Safflane," had the same information as Gagosian Gallery with respect to Cowles' ownership of the Tansey Painting.

As Wylde clearly was conducting his own due diligence, including internet research which revealed that Cowles and his mother gifted the Tansey Painting to the Met in 1988, he could have easily tested the veracity of Cowles' representations that the Tansey Painting was his to sell, through the exercise of ordinary due diligence by conducting further investigation or insisting on a follow-up conversation with Cowles regarding his finding on the Met's webpage. But the Complaint alleges no such follow-up. Instead, the Complaint shows that Cowles, having "confirmed" Cowles' representation, made the decision to purchase the Tansey Painting.

[4] While Plaintiffs allege that the "lay Plaintiffs had no such capability" to research and evaluate the truth of Cowles' representations, Wylde, in fact, did have the capability and equal access to the same information as Gagosian, as evidenced, *inter alia*, by the internet research he conducted. *See* Cpl. at ¶ 19(v).

Plaintiffs' fraud claim, thus, must be dismissed. *See Joseph v. NRT Inc.*, 18 Misc. 3d at 300 (dismissing plaintiff's fraud claim against real estate broker where, while the defendant misrepresented the number of bedrooms in the listing for an apartment, plaintiffs were not reasonable in relying on the defendants' representations as it was not a matter peculiarly within the defendant's knowledge and plaintiffs had the means to "discover the truth by the exercise of ordinary intelligence"). *See also* Cpl. at ¶ 19(i), (iii).

Nor was there any reason why Wylde could not have asked Gagosian Gallery to call the Met or, for that matter, called the Met himself. *See Dallas Aerospace, Inc.,* 352 F.3d at 786 (rejecting plaintiff's argument that it did not have access to certain information, noting that it "could have asked [defendant] to procure" it for plaintiff, but did not, and thus the information was not peculiarly within defendant's knowledge).

In sum, as the Complaint reflects, Wylde knew that the Met, having displayed the Painting, had some connection to it and was concerned enough that he wanted to confirm Cowles' possession of it by viewing it himself in Cowles' residence. It was only after observing the Painting in Cowles' residence, and having the opportunity to hear Cowles' responses to questions about his ownership of it, did Wylde decide to purchase the Tansey Painting. The notion that, having done so, plaintiffs relied on Gagosian Gallery – who made no misrepresentations of its own but rather simply conveyed Cowles' prior statements about his ownership to Wylde – is nonsensical and fails to state a claim against Gagosian Gallery as a matter of law.

B. Plaintiffs' Fraud Claim Must be Dismissed as Duplicative of Their Breach of Contract Claim

It is well-established that "a cause of action for fraud does not arise when that fraud relates to a breach of contract." *Shea v. Angulo*, 1993 U.S. Dist. LEXIS 16740, at *9 (S.D.N.Y. Nov. 29, 1993). *See also Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1160

(S.D.N.Y. 1996) ("a contract claim cannot be converted into a fraud claim by the addition of an allegation that the promisor intended not to perform when he made the promise"). In determining whether a fraud claim relates to a breach of contract claim, courts scrutinize whether a plaintiff has alleged that a legal duty exists independent of the parties' contractual relations. *See Shea*, 1993 U.S. Dist. LEXIS 16740, at *11 (holding that "to overcome the general rule and allege an independent fraud claim [a plaintiff must] allege that the representation or concealment breached a legal duty between the parties that existed independently of their contractual relations"). Courts also look to whether the plaintiff has alleged "a fraudulent misrepresentation collateral or extraneous to the contract," or "special damages proximately caused by the fraudulent representation that are not recoverable under the contract measure of damages." *Papa's-June Music, Inc.*, 921 F. Supp. at 1161.

Here, even a cursory review of plaintiffs' Complaint reveals that their fraud claim is nothing more than their contract claim dressed up as a tort. In particular, the fraud claim contains no allegation of an independent duty between the parties arising outside of their contractual relations. Nor does that claim contain an allegation of a fraudulent misrepresentation collateral or extraneous to the contract. *See Papa's-June Music, Inc.*, 921 F. Supp. at 1161. Moreover, the damages plaintiffs seek – namely, the alleged value of the Tansey Painting – is identical to the damages plaintiffs seek in their breach of contract claim. *Compare* Cpl. ¶ 52 with ¶ 58. As such, it reflects both that the fraud claim is duplicative of the breach of contract claim and that special damages (which are not recoverable under the contract claim) have not been alleged. *See Ho Myung Moolsan Co., Ltd. v. Manitou Mineral Water, Inc.*, 665 F. Supp. 2d 239, 254 (S.D.N.Y. 2009) (holding that fraud claim was duplicative of contract claim where plaintiff could recover the same damages for its contract claim). Accordingly, plaintiffs' fraud claim must be dismissed as a matter of law.

