

Butt v R.N. Joseph Fine Jewelry LLC

2015 NY Slip Op 31445(U)

July 28, 2015

Supreme Court, New York County

Docket Number: 150891/13

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17**

-----X
DAVID S. BUTT,

Plaintiff,

-against-

**R.N. JOSEPH FINE JEWELRY LLC,
R.N. JOSEPH FINE ARTS LTD.,
RNJA COMPANY, LLC, and
RONALD SAFDIEH,**

Defendants.

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

**Index No. 150891/13
Motion Sequence No.: 001**

DECISION & ORDER

Defendants R.N. Joseph Fine Jewelry LLC (“RN Jewelry”), R.N. Joseph Fine Arts Ltd. (“RN Fine Arts”), RNJA Company, LLC (“RNJA”), and Ronald Safdieh (“Safdieh”) (collectively “defendants”) move, pursuant to CPLR § 3212, for summary judgment dismissing the Complaint. Plaintiff David S. Butt (“Butt” or “plaintiff”) opposes defendants’ motion.

FACTUAL BACKGROUND

Plaintiff David S. Butt (“Butt” or “plaintiff”) contends that on or about August 28, 2002, defendants sold him five items which they represented as authentic original Fabergé antiques but which turned out not to be authentic original Fabergé items (“the Items”). Based on this allegation, plaintiff asserts five (5) causes of action against defendants for (1) breach of contract, (2) breach of express warranty, (3) fraudulent inducement, (4) unjust enrichment, and (5) violation of General Business Law § 349. Defendants interposed an answer asserting, in part, that this action is barred by the applicable statutes of limitations.

During the relevant time period, defendants RNJA and RN Fine Arts operated a “fine arts gallery” (“the Gallery”) located at the Essex House Hotel, on Central Park South, in Manhattan, New York (Affidavit of Ronald Safdieh in Support of Defendants’ Motion, sworn to on April 10, 2014 [“Safdieh Aff.”] at ¶ 4). Defendant Safdieh states that the Gallery sold many items of fine art, from paintings and sculptures to jewelry and display pieces, including both original Fabergé pieces, and high quality Fabergé-style pieces (Safdieh Aff. at ¶ 5). Safdieh explains the difference between an authentic Fabergé and Fabergé style as follows:

The House of Fabergé was founded in 1842 . . . [and] has been famous for designing elaborate jewel-encrusted Fabergé eggs for the Russian Tsars and a range of other work of high quality and intricate details. They also produced a full range of jewelry and other ornamental objects.

(Safdieh Aff. at ¶¶ 4 and 6). In contrast, Fabergé-style is an item designed similar to an authentic Fabergé item but is not in fact made by Fabergé. Fabergé style is an alternative to the more expensive original Fabergé items for those reluctant or unable to purchase the much more expensive original Fabergé items (*id.* at ¶ 5).

On or about August 27, 2002, while vacationing in New York City, plaintiff saw a kiosk that contained advertisements for the Gallery (Affidavit of David S. Butt in Opposition to Defendants’ Motion [“Plaintiff’s Aff. in Opp.”] at ¶ 8. Plaintiff noticed the Gallery’s posters advertising the sale of Fabergé items (*id.*). Since the Gallery was located at a world-renowned first-class hotel, plaintiff believed that it was the kind of establishment that would plausibly sell authentic Fabergé items (*id.*). Defendants agree that the Gallery is “a fine arts gallery” which sells “many items of fine art, from paintings and sculptures to jewelry and display pieces” (Safdieh Aff. at ¶¶ 4, 5).

Upon entering the Gallery, plaintiff observed many posters, cards, and flyers throughout the store, all of which promoted the sale of Fabergé items (Plaintiff’s Aff. in Opp. at ¶ 10). The price

tags on the items on display throughout the Gallery indicated many were being sold for tens of thousands of dollars (*id.*). Plaintiff avers that nothing in the printed materials plaintiff reviewed throughout the Gallery indicated in any way that there was a distinction among the items for sale between “original Fabergé pieces” and “Fabergé style pieces” and none of the printed materials in the Gallery suggested in any way that the Fabergé items being offered for sale were anything other than authentic Fabergé items (*id.*).

Plaintiff was greeted by defendant Safdieh and plaintiff informed Safdieh that he was interested in viewing Fabergé items (Plaintiff’s Aff. in Opp. at ¶ 12). Safdieh proceeded to show plaintiff approximately 20-25 pieces, each of which plaintiff contends Safdieh expressly represented to plaintiff to be authentic, original Fabergé items (*id.* at ¶ 13). Plaintiff avers that Safdieh supported this claim that the pieces were genuine and authentic by pointing out to plaintiff that each item was stamped with a Cyrillic “Fabergé” and the number “56” (*id.* at ¶ 14). Plaintiff states that Safdieh explained that was the trademark of the gold content of pieces made by Carl Fabergé and the House of Fabergé goldsmiths (*id.*). Plaintiff states that he was aware of this because he had once before, in 1993, purchased a small Fabergé cigarette case from M. S. Rau Antiques, a antiques dealer in New Orleans and as a result of that purchase, plaintiff knew about the Cyrillic stamp “Fabergé” and the “56” stamp (*id.* at ¶ 14, note 4).¹

After examining the 20-25 items that Safdieh showed him, each one of which plaintiff claims Safdieh expressly represented was an authentic, original “Fabergé” pre-Russian Revolution *objets d’art*, plaintiff decided to purchase the five (5) items and negotiated with Safdieh a total package

1. Plaintiff alleges that in that instance he also relied on a money back guarantee and the reputation of the dealer, but does not indicate whether he had that item authenticated or appraised (*id.* at ¶ 14, note 4).

price of \$165,000.00 for all the Items.² Plaintiff requested and Safdieh agreed to provide plaintiff with appraisals for each of the Items being purchased (Plaintiff's Aff. in Opp, at ¶ 19) but plaintiff did not request and defendants did not offer to provide plaintiff with a certificate of authenticity. Plaintiff alleges that Safdieh informed him that defendants would provide appraisals for each item from a knowledgeable and reputable appraiser, which would include a full description identifying the Items being purchased as Fabergé pieces, along with their individual value at the time of purchase (*id.* at ¶ 19). Plaintiff also states that the appraisal was also intended for authentication, and that Safdieh never advised him that there is a difference in the world of antiques between an appraisal and a certificate of authenticity (Plaintiff's Aff. in Opp. at ¶ 20). The appraisal, which was provided by a third party and arranged by defendants, but which defendants contend was independent and not controlled by them, does identify the Items as Fabergé items (Exhibit "3" to Plaintiff's Aff. in Opp.).

Defendants shipped the Items to plaintiff, which were delivered and received by plaintiff in early September 2002 (Complaint at ¶ 28, Exhibit "A" to Defendants' Motion). Plaintiff also received the appraisals of the Items separately in early September 2002 (Complaint at ¶ 29, Exhibit "A" to Defendants' Motion).

On or about July 21, 2012, plaintiff attended the Antiques Roadshow ("the Roadshow") in Cincinnati, Ohio (Complaint at ¶ 33 and Plaintiff's Aff. in Opp. at ¶ 35). The Roadshow is a television program presented on the Public Broadcasting System where attendees bring various objects to have specialists identify and appraise the objects (Complaint at ¶ 33 and Plaintiff's Aff.

2. Defendants also included an additional item at no charge, a small yellow-gold enameled pendant on a yellow gold chain, with plaintiff's purchase which plaintiff gave away as a gift and is not at issue in this lawsuit (Complaint at ¶ 20; Plaintiff's Aff. in Opp. at p.8, n 5). Plaintiff alleges that defendants provided this item as an added inducement for plaintiff to purchase the Items (*id.*).

in Opp. at ¶ 36). Plaintiff brought two (2) of the Items to the Roadshow to be evaluated, specifically a salmon-pink translucent guilloche enamel bonbonniere described in the Complaint at ¶ 19-a and in Plaintiff's Aff. in Opp. at ¶ 15-a ("the pink snuff box") and a jeweled gold, diamond and water agate bonbonniere in the Complaint at ¶ 19-b and in Plaintiff's Aff. in Opp. at ¶ 15-b ("the stone container") (Complaint at ¶ 34 and Plaintiff's Aff. in Opp. at ¶ 36). After examining plaintiff's two Items, the Roadshow's antiques specialist allegedly informed plaintiff that neither of plaintiff's items were authentic Fabergé items (Complaint at ¶ 36 and Plaintiff's Aff. in Opp. at ¶ 37). Plaintiff states that prior to bringing those two items to the Roadshow on July 21, 2012, he had not had any of the Items appraised, examined or evaluated by any specialist (other than the initial appraisal performed through defendants' appraiser), because he had no prior reason to doubt the authenticity of the Items (Complaint at ¶¶ 37 and 38; Plaintiff's Aff. in Opp. at ¶ 38).

Plaintiff alleges that on July 28, 2012, he called the Gallery to speak to Safdieh, who was not there, and instead spoke to an unnamed person there who refused to give his name and denied any culpability on defendants' part (Plaintiff's Aff. at ¶ 39). Thereafter, plaintiff contacted representatives from Sotheby's and Christie's and sent them photographs and descriptions of the five Items. Christie's informed plaintiff that the Items did not appear to be original Fabergé works produced prior to 1917, while a senior vice president at Sotheby's Department of Russian Works of Art and Icons, informed plaintiff that the Items were not suitable for sale by that auction house (*id.* at ¶ 40 and Exhibits "5" and "6"). Plaintiff commenced this action several months later on January 30, 2013.

