

STATE OF NEW YORK

SUPREME COURT

COUNTY OF FRANKLIN

ESTATE OF LOUISE HART,

Index No. 2000-359

Plaintiff,

**DECISION
&
ORDER**

- against -

**R. R. MERRILL, INC., and YAWGA ENERGY
PRODUCTS, LLC f/k/a Agway Energy
Products, LLC,**

IAS #16-1-2002-0470

Defendants.

Appearances: Gates & Adams, P.C. (Richard T. Bell, Jr., Esq. of counsel) attorneys for Plaintiff; Smith, Sovik, Kendrick & Sugnet, P.C. (Gabrielle Mardany Hope, Esq., of counsel), attorneys for Defendant R.R. Merrill, Inc.; Menter, Rudin & Trivelpiece, P.C. (Julian B. Modesti, Esq., of counsel), attorneys for Defendant/Third Party Plaintiff, Yawga Energy Products, LLC; Robin R. Merrill, Third Party Defendant, *pro se*.

DEMAREST, J.

This lawsuit arises out of a delivery of fuel oil to a residence owned by the Plaintiff's decedent ("Hart") on or about May 12, 1994. Hart had contracted with Agway Energy Products, LLC ("Agway"), the predecessor to the Defendant Yawga Energy Products, LLC ("Yawga") for the delivery of fuel oil and the maintenance and inspection of her heating system. Defendant R.R. Merrill, Inc. ("R.R. Merrill") had an agreement with Yawga to deliver fuel oil to its customers in a defined area that included the Hart residence. Robin R. Merrill ("Merrill") was the owner of R.R. Merrill and a guarantor of his corporation in the contract with Agway.

The delivery in May 1994 resulted in an oil spill in the basement of the Hart residence, requiring remediation. That work was done and paid for by the insurers of R.R. Merrill.

Hart commenced this action in May 2000, alleging a breach of the contract with Agway to deliver fuel oil and the contract between Agway and R.R. Merrill, alleging she was an intended third-party beneficiary. Agway cross-claimed against R.R. Merrill and brought a third party action against Merrill on the basis of his guarantee.

The following motions have been interposed and will be resolved with this Decision and Order:

1. Merrill moves to dismiss the Third-Party Complaint against him on the grounds that it is barred due to his discharge in bankruptcy.
2. Yawga cross-moves for an order converting the motion to one for summary judgment and for a declaration that Merrill must defend and indemnify it in the underlying action.
3. Yawga moves for summary judgment dismissing the complaint as time-barred.
4. R.R. Merrill moves for summary judgment on the grounds that Hart was not an intended third-party beneficiary, that the action is barred by an arbitration clause, and that any claims for property damage are time-barred.

The papers which have been considered in rendering this Decision are listed in Schedule A, attached.

It is not disputed that any claim for negligence would be barred by the applicable three-year statute of limitation. C.P.L.R. §§ 214 and 214-c(2). The salient question, then, is whether or not Plaintiff has established a prima facie cause of action in contract. For the reasons discussed below, it is found that it has not and summary judgment should be granted the Defendants, dismissing the complaint in its entirety.

First, Plaintiff has failed to prove the existence of any written contract. In response to a Notice to Admit, Plaintiff denies a form contract, provided in the Notice to Admit, was binding and effective between Hart and Agway. It now claims the agreement was verbal. However, there is absolutely no proof as to what the terms of any verbal agreement were, and with the passing of Plaintiff's decedent, such proof will never be forthcoming.

Second, despite couching the complaint in terms of breach of contract, the essence of this claim is for the negligent delivery of fuel oil and for the resultant property damage. These claims are barred by the applicable statutes of limitation.

Third, there is no proof to sustain the claim that Hart was an intended beneficiary of the contract between Agway and R.R. Merrill. That contract was simply one for hauling and delivering fuel oil and any promise to indemnify was limited to damages ". . . arising out of any act or omission of [R.R. Merrill] . . ." It does not bind R.R. Merrill to indemnify for any breach of contract.

Fourth, Plaintiff has failed to come forward with proof in admissible form that it has suffered damages as a result of the breach of any contract. The unsworn

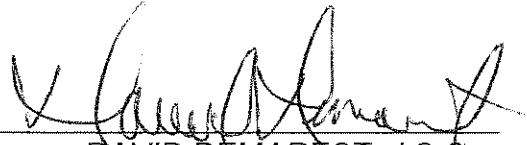
document from the St. Regis Mohawk Tribe, dated June 25, 2001, that the house is uninhabitable is of no probative value.

The motions of the Defendants R.R. Merrill, Inc., and Yawga Energy Products, Inc., for summary judgment dismissing the complaint are granted.

Robin R. Merrill's motion to dismiss the third party complaint and Yawga's cross-motion for summary judgment against Merrill are rendered moot by this Decision.

SO ORDERED

DATED: October 26, 2006, at Chambers, Canton, New York.



DAVID DEMAREST, J.S.C.

ENTER:

{Decision & Order, and moving papers filed}

Schedule A - Submissions considered

1. Notice of Motion of Third Party Defendant, dated January 30, 2006.
2. Affidavit, with attachments, of Robin R. Merrill, sworn to January 30, 2006.
3. Notice of Cross-Motion of Defendant/Third Party Plaintiff, Yawga Energy Products, LLC, dated February 27, 2006.
4. Affidavit, with attachments, of Julian B. Modesti, Esq., sworn to February 27, 2006.
5. Defendant/Third Party Plaintiff's Memorandum of Law dated February 27, 2006.
6. Affidavit, with attachments, of Gabrielle Mardany Hope, Esq., sworn to April 13, 2006.
7. Defendant R.R. Merrill Inc. Memorandum of Law, undated.
8. Notice of Motion of Defendant/Third Party Plaintiff Yawga Energy Products, LLC, dated August 24, 2006.
9. Affidavit, with attachments, of Julian B. Modesti, Esq., sworn to August 24, 2006.
10. Defendant/Third Party Plaintiff's Memorandum of Law, dated August 24, 2006.
11. Defendant R.R. Merrill, Inc., Notice of Motion, dated September 14, 2006.
12. Affidavit, with attachments, of Gabrielle Mardany Hope, Esq., sworn to September 14, 2006.
13. Defendant R.R. Merrill, Inc.'s Memorandum of Law, undated.
14. Affirmation, with attachments, of Richard T. Bell, Esq., dated Sept. 27, 2006.
15. Reply Affidavit, with attachment, of Julian B. Modesti, Esq., sworn to October 4, 2006.
16. Defendant/Third Party Plaintiff's Memorandum of Law, dated October 4, 2006.
17. Defendant R.R. Merrill, Inc.'s Reply Memorandum of Law, undated.