STATE OF MICHIGAN

COURT OF APPEALS

TRUDY BAIN, f/k/a TRUDY SIMS, f/k/a TRUDY COLMER,

Plaintiff-Appellant,

v

COMMUNITY SALES, INC and CHAMPION HOME BUILDERS,

Defendants-Appellees.

UNPUBLISHED
February 4, 2010

No. 288370
Lapeer Circuit Court
LC No. 08-040402-CZ

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In 1999, plaintiff bought a manufactured home from defendant Community Sales, to be placed on a rented lot owned by Community Sales. Defendant Champion manufactured the home. Community Sales assembled the home. Soon after plaintiff took possession, several serious defects were discovered, including conditions that resulted in the growth of toxic mold. In 2001, plaintiff filed suit against both defendants, alleging breach of contract, breach of the Uniform Mobile Home Warranty Act, breach of implied warranty of fitness, and negligence. The parties reached a settlement agreement in July 2002, under which defendants agreed to repair various defects in a workmanlike manner and to pay plaintiff and her attorney $8,500. Plaintiff stayed in a hotel while the repairs, which included the plumbing, were being completed. Two weeks later, she did a walk-through, visually inspecting the repairs, many of which were hidden within the walls of the home. Plaintiff and her attorney signed off on the repairs:

> I, Trudy Sims, have visually conducted a walk through of my home on 7/24/02 and have confirmed the repairs listed on the two (2) pages of Addendum A have been completed to my satisfaction.

On August 2, 2002, the trial court entered a Stipulated Order for Dismissal with Prejudice and Without Costs, based on the settlement agreement, settling all pending claims.[1] However, the problems resumed soon after plaintiff retook possession, and in January 2003, plaintiff's attorney sent a letter to defendants, identifying the problems and asking that they be repaired. Defendants replied that it had no further responsibility, plaintiff having agreed in July that the repairs were completed to her satisfaction.

In November 2004, plaintiff had a mold test done and it showed high levels of toxic mold, most likely resulting from improper cleanup or from water leaks that were not properly repaired. In November 2005, plaintiff moved out of the home after suffering a number of respiratory problems that continue. On July 10, 2008, plaintiff filed suit, alleging that defendants breached the settlement agreement by not completing the repairs in a workmanlike manner, as they had promised, and alleging negligence in both the original construction and the later repair of the home. Defendants moved for summary disposition, arguing that plaintiff's breach of contract claim was barred by the doctrine of accord and satisfaction because of her agreement that the repairs were satisfactory and acceptance of the settlement money. Defendants also argued that plaintiff's negligence count was barred by the three-year statute of limitations.

In response, plaintiff argued that she could not have discovered the improperly completed repairs because defendants would not let her inspect the work until the repairs were enclosed in the walls. She instead had to rely on their false representations that the repairs were done properly. She also argued that under *Frankenmuth Mut Ins Co v Marlette Homes*, 456 Mich 511; 573 NW2d 611 (1998), her home and the repairs to it constituted "improvements to real property." Under MCL 600.5839, six years is the applicable time period to apply for actions against a contractor for damages arising out of a defective and unsafe condition of an improvement to real property. Thus, plaintiff asserted, her claim was not time-barred because she brought it within six years of the time the repairs were done.

The trial court disagreed with both of plaintiff's arguments. It found the language of the release was unambiguous, that plaintiff knowingly signed it, that nothing prevented her from having someone inspect the work as it was being done, and that her statement accepting the repairs as satisfactory was valid. Because the court ruled that the settlement agreement barred plaintiff's suit, the court did not need to address the period of limitations.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

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[1] The same trial judge entered that order as heard the present case.

Plaintiff argues that she does not need to tender back the $8,500 because she is not trying to repudiate the release and pursue the underlying suit. The present complaint is not about the underlying suit but about breach of the settlement agreement. Plaintiff's July 24, 2002, recitation of satisfaction had no legal effect on the July 10, 2002, agreement, especially where plaintiff noted that she only "visually" inspected the repairs.

Simply put, plaintiff is attempting to repudiate her release. To do so, she must first tender back the consideration given. *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 163, 165; 458 NW2d 56 (1990). Plaintiff has not done this. If there had been no statement of satisfaction, she could have compelled defendants to complete the repairs as required. As defendants note, once plaintiff agreed that they performed as required, and once they tendered the cash to satisfy her claims, the contract was completed. There is no evidence that plaintiff was prevented from checking on the work while it was being done, or that she could not have demanded photographs of the work before it was sealed up. She simply accepted that it was done as stated. Defendants are entitled to rely on plaintiff's agreement that the settlement was satisfied in full and her acceptance of the consideration. 435 Mich at 163.

Plaintiff also argues that the six-year period of limitations set forth in MCL 600.5839 applies to this case because the home and repairs to it are both "improvements to real property." Plaintiff asserts that contrary to defendants' argument in the trial court that plaintiff's home is a "mobile home," the home in question is a "manufactured home," placed on a permanent foundation, and unlikely to be moved. In *Frankenmuth*, our Supreme Court held without reservation that a manufactured home is an improvement to real property. Alternatively, plaintiff argues that even if the three-year period of limitations applies, the harm to plaintiff's respiratory system was ongoing until the time she moved out of her home in November 2005.

The question of which period of limitations applies is a matter of statutory interpretation, a question of law that we consider de novo on appeal. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006). The period of limitations plaintiff seeks to apply provides in relevant part:

> 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, 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. [MCL 600.5839(1).]

Plaintiff's argument that her home is an improvement to real property fails because mobile and manufactured homes are treated like vehicles in this state unless the owner follows the procedures outlined in MCL 125.2330i. Under that statute, the owner of the home must also have an ownership interest in the real property, and the home must have its wheels, towing hitches, and running gear removed. MCL 125.2330i(1), (11). Unless the towing gear is removed, the home is not "affixed" to the land. MCL 125.2330i(11). There is no evidence this has been done to plaintiff's home; it is still titled as a vehicle. Thus, the repairs made to plaintiff's home are the equivalent of repairs made to an automobile parked on someone else's real property: no "improvement to real property" is made by an improvement to personal property. Accordingly, plaintiff's argument on this issue fails.

Plaintiff's alternative argument that she filed timely because her injuries were ongoing until she moved out also fails. In general, a claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. The alleged "wrong," in this case, was the faulty repair work. The continuing growth of mold is damage resulting from that wrong. Thus, plaintiff's negligence claim was barred three years after the repair work was completed.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello