297 A.D.2d 621, 747 N.Y.S.2d 35, 49 UCC Rep.Serv.2d 185, 2002 N.Y. Slip Op. 06327

Joseph R. **Imperia et** al., Appellants,
v.
Marvin Windows of **New York**, Inc., **et** al., Respondents.

Supreme Court, Appellate Division, Second Department, **New York**
2000-10404, 2001-04790, 20240/98
(September 9, **2002**)

CITE TITLE AS: **Imperia** v **Marvin Windows** of N.Y.

HEADNOTE

LIMITATION OF ACTIONS
FOUR-YEAR STATUTE OF LIMITATIONS
Breach of Express Warranty

() Motion for summary judgment dismissing cause of action alleging breach of express warranty denied --- there is question of fact as to whether defendants expressly warranteed future performance of products treated with specialty coatings --- express warranty can arise from literature published about product; since defendants sold specialty coating for premium as addition to underlying product, and sole purpose of specialty coating was to extend life of product, "very nature of the product implies performance over an extended period of time"; plaintiffs are entitled to opportunity to prove that defendants guaranteed that coating would work for specified period of time; such warranty would not be barred by general disclaimers of warranty that accompanied sale of products.

In an ***622** action, inter alia, to recover damages for breach of contract and breach of warranty, the plaintiffs appeal, as limited by their brief, from so much of (1) an order of the Supreme Court, Westchester County (Rudolph, J.), entered October 12, 2000, as granted those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging breach of contract, breach of warranty, and fraud, and denied their cross motion for leave to amend their complaint as to the causes of action alleging breach of contract and breach of warranty and to compel discovery, and (2) an order of the same court entered May 7, 2001, as denied those branches of their motion which were for leave to renew their cross motion and to add a cause of action to impose a constructive trust.

Ordered that the order entered October 12, 2000, is modified by (1) deleting the provision thereof granting that branch of the motion which was for summary judgment dismissing the cause of action alleging breach of express warranty and substituting therefor a provision denying that branch of the motion, and (2) deleting the provision thereof denying those branches of the plaintiffs' cross motion which were to amend the cause of action to recover damages for breach of warranty and to compel discovery, and substituting therefor provisions granting those branches of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the appeal from so much of the order entered May 7, 2001, as denied that branch of the plaintiffs' motion which was for leave to renew is dismissed as academic, without costs or disbursements; and it is further,

Ordered that the order entered May 7, 2001, is affirmed insofar as reviewed, without costs or disbursements.

From 1989 through 1992, the plaintiffs purchased so-called **Marvin windows** and doors covered with a "flexacron" coating for installation in their home. The plaintiffs paid an additional 10% over the purchase price of the **windows** and doors for the flexacron coating, and allegedly were told by representatives of the defendants and by the product literature that the coating would last much longer than paint and that their **new windows** and doors would be maintenance-free. Problems with paint failure around the **windows** appeared as early as 1994, and in the spring of 1997, the plaintiffs became aware that some of the **Marvin windows** and doors they installed in their home had decayed, damaging the surrounding structure of the house. Although the defendants assured the plaintiffs in the spring of 1998 that they would replace the failed **windows** and doors and ***623** reimburse them for their consequential losses, the defendants later declined to cover consequential losses.

The plaintiffs commenced this action in December 1998, alleging, inter alia, breach of contract, breach of warranty, and fraud. The defendants moved for summary judgment dismissing the complaint, inter alia, on the ground that the statute of limitations had expired. The Supreme Court granted the motion and dismissed the plaintiffs' complaint in its entirety. The plaintiffs appeal.

While an action sounding in breach of warranty must be commenced within four years after the cause of action has accrued (*see* UCC 2-725), which is usually upon delivery of the goods, an exception is made "where a warranty explicitly extends to [the] future performance of the goods and discovery of the breach must await the time of such performance" (UCC 2-725 [2]). In the event of a warranty of future performance, the cause of action accrues when the breach is or should have been discovered (*see* UCC 2-725 [2]; *Mittasch v Seal Lock Burial Vault,* 42 AD2d 573). "A warranty of future performance is one that guarantees that the product will work for a specified period of time" (*St. Patrick's Home for Aged & Infirm v Laticrete Intl.,* 264 AD2d 652, 657).

Contrary to the conclusion of the Supreme Court, we find that the plaintiffs' opposition to the defendants' motion for summary judgment was sufficient to raise a question of fact as to whether the defendants expressly warrantied future performance of the products treated with the specialty coatings (*see Mittasch v Seal Lock Burial Vault, supra; see also Parzek v New England Log Homes,* 92 AD2d 954). The plaintiffs alleged that, before purchasing the **windows** and doors, they had numerous meetings with the defendants' representative who told them that with the flexacron coating, the **windows** and doors would be maintenance-free for 10 years and would be accompanied by a 10-year warranty. The representative gave them brochures and product literature containing, inter alia, the assurance that the flexacron finish "lasts four to five times as long as paint" and that products treated with the flexacron prefinish were "maintenance-free" and would resist "cracking, blistering or peeling even under the toughest conditions." The plaintiffs alleged that they relied upon these representations in agreeing to purchase all of their **windows** and doors with the flexacron coating.

An express warranty can arise from the literature published about a product (*see Wiltshire v Robins Co.,* 88 AD2d 1097; *Friedman v Medtronic, Inc.,* 42 AD2d 185). Under the circumstances ***624** of this case, where the defendants sold a specialty coating for a premium as an addition to the underlying product, and the sole purpose of the specialty coating was to extend the life of the product, "the very nature of the product implies performance over an extended period of time" (*Mittasch v Seal Lock Burial Vault, supra* at 574). Although the warranty period is not precisely defined, the language in the brochure made specific reference to the future, and the length of the warranty period can be the subject of proof at trial. The plaintiffs are entitled to an opportunity to prove that the defendants guaranteed that the flexacron coating would work for a specified period of time. Such a warranty would not be barred by the general disclaimers of warranty that accompanied the sale of the products (*see* UCC 2-316; *Wilson Trading Corp. v David Ferguson, Ltd.,* 23 NY2d 398, 404-406; *Norwest Fin. Leasing v Parish of St. Augustine,* 251 AD2d 125).

That branch of the plaintiffs' cross motion which was to compel discovery should have been granted to the extent that the discovery sought relates to the cause of action sounding in breach of express warranty (*see Vanalst v City of New York,* 276 AD2d 789). Moreover, the plaintiffs' cross motion for leave to amend the complaint should have been granted (*see McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.,* 59 NY2d 755, 757), except to extent that they sought to include a cause of action to impose a constructive trust. The plaintiffs withdrew their request to add a cause of action in constructive trust before the court's decision on the motion. Having withdrawn the request for that relief, they were not entitled to seek to reinstate it on a motion for leave to renew. In light of the above, the arguments of the plaintiffs pertaining to that branch of their cross motion which was, in effect, for leave to renew, are academic.

The plaintiffs' remaining contentions are without merit.

Altman, J.P., Adams, Townes and Crane, JJ., concur.