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4-21-10

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

PRESENT: PAUL G. FEINMAN Justice

PART 12

HABER, M.

- v -

STUDIUM, INC.

INDEX NO. 602655/07

MOTION DATE 1/22/10

MOTION SEQ. NO. 005

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 is decided in accordance with the annexed decision & order.

☑ MED-I 5/6/10

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/19/2010

J.S.C.

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

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X
MANNY HABER,

Plaintiff,

against

STUDIUM, INC., and MATERIALS MARKETING CORPORATION,

Defendants.
----------X

Index Number 602655/2007
Mot. Seq. No. 005

DECISION AND ORDER

For the Plaintiff:
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For Defendant Studium:
Paykin Mahon Rooney & Krieg LLP
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Papers considered in review of this motion sumar :

Papers	Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause	
Answering Affidavits	
Replying Affidavits	
Other	

PAUL G. FEINMAN, J.:

Defendant Studium, Inc., moves for summary judgment and dismissal of the complaint in its entirety as against it pursuant to CPLR 3212. For the reasons set forth below, the motion is denied.

According to the allegations in the verified complaint, defendant Studium, Inc. is an authorized dealer for former defendant Materials Marketing Corporation which produces stone tile and flooring for homes (Mot. Ex. A, Ver. Compl. ¶¶ 4, 9).[1] In about 1999, plaintiff's

[1]Judgment was entered on August 27, 2007 in the New York County Clerk's Office, dismissing the complaint and all cross-claims as against Materials Marketing, Ltd., successor to Materials Marketing Corporation.

decorator ordered tiles from Studium manufactured by Materials Marketing for installation in the kitchen and dinette area of plaintiff's New Jersey summer home (Ver. Compl. 11). Some time thereafter, plaintiff inquired of Studium whether that type of stone tile was appropriate for outdoor use (Ver. Compl. 12). Studium "expressly warranted" to plaintiff that this 3/8-inch thick tile was suitable for outdoor use and would not be harmed by winter weather conditions (Ver. Comp. 13-14, 22). This was based on the "express warrant[y]" made by Materials Marketing to Studium that "as long as the tile was properly installed," it was suitable for winter outdoor weather (Ver. Compl. 15). Plaintiff then made several purchases of this type of tile from Studium in May 2000, April 2001, January 2002, and May 2002, and plaintiff had the tile installed in the deck and pool area of his home (Ver. Compl. 16).[2]

In about July 2004, plaintiff first noticed deterioration or delamination of some of the deck and pool area tiles (Ver. Compl. 17). Thereafter, he and his representatives had "numerous" discussions with Studium's president, David Meitus in 2004 and 2005 (Ver. Compl 18). Plaintiff was repeatedly told by Meitus that he had extensive conversations with Materials Marketing which continued to stand behind its warranty (Ver. Compl. 18). He was told that in the opinion of Meitus and Materials Marketing, neither of whom visited plaintiff's home, the problem involved the tiles' installation (Ver. Compl. 19). In 2005, plaintiff suggested an "experiment" to establish whether the issue was installation or the tile itself, but was told by Studium that Materials Marketing would not participate (Ver. Compl. 21).

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[2]Plaintiff attaches copies of Studium's "proposals" or "quotes," and copies of plaintiff's personal checks or checks from Fleet Street Ltd., in payment for each. The proposals are dated May 10, 2000, April 17, 2001, April 27, 2001, January 11, 2002, and May 14, 2002 (Mot. Ex. C).

Plaintiff tried to resolve the problem and avoid litigation through the summer of 2006 (Ver. Compl 22). He continued to be told by Studium that if the tiles were correctly installed, they were suitable for outdoor use (Ver. Compl. 22). However, he was now advised that Materials Marketing believed that for "safety's sake," the tile should be 3/4-inches thick (Ver. Compl. 23).[3] A sample of this tile was delivered to plaintiff (Haber Aff. in Opp. ¶ 14 n. 1). After negotiations with Studium, plaintiff "accept[ed Studium's] proposal" and agreed to purchase 2,800 square feet of the 3/4-inch tile at a discounted rate and to pay for the installation, with the understanding that "when we follow the instructions provided by the supplier . . .the stone will be suitable for NJ outdoor installation, which we would like you to confirm." (Haber Aff. in Opp. Ex. B, email from Wilhoit to Studium, Dec. 7, 2006). The invoice, dated February 13, 2007, for which plaintiff paid by personal check on February 15, 2007, indicates a total due of $8,400.00 for the tile, and contains the statement, "THIS IS THE FINAL RESOLUTION TO ANY CLAIMS REGARDING THIS [SIC] MATERIALS AND INSTALLATION - THIS IS A DISCOUNTED PRICE INCLUDING DELIVERY AND IS DUE PRIOR TO SHIPMENT - LEAD TIME 8-10 WEEKS. THANK YOU!" (Mot. Ex. C).

