SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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JAMES WHITELEY,

Plaintiff,

Index No. 654247/13

-against-

AARON FABER INC.,

Defendant.

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HON. ANIL C. SINGH, J.:

Defendant Aaron Faber Inc. (Faber) moves, pursuant to CPLR 3211 (a) (5) and (7), 213, and 214, and the Uniform Commercial Code (UCC), to dismiss the amended complaint on the grounds that the claims are all time-barred, plaintiff fails to state a claim for negligent misrepresentation and breach of fiduciary duty, and the fraud claim is not pled with particularity as required under CPLR 3016. Plaintiff James Whiteley (Whiteley) opposes the motion.

FACTS

Whiteley bought a watch from Faber in January 2007, after receiving its assurances in December and January that the watch was a genuine Rolex stainless steel "Cosmograph Daytona." Faber provided Whiteley with an appraisal stating that all parts were the originals by Rolex, and that the retail replacement value of the watch was $66,500.00, which was the amount that Whiteley paid

Faber for the watch. First amended complaint, ¶¶ 5-6. Plaintiff stored the watch in a locked safe from January 2007 until November 2013, at which time he sought to have the watch serviced and evaluated by Rolex. He had never had it serviced before. Rolex determined that the watch was not a genuine Rolex, and that the dial of the watch was not of Rolex manufacture. Thus, the watch was virtually worthless. In November 2013, a genuine Rolex watch, of the type it was supposed to be, was worth approximately $150,000. *Id.*, ¶¶ 7-8.

Whiteley asserts causes of action for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, constructive trust, conversion, negligent misrepresentation, and negligence.

DISCUSSION

Faber contends that all of the causes of action are time-barred, and that Whiteley has not properly pled the existence of a fiduciary relationship, the necessary relationship to support a claim for negligent misrepresentation, or the fraud claim with necessary particularity.

STATUTE OF LIMITATIONS

The statutes of limitations for the various claims are between three and six years, depending on whether the particular cause of action is controlled by UCC § 2-725 (four years); CPLR 203 (a) and 213 (2) (six years for breach of contract); CPLR 213 (8) (six years for fraud); CPLR 213 (1) (six years for unjust

enrichment and constructive trust); CPLR 214 (3) (three years for conversion); or CPLR 214 (4) (three years for negligence). Faber maintains that the causes of action accrued in January 2007. This action was commenced in December 2013. Thus, even with the longest statute of limitations, six years, the action is time-barred. Whiteley does not dispute that the statutes of limitations for the various causes of action are, at most, six years, but he argues that Faber should be estopped from raising the statute of limitations defense, or, alternatively, that the accrual date should be tolled until the date that Whiteley discovered that the watch was not genuine.

Estoppel

While it is true that a defendant can be estopped from pleading a statute of limitations defense, in order to do so, the plaintiff must demonstrate that he was induced by fraud, misrepresentation or deception to refrain from filing a timely action. *General Stencils v Chiappa*, 18 NY2d 125, 128 (1966). Here, plaintiff relies on the representations and appraisal report that Faber provided at the time of the purchase. However, in order to apply equitable estoppel, the acts that trigger the estoppel must be separate, subsequent acts of the defendant, not the ones upon which the action is based. *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789 (2012).

The fact that plaintiff commenced this action promptly after

learning that the watch was not genuine does not assist him. Although such due diligence is an essential element in seeking equitable estoppel (*Marshall v Duryea*, 172 AD2d 726, 727 [2d Dept 1991]), a plaintiff must also establish that a subsequent and specific action by the defendant kept him from timely bringing suit. *Zumpano v Quinn*, 6 NY3d 666, 674 (2006). Plaintiff has not pleaded any facts to support a conclusion that Faber engaged in any action subsequent to the sale of the watch that influenced Whiteley to refrain from bringing this action. Contrary to plaintiff's assertions, in the absence of any such allegation, there is no question of fact as to whether equitable estoppel applies to this matter, and equitable estoppel cannot be applied.

Accrual of the Fraud Cause of Action

Whiteley contends that the accrual for the fraud cause of action was one month before he brought this action, because that is when he discovered the fraud. He maintains that he could not have discovered the fraud earlier with reasonable diligence because it was reasonable for him to believe that the watch was a genuine Rolex, given Faber's expert knowledge and its vouching in writing for the genuineness of the watch. At the very least, Whiteley argues that there is a question of fact as to whether he should have discovered the fraud earlier. *See Trepuk v Frank*, 44 NY2d 723, 724-725 (1978). Faber does not directly address this argument, but only discusses the accrual for purposes of the

other causes of action.

Where there is an allegation of fraud, CPLR 213 (8) provides for a six-year statute of limitations, or two years from when the fraud could have been discovered with reasonable diligence. The question of whether a person could have discovered a fraud with reasonable diligence is a mixed question of law and fact. *Trepuk v Frank*, 44 NY2d at 725. Generally, where it does not appear that a plaintiff had knowledge of facts from which he could have reasonably inferred that there was a fraud, a complaint should not be dismissed on motion, but the question should be presented to the trier of facts. *Id.; Azoy v Fowler*, 57 AD2d 541, 542 (2d Dept 1977).

Here, accepting the facts as presented in the amended complaint, Whiteley received an appraisal from defendant, a recognized expert, stating that the watch was a genuine Rolex, with all original Rolex parts. He had no reason to doubt the certification, inasmuch as he paid the appraised value of the watch, and there were no indications that he should have doubted the genuineness of the watch. It would be inappropriate for the court to determine, as a matter of law, that someone who purchases such an item from a recognized, reputable entity, is required to have it appraised by another entity in order to preserve any fraud claim if the item proves to be counterfeit. Nor has Faber offered any law to support such a conclusion.

Consequently, the fraud cause of action is not time-barred.

Faber contends that the fraud cause of action should nonetheless be dismissed because it was not pled with sufficient particularity. Specifically, Faber maintains that Whiteley failed to allege that Faber knew that its representation that the Rolex was genuine was false. It claims that, instead, he alleges that Faber should have known that the dial was not genuine. Relying on *Monaco v New York Univ. Med. Ctr.* (213 AD2d 167, 169 [1st Dept 1995]), Faber concludes that this is insufficient to support the scienter requirement for a fraud cause of action.

In the amended complaint, Whiteley does not state that Faber should have known that the dial was not genuine. He states that defendant "acted with scienter" and that it "intentionally made the false and misleading material statements and omissions." When combined with allegations that defendant represents itself to the public as an expert in appraising vintage timepieces, the complaint adequately alleges that Faber knowingly misrepresented the genuineness of the watch. Thus, the fraud cause of action may continue.

Accrual of Statutes of Limitations for All Causes of Action

In asserting that the causes of action did not accrue until November 2013, Whiteley suggests what he terms "a more novel legal theory," maintaining that he was not injured until he sought to sell the watch in November 2013. At that time, he

learned that the watch was virtually worthless, while a genuine watch of its type was worth approximately $150,000. Whiteley argues that the statute of limitations does not begin to run until the action complained of produces injury, and that did not happen until November 2013.

Whiteley's "novel" theory is neither novel, nor in accordance, with New York law. It is well established that a statute of limitations may begin to run even if the injured party is unaware of the wrong or of the injury. *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210-211 (2001); *General Stencils v Chiappa*, 18 NY2d at 127; *Guild v Hopkins*, 271 App Div 234, 244 (1st Dept 1946), *affd* 297 NY 477 (1947)("Nor does the existence of a cause of action depend upon respondent's knowledge that she has suffered an injury. That she may not have discovered the wrongs complained of until long after they were committed is immaterial."). Here, it is not true that Whiteley was first injured in 2013 when he wanted to sell the watch. He was injured in 2007 when he allegedly paid for a genuine watch and received a watch that was not genuine and did not comport with the appraisal that Faber provided. While he did not know of the injury at the time, the injury had nonetheless occurred. Whether viewed as a contract cause of action, unjust enrichment, or any of the other causes of action that plaintiff asserts, with the exception of the fraud claim, the injury occurred in January 2007, and the

causes of action accrued at that time. Thus, those claims are time-barred.

Whiteley's contention that the contract cause of action did not begin to accrue until the breach was or should have been discovered, because the appraisal created a warranty of the watch's genuineness running into the future, is also without merit. There is nothing in the appraisal that warrants future performance. Without such an explicit warranty, the appraisal cannot be held to include a warranty running into the future. *Dormitory Auth. of State of N.Y. v Baker, Jr., of N.Y.*, 218 AD2d 515, 517 (1st Dept 1995); UCC § 2-725 (2). Further, the appraisal states "[t]he foregoing Appraisal is made with the understanding that the appraiser assumes no liability with respect to any action that may be taken on the basis of this Appraisal." Plaintiff's exhibit A.

Thus, the date of accrual of the causes of action, other than the fraud cause of action, is January 2007, and those causes of action are time-barred.

In view of this conclusion, it is unnecessary for the court to reach the question of whether the parties had a fiduciary relationship, or a relationship sufficient to support a negligent misrepresentation claim.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted to the extent that the first, second, fourth, fifth, sixth, seventh and eighth causes of action are dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a [preliminary] [status] conference in Room 320, 80 Centre Street, on APRIL 30TH, 2014, at 9:30 a.m./~~p.m.~~

Dated: MARCH 7, 2014

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE