SHORT FORM ORDER

INDEX NO. 23649/06

Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:
HON. ARTHUR G. PITTS
JUSTICE OF THE SUPREME COURT

COPY

ORIG. RETURN DATE: 11/13/06
FINAL SUBMIT DATE: 12/14/06
MOTION SEQ. NO.: 001-MG

SETSUO ITO,

Plaintiff,

-against-

MARVIN LUMBER AND CEDAR COMPANY. a/k/a MARVIN WINDOWS, a/k/a MARVIN WINDOWS AND DOORS,

Defendants.

PLTF'S/PET'S ATTY:
CAHALAN & CAHALAN, P.C.
By: Eric M. Cahalan, Esq.
The Huntington Law Center
191 New York Avenue, 2nd Floor
Huntington, New York 11743

DEFT'S/RESP'S ATTY:
SANFORD H. GREENBERG, ESQ.
110 East 59th Street, 29th Floor
New York, New York 10022

Upon the following papers numbered 1 to__ read on this motion /dismissal Notice of Motion/OSC and supporting papers 1-9 ; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in opposition and supporting papers 10-18 ; Affirmation/affidavit in reply and supporting papers 19-22/23-29 Other _____; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that defendant Marvin Lumbar and Cedar Company's motion to dismiss is granted under the circumstances presented herein. (CPLR 3211 (a) (5))

The matter at bar is one sounding in breach of an express and implied warranty. Defendant Marvin Lumbar and Cedar Company is the manufacturer of windows and doors purchased in 1990 by plaintiff Setsuo and installed in his house located in Bridgehampton, Suffolk County, New York. By way of his complaint, the plaintiff alleges that the windows and doors were defective causing water damage and wood rot. In support of the instant motion the defendant avers that the instant matter is time barred pursuant to UCC 2-725.

It is well settled that breach of warranty claims are governed by the four year limitations set forth in UCC 2-725. (***St. Patrick's Home for the Aged and Infirm v. Laticrete Intern., Inc.*** 264 A.D.2d 652, 696 N.Y.S.2d 117 [1st Dept 1999]) UCC 2-275 (2) provides that a cause of action under a

breach of warranty accrues "when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered." In the matter at bar it is undisputed that the subject windows and doors were purchased by the plaintiff in 1990. In his complaint and at his examination before trial, the plaintiff avers that he discovered the defect in the windows and doors in 1997. As such, clearly his claim alleging a breach of warranty or a breach of warranty for future performance both are time barred.

In opposition to the instant motion, the plaintiff submits that his action is not time barred and the basis of his complaint is a breach of a "lifetime warranty." The plaintiff alleges that at the time of the purchase of the windows and doors an unidentified saleswoman at Window City told him that the finish on the windows and doors were "almost permanent" and that they had a "lifetime guarantee." When questioned at his examination before trial regarding the specifics of the lifetime guarantee he could not provide the scope of the coverage, the identity of the guarantor or the remedies available. He further admitted that there was no written confirmation of such guarantee.

It is well settled that bare legal conclusions and factual claims which are flatly contradicted by documentary evidence are not presumed to be true with regard to a motion to dismiss. (***Hartman v. Morganstern***, 28 A.D.3d 423, 814 N.Y.S. 2d 169 [2nd Dept. 2006]) Herein, the defendant has proffered the written limited warranty offered for its windows and doors which clearly provide certain time limitations which cannot be usurped by an unsupported verbal warranty given by an unidentified salesperson.

The plaintiff further argues that the defendant undertook the repair and replacement of the windows from 1998 through 2001 thereby creating a new contractual obligation subject to a six year statute of limitations as well as alternatively, tolling the four year statute of limitation. Such assertions are without merit and are unsupported at law. Although a defendant may be estopped from pleading a statute of limitations defense where the plaintiff was induced by fraud, misrepresentations or deception to refrain from timely filing an action (see ***Hetelekides v. Ford Motor Company,*** 299 A.D.2d 868, 750 N.Y.S.2d 404 [4th Dept 2002]), in the matter at bar the plaintiff simply asserts that the statute of limitations is tolled because the defendant began to undertake the repair and replacement of some of the windows and doors. There is no allegation of fraud, misrepresentation or deceit on the defendants part and as such the statute of limitations is not tolled for the time period of the repairs.

As to the plaintiff's claim that a new contract was created between the parties when the defendant agreed to make repair and/or replace his windows and doors, such oral agreement is an extension of warranty of an alleged lifetime warranty which must be in writing pursuant to the statute of frauds. (General Obligations Law 5-701) Accordingly, pursuant to the foregoing and the circumstances presented herein, the defendant's motion to dismiss is granted.

This shall constitute the decision and order of the Court.

Submit judgment.

So orcered.

Dated: Riverhead, New York
March 1, 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION _____ DO NOT SCAN