According to the verified complaint, Studium "resisted recommending" a contractor to install the tiles, and the contractors found by plaintiff all informed him that the tiles were not fit for outdoor use (Ver. Compl. 24). In addition, Materials Marketing's own contractor refused to install the tiles and advised plaintiff that the tiles should be installed only in warm climates (Ver.

[3]According to a July 12, 2006 email from Meitus to a third party, there was some question by that date as to whether the thinner tile was appropriate for outdoor winter use in the northeast (Haber Aff. in Opp. Ex. A)

Compl. 25).

Plaintiff commenced this litigation by filing the summons and verified complaint on August 6, 2007. The verified complaint contains five causes of action: (1) breach of express warranties; (2) violation of the Magnuson-Moss Warranty Act; (3) breach of contract based on the tiles not being suitable for the purpose intended; (4) breach of implied warranties; and (5), breach of contract based on the non-merchantability of the tiles. The damages entail the costs of the tiles and their installation, the costs of removing the tiles, and the purchase and installation of new tiles. Issue was joined thereafter; the verified answer contains four affirmative defenses, including the statute of limitations (Mot.Ex. B).

The note of issue was filed on June 24, 2009, and defendant Studium, Inc. timely moved for summary judgment and dismissal of the of the complaint pursuant to CPLR 3212. Its motion is based on the running of the four-year statute of limitations, because the tiles were purchased between 2000 and 2002, and the litigation was commenced in 2007. Defendant argues that although plaintiff purchased an additional order of tiles in 2007, those tiles were never delivered or installed, and no claims are asserted as to those tiles.

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Corvino v Mount Pleasant Centr. Sch. Dist.*, 305 AD2d 364, 364 [2d Dept 2003]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept. 2000]). To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor

(*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Article 2 of the New York Uniform Commercial Code, pertaining to the sale of goods, governs the sale of the tiles at issue. Under NY UCC § 2-725, an action for breach of a contract for sale must be commenced within four years after the cause of action has accrued, and a "cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach" (UCC § 2-725 [1], [2]). A breach of warranty occurs when tender of delivery is made, however if a warranty explicitly extends to future performance of the goods, and discovery of the breach must await the time of such performance, then the cause of action accrues when the breach is or should have been discovered (UCC § 2-725 [2]). Where the seller at the time of contracting has reason to know of a particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for such purpose, unless there is language explicitly excluding or modifying the implied warranty (UCC §§ 2-315, 2-316). A warranty that goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind (UCC § 2-314 [1]). Merchantable goods are, among other qualities, fit for the ordinary purposes for which such goods are used, and conform to the promises or affirmations of fact made on the container or label, if any (UCC § 2-314 [2] [c], [f]). The warranty can explicitly be modified or excluded (*see, United States Leasing Corp. v Comerald Assoc., Inc.*, 101 Misc 2d 773, 776 [Civ. Ct. N.Y. County 1979]). The warranty of fitness for ordinary purposes provides a minimal level of quality, although not that the goods will fulfill the buyer's every expectation

(*Denny v Ford Motor Co.*, 87 NY2d 248 [1995], *rearg denied* 87 NY2d 969, *answer to cert. question aff'd* 79 F.3d 12 [2d Cir. 1996]).

The Magnuson-Moss Warranty Act (15 USC § 2301, *et seq.*), provides consumers with a remedy against a supplier that breaches a written or implied warranty. It has been held that in New York, the statute of limitations is the same four years from the delivery date as provided for in UCC § 2-275 (*see Murungi v Mercedes Benz Credit Corp.*, 192 F. Supp. 2d 71, 71 [WDNY 2001]). The remedy does not accrue until it is shown that the defect is unable to be repaired or [redacted] after a reasonable number of attempts, and the Act provides that the buyer may elect either a refund or replacement (15 USC § 2304 [a] [4]).

