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

PRESENT: BERNARD J. FRIED J.S.C. PART 60

Index Number : 603135/2006

TRIBECA PRINT SERVICES, INC.

VS

CANON BUSINESS SOLUTIONS-EAST,

Sequence Number : 00

DISMISS ACTION

FBEM

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum.

SO ORDERED

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

Dated: 3/29/07

BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION[1] ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 60

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TRIBECA PRINT SERVICES, INC. and
JCJ, LTD.

Plaintiffs,

-against-

CANON BUSINESS SOLUTIONS-EAST, INC.,
CITICORP t/a CITICAPITAL, and
CITICORP VENDOR FINANCE, INC.

Defendants.

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FBEM

Index No. 603135/06

APPEARANCES:

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FRIED, J:

In this action alleging breach of an express warranty, defendant Canon Business Solutions-East, Inc. ("Canon") moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. For the reasons stated below, the motion is granted.

Plaintiff Tribeca Print Services, Inc.("Tribeca" or "plaintiff"), a specialty printing firm engaged in the business of producing promotional material for models, alleges that in 2004, it consulted with Canon sales personnel regarding Tribeca's interest in purchasing photocopy machines that could produce model cards and specialized printed material called

"portfolio work". Plaintiff contends that, in reliance on Canon's express verbal warranty, on May 3, 2004, it took delivery of two Canon model CLC4000 photocopiers at a cost of $147,312.00. On or about the same date, by separate agreement, Tribeca acquired one Canon model 1140 photocopier for $44,424. Tribeca financed all three machines by means of finance leases issued by defendant Citicorp Vendor Finance, Inc., paying $4,092 per month for the model CLC4400's and $1,234 per month for the model 1140. Plaintiff JCJ, Ltd. Tribeca's subsidiary, guaranteed each of the leases.

Plaintiff alleges that, for eighteen months, Canon's authorized personnel tried to adjust the copiers so that they would perform the jobs Tribeca had specified and that during that time Canon continued to assure Tribeca that the machines would be able to print the model cards and portfolio work. However, at the end of the eighteen months, Tribeca determined that the copiers were unable to perform the printing tasks for which they were acquired, and it rejected all three copiers.

The complaint states four causes of action for breach of an express warranty and seeks to recover the cost of the photocopiers and consequential damages. (Karagheuzhoff Aff., Ex. A)

Paragraph 3 of the Acquisition Agreements ("Agreements") for the photocopiers contains a 90 day limited warranty that the equipment is free of defects in material and workmanship. Immediately below the warranty, the contract states, in capital letters:

> OTHER THAN AS SET FORTH IN PARAGRAPH 3, CANON-EAST EXPRESSLY DISCLAIMS AND EXCLUDES ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR

> PURPOSE RELATING TO THE USE OR PERFORMANCE OF THE LISTED ITEMS. IN ADDITION, CANON-EAST MAKES NO WARRANTIES EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO SOFTWARE. . . .

(Leonard Aff, Exs. A & B)

Paragraph 6 of the Agreements states, in pertinent part, "ANY SUIT BETWEEN THE PARTIES HERETO, . . ., SHALL BE COMMENCED, IF AT ALL, WITHIN ONE (1) YEAR OF THE DATE THAT THE CLAIM ACCRUES." (Leonard Aff., Exs. A & B)

Paragraph 7 of the Agreements contains a merger clause that provides that this, "constitutes the entire agreement between the parties . . .superseding all previous proposals oral or written." The paragraph also states;

> "[n]o representation or statement not contained in the original of this Agreement shall be binding on Canon-East as a warranty or otherwise, nor shall this agreement be modified or amended except by a writing Signed by an officer of Canon-East and by the Customer. Customer expressly disclaims having relied on any representation or statement concerning capability, condition, operation, performance or specifications of the Listed Items except as set forth in the original of this agreement.

(Leonard Aff., Exs. A & B)

In support of dismissal, Canon argues that, pursuant to the Agreement, the complaint is time barred and that Tribeca's warranty claims are also barred by the disclaimer of warranties in the Agreement and the merger clause. Finally, they state that plaintiff's demand for consequential damages is barred by the agreement.[1]

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[1] Paragraph 5 of the Agreement states that Canon East will not be liable for loss of profit or other indirect, special incidental or consequential damages. (Leonard Aff, Exs. A & B)

In opposition, Tribeca argues that the claims are not time barred because the limitations period did not begin to run until late 2005 when Tribeca knew about the copiers' inability to perform the specified tasks; that Canon cannot rely on the Agreement to disclaim the express warranty that was a foundation of the transaction and that Tribeca is entitled to recover consequential damages because it relied on Canon's express warranty.

It is well settled that parties may, by agreement, provide for a shortened limitations period provided that the shortened period is reasonable and the agreement is in writing. N.Y.U.C.C. 2-725(1) (parties may reduce the limitations period to not less than one year); John J. Krassner & Co., Inc. v. City of New York, 46 N.Y.2d 544, 551 (an agreement that modifies the statute of limitations by specifying a shorter but reasonable period is enforceable, provided it is in writing); H.P.S. Capitol, Inc. v. Mobil Oil Corporation, 186 A.D.2d 98 (1st Dept 1992)(a 12 month shortened limitation period, agreed to by the parties, is reasonable and enforceable)

Accordingly, in this case, the one year written limitations period in the Agreement is valid and enforceable and thus, Tribeca was obligated, by contract, to bring this action within one year of accrual of the claim. Section 2-275 of the N.Y.U.C.C. provides that a "cause of action accrues when the breach occurs regardless of the aggrieved party's lack of knowledge of the breach." A cause of action for a breach of warranty against a manufacturer or distributor accrues when the party charged tenders delivery. N.Y.U.C.C. 2-725(2); Heller v. U.S. Suzuki Motor Corp., 64 N.Y. 2d 407, 410 (1985)

It is undisputed that Tribeca took delivery of the photocopiers from Canon in or about May, 2004. However, Tribeca did not file the complaint in this matter until September 6,

2006 and it did not serve Canon with the complaint until September 18, 2006–more than two years after Canon tendered delivery of the copiers, and more than one year after the statute of limitations ran. Accordingly, pursuant to paragraph 6 of the Agreement, this action is time barred.

Tribeca is not entitled to invoke the "future performance" provision of N.Y.U.C.C. 2-725(2), which provides that "where a warranty explicitly extends to future performance and discovery of the breach must await the time of such performance," a claim accrues "when the breach is or should have been discovered," because the Agreement, here, specifically limited all warranties to a single 90 day warranty against defects in material and workmanship and explicitly disclaimed all other warranties. Moreover, the merger clause in the agreement reiterated Canon's disclaimer of all warranties that were not contained in the Agreement.

Because I find that the Agreement's one year statute of limitations is dispositive in this matter, I need not address the other arguments.

Accordingly, it is ORDERED that defendant Canon Business Solutions-East, Inc.'s motion to dismiss the complaint for failure to state a cause of action is granted and the complaint is hereby severed and dismissed as to that defendant and the Clerk is directed to enter judgment in favor of that defendant; and it is further

ORDERED that the remainder of the action shall continue.

DATE 3/29/07

J.S.C.

BERNARD J. FRIED
J.S.C.