STATE OF MICHIGAN

COURT OF APPEALS

EUGENE JETTS, JR., and MELINDA JETTS,

Plaintiffs-Appellants,

v

STEWART BUILDING COMPANY, INC., and CHRISTOPHER SCOTT FIX,

Defendants-Appellees,

and

JAZBRICK, d/b/a CENTURY BRICK,

Defendant/Cross-Defendant-Appellee,

and

LINCOLN BRICK AND SUPPLY CO.,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
June 15, 2010

No. 290635
Oakland Circuit Court
LC No. 2006-079779-CH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants in this action arising from disputes related to the new construction of plaintiffs' home. We affirm.

Plaintiffs entered into a building contract with defendant Stewart Building Company, Inc., for the construction of a residential home. Stewart acted as the general contractor. It arranged for defendants, Jazbrick, d/b/a Century Brick, and Lincoln Brick and Supply Company, to supply the bricks, and for defendant Christopher Scott Fix to install the bricks. Construction of the house was completed in July 2000, with the city of Rochester granting a certificate of occupancy on July 25, 2000. Plaintiffs moved into the residence in August 2000.

According to plaintiffs' complaint, in 2001 they built a patio and two walls in front of their home, using the same type of bricks that were used in the construction of the home. In the

summer of 2002, plaintiffs noticed that a few of the bricks on the patio walls were broken. In 2003, plaintiffs noticed more broken bricks on the patio walls. During the summer of 2004, plaintiffs noticed still more broken bricks on the patio walls and replaced them. Additionally, plaintiffs replaced some cracked bricks on the home.

During the summer of 2005, plaintiffs observed that a considerable number of bricks on the home had started to crack and break. Plaintiffs contacted Stewart with their concern regarding the bricks. Stewart contacted Lincoln, which resulted in a Century representative visiting plaintiffs' residence to inspect the bricks. Century issued a report of its findings in a letter to Lincoln on July 5, 2005, which was forwarded to plaintiffs on July 11, 2005. The letter stated that the bricks were failing because they were installed at or below grade level, in violation of applicable building codes.

Plaintiffs contacted Soil and Materials Engineers, Inc. (SME), and an SME representative visited plaintiffs' residence in late spring or early summer and inspected the bricks. On approximately October 18, 2006, SME delivered a report of its findings to plaintiffs. The report indicated that the construction was noncompliant with Michigan Residential Building Code (MRBC) 2003, in the following manner:

> 1. Contrary to ACI 530, Chapter 6.1.2.1 and MRBC R703.7.5 and R703.8, flashings were not installed as required, and there are no indications of through-wall flashing materials at the following required locations:
>
> a. Base Flashing at bottom of walls in the first course above grade,
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> b. Top of windows and door lintels,
>
> c. Under copings on walkway walls,
>
> d. Under window and door sills,
>
> e. Above arched openings and windows, [and]
>
> f. In walls abutting structural slabs for porches and decks.
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> 2. Weeps were not observed at the base of the walls or under windows and cap stones as required by MRBC R703.7.6. Weeps are required at a maximum spacing of 33 inches immediately above all flashing locations.
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> [3]. No provision to accommodate differential movement at the walls corners both interior and exterior was provided in accordance with MR[B]C R703.2 Exterior Veneer Support. Also no expansion joints were provided between the veneer supported on the foundation wall and the walls supported on garage footings.
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> [4]. The air cavity between the inside face of the veneer and exterior face of the sheathing was noted to be less than ½ inches which fails to comply with the minimum 1 inch requirement of MR[B]C R703.7.4.2 Air Space. This condition was observed at missing header joints and at wall edges.

On December 27, 2006, plaintiffs filed suit against defendants, alleging (1) a breach of warranty of quality or fitness, directed against all defendants, and (2) defective and unsafe condition of an improvement to real property, directed against Stewart and Fix.

The trial court granted defendants' motions for summary disposition on the ground that the six-year statute of repose, MCL 600.5839(1), precluded plaintiffs' claims. The court found that the six-year period began to run on when the certificate of occupancy was issued on July 25, 2000, and that plaintiffs exceeded this deadline when they filed their suit on December 27, 2006. The court also determined that plaintiffs could not avail themselves of the one-year discovery rule exception for gross negligence because plaintiffs failed to properly plead gross negligence in their complaint.

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendants. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) on the ground that a particular claim is barred because the applicable statute of limitations expired before commencement of the action. *Driver v Cardiovascular Clinical Assoc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 280844, issued March 2, 2010), slip op p 2. "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 281020, issued March 9, 2010), slip op p 13. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law." *Id.* at 13-14.

The relevant statute of repose is found in MCL 600.5839(1), and states in pertinent part:

> No person may maintain any action to recover damages for any injury to property, real or personal . . . arising out of the defective and unsafe condition of an improvement to real property . . . 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 . . . .

This statue applies to *all* actions against a contractor arising out of an improvement to real property, including actions based on tort and contract theories. *Travelers Ins Co v Guardian Alarm Co of Mich*, 231 Mich App 473, 481; 586 NW2d 760 (1998). A contractor is defined as "an individual, corporation, partnership, or other business entity which *makes* an improvement to real property." MCL 600.5839(4) (emphasis added). Thus, since only Stewart and Fix actually *made* any improvements to plaintiffs' property by performing the actual house construction, this statue of repose only applies to them and not Century or Lincoln. See *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515-518; 573 NW2d 611 (1998) (company, which produced manufactured home *and placed it* on property, was a "contractor"). This period of repose starts to run upon the occupancy, the use, or the acceptance of the improvement. *Travelers Ins Co*, 231 Mich App at 481. No party challenges the finding of the trial court that the period began to run on July 25, 2000, when the city of Rochester issued a certificate of

occupancy. Thus, plaintiffs had until July 25, 2006, to file any suit against defendants Stewart and Fix. Since plaintiffs filed their lawsuit on December 27, 2006, it clearly fell outside the six-year period of repose, and their claims were barred.

However, MCL 600.5839 does allow for an exception to this six-year period of repose. If gross negligence caused the defect, then a plaintiff has one year after the plaintiff discovered or should have discovered the defect. However, this one-year discovery rule applies only when gross negligence has been specifically pleaded. *Mich Millers Mut Ins Co v W Detroit Building Co*, 196 Mich App 367, 371; 494 NW2d 1 (1992). Although "gross negligence" is not defined for purposes of the statute of repose, the term has been defined in other contexts as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). Plaintiffs must allege facts–not mere allegations–that demonstrate that gross negligence resulted in the defect. See *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). The contents of the complaint are accepted as true unless contradicted by documentation by the movant. *Maiden*, 461 Mich at 119.

Here, the trial court found that plaintiffs did not adequately plead gross negligence. The trial court reasoned that the alleged failure to install various components during construction did not reflect conduct that demonstrated a substantial lack of concern for whether injury resulted. We agree. Plaintiffs' allegations that Stewart and Fix failed to install some components do not rise to the level of gross negligence; rather, they go to simple negligence. The alleged conduct does not appear to be "so reckless as to demonstrate a substantial lack of concern for whether an injury results." Because plaintiffs failed to adequately plead gross negligence, the trial court was correct in granting summary disposition to Stewart and Fix pursuant to MCR 2.116(C)(7) since plaintiffs could not avail themselves of the one-year discovery exception.

Even if plaintiffs had adequately pled gross negligence, summary disposition was still warranted because plaintiffs did not file their lawsuit within one year of when they discovered or should have discovered the *defect*. The question of when a party should have discovered a defect is a matter of law when there are no disputed facts. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997) (when dealing with a statute of limitations that started to run upon discovering the "existence of a claim," the court held that the question of when the period started is a question of law when there are no undisputed facts). Plaintiffs contend that they only became aware of the defect when they received a report in October 2006 that provided the results of the inspection and evaluation that an engineering firm performed. This may explain when plaintiffs *knew* they had a *specific* claim, but it does not address when they *should have known of the construction defect*.

Plaintiffs admit in their complaint that they first noticed that a "couple" bricks on the home had started to crack in 2004. Then in 2005, plaintiffs "noticed a considerable number of bricks" on the home cracking and breaking and, in fact, replaced some. At this point, plaintiffs knew there was a problem and "promptly" called Stewart. Later, in July 2005, plaintiffs received a letter that stated that the bricks had failed because of improper installation at or below grade level. Thus, the undisputed facts show that plaintiffs either knew or should have known that the construction was defective in July 2005. Plaintiffs had one year from this point to determine the exact nature of any lawsuit. Plaintiffs' contention that they could not have launched the instant litigation in 2005 is misplaced. The law allowed them one year from July 2005 to launch the litigation – it did not have to be filed upon immediately learning of the defect. Consequently,

plaintiffs' failure to file suit within one year of when they discovered or should have discovered the defect means that the court did not err in granting summary disposition in favor of Stewart and Fix pursuant to MCR 2.116(C)(7).

