

LSF6 Mercury Reo Inv., LLC v Levin

2012 NY Slip Op 33410(U)

November 13, 2012

Sup Ct, New York County

Docket Number: 101768-2012

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

LSF6 MERCURY REO INVESTMENTS, LLC,

Plaintiffs,

INDEX NO. 101768-2012

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

RICHARD LEVIN,

Defendants.

FILED
NOV 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion for/to

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: Yes **X** No

Plaintiff, the successor in interest for CIT Group, Inc., engaged Defendant Richard Levin to perform an appraisal of property located at 152 Ridgewood Terrace in Chappaqua, New York. It is alleged that Defendant submitted an appraisal on January 17, 2006, that overvalued the property by approximately \$90,000. Plaintiff allegedly discovered that the property had been overvalued on December 8, 2011, when a retroactive appraisal was done on the property. Plaintiff

filed a verified complaint on February 17, 2012, alleging 9 causes of action sounding in negligence, fraud, negligent misrepresentation, breach of contract, breach of express warranty, breach of implied warranty, negligence per se, unlawful, deceptive and/or unfair business practices, and punitive damages.¹

Defendant Richard Levin moves to dismiss on a number of grounds pursuant to CPLR §3211(a)(1), (5), (7) and (8) on the grounds that Plaintiff's claims are barred by the statute of limitations, documentary evidence establishes that the court lacks personal jurisdiction over the defendant, and that the complaint fails to state a cause of action.

CPLR §214(6), the professional malpractice statute, applies to Defendant Richard Levin, as he is a licensed appraiser. Those qualities shared by a group guide us in defining the term "professional". "(*Chase Scientific Research v. Nia Group, Inc.*, 96 NY2d 20, 749 NE2d 161, 725 NYS2d 592 [2001]) "In particular, those qualities 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." *Id.* "Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise." *Id.* A licensed appraiser is required to satisfy extensive educational and experiential requirements, and to pass a written examination. To renew their license, they must complete 28 hours of continuing education every two years. As such, a licensed appraiser falls within the criteria of a "professional" and is thus subject to CPLR §214(6).

Pursuant to CPLR §214(6), a cause of action for negligence is subject to the three year statute of limitations applicable to non-medical professionals. (*See, Early v. Rossback*, 262 AD2d 601, 692 NYS2d 465 [2ndDept 1999]). Defendant submitted the appraisal on January 17, 2006 and the suit was commenced on February 17, 2012. Since statute of limitations begins to run from the date the

¹ LSF6 Mercury Reo Investments, LLC, brought a motion on strikingly similar grounds against different Defendants before the Honorable Judge Mendez on January 26, 2012. This decision is consistent with Judge Mendez's reasoning from his August 3, 2012 decision. Judge Mendez's decision has not been appealed.

appraisal was submitted, the negligence, negligent misrepresentation and negligence per se causes of action are barred by the applicable statute of limitations and are 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.”(See, CPLR 213[8]). 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 AD3d 756, 925 NYS2d 135 [2nd Dept 2011]). Therefore, the cause of action for fraud, which arose in 2006, is untimely as filed in 2012.

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 NY3d 538, 821 NE2d 952, 788 NYS2d 648 [2004]). The cause of action accrued and the statute began to run at the time of the alleged breach, January 17, 2006. Since the lawsuit was not commenced until February 17, 2012, the breach of contract claim is untimely.

“An action for breach of 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 AD2d 383, 597 NYS2d 52 [1st Dept 1993]). However, no warranty attaches to the performance of a service.

Defendant provided a service to Plaintiff on January 17, 2006. The statute for breach of implied or express warranty expired on January 17, 2010, but suit was not commenced until 2012. Additionally, since Defendant provided a service, a cause of action for breach of an express or implied contract was never established.

Moreover, pursuant to CPLR §214[2], the three year statute of limitations

has expired for Plaintiff's cause of action for unlawful, deceptive and unfair business practices.

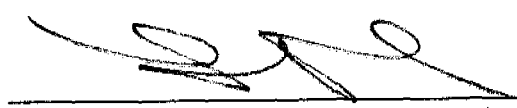
Finally, New York does not recognize an independent cause of action for punitive damages. Since it is not attached to any substantive action, it is dismissed. (*Randi A.J. v. Long Island Surgl-Ctr*, 46 AD3d 74, 842 NYS2d 558 [2nd Dept 2007]).

Wherefore, it is hereby,

ORDERED that the motion is granted; and it is further,

ORDERED that the complaint against Defendant Richard Levin is dismissed in its entirety.

Dated: November 13, 2012


HON. EILEEN A. BAROWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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