

Solil Mgt. LLC v Marley-Wylain Co.

2008 NY Slip Op 31094(U)

April 15, 2008

Supreme Court, New York County

Docket Number: 0600700/2007

Judge: Barbara Kapnick

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

PRESENT: HON. BARBARA R. KAPNICK

PART 12

Justice

Index Number : 600700/2007
SOLIL MANAGEMENT, LLC
vs
MARLEY-WYLAIN CO.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.

600700/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

APR 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/15/08

[Signature]
BARBARA R. KAPNICK

J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
SOLIL MANAGEMENT LLC,

Plaintiff,

-against-

THE MARLEY-WYLAIN COMPANY d/b/a
WEIL-MCLAIN COMPANY, TURNABOUT
ENVIRONMENTAL SERVICES, INC. and
CASTLE OIL CORPORATION,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 600700/07
Motion Seq. No. 001

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NEW YORK

This action stems from the alleged failure of replacement boilers manufactured by defendant The Marley-Wylain Company d/b/a Weil-McLain Company ("McLain") and sold and installed by defendants Turnabout Environmental Services, Inc. ("Turnabout") and Castle Oil Corporation ("Castle") in eight buildings managed by plaintiff Solil Management, LLC.

Plaintiff seeks to recover damages (i) against defendant McLain for breach of express warranty (first cause of action), breach of implied warranty of merchantability (second cause of action) and negligence (third cause of action); (ii) against defendant Turnabout for breach of contract (fourth cause of action), breach of implied warranty of merchantability (fifth cause of action) and negligence (sixth cause of action); and (iii) against defendant Castle for breach of contract (seventh cause of

action), breach of implied warranty of merchantability (eighth cause of action), and negligence (ninth cause of action).

Defendant Castle now moves for summary judgment dismissing plaintiff's Complaint and all cross-claims against it on the ground that plaintiff's claims accrued in or prior to 2002 and are, therefore, barred by the three-year statute of limitations for negligence as set forth in CPLR § 214, and the four-year statute of limitations for breach of warranty and breach of contract set forth in UCC § 2-725.

Defendant McLain and plaintiff both argue in affirmations in opposition that the motion should be denied because discovery is not yet complete.

Plaintiff also argued for the first time at the oral argument held on February 6, 2008 that the contractual claims against defendant Castle are timely because the contract between plaintiff and Castle was not merely a contract for the sale of the boiler, but also for the installation of the boiler, and thus should be subject to the six-year statute of limitations set forth in CPLR § 213(2).

In evaluating whether the violation of a contract providing both for the sale of goods and for the furnishing of services is controlled by the four-year statute of limitations set forth in the UCC or the six-year contractual statute of limitations in CPLR § 213, subd. 2, the test established by controlling authority is

whether the agreement is "predominantly" one for the sale of goods or for the providing of services.

Levin v. Hoffman Fuel Co., 94 A.D.2d 640 (1st Dep't 1983), aff'd, 60 N.Y.2d 665 (1983). See also, Wuhu Import & Export Corp. v. Capstone Capital, LLC, 39 A.D.3d 314 (1st Dep't 2007).

Under the "Retail Installment Contract" dated May 8, 2002 between Castle and plaintiff, a copy of which is annexed to plaintiffs' Affirmation in Opposition, Castle ("Seller") agreed to sell and install, and plaintiff ("Buyer") agreed to buy from Seller, the following equipment:

Remove existing defective Weil McLain 688 (boiler leaking at steam drum) and install new Weil McLain 688 boiler. New boiler will be complete with new Probe Low Water Cut-Off, new 47-2 feeder and Low Water Cut-Off and two (2) Hot Water Generating Coils. After new boiler is installed, Castle will proceed with work on replacement contract dated 2/7/02 for the replacement of the oil burner. Castle will clean fuel oil tank after product in tank has been burned down.

Although defendant's Castle's promise to provide services to plaintiff "may conceivably have been an inducing factor in their entering into the agreement", this Court finds that the Retail Installment Contract was "predominantly" one for the sale of a new Weil McLain 688 boiler and that "the promised service, however important, was incidental." Levin v. Hoffman Fuel Co., supra at 640-641.

Accordingly, based on the papers submitted and the oral argument held on the record, this Court finds that plaintiff's claims against defendant Castle are governed by the three and four-year statute of limitations set forth in CPLR § 214 and UCC § 2-725 and are thus time barred.

Defendant Castle's motion for summary judgment is, therefore, granted. The Clerk may enter judgment dismissing plaintiff's Complaint and all cross-claims against defendant Castle only with prejudice and without costs or disbursements.

Plaintiff's claims against the co-defendants are severed and continued. A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on May 14, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 15, 2008



BARBARA R. KAPNICK
J.S.C.

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