SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART 61**

Justice

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EXCEED LLC,

Plaintiff,

- v –

RELO LLC d/b/a WINDMERE RELOCATION AND REFERRAL SERVICES,

Defendant.

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INDEX NO. 653559/2019

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 147, 148, 149, 150, 151, 152, 153

were read on this motion to/for SUMMARY JUDGMENT.

I. INTRODUCTION

The plaintiff, a New York real estate company, seeks, *inter alia*, (1) a judgment declaring that its 2014 cooperating broker agreement with the defendant, a Washington State brokerage and relocation company, remains in effect, (2) money damages for unpaid shares of commissions earned on client referrals, in alleged breach of the 2014 cooperating broker agreement, (3) punitive damages, and (4) attorney's fees.

The defendant now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. It argues, in essence, that no commissions are owed because: it received no referrals from the plaintiff and thus earned no commissions on any such referrals that it would have been obligated to share with the plaintiff; it terminated the cooperating broker agreement with the plaintiff due to the plaintiff's breach; and there was no contract or contractual relationship in the first instance between the plaintiff and the clients it purportedly referred to the defendant. The plaintiff opposes the motion. The motion is granted.

II. BACKGROUND

Plaintiff Exceed LLC ("Exceed") is a licensed real estate broker in New York and Washington state. Exceed contracts with client-homeowners who enroll in its Smart Homeowners Program (the "Program"). Client-homeowners sign a Homeowner Enrollment Agreement ("HEA") with Exceed, whereby, in exchange for yearly gift cards delivered by Exceed, the client-homeowners agree that, when they decide to sell their homes, they will use a broker from Exceed's list of cooperating real estate brokers (the "Cooperating Brokers List"), and the cooperating broker will then share a portion of its commission with Exceed.

Defendant Relo LLC d/b/a Windermere Relocation and Referral Services ("Windermere") works with relocation management companies that are contracted by corporations to facilitate the relocation of their employees. Windermere refers these relocating employees to franchisee-brokers to complete the referred client's sale or purchase. The franchisee-brokers are not owned or controlled by Windermere; that are independently owned and franchised through a separate and distinct entity. Windermere enters into referral agreements with the franchisee-brokers, whereby the franchisee-brokers agree to share commissions with Windermere when they accept a referral from Windermere and successfully broker a purchase or sale on behalf of a referred client. Windermere earns such a share of commission only if the franchisee-broker obtained and accepted a referral from Windermere and successfully completes a sale or purchase on behalf of the referred client. As such, if the client goes directly to the franchisee-broker without a referral from Windermere, Windermere would receive no part of the commission.

On September 4, 2014, Exceed and Windermere entered into a Cooperating Broker Referral Agreement (the "2014 Agreement"), pursuant to which Exceed agreed to include Windermere on its Cooperating Brokers List, and Windermere agreed to accept referrals from Exceed of client-homeowners who selected Windermere from the Cooperating Brokers List, and to share with Exceed a portion of the commissions earned by Windermere (the "Commission Share") on sales and purchases completed on behalf of client-homeowners referred by Exceed, though Windermere acknowledged that Exceed had no obligation to actually provide it with any such referrals. Windermere further agreed to provide Exceed an accurate and complete list of its offices and locations, though no such list was attached to the agreement. The agreement

also did not define the process by which Exceed would refer to Windermere the client-homeowners who selected Windermere as their broker from the Cooperating Brokers List. The agreement stated that it would be governed by New York law and had an initial term of ten (10) years from the date of execution. The agreement also provided, as relevant here, for automatic termination upon a breach by either party unless the breach be cured within five (5) days following written notice delivered by the non-breaching party. Notably, the only parties to the 2014 Agreement were Exceed and Windermere; the agreement was not signed by, and did not purport to bind, any of Windermere's franchisee-brokers.

