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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000288-MR

DENNIS ANDERSON PARK LAKE
APARTMENTS, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 10-CI-006332

LOUISVILLE AND JEFFERSON
COUNTY METROPOLITAN
SEWER DISTRICT

APPELLEE

AND

NO. 2012-CA-001034-MR
AND
NO. 2012-CA-001083-MR

DENNIS ANDERSON PARK LAKE
APARTMENTS, LLC

APPELLANT/
CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 10-CI-006332

ROBERT FREEPARTNER
D/B/A OKOLONA PLUMBING;
AND OKOLONA PLUMBING, LLC

APPELLEES/
CROSS-APPELLANTS

OPINION
AFFIRMING APPEAL NO. 2012-CA-000288-MR
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
APPEAL NO. 2012-CA-001034
AFFIRMING CROSS-APPEAL NO. 2012-CA-001083-MR

** ** ** ** **

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dennis Anderson Park Lake Apartments, LLC (Park Lake), brings Appeal No. 2012-CA-000288-MR from a September 19, 2011, summary judgment of the Jefferson Circuit Court dismissing Park Lake's claim against Louisville and Jefferson County Metropolitan Sewer District (Metropolitan Sewer District). Park Lake also brings Appeal No. 2012-CA-001034-MR from a May 17, 2012, order of the Jefferson Circuit Court and Robert Freepartner d/b/a Okolona Plumbing and Okolona Plumbing, LLC, (collectively referred to as Okolona Plumbing) brings Cross-Appeal No. 2012-CA-001083-MR from the same order. We affirm Appeal No. 2012-CA-000288-MR, we affirm in part, reverse in part, and remand Appeal No. 2012-CA-001034-MR, and we affirm Cross-Appeal No. 2012-CA-001083-MR.

In May 2005, Park Lake and Okolona Plumbing entered into a contract for the installation of underground water pipes at an apartment complex owned by Park Lake in Louisville, Kentucky. These underground water pipes would carry water from the main water meter to the sub-meters for each apartment unit. The main water meter received water directly from the city's water source operated by Metropolitan Sewer District. Park Lake had recently purchased the apartment

complex and was extensively remodeling the facility. It appears the installation was fully performed by early 2006. In September and October 2009, three separate water leaks were discovered at various locations in the underground water pipes installed by Okolona Plumbing between Park Lake's water meter and the complex. Park Lake repaired each leak in the underground water pipes.

In 2010, Park Lake filed the instant action against Okolona Plumbing and Metropolitan Sewer District. Park Lake alleged that Okolona Plumbing breached its contract and negligently installed the underground water pipes causing the underground pipes to progressively leak water since their installation in 2005. Relevant to this appeal, Park Lake sought damages against Okolona Plumbing for reimbursement of sums paid for excess water and sewage usage fees caused by the underground leaking water pipes from 2005 to 2009. In total, Park Lake sought recovery of \$208,064.43 against Okolona Plumbing; of that amount, \$103,383.33 was for sewer charges (less a sewer credit of \$5,439.52), \$102,682.62 was for water charges, and \$7,438 was for repairs and cleanup costs. Park Lake also sought to recover against Metropolitan Sewer District for overpayment of sewer charges from 2005 to 2009, which totaled \$103,383.33. Both Metropolitan Sewer District and Okolona Plumbing filed motions for summary judgment seeking dismissal of all claims.

By order entered September 19, 2011, the circuit court granted Metropolitan Sewer District's motion for summary judgment and dismissed Park Lake's claims against the Metropolitan Sewer District in their entirety. The order included

complete Kentucky Rules of Civil Procedure (CR) 54.02 language. Thereupon, Park Lake filed a Notice of Appeal (No. 2012-CA-000288-MR) from the September 19, 2011, order granting summary judgment.

