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**SHORT FORM ORDER**
**SUPREME COURT OF THE STATE OF NEW YORK**
**Present: Hon. F. Dana Winslow,**
**Justice.**

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**MELVIN L. WEISS AND BARBARA WEISS,**

**Plaintiffs,**

**–against–**

**POLYMER PLASTICS CORPORATION, d/b/a/ POLYMER PLASTICS CORPORATION VITRICON DIVISION, VITRICON CORPORATION, EIFS INC., ENERGEX,**

**Defendants.**

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**POLYMER PLASTICS INC., VITRICON INC. AND EIFS, INC.**

**Third-Party Plaintiffs,**

**–against–**

**PRIMA PLASTERING INC., KELLER SANDGREN ASSOCIATES AND DMC CAPPY INC.,**

**Third-Party Defendants.**

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**IAS/TRIAL PART 16**
**NASSAU COUNTY**

**Index No. 019550/99**

**Mtn Seq. # 003,004,005**

**Motion Date: 4/24/03**

**The following papers having been read on the motion [numbered 1-6]**

**Notice of Motion for Summary Judgment (POLYMER).....1**
**Notice of Motion for Summary Judgment (DMC CAPPY) (and memo of law).....2**
**Notice of Motion for Summary Judgment (PRIMA) (and memo of law).....3**

Plaintiff, the owner of a private three-story water-front home in Oyster Bay Cove, brings this action against POLYMER PLASTICS CORPORATION and related corporate entities (collectively referred to herein as POLYMER), the manufacturers of components of a synthetic stucco "Exterior Installation and Finish System" (EIFS) sold under the name "ENERGEX." Components of this system were applied to the exterior of plaintiff's newly constructed home by the subcontractor, PRIMA PLASTERING, INC., (PRIMA) between March 31st and October 19th 1994, and to an ancillary structure from April 1995 through June, 1995. PRIMA purchased the base coat, reinforcing mesh and a top finish coat directly from POLYMER. PRIMA did not, however, purchase or use the sealant materials recommended by the manufacturer.

Sometime in 1999, plaintiff saw a report on a TV news program concerning class action litigation arising out of claims of water damage associated with synthetic stucco. This program alerted plaintiff to the possibility that he had a problem with the EIFS that had been installed on his own house, even though the defendant was not a party to that foreign litigation. The TV program also prompted plaintiff to "immediately" call the water infiltration experts associated with that class action, Simpson & Gumpertz, (Plaintiff's EBT p.14). Plaintiff then commenced this lawsuit on July 29, 1999, in anticipation of injuries that he might incur in the future. The twenty-one page complaint alleged that plaintiff had suffered injury because the product "will" trap moisture and cause wood to rot...," and "will" cause damage to other parts of the structure, and "will" cause plaintiffs expense and labor for repair and replacement. Plaintiff essentially alleges that the defendant's product was defective because it permitted moisture to enter and become trapped behind it, because defendant's "system" did not include a means for the moisture to escape, and because defendant had failed to warn that this product was not suitable for waterfront property. It was not until "several months after" this lawsuit was commenced (pp. 24-25), that Simpson and Gumpertz actually inspected plaintiff's home for the first time and, according to the plaintiff, reported that "there was a lot of moisture behind the surface in different parts of the house and that the moisture, over time, ... would become a very serious problem if it wasn't repaired..." (p.14).

In May of 2001, two years after suit was commenced, plaintiff engaged JRC Consulting Group to oversee an EIFS investigation and the performance of repairs upon plaintiff's home. Jeffrey Capazzi, President of JRC, submits an affidavit and report stating that his investigation revealed "large cracks in the EIFS in numerous locations, hairline cracks in the EIFS, moisture infiltration around windows and doors, apparently bypassing the sealant; moisture penetration directly through the surface of the EIFS system at the intersection of the flying beam; rust staining on the surface of the top coat; minor sealant failure at the perimeter of Windows and doors." In his affidavit, Mr. Capazzi states generally that "EIF systems marketed to the public prior to 1998 did not provide for water drainage systems...Water would infiltrate between the EIFS and the substrate it had been applied to...,"and that the water penetration seen at plaintiff's home was "typical" of EIFS installations he had seen before. In his "Construction/Materials Deficiency Report" of May 25, 2001 [plaintiff's exhibit F], he notes that JRC found "deficiencies in the wall system, which are contributory to the abnormally high moisture readings." Mr. Capazzi does not, however, offer an opinion in his affidavit or report as to the presence or absence of any defect in or failure of the defendant's product *per se*, that caused or contributed to this particular plaintiff's damage. Nor does he state that materials of this type are unsuitable for waterfront property. The court notes that the record is entirely devoid of any such evidence from any other source.

