

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KEVIN and HEATHER KEEGAN,)
)
 Plaintiffs)
)
 v.)
)
 THE DOWNING AGENCY, INC., et al.,)
)
 Defendants)

Docket No. 03-56-P-H

RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS

The remaining defendants,¹ The Downing Agency, Inc. and Robert Houle, move to dismiss the claims asserted against them in this action arising out of the sale of real property. I recommend that the court grant the motion in part.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Defendants’ Motion to Dismiss Plaintiffs’ Complaint, etc. (“Motion”) (Docket No. 12) at 1. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in h[er] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of

¹ Previously named defendants Angus and Cynthia Garfield have been dismissed by stipulation. Docket No. 11. The plaintiffs were granted leave to amend their complaint to delete previously named defendants Laura Ross and Kennebunk Beach Realty, Inc. Motion to Amend Complaint (Docket No. 15) ¶¶ 2, 4 and margin endorsement.

facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The amended complaint alleges that the plaintiffs are residents of Kennebunk, Maine. First Amended Complaint, etc. (“Amended Complaint”) (Docket No. 18) ¶ 1. The corporate defendant is a real estate agency with a principal place of business in Kennebunk and the individual defendant is an employee or agent of the corporate defendant. *Id.* ¶¶ 2, 5. The plaintiffs purchased a home in Kennebunk from Angus and Cynthia Garfield in December 2000. *Id.* ¶ 5. The defendants represented the plaintiffs as the buyers’ agent in this transaction. *Id.* The defendants were paid for their work by the Garfields or by the Garfields’ agents, Kennebunk Beach Realty and Laura Ross. *Id.*

At no time during the transaction were the plaintiffs provided with a lead hazard information pamphlet, a lead warning statement or notice of their opportunity to conduct a risk assessment or inspection for the presence of lead-based paint hazards in the house. *Id.* ¶ 6. After the purchase, the plaintiffs discovered that there was extensive lead paint throughout the house and that the abatement of this hazard would cost in excess of \$35,000. *Id.* ¶¶ 8-9.

III. Discussion

The amended complaint is presented in two counts. Count I alleges violation of the Residential Lead-Based Paint Hazard Reduction Act of 1992, a federal statute. Amended Complaint ¶ 10. Count II alleges negligence and breach of duty of care. *Id.* ¶¶ 14-16. The defendants contend that, as the buyers’ agent, they are not subject to the requirements of the federal statute and that, because the negligence claim is based on allegations of violation of the federal statute, that claim must also fail. Motion at 2-3; Defendants’ Reply to Plaintiffs’ Opposition to Their Motion to Dismiss Plaintiffs’ Complaint (“Reply”) (Docket No. 16) at 2.

A. Count I

The statute at issue provides, in relevant part:

Whenever a seller or lessor has entered into a contract with an agent for the purpose of selling or leasing a unit of target housing, the regulations promulgated under this section shall require the agent, on behalf of the seller or lessor, to ensure compliance with the requirements of this section.

42 U.S.C. §4852d(a)(4).² “Compliance with the requirements of this section” would include the requirement that the seller or lessor provide the purchaser or lessee with a certain lead hazard information pamphlet, disclose to the purchaser or lessee the presence of any known lead-based paint or hazards and permit the purchaser or lessee a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint hazards. 42 U.S.C. § 4852d(a)(1).

On its face, this statutory language applies only to the agents of sellers of target housing. The defendants were agents of the buyers. The statutory language is clear and would appear to be dispositive of Count I. *Flowers v. ERA Unique Real Estate, Inc.*, 170 F.Supp.2d 840, 843 (N.D. Ill. 2001). The plaintiffs, however, contend that the “regulatory history” of this statute subjects buyers’ agents to liability if they are paid by the seller or through a cooperative brokerage agreement with the listing agent for the seller. Plaintiffs’ Objection to Defendants’ Motion to Dismiss Plaintiffs’ Complaint (“Opposition”) (Docket No. 14) at 2. This is a reference to 24 C.F.R. § 35.86, promulgated by the federal Department of Housing and Urban Development pursuant to 42 U.S.C. § 4852d, which provides in relevant part:

Agent means any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing. This term does not apply to purchasers or any purchaser’s representative who receives all compensation from the purchaser.

