

**Plotkin Family Amagansett Trust v Amagansett
Bldg. Materials, Inc.**

2012 NY Slip Op 31916(U)

June 29, 2012

Supreme Court, New York County

Docket Number: 102296/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**PLOTKIN FAMILY AMAGANSETT TRUST,
BY ITS GRANTOR, RICHARD L. PLOTKIN and
CO-TRUSTEES, DAVID R. PLOTKIN,
GERALYN B. KERVEN and
MATTHEW H. PLOTKIN**

INDEX NO. 102296/10

MOTION SEQ. NO. 001

Plaintiffs,
- against -

**AMAGANSETT BUILDING MATERIALS, INC.
and KEIVER-WILLARD LUMBER CORPORATION,**

Defendants.

The following papers were read on this motion by defendant Keiver, pursuant to CPLR 3211(a) and a cross-motion by defendant Amagansett pursuant CPLR 3211(a)

FILED
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

JUL 20 2012

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

NEW YORK

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE

Plaintiff Plotkin Family Amagansett Trust (Plotkin Trust) brings this action against defendants Amagansett Building Materials, Inc. (Amagansett) and Keiver-Willard Lumber Co. (Keiver), in connection with plaintiff's purchase of allegedly defective Cypress d4s lumber (lumber) for use in the construction of a single-family home on plaintiff's property, located at 266 Marine Boulevard, Amagansett, Long Island, New York. Specifically, plaintiff brings seven causes of action asserting, *inter alia*, breach of contract, breach of implied warranties, fraud and negligence.

Before the Court is Keiver's motion to dismiss plaintiff's complaint as asserted against it in its entirety, pursuant to CPLR 3211(a)(3), (5), and (7), and to dismiss Amagansett's cross-claims asserted against it. Defendant Amagansett's cross-moves, pursuant to CPLR 3211(a)(5) and (7), to dismiss the complaint asserted against it in its entirety and submits partial opposition regarding Keiver's motion to dismiss its cross-claims. Plaintiff has responded in

opposition to both motions, and both defendants have filed replies.

BACKGROUND

Plotkin Trust was established in 2004 by its grantor, Richard L. Plotkin (Plotkin), and its co-trustees David R. Plotkin, GERALYN B. KERVAN and Matthew H. Plotkin. Plotkin Trust is the owner of real property located at 266 Marine Boulevard, Amagansett, Long Island, New York. In 2005, plaintiff began to build on this property a 5,500 square foot single-family home. Plotkin was the general contractor for the construction of the home.

Keiver was the manufacturer and supplier of the lumber used in connection with the construction of the home. Keiver sold 2,986 pieces of lumber to Amagansett memorialized by an invoice numbered 0028965-IN and dated February 16, 2005. Amagansett in turn sold the lumber to plaintiff pursuant to a purchase order, dated February 2, 2005. The lumber was used as trim around the 130 windows and sliding glass doors of the home.

On February 17, 2005, pursuant to the purchase order, Amagansett delivered the 2,986 pieces of lumber to plaintiff. Installation of the lumber was completed in or about April 2005 and initially it appeared satisfactory.¹ Plaintiff immediately paid Amagansett's invoice dated February 18, 2005 for the total sum of \$10,811.70, representing the cost of the lumber.

Plotkin subsequently learned that in late 2006 or early 2007, Bill Masin (Masin), the construction site manager, noticed black marks on some of the window trim (Plotkin Affidavit at ¶ 5). Masin contacted Amagansett, which sent a representative to the construction site (*id.* at ¶ 5). Plaintiff alleges that the Amagansett's representative observed the defective condition of the lumber and "admitted to a representative of [plaintiff] that there was a problem with the [lumber]" (Complaint at ¶ 15).

¹ This allegation, made in paragraph 5 of the Plotkin Affidavit, appears to contradict an allegation made in paragraph 13 of plaintiff's complaint; to wit, that the lumber "was installed on the home following February 17, 2005, and almost immediately thereafter the [lumber] began to exhibit characteristics demonstrating that it was defective."

In the summer of 2008, Plotkin's grandson Max, who was living in the newly constructed home, was diagnosed with cancer. Plotkin retained a mold consultant (MoldPro) to perform an investigation of the home to determine whether any toxic mold was present that might present a threat to Max. MoldPro discovered a mold problem in three areas of the house; the guest bedroom, the laundry room, and the basement. In October 2008, Plotkin was informed by a representative of MoldPro that there may be a mold problem in the wood trim caused by the faulty installation of vinyl caps. Plotkin retained Carl Walter (Walter) of Wagner Hohns Inglis, Inc. to remedy this issue. After a subsequent investigation, Walter concluded that the mold problem was not caused by the faulty installation of the vinyl caps, but by a wood-decaying fungus called brown rot, existing in the lumber. Plaintiff further alleges that sometime thereafter, B. J. Wilson (Wilson), the framing contractor who installed the lumber, told Plotkin that he had seen black markings on wood trim supplied to other homes and realized after reading Walter's report that the black markings were an indication of the brown rot fungi.

On or about February 22, 2010, plaintiff commenced the present action against defendants by the filing of a summons and complaint. Plaintiff alleges that Amagansett breached the contract for the sale of the lumber, the implied warranty of fitness for a particular purpose and the implied warranty of merchantability by selling plaintiff defective lumber infected with brown rot fungi. Plaintiff also brought a breach of contract claim against Keiver as a third-party beneficiary of the contract for the sale of lumber between both defendants. In its fifth and sixth counts, plaintiff alleges a violation of the Consumer Acts and Practices Statute, GBL §349, and fraud, claiming that the defendants knew or had reason to know of the existence of the defects at the time of the sale of the lumber and failed to disclose these material defects. Lastly, plaintiff claims that defendants were negligent in failing to exercise reasonable care in connection with the sale of the lumber, including but not limited to, subjecting the lumber to inspection and testing to ensure that it was free from any material defects.

Issue was joined when Amagansett interposed its answer on or about April 27, 2010, which asserted a cross-claim against Keiver for indemnification in the event that Amagansett is held liable to plaintiff.

Subsequently, Keiver brought the herein motion seeking to dismiss the complaint, pursuant to CPLR 3211(a)(3), (5) and (7), arguing that plaintiff lacks standing to bring a third-party beneficiary breach of contract claim, that count 5 and 6 of the complaint fail to state a cause of action, and that the negligence cause of action is untimely. Keiver also seeks dismissal of Amagansett's cross-claim if the underlying claims are dismissed. In support of its motion, Keiver submits an affirmation of counsel, a copy of the summons and complaint, a copy of Amagansett's answer, and an Affidavit of Karl I. Gray, the senior vice president of Keiver.

Amagansett brings a cross-motion to dismiss the complaint, pursuant to CPLR 3211(a)(5) and (7), on the grounds that counts 1, 2, 3, 5 and 7 of the complaint are untimely, and the sixth count alleging fraud is improperly asserted as it is duplicative of the alleged breach of contract claims. In support of its motion, Amagansett submits an affirmation of counsel, an affidavit of A. Patrick Droesch, the president of Amagansett, a copy of the invoice dated February 18, 2005 memorializing the sale of lumber from Amagansett to plaintiff, and a copy of its answer with cross claims.

Plaintiff, in opposition, asserts that counts 1, 2, 3 and 7 are timely as the causes of action for breach of contract, breach of implied warranties and negligence did not accrue until discovery of the breach. In the alternative, plaintiff argues that defendants should be estopped from raising the statute of limitations defense because their own misconduct in failing to disclose and hiding the latent defects in the lumber prevented plaintiff from filing within the limitations period. Moreover, plaintiff maintains that it states a viable third-party beneficiary breach of contract claim against Keiver because it is an intended beneficiary of the contract between Keiver and Amagansett. As to count 5, plaintiff alleges that it stated a viable claim

under the Consumer Deceptive Acts and Practices Statute, as a private cause of action is allowed under GBL §349(h). Moreover, plaintiff argues that count 5 is timely because the three year statute of limitations is not triggered until the discovery of the defects. Lastly, as to count 6 which alleges fraud, plaintiff maintains that if the Court finds the allegations of fraud contained in the complaint to be duplicative of the underlying breach of contract claim, additional facts submitted in opposition as to the defendants' alleged continued concealment of the defects after the sale of the lumber sufficiently states a claim for fraud.

STANDARD OF REVIEW

CPLR 3211(a), provides that:

“a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- [3] The party asserting the cause of action has no legal capacity to sue; . . .
- [5] the action may not be maintained because of... statute of limitations; . . .
- [7] The pleading fails to state a cause of action; . . .”

When determining a CPLR 3211(a) motion, “we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). “We also accord plaintiffs the benefit of every possible favorable inference” (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. “The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense” (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]). The doctrine of legal capacity “concerns a litigant's power

to appear and bring its grievance before the court" (*Security Pac. Natl. Bank*, 31 AD3d at 279).

Upon a CPLR 3211(a)(5) motion to dismiss a complaint as time barred under the applicable statute of limitations, the initial burden is on the defendant to show that the claims against him are time barred by the applicable statute of limitations (*see Tristaino v Teitler*, 24 Misc3d 1244[A] [2009]). Then, the burden shifts to the plaintiff to establish that the statute of limitations should have been tolled or that the defendant should have been estopped from asserting a statute of limitations defense (*see Putter v North Shore University Hosp.*, 7 NY3d 548, 552 [2006]; *Tristaino v Teitler*, 24 Misc3d 1244[A] [2009]).

Concerning a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

DISCUSSION

Counts 1, 2 & 3:

Amagansett met its initial burden by establishing that counts 1, 2 and 3, alleging breach of an implied warranty of fitness for a particular purpose, breach of an implied warranty of merchantability, and breach of contract, are barred by the applicable statute of limitations.² The contract for the sale of lumber between plaintiff and Amagansett is controlled by Article 2 of the New York Uniform Commercial Code (*see Equitable Lumber Corp. v IPA Land Development Corp.*, 38 NY2d 516, 519 [1976]). Pursuant to NY UCC §2-725(a), the statute of limitation for a

² As previously indicated, the first three causes of action were brought against Amagansett only.

breach of contract for the sale of goods expires four years after the cause of action has accrued. A breach of contract claim, and any warranties thereunder, accrue "when tender of delivery is made . . ." (NY UCC §2-725[b]). Here, it is undisputed that Amagansett delivered the lumber to plaintiff on February 17, 2005. It is also undisputed that plaintiff filed its complaint on or about February 22, 2010, more than five years after the lumber delivery. The Court finds this sufficient to establish prima facie that counts 1, 2 and 3 are barred by the four year statute of limitations.

In opposition, plaintiff has failed to establish that the causes of action stated in counts 1, 2 and 3 accrued after tender of delivery, or that Amagansett should be estopped from raising the statute of limitations defense. First, plaintiff's contention that the causes of action alleged in counts 1, 2 and 3 did not accrue until discovery of the breach pursuant to NY-UCC §2-725(b) is meritless. NY UCC §2-725(b) provides an exception to the general rule that a cause of action accrues upon tender of delivery; to wit, where "a warranty explicitly extends to future performance of the goods . . . the cause of action accrues when the breach is or should have been discovered" (NY-UCC §2-725[b]). This exception does not apply to the present case because the warranties were not explicitly extended to future performance (*see Hanover Square Antiques v Insalaco*, 16 AD3d 258, 258 [1st Dept 2005]; *Tony Shafrazi Gallery Inc. v Christie's Inc.*, 2008 NY Slip Op 33092[U] [2008]). Plaintiff alleges breach of *implied* warranties, and does not make any factual allegations that Amagansett *explicitly* extended the warranties to future performance. As such, the Court concludes that the exception provided for by NY UCC §2-725(b) does not apply.

Plaintiff's second argument, that the causes of action did not accrue until the discovery of the breach pursuant to NY UCC §2-608, is similarly meritless. NY UCC §2-608 allows a party to revoke its prior acceptance of goods "whose non-conformity substantially impairs its value" and provides that "[r]evocation of acceptance must occur within a reasonable time after

the buyer discovers or should have discovered the ground for it.” However, as paragraph 1 to the Official Comment of NY UCC §2-608 illustrates, the revocation of acceptance of goods is a distinct remedy separate from a purchaser’s right to sue for damages under breach of warranty and breach of contract claims. Here, plaintiff did not seek revocation of their acceptance under NY-UCC §2-608, but rather elected to sue for damages. As such, NY UCC §2-608 is inapplicable to the present case and does not toll the accrual of the cause of action.

Lastly, the Court finds unavailing plaintiff’s final argument that Amagansett should be estopped from asserting a statute of limitations defense because Amagansett’s own actions delayed discovery of the defect. “[A] defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action” (*Simcuski v Saeli*, 44 NY2d 442, 448-49 [1978]). However, “[i]f the conduct relied on . . . has ceased to be operational within the otherwise applicable period of limitations . . . and . . . the plaintiff thereafter had sufficient time to commence his action prior to the expiration of the period of limitations” then the doctrine of equitable estoppel extending the limitations period is inapplicable (*Simcuski*, 44 NY2d at 449-50; see also *Ortiz v City of New York*, 28 AD2d 1098, 1098 [1st Dept 1967] [holding that 190 days was a sufficient period of time to commence the action]). Even if this Court accepts the conclusory allegation that Amagansett continued to make fraudulent misrepresentations or omissions concerning the defects in the lumber, plaintiff acknowledges that it had knowledge of the defects prior to the expiration of the four year statute of limitations. For starters, Plotkin admits that its site manager, Masin, noticed black marks on the wood window trim in late 2006 or early 2007. When Masin contacted Amagansett, a representative of Amagansett “admitted to a representative of the Trust that there was a problem with the [lumber]” (Complaint at ¶ 15). Moreover, Plotkin was advised by a representative of MoldPro that there was a potential mold problem in the wood trim in October of 2008 (Affidavit of Richard L. Plotkin at ¶ 7). As such,

plaintiff admits knowledge of the defective condition of the lumber between late 2006 and October of 2008, at least four months prior to the expiration of the statute of limitations on February 17, 2009. The Court finds this sufficient to prevent the invocation of the doctrine of equitable estoppel to toll the statute of limitations. Accordingly, the first, second and third causes of action are hereby dismissed as barred by the statute of limitations.

Count 4:

Keiver does not meet its burden to establish that plaintiff lacks the legal capacity to sue as a third-party beneficiary of the contract for the sale of lumber between Keiver and Amagansett.³ A party has standing to sue as a third-party beneficiary of a contract where: (1) there exists a valid and binding contract between other parties, (2) the contract was intended for his or her benefit, and (3) the benefit to him or her is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him or her if the benefit is lost (*see Edge Management Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006]). Keiver argues that each of the three necessary elements is absent here and, therefore, plaintiff lacks standing to sue as a third party beneficiary. The Court finds Keiver's arguments unavailing and, as such, denies that part of Keiver's motion seeking dismissal of plaintiff's fourth count.

First, there was a valid and binding contract between Keiver and Amagansett regarding the purchase and sale of lumber as memorialized by an invoice dated February 16, 2005 (*see Jemzura v Jemzura*, 36 NE2d 496, 503-504 [1975] ["A contract implied in fact may be inferred from the facts and circumstances of [a] case . . . and . . . is just as binding as an express contract"]).

Moreover, Keiver has failed to establish that plaintiff was not an intended beneficiary of

³ As previously indicated, the fourth cause of action was brought against Keiver only.

the contract between Keiver and Amagansett. Intended beneficiaries, as opposed to incidental beneficiaries, have enforcement rights concerning the contract of which they are a third-party beneficiary (see *Fourth Ocean Putnam Corp v Interstate Wrecking Co.*, 485 NY2d 208, 210 [1985]). A third party is an intended beneficiary where the "circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance" (*id.* at 212). In the present case, plaintiff approached Amagansett in an effort to purchase 2,986 pieces of lumber for use as trim around the windows and sliding doors in connection with the construction of plaintiff's house. In response, Amagansett purchased exactly 2,986 pieces of lumber from Keiver via an invoice dated February 16, 2005, and then delivered the lumber to plaintiff the very next day. While subsequent purchasers of goods may often be too remote to be considered intended beneficiaries, here the Court is satisfied that the contract between Keiver and Amagansett was made for the sole purpose of immediately providing lumber to plaintiff to be used in the construction of plaintiff's home (see *City of New York v Seabury*, 4 AD3d 124, 125 [1st Dept 2004] [allowing city to bring a third party beneficiary claim against the manufacturer of defective chains, who sold the chains to the city's general contractor to be used to reconstruct water waste tanks]; *Bonwell v Stone*, 128 AD2d 1013, 1014 [3d Dept 1987] [holding that purchasers were third party beneficiaries of contract between real estate agent and contractor who defectively repaired septic system because of contractor's knowledge that the home was being sold and that purchasers would benefit from the repair of the septic system]). Accordingly, the portion of Keiver's motion seeking to dismiss plaintiff's fourth count alleging a third party beneficiary claim is denied.

Count 5:

The Court finds that Amagansett has met its initial burden of establishing that count 5, alleging a violation of the Consumer Deceptive Acts and Practices Statute, GBL §349, is barred

by the applicable statute of limitations.⁴ A GBL § 349 claim must be commenced within three years from the accrual of the cause of action (see CPLR 214[2]). A cause of action under GBL § 349 accrues when plaintiff has been injured by a deceptive act or practice violating § 349 (see *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]). In the present case, plaintiff was injured at the time it received and paid for the defective lumber, and thus, the cause of action accrued with tender of delivery. Plaintiff's subsequent expenditures to remedy the defects simply increased its damages (see *Soskel v Handler*, 189 Misc 2d 795, 798 [Sup Ct Nassau County 2001] [holding that plaintiff's cause of action accrued upon his initial injury and subsequent expenditures to correct the injury simply increased his damages and did not change the date when the cause of action accrued]; *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789-90 [2012] [clarifying that the statute of limitations on a GBL § 349 claim runs from the time when plaintiff is injured, not from the date when plaintiff learns, or reasonably should learn, that he has been deceived]).

In opposition, plaintiff's reliance on *Gaidon v Guardian Life Insurance Company of America* as support for its argument that its fifth cause of action based upon GBL § 349 did not accrue until plaintiff began to incur expenses resulting from the infection and deteriorating of the lumber is misplaced (96 NY2d 201 [2001]). In *Gaidon*, a class of insured customers brought an action under GBL § 349 against their insurer regarding insurance policies sold under a "vanishing premiums" campaign (*id.* at 206). Specifically, the *Gaidon* plaintiffs argued that they were deceived by the insurance company into believing that after a specific period of time the policy's dividends would cover the premium costs (*id.* at 206). The Court of Appeals determined that the plaintiffs suffered no damage until they were required to pay additional premiums beyond the date by which they were led to believe the premiums would vanish, and

⁴ Keiver did not raise the affirmative defense of statute of limitations as to count 5 and has therefore waived this defense (see CPLR 3211[e]).

accordingly the cause of action did not accrue until that point (*id.* at 211). By contrast, in the present case, plaintiff was initially injured when it paid for but did not receive suitable lumber (*see Soskel*, 189 Misc 2d at 798). It is at this point that plaintiff's cause of action accrued and any further expenses plaintiff paid to remedy the defect simply increased its damages (*see id.* at 798).

Keiver met its burden of establishing that plaintiff failed to state a claim of a violation of the Consumer Deceptive Acts and Practices Statute. A GBL § 349 claim was initially created to give the Attorney General the ability to limit deceptive acts and practices aimed at the public (*see Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330, 343-44 [1999]). In 1980, the statute was expanded to allow a private cause of action via GBL §349(h) (*see id.* at 344). As a threshold matter, in order to state a claim under GBL § 349, plaintiff's claim "must be predicated on a deceptive act or practice that is consumer oriented" (*Id.* at 344; *Akgul v Prime Time Transp., Inc.*, 293 AD2d 631, 634 [2d Dept 2002]). In the absence of allegations of a deceptive scheme or other ramifications for the public at large, private transactions are not the proper subject of a claim under GBL § 349 (*compare Canario v Gunn*, 300 AD2d 332, 333 [2d Dept 2002] [holding that misrepresentations made by real estate agents to property purchasers concerning amount of acreage was not the proper subject of a claim under GBL § 349]; *with Akgul*, 293 AD2d at 634 [allowing franchisees to bring a GBL § 349 claim where they alleged a franchise marketing scheme with an impact on consumers at large]).

The present case concerns a private dispute between parties to a contract. Plotkin only mentions other consumers one time in his affidavit when he recounts a conversation he had with his framing contractor, Wilson, in which Wilson allegedly saw black markings on wood trim supplied to other homes (Affidavit of Plotkin at ¶ 9). However, there is no indication that the wood supplied to these other homes was sold by either of the defendants or that these other property owners were deceived in their purchase of the wood trim. Furthermore, there is no

allegation of a deceptive public marketing scheme or any other scheme aimed at the public at large.

Based on the foregoing discussion, plaintiff's fifth count alleging a violation of the Consumer Deceptive Acts and Practices Statute is hereby dismissed against Amagansett for being untimely and against Keiver for plaintiff's failure to state a viable claim.

Count 6:

Plaintiff's sixth cause of action alleging fraud is dismissed for their failure to state a viable cause of action separate from the underlying breach of contract claim. "A cause of action to recover damages for fraud may not be maintained when the only fraud alleged relates to a breach of contract" (*see Lee v Matarrese*, 17 AD3d 539, 540 [2d Dept 2005]; *Combina Inc. v Iconic Wireless Inc.*, 32 Misc.3d 1231[A], 936 NYS2d 58 [Sup Ct Kings County 2011] [dismissing plaintiff's cause of action for fraud because plaintiff's allegations that he was induced into purchasing non-conforming goods was duplicative of the breach of contract claim]). In the present matter, plaintiff's sixth count alleging that defendants knowingly sold defective lumber is duplicative of the breach of contract and breach of implied warranty claims, and therefore is dismissed (*see Sforza v Health Ins. Plan of Greater New York, Inc.*, 210 AD2d 214, 214-15 [1994] [dismissing plaintiff's claim of fraud for failure to state a claim where there were no alleged misrepresentations of facts collateral to the purported contract]).

For the first time plaintiff contends in its opposition that "[d]efendants continued to make misrepresentations to [p]laintiff after the contract had been consummated" and that this portion of the fraud claim is not duplicative of the breach of contract or breach of warranty claims and therefore should not be dismissed. However, these conclusory statements of continued misrepresentations made in plaintiff's attorney affirmation are not supported by facts alleged in either the complaint or Plotkin's affidavit and are therefore insufficient to defeat a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] ["Although on a motion to dismiss

plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss"). In its complaint, plaintiff alleges that once it discovered the defect, Amagansett was advised of the defect and admitted that there was a problem with the lumber (Complaint at ¶ 15). Moreover, in Plotkin's affidavit, plaintiff alleges that its site's manager asked Amagansett to look at some black marks he noticed on some of the window trim (Plotkin Affidavit at ¶ 5). However, the affidavit does not allege that Amagansett made any misrepresentation to the site manager (*Id.* at ¶ 5). In the absence of factual allegations to support the conclusory statements made in plaintiff's attorney affirmation, and considering the allegation that defendant Amagansett admitted that there was a problem with the lumber as alleged in the complaint, the conclusory statements alleged by plaintiff's attorney do not state a viable cause of action for continued fraud (*see Godfrey*, 13 NY3d at 373).

Count 7:

The Court finds that Keiver and Amagansett failed to meet their initial burden of establishing that plaintiff's seventh cause of action alleging negligence was untimely, and therefore, those portions of defendants' motions seeking dismissal of the negligence cause of action are denied. Defendants contend that pursuant to CPLR 214(4), a negligence cause of action must be commenced within three years from its accrual, and that the cause of action accrued upon tender of delivery. Therefore, defendants contend, this cause of action filed over 5 years after tender of delivery of the lumber was untimely and should be dismissed.

However, accrual of the negligence cause of action is controlled by CPLR 214-c(2) which provides, in pertinent part, that "the three year period within which an action to recover damages for personal injury or *injury to property* caused by the latent effects of exposure to any substance or combination of substances . . . shall be computed from the date of discovery of

the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" (CPLR 214-c[2] [emphasis added]). CPLR 214-c applies to property damage cases, not just personal injury cases (*see Jensen v General Elec. Co.*, 82 NY2d 77, 81 [1993]; *Harvey v SUNY*, 262 AD2d 755, 756-57 [3d Dept 1999] [holding that owner's lawsuit against petroleum products distributor seeking compensation for his property damage caused by a leak of petroleum from the gasoline storage tank sold by defendant was governed by CPLR 214-c and the statute of limitations began to run when the owner discovered the leak]). In the present case, Plotkin alleges that the lumber was installed on or about April 2005 and initially appeared satisfactory. He further alleges that in late 2006 or early 2007, Masin, the site's manager, noticed black marks on the window trim. Therefore, the Court finds that there is a possibility that plaintiff did not discover or should not have discovered the property damage until early 2007 and therefore the February 22, 2010 complaint may be timely. As such, those portions of defendants' motions seeking to dismiss plaintiff's seventh count alleging negligence are denied.

Cross-Claims:

The Court denies that portion of Keiver's motion seeking to dismiss Amagansett's cross-claims. Keiver proffered, based on its mistaken belief that all of plaintiff's claims would be dismissed, that "any cross-claims arising therefrom should be deemed a nullity." However, as this Court did not dismiss all of plaintiff's claims against Keiver, Keiver's argument is without merit.

For these reasons and upon the foregoing papers, it is,

ORDERED that Keiver's motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(3), (5) and (7) and Amagansett's cross-motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(5) and (7) are granted as to counts 1, 2, 3, 5 and 6 but denied as to counts 4 and 7; and it is further

ORDERED that Keiver's motion to dismiss Amagansett's cross-claim is denied; and it is further,

ORDERED that Keiver shall serve a copy of this order, with Notice of Entry, upon all parties; and it is further,

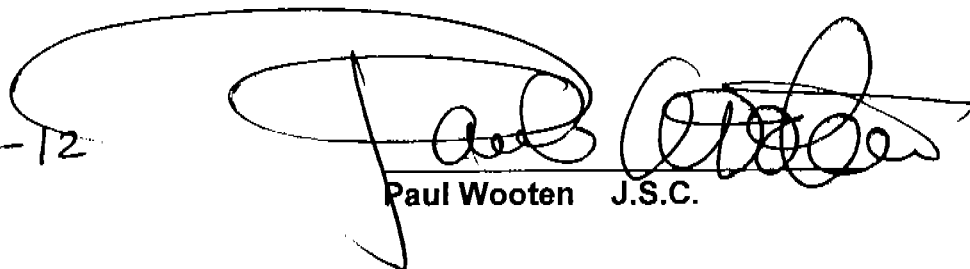
ORDERED that Keiver's time to answer is extended until 30 days after the date of entry of this Order; and it is further,

ORDERED that all parties are directed to appear for a preliminary conference on November 28, 2012 at 11:00 A.M., in Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

Dated:

6-29-12



Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

FILED

JUL 20 2012

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