Defendant argues that the entirety of the complaint is time-barred by the running of the statute of limitations. It argues that as to the tile that was delivered as late as May 2002, any claims of breach of contract or warranty should have been brought no later than 2006, citing *Weiss v Herman*, 193 AD2d 383 (1st Dept. 1993). It argues that the sale of additional tiles in February 2007 in an effort to settle plaintiff's claim, tiles which apparently were never delivered or installed, does not extend the accrual time, citing *Triangle Underwriters, Inc. v Honeywell, Inc.*, 604 F2d 737, 743, 745 (2d Cir. 1982) (holding that where newly installed computer system failed at the time of installation and thereafter, the breach occurred at the time of installation, and defendant's attempts to remedy the problems in the months following did not toll the statute of limitations; the general rule is that a manufacturer's efforts to repair subsequent to delivery do not extend the contract statute of limitations; *cf.*, *Unitron Graphics, Inc. v Mergenthaler Linotype Co.*, 75 AD2d 783 [1st Dept. 1980] [holding that where plaintiff sought damages because the defendant installed rebuilt rather than new equipment under an agreement, the defendant's

motion to dismiss on the ground of statute of limitations was denied because "tender of delivery" was deemed to be only when the installation was complete, as only after the installation was completed was the plaintiff was in a position to determine whether the equipment was rebuilt or new).

Plaintiff argues that his claims are not time barred, as the "express warranties" given to him by both Studium and Materials Marketing through Studium, guaranteed the tiles' future performance. He also argues that the February 2007 agreement "supplemented" the earlier agreements in that the parties agreed that plaintiff would buy new tiles at a discounted price in order to replace the damaged ones already installed, and that the statute of limitations thus began to run only in 2007. In addition, citing *Lindsley v Lindsley*, 54 AD2d 664 (1st Dept. 1976), he argues that defendant should be equitably estopped from asserting the bar of the statute of limitations because plaintiff relied on the "tenor of my conversations and communications" with Studium's Meitus, in 2004 and 2005.

Plaintiff has raised material questions of fact as to whether the statute of limitations had in fact run at the time he commenced this action. He claims, and defendant does not dispute, that he was given express oral warranties concerning the future performance of the tiles. An express warranty is created by a seller's affirmation of fact or promise made to the buyer which relates to the goods and becomes part of the basis of the bargain, as well as any description of the goods which is made part of the basis of the bargain (UCC § 2-313 [1] [a], [b]). A warranty of future performance guarantees that the product will work for a specified period of time (*Imperia v Marvin Windows of N.Y., Inc.*, 297 AD2d 621, 623 [2d Dept. 2002], quotation and citation omitted). Under the UCC, where a warranty explicitly extends to future performance of the

goods, a cause of action accrues when the breach is or should have been discovered (UCC § 2-725 [2]). The burden of proof of breach of either an implied warranty of merchantability or express warranty of condition is on the buyer (*Pronti v DML of Elmira, In.c*, [3d Dept. 1984]). Where an implied warranty is presumed to exist, the burden of providing that it did not exist is on the seller, and where an express warranty is alleged, the burden of proving its existence is on the buyer (*Basic Adhesives, Inc. v Robert Matzkin Co.*, 101 Misc. 2d 283, 286 [Civ. Ct. Bronx County 1979]; *John Turl's Sons, Inc. v Williams Engineering & Contracting Co.*, 136 AD 710 [2d Dept. 1910]).

Here, where plaintiff alleges he relied on the statements by defendant that the tile was fit for outdoor use and warrantied for future performance, and he alleges to have first noticed deterioration in some of the tiles in about the summer of 2004, the 2004 date serves as the commencement of the running of the four-year statute of limitation period. Although it might be assumed that the very nature of the product implies performance over an extended period of time, plaintiff is entitled to prove that defendant had warranted the tiles for a specified period of time and that the warranty was breached (*see, Imperia v Marvin Windows of N.Y., Inc.*, 297 AD2d at 623 [holding that where plaintiffs paid for a speciality coating for new windows based on representations made by defendant's sales team that the windows would be maintenance-free for 10 years, and based on product literature stating that the coating "lasts four to five times as long as paint,"plaintiffs had raised sufficient questions of fact to preclude summary judgment and dismissal of their complaint, and plaintiffs should be allowed to prove the length of the warranty period at trial]). Therefore, defendant's motion for summary judgment and dismissal is denied on the ground that there is a question of fact concerning whether the statute of limitations has

run. In light of this ruling, the argument as to whether defendant should be equitably estopped from raising the statute of limitations need not be addressed. It is

ORDERED that the motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties are to appear as previously scheduled on May 6, 2010 in Supreme Court, Mediation-I, 80 Centre Street, New York, NY 10007.

This constitutes the decision and order of the court.

Dated: April 19, 2010
New York, New York

Paul G. Feinman
J.S.C.