DISCUSSION

Summary Judgment

A party moving for summary judgment must show it is entitled to judgment as a matter of law (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party fails

to eliminate any material issues of fact from the case, summary judgment must be denied (*id.*) Considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant (*Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). Defendants here are only entitled to summary judgment if, viewing all evidence in a light most favorable to the plaintiff, there are no material issues of fact to be resolved and the issues are all in defendants' favor. If the undisputed facts do not unequivocally support the defendants' arguments, or if the facts are in dispute, summary judgment in defendants' favor must be denied.

Defendants here move for summary judgment pursuant to CPLR § 3212, contending plaintiff's Complaint fails to state a cause of action and that all of plaintiff's claims are time barred by the applicable statute of limitations.³ As previously noted, plaintiff asserts five (5) causes of action against defendants for (1) breach of contract, (2) breach of express warranty, (3) fraudulent inducement, (4) unjust enrichment, and (5) violation of General Business Law § 349. The Court will deal with the summary judgment motion as it applies to each of the causes of action.

Significantly, while plaintiff argued in general terms that the statutes of limitations on his claims have not run, or should be tolled, plaintiff has effectively limited that argument only to the third cause of action for fraudulent inducement and has not presented any argument or challenge to the portion of defendants' summary judgment motion regarding the statutes of limitations applicable to the first cause of action for breach of contract, the second cause of action for breach of warranty, the fourth cause of action for unjust enrichment, and the fifth cause of action for violation of General Business Law § 349.

3. Although defendants did not previously move to dismiss the Complaint on the statute of limitations grounds, they preserved that argument in their affirmative defenses of their Verified Answer at ¶ 81.

**First Cause of Action for Breach of Contract and
Second Cause of Action for Breach of Express Warranty**

In his first cause of action, plaintiff alleges that the defendants breached the sales contract between the parties by failing to deliver to the plaintiff genuine, authentic and original Russian Fabergé items as expressly represented and warranted (Complaint at ¶ 45, Exhibit “A” to Defendants’ Motion). The statute of limitations in New York for a breach of contract is six (6) years (see CPLR § 213.2) and the cause of action accrues at the time of the contract’s breach (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *De Hernandez v Bank of Nova Scotia*, 76 AD3d 929, 930 [1st Dept 2010]) Furthermore, as these decisions stated “[k]nowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in a contract action” (*id.* [internal quotation marks and brackets omitted]). However, the statute of limitations for a breach of contract or of warranty in the sale of goods in New York is set forth in the Uniform Commercial Code (“UCC”) at § 2-725(2) and is four years from the date of the delivery of the goods at issue (*Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168, 168-169 [1st Dept 2002] [“Inasmuch as the UCC four-year statutory period is applicable, plaintiff’s claim for breach of contract and warranty are time-barred, the goods in question having been delivered more than four years prior to commencement of this action [see, UCC 2-725(2)].”). As the First Department recently stated in *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 121 AD3d 535, 536 (1st Dept 2014), “[i]f a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract (citation omitted).” The existence and accrual of a cause of action for breach of contract or warranty does not depend on a party’s knowledge of the breach (*Elie Intl., Inc. v Macy’s W. Inc.*, 106 AD3d 442, 443 [1st Dept 2013]; *Vanata v Delta Intl. Mach. Corp.*, 269 AD2d 175, 176 [1st Dept 2000]).

In this case, the contract for the sale of the Items was executed at the end of August 2002, with the bill of sale (Exhibit “F” to Defendants’ Motion) and plaintiff’s check in payment for the Items (Exhibit “F” to Defendants’ Motion and Exhibit “2” to Plaintiff’s Aff. in Opp.) both dated August 28, 2002. Delivery and receipt of the Items, as well as the appraisals for the Items, occurred in early September 2002. Thus, the breach of contract and breach of warranty causes of action accrued no later than early September 2002 pursuant to UCC § 2-725(2), and the four year statute of limitations on those causes of action expired in early September 2006, more than six years before plaintiff commenced this action on January 30, 2013.⁴ Accordingly, the portion of defendants’ motion for summary judgment dismissing plaintiff’s first cause of action for breach of contract and second cause of action for breach of express warranty is granted and those causes of action are both dismissed.

Third Cause of Action for Fraudulent Inducement

Plaintiff’s third cause of action for fraudulent inducement alleges that defendants “expressly and knowingly misrepresented to Plaintiff” that the Items being sold to him “were genuine, original and authentic Russian Fabergé antiques” (Complaint at ¶¶ 17, 18 and 58), that these representations were false and plaintiff relied upon those representations (Complaint at ¶¶ 18 and 61) and that he was thereby induced into purchasing the Items (Complaint at ¶ 60). Defendants deny that they represented the Items as “original Fabergé items” (Verified Answer at ¶¶ 17, 18, 58 and 61) but, instead, allege that Safdieh described the Items to plaintiff as “high quality Fabergé Style pieces” (Safdieh Aff. at ¶14).

4. Even under the six (6) year statute of limitations for breach of contracts other than for the sale of goods, the first cause of action would still be time barred as the action was filed more than ten and a half years after the sale of the Items took place.

