IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER LEE and ELIZABETH LEE,	)	
Plaintiffs,	)	
	)	C.A. No. 08C-03-008 PLA
v.	)	
LINMERE HOMES, INC.,	)	
Defendant.	)	

Submitted: September 24, 2008
Decided: October 1, 2008

ON DEFENDANT'S MOTION TO DISMISS
DENIED

Donald L. Gouge, Esquire, Wilmington, Delaware, Attorney for Plaintiffs.

William J. Cattie, III, Esquire, RAWLE & HENDERSON, LLP, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

On November 13, 1999, Plaintiffs Christopher Lee and Elizabeth Lee (collectively "Plaintiffs") purchased a new home from Linmere Homes, Inc. ("Linmere"). After moving into the home about a year later, on December 18, 2000, plaintiffs discovered numerous leaks. In December 2000 and early 2001 they reported the problems to Linmere, who agreed to make the necessary repairs. Despite its efforts, Linmere was unable to repair the defects and ceased all repair efforts by September 8, 2006. Plaintiffs then filed suit on March 3, 2008.

Linmere has now filed the instant Motion to Dismiss. Linmere argues that Plaintiffs' Complaint is barred by the applicable three-year statute of limitations in 10 *Del. C.* § 8106. Linmere further contends that Plaintiffs have failed to plead the necessary elements for fraudulent and negligent misrepresentation.

As will be explained more fully hereafter, the Court concludes that plaintiffs have alleged sufficient facts demonstrating that Linmere continually promised to repair any defects in Plaintiffs' home, thereby affirmatively misleading them. As a result, there exists in this case a genuine issue of material fact as to whether Linmere waived the statute of limitations and is estopped from raising it. The Court further concludes that

Plaintiffs have sufficiently pleaded a claim for fraudulent and negligent misrepresentation. Accordingly, Defendant's Motion to Dismiss is denied.

II. Statement of Facts[1]

On or about August 12, 1999, Plaintiffs purchased a lot in Greenville, Delaware. On November 13, 1999, Plaintiffs entered into a "Home Building Agreement" with Linmere wherein Linmere agreed to construct a single family residence for Plaintiffs. Upon completion, Linmere obtained a Certificate of Occupancy on December 13, 2000. On that same date, the parties completed the final settlement, and Linmere provided a one year warranty on the home.

Plaintiffs moved into the home on December 18, 2000. According to their Complaint, they discovered numerous window leaks throughout the home in late 2000 and early 2001. Plaintiffs reported the leaks to Linmere, who, at no additional cost, made numerous attempts to repair the defective windows. By letter dated April 10, 2002, Linmere offered further assurances to Plaintiffs that all problems would be corrected.[2] Although it continued to claim responsibility for the problems associated with the home,

[1] The facts are taken from the well-pleaded allegations in Plaintiffs' Complaint. *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[2] Docket 1 (Compl.), Ex. 1.

Linmere threatened to discontinue its efforts to repair the defects if Plaintiffs initiated litigation.[3]

As late as October 25, 2005, Plaintiffs sent Linmere a detailed list of construction defects in the home, and requested that it address the following: (1) various leaks; (2) rotting trim; (3) problems with screen doors; (4) stone wall; (5) weather stripping; (6) lack of HVAC control in a walk-in closet; (7) holes in the outer stucco wall; and (8) installation of a second set of mullions.[4] Plaintiffs also agreed to forego remediation of other flaws that Linmere had not fixed, including old stucco steps, stained tiles, and stained draperies.[5] Plaintiffs expressly pointed out, however, that Linmere had been informed of each of the defects and had made assurances in the past to rectify them, and that Plaintiffs were still waiting for the repairs to be completed.[6]

On November 28, 2005, Linmere acknowledged in a letter that it was taking action to repair the window leaks. It also informed Plaintiffs that it

[3] In their Complaint, Plaintiffs do not provide dates as to when Linmere threatened to cease its repair efforts. *Id.* at ¶ 14.

[4] *Id.*, Ex. 3.

[5] *Id.*, Ex. 3.

[6] *Id.*, Ex. 3.

would not repair an exterior wall because the statute of limitations had expired:

> I am waiting word from Hurd Windows on what direction to take to prevent your windows from leaking. As soon as I hear from them I will let you know what will need to be done. . . . As to your exterior wall, as I was not aware of this until recently when you brought it to my attention, there is a statute of limitations in the State of Delaware of three years. Unfortunately I will not take any further action on the wall.[7]

On September 8, 2006, after discovering that the problems were "too big," Linmere informed Plaintiffs that it would cease repair work. Plaintiffs allege that Linmere also advised them that their insurance carrier, Zurich, would provide funds for the repairs. Zurich has refused payment.[8]

The instant Complaint against Linmere was filed on March 3, 2008. In it, plaintiffs allege breach of contract, mutual mistake, fraudulent misrepresentation, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. They also asserted that Linmere is estopped from raising a statute of limitations defense because: (1) Linmere's breach was not complete until September 8, 2006, when it refused to make any further efforts to repair the defects; and (2) Linmere's repeated assurances

[7] Docket 1, Ex. 2.

[8] *Id.* at ¶¶ 16-17.

that it bore responsibility for the defects evidence a clear intent to mislead Plaintiffs to their detriment so as to persuade them not to file suit.[9]

III. Parties' Contentions

In this Motion to Dismiss Linmere contends that Plaintiffs' claims are barred by the terms of the one-year warranty offered on the home, as well as the three-year statute of limitations set forth in 10 *Del. C.* § 8106. Even if the rule of discovery were applied, Linmere argues that the statute of limitations would have expired in early 2004 because, as the Complaint alleges, Plaintiffs discovered the defects in their home, at the latest, in early 2001. Linmere also submits that the Complaint fails to set forth the required elements for claims of fraudulent concealment and fraudulent misrepresentation. With respect to the claim of mutual mistake, Linmere maintains that the statute of limitations is not tolled since allegations of attempted repairs do not result in new injuries. Finally, Linmere argues that the covenant of good faith and fair dealing does not justify tolling the statute of limitations.

In response to these arguments, Plaintiffs contend that Linmere waived or is estopped from raising the statute of limitations through its

[9] *Id.* at ¶¶ 25-26.

conduct and written promises.[10] They claim that the defects were inherently unknowable because they could not be discovered except through inspection by a specialist. Finally, Plaintiffs dispute Linmere's claim that they have failed to allege the requisite elements for fraudulent misrepresentation.

IV. Standard of Review

As an initial matter, the Court notes that the statute of limitations is an affirmative defense which should have been raised in the Answer.[11] Although this Court has addressed a statute of limitations defense in the context of a motion to dismiss,[12] the appropriate pleading to raise the statute of limitations defense is a summary judgment motion or a motion for judgment on the pleadings.[13] The Court will therefore treat Linmere's motion as a motion for summary judgment.

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[10] In their Response to Linmere's motion, Plaintiffs argued that Linmere was subject to a continuous duty to repair arising from its assurances that it would correct the defects, and that the alleged breach therefore did not become complete until the last opportunity to correct the defects passed. According to Plaintiffs' Response, that final opportunity occurred on September 8, 2006, when Linmere informed Plaintiffs that it would not be completing the repair work. At oral arguments, however, Plaintiffs conceded that Linmere was not under a continuous duty to perform. *See Ensminger v. Merritt Marine Construction, Inc.*, 597 A.2d 854 (Del. Super. 1988) (holding that promises to repair do not give rise to a separate cause of action for breach where only consideration alleged is forbearance from filing suit).

[11] *See McNair v. Taylor*, 2007 WL 2083652, at *1 (Del. Super. Jul. 10, 2007).

[12] *See, e.g.*, *Middlebrook v. Ayres*, 2004 WL 1284207 (Del. Super. Jun. 9, 2004), *aff'd*, 867 A.2d 902, 2005 WL 86586 (Del. Jan. 14, 2005) (Table); *Moorehead v. City of Wilmington*, 2003 WL 23274848 (Del. Super. Dec. 17, 2003).

[13] *McNair*, 2007 WL 2083652 at *1 (citing Super. Ct. Civ. R. 12(c)).

When considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[14] The Court must "view the evidence in the light most favorable to the non-moving party."[15] The moving party bears the initial burden of demonstrating that the undisputed facts support his legal claims.[16] If the proponent properly supports his claims, the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.[17] Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[18] If, however, the record reveals that there are no material facts in dispute and judgment as a matter of law is appropriate, then summary judgment will be granted.[19]

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[14] Super Ct. Civ. R. 56(c).

[15] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. 2005).

[16] *Id.* at 879.

[17] *Id.* at 880.

[18] *Id.* at 879.

[19] *Id.*

V. Analysis

1. The Three-Year Statute of Limitations Applies

10 *Del. C.* § 8106 provides, in pertinent part: "No action . . . based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."[20] A claim of a breach of contract begins to accrue at the time of the breach.[21]

Generally, where a plaintiff alleges claims of breach of contract, fraudulent misrepresentation, and negligence related to the purchase of a home, the statute of limitations begins to run on the date of the settlement or closing.[22] The statute may be tolled, however, under the "time of discovery rule," also known as the "doctrine of inherently unknowable injuries," if the cause of action is inherently unknowable and the plaintiff was blamelessly ignorant of the cause of action, or if the defendants fraudulently concealed

[20] 10 *Del. C.* § 8106.

[21] *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. 1969). A claim for breach of contract is subject to the three-year statute of limitations contained in 10 *Del. C.* § 8106. *Id.* at 255.

[22] *Schumann v. Lenape Associates Builders, Inc.*, 1997 Del. Super. LEXIS 210, at *7 (Del. Super. May 15, 1997).

the cause of action.[23] For the doctrine to be applicable, a plaintiff must establish that there were no observable or objective factors to alert her of the injury and that she was blamelessly ignorant.[24] Once the plaintiff is objectively aware of facts giving rise to the injury, the statute begins to run.[25]

Settlement on the house occurred on December 13, 2000, so the statute would normally expire three years later, on December 13, 2003.[26] Any claim for a breach of contract between Plaintiffs and Linmere should therefore have been asserted by that time. Since Plaintiffs have pleaded additional facts suggesting that there were no observable indicia of window leaks until early 2001, at the latest, the statute would be tolled until early 2004.[27]

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[23] *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 133 (Del. 1974); *Ruger v. Funk*, 1996 WL 110072, at *2 (Del. Super. Jan. 22, 1996).

[24] *Ruger*, 1996 WL 110072 at *2.

[25] *Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478, at *8 (Del. Super. Nov. 21, 2007) (citation omitted).

[26] For purposes of computing the statute of limitations period, the Court does not include the day of the act but begins the running on the next day. *See* Super. Ct. Civ. R. 6(a).

[27] For purposes of this motion, the Court accepts that Plaintiffs did not discover the window leaks until early 2001. *See Storm*, 898 A.2d at 880 (requiring that the Court "view the evidence in the light most favorable to the non-moving party."). Although Plaintiffs assert that they had no way of knowing the extent of the defects, Plaintiffs admit that they were aware of the defects at that time. *See* Docket 13 (Pl.'s Resp. to Def.'s Mot. to Dismiss), at ¶ 5 (identifying that Plaintiffs knew of the problems but

Despite the fact that Plaintiffs attempt to extend the statute of limitations further, by asserting that the time of discovery rule applies, the record evidence undermines their position. The Complaint indicates that Plaintiffs became aware of the defects in early 2001, at the latest. On November 28, 2005, Linmere informed Plaintiffs that the three-year statute of limitations had already run.[28] Despite notice of the statute of limitations, however, Plaintiffs inexplicably waited until March 3, 2008 to file suit,[29] thereby invalidating any possibility of showing that they were blamelessly ignorant of the cause of action.[30] Thus, even under the rule of discovery, the statute would expire in early 2004, and Plaintiffs' case should have been filed by that time.

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disputing their knowledge as to the extent of the defects). Thus, for purposes of applying the time of discovery rule, Plaintiffs had knowledge, at the latest, in early 2001.

[28] Docket 1, ¶ 18; *Id.*, Ex. 2.

[29] The Court recognizes that if the breach occurred on November 28, 2005, the Complaint would still be timely. Nonetheless, Plaintiffs waited to file suit until nearly one-and-a-half years after Linmere refused to repair. Plaintiffs' delay is even more surprising given that Linmere expressly informed them on November 28, 2005 that the three-year statute of limitations barred any action for other defects. *See id.*, Ex. 2.

[30] *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 133 (Del. 1974); *Ruger v. Funk*, 1996 WL 110072, at *2 (Del. Super. Jan. 22, 1996).

2. Fraudulent Concealment Cannot Toll the Statute

Defendants next argue that the statute of limitation cannot be tolled on the basis of fraudulent concealment. For fraudulent concealment to toll the statute of limitations, the plaintiff must allege an affirmative act by the defendant that is intended to prevent, and which does prevent, the plaintiff from discovering facts giving rise to the cause of action.[31] Such an affirmative act is absent here. In their Complaint, Plaintiffs allege that Linmere not only admitted to the defects in the windows but even made numerous attempts to repair them.[32] Plaintiffs also wrote at least one letter to Linmere in which they detailed the numerous defects in their home, and informed them that they had reviewed many of the defects with third parties.[33] The evidence establishes that Plaintiffs were readily able to discover the defects. It further demonstrates that Linmere never concealed the defects, nor did it do anything to prevent Plaintiffs from discovering the nature or extent of any construction flaws. Without a showing that Linmere

[31] *Nardo*, 254 A.2d at 256.

[32] *See* Docket 1, ¶¶ 11-16, 18.

[33] *Id.*, Ex. 3.

engaged in any affirmative act to conceal the defects from Plaintiffs, fraudulent concealment cannot serve as a basis to toll the statute.[34]

In asserting that fraudulent concealment serves to toll the statute in this instance, Plaintiffs look to a California Court of Appeals case as authority. In *Balfour, Guthrie & Co. v. Hansen*,[35] the Court recognized that fraudulent concealment may toll the statute of limitations, even in a case where a plaintiff has the ability to learn of the true facts but does nothing, if the plaintiff is under no duty to inquire and if a prudent man would not investigate.[36] The Court in that case noted, however, that where the party claiming fraud has received information which should put him on inquiry, and the inquiry, if made, would disclose the fraud, that party will be charged with discovery at the time that the inquiry should have given him knowledge of the true facts.[37]

Even if the *Balfour* decision directly controlled in a case applying Delaware law, which it does not, it still does not support Plaintiffs' position. *Balfour* recognized that where the party claiming fraud actually receives

[34] *See Nardo*, 254 A.2d at 256 (determining that the statute of limitations cannot be tolled as a matter of law by any alleged fraudulent concealment where plaintiff failed to offer evidence of fraudulent intent to conceal any defects in constructing a roof).

[35] 227 Cal. App. 2d 173 (Cal. Ct. App. 1964).

[36] *Balfour*, 227 Cal. App. 2d at 190.

[37] *Id.*

information regarding the fraud and investigates, the plaintiff cannot argue fraudulent concealment as a basis to toll the statute of limitations. In the case at bar, Plaintiffs Complaint and the exhibits attached thereto show that Plaintiffs: (1) recognized the defects in early 2001; (2) contacted Linmere to repair them; and (3) enlisted the assistance of third parties to review and investigate the defects. While Plaintiffs contend that Linmere, who had superior knowledge, misled them by stating that the problems were "nothing more than typical of new construction,"[38] Plaintiffs nonetheless acted prudently by initiating an investigation. As recognized in *Balfour*, Plaintiffs received information that would lead a prudent person to begin inquiry. Since Plaintiffs are charged with the discovery of the defects at the time of their inquiry, which began, at the latest, in early 2001, fraudulent concealment does not exist in this instance.

3. Plaintiffs Have Pleaded Sufficient Facts to Allege Fraudulent Misrepresentation

Linmere next contends that Plaintiffs have failed to satisfy the minimum pleading requirements to allege fraudulent and negligent misrepresentation. To plead fraudulent misrepresentation, a plaintiff must allege:

[38] Docket 13 (Pls.' Resp. to Def.'s Mot. to Dismiss), at ¶ 5.

> 1) . . . the existence of a false representation, usually one of fact, made by the defendant; 2) [that] the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; 3) [that] the defendant had the intent to induce the plaintiff to act or refrain from acting; 4) [that] the plaintiff acted or did not act in justifiable reliance on the representation; and 5) [that] the plaintiff suffered damages as a result of such reliance.[39]

The defendant's representation does not need to be overt.[40] Rather, a defendant's deliberate concealment of a material fact or silence in the face of a duty to speak is sufficient for a claim of intentional misrepresentation.[41] Moreover, the term "misrepresentation" is sufficiently broad to encompass fraudulent, negligent, or even innocent statements.[42]

In this case, Plaintiffs have sufficiently pleaded a claim of fraudulent misrepresentation. Specifically, Plaintiffs have alleged: (1) that Linmere deliberately concealed the true extent of the defects and falsely promised to repair the defects; (2) that Linmere, as the home builder, knew the true extent of the defects and intentionally misled Plaintiffs; (3) that Linmere, through its assurances that it would repair the defects and its threats to cease

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[39] *Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at *6 (Del. Ch. Jun. 6, 2006) (citation omitted).

[40] *Id.*

[41] *Id.*

[42] *See Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1053 (Del. Ch. 2006) (quoting BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 567 (2d ed. 1995)).

repair efforts if Plaintiffs filed suit, intended to stall or delay Plaintiffs from filing suit; (4) that Plaintiffs justifiably relied on Linmere's promises to repair the defects; and (5) that Plaintiffs have suffered damages as a result of their reliance in the form of diminished value to the home and other associated costs.[43] Plaintiffs also included letters from Linmere demonstrating what the statements were, who made the statements, when and where the statements were made, and why they were materially false.[44] These allegations sufficiently plead fraud with particularity under Superior Court Civil Rule 9(b).[45] Since Plaintiffs' Complaint gives adequate notice to Linmere of the basis for the claim, dismissal of the counts concerning fraudulent misrepresentation and negligent misrepresentation is not appropriate at this juncture.[46]

4. Genuine Issues of Material Fact Exist Regarding Waiver and Estoppel

[43] Docket 1, ¶¶ 31-40.

[44] *Id.*, Exs. 1-3.

[45] *See* Super. Ct. Civ. R. 9(b) ("In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.").

[46] *See Caldera Properties - Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2008 WL 3323926, at *11 (Del. Super. Jun. 19, 2008) (denying a motion to dismiss where the Complaint gives general notice of the claim and is not clearly without merit).

The Court is also precluded from granting summary judgment because of the existence of factual disputes regarding whether Linmere waived the statute of limitations or is estopped from raising the statute as a defense. A waiver is the "voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect."[47] A party may waive a right by a clear, unequivocal and decisive act, by either express or implied conduct, demonstrating his intent to relinquish the right.[48] The party raising the defense of waiver has the burden of proof to establish acquiescence.[49] Where evidence concerning a party's waiver is in dispute, Courts have generally refused to grant summary judgment.[50]

In this case, Plaintiffs have put forth sufficient evidence creating a genuine issue of material fact regarding Linmere's intent to waive the statute of limitations. Specifically, Plaintiffs have offered letters from Linmere wherein it promised to repair all defects, regardless of the one-year warranty

[47] *Dervaes*, 1980 WL 333053 at *7 (citations omitted).

[48] *Id.*

[49] *Id.* at *8

[50] *See id.* ("Where the evidence concerning waiver, or an element or requisite thereof is disputed, or where more than one reasonable inference may be drawn from the evidence, the issue is generally held to be a factual question and inappropriate for summary adjudication.").

or the three-year statute of limitations.[51] Indeed, one of Linmere's letters impliedly waived the defense, noting that Linmere would assert the statute of limitations defense regarding the exterior wall defects, but in the same paragraph, making no mention of asserting that defense with respect to the leaks.[52] Plaintiffs have offered additional evidence demonstrating that they complained of the leaks and other defects on numerous occasions.[53]

Nonetheless, the evidence of record demonstrates that, at least on one occasion, Linmere specifically asserted the statute of limitations as a defense to certain claims of Plaintiffs.[54] The record also reflects that Plaintiffs may not have notified Linmere of some of the defects until April 14, 2005, despite their insistence that Linmere knew of the problems.[55] Although Plaintiffs' letter of October 25, 2005 indicates that the other items remained "open" from the time Plaintiffs first moved into the home, Linmere may not have known of some of these defects until October 25, 2005.[56] All of the

[51] *See* Docket 1, Exs. 1 & 2.

[52] *Id.*, Ex. 2.

[53] *Id.*, Ex. 3.

[54] *Id.*, Ex. 2.

[55] *See id.*, Ex. 3 ("Many of these [issues] have been open since the first few months in the house with the exception of the front stone wall that we first discussed no [sic] April 14, 2005.").

[56] *Id.*, Ex. 3.

foregoing conflicting evidence serves to demonstrate to the Court that Linmere's intent regarding any waiver is disputed, and that summary judgment is therefore inappropriate at this stage.[57]

Plaintiffs' argument that Linmere should be estopped from raising the statute of limitations as a defense may also have merit. A party claiming estoppel must allege that: (1) he lacked the knowledge and means to learn the truth of the facts at issue; (2) he justifiably relied upon the conduct of the party against whom estoppel is alleged; and (3) he suffered a prejudicial change of position as a result of their reliance.[58] Allegations of estoppel must contain facts with "sufficient specificity to indicate a defendant affirmatively acted to mislead and induce that party from bringing suit[.]"[59] Unless the Court can draw only one inference, the trier of fact must determine whether estoppel exists.[60]

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[57] *See Dervaes*, 1980 WL 333053 at *8 ("Where the evidence concerning waiver, or an element or requisite thereof is disputed, or where more than one reasonable inference may be drawn from the evidence, the issue is generally held to be a factual question and inappropriate for summary adjudication.").

[58] *Dervaes*, 1980 WL 333053 at *8 (citations omitted).

[59] *Ensminger*, 597 A.2d at 855 (citing *Di Biase v. A & D, Inc.*, 351 A.2d 865 (Del. Super. 1976); *Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261, 1272 (D. Del. 1983).

[60] *Dervaes*, 1980 WL 333053 at *10.

Although the Court concludes that the present record lacks sufficient evidence to establish estoppel as a matter of law,[61] Plaintiffs have offered enough evidence to create a genuine issue of material fact as to whether estoppel should preclude Linmere from raising the statute as a defense. Letters from Linmere attached to the Complaint demonstrate that, as late as November 28, 2005, Linmere acknowledged its responsibility for the defects and promised to repair them. Given Linmere's expertise as a homebuilder, Plaintiffs acted reasonably when they justifiably relied on these assertions. Moreover, by relying on Linmere's assurances, plaintiffs were prejudiced because they were lulled into believing that filing suit against Linmere was not necessary at that time.

The Court is also mindful of Plaintiff's specific allegations that Linmere took deliberate steps to keep them from filing suit through its numerous promises to repair the defects. This evidence precludes summary judgment for Linmere on statute of limitations grounds.[62]

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[61] *Id.* (requiring the party alleging estoppel to produce clear and convincing evidence).

[62] Docket 1, ¶ 14; *Ensminger*, 597 A.2d at 855. In *Ensminger*, the Court noted that a defendant was estopped from raising the statute of limitations where a last minute promise induced the delay in the plaintiffs' decision to file suit and where a defendant tricked the plaintiff into believing that all responsibilities would be honored until the last minute. *See Di Biase*, 351 A.2d at 868-69 (discussing *Nowell v. Great Atlantic & Pacific Tea Co.*, 108 S.E.2d 889 (N.C. 1959) and *State Farm Mut. Auto. Ins. Co. v. Budd*, 175 N.W.2d 621 (Neb. 1970), *overruled on other grounds*, *Aken v. Neb. Methodist Hosp.*, 511 N.W.2d 762 (Neb. 1994)). Plaintiffs have put forth documentary evidence demonstrating

Additionally, the evidence is inconclusive concerning whether Plaintiffs lacked the knowledge and means to learn the truth about the defects. While Plaintiffs have asserted that they did not investigate their claims because of Linmere's repeated assurances and expertise as a home builder, the list documenting the defects which they prepared suggests that they were sufficiently savvy to identify many of the home's deficiencies. Linmere's refusal to discuss the defects with Plaintiffs or with their investigators, and its continued misrepresentations, may suggest that Plaintiffs lacked the means to discover the true nature and extent of the defects. Absent clear and convincing evidence regarding Plaintiffs' ability to discover the extent of the problems, the Court can draw more than one reasonable inference.[63] At this stage, therefore, questions of fact exist for determination by a jury with respect to whether Plaintiffs lacked the means and knowledge to uncover the information they needed to file this lawsuit on a timely basis.

VI. Conclusion

Plaintiffs have pleaded fraudulent and negligent misrepresentation with sufficient specificity to withstand Linmere's motion to dismiss.

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that, at least until November 28, 2005, Linmere promised to repair the leaks. This evidence is sufficient to allege estoppel. *See Ensminger*, 557 A.2d at 855.

[63] *Dervaes*, 1980 WL 333053, at *10.

Plaintiffs have also offered sufficient evidence to suggest that Linmere may have intended to waive the statute of limitations, or that Linmere may be estopped from raising the statute of limitations as a defense. These are genuine issues of material fact that preclude summary judgment at this time. Accordingly, Defendant's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary

cc: Donald L. Gouge, Esq.
William J. Cattie, III, Esq.