NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

THE BECKER ORGANIZATION LLC,

Plaintiff,

v.

SHARP OFFICE HOLDINGS, LLC; SHARP OFFICE TREMONT, LLC; and GEOFF BLOCK, individually,

Defendants/Counterclaimants/ Third-Party Plaintiffs.

and

RLB SQUARED, LLC and SHARP OFFICE EQUITIES, LLC,

Third-Party Plaintiffs,

v.

BRYAN BECKER,

Third-Party Defendant.

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION: CIVIL PART

Docket No.: ESX-L-1882-18

Civil Action

MEMORANDUM OPINION

For Defendants Sharp Office Holdings, LLC, Sharp Office Tremont, LLC, and Geoff Block: Marie L. Mathews (argued and on the brief); Adam K. Derman (on the brief), Chiesa Shahinian & Giantomasi PC

For Plaintiff The Becker Organization LLC: Michael R. Yellin (argued and on the brief); Michael D. Sirota (on the brief); Rebecca W. Hollander (on the brief), Cole Schotz P.C.

Decided: September 21, 2018

HON. KEITH E. LYNOTT, J.S.C.

In this case alleging breach of contract and other claims arising from a property management agreement, the Defendants, Sharp Office Holdings, LLC ("Sharp Holdings"), Sharp Office Tremont, LLC ("Sharp Tremont"), and Geoff Block ("Block"), (collectively the "Defendants"), move to dismiss Count I and a portion of Count II of the First Amended

Complaint For Declaratory Judgment, Compensatory and Punitive Damages and Other Relief ("Amended Complaint") of The Becker Organization LLC ("TBO"). For the reasons set forth herein, the Court grants the motion.

I

As this is a motion to dismiss pursuant to R. 4:6-2(e), the Court draws the pertinent facts from the Amended Complaint and assumes such facts to be true for purposes of this motion only.

This action arises out of the relationship among the parties with regard to the management of commercial property located at 10 Sharp Plaza, Mahwah, New Jersey (the "Property") owned by Sharp Holdings and Sharp Tremont as tenants in common. (See Am. Compl. ¶¶ 1, 18, 20.) At all relevant times, TBO managed the Property pursuant to the terms of a Management Agreement dated November 3, 2015 ("Management Agreement"). (See Am. Compl. ¶¶ 1, 26; see also Cert. of Michael R. Yellin, Ex. B, Management Agreement.) TBO's managing member is Bryan Becker ("Becker"). (See Am. Compl. ¶ 2.)

The Amended Complaint alleges that, on or about March 17, 2015, Sharp Holdings and Sharp Office RK, LLC acquired the Property. The Property is a 147,077 sq. ft. office building situated on approximately 13.9 acres of land. (See Am. Compl. ¶ 15.)

On November 3, 2013, Sharp Holdings and Sharp Office RK LLC conveyed a 51.5252% ownership interest in the Property to Sharp Holdings and a 49.4848% ownership interest in the Property to Sharp Tremont. (See Am. Compl. ¶18.) Sharp Holdings and Sharp Tremont currently own those respective interests in the Property as tenants in common. (See Am. Compl. ¶ 18.)

The Amended Complaint alleges that Sharp Holdings is a New Jersey limited liability company and is governed by an Amended and Restated Operating Agreement for Sharp Office Holdings, LLC dated March 27, 2017. (See Am. Compl. ¶¶ 10, 21.) Pursuant to Section 2.4 of

this operating agreement, Becker and Block were the first-named Managers of the company, with approval of both individuals required for any Manager-level decision. (See Am. Compl. ¶ 21.) Although Becker was terminated as Manager of Holdings in early 2018, he retains a "residual membership interest in Holdings." (See Am. Compl. ¶¶ 10, 23.)

Sharp Holdings's sole priority Member was and is Sharp Office Holdings Mezzanine LLC ("Holdings Mezzanine"), also a New Jersey limited liability company. (See Am. Compl. ¶ 10(a).) Block and Becker are the Managers of Mezzanine. (See Am. Compl. ¶ 10 (a).)

Sharp Tremont is a New Jersey limited liability company and is governed by an Amended and Restated Operating Agreement for Sharp Office Tremont, LLC dated March 27, 2017. (See Am. Compl. ¶¶ 11, 22.) Pursuant to Section 2.4 of that operating agreement, Block and his wife Kimberly were initially designated as Managers of the company, with approval of both individuals required for Manager-level decisions. (See Am. Compl. ¶¶ 11, 22.)

Sharp Tremont's sole member is Sharp Office Tremont Mezzanine LLC, also a New Jersey limited liability company. (See Am. Compl. ¶ 11(a).) Block and his wife manage this company. (See Am. Compl. ¶ 11(a).)

On November 3, 2015, Sharp Holdings and Tremont jointly retained TBO to "operate and manage the [P]roperty" pursuant to the Management Agreement. (See Am. Compl. ¶ 26.) Specifically, TBO assumed responsibility for, among other things:

- Employing all contractors necessary to be engaged in normal operations of the property;
- Arranging for the billing of all rents and any additional amounts due under the leases for the property;
- Maintaining and repairing the property, including supervising the installation of any improvements and alterations to any tenant's premises within the property;
- Entering into and maintaining contracts for electricity, gas, alarm monitoring services, air-conditioning, water treatment, elevator, telephone, window cleaning, rubbish removal,

detective agency protection, vermin extermination, and or such other services as may be necessary;
- Securing compliance by all tenants with the terms, covenants, and conditions of their respective leases, and
- Maintaining legal actions or proceedings for the collection of rent, if necessary.

[(See Am. Compl. ¶ 26.)]

In addition, TBO acted as Sharp Holdings's and Sharp Tremont's agent and, as part of the regular course of its work for Sharp Holdings and Sharp Tremont, engaged in leasing activities at the Property. (See Am. Compl. ¶ 31.)

Paragraph 4 of the Management Agreement provided that Sharp Holdings and Sharp Tremont would pay TBO a monthly "Management Fee" equal to 5% of the rents collected from the Property for the services rendered pursuant to the agreement. (See Am. Compl. ¶ 27.) In addition, under Paragraph 4 Sharp Holdings and Sharp Tremont were obligated to pay TBO a "Construction Supervision Fee"—equal to either 10% of the total construction costs for any construction or extraordinary repair or replacement of any portion of the Property under $1 million or 5% of the total construction costs for any construction or extraordinary repair or replacement of any portion of the Property over $1 million. (See Am. Compl. ¶ 28.) Finally, the Plaintiffs allege that, pursuant to Paragraph 11 and Exhibit A to the Management Agreement, Sharp Holdings and Sharp Tremont were obligated to pay to TBO a leasing commission based on a schedule for all leases executed by Sharp Holdings and Sharp Tremont for space within the Property. (See Am. Compl. ¶¶ 29, 43.)

As set forth in Paragraph 5, the Management Agreement provided for a term of one year, commencing November 3, 2015. (See Am. Compl. ¶ 33) The Management Agreement automatically renewed for one-year terms thereafter. (See Am. Compl. ¶ 33.) The agreement

further provided that Sharp Holdings and Sharp Tremont could only terminate the Management Agreement "upon ten (10) days prior written notice." (See Am. Compl. ¶ 33.)

On February 26, 2018, Block sent TBO a letter on behalf of Sharp Holdings and Sharp Tremont, attempting to terminate immediately the Management Agreement. (See Am. Compl. ¶ 38.) The letter stated:

> This is to inform you that effective as of the date of this letter, I, as Manager of Sharp Office Holdings LLC and Sharp Office Tremont LLC, hereby terminate The Becker Organization as the Property manager for [the Property].
>
> [(See Am. Compl. ¶ 38) (emphasis added).]

The termination letter did not "provide the requisite ten days' notice." (See Am. Compl. ¶¶ 33, 39; Management Agreement ¶ 5.) The Plaintiff alleges that Block had previously improperly terminated Becker's role as Manager of Sharp Holdings. (See Am. Compl. ¶ 34.)

Between November 3, 2015 and February 26, 2018, TBO performed its required services under the Management Agreement and Sharp Holdings and Sharp Tremont accepted such services without objection or complaint. (See Am. Compl. ¶ 34) However, since that time, Sharp Holdings and Sharp Tremont "have refused to allow TBO to perform management services in accordance with the Management Agreement." (See Am. Compl. ¶ 47.)

Neither Sharp Holdings nor Sharp Tremont has paid TBO fees due under the Management Agreement. (See Am. Compl. ¶ 40.) In addition to Management Fees continuing to accrue to date, the Plaintiff alleges the following are amounts due and owing under the Management Agreement:

- Management Fees, through March 2018 ($95,974);
- Construction Supervision Fee for construction undertaken by Jaguar Land Rover North America, LLC ("Jaguar") ($1,465,226);

- Leasing Commission Payment earned from securing the Jaguar lease at Property ($710,214)

[(See Am. Compl. ¶¶ 41–44, 76–79.)]