The elements of a claim for fraudulent inducement are:

- (1) a material misrepresentation of a material fact,
- (2) which was known by defendant to be false and,
- (3) was intended by defendant to be relied on by plaintiff when it was made, and
- (4) that plaintiff justifiably relied upon the misrepresentation, and
- (5) a resulting injury by plaintiff as a result of reliance on the misrepresentation.

(See e.g., *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 608 [1st Dept 2010]; *Braddock v Braddock*, 60 AD3d 84,86 [1st Dept 2009]; *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

Defendants move to dismiss the third cause of action for fraudulent inducement on the following grounds:

- (i) as a matter of law, plaintiff could not have relied on the statements of the defendants since plaintiff failed to conduct any investigation or conduct any due diligence of his own;
- (ii) this cause of action was brought after the expiration of the relevant statute of limitation and plaintiff is not entitled to the statute's tolling provision;
- (iii) the fraud claim is duplicative of the first cause of action for breach of contract; and
- (iv) plaintiff has failed to allege any damages as a result of his claim of fraud

(Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment ["Defendants' Memo of Law in Support"] at p. 10).

Defendants assert that plaintiff's cause of action for fraudulent inducement should be dismissed because it is duplicative of his breach of contract claim, citing *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316, 318 (1995), *Brown v Brown*, 12 AD3d 176, 176 (1st Dept

2004), *McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233, 234 (2d Dept 1991), and *Bridgestone/Firestone, Inc. v Recovery Credit Servs. Inc.*, 98 F3d 13, 20 (2d Cir 1996) for the proposition that a simple breach of contract claim may not be considered a tort unless there exists a duty independent of the contract, *i.e.*, one arising out of circumstances extraneous to and not constituting elements of the contract itself (Defendants' Memo of Law in Support at p. 21). Plaintiff counters that "a misrepresentation of material fact, [that] is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud" citing *Selinger Enters. Inc. v Cassuto*, 50 AD3d 766, 768 (2d Dept 2008) (citations omitted), and *Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 408 (1958).

In this case, plaintiff has alleged in his Complaint that the defendants' misrepresentations that the Items he was purchasing were authentic, original Fabergé items, induced him to enter into the contract of sale. Such an allegation, if proven by plaintiff, would establish a cause of action for fraud which is not duplicative of plaintiff's breach of contract claim (*see New York Univ. v Continental Ins. Co.*, 87 NY2d at 316 ["Where a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort" citing *Channel Master*, 4 NY2d at 406-408 and *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 (1986)]).

Defendants also argue that plaintiff has failed to plead damages with particularity in the Complaint, which defendants assert is required in a fraud allegation, citing *Nicosia v Bd. of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 (1st Dept 2010). While the majority opinion in *Nicosia* seems to imply that damages need to be plead with particularity, in that case plaintiff failed to plead any damages. Moreover, as the Court of Appeals has stated in *Lanzi v Brooks*, 43 NY2d 778 (1977) that the requirement in CPLR § 3016(b) that "in an action for fraud, 'the circumstances constituting the wrong shall be stated in detail' that provision "requires only that the misconduct

complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” (43 NY2d at 780). *Accord, Eurycleia Partners, LP*, 12 NY3d at 559; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 (2008); *Smith v D.A. Schulte, Inc.*, 280 AD 913, 913 (1st Dept 1952) (“The particular items of damage need not be stated, but facts must be alleged which are claimed to have caused the damage”).

Defendants also move to dismiss this cause of action since one of the essential elements of fraudulent inducement is justifiable reliance on the alleged misrepresentation, and defendants argue that plaintiff could not have justifiably relied on the statements of the defendants since plaintiff failed to conduct any investigation or conduct any due diligence of his own.

Clearly the central issue in this lawsuit is whether defendants, through Safdieh, represented to plaintiff that the Items were authentic, original Fabergé items, as plaintiff alleges, or whether Safdieh informed plaintiff that the Items were in the Fabergé style but were not authentic, original Fabergé items, as the defendants allege. While the defendants’ sales invoice to plaintiff (Exhibit “3” to the Complaint) does not identify the Items as authentic, original Fabergé items, neither does it indicate that the Items are “Fabergé style.” However, the appraisal of the Items does call the Items “Fabergé” and not “Fabergé style” (Exhibit “3” to Plaintiff’s Aff. in Opp.). Defendants claim that the appraisal’s statement that the Items are Fabergé can not be attributed to them because the appraisal was done by an independent third party who they claim does not work for them and with whom the defendants claim they do not have an ongoing relationship (Safdieh Aff. at ¶¶ 16-18).

This issue of whether defendants represented the Items as authentic, original Fabergé items in order to fraudulently induce plaintiff to purchase the Items or if defendants informed plaintiff that the Items were “Fabergé style” is a classic question of fact which turns on credibility of the parties or the presentation of more conclusive evidence or proof.

