

**LSF6 Mercury Reo Inv., LLC v Mitchell Assoc.**

2012 NY Slip Op 33435(U)

August 3, 2012

Sup Ct, New York County

Docket Number: 100845/12

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

LSF6 MERCURY REO INVESTMENTS, LLC

INDEX NO. 100845/12

- v -

MOTION DATE 06-20-2012

MITCHELL ASSOCIATES and RICHARD SCHWIEZER

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2, 3</u>
Answering Affidavits — Exhibits _____	<u>4-5, 6</u>
Replying Affidavits _____	<u>7, 8</u>

**FILED**  
AUG 13 2012

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon a reading of the foregoing cited papers, it is ordered that defendant Richard Schwiezer's motion to dismiss the complaint as against him is granted. As against this defendant the complaint is severed and dismissed.

Plaintiff the successor in interest to CIT Group, Inc., engaged defendants to perform an appraisal of property located at 11830 193<sup>rd</sup>. Street, St. Albans, N.Y. Owned by Dean Spencer, who applied to CIT for refinancing. It is alleged that defendant submitted an appraisal on May 30, 2006 that overvalued the property by approximately \$27, 000 dollars. Plaintiff discovered the overvaluation of the property on January 26, 2009 when it first incurred a loss on the loan. Plaintiff filed a verified complaint on January 26, 2012 alleging nine causes of action: (1) Negligence; (2) Fraud; (3) Negligent Misrepresentation; (4) Breach of Contract; (5) Breach of Express Warranty; (6) Breach of Implied Warranty; (7) Negligence per Se; (8) Unlawful, Deceptive and/or Unfair Business Practices [ GBL § 349 ] and (9) Punitive Damages.

Defendant Schwiezer moves to dismiss the verified complaint on a number of grounds:

- (1) actions for negligence and negligence per se are time barred by the three year statute of limitations;
- (2) action for fraud is time barred by the three year statute of limitations;
- (3) Plaintiff failed to plead a cause of action for negligent misrepresentation;
- (4) action for Breach of contract are barred by the three year statute of limitations
- (5) actions for express and implied warranty are not plead
- (6) GBL § 349 action is barred by the statute of limitations and unplead
- (7) Independent action for punitive damages not recognized in New York.

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

The first issue to be resolved by the court is whether CPLR § 214(6), the professional malpractice statute, applies to Licensed Appraisers. Defendant claims that it does and that the applicable statute of limitations is therefore three years. Plaintiff claims that it does not because a licensed appraiser is not considered a professional subject to the applicability of this section and therefore the applicable statute of limitations is six years. Plaintiff cites the court of appeals case of Chase Scientific Research v. NIA Group in support of the proposition that CPLR 214(6) only applies to professionals such as Attorneys, Engineers, Architects and Accountants.

An analysis of this case reveals that the court has not set a bright line rule with respect to which "professionals" are to be considered professionals within the ambit of the malpractice statute. In Chase Scientific the court found Insurance agents and brokers are not professionals subject to the statute because they are not required to engage in extensive specialized education and training as required of Attorneys, Engineers, Architects and Accountants. In seeking a definition for the word professional the court stated: "professional is a term of wide usage commonly understood to have several meanings....Often there are study, licensure and continuing skills requirements as for barbers, electricians and real estate brokers....the term is commonly understood to refer to the learned professions exemplified by law and medicine....In particular the qualities of a professional include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards". (Chase Scientific Research v. NIA Group, 96 N.Y. 2d 20, 749 N.E. 2d 161, 725 N.Y.S. 2d 592 [2001]).

None of the parties have provided this court with the education and practice requirements necessary to be licensed as an Appraiser, but it has been previously determined that a cause of action for negligence by an Appraiser is subject to the three year statute of limitations applicable to non-medical professionals (Early v. Rosback, 262 A.D. 2d 601, 692 N.Y.S. 2d 465 [2<sup>nd</sup>. Dept. 1999] reversed on other grounds by Brothers v. Florence, 95 N.Y. 2d 290, 739 N.E. 2d 733, 716 N.Y.S. 2d 367 [2000]; CPLR § 214(6); Locafrance U.S. Corp., v. Daley-Hodkin Corp., 60 A.D. 2d 804, 400 N.Y.S. 2d 823 [1<sup>st</sup>. Dept. 1978] dismissing cause of action for negligent appraisal of the value of electronic equipment when suit instituted more than three years from the date the appraisal was submitted).

Defendant submitted the appraisal on May 30, 2006 and the suit was commenced on January 26, 2012. The Statute of limitations begins to run from the date the appraisal was submitted - May 30, 2006 - suit was not filed until January 26, 2012 which is more than three years after the appraisal was submitted. Accordingly, the Negligence, Negligent Misrepresentation and Negligence per se causes of action are barred by the applicable statute of limitations and are therefore dismissed.

"An action based on fraud must be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered or, with reasonable diligence could have discovered the fraud." (CPLR 213 [8]; Gutkin v. Slegal, 85 A.D. 3d 687, 926 N.Y.S. 2d 485 [1<sup>st</sup>. Dept. 2011]). However, when the cause of action for Fraud is incidental to a negligence action it is subject to the three year statute of limitations of the negligence action (Scott v. Fields, 85 A.D. 3d 756, 925 N.Y.S. 2d 135 [2<sup>nd</sup>. Dept. 2011]).

The cause of action arose in 2006 and the claim was asserted in 2012, therefore it is untimely.

Furthermore, Plaintiff failed to set forth in detail the elements required to maintain a cause of action for Fraud( see CPLR 3016[b]). "A cause of action alleging Fraud requires a plaintiff to establish a misrepresentation or omission of material fact which the defendant knew was false, that the misrepresentation was made to induce the plaintiff's reliance, the plaintiff's justifiable reliance on the misrepresentation or material omission, and a resulting injury." ( Hense v. Baxter, 79 A.D. 3d 814, 914 N.Y.S. 2d 200 [2<sup>nd</sup>. Dept. 2010]).

Accordingly, the cause of action alleging Fraud is dismissed as barred by the applicable statute of limitations and for failure to allege the necessary elements.

Although the statute of limitations in an action for breach of contract is ordinarily six years, where the action is to recover damages for professional malpractice ( CPLR 214[6]) the statute of limitations is three years ( Matter of R.M., 3 N.Y. 3d 538, 821 N.E. 2d 952, 788 N.Y.S. 2d 648 [2004] applying three year malpractice statute to cause of action for breach of contract against architect). The cause of action accrued and the statute began to run at the time of the breach ,May 30, 2006. Suit was not commenced until January 26, 2012 and is therefore untimely.

"An action for breach of an implied or express warranty must be commenced within four years after the cause of action has accrued, which ordinarily would be the date the party charged tenders delivery of the product" ( Weiss v. Herman, M.D., 193 A.D. 2d 383, 597 N.Y.S. 2d 52 [1<sup>st</sup>. Dept. 1993]). However, no warranty attaches to the performance of a service. If the service is performed negligently the cause of action accruing is for that negligence. If it constitutes a breach of contract, the action is for that breach. (Rochester Fund Municipals, v. Amsterdam Municipal Leasing, Corp., 296 A.D. 2d 785, 746 N.Y.S. 2d 512 [3<sup>rd</sup>. Dept. 2002]; Mallards Dairy, LLC, v. E & M Engineers & Surveyors, PLLC, 71 A.D. 3d 1415, 897 N.Y.S. 2d 552 [4<sup>th</sup> Dept. 2010]).

Defendant provided a service to the Plaintiff on May 30, 2006, the statute for breach of contract expired on May 30, 2010, but suit was not commenced until January 26, 2012, almost two years after the statute of limitations expired. Furthermore, since Defendant provided a service a cause of action for breach of an express or implied warranty does not lie.

Accordingly, the causes of action for breach of express and implied warranty are dismissed.

"To constitute a violation of General Business Law § 349, the alleged conduct must satisfy a threshold requirement that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large. Private transactions without ramifications for the public at large are not the proper subject for a claim under General Business law § 349"(Canarlo v. Gunn, 300 A.D. 2d 332, 751 N.Y.S. 2d 310 [2<sup>nd</sup>. Dept. 2002]). The complaint does not allege that defendant's actions affected the public at large. At most this is a private dispute unique to the parties involved. Furthermore, in accordance with CPLR § 214[2] the statute of limitations is three years and this statute has expired.

Accordingly the cause of action for violation of GBL § 349 is dismissed.

"Appraisals are not actionable because they are matters of opinion ( Newman v. Wells Fargo, 85 A.D. 3d 435, 924 N.Y.S. 2d 264 [1<sup>st</sup>. Dept. 2011]affirming dismissal of complaint against bank for fraudulent misrepresentation).

Finally, the cause of action for punitive damages is dismissed as it is not attached to any substantive action ( Randi A.J. v. Long Island Surgl-Ctr, 46 A.D. 3d 74, 842 N.Y.S. 2d 558 [2<sup>nd</sup>. Dept. 2007]).

Accordingly, It is ORDERED that the motion is granted and It is further

ORDERED, that the entire complaint against defendant Richard Schwlezer is severed and dismissed.

ENTER:

Dated: August 3, 2012

MANUEL J. MENDEZ  
J.S.C.

**FILED**

  
\_\_\_\_\_  
Manuel J. Mendez  
J.S.C.

AUG 13 2012

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