Corrective action proposed by JRC was subsequently undertaken. The work included removal and replacement of 200 square feet of moisture damaged plywood; and the re-covering the home with a similar EIFS synthetic stucco product, installed in a manner that would permit water vapor to escape. Repairs began in June 2001 and were completed in December 2001. Plaintiff now seeks to recover repair and replacement costs which total $160,566.

Plaintiff asserts four causes of action sounding in common law tort (fraud, negligent or intentional misrepresentation, strict product liability and negligence), two separate causes of action for breach of warranty (express and implied ), a cause of action alleging deceptive trade practices in violation of General Business Law section 349. Defendant denies all material allegations of the complaint and, in a third party action, seeks contribution or indemnification from the general contractor (DMC CAPPY, INC.) and the EIFS subcontractor/installer (PRIMA PLASTERING, INC.)[1], contending that any

[1] The third-party action against the architect, KELLER SANDGREN ASSOCIATES) was previously dismissed.

failure of its product or entry of moisture was a result of improper installation. In support of this contention, defendant submits the unsworn "declaration" and photos of building envelop consultant investigator Colin Murphy, who opines that the sealant joints at the windows and wall penetrations were not in compliance with industry standards and were a source of water entry behind the EIFS assembly. Defendant now moves for summary judgment dismissing the complaint in its entirety on various grounds addressed separately below. Third party-defendants cross move for summary judgment dismissing the third party complaint on grounds that neither contribution nor indemnification are available since defendant cannot be liable to plaintiff, in the first instance, for improper installation of its product and, therefore, no claim over lies against them as a matter of law. The motions are determined as follows.

## I. The Tort Claims

(fraud, negligent or intentional misrepresentation, strict product liability and negligence)

Defendant contends that plaintiff's tort claims are barred by the "economic loss rule, " as adopted by the Court of Appeals in **Schiavone Construction Co. v. Mayo Corp.**, 56 NY2d 667. This rule was applied in **Hemming v. Certainteed Corporation**, 97 AD2d 976 *appeal dismissed,* 61 NY2d 758, a case that is virtually identical to the instant case in that it involved tort claims asserted by homeowners against a home siding manufacturer. The Appellate Division, Third Department held:

> [W] hen damage suffered by a plaintiff is the result of a nonaccidental cause, such as deterioration or breakdown of the product itself, the injury is properly characterized as "economic loss" and plaintiff is relegated to contractual remedies. This decision reflects the principle that defects related to the quality of the product, e.g., product performance, go to the expectancy of the parties (loss of bargain) and are not recoverable in tort. [citations omitted] Moreover, the "economic loss rule" applies equally to negligence and strict liability causes of action and includes the direct and consequential damages which may result from product nonperformance [citation omitted]. In short, these decisions relegate "economic loss" claims to the law of contracts and warranty which govern the economic relations between suppliers and consumers of

> goods. [citations omitted] The essence of plaintiff's claims is that the shingles, sheathing and nails ("sidings systems" did not perform properly to protect their homes and, as a consequence, *they have suffered direct loss to the siding itself and consequential damages to their homes.* Their negligence and strict liability claims are properly characterized as being for "economic loss" due to product failure. Accordingly, Special Term erred in failing to dismiss those causes of action. *Ibid.*

Similarly, the "economic loss rule" was applied by the Fourth Department in **Ralston Purina Company v. Arthur G. McKee & Company**, 158 AD2d 96, a case involving damage to a pet food plant due to water leaks arising out of allegedly defective roofing materials. Ralston Purina sought to recover the cost of replacing the roof, the expenses of interim roof repairs, the expense of hiring consulting engineers, as well as damages for injury to its plant. The court held that the Supreme Court erred in failing to grant the manufacturer's motion for summary judgment dismissing the negligence and strict liability claims.

Plaintiff urges this court not to follow **Hemming** on the basis of the subsequent Court of Appeals decision in **Bocre Leasing Corp. v. General Motors Corp.**, 84 NY2d 685. Plaintiff relies on **Bocre** for the proposition that the "economic loss rule" is limited to those cases in which the *only* damage caused by the defective product is damage to the product itself. (e.g., where the product fails to live up to expectations but does not cause damage to person or property). Since ENERGEX is alleged not only to have damaged itself but also to have damaged portions of the plywood sheathing as a consequence of its failure, plaintiff argues that the "economic loss rule" does not apply. This court disagrees.

In **Bocre Leasing Corp.,** the Court held that plaintiff had "no cause of action in tort against the remote manufacturer for contractually based economic losses *including* [*n.b. but not limited to*] to the product itself, occasioned by the failure of the product." *Id*, 687. The **Bocre** court did note that "when a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." [quoting **East River S.S. Corp. v. Transamerica Delaval**, 476 US 858] This is not to say, however, that such losses must be *limited* to the product itself in order for the rule relegating plaintiff to contractual remedies to apply. In **7 World Trade Company v. Westinghouse Electric Corp.**, 256 AD2d 263, the First Department said that "[i]n **Bocre**, the Court of Appeals adopted the rule ...that a purchaser may not use a

tort theory to recover economic losses *based on or flowing from the defective product itself*, where personal injury is not alleged or at issue." *Id.* 264.(emphasis added). In the instant case, plaintiff's alleged damages were "based on and flowed from" the defective product itself.

In this court's view, the intent of the Court of Appeals in **Bocre**, consistent with the Court's public policy rationale discussed in **Bellevue South Associates v. HRH Construction Corp.,** 78 NY2d 282, and **Schiavone Construction Co. v. Elgood May Corp.**, *supra*, was to disallow tort claims for damages arising out of product failures where the expectations of the parties are essentially contractual in nature. The critical issue is not whether or not the product damaged only itself, but whether or not "the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim." **La Barre v. Mitchell**, 256 AD2d 850. As the Appellate Division, Second Department explained in **Suffolk Laundry Services, Inc. v. Redux Corporation**, 238 AD2d 577, 578 "the economic loss rule is based on the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, *unless a legal duty independent of the contract itself has been violated."* (emphasis added).

This court finds nothing in **Bocre Leasing Corp.** or subsequent decisions that contradicts the **Hemming** decision or that calls either its outcome or applicability to the instant case into question. As in **Hemming**, the plaintiff in this case claims to "*have suffered direct loss to the [product] itself and consequential damages to [his] home."* Only economic losses have been incurred, directly attributable to a product's failure to perform in a manner consistent with the expectation-bargain. No legal duty independent of the contract itself can be said to have been violated. No "accident" occurred. Accordingly, the common law tort claims asserted in the first, second, sixth and seventh causes of action must be dismissed.

## II. Deceptive Trade Practices Under General Business Law Section 349

In order to establish a claim for deceptive trade practices under **GBL section 349**, the plaintiff must prove (1) that the defendant engaged in consumer-oriented conduct or

practice that can reasonably be expected to have a broad impact on consumers at large, (2) that it was deceptive or misleading in a material respect, and (3) that the deception caused injury. **Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,** 85 NY2d 20.

The court finds **St. Patrick's Home for the Aged and Infirm v. Laticrete International, Inc.**, 264 AD2d 652 to be on point and controlling. In that case, plaintiff brought suit against the manufacturer of an exterior wall system (panels) after the walls had begun leaking. The panels were sold by the defendant manufacturer to the installer who was not a party to the action, as in this case. Reversing the determination of the trial court, the First Department dismissed Plaintiff's **GBL section 349** claim for the following reasons.

> Deceptive act or practices may be defined as representations or omissions "likely to mislead a reasonable consumer acting reasonably under the circumstances... Plaintiff failed to meet the threshold requirement of **General Business Law section 349** because Laticrete's sale of the [panels]...did not constitute consumer oriented conduct...The transaction in this case was a sizeable one between two companies in the building construction and supply industry. It did not involve any direct solicitation by Laticrete, which had no contact with the plaintiff, the ultimate consumer. Significantly, sophisticated business entities ...acted in an intermediary role in the transaction, thereby reducing any potential that a customer in an inferior bargaining position would be deceived. In short, this was not the type of "modest" transaction that the statute was intended to reach.(*Teller v. Bill Hayes, Ltd.*, 213 AD2d 141,147), *lv dismissed in part and denied in part* 87 NY2d 937), but rather a private dispute between a plaintiff and a supplier over a defective product. (***see,* New York Univ. v. Continental Ins. Co.** [87NY2d 308] at 321.) *Ibid.* at 655.

Likewise, in the instant case, plaintiff had no direct dealings with defendant but opted for an EIFS, generically speaking, on the basis of discussions with his architect and general contractor. The details of those conversations were not clear in plaintiff's memory, beyond his having been led to believe that this type of product would be suitable, durable, and a good option. In fact, defendant's product in particular was

selected for this project by a professional stucco installer, PRIMA, who had been using defendant's products for ten years before this project, apparently without incident. PRIMA purchased the product directly from the manufacturer. Plaintiff had no recollection about whether or when he had even seen defendant's literature or product. On the basis of these undisputed facts, the court finds, as a matter of law, that the transaction in question was not of the consumer oriented kind contemplated by the statute. Nor does plaintiff offer proof of an act or practice that was deceptive or misleading in a material respect. Accordingly, the plaintiff's third cause of action alleging deceptive trade practices must be and is dismissed.

