SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

DEMETERIO AND NEJATHEIM, M.D., P.C.,

Plaintiffs,

-against-

MOTION DATE: 12/13/07
MOTION SEQ. NO.: 001

ATL FINANCIAL SERVICES, INC., PHILIPS MEDICAL SYSTEMS, N.A., PHILIPS MEDICAL SYSTEMS, INC. f/k/a ATL UNTRASOUND, INC.

INDEX NO.: 13021/07

Defendants.

The following papers having been read on the motion (numbered 1-3)

Notice of Motion.....1
Affirmation in Opposition 2
Notice of Cross Motion with Affirmation.....3

Motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(5) is **granted**.

Cross motion by plaintiff pursuant to CPLR 3025(b) to amend its complaint in the form annexed to the moving papers is **denied.**

BACKGROUND

This action was commenced by plaintiff medical corporation on or about July 17, 2007 to recover damages arising from defendants' alleged breach of a purchase/lease agreement executed on or about December 23, 1999 pursuant to which plaintiff leased an ALT ultrasound machine, Model HDI 1000 bearing serial number 01DBX2, which was obtained for the purpose of performing sonograms in plaintiff's Valley Stream office.

According to plaintiff, during the first year of the lease, the machine was

under warranty and repairs were made as needed by a service representative from Philips Medical Systems. The machine allegedly continued to inadequately perform after the initial warranty period had expired. However, because of the machine's alleged failure to work properly, and defendants' failure to timely and adequately repair the machine, plaintiff requested that defendants take back the machine which was removed from plaintiff's office on or about June 30, 2003.[1] Subsequently, a money judgment was entered on default against plaintiff in the sum of $51,392.72 plus interest as and for payments due under the lease agreement in an action brought by the successor in interest to Fleet Capital Leasing, i.e., Bal Global France, LLC against Demeterio and Nejatheim, M.D., P.C. [index no. 11136/06].[2]

Although the summons states that the nature of the action is one for breach of contract and fraud, the complaint alleges three causes of action to recover for breach of implied warranty; lost revenue and recovery of money awarded to defendants as a result of the money judgment entered in their favor on plaintiffs' default. No actual fraud cause of action was pleaded. In any event, the facts as alleged do not support a cause of action for fraud as such a claim does not lie where the only fraud alleged relates to a breach of contract. *Marshel v Farley*, 21 AD3d 935 [2nd Dept. 2005], *lv to appeal den.* 6 NY3d 710 [2006].

In opposition to defendants' motion to dismiss the compliant as time barred, plaintiff has cross moved to amend the complaint to add a theory of recovery

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[1]Plaintiff ceased making required monthly payments of $1,246.00 beginning in January, 2003.

[2]It appears from the affidavit of plaintiff's office manager submitted in connection with that action that a letter detailing problems with the machine was sent to defendant on or about February 13, 2003 after a long series of allegedly failed repairs.

based on breach of contract governed, according to plaintiff, by the six-year statute of limitations as set forth in CPLR 213. Plaintiff argues that the breach of contract claim accrued on June 30, 2003, the date on which the machine was removed from its office, after numerous attempts by defendants to repair the machine were unsuccessful and plaintiff determined that it would never work properly.

Although not referenced by the parties, paragraph 21 of the lease contains a choice of law provision which reads, in pertinent part, as follows:

> "This lease shall in all respects be interpreted and all transactions hereunder and all rights and liabilities of the parties hereto shall be determined and governed as to validity, interpretation, enforcement and effect by the laws of the State of Washington * * *."

Also not referenced are paragraphs 4 and 19 which are relevant to the issue at hand and which read as follows:

> (4) Selection of Equipment: Disclaimer of Warranty. Lessee has selected the Equipment, Lessee agrees that the equipment is leased as specified by lessee, that it is suitable for lessee's purpose, and that except for the manufacturer's standard warranties, lessor has made no representation or warranty about the suitability or durability of the equipment for the purposes and uses of lessee, or any other representation or warranty, express or implied

including the implied warranties of merchantability and fitness for a particular purpose. In the event lessor assigns the lease, the assignee shall not be liable for loss, damage or injury to lessee or third parties as a result of any defects, latent or otherwise in the equipment whether arising from the application of the laws of strict liability or otherwise. Lessor makes no warranty as to the treatment of this lease, for tax or accounting purposes.