Furthermore, whether the plaintiff's reliance upon defendants' alleged misrepresentations was justifiable is also a question of fact, as it turns on the issue of whether plaintiff should have discovered the alleged fraud with reasonable diligence. This issue is related to and will be examined together with the issue of whether the plaintiff's action is timely.

The statute of limitations for fraudulent inducement is "six years from the time of the fraud or within two years from the time the fraud was discovered or, with reasonable diligence, could have been discovered" (CPLR §§ 213[8] & 203[g]; *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]; *Saphir Intl., SA v. UBS Painewebber Inc.*, 25 AD3d 315, 315 [1st Dept 2006]). Since the alleged fraudulent inducement occurred on or about August 28, 2002, more than six years elapsed before plaintiff commenced his action on or about January 30, 2013. Plaintiff argues that he did not discover the fraud until he brought two of the Items to the Antiques Roadshow in July 2012 and, therefore, timely commenced his action within two years of discovering the fraud (Plaintiff's Memo of Law in Opp. at pp. 15-16).

The Court of Appeals in *Sargiss* held that "[t]he inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff 'was possessed of knowledge of facts from which [the fraud] could be reasonably inferred' " (12 NY3d at 532 [citing *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 (1957)]). Furthermore, " 'knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute' " (*id.*). See also, *Gorelick v. Vorhand*, 83 AD3d 893, 894 [2d Dept 2011]). However, "a plaintiff may not shut his eyes to facts which call for investigation" (*Gorelick*, 83 AD3d 894). "It is well settled that if a party omits an inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him (internal citations and quotations omitted)" (*CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 156 [1st Dept 2009] [citing

Higgins v Crouse, 147 N. Y. 411, 416 (1895)]. On the other hand, “[w]here it does not conclusively appear that a plaintiff had knowledge of the alleged fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of fact” (*Sargiss*, 12 NY3d at 532 [quoting *Trepuk v Frank*, 44 NY2d 723, 725 [1978]]).

Thus, imputing a party with knowledge of fraud requires a determination, “whether the plaintiff possessed knowledge of facts from which he could reasonably have inferred the fraud” (*K&E Trading & Shipping, Inc. v Radmar Trading Corp.*, 174 AD2d 346, 347 [1st Dept 1991]). “Whether a person had sufficient knowledge to discover a fraud necessarily involves a dispute over state of mind and conflicting interpretations of perceived events” (*id.*). “This inquiry involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact” (*Saphir*, 25 AD3d at 316 [citing *Trepuk* and *Erbe*]).

In *Saphir*, the Appellate Division, First Department held that “competing factual contentions preclude summary resolution of the statute of limitations issue” (*id.*). Petitioner-plaintiff, a Panama investment company, said it filed its fraud claim as soon as it learned that the respondent-defendants had participated in a stock fraud scheme (*id.*). Respondent-defendants contended plaintiff was on notice from the date plaintiff learned it had lost most of its investment (*id.*). Reversing the lower court’s grant of summary judgment for respondent-defendants, the First Department noted multiple fact questions answered in favor of the non-movant plaintiff, including: (1) whether the plaintiff’s losses were sufficient to put the plaintiff on notice of fraud; (2) whether plaintiff knew of certain statements attributable to the respondent-defendants’ co-defendant; (3) if plaintiff did know of those statements, whether plaintiff’s owner should have known the statements were false; and

(4) if charged with that knowledge, should the false statements have put plaintiff's owner on notice that respondent-defendants were also involved in the fraud (*id.* at 317). The Appellate Division found the trial court had improperly summarily resolved these fact questions against the non-movant plaintiff and, accordingly, reversed the grant of summary judgment so the competing factual contentions could be determined by a trier-of-fact.

A party suspicious of fraud and who subsequently investigates but fails to discover the fraud, may not be imputed with knowledge of the fraud (*CSAM Capital*, 67 AD3d at 56). In *CSAM*, investors alleged fraud against a general partner of an investment fund. The Supreme Court, relying in part on a letter [“the Heller letter”] from two investors accusing the investment fund of being managed improperly and its managers of violating their fiduciary duty, granted summary judgments in favor of the defendants finding their fraud claim time barred (*id.* at 151). Reversing the lower court, the Appellate Division found that :

contrary to the findings of the court below, we do not find that the Heller letter could be considered evidence of actual knowledge of fraud. The letter did not allege any facts constituting fraud; rather, it simply proves the uncontested fact that the Hellers suspected mismanagement by CSAM. [M]ere suspicion will not suffice as a ground for imputing knowledge of the fraud.

In fact, the exchange . . . demonstrates that the appellants could not have discovered the fraud through the exercise of reasonable diligence. The Heller letter sought an explanation for the losses the fund had experienced, satisfying the duty of inquiry In response to this inquiry, Paolella [Director of the fund] explained the rationale for the fund's actions and expressed a hope that the fund would recoup some of its losses moving forward. At the very least, the Paolella letter conveyed a representation that qualified people were acting purposefully in managing the fund. This provided no further grounds from which a reasonable person would necessarily infer fraud.

(*Id.* at 155-56). Thus, the First Department held that even where a party has a duty of inquiry,

makes the inquiry, and receives in response a representation from which a reasonable person would not infer fraud, the statute of limitations does not begin to run.

Reasonable diligence may require investigation in the business of buying and selling art (see, e.g., *ACA Galleries, Inc. v Kinney*, 928 F Supp 2d 699, 703 [SDNY 2013], *affd* 552 Fed Appx 24 [2d Cir 2014]). In *ACA Galleries*, the plaintiff, knowing that full authentication of a painting would increase the price, chose to rely on its self-conducted pre-purchase inspection (552 Fed Appx at 25). After buying the painting and discovering it was fake, plaintiff brought a fraud claim (928 F Supp 2d at 703). The district court held that plaintiff was not entitled to claim fraud because “[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm’s length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it (internal citations and quotations omitted)” (*id.*).

In this instant case, fact disputes include whether the defendants represented the Items as authentic, genuine, original Fabergé *objets d’art* or as merely Fabergé style, whether the appraiser was retained strictly for insurance purposes or was also proving authenticity, whether the appraiser facilitated the alleged fraud on behalf of the defendants, whether plaintiff justifiably relied on defendants’ alleged misrepresentations, and whether plaintiff should have discovered that the Items were not authentic, genuine, original Fabergé items sooner than he did. Furthermore, neither side has presented any expert affidavits regarding the true value of the any of the Items or whether authentic, original Fabergé Items could reasonably be purchased for the prices plaintiff paid.

Defendants argue that just as plaintiff had the Items evaluated in July, 2012, plaintiff could have had the Items evaluated prior to that date. Furthermore, if plaintiff were established as a sophisticated art collector, like the plaintiff in *ACA Galleries*, plaintiff would have had the duty to

independently investigate the authenticity of the Items and could not have justifiably relied upon defendants' alleged statements. However, there is a genuine factual dispute between the parties to whether the plaintiff is a sophisticated art collector and had a duty to independently investigate the authenticity of the Items in addition to requesting and receiving the appraiser's letter. Such a question cannot be determined on this summary judgment motion, but must be decided by the trier of fact.

Therefore, defendants' motion for summary judgment dismissing plaintiff's third cause of action for fraudulent inducement is denied at this time and the factual questions concerning this cause of action must be resolved by the trier of fact, or after additional proof is developed during discovery.

Fourth Cause of Action for Unjust Enrichment

Plaintiff's fourth cause of action is for unjust enrichment, alleging that he paid defendants \$165,000.00 but failed to receive proper value of consideration for that payment (Complaint at ¶ 66-68). Defendants move to dismiss this cause of action both because the unjust enrichment claim is duplicative of the breach of contract claim as well as being barred by the statute of limitations (Defendants' Memo of Law in Support at pp. 26-27).

To assert a legally cognizable claim of unjust enrichment, a plaintiff must allege that the plaintiff bestowed a benefit upon the defendant, that the benefit remains with the defendant, and that the defendant has not adequately compensated the plaintiff for that benefit (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120-121 [1st Dept 1998]). However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter A 'quasi contract' only applies

in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [citations omitted]; *see also Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991] [the law recognizes a cause of action for unjust enrichment “in the absence of an agreement when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another] [citation omitted]; *cf. Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Therefore, to the extent that plaintiff’s fourth cause of action arises out of allegations that the defendants have been unjustly enriched by its retention of the \$165,000.00 purchase price for the Items, where there was an actual contract governing that sale, the unjust enrichment claim would ordinarily be precluded.

Plaintiff argues, however, because the sale of the Items was procured through fraudulent inducement, he is entitled to rescind the sales contract and pursue a claim for unjust enrichment, citing *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49,56 (1st Dept 2013), *Sabo v Delman*, 3 NY2d 155, 162 (1957), *Adams v Gillig*, 199 NY 314, 317 (1910); *Gordon v Oster*, 36 AD3d 525 (1st Dept 2007), and *Taylor & Jennings v Bellino Bros. Constr. Co.*, 106 AD2d 779, 780 (3d Dept 1984); *see also Cohen v Cohen-Fisher*, 78 AD3d 640 (2d Dept 2010).

While plaintiff may ordinarily be entitled to assert his unjust enrichment claim if his fraudulent inducement claim prevails, there are two other issues which must be addressed. First, as noted in *VisionChina*, to rescind a contract allegedly induced by fraud, the party, in relevant part, “may rescind the contract by promptly tendering back all that he [or she] has received under it. He [or she] may then bring an action at law upon the rescission to recover back what he [or she] has paid, or . . . may bring an action in equity for rescission” (109 AD3d at 56). Plaintiff has not alleged that he has “promptly tendered back” the Items or brought an action in equity for rescission.

Second, and more significantly, a cause of action for unjust enrichment has a six year statute of limitations and accrues on the date when the defendants were unjustly enriched (*Knobel v Shaw*, 90 AD3d 493, 495 [1st Dept 2013]; *Sirico v F.G.G. Prod., Inc.*, 71 AD3d 429, 434 [1st Dept 2010]). Here, the six year statute of limitations for unjust enrichment accrued and began to run on the date that the plaintiff paid the defendants for the sale of the Items on or about August 28, 2002, approximately ten and a half years before plaintiff commenced this action. Plaintiff has not challenged or even addressed this statute of limitations issue.

Therefore, this Court holds that the plaintiff's unjust enrichment claim accrued more than the six years permitted by the applicable statute of limitations. Accordingly, that portion of defendants' summary judgment motion to dismiss plaintiff's claim for unjust enrichment is granted and plaintiff's fourth cause of action is dismissed.

Fifth Cause of Action for Violation of General Business Law § 349

In his fifth cause of action, plaintiff has alleged that defendants violated General Business Law ("GBL") § 349. Defendants have moved for summary judgment dismissing that cause of action on statute of limitations grounds.

GBL § 349(h) grants a right of action to any private person who has been injured by a violation of this section. The statute of limitations for GBL § 349 is the three-year limitations period which applies to an action to recover upon a liability, penalty, or forfeiture created or imposed by statute (CPLR § 214[2]; *Gaidon v Guardian Life Ins. Co. of America*, 96 NY2d 201, 208 [2001]). A cause of action accrues under GBL § 349 and begins to run from the time when the plaintiff is injured (*Corsello v Verizon New York*, 18 NY3d 777, 789-790 [2012] [clarifying and explaining *Gaidon*]; *Salvaggio v American Exp. Bank, FSB*, 129 AD3d 816 [2d Dept 2015]). Furthermore, the

time to make a claim under GBL § 349 is not tolled or delayed until the plaintiff learns, or reasonably should have learned, of the violation of the statute (*id.*).

While plaintiff has argued in its opposition to defendants' motion that defendants' alleged dishonesty and misrepresentations were directed not only to plaintiff but to the general public, and therefore presumably a violation of GBL § 349, plaintiff has not challenged or presented any argument against defendant's statute of limitations defense. Accordingly, that portion of defendants' summary judgment motion which seeks to dismiss plaintiff's fifth cause of action for defendants' violation of General Business Law § 349 is granted.

Plaintiff's Claims for Compensatory and Punitive Damages

In his Complaint, plaintiff seeks compensatory damages in the amount to be determined at trial in a sum not less than \$165,000.00 on his first, second, third, fourth, and fifth causes of action and for punitive damages "in a sum to be determined at trial to be reasonably proportionate to the damages inflicted and suffered by Plaintiff" on his third, fourth, and fifth causes of action. In their motion for summary judgment, defendants seek to dismiss plaintiff's punitive damages claims. Since this Court is granting defendants' motion to dismiss plaintiff's fourth and fifth causes of action, the punitive damages claims under those causes of action are also dismissed.

Defendants also seek to dismiss plaintiff's punitive damages claims on the independent basis that such damages are not available for a private wrong including ordinary fraud, citing *Mom's Bagels of N.Y. v Sig Greenebaum, Inc.* (164 AD2d 820, 823 [1st Dept 1990], appeal dismissed 77 NY2d 902 [1991] [citing *Walker v Sheldon*, 10 NY2d 401, 405 [1961]. See also, *Chase Manhattan Bank, N.A. v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d 1, 6 [1st Dept 1999]). Plaintiff argues in his opposition papers that defendants' fraud was

perpetrated not only upon him but that defendants' fraudulent business practices aimed at the general public (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion ["Plaintiff's Memo of Law in Opp.,"] at pp. 38-39). In addition, plaintiff cites the unpublished decision of *Serbetcioglu v R.N. Joseph Fine Jewelry LLC*, 2011 NY Slip Op 30687(U) which involved the same defendants in an action by a different plaintiff alleging that defendants sold him a number of purportedly antique items including several fake Fabergé items. In that case, the plaintiff also alleged that the defendants represented that the items they sold him were authentic Fabergé or otherwise antique, while defendants claimed they did not represent the items as genuine, authentic Fabergé items.

In *Serbetcioglu*, Justice Judith J. Gische, J.S.C., denied defendants' post-answer CPLR § 3211(a) motion to dismiss plaintiff's third cause of action for fraudulent inducement, fourth cause of action for unjust enrichment and fifth cause of action for violation of GBL § 349. Justice Gische, noting that on a CPLR § 3211(a) motion to dismiss, "the court must 'accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88[1994])" (*6). In addition, the court stated that the issue in such a motion to dismiss, "is whether plaintiff has stated a claim . . . with sufficient particularity, and not . . . whether there is merit to this claim" (*id.*).⁵ The *Serbetcioglu* court held that questions regarding plaintiff's

5. In contrast, on a motion for summary judgment the standard of review for a summary judgment motion is different as the movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Once the movant has provided such proof, in order to defend the summary judgment motion the opposing party must "show facts sufficient to require a trial of any issue of fact" (CPLR § 3212(b); *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists (*Kuehne & Nagel, Inc. v F.W.*

knowledge and the reasonableness of his reliance on defendants' alleged representations were fact intensive and required discovery (*9).