Defendants Century and Lincoln were not contractors, so the statute of repose in MCL 600.5839 does not apply to them. Century manufactured the bricks and sold them to Lincoln who, in turn, sold them to Stewart. Thus, Century and Lincoln cannot be said to have *made* any improvements to plaintiffs' property.

Plaintiffs alleged that Century and Lincoln breached the implied warranty of "quality or fitness" when it sold defective bricks. Michigan's UCC governs the sale of the bricks because the bricks were "goods," which were movable at the time of identification to the contract for sale. MCL 440.2105. The statute of limitations involving transactions for the sale of goods is found in MCL 440.2725, which provides that a plaintiff has four years after a cause of action accrues to file suit. *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003). A cause of action for breach of warranty accrues when tender of delivery is made, regardless of the aggrieved party's lack of knowledge of the breach. *Id.*; MCL 440.2725(2). The fact that plaintiffs lacked any privity of contract with Lincoln or Century is of no consequence since the claims involved a breach of implied warranties. *Heritage Resources, Inc v Caterpillar Fin Services Corp*, 284 Mich App 617, 637; 774 NW2d 332 (2009).

For ease of analysis, using July 25, 2000, the date the certificate of occupancy was issued, as the date when the bricks were tendered, plaintiffs had four years from that date to file suit against Century and Lincoln for any breach of warranty. Plaintiffs filed their suit in December of 2006; thus, plaintiffs failed to timely file their suit against Century and Lincoln, and summary disposition was proper. The trial court granted Century's and Lincoln's motions for summary disposition based on the court's belief that the six-year statute of repose for contractors applied. "[T]his Court will not reverse a trial court's order if it reached the right result for the wrong reason." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001). Accordingly, the trial court's decision to grant Century's and Lincoln's motions for summary disposition under MCR 2.116(C)(7) will not be disturbed.

Plaintiffs next argue that defendants engaged in fraudulent concealment of the claim, which would permit them to file their lawsuit up to two years after discovering they had a cause of action. MCL 600.5855 provides the following:

> 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.

In order to take advantage of this two-years-after-discovery period, a plaintiff must plead in the complaint the specific acts or misrepresentations that comprised the fraudulent concealment. *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 643; 692 NW2d 398 (2004). The plaintiff must show that the defendant engaged in some arrangement or

contrivance of an affirmative character that was specifically designed to prevent subsequent discovery; mere silence is insufficient. *Id.* at 642-643, 645.

Plaintiffs never pled fraudulent concealment. The closest plaintiffs came to pleading fraudulent concealment was in paragraphs 14 and 15 of the complaint, which involved defendants Lincoln, Century, and Stewart[1]:

> 14. Stewart, upon information and belief, contacted Lincoln who sent a representative to the Residence who reviewed the bricks on the Residence.
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> 15. On or about July 11, 2005, Plaintiffs received a copy of a letter which Lincoln had received from Century stating that the bricks had failed because of their installation at or below grade level.

Plaintiffs only framed this as fraudulent concealment after defendants brought their motions for summary disposition. Thus, on the sheer fact that plaintiffs failed to adequately plead fraudulent concealment means that plaintiffs cannot avail themselves of this reprieve from the normal statue of repose. Plaintiffs did not allege that any defendant knew of the true nature of the construction defects and did not allege that the report authored by Lincoln was designed to prevent subsequent discovery. Plaintiffs stress, in their brief of appeal, that no defendant ever disclosed the nature of the construction defects. But, as noted above, a defendant's silence in a matter does not constitute fraudulent concealment. *Id.* at 645.

In sum, with respect to defendants Stewart and Fix, plaintiffs were bound by the statute of repose, which set a deadline of July 25, 2006, for them to file their lawsuit. With respect to defendants Lincoln and Century, plaintiffs had, at the very latest, until July 25, 2004, to file their claims. Plaintiffs failed to meet either of these deadlines and, therefore, the trial court properly granted summary disposition in favor of all defendants.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

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[1] Thus, the fraudulent concealment issue only pertains to defendants Lincoln, Century, and Stewart.