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<b>Corona Treasures LLC v Star Home Designs, LLC</b>
2013 NY Slip Op 52294(U)
Decided on December 11, 2013
Supreme Court, Kings County
Schmidt, J.
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Decided on December 11, 2013

**Supreme Court, Kings County**

**Corona Treasures LLC, D/B/A GREAT AMERICAN CLASSICS,  
Plaintiffs,**

**against**

**Star Home Designs, LLC, RIZWAN KHAN, STACY KHAN,  
RICHARD FEDERMAN, and UNIVERSAL ARK ENTERPRISES,  
Defendants.**

502966/2012

Plaintiff's Attorney: Dmitry Tayts, 44 Court Street, Suite 906, Brooklyn NY 11201

Moving Defendants' Attorney: Floyd Sarisohn; Sarisohn Law Partners: 350 Veterans Memorial Hwy, Commack, NY 11725

David I. Schmidt, J.

Defendants Star Home Designs, LLC (Star Home), Rizwan Khan (Rizwan), Stacy Khan (Stacy) and Richard Federman (Federman) (collectively, moving defendants) move, pursuant to CPLR 3211(a)(5), to dismiss the claims asserted against them by plaintiff Corona Treasures, LLC, D/B/A Great American Classics (Corona) on the ground that the causes of action asserted against them are barred by the statute of limitations. [\[FN1\]](#) Corona opposes.

For the reasons that follow, the motion is granted in part and denied in part.

## **I. Background**

This action, to recover damages in the amount of \$170,000 plus interest and disbursements, arises out of an alleged agreement in which "Plaintiff agreed to purchase and Defendants agreed to sell and deliver merchandize (sic) and/or goods." Compl. ¶ 7. Each of the moving defendants are alleged to have "acted as an agent and/or intermediary for Defendant Universal [], in shipping, delivering, and selling the goods sold and delivered to [Corona]." *Id.*, ¶¶ 10-13. The goods were delivered sometime between October and December 2007 and were discovered to be defective by Corona around that time. *Id.*, ¶¶ 7, 18. Upon discovery of the defects, Corona allegedly notified the defendants of its rejection of the goods. *Id.*, ¶ 15. Corona further alleges that defendants acknowledged the defects and promised to exchange or refund the defective goods. *Id.*, ¶¶ 16-19. The causes of action asserted against the moving defendants — [\[\\*2\]](#) for breach of contract, unjust enrichment, conversion, fraud and fraudulent concealment — are based on Corona's claim that the moving defendants, despite their promise, "failed to take possession of said defective goods and have wrongfully taken [Corona]'s money with respect to this transaction." *Id.*, ¶ 22.

Corona commenced the instant action with the filing of a summons with notice on September 24, 2012.

## **II. Discussion**

Defendants move to dismiss the action, as asserted against them, based primarily on their contention that the statute of limitations period in which to bring breach of contract claims has expired. [\[FN2\]](#) Specifically, the moving defendants argue that this action is for goods sold and delivered and is therefore governed by Article 2 of the Uniform Commercial Code (UCC). In making this argument, the moving defendants point to allegations in the complaint which describe an agreement between Corona and defendants for the sale and delivery of goods. *See e.g.* Compl. ¶

7. Consequently, any breach of contract claim relating to this agreement is, according to moving defendants, subject to the 4-year statute of limitations set forth in UCC § 2-725(1) and not the 6-year limitations period set forth in CPLR 213(2). Thus, even giving Corona the benefit of the latest date by when its cause of action accrued, December 2007 (when defendants are alleged to have acknowledged the defects), the limitations period for Corona's breach of contract claim expired in December 2011, nine months prior to the commencement of the instant action.

Going further, the moving defendants maintain that since all the causes of action are premised in one form or another on the same allegation as the breach of contract claim, *i.e.*, Corona's receipt of allegedly defective goods, the remaining claims are also subject to the 4-year limitation period and must be dismissed. [\*See Wuhu Import & Export Corp. v Capstone Capital, LLC\*, 39 AD3d 314, 315 \(1st Dept 2007\)](#) (affirming dismissal of claims for breach of contract, fraud, unjust enrichment, and conversion, because "the causes of action in the complaint are all premised on the same allegation, namely, nonpayment for goods, thus invoking the four-year statute").

In opposition, Corona argues, *inter alia*, that moving defendants are "non-sellers" and that the only defendant entitled to defend under the UCC "would be non-answering Defendant, Universal Ark Enterprises," a company based in India. *See* affirmation in opposition of Dmitry Tayts (Tayts *aff.*), dated January 11, 2013, ¶¶ 3-4. In support, Corona submits the affidavit of its managing member, Chaim Freund, who testifies that his relationship with defendants was the result of his efforts to make Corona more competitive in the local New York market through the purchase of (cheaper) goods from abroad. *See* affidavit of Chaim Freund, sworn to January 10, 2013 (Freund *aff.*), ¶ 5. With respect to the moving defendants, Freund details that:

1. His search to locate overseas sellers led him to defendant Rizwan.

2. At their first meeting, Rizwan indicated that he was capable of providing Corona with a significant amount of goods from India which would be delivered to Corona by an Indian [\*3] company and that any problems that Corona might have with the Indian company would be resolved by the moving defendants.

3. In exchange for the connection moving defendants were making for him with the as yet unidentified Indian company, Freund was required to make payments to moving defendants that were separate and apart from the payments Corona would be making to the Indian company supplying the goods.

4. In October 2007, Freund was advised by the moving defendants that Corona should purchase the goods it was seeking from defendant Universal.

*Id.*, ¶¶ 6-8.

It is Corona's position that, based on the allegations in the complaint and the testimony in the Freund affidavit (and exhibits annexed thereto, including the invoices Corona received from Universal), there are questions of fact as to whether or not moving defendants were the sellers of the goods purchased by Corona. As such, Corona argues that moving defendants have not met their prima facie burden of demonstrating that the claims against them are governed by the UCC's 4-year statute of limitations, and therefore, the motion must be denied.

In reply, moving defendants assert that they have met their prima facie burden. They point, in particular, to paragraph 7 of the complaint, which alleges that: "On . . . October 2007 and thereafter, Plaintiff agreed to purchase and Defendants agreed to sell and deliver merchandize [sic] and/or goods." Moving defendants place particular emphasis on the fact that, in this allegation, Corona does not differentiate among the various defendants, lumping them all together in a class of sellers. As to the allegations in the complaint describing each of the moving defendants as agents or intermediaries for Universal, the moving defendants counter that, as an agent, they would be entitled to the same remedies as a disclosed principal (Universal). With respect to the allegations that they may have acted in some other capacity, moving defendants argue, in a footnote, that the word "intermediary" is a "meaningless" and "cover all your bases" description that "can mean anything and nothing." *See* reply affirmation, ¶ 10, n 1.

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." [\*Island ADC, Inc. v Baldassano Architectural Group, P.C.\*, 49 AD3d 815](#), 816 (2d Dept 2008) (internal citations omitted). "Further, plaintiff's submissions in response to the motion must be given their most favorable intendment." [\*Benn v Benn\*, 82 AD3d 548](#), 548 (1st Dept 2011) (citation and internal quotation marks omitted).

Applying these standards to the instant action, moving defendants have failed to meet their initial burden of establishing that the shorter limitations period of UCC Article 2 governs the claims asserted against them. In the first instance, moving defendants rely too heavily on a single allegation in the complaint (paragraph 7) to claim the status of sellers, to the exclusion of other

allegations that suggest that they acted in another capacity, *i.e.*, as some kind of intermediary for the alleged seller. Tellingly, the moving defendants do not dispute Freund's [\*4] assertion, supported by documentary evidence, that he purchased the goods directly from Universal (*see* Freund aff., Exs. 1 and 4 [invoices from Universal]) and that the payments that were made to moving defendants were not for the goods themselves but were essentially a finder's fee. Conspicuously absent from moving defendants' motion papers is any evidence, other than the complaint itself, that demonstrates, or even gives some indication, that they are the sellers of the goods Corona purchased. [EN3] If anything, moving defendants appear to assiduously avoid describing the nature of their relationship with Universal.

Resolving all inferences in favor of plaintiff, the complaint raises questions as to the role moving defendants played in the transaction that is not answered by any of moving defendants' submissions. Thus, whether the contract claims asserted against moving defendants are governed by the 4-year limitations period under UCC § 2-725(1), or the 6-year period provided by CPLR 213(2), is an issue of fact that cannot be determined on this motion. Consequently that branch of moving defendants' motion seeking dismissal of all of the claims pursuant to UCC § 2-725(1), must be denied.

However, the remaining branches of moving defendants' motion, which seek dismissal of the conversion claims because they fail to state a cause of action and dismissal of the fraud claims because they are duplicative of the contract claims, must be granted.

Turning first to the conversion claims (asserted against defendants Star Home and Rizwan), the complaint alleges a conversion of the money paid by plaintiff to these defendants. Compl. ¶¶ 35, 56. However, this cause of action cannot be sustained, as plead, because the money alleged to have been converted is not sufficiently identifiable and is therefore not the proper subject of a conversion action. *See 9310 Third Ave. Assoc. v Schaffer Food Serv. Co.*, 210 AD2d 207, 208 (2d Dept 1994).

Furthermore, even if there was a valid cause of action for the conversion of money, it would be barred by the three-year statute of limitations set forth in CPLR 214(3). *See Jones v. Community Bank of Sullivan County*, 306 AD2d 679, 680 (3d Dept 2003). Reading the complaint and the Freund affidavit generously, the last time any payment was made to these defendants was in December 2008. *See e.g.* Freund aff., ¶¶ 13, 20. Thus, pursuant to CPLR 214(3), the three year period of limitations within which Corona could have properly brought this cause of action expired in December 2011, prior to the commencement of this action on September 24, 2012. Having failed

to commence the action within the required limitations period, the causes of action for conversion asserted against Star Home and Rizwan must be dismissed.

The causes of action for fraud and fraudulent concealment must also be dismissed. Under New York law, a claim to recover damages for fraud based upon an alleged breach of contract, where the allegations of the complaint do not concern representations which are collateral or extraneous to the terms of the agreement, will not support a cause of action sounding in fraud. [\*5] *McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233, 234 (2d Dept 1991). Here, the only fraud alleged relates directly to the moving defendants' alleged breach of contract. *Compare* Compl. ¶ 25 (contract cause of action) ("Defendant Star Home has failed to heed and/or otherwise ignored Plaintiff's requests to return and/or take the rejected goods from Plaintiff) *with* Compl. ¶ 39 (fraud cause of action) ("Although plaintiff relied on Defendant Star Home's promises to refund the moneys paid and/or accept the defective goods shipped to Plaintiff, Star Home failed to do so"). As there are no fraud allegations which are collateral to or extraneous to the alleged agreement between the parties, the causes of action for fraud and fraudulent concealment are dismissed.

Accordingly, it is

**ORDERED** that defendants Star Home Designs, LLC, Rizwan Khan, Stacy Khan and Richard Federman's motion to dismiss the complaint as asserted against them is granted insofar as the causes of action for conversion, fraud and fraudulent concealment are dismissed; and is otherwise denied.

Dated: December 11, 2013

ENTER:

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J.S.C.

### Footnotes

**Footnote 1:** Defendant Universal Ark Enterprises (Universal) has not appeared in this action.

**Footnote 2:** In addition, and as will be discussed below, the moving defendants offer other grounds on which the court can dismiss individual causes of action.

**Footnote 3:** Under UCC Article 2, " Seller' means a person who sells or contracts to sell goods." UCC § 2-103(1)(d). Also instructive is the UCC's definition of "sale," which is "the passing of title from the seller to the buyer for a price." UCC § 2-106(1). This definition supports the proposition that a person is not a seller of goods unless one had some kind of ownership rights in them. Moving defendants here make no such claim.