STATE OF MICHIGAN

COURT OF APPEALS

R.D. MCINTOSH LAND DEVELOPMENT, LLC,

Plaintiff-Counterdefendant-Appellee,

v

JOHN W. KUNDINGER and JODEE M. LARSON, Co-Personal Representatives of the ESTATE OF WILLIAM J. KUNDINGER,

Defendants-Counterplaintiffs-Cross-Defendants-Appellants,

and

SUPERIOR ENVIRONMENTAL CORPORATION,

Cross-Plaintiff-Cross-Defendant.

UNPUBLISHED
January 12, 2012

No. 300166
Bay Circuit Court
LC No. 09-003521-CK

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Defendants John W. Kundinger and Jodee M. Larson, acting as co-personal representatives of the Estate of William J. Kundinger (hereafter collectively referred to as "the estate"), appeal by leave granted an order denying the estate's motion for summary disposition. We reverse and remand for further proceedings.

This case involves a breach of contract action brought by plaintiff R.D. McIntosh Land Development, LLC ("McIntosh") arising out of the sale of real property that was used to operate a car dealership. On October 20, 1998, William and Shirley Kundinger ("Kundingers"), both of whom are now deceased, entered into a real estate purchase agreement to sell the property to McIntosh. The purchase agreement contemplated environmental assessments of the property and the performance of corrective and remediation measures, with McIntosh having the option to proceed with the sale if the property was found to be contaminated and the Kundingers having the obligation to cover all associated assessment and remediation costs and expenses should

McIntosh choose to proceed with the conveyance. The assessments resulted in the discovery of underground storage tanks and contamination; however, McIntosh decided that it still wished to purchase the property. The Kundingers then hired Superior Environmental Corporation ("Superior") to provide environmental remediation services.

Superior initiated a corrective action plan with the Michigan Department of Environmental Quality ("MDEQ") to clean up the property. Superior removed the underground storage tanks and excavated, removed, and otherwise remediated the contaminated soil in December of 1998. But the MDEQ required monitoring of the site for one year after cleanup of the property to ensure that no contamination had returned. In light of the waiting period, McIntosh and the Kundingers entered into a supplemental agreement for real estate purchase in January 1999, continuing the original agreement's conditions and obligations regarding environmental matters and allowing McIntosh to occupy the premises rent free until a closing on the property could take place. By December 1999, the MDEQ-required monitoring period had elapsed, and the property remained free of contamination. The only remaining step was to prepare and file the final paperwork with the MDEQ, which would then typically lead to MDEQ approval of the site and/or confirmation that the property is contaminant free, the lifting of a "facility" designation, the removal of several property restrictions, and a formal MDEQ closure.

On December 28, 1999, the parties entered into a second supplemental agreement for real estate purchase, which indicated that the Kundingers had not yet fully completed the requirements for environmental remediation as mandated by the purchase agreement,[1] that the parties would nonetheless close the real estate transaction on December 28, 1999, and that the Kundingers would "continue, at their sole expense, to complete remediation of the contaminated site in accordance with said section of the Purchase Agreement." The second supplemental agreement further provided that it "shall survive the closing and remain in effect until the site is remediated to the satisfaction of the [MDEQ] and is no longer defined as a 'Facility' by the aforesaid statute." A warranty deed transferring title of the property to McIntosh was executed by the Kundingers.

The parties agree that the final paperwork was never completed and filed with the MDEQ, and they accuse each other of being at fault for the failure and neglecting contractual obligations. Because the required paperwork was not filed, there was never a formal closure of the site by the MDEQ. It appears that neither McIntosh nor the Kundingers made any effort in the following years to inquire whether formal closure had been achieved. Shirley Kundinger died in 2002, and William Kundinger died in 2006. Apparently, McIntosh first became aware of the problem with the paperwork and the lack of formal closure by the MDEQ when it attempted to refinance the property in September 2007. In 2008, McIntosh filed suit against Superior and the estate. The parties entered into a settlement agreement in which each agreed to pay one-third the cost of finalizing the environmental remediation and achieving final closure of the property, up to a cost of no more than $4,000 for each party. The settlement agreement further provided

[1] The parties realized that formal MDEQ closure was all that needed to be accomplished at this point.

that the litigation could be re-filed if the total cost exceeded $12,000. Superior subsequently discovered that environmental contaminants had reappeared in the property's soil and groundwater, requiring remediation at a cost of $77,000 before formal MDEQ closure could be obtained. McIntosh claimed that it never operated any underground storage tanks on the property or made any other use of the property that would have resulted in contamination of the soil. McIntosh therefore placed the responsibility for the contamination on Superior and the estate.

McIntosh proceeded to file a breach of contract action against the estate and Superior in July 2009. Superior moved for summary disposition, and the trial court granted the motion. The estate also moved for summary disposition, claiming that the breach of contract action was barred by the statute of limitations and the doctrine of laches. The trial court denied the estate's motion for summary disposition, finding that the action was not barred by the statute of limitations. The court failed to address the laches argument. The trial court, relying on language in a dissenting opinion in *Jackson v Estate of Green*, 484 Mich 209, 227-245; 771 NW2d 675 (2009), found that the contract failed to include a time for performance, that a reasonable time for performance had to be implied by the court and should be measured by the six-year statute of limitations governing this particular contract action, MCL 600.5807(8), that the limitations period would then run for six years from that point, giving McIntosh essentially 12 years from the date of the agreement to file suit, and that the contract action was therefore timely.

This Court granted the estate's application for leave to appeal. *R D McIntosh Land Dev, LLC v Estate of William Kundinger*, unpublished order of the Court of Appeals, issued April 13, 2011 (Docket No. 300166).

Summary disposition is appropriate under MCR 2.116(C)(7) where an action is barred by a statute of limitations.

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may file supportive material such as affidavits, depositions, admissions, or other documentary evidence. If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. If the pleadings or other documentary evidence reveal that there is no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. [*Vance v Henry Ford Health Sys*, 272 Mich App 426, 429-430; 726 NW2d 78 (2006) (citations omitted).]

The question whether a cause of action is time-barred is one of law, which this Court reviews de novo on appeal. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

We first hold that the trial court erred in relying on language from the dissenting opinion in *Jackson*, 484 Mich at 227-245, given that a majority of the Justices did not agree on the principle employed here by the trial court. Moreover, *Jackson* is distinguishable where it dealt with oral promises to repay loans with no fixed time for repayment, which implicated the established principle that such loans are payable on demand, and the Court struggled with

determining when the limitations period commenced running where no demand was made. No consensus was arrived at in *Jackson* relevant to our issue, where *Jackson* encompassed five separate opinions. We find that the case at bar can be resolved by using well-established contract principles.

The parties do not dispute that this is an action for breach of contract and that the applicable statute of limitations is six years under MCL 600.5807(8). "[T]he period of limitations runs from the time the claim accrues. The 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. On appeal, McIntosh argues that the "wrong" alluded to in MCL 600.5827 occurs when a plaintiff is harmed and the wrong is discovered, not simply when the defendant acts or fails to act. McIntosh asserts that its action accrued when McIntosh learned that the property remained contaminated in 2007-2008. The estate maintains that a contract action accrues at the time of a breach and that the breach here occurred in 1999-2000 when remediation and a formal closure could have been accomplished.