This Court has also determined that questions regarding plaintiff's knowledge and the reasonableness of his reliance on defendants' alleged representations in our case preclude summary judgment on plaintiff's third cause of action for fraudulent inducement. However, the *Serbetcioglu* court's denial of the dismissal of the fourth and fifth causes of action are distinguishable from our case since there were no statute of limitations issues in *Serbetcioglu* which are present in this case. In addition, in *Serbetcioglu*, plaintiff had requested a certificate of authenticity of the items he purchased and which he alleged defendants promised to provide but failed to do so (*id.* at *3-4). In our case, plaintiff failed to request such a certificate of authenticity and was provided with the appraisal he requested.

Furthermore, while plaintiffs in both *Serbetcioglu* and the instant case have pled that defendants engaged in a consumer-oriented act or practice that was deceptive or misleading in a material way, directed at the general public, and that the plaintiff was injured by reason of such act or practice, this allegation and claim is made in both cases within the context of the fifth cause of action for violation of GBL § 349 (*Serbetcioglu* at *11-12; Complaint at ¶¶ 73-75).⁶ As that cause of action is being dismissed in our action on statute of limitations grounds, which was not a factor in *Serbetcioglu*, there is no longer any surviving claim of fraud upon the public in the instant case.

Baiden, 36 NY2d 539 [1975]).

6. It should be noted that the damages available under GBL § 349 is limited to actual damages or fifty dollars, whichever is greater, and the court also has the discretion to award punitive damages by increasing the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section (GBL § 349[h]; *Serbetcioglu* at *12-13).

Plaintiff's third cause of action for fraudulent inducement which is the sole remaining cause of action, only alleges that the alleged fraud was directed at the plaintiff and not to the public at large.

To the extent that plaintiff is alleging that punitive damages are available for actions that are "reprehensible, morally bankrupt" or "has circumstances of aggravation and outrage" (*id.* at pp. 37-38), such allegations were not made in his third cause of action but was raised for the first time in his opposition to defendants' motion. Finally, plaintiff has not shown or even alleged that defendants do not offer or sell any actual "authentic, genuine, original Fabergé antiques" but have only alleged that defendants misrepresented and misled him to purchase non-authentic or imitation Fabergé style items. Defendants freely admit that they sell Fabergé style items but assert that also sell authentic, genuine, and original Fabergé items and that they inform buyers of the difference between the two (Safdieh Aff. at ¶¶ 5, 9 and 10).

Accordingly, the portion of defendants' motion for summary judgment which seeks to dismiss all of plaintiff's claims for punitive damages is granted.

Dismissal of Complaint As Against Defendant R.N. Joseph Fine Jewelry LLC

Defendants have also moved to dismiss all claims against named defendant R.N. Joseph Fine Jewelry LLC ("RN Fine Jewelry") on the grounds that this entity was not formed until August 21, 2006, approximately four years after plaintiff transaction to place (Safdieh Aff. at p. 2, n 1). In support of this assertion, defendants have attached Exhibit "H" to the Affirmation of Defendants' Counsel David J. Wolkenstein, Esq., in Support of Defendants Motion for Summary Judgment ("Wolkenstein Aff. in Support") which is a printout from the NYS Department of State, Division of Corporations, Entity Information current through of April 10, 2014 showing that R.N. Joseph Fine Jewelry LLC was issued DOS ID # 3402804 and the Initial DOS Filing Date was August 21, 2006.

Since plaintiff has neither challenged this portion of defendants' motion nor pled successor liability, this portion of the defendants' motion for summary judgment is granted without opposition.

CONCLUSION

Based upon the above discussion, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing all of plaintiff's causes of action against defendant R.N. Joseph Fine Jewelry LLC only, and it is further

ORDERED that defendants' motion for summary judgment is also granted to the extent of dismissing plaintiff's first cause of action for breach of contract, plaintiff's second cause of action for breach of warranty, plaintiff's fourth cause of action for unjust enrichment, and plaintiff's fifth cause of action for violation of General Business Law § 349 and those causes of action are hereby dismissed; and it is further

ORDERED that the portion of defendants' motion for summary judgment dismissing plaintiff's third cause of action for fraudulent inducement is denied at this time without prejudice; and it is further

ORDERED that the parties shall appear for a conference on September 21, 2015 at 11:00 A.M. to establish a continued discovery schedule.

The foregoing constitutes the decision and order of this Court.

ENTER:

Shlomo Hagler
J.S.C.

Dated: July 28, 2015
New York, New York

Hon. Shlomo S. Hagler, J.S.C.