The Amended Complaint further alleges that, following the termination of TBO as Property manager, Block misrepresented the circumstances of the termination to the lender that holds the mortgage on the Property. (See Am. Compl. ¶¶ 47–50.) Specifically, TBO asserts that, in connection with securing the lender's consent to the change in Property management, Block misrepresented that the Management Agreement had been properly terminated and that all amounts due to TBO have been paid. (See Am. Compl. ¶ 50.)

The lender, Wilmington Trust, National Association, as Trustee for the benefit of registered holders of Wells Fargo Commercial Mortgage Trust 2015-NXS1 Commercial Mortgage Pass-Through Certificates, Series 2015-NXS1 (the "Lender"), advised in May 2018 that, in light of this lawsuit, it would only consent to the change in Property manager upon posting of a $4 million escrow, among other conditions. (See Am. Compl. ¶¶ 17, 52.) The Amended Complaint alleges that Block improperly directed a capital call to Sharp Holdings and from Sharp Holdings Mezzanine's members to fund an aliquot share of the amount requested by the Lender, as well as a share of the cost of this litigation. (See Am. Compl. ¶ 53.) The Amended Complaint alleges that Block has falsely represented that the Lender "demanded" the escrow. (See Am. Compl. ¶ 55)

The Plaintiff further alleges that recent financial statements of Sharp Holdings provided to Becker contain materially misleading statements concerning this litigation and its likely impact on Sharp Holdings. (See Am. Compl. ¶¶ 58–59.) The financial statements also fail to disclose a Securities and Exchange Commission Order against Block and the investigation that resulted in the Order. (See Am. Compl. ¶¶ 60–61.)

The Amended Complaint lodges five causes of action. In Count I, the Plaintiff seeks a Declaratory Judgment that the termination of the Management Agreement was improper and ineffective. (See Am. Compl. ¶¶ 65–71.) Specifically, the Plaintiff seeks a declaration that the "Holdings and Tremont's attempted termination of the Management Agreement as of February 26, 2018 was ineffective and that the Management Agreement remains extant pursuant to its express terms." (See Am. Compl., Count I, Prayer for Relief.)

In Count II, the Plaintiff alleges breach of the Management Agreement by Sharp Holdings and Sharp Tremont and seeks compensatory and punitive damages and attorneys' fees. (See Am. Compl. ¶¶ 72–80.) Count III sets forth a claim for breach of the implied covenant of good faith and fair dealing by the corporate Defendants and also seeks compensatory and punitive damages and attorneys' fees. (See Am. Compl. ¶¶ 81–85.) In Count IV, the Plaintiff alleges a claim against Sharp Holdings and Sharp Tremont for unjust enrichment. (See Am. Compl. ¶¶ 86–90.) In Count V, the Plaintiff asserts a claim against Block for tortious interference with contract. (See Am. Compl. ¶¶ 91–96.)

II

On a motion to dismiss, the Court is to determine "whether a cause of action is suggested by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (internal quotation marks omitted). The Court must liberally construe the pleading "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Ibid. (citation omitted).

In adjudicating a motion to dismiss, the Court must afford the plaintiff "every reasonable inference of fact." Ibid. The Court must assume as true facts asserted by the plaintiff. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). At the motion to dismiss stage, the Court is

"not concerned with the ability of plaintiff[] to prove the allegation[s] contained in the [pleading]." Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 384 (App. Div. 2010). Nonetheless, "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011).

III

A. Count I

The Defendants move to dismiss Count I, which as noted seeks a judgment declaring that Sharp Holdings's and Sharp Tremont's attempted termination of the Management Agreement was ineffective. That Count also seeks a declaration that the Management Agreement remains extant because the Defendants did not give TBO ten days' notice of termination as required by the applicable provision of the Management Agreement. (See Am. Compl. ¶¶ 65–71.) Specifically, TBO seeks a declaration that "[Sharp] Holdings' and [Sharp] Tremont's attempted termination of the Management Agreement as of February 26, 2018, was ineffective and that the Management Agreement remain extant pursuant to its express terms." (See Am. Compl. ¶ 71.)

The Defendants argue that long-standing legal principles provide that, if a party to a contract attempts to terminate a contract upon shorter notice than the contract specifies, the termination takes effect when the notice period required by the contract expires. (See Defs.' Mov. Br. 5–6.) As a result, the Defendants argue that, consistent with the ten-day notice period contemplated in the Management Agreement, the termination notice tendered on February 26, 2018 was effective as of March 8, 2018—ten days after the Defendants sent the notice letter to TBO. (See Defs.' Mov. Br. 6.) They contend this is so even though the notice itself purported to

take immediate effect. In opposition, TBO argues that it has stated a viable claim for a declaratory judgment that the termination at issue is ineffective. (See TBO's Opp'n Br. 13.)

The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, provides, in relevant part, that any "person interested under a . . . written contract . . . may have determined any question of construction . . . arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." N.J.S.A. 2A:16-53. Nonetheless, a "court may refuse to render or enter a declaratory judgment, when, if rendered or entered, it would not terminate the uncertainty or controversy giving rise to the proceeding." Id. § 2A:16-61.

Termination provisions with notice periods are common in contracts. As early as 1874, the United States Supreme Court held that where a notice to terminate is given, the actual termination takes effect after the notice period specified in the contract expires. See Lyon v. Pollard, 87 U.S. 403, 407 (1874).

Other courts have more recently affirmed this principle of contract law. In New York, courts refer to this doctrine as the "erroneous date" rule. See generally G. B. Kent & Sons, Ltd. v. Helena Rubinstein, Inc., 393 N.E.2d 460, 461 (N.Y. 1979). In G. B. Kent & Sons, the parties' contract provided that the defendant could terminate with one year's written notice. See ibid. On September 16, 1971, the defendant gave written notice to the plaintiff that their contractual relationship would terminate on December 31, 1971. See ibid. The court held that the termination was actually effective December 31, 1972, the first permissible termination date after the date on which the defendant attempted to effectuate termination. Id. at 462.

Similarly, in Rockland Exposition, Inc. v. Alliance of Automotive Service Providers of N.J., 706 F. Supp. 2d 350, 357 (S.D.N.Y. 2009), the court granted summary judgment to a defendant that had tendered a termination notice that "'jumped the gun' in purporting to take

effect immediately." The parties in that case had a contract that required the plaintiff to promote trade shows. The contract included a termination provision permitting the defendant, within 45 days of the 2008 show, to terminate the agreement following the 2009 show. In March 2008, both before and after the 2008 show, the defendant provided written notice of termination effective as to the 2009 show. The plaintiff sought summary judgment contending that the notice was ineffective and that the contract remained in effect.

Applying the "erroneous date" rule under New York law, the court held the notice "effectively cancelled the Contract prior to the 2010 show." Ibid. (footnote omitted). The court further found that, even if New York recognized a prejudice exception to the rule, as the plaintiff asserted, there was no showing of prejudice.

In Shain v. Washington National Insurance Co., 308 F.2d 611 (8th Cir. 1962), the Court of Appeals affirmed the District Court's directed verdict for the defendant in a case involving a termination of an agency contract. The contract provided for termination upon thirty days' written notice. On April 30, 1957, the defendant mailed a letter to the plaintiff terminating the agreement effective thirty days from the date of the letter. However, the plaintiff received the letter on May 1. Under the contract, a proper notice delivered on May 1 could effect termination only on May 31, not May 30.

In affirming the District Court, the Court of Appeals noted that "a provision in a contract that either party may terminate the agreement upon specified days' notice is itself valid." Id. at 613. Judge (later Justice) Blackmun then determined that it was the "general rule" that "where a contract, whether it be for employment or for insurance or of a different kind, requires written notice of cancellation upon a stated time, a notice failing to meet the time requirement, but

otherwise appropriate, is nonetheless effective upon the lapse of the time required by the contract." Id. at 614.

The court distinguished a decision of the Iowa Supreme Court in Oldfield v. Chevrolet Motor Co., 199 N.W. 161 (Iowa 1924), in which the defendant had failed to terminate on five days' notice as required. In that case, the defendant attempted to terminate the agreement two weeks before the plaintiff would have been entitled, provided the agreement remained in effect, to additional compensation (by way of rebate) for purchases made prior to the termination.

The plaintiff in Shain argued for a similar result, claiming the termination impaired his ability to receive higher commissions on renewals of policies occurring after the termination. The Shain court distinguished Oldfield, noting that Oldfield involved an "accumulation of amounts already earned for past services" but forfeited because of the termination. Shain, 308 F.2d at 616. In contrast, Shain was alleging a right to commissions for services rendered after the termination. As to Shain's claim of prejudice, the court observed:

> Shain urges that in the present case the notice did indeed materially impair substantial existing rights which he possessed. These were the lessening of the value of his general agent's renewal commission and his inability to solicit agency clientele he had developed. The immediate answer to this observation is that the contract expressly provided for termination by either party.This, then, was nothing other than what Shain had agreed to. If there was hardship here it was due to the contract itself and to its failure to afford the plaintiff more adequate protection against termination.
>
> [Ibid.]

This Court's research has not disclosed any controlling case law directly addressing this issue. Instead, this appears to be an issue of first impression in the New Jersey state courts. Nonetheless, the Court finds persuasive the holdings and logic in Lyon, G. B. Kent & Sons, Rockland Exposition and Shain. Ultimately, the purpose of a notice to terminate a contract is "to apprise the party on whom it was served that the other party intended to terminate the contract."

Lyon, 87 U.S. at 407. "The contract itself fixe[s] the time when [termination] should take place." Ibid. Simply because the notice "speaks of the termination of the contract as being already [sic] accomplished, does not destroy its effect as a notice of present intent to put an end to the arrangement." Ibid.

Here, Sharp Holdings's and Sharp Tremont's February 26, 2018 letter to TBO attempting to immediately terminate TBO as the manager of the Property did not comply with the 10-day time period requirement in the Management Agreement. (See Management Agreement ¶ 5.) Nonetheless, the effect of such non-compliance is not—and cannot be—that the letter is null and void. Rather, the letter clearly expressed to TBO that Sharp Holdings and Sharp Tremont "intended to terminate the contract." See Lyon, 87 U.S. at 407. Therefore, although Sharp Holdings and Sharp Tremont "jumped the gun" and attempted immediately to terminate TBO as Manager of the Property, pursuant to the plain language of the Management Agreement, see Rockland Exposition, 706 F. Supp. 2d at 355–57, the termination letter terminated the Management Agreement effective March 8, 2018. That is the date that was ten days after Sharp Holdings and Sharp Tremont sent the termination letter to TBO, and therefore the first permissible termination date. See G. B. Kent & Sons, 393 N.E.2d at 462.

The Plaintiff seeks a declaratory judgment that the termination notice was ineffective and void ab initio and, as a result, that the Management Agreement remains in effect even today. Any such judgment would be fundamentally at odds with the well-settled "erroneous date" rule and the case law discussed above.

The Plaintiff contends that the Court should deny the motion to dismiss and permit discovery. It asserts that, following discovery, the record may reveal a basis for declaratory relief that the Management Agreement remained in effect after the purported termination—if not

through today, then for some period of time beyond March 8, 2018. But the purpose of discovery is to permit a party to flesh out facts to support a known—and valid—cause of action, not to probe for facts that might permit a party to assert a cause of action.

Here, the Plaintiff has not pleaded any facts in its Amended Complaint that could support a declaration that the Management Agreement remained in effect after the expiration of ten days from the delivery of the termination letter. For example, it has not pleaded that the termination by the Defendants prevented them, like the plaintiff in Oldfield, from exercising a right or obtaining a benefit under the Management Agreement based on work or services already performed.

Instead, the Plaintiff in effect asks the Court simply to write a better agreement than it negotiated for itself. Here, as in Shain, the termination provision "was nothing other than what the [TBO] had agreed to. If there was hardship here it was due to the contract itself and to its failure to afford the plaintiff more adequate protection against termination." Shain, 308 F.2d 611, 616.

B. Count II

The Defendants also move to dismiss a portion of Count II, which alleges breach of contract and seeks fees due and owing under the Management Agreement. (See Am. Compl. ¶¶ 72–80.) Specifically, the Defendants move to dismiss the claim for fees allegedly owed as a Leasing Commission Payment in the amount of $710,214 in respect of its efforts to lease space at the Property to Jaguar. (See Am. Compl. ¶ 43.)

The Defendants argue that the Court must dismiss Count II because the New Jersey Real Estate Brokers and Salesmen Act, N.J.S.A. 45:15-1 to -29.5 (the "Act"), bars the collection of a commission by a person or entity without a real estate broker license. (See Defs.' Mov. Br. 7

(citing N.J.S.A. 45:15-3).) The Defendants argue that TBO does not, and cannot, allege that it was a duly licensed real estate broker or that it was the owner or lessor of the Property acting for its own account at the time it allegedly earned the Leasing Commission Payment. (See ibid.; see also Defs.' Reply Br. 4 (citing N.J.S.A. 45:15-4).)[1] In opposition, TBO contends that it is exempt from the Act because (1) it "acted in the ordinary course of its business as an agent of [Sharp] Holdings and [Sharp] Tremont when it secured the Jaguar lease"; and (2) "Becker is an owner of [Sharp] Holdings." (See TBO's Opp'n Br. 16.)

In New Jersey:

> No person, firm, partnership, association or corporation shall bring or maintain any action . . . for the collection of compensation for the performance of any of the acts mentioned in [the Act] without alleging and proving that he was a duly licensed real estate broker at the time the alleged cause of action arose.
>
> [N.J.S.A. 45:15-3.]

The Act defines a real estate broker as follows:

> [A] person, firm or corporation who, for a fee, commission or other valuable consideration, or by reason of a promise or reasonable expectation thereof, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of real estate or an interest therein, or collects or offers or attempts to collect rent for the use of real estate or solicits for prospective purchasers or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate or negotiates, or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others, or any person who, for pecuniary gain or expectation of pecuniary gain conducts a public or private competitive sale of lands or any interest in lands. In the sale of lots pursuant to the provisions of R.S.45:15-1 et seq., the term "real estate broker" shall also include any person,

[1] The Defendants also contend that the Plaintiff did not in fact earn a leasing commission in respect of the Jaguar lease. On this motion to dismiss, the Court assumes the truth of the Plaintiff's allegations that it did participate in the leasing of space to Jaguar to an extent sufficient to earn a commission under the Management Agreement.

> partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.
>
> [Ibid.]

Under that definition, TBO clearly acted as a real estate broker when it allegedly brokered the Jaguar lease for the Property: TBO is a "firm" "who, for a" "commission," "offer[ed] or attempt[ed] to negotiate a" "rental of real estate" "or collect[ed] or offer[ed] or attempt[ed] to collect rent for the use of real estate" "or assist[ed] or direct[ed] in the procuring of prospects" "which" "result[ed] in the" "renting" "of any real estate." See ibid.

The Act, however, exempts from its provisions "any person, firm, partnership, association or corporation who, as a bona fide owner or lessor, shall perform any of the aforesaid acts with reference to property owned by him." N.J.S.A. 45:15-4 (emphasis added). Moreover, the final sentence of the first paragraph of N.J.S.A. 45:15-3—an amendment to the Act adopted in the early 1950s, long after the Act's original enactment—expands the scope of the definition of "broker"—and thus the coverage of the Act in cases involving the "sale of lots"—to any "person, partnership, association or corporation" employed by or on behalf of "the owner or owners of lots or other parcels or real estate" at a salary or on commission, or both. But it does so only in respect of such persons or entities who "sell such real estate." N.J.S.A. 45:15-3.

TBO first contends that it falls within the purview of the exception set forth in Section 4, N.J.S.A. 45:51-4, as it functioned as the agent of the bona fide owners or lessors of the Property—namely, Sharp Holdings and Sharp Tremont. It asserts that the exemption plainly covers owners or lessors acting for their own account and points out that corporate owners or lessors can only act by and through employees and other agents. TBO draws a distinction

between an employee of the landowner, who would be covered by the Act's exception, and an independent third-party, who would not be covered. (See TBO's Opp'n Br. 18–19.) It asserts that TBO is akin to the employee acting on behalf of the landowner in the ordinary course of its business of leasing land for its own account—and is thus exempt from the Act's licensure requirements. (See TBO's Opp'n Br. 18–19.) It contends that, unlike Weichert or Coldwell Banker, hired by an owner solely to effect sales or leasing transactions, it functioned as a general managing agent for the owners and lessors. In that capacity, one of its many functions was to arrange for leasing of the owners' property.

TBO refers to the final sentence of the first paragraph of N.J.S.A. 45:15-3 as textual support for its argument. It asserts that this provision—added after the original enactment—reflects a legislative recognition that the exemption in Section 4 applies to general agents of the owner. It argues that the Legislature deemed it necessary to amend the statute to pull back into the regulatory net "person[s], partnership[s], association[s] or corporation[s]" engaged on behalf of the owner for the "sale of lots." However, it asserts this text applies only to the sale, but not the leasing, of lots, thereby preserving the applicability of the exemption for general agents of the owner, like TBO, engaged in leasing for the owner's account.

It is well-established that when interpreting statutory language, a court is to "consider the overall object and policy of the statute, and avoid constructions that produce odd or absurd results or that are inconsistent with common sense." Long v. Tommy Hilfiger U.S.A., 671 F.3d 371, 375 (3d Cir. 2012); see also Shelton v. Restaurant.com, Inc., 214 N.J. 419, 440–41 (2013). Additionally, the Court must be "mindful that remedial legislation should be construed broadly to effectuate its purpose." Long, 671 F.3d at 375; see also Smith v. Millville Rescue Squad, 225

N.J. 373, 390–91 (2016) (holding that remedial statutory provisions are to be construed broadly to give effect to the goal sought to be accomplished by the legislature).

The underlying policy of the Act "is to protect consumers by excluding undesirable, unscrupulous and dishonest persons . . . from the real estate business." Sammarone v. Bovino, 395 N.J. Super. 132, 138 (App. Div. 2007) (emphasis added) (internal quotation marks omitted) (collecting cases and legislative statement) (ellipses in original). The Act is "intended to protect against fraud, misrepresentation, incompetence and sharp practice." Ibid. (internal quotation marks and citation omitted).

Here, the Act's plain language broadly defines "real estate broker" to include any "person, firm or corporation who, for a fee, commission or other valuable consideration . . . offers or attempts to negotiate a . . . rental of real estate." The Act is equally broad in defining the field it seeks to regulate with its licensure requirement—namely all real estate transactions. The exemption set forth in Section 4 is limited to owners selling or leasing their own property. That exemption logically includes individual employees of a corporate owner engaged in selling or leasing its own property, as corporations can, as noted, only act through individual employees.

But TBO's argument that the exemption also applies to general agents of the owner, such as TBO, while creative, proves too much. It would require the Court to find that, despite the broad net cast by the Legislature and the statutes remedial purpose, the statute actually excludes an unaffiliated third-party, such as TBO, engaged by an owner as an agent to perform real estate sales and leasing functions. The Court sees no basis in the text or intendment of the Act for such a conclusion. Nor is there a sensible basis in the text to distinguish among unaffiliated third-party agents who are or are not subject to licensure.

The final sentence of the first paragraph of Section 3 is of no succor to TBO. Putting aside the explicit reference to the "sale of lots" as opposed to the "sale of real estate"—which in context would appear quite possibly to relate to the sale of vacant lots of property—the language in all events plainly seeks to expand, not limit, the scope of the Act. It adds to, rather than restricts, the categories of individuals and entities subject to the licensure obligation.

It would be fundamentally inconsistent with the text and purpose of the provision, construed with the statutory scheme as a whole, to contend, as TBO does, that it somehow operates to confirm that parties in TBO's position are exempt from the Act's coverage. A more tenable construction of the provision is that the Legislature intended it to ensure that, where an owner is engaged in the business of selling "lots," anyone relied upon by that owner to perform such activity on its behalf—including even an employee or an affiliated entity—must meet the licensure requirement.

Palkoski v. Garcia, 19 N.J. 175 (1955), the only case cited by the parties that addresses this portion of Section 3, is instructive. There, the plaintiff sought to recover commissions for the rental of apartments. The Appellate Division reversed the trial court's award of such commissions on the basis that the plaintiff did not have a real estate broker's license. The Supreme Court affirmed.

Palkoski involved three commonly owned corporations organized for the construction and operation of apartment complexes. One entity supplied lumber. A second entity performed construction. The third was the builder and owner/operator of the buildings.

The plaintiff managed the lumber yard at a fixed salary. Later on, he also functioned as the superintendent of the construction, at no increase in salary. The lumber supply company paid

the salary, but a portion of the same was charged to the builder/owner-operator. The plaintiff was also nominally a vice president of each company and held a single share of stock in each as well.

The principal in the three companies became dissatisfied with the unaffiliated broker engaged to rent apartments, as the broker was demanding an increase in commissions. He agreed to pay the plaintiff for each apartment he rented, the service to be performed after hours of his regular employment by the lumber company.

After he was terminated from employment, the plaintiff sought commissions from the individual principal and the three companies. He contended the individual was engaged in one commercial venture and used the three companies to accomplish the end result of owning and operating apartment buildings.

The plaintiff claimed that the exemption set forth in N.J.S.A. 45:15-4 applied to him, as he functioned as an employee of the owner/operator. He also claimed to fall within the purview of the last sentence of the first paragraph of Section 3, noting as TBO does here that it expands the coverage of Section 3 to sale, but not leasing, of lots. The New Jersey Supreme Court expressly observed the following:

> [I]t is argued that "the increased scope given to the term 'real estate broker' is limited to the sale of lots," and "If the law precluded a person from recovering compensation earned by the renting of corporate property, or the sale thereof, prior to 1953 [the year of the amendment adding this final sentence] it is hard to believe that the Legislature would change the statute so as to preclude recovery if there was the sale of certain property without also applying the amendment to the rental of property."
>
> [Palkoski, 19 N.J. at 179.]

In holding that the plaintiff was not entitled to commissions for want of licensure, the Court reasoned that the "point" of the Section 4 exemption "seems to be that a corporation acts only through agents and servants, and so it is implicit in the exception . . . that an employee of

[the owner-operator] engaged in such service in its behalf is also within the exception." Id. at 180. But it concluded this exemption did not extend to the plaintiff. The Court found that the plaintiff was employed "to replace a licensed broker who was paid a commission of $50 for each apartment rental, but had demanded more, even though there were many vacancies." Ibid. He was thus "retained for the selfsame service on the selfsame terms 'at times when he was able to, bearing in mind that he had to work during the day for [the lumber company,] late afternoons and evenings, and Saturdays and Sundays.'" Ibid.

The Court held that the 1953 amendment of Section 3 "does not signify a different legislative understanding of the sense of the pre-existing statute." Id. at 181. It concluded that the amendment "does not mean that under the prior act the corporate owner of real property could enlist the services of an unlicensed broker, not in its regular employ, to sell or rent its property, as a hiring or employment not within the licensing act." Ibid. Instead, in the sale of lots, "even a regular salaried employee of the corporation is under the statutory disability unless he is licensed." Ibid. The Court determined that "[t]here is a difference between a regular employee engaged in the pursuit of the corporate employer's general business and an outsider retained to render a purely brokerage service that is made the subject of license in the common interest." Ibid. It found that the case at hand was "in the latter category." Ibid.

The Court concluded that its construction of the statute, including the amending language, "is the spirit and the indubitable reason of the law, considered as an integrated whole." Ibid. In so holding, the Court declared that "it is not the words but the internal sense of the law that controls. The intention comes from a general view of the whole of the expression rather than from the literal sense of particular terms." Ibid.

Palkoski instructs that this Court must narrowly construe the exception set forth in Section 4 in light of the overall purpose of the statutory scheme. If the plaintiff in Palkoski was not entitled to a commission for his leasing activity because he did not have the required license, then surely TBO is also not permitted to claim a commission, as "[t]here is a difference between a regular employee engaged in the pursuit of the corporate employer's general business and an outsider retained to render a purely brokerage service that is made the subject of license in the common interest." Palkoski, 19 N.J. at 181.

The plaintiff in Palkoski was "in the latter category," even though he was an employee of an entity affiliated with the owner/operator and was even nominally employed by the owner itself. Ibid. So too is TBO in the "latter category." Indeed, the connection between TBO and the owners of the Property here is even more attenuated. Insofar as its leasing activities were concerned, including any such actions in relation to the Jaguar lease, TBO was manifestly an "outsider retained to render purely a brokerage service" within the intendment of the Act. It thus required a broker's license to engage in such activities. Such a conclusion, and the construction of the statute on which it is based, is consistent "with the spirit and the indubitable reason of the law, considered as an integrated whole." Ibid.

TBO also argues that because "Becker has an ownership interest in [Sharp] Holdings by virtue of his 13.65000% residual membership interest," TBO is exempt from the Act's licensure requirement as the bona fide owner or lessor of the Property. (See TBO's Opp'n Br. 19.) It notes that the Management Agreement permits TBO to act through a local agent, and it performed its leasing activities through Becker as such an agent.

Even overlooking the fact that TBO itself has no ownership interest in Sharp Holdings, the logic of TBO's position is that, for purposes of this statutory scheme, a minority Member of

an entity that owns a property must be treated as the owner of the same. This argument suffers from multiple flaws. It ignores the general principle that a corporate entity is separate and distinct from its constituent shareholders or members. Here, Becker is separate and distinct from both TBO and Sharp Holdings. TBO's contention that it is in effect an owner of the Property by virtue of Becker's minority interest in Sharp Holdings is also inconsistent with the broad remedial purpose of the licensure statute and the teaching of the court in Pasloski to construe the exemption for bona fide owners or lessors accordingly. The Court thus holds that Becker's residual interest in Sharp Holdings is of no moment in determining whether the Act applied to TBO's leasing activities.

IV

For the foregoing reasons, the Court grants the Defendants' motion to dismiss. Although the Court discerns no basis on which re-pleading by the Plaintiff would rectify the legal insufficiency of the challenged portions of its pleading, it is mindful of the instruction to trial courts to permit an opportunity for re-pleading when granting a motion to dismiss. Accordingly, it will dismiss Count I and that portion of Count II seeking Leasing Commission Payments without prejudice, subject to the right to re-plead within thirty (30) days of electronic posting of its Order.