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

D33195
C/kmb

_____AD3d_____ Submitted - November 18, 2011

ANITA R. FLORIO, J.P.
RUTH C. BALKIN
ARIEL E. BELEN
CHERYL E. CHAMBERS, JJ.

2010-11307 DECISION & ORDER

Jennifer Harris, et al., appellants, v Bryan Whalen, respondent.

(Index No. 11868/07)

Joseph A. Solow, Hauppauge, N.Y., for appellants.

Peter B. Gierer, Hauppauge, N.Y., for respondent.

In an action, inter alia, in effect, to recover damages for breach of an express limited warranty pursuant to General Business Law § 777-a for the construction and sale of a new home, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), dated September 22, 2010, as granted that branch of the defendant's motion which was for summary judgment dismissing the complaint.

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

General Business Law § 777-a, which is contained within General Business Law article 36-B, provides that as a prerequisite to commencing an action alleging breach of the statute, written notice of a claim for breach of warranty must be received by the defendant prior to the commencement of the action no later than 30 days after the expiration of the warranty period (*see Finnegan v Brooke Hill, LLC*, 38 AD3d 491). The warranty date is defined as "the date of the passing of title to the first owner for occupancy by such owner or such owner's family as a residence, or the date of first occupancy of the home as a residence, whichever first occurs" (General Business Law § 777[8]).

Here, contained in the contract of sale for the new home constructed by the defendant for the plaintiffs was a limited warranty provision which guaranteed the home for a period of one year against, inter alia, any structural defects. The Supreme Court correctly concluded that the defendant demonstrated prima facie that he had not been given timely written notice regarding the alleged defects. Specifically, the defendant showed that although the date of first occupancy was August 1, 2005, the date that title passed was May 5, 2005, and the date the plaintiffs first provided the defendant with written notice of a warranty claim was by letter dated July 12, 2006, which was beyond the expiration of the statutory period for timely written notification (*see* General Business Law § 777[8]; § 777-a). The plaintiffs failed to raise a triable issue of fact in response (*see Gallup v Summerset Homes, LLC*, 82 AD3d 1658).

Accordingly, the Supreme Court correctly granted that branch of the defendant's motion which was for summary judgment dismissing the complaint.

In light of the foregoing, we need not consider the plaintiffs' remaining contentions.

FLORIO, J.P., BALKIN, BELEN and CHAMBERS, JJ., concur.

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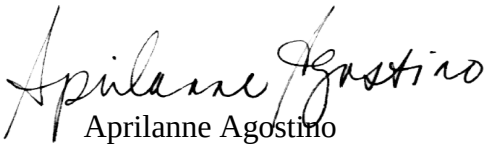

Aprilanne Agostino
Clerk of the Court