STATE OF MICHIGAN

COURT OF APPEALS

STUDIO B ARCHITECTS, INC., and XL DESIGN PROFESSIONALS, INC.,	UNPUBLISHED November 29, 2005
Plaintiffs-Appellants,	
v	No. 261385 Oakland Circuit Court
PARADIS ASSOCIATES, INC., and GARY O. PARADIS,	LC No. 2004-058947-CK
Defendants-Appellees.	

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

This litigation arises out of the construction of the headquarters and research facility of Simpson Industries[2] (hereinafter "Simpson") in Plymouth, Michigan. Plaintiff was hired by Simpson to perform architectural services for the construction project. Plaintiff, in turn, hired defendant company to provide structural engineering services, and the individual defendant, a professional engineer, was in charge of the project. The contract between plaintiff and defendants was not reduced to writing. After the certificate of occupancy was issued on May 3, 1995, Simpson expressed concerns regarding the structural soundness of the building. In August 1996, Simpson reportedly forwarded to plaintiff a report prepared by Ehlert/Bryan, Inc., addressing an on site review of the premises. Plaintiff relayed the concerns to defendants who repeatedly assured plaintiff that the structural design was correct, sound, and met applicable codes. Specifically, by letter dated August 23, 1996, defendants opined that any cracks were caused by shrinkage of the concrete and were not structural in nature. However, despite the

[1] Although XL Design Professionals, Inc., is also named as a plaintiff, it was added as a plaintiff because of its status as subrogee of plaintiff Studio B Architects, Inc. Any actions involved in the litigation involved the latter plaintiff. Accordingly, the singular "plaintiff" refers to Studio B Architects, Inc. only.

[2] Simpson Industries is now known as Metaldyne.

explanations and representations regarding the soundness of the structure, Ehlert/Bryan recommended that continued monitoring of the building occur. Indeed, between 1996 and 2001, Simpson and plaintiff corresponded regarding the building structure. In turn, plaintiff alleged that it continued to apprise defendants of the status of the concerns and even advised defendants to contact their insurance carrier.

In 2001, Simpson compelled plaintiff into arbitration. Despite the arbitration, plaintiff alleged that it stood by defendants' work based on the defense representations. Plaintiff alleged that during the course of the deposition for the arbitration proceeding, individual defendant denied any knowledge of the course of the concerns regarding the status of the building. Consequently, plaintiff alleged that it retained an independent expert who concluded that, contrary to the representations by defendants, errors had been committed with regard to the structural engineering. Plaintiff alleged that it attempted to involve defendants in a negotiation with Simpson to resolve the outstanding issues. When defendants allegedly refused to participate, plaintiff filed a multi-count complaint alleging breach of contract, professional negligence, indemnification, and fraud. Plaintiff later filed a second amended complaint that raised claims of gross negligence.

Plaintiff moved for summary disposition of the indemnification claim. In response, defendants filed their own dispositive motion alleging that the claims were barred by the statute of limitations or statute of repose. The trial court granted the defense motion for summary disposition, and plaintiff appeals as of right.

Summary disposition decisions and issues of statutory construction are reviewed de novo on appeal. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004); *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). A statute of limitation is a procedural device designed to promote judicial economy by protecting the rights of defendants to be free from a plaintiff who delays in bringing an action to acquire an advantage over an unsuspecting defendant. *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). On the contrary, a statute of repose acts to prevent a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. *Sills v Oakland General Hosp*, 220 Mich App 303, 308; 559 NW2d 348 (1996). Unlike a statute of limitation, the statute of repose "may bar a claim before an injury or damage occurs." *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 513 n 3; 573 NW2d 611 (1998). Both the statute of limitations and the statute of repose prevent stale claims and provide relief to defendants from the protracted fear of litigation. *Id*. at 515. The Legislature has the power to determine that a cause of action cannot arise unless it accrues within a specific period of time. *Sills, supra* at 312.