² “Target housing” is defined as any housing constructed prior to 1978, with exceptions not relevant here. 42 U.S.C. § 4851b(27). The parties apparently agree that the house at issue in this case was “target housing” within this definition.

24 C.F.R. § 35.86. The *Flowers* court’s rejection of this argument is persuasive:

However, respectfully, it is well settled that the court “must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate . . .” *Chemical Manufacturers Association, et al. v. Natural Resources Defense Council, Inc. et al.*, 470 U.S. 116, 151-52, 105 S.Ct. 1102, 1120-1121, 84 L.Ed.2d 90 (1985) (quoting *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31, 102 S.Ct. 38, 41-42, 70 L.Ed.2d 23 (1981)). As seen, the clear statutory mandate under the subject Act is to impose responsibility to ensure compliance *solely* on the seller’s real estate agent and *not* on the buyer’s agent. The Plaintiff’s cited administrative construction, therefore, must be rejected.

170 F.Supp.2d at 843. This result is consistent with the guidelines for statutory construction imposed on federal courts by the Supreme Court.

As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citation and internal quotation marks omitted). That is the case with section 4852d and the particular dispute here. *See also United States v. Commonwealth Energy Sys. & Subsidiary Cos.*, 235 F.3d 11, 15 (1st Cir. 2000). The statutory language is unambiguous with regard to the liability of real estate agents; only seller’s agents are liable.

Count I of the amended complaint should be dismissed.

B. Count II

The defendants contend that the allegations of professional negligence in Count II are “not truly a separate claim” because all of the duties alleged as the basis of the claim “stem from the [federal] Act, not from any buyer’s broker’s duty recognized in Maine law.” Reply at 2. However, the amended complaint does not allege a duty arising only from federal statutes concerning lead-based paint hazards. Count II also alleges that the defendants “owed Plaintiffs a duty of due care as

Plaintiff's [sic] buyer's agent to warn them of the risk that there would be lead paint in the home and the dangers thereof, a risk that they knew or should have known existed." Amended Complaint ¶ 14. In a subsequent decision in the same case, the *Flowers* court made clear that a claim for negligence independent of the existence of the Residential Lead-Based Paint Hazard Act of 1992 may be brought against a seller's agent. *Flowers v. ERA Unique Real Estate, Inc.*, 227 F.Supp.2d 998, 1000 (N.D. Ill, 2002). If state law provides that a real estate agent or broker has a duty to disclose material facts about the property at issue, a cause of action in negligence arises out of the failure to disclose a latent defect, including the presence of lead-based paint. *Id.* at 1000-01.

Under Maine common law, sellers and their agents have no obligation to disclose property defects to buyers. *Kezer v. Mark Stimson Assocs.*, 742 A.2d 898, 903 (Me. 1999). However, a cause of action in negligence against a seller's real estate broker or agent arises pursuant to statutory and regulatory requirements establishing the duty to disclose physical defects in the property to the buyer. *Id.* at 902-03. This requirement may reasonably be extended to the presence of lead-based paint hazards on the property. Maine law extends this duty to a buyer's agent.

1. Duty to buyer. A real estate brokerage agency engaged by a buyer:

* * *

B. Shall promote the interests of the buyer by exercising agency duties . . . including:

* * *

(3) Disclosing to the buyer material facts of which the agency has actual knowledge or, if acting in a reasonable manner, should have known concerning the transaction Nothing in this subchapter limits any obligation of a buyer to inspect the physical condition of the property

32 M.R.S.A. § 13274(1). In this case, the plaintiffs have alleged that the defendants knew or should have known of the risk that lead-based paint was in the house and that this fact was material to the transaction. Nothing further is necessary in order to state a claim under Maine law.

Count II should be dismissed to the extent that its negligence claim is based on federal statutory law but its claim based on a duty to warn of the risk of the presence of lead-based paint should not be dismissed, on the showing made.

IV. Conclusion

For the foregoing reasons, the defendants' motion to dismiss should be **GRANTED** as to Count I and so much of Count II as is based on an alleged duty arising under federal law and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of May 2003.

David M. Cohen
United States Magistrate Judge

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