## III. The Warranty Claims

Defendant's invoices to PRIMA contained the following pertinent language:

> Seller makes no warranties with regard to any material delivered hereunder or the performance thereof either express or implied, including any implied warranty of merchantability or fitness for a particular purpose..... The customer assumes all risk and liability for the results obtained by the use of any material delivered hereunder or the performance thereof in the application processes of the customer or of the applicator in combination with any other substances. Seller's sole obligation shall be, at its option, to replace that quantity or product proved to be defective or to refund the purchase price of such material. In any event, the seller shall not be liable for any loss or damage, including incidental or consequential damages, arising from the use of the product sold.

While there is evidence in the record that defendants offered limited express warranties upon request, there is no evidence that any such express warranty was either requested or given in this case. On the contrary, Steve Noskin, President of Vitricon, Inc., manufacturer of ENERGEX, submits an affidavit stating unequivocally that upon his search of corporate records, "no one, not the general contractor DMC CAPPY not the architect KELLER SANDGREN not the applicator PRIMA PLASTERING not MR. or MRS. WEISS ever requested a warranty, and that no such warranty was ever issued for this project." This testimony was unrebutted. On this basis alone, the claim for breach of express warranty must be dismissed.

Additionally, both the express and implied warranty claims are barred by the applicable four year statute of limitations **[UCC section 2-725]** and not the six year statute of limitations applicable to contracts more generally. **[CPLR 213].** For purposes of determining whether the four year or the six year statute of limitations applies, the court must look to the primary nature of the transaction. Where the sale of a commodity is merely incidental to the transaction, the four year limitations period may not apply. *See* **Dynamics Corp. of America v. International Harvester Co.**, 429 F. Supp. 341 (SDNY 1977). Plaintiff's reliance on **Huebner v. Caldwell & Cook, Inc.**, 139 Misc.2d 288 (Supreme Court, New York County, 1988), which held that **UCC 2-725** has no application to real property or its appurtenances, is misplaced. That case did not involve the sale of "goods" but the sale of a newly constructed home which had defective siding. The sale of the siding was incidental to the sale of the home. In the instant case, the transaction out of which this claim arises is clearly and primarily one for the sale and delivery of "goods." That the goods happen to have been applied to a new home, does not convert this sale into a real estate transaction.

The four year limitations period begins to run upon delivery, except where a warranty "explicitly extends to the future performance of the goods and discovery of the breach must therefore await the time of such performance." **UCC 2-725-2.** Product literature which speaks generally of the high quality and durability of the product does not constitute an "explicit" warranty of future performance. *See*, **Homart Development Co. V. Graybar Electric Co.**, 63 AD2d 727 ["excellent moisture resistant" cable "designed to give long and reliable service"] Neither does an "implied warranty of fitness" constitute a warranty of future performance. **Holdridge v. Heyer-Schulte Corp.**, 440 F.Supp. 1088 (NDNY 1977). The discovery rule is, therefore, inapplicable and plaintiff's cause of action accrued at the time of last delivery of the product utilized on the house in October, 1994 or, at the very latest, in June, 1995 when the product was delivered for usage on an ancillary structure. Since suit was not commenced until July 29, 1999, the warranty claims are time barred. The fourth and fifth causes of action are dismissible on this basis alone.

Additionally, the warranty claims must be dismissed on grounds of lack of privity. Even if plaintiff's general contractor and architect can be said to have been acting as his "agents," they were not in privity with the defendant. The defendant's product was purchased from the manufacturer directly by PRIMA, a subcontractor, with whom plaintiff had no relationship, much less an agency relationship. *See* **Jaffee Associates v. Bilsco Auto Service,** 58 NY2d 993,994; **Carcone v. Gordon Heating & Air**

**Conditioning Co., Inc.**, 212 AD2d 1017. This lack of privity cannot be overcome in the absence of specific representations upon which plaintiff relied. **Randy Knitwear v. American Cyanamid Co.**, 11 NY2d 5. The plaintiff in this case cannot demonstrate such reliance upon specific representations given his lack of memory concerning whether, when and to what extent he may have reviewed or discussed defendant's product literature with his "agents."

On the basis of the foregoing, the defendant's motion for summary judgment dismissing the complaint is **granted**. The motions of the third party-defendants are **denied as moot.**

This constitutes the order of the court.

Dated: May 16, 2003

ENTER,

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE