

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25310
C/prt

_____AD3d_____

Argued - November 5, 2009

WILLIAM F. MASTRO, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
LEONARD B. AUSTIN, JJ.

2008-08982

DECISION & ORDER

Thomas Hamilton Pharmacy, Inc., appellant,
v Nationwide Mutual Insurance Company,
respondent, et al., defendant.

(Index No. 18258/06)

Alan Jay Martin (Feldman, Rudy, Kirby & Farquharson, P.C., Westbury, N.Y. [Bruce W. Farquharson], of counsel), for appellant.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains, N.Y. (Edward J. Guardaro, Jr., and Gina Bernardi Di Folco of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Nicolai, J.), entered September 19, 2008, as granted that branch of the cross motion of the defendant Nationwide Mutual Insurance Company which was for summary judgment dismissing the complaint insofar as asserted against it and denied that branch of its motion which was for summary judgment on its first cause of action.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The defendant Nationwide Mutual Insurance Company (hereinafter Nationwide) met its initial burden of establishing that the plaintiff commenced this action after expiration of the two-year limitations period contained in the subject insurance policy (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967-968; *Halim v State Farm Fire & Cas. Co.*, 31 AD3d 710; *Schachter v*

December 8, 2009

Page 1.

THOMAS HAMILTON PHARMACY, INC. v
NATIONWIDE MUTUAL INSURANCE COMPANY

Royal Ins. Co. of Am., 21 AD3d 1024). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the action was governed by the six-year statute of limitations set forth in CPLR 213(2). Moreover, the plaintiff failed to raise a triable issue of fact as to waiver (see *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d at 968; *Saxena v New York Prop. Ins. Underwriting Assn.*, 232 AD2d 622), or estoppel (see *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d at 968; *Proc v Home Ins. Co.*, 17 NY2d 239, 245-246; *Culinary Inst. of Am. v Aetna Cas. & Sur. Co.*, 151 AD2d 638).

In light of our determination, the plaintiff's remaining contention has been rendered academic.

MASTRO, J.P., BELEN, HALL and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court