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

PRESENT: **BARBARA R. KAPNICK** PART 39

Justice

Index Number : 604283/2007

FU, PHOENIX M.

VS.

PUBLISHERS CLEARING HOUSE

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 604283/07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

...e read on this motion to/for

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

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

FEB 13 2009

COUNTY CLERK'S OFFICE NEW YORK

Dated: 2/10/09

BARBARA R. KAPNICK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

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PHOENIX M. FU,

Plaintiff,

- against -

PUBLISHERS CLEARING HOUSE, ROBIN SMITH and DAVE SAYER,

Defendants.

---------------------------------------X

DECISION/ORDER
Index No. 604283/07
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

This is an action alleging breach of contract and fraud.[1] Specifically, plaintiff Phoenix M. Fu claims that defendants Publishers Clearing House ("PCH"), Robin Smith and Dave Sayer notified her between December 1998 and January 1999 that she would win $31 million, the largest prize in PCH's history.

Plaintiff has annexed to her Verified Complaint a notice fashioned as a mock press release issued by PCH stating, in relevant part, as follows:

> "Congratulations! You've won Thirty-One Million Dollars," Mr. Sayer announced to the stunned Phoenix Fu. "You've got to be kidding," responded Phoenix Fu. "I guess that means I'm rich now." Unlike lottery winners, Publishers Clearing House winners never have to share their Superprize®.

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[1] Plaintiff conceded during the oral argument held on December 3, 2008 that the fraud claim was out of the case and this was only an action for breach of contract.

Plaintiff claims that both Dan Doyle, PCH's Treasurer, and Dorothy Addeo, PCH's Contest Director, communicated to plaintiff "to be ready for the prize."

Plaintiff further claims in her Complaint that defendants forwarded various documents to her which purported to be part of a verification process, which she claims she returned, as requested, as well as additional documents that were subsequently sent to her, including a final winner registration form, a bank wire draft and check issuance authorization form.

There is no dispute, however, that plaintiff has not received payment of any of the prize money.

Finally, plaintiff claims to have learned in November 2002 that Ginny Jackson and Beverly Cook were given the $31 million prize money, even though plaintiff claims that these two individuals are relatives of PCH employees and are thus barred from collecting proceeds under the contest's rules.

Defendants now move for an order: (i) pursuant to CPLR § 3211(a)(1), (5) and (7) dismissing the Verified Complaint with prejudice; and (ii) pursuant to 22 NYCRR § 130-1.1 imposing sanctions on plaintiff and her attorneys, on the grounds that:

(a) plaintiff's claims are precluded under the terms of the Second Amended Class Action Stipulation of Settlement dated January 14, 2000 in the class action entitled Thomas G. Vollmer, et al. v.

Publishers Clearing House, in the U.S. District Court for the Southern District of Illinois, Case No. 99-434-GPM (the "Vollmer action"), since plaintiff was as an eligible class member[2] and, according to defendants, submitted a claim and received a $789.40 settlement;

(b) plaintiff's Verified Complaint is precluded by the applicable six-year Statute of Limitations (see, CPLR § 213[2] and [8]); and

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[2] The "Settled Claims" included

> all claims, rights, causes of action, suits, matters, issues, controversies or other bases for liability, whether known or unknown, that have been, could have been or hereafter may be asserted in the *Vollmer* Action, or in any other court or proceeding (including but not limited to any claims arising under federal, state or local law) by or on behalf of the Named Plaintiffs or any members of the Settlement Class, whether individual, derivative, representative, legal, equitable or of any other type or in any other capacity, against the Settling Defendants which have arisen, arise now or hereafter may arise out of or relate in any way to defendants' direct mail solicitations, their promotional sweepstakes or their marketing or business practices or policies, including but not limited to their billing practices, advertising campaigns and telemarketing efforts, from the beginning of time until the conclusion of the Class Period.

The "Settlement Class" and "Subclass" are defined in the Stipulation of Settlement as

> all persons who received Solicitation Materials by mail from defendants during the period from February 3, 1992 through the date of preliminary class certification (the "Class Period"). The "Settlement Class" shall include a "Subclass" consisting of all members of the Settlement Class who responded by mail to Solicitation Materials received by mail from defendants during the period from February 3, 1992 through the date of preliminary class certification by ordering and paying for magazines and/or merchandise from defendants.

(c) plaintiff has no claim to the PCH Sweepstakes Prize because plaintiff does not and cannot allege that she possessed the winning number.

Plaintiff opposes the motion and cross-moves for an order compelling the defendants to disclose and certify the January 31, 1999 Superprize winning number and the name of the person holding this number.

Plaintiff, relying on the case of *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141 (1993), argues that since the prize money was to be paid out in 30 annual installments beginning in 1999, the instant action is not barred by the Statute of Limitations.

In *Phoenix Acquisition Corp. v Campcore, Inc.*, *supra*, the Court of Appeals found that the statute of limitations for an action to recover on a promissory note payable on demand accrues at the time of its execution. However, in an action to recover on a promissory note payable in installments, "separate causes of action accrued as installments of the loan indebtedness became due and payable"; thus, the statute of limitations begins to run on the date each installment becomes due and is defaulted upon, unless the debt is accelerated. *Id*. at 141. *See also, Sce v Ach,* 56 AD3d 457 (2nd Dep't 2008).

Plaintiff thus argues that a separate cause of action would accrue on each missed payment by the defendant, which is outside and beyond the class period in the Vollmer action and within the six year Statute of Limitations.[3]

However, the Statute of Limitations accrued no later than 2000 when plaintiff unequivocally knew that PCH was not declaring her the winner of the contest. *See, Walsh v Andorn,* 33 NY2d 503 (1974), which held that the six year Statute of Limitations applicable to plaintiff's claim for pension benefits began to run upon the death of the pension system member. The Court of Appeals rejected the theory that the plaintiff had an independent and "continuing" cause of action for each of the period pension installments, finding "[t]o the contrary, [that] the enforceability of the right to the installments derives from and depends upon the enforceability of the primary right to the pension (citation omitted)." *Id.* at 506-507. *See also, Roslyn Savings Bank v National Westminster Bank USA,* 266 AD2d 272, 273 (2nd Dep't 1999).

Accordingly, based on the papers submitted and the oral argument held on the record on December 3, 2008, this Court finds that the instant action which was not filed until December 31, 2007 is time barred. Defendants' motion to dismiss the Verified Complaint is, therefore, granted.

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[3] Plaintiff also argues that the Vollmer action is not binding on her on the grounds, inter alia, that there is no "commonality" between Fu and the plaintiffs in the class action.

[* 7]

The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

That portion of the motion seeking sanctions is denied in the discretion of the Court, and plaintiff's cross-motion is denied as moot.

This constitutes the decision and order of this Court.

Dated: February 10, 2009

BARBARA R. KAPNICK
J.S.C.

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J.S.C.

FILED
FEB 13 2009
COUNTY CLERK'S OFFICE
NEW YORK