

**LSF6 Mercury Reo Investments LLC v Platinum
Appraisals**

2013 NY Slip Op 31464(U)

July 3, 2013

Sup Ct, NY County

Docket Number: 153196/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ELLEN M. COIN
J.S.C. Justice

PART 63

Index Number : 153196/2012
LSF6 MERCURY REO INVESTMENTS
vs.
PLATINUM APPRAISALS
SEQUENCE NUMBER : 001
DISMISS

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.**

*This constitutes the decision and order of
the Court.*

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

Dated: 7/3/13

Ellen M. Coin 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

-----X

LSF6 MERCURY REO INVESTMENTS LLC,

Plaintiff,

Index No.:153196/2012
Subm. Date: 4/10/2013
Mot. Sequence: 001
DECISION AND ORDER

-against-

PLATINUM APPRAISALS and JOSEPH BARRARA,

Defendants.

-----X

Appearances:

For Plaintiff
Belluck & Fox, LLP
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For Defendants:
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Papers considered in review of this motion:

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Affirmation in Opposition..... | <u>2</u> |
| Reply Affidavit..... | <u>3</u> |

ELLEN M. COIN, J.:

In this action, plaintiff LSF6 Mercury Reo Investments LLC seeks to recover damages it allegedly suffered as a result of a faulty real estate appraisal conducted by defendants Platinum Appraisals and Joseph Barrara. Defendants move pursuant to CPLR §3211(a)(1), (5) and (7) to dismiss the complaint.

The complaint alleges that sometime prior to October 3, 2006, plaintiff's predecessor-in-interest, CIT Group, Inc., a real estate lender, contracted with defendants, licensed real estate appraisers, to conduct an appraisal of the property

located at 9419 211th Street, Queens, N.Y. (property). The property was owned by Gandi Ramlochan (Ramlochan), who was seeking a home improvement loan. Defendants provided an Appraisal Report, dated October 3, 2006, in which they valued the property at \$565,000.00. Plaintiff claims that in "full reliance" on the appraisal, plaintiff's predecessor-in-interest approved a loan to Ramlochan. (Complaint, ¶ 11).

Ramlochan subsequently defaulted on the mortgage. According to the complaint, plaintiff's predecessor-in-interest commenced foreclosure proceedings, and, on May 29, 2009, charged off the loan. Plaintiff claims that it "reduced the asset on its general ledger, but kept the balance with the intention of pursuing collection of said remaining balance." (Complaint, ¶ 13). It is not stated whether the property was ever sold.

Plaintiff complains that defendants failed to provide "a competent and accurate appraisal of the fair market value of the property" (*id.*, ¶ 22), in that the true market value of the property was only \$430,000.00. Plaintiff alleges that "[b]ut for the inflated appraisal values of the property, Plaintiff's predecessor-in-interest would not have refinanced the mortgage loan on the terms by which it was made and Plaintiff would not have subsequently suffered a loss from the loan." (*Id.*, ¶ 16).

Plaintiff's complaint, filed in May 2012, sets forth causes of action for negligence (first cause of action); fraud (second

cause of action); negligent misrepresentation (third cause of action); breach of contract (fourth cause of action); breach of express warranty (fifth cause of action); breach of implied warranty (sixth cause of action); negligence per se (seventh cause of action); unfair business practices under General Business Law § 349 (eighth cause of action); and punitive damages (ninth cause of action). At oral argument of the motion, plaintiff withdrew its causes of action for negligence, negligence per se, and violation of General Business Law §349.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1994]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110, 1111 [2nd Dept 2011], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion brought pursuant to CPLR §3211(a)(1) “may be granted where ‘documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of

law.'" (*Held v Kaufman*, 91 NY2d 425, 430-31 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007])["[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"] [citations omitted]). Pursuant to CPLR §3211(a)(5), claims can be dismissed as barred by the statute of frauds.

Defendants first move to dismiss the causes of action for fraud, negligent misrepresentation, and breach of contract on the ground that they are all barred by the statute of limitations. Defendants maintain that these causes of action are subject to the three-year statute of limitations as found in CPLR §214(6), for claims alleging professional malpractice. Plaintiff maintains that CPLR §214(6) does not apply, because real estate appraisers are not "professionals" for purposes of the statute.

CPLR §214(6) states that a three-year statute of limitations applies to "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort." CPLR §214(6) does not define "malpractice."

A cause of action for fraud is generally governed by a six-year statute, running from the date of the fraud, or a two-year statute, running from the date the fraud was discovered, or could have been discovered by reasonable means. (CPLR §213 (8); *House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3d 848, 849

[2nd Dept 2013]). A cause of action for negligent misrepresentation is generally subject to a six-year statute as well. (*14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp.*, 78 AD3d 431, 432 [1st Dept 2010]). Breach of contract generally allows for a six-year statute, running from the date of the breach. (CPLR §213(2); *Meadowbrook Farms Homeowners Assn., Inc. v JZG Resources, Inc.*, 105 AD3d 820,822 [2d Dept 2013]).