(19) Supplier's Contract. Lessor and Lessee agree that this Lease is a Finance Lease as that term is defined in Article 2A of the Uniform Commercial Code. Lessee acknowledges that Lessor has apprised Lessee of the identity of the equipment supplier. Lessor hereby notifies Lessee that Lessee may have rights pursuant to the contract with the supplier and the Lessee may contact the supplier for a description of any rights or warranties that Lessee may have under this contract.

DISCUSSION

New York courts will generally defer to the intent of the parties as manifested in a choice of law provision like the one contained in the parties' lease

agreement. *Cargill, Inc. v Charles Kowsky Resources, Inc.*, 949 F.2d 51, 55 [2d Cir. 1991]. In spite of the choice of law provision contained in the lease agreement herein, however, the parties have briefed the current motion on the basis of New York law and have agreed that the lease is a finance lease as defined in Article 2A of the Uniform Commercial Code. Under such circumstances, it is appropriate for the court to apply the law of the forum as briefed by the parties. *Walter E. Heller & Co. v Video Innovations, Inc.*, 730 F2d 50, 52 [2d Cir. 1984]. In any event, there is no material difference between the law of New York and the law of Washington with respect to the issue in dispute herein.

Notwithstanding plaintiff's assertions to the contrary, the alleged breach of the lease in this matter is subject to the four year statute of limitations set forth in Uniform Commercial Code § 2-A-506(1) and not the six year statute of limitations which generally applies to breach of contract claims. Under the statute which governs finance leases, the cause of action, including a breach of warranty claim, accrues when the act or omission on which a default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs whichever is later. Uniform Commercial Code § 2-A-506(2). Here defendants' breach of the base agreement occurred at the very latest when, according to the proposed amended complaint, the last allegedly defective repair was made in May, 2003. Inasmuch as this action was commenced more than four years later, on or about July 27, 2007, a breach of contract or breach of warranty claim is time barred.

If the agreement herein were to be construed as a contract for the sale of goods under the typewritten rider which provides:

> "Provided the Lessee has complied with all of the terms, covenants and provisions of the above Lease Agreement, Lessee may choose to exercise one of the following options at the end of the lease term: Lessee hereby agrees to purchase all, but not less than all of the equipment, leased under the above Lease Agreement, as AS-IS, WHERE-IS basis and without warranty by the Lessor for one dollar $1.00,"

Uniform Commercial Code § 2-725(2) would be applicable. Pursuant to that section a breach of warranty occurs when tender of delivery is made except in those instances, not here present, where a warranty explicitly extends to future performance of the goods, and discovery must await performance. In such a case, the cause of action accrues when the breach is, or should have been, discovered. It is well settled that the statute of limitations applicable to a breach of warranty claim under § 2-725(2)accrues upon tender of delivery despite the aggrieved party's lack of knowledge of the breach. *Vanata v Delta Intern. Machine Corp.*, 269 AD2d 175, 176 [1st Dept. 2000]; *Holbrook, Inc. v Link-Belt Const. Equipment Co.*, 103 Wash. App. 279, 283 [Wash. App. Div. 2000].

The breach of contract pleaded by plaintiffs in the amended complaint is, therefore, time barred, having occurred almost eight years prior to commencement of this action on July 27, 2007. *Triangle Underwriters, Inc. v Honeywell, Inc.*, 604 F.2d 737, 743 [2d Cir.1979].

While the determination of whether to deny or permit amendment to a pleading is addressed to the sound discretion of the court (*Thone v Crown Equip.*

Corp., 27 AD3d 723, 724 [2nd Dept. 2006]), a court need not grant amendment where, as here, the proposed amendment is palpably without merit. *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept. 2005]. Inasmuch as plaintiffs are, under any recitation of the facts, unable to satisfy the requirement of the statute of limitations, leave to file an amended complaint must be **denied.**

This constitutes the Order of the Court.

Dated: Feb 27, 2008 ENTER:

J.S.C.

ENTERED

APR 11 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE