SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WEST CHESTER

HAROLD WEISBERG,

INDEX NO. 1845-1977

Plaintiff,

-against-

DIMONDSTEIN BOOK COMPANY, INC.,

Defendant.

MEMORANDUM OF LAW IN REPLY TO DEFENDANT'S MEMORANDUM OF LAW AND IN SUPPORT OF MOTION TO DISMISS COMPLAINT

It is assumed for the purposes of this motion that all of the allegations of the complaint and the statements in plaintiff's answering affidavit are true. It is defendant's contention that the complaint must be dismissed as a matter of law because of the applicable provisions of the statute of limitations and further, no cause of action for fraud is stated.

POINT I

NO ACCOUNT WAS STATED BY THE PARTIES

"An account stated may be defined, broadly, as

an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other." 1 NY Jur. 149.

When the defendant allegedly asked the plaintiff for a current statement of their account what it was actually stating was,"would you send us details of what you say we owe you, if anything".

In order for the statute of limitations to start running from the date that the statement of account was mailed to the defendant, there would have to be a dispute concerning one or more of the items contained in the statement which the parties came to an agreement on. Frucht v. Garcia, 44 M2d 52, 252 N.Y.S.2d 825; Siepka v. Bogulski, 164 Misc. 831, 832-833, 299 N.Y.S. 1018, 1021.

In the case at bar there could not have been any dispute because defendant could not object to any item of the account until it received the account. Merely asking plaintiff to send it the account cannot constitute an objection to it. The only time a dispute could arise is after defendant received and reviewed the account and according to plaintiff no such objection was ever received by him. It therefore

follows inexorably that no new obligation was created by the parties resolving a dispute concerning the contents of the account since there is no allegation that a dispute and a resolution of that dispute ever occurred.

The statute started to run from the dates of the sales which plaintiff alleges commenced in 1966 and terminated in August 1970. The statute of limitations for the last sale ran in August of 1974, almost three years prior to the commencement of this action. (UCC 2-725).

POINT II

THAT PORTION OF THE SECOND CAUSE OF ACTION WHICH DEMANDS JUDGMENT FOR $2,475.00 MUST BE DISMISSED AS BEING LEGALLY INSUFFICIENT.

Although in Paragraph 11 of the complaint the plaintiff alleges that the defendant agreed to buy the books set forth in Exhibit 1, which is the statement of account, nowhere does he allege that the defendant similarly ordered, agreed to buy or accepted the 1000 books for which he alleges he is entitled to $2,475.00.

Plaintiff states in Paragraph 14 of the complaint that defendant breached its contract with him concerning these 1000 books but the word ""contract" is a legal conclusion. The ultimate facts of this transaction are not pleaded even to the extent of establishing an order for or agreement to

accept the 1000 books.

In Sharinn v. RLM Sports, Inc., NYLJ 5/9/77, p. 13, col. 2, the court stated

> "Nevertheless, the complaint must contain all material elements of the cause of action and legal conclusions cannot be used to supply material facts by inference (Fun Fair Park, Inc. v. Garbor Holding Corp., 22 Misc.2d 824, 203 N Y.S. 2d 233, mot. den. 203 N.Y.S.2d 994)."

The court further stated in Sharinn

> "Similarly, with respect to an action for breach of contract, an offer must be communicated to the proposed acceptor and accepted by him before there is a contract (Trimble v. New York Life Ins. Co., 234 App. Div. 427, 255 N.Y.S 292). Here, it is not alleged that the purported promise of the defendant was communicated to the plaintiffs prior to their purchase or that it became part of the bargain."

The motion to dismiss a cause of action or part of a cause of action for legal insufficiency may, of course, be made at any time. CPLR 3211(e).

POINT III

FRAUD CANNOT BE COMMITTED IN SILENCE.

> "Where the parties deal at arm's length, and there is no duty to speak imposed by law, mere silence or failure to disclose material facts does not constitute a misrepresentation so as to support an action for fraud." Mottla, New York Evidence - Proof of Cases, Lawyers Co-operative Publishing Co., 1966.

In his complaint and affidavit plaintiff claims that defendant committed fraud by receiving 1000 books which were mistakenly sent to a third party, Bookazine, by the plaintiff and in turn, Bookazine, shipped the books to defendant in or about August 1968.

The fraud as alleged in Paragraph 17 of the complaint is that defendant never told plaintiff of its receipt of the 1000 books which caused plaintiff to mistakenly bill Bookazine. In Paragraph 19 of the complaint, plaintiff alleges he discovered his mistake five years later, in 1973, at which time he demanded payment from defendant.

In his memorandum of law, plaintiff alleges that the fraud was also committed in July 1971 because again, defendant failed to perform "...its obligation to advise plaintiff that the statement of account was incomplete and therefore inaccurate..." because the 1000 book item was not listed thereon.

The plaintiff in short, is claiming that defendant's silence and failure therefore to advise him that it received the 1000 books in August 1968 and that the statement of account which presumably was received in July 1971 was to that extent inaccurate, constituted fraud. It has been repeatedly held in this State and most recently by our Court of Appeals that silence, unless

there is a duty to speak because of a fiduciary relationship, cannot constitute fraud.

In Moser v. Spizzirro, 25 N.Y.2d 941, 305 N.Y.S.2d 153, 252, N.E.2d 632 (1969). The Court of Appeals affirmed the Appellate Division, Second Department (31 AD 2d 537) when it modified a judgment of the Supreme Court, Westchester County (Donohoe, J.) by dismissing a cause of action for fraudlent concealment. The Court of Appeals and Appellate Division held that there was a failure of proof because mere silence of the defendant unaccompanied by some act or conduct which deceived plaintiff, in the absence of a confidential or fiduciary relationship, was not actionable fraud.

The plaintiff has rested its cause of action for fraud on defendant's silence which resulted in his not being informed that it received the 1000 books that were originally delivered to Bookazine and then transmitted to defendant. Silence, of course, in this State is insufficient for establishing a cause of action for fraud.

In any event, plaintiff made the mistake of shipping the books to Bookazine and billing that party from 1968 to 1973 and in effect, it is claiming that its mistake is proof of the commission of fraud by the defendant. The defendant, of course, by its silence misrepresented nothing, committed no overt act and because of the lack of

confidential or fiduciary relationship had no duty to speak. There was therefore no fraud committed by defendant as a matter of law.

POINT IV

PLAINTIFF'S CONVERSATION WITH DEFENDANT'S COMPTROLLER IN MAY 1973 HAS NO EFFECT UPON THE STATUTE OF LIMITATIONS.

Plaintiff claims in his affidavit that he had a conversation with defendant's comptroller in May 1973 in which the comptroller acknowledged that defendant owed plaintiff money and plaintiff would be paid. (See plaintiff's affidavit, Paragraphs 7, 8 and 9).

General Obligations Law 17-101 however, requires an acknowledgment of a debt or promise to pay to be in writing and signed by the party to be charged in order to take it out of the statute of limitations.

If this were not the case, the plaintiff could always claim such an oral acknowledgment or promise to defeat the defense of the statute of limitations.

In any event, when that oral promise was allegedly made, May 1973, all but the last item on the statement of account was already time barred and the 1000 book transaction similarly was time barred. (UCC 2-725 which provides for a four year statute of limitations).

The last item on the statement of account was for $3.83 and with the exception of that amount it was already too late for plaintiff to sue. His allegation that he was lulled into a sense of security by defendant's comptroller which caused him not to retain an attorney at that time has no legal significance because if he had then retained an attorney and immediately commenced an action, the only amount which was not beyond the statute of limitations was $3.83.

POINT V

THIS COURT SHOULD NOT EXERCISE ITS EQUITABLE POWER TO PREVENT DEFENDANT FROM ASSERTING THE STATUTE OF LIMITATIONS.

Plaintiff correctly cites UCC 17-103(4)b which gives a court the power to find that by reason of the defendant's conduct it is inequitable to permit it to impose the defense of the statute of limitations.

In connection with that Subsection, it has clearly been held that silence on the part of the defendant when he has no duty to speak, i.e. no confidential or fiduciary relationship, is not such conduct as to make it inequitable to permit defendant to assert the statute of limitations.

In Adelman v. Friedman, 80 Misc.2d 946 (1975), the court stated at page 950

> "There is no acceptable justification for the delay. "Plaintiffs were not lulled into inactivity * * * Moreover, the plaintiffs do not allege the defendant(s) * * * mislead them into believing that the time limitation would not be invoked * * * Plaintiff had more than ample time to ascertain the facts * * * If they elected to sit by and rely upon the defendant, they have only themselves to blame. Under the circumstances herein, there is no basis for invoking the theory of equitable estoppel." (Vignari v. Continental Tennessee Lines, 70 Misc 2d 362, 365.)"

The plaintiff had four years to correct its mistake in billing Bookazine and bill defendant instead. It had those same four years under UCC 2-725 to sue defendant if it did not pay. The statute of limitations ran in August 1972, four years after defendant received the 1000 books. There is nothing defendant did which deceived plaintiff or cause him to believe that it would not invoke the statute of limitations and certainly plaintiff had more than enough time to correct his mistake. Under these circumstances the equitable estoppel provisions of Gen. Ob. 17-103(4)b should not be invoked.

POINT VI

CONCLUSION

THE COMPLAINT SHOULD BE DISMISSED BECAUSE

OF THE RUNNING OF THE STATUTE OF LIMITATIONS ON ALL THREE CAUSES OF ACTION AND FURTHER AS TO PART OF THE SECOND AND ALL OF THE THIRD CAUSE OF ACTION IT SHOULD BE DISMISSED FOR LEGAL INSUFFICIENCY.

LEVINE, KIRSHON & SCHAPS
Attorneys for Defendant

Charles J. Fine,
Of Counsel