POINT III

PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIM CONCERNING THE TANSEY PAINTING MUST BE DISMISSED FOR LACK OF ALLEGATIONS OF REASONALBE RELIANCE AND A SPECIAL RELATIONSHIP AND BECAUSE IT IS DUPLICATIVE OF PLAINTIFFS' BREACH OF CONTRACT CLAIM

For the reasons discussed above in Point II, Plaintiffs simply cannot allege that they reasonably relied on any statement from Gagosian Gallery given Wylde's visit to, and questioning of, Cowles. As such, plaintiffs' claim for negligent misrepresentation must also be dismissed as a matter of law. *See Joseph*, 18 Misc. 3d at 301 (negligent misrepresentation claim dismissed where plaintiffs could not demonstrate that they reasonably relied on the defendants' misrepresentations); *Hudson River Club v. Consol. Edison Co.*, 275 A.D.2d 218, 220-21 (1st Dep't 2000) (reversing lower court's decision and dismissing plaintiff's claim of negligent misrepresentation on a motion to dismiss, where plaintiff "did not reasonably rely upon [defendant's] misrepresentation," as plaintiff could have reasonably ascertained the facts it relied upon by conducting its own due diligence); *see also Gray v. Wackenhut Servs. Inc.*, 721 F. Supp. 2d 282, 292 (S.D.N.Y. 2010) ("The law has long required plaintiffs to make full use of the facts known to them, and their ordinary intelligence, before asserting a cause of action for misrepresentation").

Moreover, like their fraud claim, plaintiffs' negligent misrepresentation claim simply duplicates their breach of contract claim, provides no independent duty that was breached beyond the alleged breach of contract, and seeks the same exact damages sought in their breach of contract claim. Accordingly, this claim too must be dismissed as a matter of law. *See LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate, Inc.*, 2003 U.S. Dist. LEXIS 4315, at *9-15 (S.D.N.Y. March 21, 2003) (dismissing plaintiff's negligent misrepresentation claim on a Rule 12(b)(6) motion because, *inter alia*, plaintiff had not alleged a "legal duty [that] spring[s] from circumstances extraneous to, and not constituting elements of, the contract. . . .").

Finally, Plaintiffs' negligent misrepresentation claim is defective for the further reason that the Complaint does not contain legally sufficient allegations of a "special relationship." While Plaintiffs allege that Gagosian Gallery failed to discharge its duty of reasonable care by not properly investigating the Tansey Painting's title, that allegation is misguided, as Gagosian Gallery and Wylde did not have the requisite "special relationship" that would impose such a duty of care on Gagosian Gallery.

It is well-settled that for liability to arise for negligent misrepresentation, there must be a relationship between the parties which gives rise to a duty owed. *Brady v. Lynes, et al.,* 2008 U.S. Dist. LEXIS 43512, *20 (S.D.N.Y. 2008). Courts have specifically found that such duty from an art gallery to potential purchasers generally does not exist, but rather only arises in very limited circumstances, such as a contract specifically employing a gallery for the purpose of rendering an appraisal concerning the work at issue or a fiduciary relationship. *See id.*; *see also Struna v. Wolf,* 484 N.Y.S. 2d 392, 397 (NY Sup. Ct. 1985) ("Whether or not a special relationship exists depends on many considerations . . . but more often than not . . . it arises out of a contract where the defendant was specifically employed. . . .").

Here, Plaintiffs did not employ Gagosian Gallery in any capacity, as Gagosian Gallery, if anything, was working solely in the capacity as an agent for Cowles in respect to the Tansey Painting. Thus, plaintiffs and Gagosian Gallery were merely acting at arm's length to effectuate plaintiffs' purchase of the Tansey Painting from Cowles. As such, the relationship between Wylde and Gagosian Gallery is quite the opposite of the "special relationship" ordinarily required, and clearly does not support holding Gagosian Gallery to a higher duty of care to investigate the title of the Tansey Painting. *See Struna* at 397 (finding that an arm's length transaction, where the plaintiff was attempting to achieve a sale of a sculpture to the defendant Museum, was the "very antithesis" of a special relationship ordinarily required to support

holding defendant to higher duty of care than otherwise required); *see also Andres v. LeRoy Adventures*, Inc., 201 A.D.2d 262, 262 (1st Dep't 1994) (affirming dismissal of a negligent misrepresentation claim on the grounds that a special relationship "could not be discerned from the arms' length dealing between parties alleged in the complaint"); *Amusement Indus., Inc.*, 2011 U.S. Dist. LEXIS 15887, at *43 (S.D.N.Y. Feb. 17, 2011) (internal citations omitted)("transaction between the defendant and [plaintiff] is alleged to have been nothing more than an arm's length business arrangement between sophisticated and experienced parties, a circumstance insufficient to create 'a special relationship,'" and court therefore dismissed negligent misrepresentation claim).