On February 24, 2015, Dena Zarra of Exceed emailed LaMonica Hummel, Windermere's Vice-President, Relocation Director and Director of Business Development, regarding the purported referral of some four hundred of Exceed's client-homeowners who selected Windermere from the Cooperating Brokers List. In an attached letter intended to "give[] a bit more detail on the referral process[,]" Zarra wrote that these client-homeowners had selected Windermere to represent them "when they are ready to put their home on the market[,]" and that:

> When our clients, who we referred to you, are ready to list their home, we will notify you to assign an agent to contact them. . . . We remain in constant contact with our contracted clients that we refer to you, and we continuously promote your firm as their selected broker within our network. We request you do not assign an agent until we notify you that the client is ready to list and sell their home (our contracted clients desire no phone calls from any agents, please follow the NAR Code of Ethics, until they ask us to have your agent contact them).

Also attached to the email was a spreadsheet listing the names and addresses, but not the contact information, of the approximately 400 client-homeowners referenced in the letter.

According to Hummel, she followed up on this email by calling Zarra and explaining that, for Windermere to earn any commissions on Exceed's referrals, Exceed had to adhere to the process outlined in Zarra's email (*i.e.*, notifying Windermere when a client-homeowner was ready to list their home so that Windermere could make a referral to the appropriate broker-franchisee). In a second email from Zarra to Hummel dated March 12, 2015, Zarra wrote that

Exceed's Cooperating Broker List used a radius search by zip code to allow client-homeowners to select a broker in their area, and asked "[a]re we to show all Windermere offices (with address) as a choice, including Windermere franchisees[?]" Acknowledging that "[o]ur contract is with Windermere HQ, not the franchisees[,]" Zarra asked "[d]oes Windermere HQ (you) have the contractual right with your franchisees to assign our referrals to Windermere franchisees?" Hummel responded by email the same day, stating "Yes, we have agreements in place with the franchises. All referrals go through our office."

At no point did Exceed notify Windermere that any of its client-homeowners were ready to list and sell their homes. As such, Windermere did not refer any of Exceed's client-homeowners to its broker-franchisees, as would be necessary for Windermere to receive a share of the commission earned on a purchase or sale. Nevertheless, in April 2015, Exceed began invoicing Windermere for its Commission Share under the 2014 Agreement for sales purportedly made by Windermere's broker-franchisees on behalf of Exceed client-homeowners. Counsel for Windermere thereafter notified Exceed on at least two separate occasions that Windermere wished to terminate the 2014 Agreement, citing, *inter alia*, Exceed's requests for payment and explaining that, because no referrals of Exceed client-homeowners had been made to Windermere, Windermere had earned no commissions that it could be obligated to share with Exceed on the transactions purportedly completed by its broker-franchisees.

On June 18, 2019, Exceed commenced the instant action, asserting eight causes of action, numbered here as in the complaint, for: (i) breach and (ii) anticipatory breach of the 2014 Agreement; (iii) declaratory judgment that the 2014 Agreement remains in force; (iv) intentional interference with contract; (v) unfair competition; (vi) equitable estoppel; (vii) fraudulent inducement; and (viii) attorneys' fees. Exceed alleged that Windermere failed to pay its Commission Share owed under the 2014 Agreement, improperly repudiated the 2014 Agreement, and intentionally instructed Exceed's client-homeowners to violate their HEAs with Exceed and to deal with Windermere exclusively.Exceed sought money damages for breach of contract, a declaratory judgment, attorneys' fees and punitive damages.

Windermere now moves for summary judgment dismissing the complaint. In support of its motion, Windermere submits, *inter alia*: the pleadings; the 2014 Agreement; a sample of the

referral agreement between Windermere and its broker-franchisees; an affidavit of LaMonica Hummel, Windermere's Vice-President, Relocation Director and Director of Business Development, stating, as relevant here, that Windermere received no client-homeowner referrals from Exceed, did not refer any Exceed client-homeowners to its broker-franchisees, and thus earned no commissions on any transactions completed by any of its broker-franchisees on behalf of any Exceed client-homeowners; the email communications between Hummel and Zarra concerning Exceed's referral process; the two termination notices sent to Exceed by Windermere's counsel; and a sample HEA.

On April 22, 2022, when Windermere's motion was already pending, Administrative Law Judge ("ALJ") Tiffany Hamilton rendered a decision in the matter of Department of State, Division of Licensing Services v ExceedLLC, LLC, Exceed Real Estate LLC, Realty Holdings USA, LLC, and Anthony T. Laudonia, holding that Exceed's Smart Homeowners Program violated several New York statutes. ALJ Hamilton found, *inter alia*, that the named Exceed affiliates: failed to include the appropriate real estate broker information in the web-based advertising for the Program, in violation of 19 NYCRR § 175.25; failed to provide client-homeowners who enrolled in the Program with signed copies of their HEAs, in violation of 19 NYCRR § 175.12; and engaged in dishonest and illegal advertising, and demonstrated untrustworthiness, when enrolling client-homeowners in the Program, in violation of Real Property Law § 441-c. Based on these findings, ALJ Hamilton revoked the broker licenses of the two Exceed affiliates named in the proceeding and fined Anthony Laudonia, the broker for those affiliates as well as for the plaintiff herein. On administrative appeal, by a decision dated October 24, 2022 (together with the April 22, 2022 ALJ decision, the "Administrative Decisions"), the ALJ's decision was modified to suspend Exceed's broker license as well because of its ties to Laudonia, pending procurement of a new representative, and was otherwise upheld.

By an order dated January 6, 2023, the court allowed the parties to submit supplemental Memoranda of Law regarding these administrative decisions.

III. STANDARD

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible

form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

IV. DISCUSSION

(1) Exceed's First, Second, Fifth, and Eighth Causes of Action

Windermere's evidentiary submissions demonstrate, *prima facie*, that Windermere did not earn any commissions on transactions purportedly completed by its broker-franchisees on behalf of Exceed's client-homeowners, and Exceed fails to submit any evidence sufficient to raise a triable question of fact on this point. By its express terms, the 2014 Agreement only requires Windermere to pay a Commission Share to Exceed if Windermere itself earns a commission on a completed transaction for an Exceed client-homeowner. Consequently, Exceed's first cause of action for breach of contract must fail insofar as it is premised on Windermere's failure to pay Commission Share to Exceed.

To the extent the breach of contract claim is premised on Windermere's refusal to continue to accept referrals of Exceed client-homeowners following the delivery to Exceed of its termination notices with respect to the 2014 Agreement, the claim fails because no referrals were ever actually made that could have been refused, nor could any future referrals necessarily be expected. The 2014 Agreement does not define the process by which Exceed would refer to Windermere the client-homeowners who selected Windermere as their broker from the Cooperating Brokers List. Given this ambiguity, the court may look to parol evidence to determine the intent of the parties. The emails exchanged between Zarra and Hummel clearly define the referral process. Indeed, Zarra herself described her February 24, 2015 email as "giv[ing] a bit more detail on the referral process." According to those emails, Exceed was meant to notify Windermere when a client-homeowner who had selected Windermere as their broker from the Cooperating Brokers List was ready to list their home so that Windermere could then contact the subject homeowner and refer them to the appropriate broker-franchisee. Indeed, such a referral from Windermere to the broker-franchisee was the necessary

precondition to Windermere earning a commission to share with Exceed. Hummel, in her sworn affidavit, states that Exceed never made any referrals following the process outlined by Zarra, and Exceed submits no evidence to demonstrate that it did do so. As such, there is no dispute that Exceed failed to make any referrals for Windermere to refuse, either before or after Windermere's delivery of its termination notices. Moreover, by its express terms, the 2014 Agreement provides that Exceed has no obligation to ever actually provide any referrals to Windermere. Consequently, to the extent that Exceed seeks breach of contract damages for future, as-yet-unmade referrals, its claim is entirely speculative.

The second cause of action for anticipatory breach fails for the same reason. This claim is premised on Windermere's repudiation and purported termination of the 2014 Agreement. However, even assuming, *arguendo*, that Windermere's termination of the agreement was invalid, Exceed cannot recover under a theory of anticipatory breach because Windermere was under no obligation to perform until Exceed furnished it with a referral. Since Exceed never made any referrals and, pursuant to the contract's express terms, no future referrals could necessarily be expected, Exceed's claim is entirely speculative. Similarly, the fifth cause of action for unfair competition, which is premised on Windermere's alleged representation of Exceed's client-homeowners without paying compensation to Exceed, fails because Windermere's unrebutted submissions establish that Windermere did not receive any referrals from Exceed nor complete any transactions on behalf of Exceed client-homeowners. The eighth cause of action for attorneys' fees falls with the breach of contract claims, as it is premised on the attorneys' fee provision in the 2014 Agreement. That is, absent a breach, no fees are owed.

Therefore, the branch of Windermere's motion seeking summary judgment dismissing the first, second, fifth, and eighth causes of action is granted.

(2) Exceed's Third Cause of Action

"A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." Apple Records v Capitol Records, 137 AD2d 50, 54 (1st Dept. 1988); see CPLR 3001; NMC Residual Ownership L.L.C. v U.S. Bank N.A., 153 AD3d 284 (1st Dept. 2017);

Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355 (1st Dept. 2006). That is, "It is well settled that a declaratory judgment action should be not be entertained where it parallel[s] a breach of contract claim, and merely seek[s] a declaration of the same rights and obligations." (Colfin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC, 199 AD3d at 406 (1st Dept. 2021) [internal quotation marks and citation omitted]. That is the case here.

Therefore, the branch of Windermere's motion seeking summary judgment dismissing the third cause of action is granted.

(3) Exceed's Fourth Cause of Action

Exceed alleges in its complaint that Windermere tortiously interfered with the contracts between Exceed and Exceed's clients by causing the clients to violate the contract with Exceed and deal exclusively with Windermere. It is well settled that "[a] claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." Foster v Churchill, 87 NY2d 744, 749–50 (1996) (citation omitted); Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48 (1st Dept. 2015); see also 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314, 315 (1st Dept. 2002).

In regard to this cause of action, Windermere, in its supplemental papers, argues in essence that there was no valid contract to be interfered with in light of the Administrative Decisions determining that the contracts were not valid. Windermere argues that Exceed is collaterally estopped from defending its Program and the associated HEAs with its client-homeowners because the Administrative Decisions determined that the Program was illegal, as it violated several New York statutes, and that Exceed therefore had no valid contracts with the client-homeowners with which Windermere could interfere. This argument is correct.

"[R]es judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies…when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." Ryan v New York Tel. Co., 62 NY2d 494, 499 (1984) (internal citations omitted). "While the proponent of collateral estoppel

has the burden of demonstrating that the issue in question is identical and decisive, it is the opponent's burden to show the absence of a full and fair opportunity to litigate the issue in the prior determination" Gersten v 56 7th Ave. LLC, 88 AD3d 189, 201 (1st Dept. 2011).

The Administrative Decisions found that Exceed's Program, and by extension the HEAs, violated New York law in numerous respects. Exceed, which was a party to those proceedings, does not argue, let alone demonstrate, that it lacked a full and fair opportunity to litigate the legality of its Program and the HEAs. Furthermore, while the Administrative Decisions concerned Exceed's activities in New York, and this matter concerns events in Washington, the HEAs expressly state that they "shall be governed and construed in accordance with the laws of the state of New York." Thus, under New York law, Exceed cannot now demonstrate that it had valid agreements with its client-homeowners. Moreover, Hummel's affidavit establishes that Exceed made no referrals to Windermere and never provided it with proof of its alleged contractual relationship with any of its client-homeowners. As such, Windermere has demonstrated, *prima facie*, that it lacked knowledge of any of the contractual relationships with which it is alleged to have interfered. Exceed, in opposition, fails to raise a triable issue of fact. While it submits several emails in which a client-homeowner is purportedly told by a "Windermere" employee to avoid Exceed and to deal with "Windermere" directly, it fails to establish that these communications were with employees of Windermere, the defendant herein, rather than with employees of one or more of the broker-franchisees or with the franchisor, Windermere Real Estate Company, which, like the broker-franchisees, is a separate and distinct entity.

Therefore, the branch of Windermere's motion seeking summary judgment dismissing the fourth cause of action is granted.

(4) Exceed's Sixth & Seventh Causes of Action

Exceed's sixth cause of action for equitable estoppel and seventh cause of action for fraudulent inducement are both premised on the allegation that Windermere represented and agreed in the 2014 Agreement that it would provide Exceed with an accurate and complete list of its offices and locations, and that insofar as the list of offices provided to Exceed included broker-franchisee locations, this was a material misrepresentation. Exceed contends that it

would not have executed the 2014 Agreement or (allegedly) spent hundreds of thousands of dollars expanding its client-homeowner list in Washington State, if Windermere did not have a network of offices that could sell homes on behalf of Exceed's client-homeowners. However, no list of Windermere offices and locations was attached to the 2014 Agreement, and the subsequent communications between Hummel and Zarra clearly demonstrate that Exceed understood the distinction between Windermere, with which it had a contract, and the broker-franchisees, with which it did not; that the list of offices and locations provided to it was mostly comprised of broker-franchisee locations; and that Windermere had agreements in place with the broker-franchisees ensuring that the broker-franchisees would accept referrals from Windermere of Exceed's client-homeowners. As such, Windermere has demonstrated, *prima facie*, that it did not misrepresent to Exceed its relationship with the broker-franchisees, and that Exceed therefore could not have justifiably relied on any such alleged misrepresentation to its detriment. See Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P., 7 NY3d 96, 106, (2006). Moreover, given that the misrepresentation alleged was not collateral to, but was contained within, the 2014 Agreement, the cause of action for fraudulent inducement is duplicative of the breach of contract claim. See Pate v BNY Mellon-Alcentra Mezzanine III, LP, 163 AD3d 429 (1st Dept. 2018).

Therefore, the branch of Windermere's motion seeking summary judgment dismissing the sixth and seventh causes of action is granted.

(5) Punitive Damages

In light of the dismissal of all of its causes of action of the complaint, Exceed is not entitled to damages of any kind, including punitive damages. In any event, the request for punitive damages was improper here because such damages may be awarded only "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future." Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013). For that reason, "punitive damages are not recoverable for an ordinary breach of contract." Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994). This was an ordinary breach of contract action and Exceed made no specific allegations that Windermere's conduct was immoral, evil, or reprehensible.

Therefore, the branch of Windermere's motion seeking summary judgment dismissing Exceed's request for punitive damages is granted.

Finally, the court notes that the Hummel affidavit, on which Windermere relies to establish key facts and to lay the foundation for consideration of much of its other evidence, was executed and notarized in Washington State and lacks a certificate of conformity. CPLR 2309(c) requires that when an affidavit is notarized outside of New York State by a foreign notary, it must be accompanied by a certificate of conformity to assure that the oath was administered in a manner consistent with the laws of New York. Nonetheless, the absence of such a certificate is considered a "mere irregularity and not a fatal defect" (Charnov v New York City Bd. of Educ., 171 AD3d at 409 [1st Dept. 2019]) and can be corrected *nunc pro tunc*. See Wager v Rao, 178 AD3d 434 (1st Dept. 2019); Moccia v Carrier Car Rental, Inc., 40 AD3d 504 (1st Dept. 2007). Therefore, Windermere shall cure this defect within thirty (30) days of the date of this order.

V. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the motion of the defendant Relo LLC d/b/a Windermere Relocation and Referral Services for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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4/17/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**		**NON-FINAL DISPOSITION**			
	X	**GRANTED**	**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**		**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**		**FIDUCIARY APPOINTMENT**		**REFERENCE**	

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