

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

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SHARESTATES INVESTMENTS, LLC,

Plaintiff,

- against -

**CREAGH & ASSOCIATES, INC., ROBERT
CREAGH and COLSON D. LEWIS,**

Defendants.

TRIAL/IAS PART 13

Index No.: 609758/2018

Motion Date: 11/20/18

Sequence No.: 002

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DECISION and ORDER

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The following papers were read on this motion:

Notice of Motion, Supporting Affidavit and Exhibits.....	1
Defendants' Memorandum of Law.....	2
Plaintiff's Memorandum of Law in Opposition.....	3
Reply Affirmation.....	4
Plaintiff's Sur-Reply Affirmation	5

PRELIMINARY STATEMENT

Defendants move for summary judgment dismissing the Complaint pursuant to CPLR §§ 214(6) and 3212(a) on the ground that the action is barred by the applicable 3-year Statute of Limitations, and for such other and further relief as may be just, proper, and equitable. Plaintiffs have submitted opposition to the motion.

BACKGROUND

In this action plaintiff seeks monetary damages resulting from alleged negligence, in the form of appraisal malpractice, in connection with an appraisal of 23 Harbour Road, Kings Park, New York (the "premises"). Plaintiff commenced this action by the filing of a Summons and Complaint on July 20, 2018. As alleged in the Complaint (Exh. "A"), SCS Strategic Capital,

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LLC (“SCS”) retained defendants to obtain an appraisal of the premises. Defendant Lewis performed the appraisal on February 11, 2015, and on February 12, 2015, Robert Creagh (“Creagh”), as Supervising Appraiser, signed the appraisal, which valued the premises at \$4,600,000.00 as of February 6, 2015. According to the Affidavit of Creagh, he emailed the Appraisal to SCS on February 12, 2015. Plaintiff made two mortgage loans to Shidroch Movtady Irrevocable Trust, the owner of the premises. The first loan was for \$1,200,000.00, evidenced by a promissory Note in that amount of July 22, 2015 (Loan 1). Lender lent an additional \$160,000.00 to Borrower on August 26, 2015. Both loans were secured by mortgages on the premises. The premises were also encumbered by a third mortgage in the amount of \$1,200,000,000.00 made by Nader & Sons, LLC to Borrower, dated May 4, 2015, which mortgage was assigned to Nations United Management, LLC, pursuant to an Assignment of Mortgage on March 26, 2018.

Loan 3 was in the first position; loan 1 was in the second position; and loan 2 was in the third position. All three loans fell into default. Sharestates foreclosed on Mortgage 2 in *ShareStates Investments, LLC v. The Shidrokh Movtady Irrevocable Trust*, Supreme Court Nassau County, Index No. 601321/2016. In the Order Confirming the Report of Sale and Granting Plaintiff leave to Enter a Deficiency Judgment, the Court determined as follows:

- a. Loan 3 balance was \$2,169,594.46;
- b. Loans 1 and 2 balances were a total of \$2,049,725.20;
- c. The total deficiency was \$4,219,319.66;
- d. Loan 3 was paid in full in the foreclosure;
- e. The premises were sold at auction for the sum of \$3,050,000.00;
- f. Loans 1 and 2 incurred a deficiency of \$1,169,319.66.

The Appraisal Report (Exh. “C”) provided at p. 6 that “[t]he borrower, another lender, at the request of the borrower, the mortgagee, or its successors and assigns, government sponsored enterprises, and other secondary market participants may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.” Plaintiff claims that, at the request of the Borrower, they relied upon the appraisal report in making Loans 1 and 2. They assert that defendants, in failing to raise material facts in the Appraisal Report,

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incorrectly valued the premises at \$4,600,000, and that the \$3,050,000.00 sale at auction represented the fair market value, resulting in a loss by plaintiff of \$1,169,319.66.

Both plaintiff and defendants acknowledge that the Statute of Limitations for professional malpractice by an appraiser is three years, but the dispute the date at which the three years begin to run. Plaintiff contends that the three year period begins to run at the time the cause of action accrues, which is “when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court” (*Ackerman v. Price Warehouse*, 84 N.Y.2d 535, 543 [1994]). Plaintiff also cites to other cases which rely upon the claimed seminal case of *McCoy v. Feinman*, 99 N.Y.2d 295 (2002).

To the contrary, defendants assert that the three year Statute of Limitations begins to run from the date the appraisal is submitted to the client, and that, in this case, the Appraisal Report upon which plaintiff claims reliance was submitted more than three years prior to the commencement of the action, and is therefor time-barred.

In a Sur-reply, to which defendants object, as unauthorized by statute or by leave of court, plaintiff claims that it is not an assignee of SCS Strategic Capital, LLC and their knowledge is not imputed to them. They also claim that the case law submitted by defendants in their Reply Memorandum of Law are inapplicable.

DISCUSSION

There is no controversy but that defendants provided SCS Strategic Capital, LLC with the subject Appraisal Report on February 12, 2015. While plaintiff asserts that it is not an assignee of SCS, and SCS’s knowledge is not imputed to them, they did agree to rely upon the report in connection with their determination to extend financing to the Borrower in the form of Loans 1 and 2. If defendants were negligent in the preparation of the Appraisal Report, they did so at the time the report was submitted to their client (*Nothnagle Home Securities Corp. v. Bruckner, Tillet, Rossi, Cahill & Associates*, 125 A.D.3d 1503 [4th Dept. 2015]).

As noted in *Nothnagle*, supra at 1504, “ ‘ [i]n most cases, . . . accrual time is measured from the day an actionable injury occurs, ‘even if the aggrieved party is then ignorant of the wrong or injury ‘ ”, citing *McCoy v. Feinman*, 99 N.Y.2d 295, 301 [2002], quoting *Ackerman v. Price Waterhouse*, 84 N.Y.2d 536, 541 [1994]). As in *Nothnagle*, plaintiff in this action relied

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upon the defendants' skill and advice as of the date it was rendered, February 12, 2015, an action commenced more than three years later is barred by the 3-year Statute of Limitations.

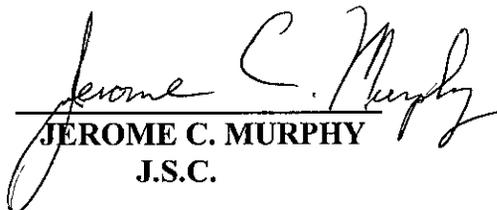
Defendants' motion to dismiss the Complaint as barred by the Statute of Limitations is granted.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
January 29, 2019

ENTER:



JEROME C. MURPHY
J.S.C.

ENTERED

FEB 05 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**