MCL 600.5839 governs the period of limitations applied to professional engineers and provides:

> 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 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, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The plain language of MCL 600.5839 provides that any action for damage to property or for indemnification against a professional engineer may not be maintained "more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement,[3] or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer." In the present case, the certificate of occupancy was issued on May 3, 1995. MCL 600.5839. This litigation was filed on June 10, 2004. Therefore, plaintiff's claim is barred by the six-year statute of limitations.

Alternatively, plaintiff alleges that the claim was brought within one year of the discovery of the defect. Plaintiff alleges that it could not have discovered the defect until 2003 because defendants continued to assert that there was no error in the performance of its services. However, the plain language of the statute does not provide for actual discovery of the injury or actual confirmation by the wrongdoer of an injury. Rather, the statute provides for litigation for "1 year after the defect is discovered or should have been discovered …" MCL 600.5839. When evaluating the discovery rule, a claim does not accrue for the purpose of triggering the limitation period until a plaintiff discovers, or through the exercise of reasonable diligence, should have discovered an injury and the causal connection to the defendant's breach of duty. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999). The test to determine when a cause of action has accrued is based on objective facts and not on the subjective beliefs of a particular plaintiff. *Id*. "Application of the test is a matter of law for the court in the absence of any issue of material fact." *Id.*

In the present case, plaintiff's allegation, that the claim could not be discovered until 2003 based on the representations by defendants, is without merit. In 1996, plaintiff was alerted to the cracking of the walls of the Simpson building. Plaintiff was presented with a report by Ehlert/Bryan that raised concerns about the construction. Plaintiff consulted with defendants and submitted a response to Simpson. Plaintiff contends that the discovery period could not arise in 1996, because Ehlert/Bryan accepted the explanation offered for the cracking. On the contrary,

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[3] The parties do not dispute that the construction at issue constitutes an improvement.

review of the correspondence in 1996 and 1997 reveals that Ehlert/Bryan did not outright accept the explanation for the cracking. Instead, it was recommended that continued monitoring of the premises continue. Moreover, although plaintiff does not provide specific dates, it was presented with independent reports from the general contractor on the project and continued reports from Simpson between 1996 and 2001. Plaintiff cannot ignore the information presented by other sources and rely on an alleged concession of error from defendants in 2003. Therefore, this issue is without merit.

MCL 600.5855 governs fraudulent concealment of claim or identity of person liable and provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

The plain language of the statute, *Neal, supra,* provides that where there is fraudulent concealment, an action may be brought within two years after the person discovers or should have discovered the existence of the claim. "The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and the plaintiff must be held chargeable with knowledge of the facts, which it ought, in the exercise of reasonable diligence, to have discovered." *Barry v Detroit Terminal Railroad Co,* 307 Mich 226, 232; 11 NW2d 867 (1943). "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation and mislead or hinder acquirement of information disclosing a right of action." *Id*. at 233, quoting *DeHaan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932). The plaintiff has the burden of establishing that the defendant engaged in an arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005).

Once again, plaintiff alleges that it did not discover nor could have discovered the existence of the claim in light of defendants' continued representations that they had not committed any error. However, in 1996, plaintiff was presented with evidence that cracks were occurring in the building for which defendant provided engineering services. Although defendant offered an explanation, the explanation certainly did not pacify plaintiff's client or their independently retained consultants. Simpson continued to monitor and research the cracks and continued to apprise plaintiff of information. Indeed, Ehlert/Bryan continued to recommend monitoring of the building despite defendants' explanation for the cracking. Under the circumstances, plaintiff cannot allege that it did not know or should not have known that any representations by defendants could be fraudulent when it was repeatedly provided information from other sources between 1996 and 2001 regarding the cracking and its continuation.

Lastly, whether phrased in terms of a breach of fiduciary duty or gross negligence, plaintiff's focus on defendants' misrepresentations is misplaced. Plaintiff seeks indemnification for damages sustained as a result of defects in an improvement to real property. Regardless of

the theory of recovery, plaintiff's claims are subject to the statute, and the above analysis is controlling.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Peter D. O'Connell