STATE OF MICHIGAN

COURT OF APPEALS

OGDEN MARTIN SYSTEMS OF KENT COUNTY, INC., FEDERAL INSURANCE COMPANY and KENT COUNTY,

Plaintiffs-Appellants/
Cross-Appellees,

v

GRANGER CONSTRUCTION COMPANY and TOWNSEND & BOTTUM, INC. d/b/a TBG,

Defendants-Cross-Plaintiffs-
Appellees/Cross-Appellants,

and

D & K ENGINEERED CONSTRUCTION, INC.,

Defendant-Cross-Defendant-Cross-
Plaintiff-Appellee/Cross-Appellant,

and

BUILDING TECHNOLOGY CORPORATION,

Defendant-Cross-Defendant,

and

STEELOX SYSTEMS, INC.,

Defendant-Cross-Defendant-
Appellee/Cross-Appellant.

UNPUBLISHED
March 12, 2002

No. 225486
Kent Circuit Court
LC No. 95-004859-CK

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order that granted all defendants summary disposition pursuant to MCR 2.116(C)(7) and (10) on the basis that the applicable limitations period barred plaintiffs' complaint. We affirm.

In October 1987, plaintiffs Ogden Martin Systems of Kent County, Inc. and Kent County contracted to build a solid waste-to-energy facility. Ogden Martin then hired defendant Granger Construction Company as the project's general contractor, and Granger in turn subcontracted with the other defendants to perform work on the facility's construction. In February 1994, one facility building collapsed and another partially collapsed. Plaintiff Federal Insurance Company reimbursed Ogden Martin and Kent County for a large amount of the damages to the facility, and plaintiffs entered a subrogation agreement permitting Federal Insurance to pursue the other plaintiffs' claims against defendants.

On October 31, 1995, plaintiffs filed their original complaint setting forth numerous counts alleging defendants' breach of contract, breach of warranties and negligence. Defendants moved for summary disposition arguing that the six-year limitations period within MCL 600.5839(1) barred plaintiffs' claims because the period began to run when the facility first was occupied, used or accepted, which defendants suggested had occurred by September 1989. Plaintiffs countered that neither occupancy nor use nor acceptance preceded October 31, 1989, or alternatively that genuine issues of material fact existed regarding when they first occupied, used and accepted the facility. The trial court found that undisputed facts warranted granting defendants' motion on the basis of MCL 600.5839(1).

Plaintiffs challenge the propriety of the trial court's grant of summary disposition, which this Court reviews de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under MCR 2.116(C)(7), we accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor, unless the movant has submitted documentation contradicting the contents of the complaint. This Court must consider all relevant documentary evidence filed or submitted by the parties. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). When no facts are in dispute, the issue whether a plaintiff's claim is statutorily barred is a question of law for the Court. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994). Summary disposition pursuant to MCR 2.116(C)(10) similarly is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

We find that the trial court correctly granted defendants summary disposition pursuant to MCR 2.116(C)(7) and (10). The relevant limitations period provides in pertinent part as follows:

> (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, *more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement* . . . . [MCL 600.5839(1) (emphasis added).]

Because plaintiffs filed their complaint on October 31, 1995, the critical date in this case becomes October 31, 1989, six years before plaintiffs filed their claims.

"The statute of repose [MCL 600.5839(1)] is triggered by the time of occupancy *or* use *or* acceptance of the improvement." *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 481; 586 NW2d 760 (1998). Because the statute employs the disjunctive "or," only one of the above criteria must occur to trigger the running of the six-year limitations period. *Beauregard-Bezou v Pierce*, 194 Mich App 388, 393; 487 NW2d 792 (1992).

The trial court correctly interpreted MCL 600.5839(1) when it concluded that completion of the improvement was not necessary for the improvement's use or acceptance to trigger the running of the six-year period. In *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14-20; 299 NW2d 336 (1980), our Supreme Court concluded that the six-year statute of limitations and repose within MCL 600.5839(1) did not violate federal constitutional guarantees of equal protection or due process. As the trial court in the present case correctly observed, the Supreme Court in *O'Brien* did rearrange the wording of the statute in dicta[1] when it stated, "For actions which accrue within six years from *occupancy, use, or acceptance of the completed improvement*, the statute prescribes the time within which such actions may be brought." *Id*. at 15 (emphasis added). However, our Supreme Court's dicta does not bind this Court. *Kuhn v Secretary of State*, 228 Mich App 319, 331; 579 NW2d 101 (1998).