Moreover, while plaintiffs allege that a special relationship was formed because they purchased numerous pieces of art from Gagosian Gallery over the course of the last few years, that allegation alone is not enough to establish the type of fiduciary relationship that might give rise to a special relationship. *See Granat v. Center Art Galleries-Hawaii, Inc.*, 1993 U.S. Dist. LEXIS 14092, *18 (S.D.N.Y. Oct. 6, 1993) (holding that the mere fact that plaintiffs bought numerous pieces of art from defendants over the course of two years is not enough to establish a fiduciary relationship between them).[5]

Finally, Plaintiffs' allegation that Gagosian Gallery's unique and specialized expertise in the art market is simply not enough to create a fiduciary relationship that would give rise to a special relationship, since "allegations of superior knowledge or expertise in the art field are per se insufficient to establish the existence of a fiduciary duty." *Brady, 2008 U.S. Dist. LEXIS* at

[5] Plaintiffs also allege that Gagosian Gallery rendered written appraisals on plaintiffs' artwork for plaintiffs' insurance company. Cpl. ¶ 13. However, plaintiffs have not alleged that any appraisals are at issue in the instant matter, and thus, that allegation is irrelevant for purposes of analyzing whether plaintiffs and Gagosian Gallery had a "special relationship" in connection with plaintiffs' purchase of the Tansey Painting from Cowles.

*21. Thus, Plaintiffs' claim for negligent misrepresentation must be dismissed for failure to show the requisite special relationship between plaintiffs and Gagosian Gallery.

POINT IV

PLAINTIFFS' NEW YORK ARTS AND CULTURAL AFFAIRS LAW § 13.03 CLAIM CONCERNING THE TANSEY PAINTING MUST BE DISMISSED BECAUSE THERE IS NO CIVIL LIABILITY PROVIDED FOR UNDER THAT STATUTE

Plaintiffs seventh claim is premised on New York Arts and Cultural Affairs Law § 13.03, which provides that "[a] person who, with intent to defraud, deceive or injure another, makes, utters or issues a certificate of authenticity or any similar written instrument for a work of fine art attesting to material facts which the work does not in fact possess is guilty of a class A misdemeanor." Setting aside that, as alleged in the Complaint and the communications referenced therein, Gagosian Gallery made no representation of its own to Wylde, and that any claim of deceit is belied by Wylde's active role and access to relevant information, no private right of action is provided for under that statute.[6] Accordingly, plaintiffs' cause of action under New York Arts and Cultural Affairs Law § 13.03 relating to the Tansey Painting must be dismissed.

POINT V

PLAINTIFFS' REPUDIATION CLAIM CONCERNING THE PRINCE PAINTING MUST BE DISMISSED BECAUSE THERE WAS NO BINDING CONTRACT BETWEEN PLAINTIFFS AND GAGOSIAN GALLERY

Generally, to establish a cause of action for repudiation of contract, a plaintiff must show that the defendant has indicated "an unequivocal intent to forego performance of its obligations under a *contract*." *Columbia Artists Mgmt., LLC v. Swenson & Burnakus, Inc.*, 2008 U.S. Dist.

[6] Gagosian Gallery has not found a single case where a party has been held liable under New York Arts and Cultural Affairs Law § 13.03 in a civil context.

LEXIS 74377, at **8-9 (S.D.N.Y. Sept. 24, 2008) (emphasis added). However, where there is a failure to meet a condition precedent under a contract, no liability can arise on the promise. *See Kaul v. Hanover Direct, Inc.*, 296 F. Supp. 2d 506, 516 (S.D.N.Y. 2004). A condition is defined as an act or event which "must occur before a duty of performance under an existing contract becomes absolute." *Id.*, *quoting Castle v. Cohen,* 840 F.2d 173, 177 (3d Cir. 1988).

Here, the parties clearly did not intend for a binding contract to exist until plaintiffs paid in full. That is evidenced by the fact that the standard form of invoice Gagosian Gallery sent to Wylde stated, in all capital letters, that "TITLE DOES NOT PASS UNTIL PAYMENT IN FULL IS RECEIVED" by Gagosian Gallery. *See* Cpl. ¶ 24; *see also* Bart Aff. Ex. A. Indeed, plaintiffs have readily admitted that the passage of title is "conditioned upon payment in full" and that only when plaintiffs paid the full amount due did they "perform the contract on its part to be performed." *See* Cpl. ¶¶ 24, 50. Such admissions evidence the course of dealing between plaintiffs and Gagosian Gallery, and the parties' intent that full payment by plaintiffs is a condition precedent to any binding contract between them. *See Tangorre v. Mako's, Inc.*, 2003 WL 470577, *7(S.D.N.Y. 2003) (contract clause stating that plaintiff "shall grant to [defendant]" the right to use the photographs "[u]pon receipt of payment in full" constituted a condition precedent to performance); *Jafari v. Wally Findlay Galleries,* 1989 WL 116437, *3 (S.D.N.Y.1989) (holding that a contract term providing that "[p]ainting to be shipped on receipt of payment" should be interpreted as a condition precedent).

Here, given that there is no dispute that any potential sale was cancelled before Wylde made any payments to Gagosian Gallery, plaintiffs' allegation that Gagosian Gallery "unlawfully repudiated" an alleged contract fails as a matter of law.

POINT VI

PLAINTIFFS' DECEPTIVE AND MISLEADING PRACTICES CLAIM CONCERNING THE PRINCE PAINTING MUST BE DISMISSED BECAUSE A PRIVATE TRANSACTION DOES NOT GIVE RISE TO SUCH A CLAIM UNDER THE NEW YORK GENERAL BUSINESS LAW

Plaintiffs claim that Gagosian Gallery's supposed repudiation of its alleged agreement with plaintiffs concerning the Prince Painting constitutes a violation of New York General Business Law § 349. However, it is well-established that this law does not apply to a private transaction between a consumer and a merchant. *See Shaheen v. Stephen Hahn, Inc.* 1994 U.S. Dist. LEXIS 2651, **10-11 (S.D.N.Y. March 9, 1994) (dismissing the cause of action because "a private transaction, such as the sale of a unique painting, that does not affect the public interest and is not one of a recurring nature, falls outside the purview of Section 349"); *Rubin v. Telemet America, Inc.,* 698 F. Supp. 447, 451 (S.D.N.Y. 1988) ("Section 349 was not adopted to address unique problems that may occur between a solitary consumer and a merchant," but instead "to combat recurring acts which are deceptive such as false advertising, pyramid schemes, and bait and switch operations"), *citing H20 Swimwear, Ltd. v. Lomas,* 164 A.D.2d 804, 806 (1st Dep't 1990) (Section 349 applies "solely to matters affecting the public interest and involving transactions of a recurring nature.").

Here, the dealings between Wylde and Gagosian Gallery were clearly between a private consumer and a merchant concerning a work of art and as such, do not fall under New York General Business Law § 349. *See Rubin, Inc.,* 698 F. Supp. at 451. Plaintiffs' allegation that "Defendant has engaged in consumer related activity affecting consumers at large . . . by maintaining a business practice of entering into a binding agreement to sell a work of art and thereafter . . . seeking and/or accepting higher offers(s)" (Cpl. ¶ 79), can thus only be viewed as irrelevant, inflammatory and indicative of a purposeful attempt to try to turn a private transaction

into a public harm.[7] However, courts have already held that unsubstantiated allegations that a defendant has engaged in similar improper behavior against others is insufficient to state a claim under GBL § 349. *See Grand Gen. Stores, Inc. v. Royal Indem. Co.*, 1994 U.S. Dist. LEXIS 5251, at **11-16 (S.D.N.Y. 1994) (dismissing plaintiff's claim for deceptive acts and practices under GBL § 349 where plaintiff merely made a conclusory statement that defendant's conduct was "part and parcel of a scheme," because it did not satisfy the requirement of a recurring injury to the public generally); *see also Tinslee Enter., Inc. v. Aetna Casualty & Sur. Co.*, 834 F. Supp. 605, 608-610 (E.D.N.Y. 1993) (dismissing GBL § 349 claim because plaintiff's allegation that "defendant has taken actions of a similar nature to those herein in the handling of other similar claims" was insufficient).

CONCLUSION

For all of the reasons stated herein, and in the accompanying Bart Affidavit, the Good Affidavit, and all the documents appended thereto, the Complaint should be dismissed in its entirety with prejudice and with costs.

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[7] Defendants also ask the Court to strike the allegations alleged at ¶¶ 32, 76-80 of the Complaint.