The applicable statute of limitations is governed by the "gravamen" of the claim. (See *Scott v Fields*, 85 AD3d 756, 758 [2nd Dept 2011]). Hence, where a claim for fraud or misrepresentation is "merely incidental" to a claim for negligence or malpractice, the three-year statute for malpractice will govern. (*Nickel v Goldsmith & Tortora, Attorneys at Law, P.C.*, 57 AD3d 496, 496-97 [2nd Dept 2008]; see also *Frumento v On Rite Co., Inc.*, 66 AD3d 828, 830 [2nd Dept 2009][the "reality" or "essence" of a claim, "not its form" determines whether it will be treated as a cause of action for fraud or for negligence] [internal quotation marks and citation omitted]). Similarly, a breach of contract which is really a restatement of a professional malpractice claim will be governed by the three-year statute applicable to such claims. (*Matter of R.M. Kliment & Francis Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 541-42 [2004]).

These precedents are important, because plaintiff's claims for fraud, negligent misrepresentation and breach of contract are all based on the same allegations that the defendants did not act with prudence in fulfilling their agreement with plaintiff. Defendants argue that all three of these claims are subject to the three-year statute of limitations in CPLR §214(6), applicable to professional malpractice.

While plaintiff argues that appraisers are not professionals who can get the benefit of CPLR §214(6), the issue has already been decided to the contrary. In *Early v Rossback* (262 AD2d 601 [2nd Dept 1999], *revd on other grounds in Brothers v Florence*, 95 NY2d 290 [2000]), the Court held, without discussion, that CPLR §214(6) applied to real estate appraiser malpractice. Other cases have also found appraiser malpractice to be governed by CPLR §214(6). (See *Locafrance U.S. Corp. v Daley-Hodkin Corp.*, 60 AD2d 804 [1st Dept 1978][appraisers of electronic equipment]; *Kitchen v Sothebys*, 18 Misc 3d 1132(A) (Civ Ct, New York County 2008)[art appraisers]).¹ Therefore, this court finds that

¹ See *LSF6 Mercury Reo Invs., LLC v Mitchell Assocs.* (Index No. 100845/12)(Mendez, J.), in which the plaintiff herein brought a nearly identical claim against a real estate appraiser (holding three-year statute of limitations for malpractice applicable to plaintiff's claims for fraud, negligent misrepresentation and breach of contract). See also *LSF6 Mercury Reo Invs., LLC v Midrome Inc.* (Index No. 101966/12)[Billings, J.], *LSF6 Mercury REO Invs. LLC v Richard Levin* (Index No. 101768/12)[Rakower, J.], *LSF6 Mercury Reo Invs., LLC v Home Safe Appraisals Corp.* (Index No. 153197/12)[Rakower, J.], *LSF6 Mercury Reo Invs., LLC v JL Appraisal Service* (Index No. 152648/120 [Mendez, J.] and *LSF6 Mercury Reo Invs., LLC v Tri-State Appraisal Group* (Index No. 153373/12)[Singh, J.]. This is not an exhaustive list of untimely actions that plaintiff brought against appraisers in this court last year.

plaintiff's claims for fraud, negligent misrepresentation and breach of contract are effectively a claim for professional malpractice and are time-barred, as each of the claims arose in October 2006 upon issuance of the Appraisal Report.

Plaintiff may not evade the malpractice statute of limitations on the ground that it withdrew its claims for negligence and negligence per se at oral argument. It is evident that these claims would have been dismissed as time-barred, and plaintiff's strategic choice to eliminate these claims does not change the fact that critical causes of action are based in actuality on professional malpractice, regardless of whether there is such a claim expressly remaining in the action.

Plaintiff also fails to allege a cause of action for fraud, under CPLR §3211(a)(7), as good faith appraisals, albeit inaccurate, are not actionable in fraud, because they are matters of opinion. (*Newman v Wells Fargo Bank, N.A.*, 85 AD3d 435, 435 [1st Dept 2011]; see also *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 450 [1st Dept 2009], *affd* 16 NY3d 173 [2011]).

Plaintiff has also failed to state a claim for breach of either express or implied warranty. The court notes that plaintiff fails, in its opposition to the motion, to defend its cause of action for implied warranty, which is therefore dismissed. But, further, a cause of action for negligence in the performance of an express or implied warranty cannot be based on

an agreement to perform services. (See *Jones v Rochdale Village, Inc.*, 96 AD3d 1014, 1018 [2nd Dept 2012]; *Mallards Dairy, LLC v E & M Engrs. & Surveyors, P.C.*, 71 AD3d 1415, 1417 [4th Dept 2010]).

Plaintiff's remaining claim is for punitive damages. There is no independent cause of action for punitive damages (*Rivera v City of New York*, 40 AD3d 334, 344 [1st Dept 2007]), and, in any event, no cause of action remains to which to attach such a claim.

In accordance with the foregoing, it is hereby


ORDERED that the motion of defendants Platinum Appraisals and Joseph Barrara is granted, and the complaint is dismissed with costs and disbursements to these parties as calculated by the Clerk of this Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: July 3, 2013

ENTER:



Ellen M. Coin, A.J.S.C.