Furthermore, since *O'Brien*, this Court in interpreting MCL 600.5839(1) has clarified that the statutory language does not require that an improvement reach completion before its use triggers the running of the statutory period. *Beauregard-Bezou*, *supra* at 390, 394. In *Beauregard-Bezou*, this Court reversed the trial court's denial of the contractor defendant's motion for summary disposition, holding that MCL 600.5839(1) barred the plaintiff's claim because she filed her complaint more than six years after she first used her unfinished home. *Id*. at 394.[2] The Court's holding furthered the legislative purposes behind MCL 600.5839(1), which are to prevent stale claims and to relieve engineers, architects and contractors from open-ended liability for defects in workmanship. *Abbott v John E Green Co*, 233 Mich App 194, 200; 592 NW2d 96 (1998).

Accordingly, we conclude that the trial court correctly applied the law when it decided that under MCL 600.5839(1), a project's incomplete status does not prevent acceptance or use of the improvement from triggering the running of the six-year period.

Plaintiffs further contend that summary disposition was improper because genuine issues of material fact existed regarding whether Ogden Martin actually used, accepted or occupied the

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[1] The Supreme Court's inaccurate rearrangement of the language within MCL 600.5839(1) occurred during the Court's explanation of the difference between a statute of limitation and a statute of repose. The misstatement did not represent the Supreme Court's effort to interpret the statute. *O'Brien*, *supra* at 15.

[2] See also *Male v Mayotte, Crouse & D'Haene Architects, Inc*, 163 Mich App 165, 169; 413 NW2d 698 (1987) (holding that an improvement is deemed to be completed at the time of acceptance, occupation or use).

facility before the pivotal date of October 31, 1989. While we agree with plaintiffs that a question of material fact existed with respect to whether they accepted the improvement before October 31, 1989, we nevertheless conclude that MCL 600.5839(1) bars plaintiffs' complaint because undisputed facts show that plaintiffs used the improvement before that date.

The following unrebutted facts reflect that plaintiffs used the facility before October 31, 1989. Ogden Martin invoices to Kent County established that in September and October 1989 the facility generated and sold tens of millions of pounds of steam and that in October 1989 it also generated and sold electricity (5,731,200 kilowatt hours) to Consumers Power Company. The September and October invoices further showed that the facility sold scrap metal, a by product of burned refuse, during these months (159,380 pounds in September 1989 and 511,640 pounds in October 1989). An October 1989 boiler log indicated that during that month the facility's boilers were operating at near maximum capacity.

In addition to the invoices and boiler logs, an October 19, 1989 Ogden Martin monthly progress report showed that up until that date the facility had delivered 8,369,400 pounds of steam to its steam distribution system, that the facility processed 7,001 tons of refuse between August 30, 1989 and October 1, 1989, and that during September 1989 the facility had received delivery of 8,453 tons of refuse. The October 1989 monthly progress report also noted that the facility was "now fully staffed," that plant personnel had received hazard communication training, and that "[o]perations [were] now being trained by their shift supervisor in operating procedures and system's [sic] descriptions." Kent County's progress notes reflect that by July 20, 1989 all furniture was delivered to the facility's administration building and that Ogden Martin would relocate there by July 21, 1989. The deposition testimony of Ogden Martin's maintenance supervisor indicated that he moved into his office in the maintenance shop as early as May or June 1989. Ogden Martin's August 1989 monthly progress report documented that "[t]he move into the Administration Building was accomplished on July 21, 1989."

Plaintiffs do not dispute the information within the invoices, logs and progress reports indicating that before October 31, 1989 the facility processed refuse into energy and sold it. Rather, plaintiffs argue that the facility was not being put to its "intended use" because the operations conducted represented tests and trial runs to ensure that the facility was operating correctly. We agree, however, with the trial court's conclusion that regardless whether one characterizes the facility activities as mere tests or regular operations, the undisputed facts establish that plaintiffs *used* the facility before October 31, 1989.

We conclude that the aforementioned evidence of activity within the facility that occurred by October 1989 plainly constituted use within MCL 600.5839(1). We reject plaintiffs' invitation to engraft onto the statute a subjective, undefined "testing" exception to use, for which the Legislature did not otherwise provide. *Lantz v Southfield City Clerk*, 245 Mich App 621, 626; 628 NW2d 583 (2001). Plaintiffs' proffered interpretation would defeat the legislative purpose behind the statute "to protect engineers, architects, and contractors from stale claims and to eliminate open-ended liability for 'defects in workmanship,'" *Abbott*, *supra* at 200, by permitting significant use to occur in the guise of "testing" without triggering the statutory six-year period.

In light of plaintiffs' failure to come forward with evidence creating a genuine issue of material fact regarding whether they used the facility before October 31, 1989, we conclude that

the trial court properly granted defendants summary disposition because the limitations period within MCL 600.5839(1) barred plaintiffs' complaint.[3]

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[3] Given our disposition of this issue, we need not consider defendants' issues on cross-appeal regarding whether Ogden Martin's act of accepting the facility from Granger also constituted an acceptance of the subcontractors' work.