SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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HIMMELSTEIN, McCONNELL, GRIBBEN, DONOGHUE & JOSEPH, LLP, HOUSING COURT ANSWERS, INC., and MICHAEL McKEE,

Plaintiffs,

-against-

Index No. 650932/2017

MATTHEW BENDER & COMPANY INC., A MEMBER OF LEXISNEXIS GROUP, INC.,

Defendant.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, defendant Matthew Bender & Company, Inc., a member of LexisNexis Group, Inc. (Matthew Bender) moves to dismiss plaintiffs' amended complaint (the Complaint) pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7).

For the reasons set forth below, the Court grants Matthew Bender's motion to dismiss the Complaint.

Background

This is a proposed class action complaint alleging omissions and inaccuracies in the "New York-Tenant Law" book published by Matthew Bender (the Tanbook).

Plaintiffs Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP (HMGDJ), Housing Court Answers, Inc. (HCA), and Michael McKee (McKee; and, together with HMGDJ and HCA, Plaintiffs) are acting on behalf of themselves and a proposed class comprised of all persons residing, or doing business

within, the State of New York who purchased the Tanbook from Matthew Bender or any of its predecessors during the six-year period prior to the commencement of this action, starting in or around 2011 (the Class Period) (Complaint, ¶ 1). HMGDJ is a law firm located in New York (*Id.*, at ¶ 17). HCA is a not-for-profit corporation with an office in New York whose mission is to "promote and protect the true administration of justice in the housing courts of New York City" (*Id.*, at ¶¶ 21, 25). McKee is a New York tenant advocate and organizer who serves as a volunteer at various tenant advocacy organizations (*Id.*, at ¶¶ 29, 30).

The Tanbook is issued on an annual basis and can be bought directly on Matthew Bender's online store on www.LexisNexis.com (the Online Store) or on www.amazon.com (Amazon), or as part of a subscription service (Complaint, ¶¶ 2, 3, 4). Tanbook purchases are governed by the "Material Terms" (Material Terms) and "Additional Terms and Conditions" (Terms & Conditions, and together with the Material Terms, the Sale Contract), generated at the time that Tanbooks are ordered, and prior to shipments of hard copies (Baldwin Aff., ¶¶ 11, 12). With the subscription service, the new Tanbook edition is automatically shipped every year along with invoices (*Id.*, ¶ 13). Upon receipt, subscribers can either retain the book and pay the invoice, or return the shipment within 30 days without obligation to pay the invoice (*Id.*).

The Terms & Conditions provide that (1) the purchaser's "access" to the subscription "indicates [the purchaser's] acceptance of the terms and conditions," and (2) the Terms & Conditions constitute the "entire agreement" with the purchaser (Baldwin Aff., Exs. 2-5). Section 6 of the Terms & Conditions additionally sets forth:

> WE DISCLAIM ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED…WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS. *Id.*

Plaintiffs estimate that Matthew Bender sold at least 100,000 Tanbooks to the proposed class members during the Class Period (Complaint, ¶ 48).

HMGDJ had a subscription with Matthew Bender since at least 2010 (Complaint, ¶ 20). During the Class Period, HCA and McKee also entered a subscription service with Matthew Bender, which included the purchase of multiple copies of the Tanbook (*Id.*, at ¶¶ 27, 31). None of the Plaintiffs purchased a Tanbook via an online store during the Class Period, and Plaintiffs do not allege that they ever visited the Online Store or the Tanbook's retail page on Amazon (Baldwin Aff., ¶¶ 10, 20, 27). Plaintiffs never chose to return their automatic shipment of the Tanbook (*Id.*, at ¶¶ 16, 22, 30). HMGDJ and McKee were sent the 2017 Tanbook in May 2017, but neither has submitted payment or returned the book to Matthew Bender (*Id.*, at ¶¶ 19, 32). HCA

cancelled its subscription in 2016, and it did not place any order for the 2017 edition (*Id.*, ¶¶ 24, 26).

Plaintiffs' Complaint alleges that Part III of the Tanbook, titled "Rent Regulation," contains inaccuracies and omissions of the New York State and New York City rent laws and regulations (Complaint, ¶¶ 6, 7). Plaintiffs maintain that Matthew Bender made several statements in the Tanbook's overview (the Overview), which appear in the hard copy book and online on Amazon and on the Online Store.

The Overview describes several Parts of the Tanbook as including "selected provisions," "selected local laws," and "various provisions," and Plaintiffs interpret this to mean that the Tanbook does not incorporate all of the relevant laws and regulations in those Parts. Meanwhile, Part III is described as "comprised of *the* laws and regulations covering rent stabilization and rent control in New York City and in applicable areas elsewhere in the state" (*Id.* at 85) (emphasis added). Plaintiffs argue the use of the word "the" indicates that Part III constitutes a complete reproduction of all of the relevant laws and regulations.

The Online Store additionally states that the Tanbook "brings together all the laws and regulations governing landlord/tenant matters in New York, providing the text of State statutes, regulations, and local laws" (Fishman Affm., Ex A). The Online Store and Amazon also represent the Tanbook as containing

"select local laws from New York City…" and "excerpts from court acts and rules", but list "rent stabilization and rent control laws and regulations" without adding qualifications such as "excerpts" or "various" (*Id.*; Fishman Affm., Ex B) (the statements on the Online Store and on Amazon together, the Online Statements).

On December 5, 2016, Matthew Chachère, an attorney at Northern Manhattan Improvement Corporation Legal Services (NMIC), sent a letter to Matthew Bender advising that he had discovered that some provisions related to rent laws and regulations had been missing from the Tanbook for years, and that several other provisions in the rent regulations section were inaccurate (Complaint, ¶ 73; Ex. B). On December 13, 2016, Chachère received a written answer from Jacqueline M. Morris (Morris Email), the legal content editor at Matthew Bender, stating:

> We sincerely apologize for these issues which occurred long ago and have only recently been brought to our attention. We are currently discussing next steps with the Product Manager. We plan to replace all of the content of the Tanbook for the 2017 edition which will ship in early 2017. Complaint, Ex. C.

Plaintiffs allege that this letter demonstrates that, "for a substantial period of time," Matthew Bender knew that the Tanbook's compilation of New York State and New York City rent regulation laws was incomplete and inaccurate (Complaint, ¶ 53).

Plaintiffs maintain that the same mistakes and inaccuracies affect editions of the Tanbook from at least 2010 (*Id.*, ¶ 50).

On or about May 22, 2017, Matthew Bender issued the 2017 edition of the Tanbook (Complaint, at ¶ 54). Up to and including the year 2016, the Tanbook had been issued in early January of each year (*Id.*, ¶ 78). Despite the delay, subscribers were charged the full price for the 2017 version (*Id.*, at ¶ 80).

Plaintiffs commenced this action on behalf of a proposed class of purchasers of the Tanbook, alleging breach of contract, a claim under section 349 of the New York General Business Law (GBL), fraud, and unjust enrichment. Plaintiffs allege that the 2017 edition included provisions of various rent regulation statutes that were missing in the 2016 edition (*Id.*). Plaintiffs argue that the fact that the missing provisions were added to the 2017 version demonstrates that those provisions should have been included in the 2016 Tanbook and the previous versions. Moreover, Plaintiffs allege that the Tanbook's text and promotional materials did not indicate that the rent regulation laws were incomplete. They also allege that the omissions and inaccuracies in the Tanbook resulted in at least one instance of a litigant being harmed because both his attorney and a New York State Supreme Court Justice mistakenly relied upon the Tanbook (Complaint, ¶¶ 70-72).

Discussion

1. Legal Standard

CPLR 3211(a)(1) permits the Court to dismiss a cause of action when "a defense is founded upon documentary evidence." Dismissal is warranted only if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83 [1994]).

Under CPLR 3211(a)(5), the Court can dismiss a complaint that may not be maintained because of the statute of limitations (*See Faison v Lewis*, 25 NY3d 220 [2015]).

As to CPLR 3211(a)(7), the Court is given the power to dismiss a pleading that "fails to state a cause of action." CPLR 3211(a)(7) may be used in two situations: when Plaintiff has not stated a claim cognizable at law, or when Plaintiff stated a cause of action but failed to assert a material allegation necessary to support the cause of action (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The Court must accept the complaint's factual allegations as true and give the plaintiff the benefit of every possible favorable inference, and must determine only whether the facts as alleged fit within any cognizable legal theory (*Arnav Indus. v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 [2001]). When documentary evidence is submitted by the

defendant, the standard shifts from whether the plaintiff has stated a cause of action to whether it has one (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 135).

2. **Breach of Contract Claim**

Matthew Bender moves to dismiss the breach of contract claim because (i) Plaintiffs did not properly notify Matthew Bender of their claim in accordance with the New York Uniform Commercial Code (UCC), and because (ii) the Sale Contracts did not include any warranty as to the accuracy of the Tanbook, but, on the contrary, contained a disclaimer. Plaintiffs allege that the UCC is not applicable, and that even if the UCC were applicable, Plaintiffs would still have a valid claim because (a) Matthew Bender was properly notified of the inaccuracies, (b) Matthew Bender breached the express warranty of accuracy, (c) Matthew Bender could not disclaim the express warranty of accuracy because such a disclaimer strikes at the heart of the bargain and is incompatible with the express warranty of accuracy, (d) Matthew Bender breached its obligation of good faith, and (e) the parties formed an implied contract, which Matthew Bender breached.

Article 2 of the UCC applies to Plaintiffs' breach of contract claim. Article 2 applies to a transaction in goods, including "all things…which are movable at the time of identification to the contract for sale" (UCC § 2-105[1]). Books are considered goods, and thus, the UCC applies to the sale of

books (*See Simon & Schuster, Inc. v Howe Plastics & Chemicals Co.*, 105 AD2d 604, 606 [1st Dept 1984]).

Here, Plaintiffs argue that the UCC does not apply because the purchase of the annual compilation of New York rent regulatory laws was predominantly a purchase of the annual updating and compiling service. However, with the subscription service, Plaintiffs were merely buying a new edition of the Tanbook every year. The fact that the content of the book was modified does not change the fact that they were buying goods, and the updating of the books is incidental to the sale (*Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168 [1st Dept 2002]) (finding that maintenance services provided for a monthly fee were incidental to the sale of computer hardware and software).

Matthew Bender alleges that Plaintiffs should be barred from pursuing their breach of contract claim because they failed to properly notify Matthew Bender of the alleged breach. Plaintiffs maintain that Matthew Bender was notified of the alleged breach because Matthew Bender must have been aware of the inaccuracies, and, if not before, was made aware of the inaccuracies thanks to the letter sent by Chachère.

According to UCC § 2-607 [3], "when a tender has been accepted…the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller

of breach or be barred from any remedy." UCC § 2-607 [3] requires the buyer to "*notify*" the seller (*emphasis added*): the use of the verb "notify" implies that the buyer has to act, and cannot just rely on the fact that the buyer may already have been aware of the issue. Moreover, according to the official comments on the UCC, the purpose of the notice requirement is to facilitate negotiations for settlement (UCC § 2-607 [3] cmt 4). Therefore, Matthew Bender's alleged awareness of the inaccuracies cannot constitute notice.

Plaintiffs fail to allege that any of them notified Matthew Bender of the alleged breach. UCC § 2-607 [3] requires that "*the buyer*…notify the seller of the breach or be barred from any remedy" (emphasis added) (*Singleton v Fifth Generation, Inc. 2016,* WL 406295 [NDNY 2016]) (citing *Schmidt v. Ford Motor Co.*, 972 FSupp2d 712, 719 [EDPa 2013], where the court held that a third party, "although possibly "a" buyer, is not "the" buyer for purposes of the UCC," and therefore proper notice was not given by complaints of third parties). Plaintiffs, as the buyers, should have notified Matthew Bender of the breach themselves (*See Paulino v Conopco*, Inc., 2015 WL 4895234 [EDNY], applying New York law, holding that the plaintiff's letter to the defendant on behalf of herself and the class members was sufficient notice). Chachère's letter to Matthew Bender does not qualify as proper notice of breach because Chachère is not a named party. Due to a

failure to meet the notice requirement of UCC § 2-607 [3], Plaintiffs are barred from pursuing their breach of contract claim.

In support of their claims, Plaintiffs also allege that the Overview Statements and the Online Statements are express warranties. Matthew Bender maintains that it did not make any statement constituting an express warranty of accuracy, and that the Sale Contracts expressly state that Matthew Bender does not warrant the accuracy of the Tanbook. Even if Plaintiffs had alleged proper notice, the breach of contract claim would fail because Matthew Bender did not warrant the accuracy of the Tanbook.

UCC § 2-213 states that there can only be an express warranty if the affirmation of facts is "part of the basis of the bargain." An action for breach of an express warranty can only be brought if the warranty was relied on (*CBS, Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 508 [1990]). Plaintiffs have to identify an "affirmation, description or promise by [Matthew Bender] which became part of the basis of the bargain" (*McGill v General Motors Corp.*, 647 NYS2d 209, 211 [1st Dept 1996]). Here, Plaintiffs do not allege that they relied upon, or otherwise ever saw, the Overview and Online Statements before ordering the books.

Plaintiffs also allege that Matthew Bender breached its obligation of good faith in the performance of the contract under the UCC (UCC § 1-304). Under an obligation of good faith, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Although the duty of good faith encompasses any promises that a reasonable person would understand to be included in the contract, it cannot imply obligations that are inconsistent with other terms of the contract, and it cannot overcome an explicit clause (*Id.*; *Moran v Erk*, 11 NY3d 452, 456-457 [2008]).

Here, while Plaintiffs allege that Matthew Bender breached its obligation of good faith by selling inaccurate Tanbooks, the Sale Contracts included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or completeness of the Tanbook. In *Moran v Erk*, 11 NY3d at 456-457, the court found that the implied covenant of good faith and fair dealing could not limit the ability of an attorney to approve or disapprove of a contract where the plain contractual language made it clear that the contract was contingent on the attorney's approval, and a reasonable person could not have understood the opposite. Likewise, a reasonable person could not have understood that Matthew Bender was warranting the accuracy of the Tanbook

because the Terms & Conditions expressly stated that the accuracy was not warranted (Baldwin Aff., Exs. 2-5). Therefore, Plaintiffs failed to sufficiently plead their cause of action for breach of contract based on the duty of good faith.

Finally, Plaintiffs allege that the parties formed an implied contract for the Tanbook to be provided at the beginning of each year, and that Matthew Bender breached this implied contract by sending the 2017 Tanbook edition in May. However, a contract "cannot be implied in fact where there is an express contract covering the subject matter involved" (*Julien J. Studley, Inc. v New York News, Inc.*, 70 NY2d 628, 629 [1987]). The Sale Contracts renewed each year with the subscription system constitutes the "entire agreement" between the parties for the sale of the Tanbook (Baldwin Aff., Exs. 2-5). Concerning Plaintiffs' subscription with automatic shipments, the Material Terms provide that updated materials are shipped "on a semi annual or annual basis as the Updates become available" (Baldwin Aff., Exs. 2-5). The phrase "as the Updates become available" suggests that Matthew Bender was not bound to deliver the new Tanbook at the beginning of each year. The Sale Contracts thus covered the timing of the shipments.

3. **The GBL Claim**

Plaintiffs' claim for violation of the GBL section 349 is premised on allegations that the public at large is harmed by

Matthew Bender's alleged misrepresentations, and that the value of the Tanbook was severely diminished as a result. Section 349 (a) of the GBL prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." Section 349 (h) provides that "any person who has been injured by reason of any violation of this section may bring an action in his own name."

To assert a claim under section 349 of the GBL, a plaintiff must plead facts that allow a court to reasonably infer that: (1) the challenged act was "consumer-oriented;" (2) "misleading in a material way;" and (3) the plaintiff must have "suffered injury as a result" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). To determine if the conduct complained of is directed at consumers or affects them, the First Department looks at criteria such as whether (1) the goods are modest in value, (2) whether numerous parties with a disparity in economic power and sophistication are involved in the transactions, and (3) whether the contract is a form contract (*Cruz v NYNEX Info. Resources*, 263 AD2d at 291). The Court of Appeals has stated that a standard marketing scheme directed at consumers at large or a multi-media dissemination of information tends to show an impact on consumers at large (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 339, 344 [1999]; *Karlin v IVF Am., Inc.*, 93 NY2d 282, 289, 293 [1999]).

Plaintiffs fail to demonstrate that the conduct complained of was consumer-oriented. According to the First Department,

consumers are those "who purchase goods and services for personal, family, or household use" (*Med. Soc'y v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 [1st Dept 2005]) (holding that the activities of health insurers were directed at physicians, and therefore were not consumer-oriented). The sale of goods directed at professionals is not a consumer-oriented conduct, and Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented towards consumers rather than professionals (*Id.*). While the First Department recognizes that the GBL can be applied to businesses in limited situations, the GBL does not apply in circumstances where a business "purchase[s] a widely sold service that can only be used by businesses" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 286, 290 [1st Dept 2000]).

In *Cruz v NYNEX Info. Resources*, the First Department analyzed whether the sale of ads in the yellow book was a consumer-oriented conduct (*Id.* at 286). The threshold inquiry into whether particular conduct was consumer-oriented was met by a showing that "the acts or practices have a broader impact on consumers at large" in that they are directed at consumers, or "potentially affect similarly situated consumers" (*Id.* at 290). In his affidavit, McKee states that rent-regulated tenants are using the Tanbook to be informed of their rights as tenants, meaning that the Tanbook can be used by consumers (McKee Aff., ¶

16). The sale and marketing of the Tanbooks, however, were not directed at consumers at large using the book for "personal, family, or household use" (*Med. Soc'y v Oxford Health Plans, Inc.*, 15 AD3d at 207), and therefore they were not consumer-oriented. GBL § 349 does not apply here.

4. **The Fraud Claim**

Plaintiffs allege that Matthew Bender committed fraud by misrepresenting that the Tanbook was complete and accurate, while Matthew Bender knew it was not. In support of its motion, Matthew Bender argues that Plaintiffs failed to properly allege their fraud claim, and that the fraud claim is duplicative of the breach of contract claim. We need not reach the question of whether the fraud claim is duplicative of the breach of contract claim because the Court finds that Plaintiffs fail to sufficiently plead the elements of fraud.

In a fraud claim, the plaintiff must allege a misrepresentation or a material omission of fact known to the defendant and made for the purpose of inducing the other party to rely on it (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Plaintiffs must also allege that they actually relied on the misrepresentation, and were injured because of the misrepresentation (*Id.*). Those elements must be pled with particularity pursuant to CPLR 3016 (b) (*Id.*).

Plaintiffs fail to allege facts to support their allegation that Matthew Bender knew that the book contained inaccuracies before 2016 and that Matthew Bender made the representation that the Tanbook was complete and accurate in order to induce customers to buy the Tanbook. In support of their claim, Plaintiffs only cite the Morris Email to show that Matthew Bender was already aware of the inaccuracies when Morris received the Chachère letter. But the Morris Email stated in relevant part that Matthew Bender had just learned of the inaccuracies, recognized its mistakes in the Tanbook and intended to correct them (Complaint, Ex. C). If anything, this suggests that Matthew Bender took corrective action soon after learning of the inaccuracies. The Morris Email does not support Plaintiffs' claims. Plaintiffs therefore failed to meet their burden.

4. Unjust Enrichment

Plaintiffs allege that Matthew Bender was unjustly enriched at Plaintiffs' expense by selling the inaccurate Tanbook. Under New York law, a plaintiff cannot recover under an unjust enrichment theory where a contract governs the subject matter of the dispute (*Cox v NAP Constr. Co., Inc.* 10 NY3d 592, 607 [2008]). A quasi contract claim cannot be brought when the existence of the contract is not in dispute, and the scope of the contract clearly covers the dispute between the parties (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]).

Here, the sale of the Tanbooks is covered by the Sale Contracts (Baldwin Aff., Exs. 2-5). Plaintiffs also do not dispute the existence and the scope of the contract. The unjust enrichment claim must be dismissed.

Accordingly, it is

ORDERED that the Complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

Date: February 6, 2018

Enter:

J.S.C.
CHARLES E. RAMOS