The cases upon which McIntosh relies concern the accrual of claims for fraud and wrongful death, not breach of contract. See generally *Trentadue v Buckler Auto Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007); *Boyle v Gen Motors Corp*, 468 Mich 226; 661 NW2d 557 (2003). "[T]his Court has generally held that a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003); see also *Estate of DeGoede v Comerica Bank*, __ Mich App __; __ NW2d __, issued June 30, 2011 (Docket No. 296129), slip op at 3; *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008). Contrary to McIntosh's argument, "[a] breach of contract claim accrues on the date of the breach, not the date the breach is discovered." *Mich Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 372 n 1; 491 NW2d 1 (1992). Where a party to a contract fails to perform by the time or date that performance is due under the contract, the innocent party is entitled to then initiate a suit for breach of contract. See *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992) (noting also that an action can be commenced earlier if there was an anticipatory breach as evidenced by an unequivocal declaration that there is no intent to perform).

Here, the breach of contract allegedly arose from the Kundingers' failure to satisfy the terms of the second supplemental agreement executed in December 1999. The agreement did not include a time for performance relative to the Kundingers' alleged obligation to complete the remediation and obtain formal MDEQ closure. A cause of action for breach of contract based on failure to perform typically arises only after the time for performance has elapsed absent performance, *id.*, with the limitations period commencing at that point and extending, in the present case, six years into the future, during which time suit must be filed. Therefore, in the case at bar, a time for performance must be established in order to identify the date on which the alleged breach first occurred, i.e., the date on which a contract cause of action accrued.

The general rule is that "[w]hen a contract does not identify a time for performance . . . 'the law will presume a reasonable time.'" *In re Prichard Estate*, 410 Mich 587, 592; 302 NW2d 554 (1981), quoting *Duke v Miller*, 355 Mich 540, 543; 94 NW2d 819 (1959); see also *Smith v Mich Basic Prop Ins Ass'n*, 441 Mich 181, 191 n 15; 490 NW2d 864 (1992) ("When no

time for performance is specified in the contract, a 'reasonable time' is implied"); *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 368; 320 NW2d 836 (1982); *Soloman v Western Hills Dev Co*, 88 Mich App 254, 257; 276 NW2d 577 (1979) ("Where the time of performance is indefinite, performance may be required to be rendered within a reasonable time"); *Johnson v Landa*, 10 Mich App 152, 156; 159 NW2d 165 (1968) ("It is well established that when a contract is silent as to the time for performance or payment, the law will presume a reasonable time"). "Reasonable time depends upon the facts and circumstances of each case." *Pierson v Davidson*, 252 Mich 319, 324; 233 NW 329 (1930); see also *Soloman*, 88 Mich App at 257. Because the determination of a reasonable time for performance is dependent on the facts and circumstances of each case, the trial court here erred in simply using the applicable six-year statute of limitations as a measurement of reasonable time.

"What constitutes a 'reasonable time' under the terms and circumstances of a contract is a question of fact." *Walter Toebe & Co v Dep't of State Hwys*, 144 Mich App 21, 31; 373 NW2d 233 (1985). However, "[w]hen the question of reasonable time depends . . . upon the construction of a contract in writing or upon undisputed facts outside of the contract, it becomes a matter of law" for the court to decide. *Reinforced Concrete Co v Boyes*, 180 Mich 609, 616; 147 NW 577 (1914).

Consistent with the caselaw, we hold that the point at which a breach of contract occurs for failure to perform relative to a contract that fails to contain a time for performance is the date on which a reasonable time for performance first elapses, thereby establishing said time as the date of accrual for purposes of commencing the six-year limitations period. We remand this case to the trial court for a determination of a "reasonable time for performance" for purposes of the Kundingers' alleged obligations under the contract, which finding will establish the date on which performance became due and the date on which performance was overdue, such that a breach arose and a contract cause of action accrued.

If the trial court ultimately rules that McIntosh's suit was timely and not barred by the statute of limitations, the court is to examine whether the suit is nonetheless barred pursuant to the doctrine of laches as governed by controlling caselaw. See e.g., *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982); *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997).[2]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Having prevailed in full on appeal, the estate is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter

[2] Nothing stated in our opinion today is to be construed as having a bearing on whether there was indeed a breach of contract.