

**Midtown Distributors Corp. v Mutual Central Alarm  
Services, Inc.**

2006 NY Slip Op 30363(U)

November 29, 2006

Supreme Court, New York County

Docket Number: 0601667/2005

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

MIDTOWN DISTRIBUTORS CORP.,  
Plaintiff,

Index No.: 601667/05

Motion Date: 10/03/06

- v -

Motion Seq. No.: 02

MUTUAL CENTRAL ALARM SERVICES, INC.,  
Defendant.

Motion Cal. No.: 73

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2

3

**UNFILED JUDGMENT**

Cross-Motion:  Yes  No

**his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).**

Upon the foregoing papers,

Plaintiff's complaint states that on August 11, 2000, the parties entered into an agreement pursuant to which the defendant was to install and maintain a central station burglar alarm system at plaintiff's premises in Long Island City, New York. Defendant installed the alarm system. The complaint states that on several occasions between September 2001 and February 2002, thieves and/or vandals broke into plaintiff's premises causing damage and property loss. The complaint asserts that at the time of each break-in the alarm was not in working order and that the lack of a working alarm allowed the break-ins to occur and

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

prevented the police from stopping the crimes. In the first cause of action plaintiff asserts that defendant knew of a problem with the alarm but failed to repair it or notify plaintiff of the problem. The second cause of action alleges breach of contract. The plaintiff's bill of particulars asserts that the breach is based upon defendant's failure to install a AAA alarm system with the required number of sensors that would have been able to ascertain on at least one occasion the presence of burglars. The third cause of action alleges that the defendant negligently failed to keep the alarm in working order.

Plaintiff initiated this suit by filing a summons with notice on May 10, 2005. Defendant now seeks to dismiss the complaint pursuant to CPLR 3211 on the grounds of statute of limitations and the exculpatory clause contained within the agreement that purports to absolve the defendant of liability for any losses sustained due to defendant's "negligent performance or failure to perform any obligation under this agreement." The court agrees with the defendant that the complaint must be dismissed.

Plaintiff argues that the first and third causes of action should be sustained because there is an issue of fact as to whether the defendant was either intentionally or grossly negligent in its conduct and therefore acted outside the protection of the exculpatory clause. See Hanover Ins. Co. v D &

W Cent. Station Alarm Co., Inc., 164 AD2d 112, 115 (1<sup>st</sup> Dept 1990) ("the record before us establishes that triable issues of fact exist regarding whether [defendant] was grossly negligent in its response or failure to respond to alarm signals"). However, to the extent that the plaintiff's claims with respect to the first and third causes of action are based either upon defendant's intentionally or grossly negligent tortious conduct, the court need not consider the application of the exculpatory clause because the claims are time-barred under CPLR 215 (see Havell v. Islam, [1<sup>st</sup> Dept 2002] ["A claim for damages for an intentional tort, including a tort not specifically listed in CPLR 215 (3), is subject to a one-year limitation period"]) and CPLR 214(4) (action to recover damages for an injury to property must be commenced within three years). Plaintiff's complaint was filed over three years after the last alleged loss and therefore the first and third causes of action are untimely.

Plaintiff's second cause of action for breach of contract must be dismissed based upon the exculpatory clause mutually consented to by the parties. Plaintiff asserts that its breach of contract claim should fall outside the scope of the exculpation because an intentional breach is alleged. However, this argument is clearly contrary to well-settled authority. As stated by the Court in a similar burglar alarm case

New York courts have repeatedly and consistently enforced exculpatory clauses in contracts for the installation,

leasing, and servicing of alarm systems, and have dismissed claims for breach of these contracts where the plaintiff seeks to recover damages for losses sustained as a result of burglaries. Special Term attempted to distinguish prior cases which enforced such exculpatory clauses by pointing out that in this case the defendant allegedly breached the contract at its inception (by failing to install two "motion detectors", as required by the contract), rather than when the loss occurred or by failing "to perform services pursuant to the contract." We conclude that there is no legal basis for such a distinction, since exculpatory clauses have been enforced where the defendant is alleged to have breached the contract at its inception, i.e., by negligently installing the alarm equipment. Furthermore, the exculpatory clause of the contract explicitly covers the "failure to perform any obligation under this agreement."

Sue & Sam Mfg. Co. v United Protective Alarm Systems, Inc., 119

AD2d 664 (2d Dept 1986) (citations omitted). Plaintiff's argument raised here is thus unsupported in the law and the second cause of action must be dismissed based upon the documentary evidence of the parties' contract incorporating the exculpatory clause.

Accordingly, it is

ORDERED that the defendant's motion to dismiss plaintiff's complaint is GRANTED for the reasons stated above; and it is further

ORDERED and ADJUDGED that the Clerk is directed to enter judgment DISMISSING the complaint in its entirety.

This is the decision and order of the court.

Dated: November 29, 2006

ENTER:

*[Handwritten signature]*  
 \_\_\_\_\_  
**DEBRA A. JAMES** J.S.C.  
 J.S.C.

**UNFILED JUDGMENT**  
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