

LSF6 Mercury REO Inv., LLC v Midrome Inc.
2012 NY Slip Op 32245(U)
August 13, 2012
Supreme Court, New York County
Docket Number: 101966/2012
Judge: Lucy Billings
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SCANNED ON 8/30/2012

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

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 101554/2012
LSF6 MERCURY REO INVESTMENTS
VS.
ADLER ASSOCIATES
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Dismiss the Complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendants' motion to dismiss the complaint pursuant to the accompanying decision. C.P.L.R. § 3211(a)(5).

FILED

AUG 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/13/12

Lucy Billings, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ 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 46

-----x
LSF6 MERCURY REO INVESTMENTS, LLC,

Index No. 101966/2012

Plaintiff

- against -

MIDROME INC. and LONNY J. ROTHMAN,

Defendants
-----x
-----x

LSF6 MERCURY REO INVESTMENTS, LLC,

Index No. 101554/2012

Plaintiff

- against -

ADLER ASSOCIATES and JOHN LINDER,

Defendants
-----x

FILED

AUG 30 2012

DECISION AND ORDER

NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

In each of these actions, consolidated for the decision of defendants' motion to dismiss in each, plaintiff discontinues its third claim for negligent misrepresentation, fourth claim for breach of a contract, fifth claim for breach of an express warranty, and sixth claim for breach of an implied warranty pursuant to an accompanying stipulation. C.P.L.R. § 3217(a)(2) and (b). The court grants defendants' motions to dismiss plaintiff's remaining claims as follows.

Even if the statute of limitations applicable to plaintiff's

[* 8]

first claim for negligence runs three years from when defendants' allegedly negligent appraisal injured plaintiff's predecessor, C.P.L.R. § 214(4) and (6), its injury, the reduced value of its security interests in the property defendants overvalued, occurred when plaintiff's predecessor obtained the security interests in 2005. The injury did not occur when plaintiff, its predecessor's assignee, decided to reflect that reduction in plaintiff's financial records in 2009. Since plaintiff commenced these actions in February 2012, the court grants defendants' motions to dismiss plaintiff's first claim for negligence as barred by the statute of limitations. C.P.L.R. §§ 214(4) and (6), 3211(a)(5).

Even if the statute of limitations applicable to plaintiff's second claim for fraud runs two years from when plaintiff discovered or with reasonable diligence could have discovered defendants' alleged fraud, C.P.L.R. § 213(8), plaintiff could have discovered the fraud with reasonable diligence at least by 2009 when plaintiff in its records reduced the value of the property defendants appraised. Plaintiff's reduction of the property value reflects its realization that defendants had inflated the value. Whether the statute of limitations runs two years from 2009 or six years from defendants' fraudulent appraisal reports in 2005, the court grants defendants' motions to dismiss plaintiff's second claim for fraud as barred by the statute of limitations. C.P.L.R. §§ 213(8), 3211(a)(5).

Plaintiff's seventh claim for negligence per se is merely

[*4]
another theory of negligence and, because plaintiff alleges defendants' violation only of a regulation, 19 N.Y.C.R.R. § 1106.1, not of a statute, such a violation is only evidence of negligence, not negligence per se. Bauer v. Female Academy of Sacred Heart, 97 N.Y.2d 445, 452-53 (2002); Elliott v. City of New York, 95 N.Y.2d 730, 734 (2001); Catarino v. State, 55 A.D.3d 467, 468 (1st Dep't 2008); Heller v. Louis Provenzano, Inc., 303 A.D.2d 20, 26 (1st Dep't 2003). In any event, this claim of negligence based on a regulatory violation fails for the same reason as plaintiff's first claim for negligence. The statute of limitations applicable to plaintiff's eighth claim for violation of New York General Business Law § 349 also runs three years from when defendants' allegedly deceptive appraisal reports injured plaintiff's predecessor and assignor, C.P.L.R. § 214(2), and therefore fails for the same reason as plaintiff's negligence claim.

Finally, absent any independent substantive claim, plaintiff may not recover punitive damages, as sought by plaintiff's ninth claim. Rocanova v. Equitable Life Assur. Socy., 83 N.Y.2d 603, 616-17 (1994); Kenny v. RBC Royal Bank, 22 A.D.3d 385, 386 (1st Dep't 2005); Prote Contr. Co. v. Board of Educ. of City of N.Y., 276 A.D.2d 309, 310 (1st Dep't 2000); Randi A.J. v. Long Is. Surgi-Ctr., 46 A.D.3d 74, 80 (2d Dep't 2007). See Rocanova v. Equitable Life Assur. Socy., 83 N.Y.2d at 613, 615. In sum, the court grants defendants' motions to dismiss each claim that plaintiff has not discontinued and therefore dismisses the entire

[* 5]
complaint in each action. C.P.L.R. § 3211(a)(5). This decision constitutes the court's order and judgment of dismissal.

DATED: August 13, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

AUG 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