As concerns the claims against Okolona Plumbing, the circuit court rendered partial summary judgments on January 11, 2012, and May 11, 2012. In the summary judgments, the circuit court concluded: (1) Park Lake may not recover “lost water” damages against Okolona Plumbing for excess water charges under the contract, (2) Park Lake’s negligence claim against Okolona Plumbing regarding damages to personal property was barred by the statute of limitations, and (3) Park Lake’s claim of breach of contract against Okolona Plumbing was not barred by the statute of limitations. Subsequently, by agreed order entered May 17, 2012, the circuit court dismissed the remaining claims of Park Lake against Okolona Plumbing.

Park Lake then filed a Notice of Appeal (No. 2012-CA-001034-MR) and Okolona Plumbing filed a Notice of Cross-Appeal (No. 2012-CA-001083-MR) from the May 17, 2012, order.

There are several issues raised by the parties in each appeal. We will address each appeal separately and its concomitant issues. However, some issues will be rendered moot as they are substantially duplicitous.

In all appeals, the circuit court rendered summary judgment upon multiple claims and issues. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. CR 56;

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

When reviewing a summary judgment, all facts and inferences are viewed in a light most favorable to the nonmoving party. Our review proceeds accordingly.

Appeal No. 2012-CA-000288-MR

Park Lake argues that the circuit court erred by rendering summary judgment dismissing its claim against Metropolitan Sewer District. Specifically, Park Lake asserts entitlement to recover for “mistaken” payments (\$103,383.33) made to Metropolitan Sewer District for sewer charges from 2005 to 2009. Park Lake argues that the sewer charges during these years were inflated because of the underground leaking water pipes. Park Lake explains that Metropolitan Sewer District charges are based upon 85 percent of a customer’s actual metered water usage and not upon actual usage of the sewer system. As a result, Park Lake claims that it was excessively charged for waste water from 2005 through 2009 that never returned to the sewer system and seeks:

[R]ecovery of the amounts Park Lake paid to MSD [Metropolitan Sewer District] for sewer charges, based on the mistaken belief that sewer services were being performed with respect to all water that was metered as arriving on the Property, when in fact sewer services were not performed on the portion of that water that did not re-enter the sewer system. Park Lake paid sums for these services in error given that the water that escaped from the leaking pipes was not discharged into the sewer system and therefore, no sewer services were rendered with respect to such water. . . .

Park Lake’s Brief at 2-3 (citations omitted). Park Lake asserts a claim of restitution under the theories of unjust enrichment and *quantum meruit*.

To recover under the theory of *quantum meruit*, Park Lake must

demonstrate:

(1) [B]enefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value.

Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. App. 2009) (citation omitted). And, to

recover under the theory of unjust enrichment, Park Lake must prove:

1. [T]hat valuable services were rendered, or materials furnished;
2. to the person from whom recovery is sought;
3. which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and
4. under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.

[Quadrille Bus. Sys. v. Ky. Cattlemen's Assn, Inc., 242 S.W.3d 359, 366 \(Ky. App. 2007\)](#) (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 38 (2001)).

The record reveals that Metropolitan Sewer District charges were based upon 85 percent of Park Lake's actual metered usage of water and were not based upon actual usage of the sewer system.¹ Therefore, the actual usage of the sewer system by Park Lake is immaterial to Metropolitan Sewer District charges for sewer services. Under the billing scheme, Park Lake's sewer charges for the years from 2005 through 2009 were properly based upon Park Lake's metered water

¹ By contrast, a sewer meter may be utilized to record the actual amount of water flowing to the sewer system.

usage, and Park Lake's payment of these sewer charges may not be characterized as "mistaken." Rather, Metropolitan Sewer District properly charged Park Lake based upon 85 percent of its metered water usage. For this reason, Park Lake is not entitled to recover under either *quantum meruit* or unjust enrichment. Accordingly, we do not believe the circuit court erred by rendering summary judgment dismissing Park Lake's claim against Metropolitan Sewer District.

Appeal No. 2012-CA-001034-MR

Park Lake contends that the circuit court erred by rendering summary judgment dismissing its negligence claim against Okolona Plumbing as time-barred and by determining that excess water charges were not recoverable under its breach of contract claim.

In its negligence claim, Park Lake maintains that Okolona Plumbing negligently installed the underground water pipes causing the water pipes to leak water from 2005 to 2009 and finally causing three separate fractures in 2009. Park Lake asserts that it did not discover Okolona Plumbing's negligence until 2009 when the underground water pipes fractured and leaked on three separate occasions.

Park Lake argues that it filed the instant action timely in 2010 after discovering in 2009 that Okolona Plumbing negligently installed underground water pipes. Park Lake also maintains that an issue of fact was presented upon

when it should have reasonably known of the leaks, thus preventing entry of summary judgment.

In dismissing Park Lake's negligence claim as time-barred under the two-year statute of limitations period of (Kentucky Revised Statutes) KRS 413.125, the circuit court reasoned:

With respect to the two year statute of limitations, it is unreasonable to conclude that Park Lake exercised ordinary care and diligence in discovering the cause of the leak. Attached to [Park Lake's] Response to Louisville and Jefferson County Metropolitan Sewer District's motion for summary judgment is a spreadsheet that details Park Lake's water consumption from September 14, 2005[,] through January 1, 2010. This spreadsheet indicates astonishingly massive water leakage amongst the leaky PVC joints. For instance, during the first billing cycle, Park Lake had two occupants. It estimated that each occupant should have accounted for \$50.00 in water and sewer bills per cycle. However, the bill was for \$1,621.46, which accounts for 223,000 gallons of water used during the 26 day cycle, or 8,576.92 gallons per day. At its worst, Park Lake consumed 1,860,000 gallons in a 34 day cycle, or 54,705.88 gallons per day. Given that the complex had 208 occupants with an estimated bill of \$5,200, Park Lake argues that it overpaid \$8,665.28 in this cycle. Unsurprisingly, the water consumption plummeted after September 2010. With 176 occupants, Park Lake consumed only 513,000 gallons in a 33 day cycle, or 15,545.45 gallons per day. The bill for this cycle was \$4,402. In sum, when accounting for variations in consumption and occupancy, the Park Lane's [sic] bills dipped by approximately 40% immediately after resolving the leaks.

Park Lane [sic] asserts that its maintenance workers inspected the units and irrigation system for leaks after receipt of unusually high water and sewage bills. They failed to find the source of the leaks, and the

search ceased. Although the leakage emanated from neither the apartment units nor the irrigation system, it was patently obvious that a massive water leak was somewhere between the meter located by the water main and the submeters within the buildings. By using simple powers of deduction or the process of elimination, Park Lane [sic] should have reasonably found the leak well within two years after receiving its first abnormally large water and sewage bill. Therefore, the statute of limitations expired as to any negligence that caused a loss of water (personal property damage) before the action was filed.

For the reasons hereinafter set forth, we conclude that the circuit court properly rendered summary judgment dismissing Park Lake's negligence claim as time-barred pursuant to KRS 413.125.

KRS 413.125 reads:

An action for the taking, detaining or injuring of personal property, including an action for specific recovery shall be commenced within two (2) years from the time the cause of action accrued.

It is undisputed that Park Lake failed to file its negligence action against Okolona Plumbing within two years of the "injury" to its personal property; i.e., the negligent installation of the underground water pipes in 2006. Nonetheless, Park Lake maintains that its action was timely filed under the discovery rule, as it only discovered the leaking pipes in 2009.

Pursuant to the discovery rule, a cause of action will only accrue at the time "plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d

709, 712 (Ky. 2000) (quoting *Hazel v. General Motors Corp.*, 863 F. Supp. 435, 438 (W.D. Ky. 1994)). Stated differently, a statute of limitations is triggered when plaintiff knows or with reasonable diligence should have known: “(1) he has been wronged, and (2) by whom the wrong has been committed.” *Wilson v. Paine*, 288 S.W.3d 284, 286 (Ky. 2009). A plaintiff exercises “reasonable diligence” when he is “as diligent as the great majority of persons would [be] in the same or similar circumstances” *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 659 (Ky. App. 2009). And, where the pertinent facts are disputed, an issue of fact is presented to the jury; however, if the material facts are undisputed, the resolution of the statute of limitations is one of law. *Emberton v. GMRI Inc.*, 299 S.W.3d 565 (Ky. 2009); *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755 (Ky. 1969).

Viewing the facts most favorable to Park Lake, the record reflects that Park Lake knew not later than September of 2007, that leaks were present somewhere on its property because of unreasonably high water and sewer bills. In his deposition, Jeremy Gribbins, facilities manager for Park Lake, was specifically questioned concerning when he knew of a water leak problem:

Q. When did you first learn that there were water leaks in the water line?

A. I actually started as the facilities manager in September of '07, and there roughly we had been discussing that there must have been some problems and we were making efforts in house to try to see what was really going on.

Q. How did you know there were some problems?

A. Because we saw the water bill.

Jeremy Gribbins Deposition at 28-29. Therefore, Park Lake admitted that it knew of a massive water leak on its property by at least September 2007. However, Park Lake maintains that it did not know that the underground water pipes were the cause of the water leak until 2009 when water from the broken underground water pipes actually surfaced and was plainly visible.

In September 2007, it is undisputed from the record that a massive water leak had plainly manifested itself and became objectively apparent by unreasonably high water bills at Park Lake. After ruling out other causes of such a massive water leak, it was reasonable to assume or suspect that the water leak was occurring between the complex's main water meter and the submeters in the apartments, as all of the water running through the main water meter was not, likewise, running through the submeters. Park Lake had actual knowledge that the amount of water passing through the complex's main meter and the amount of water reaching the submeters in the apartments was not the same. Clearly, it was reasonable for Park Lake to know that more water was passing through the main water meter as compared to the submeters; thus, the massive water leak was necessarily located between the main water meter and submeters in the underground water pipes. In sum, Park Lake failed to use reasonable diligence to discover the cause of the water leak. Consequently, we conclude that Park Lake's

negligence claim is time-barred under the two-year limitation period set forth in KRS 413.125.

Next, Park Lake argues that the circuit court erred by holding that excessive water/sewer usage fees it paid from 2005-2009 were not recoverable as damages under a breach of contract claim. Park Lake points out that the underground water pipes leaked water progressively from 2005 through 2009, and Park Lake paid excessive water/sewer usage fees caused by the massive water leak totaling \$206,065.95.² Park Lake maintains that Okolona Plumbing breached its 2005 contract to install the underground pipes “free from defects.” Park Lake believes that damage from excessive water/sewer usage fees are recoverable as consequential damages.

The circuit court concluded that Park Lake could not recover what the court referred to as “lost water” damages, or in actuality, excessive water/sewer usage fees, because “Park Lake’s claim for numerous years of lost water due to defective plumbing work were not contemplated under the parties[’] contract.” For the following reasons, we disagree with the circuit court.

In this Commonwealth, the measure of general damages for breach of contract is usually the cost of remedying the breach or defective performance if reasonable. *State Prop. & Bldgs. Comm’n v. H.W. Miller Constr. Co.*, 385 S.W.2d 211 (Ky. 1964). In addition to such general damages, special or consequential damages are also recoverable for breach of contract. *University of Louisville v.*

² Less a sewer credit of \$5,439.52

RAM Engineering & Constr., Inc., 199 S.W.3d 746 (Ky. App. 2005).

Consequential and special damages do not naturally or necessarily result from the breach but are, nevertheless, recoverable if caused by the breach and are foreseeable. *McCracken & McCall v. Bolton*, 304 Ky. 438, 200 S.W.2d 923 (1947); *see also* 24 Williston on Contracts § 64:12 (4th ed. 2013).

The circuit court concluded that damages for excess water/sewer usage fees were not recoverable as consequential damages because such fees were not foreseeable by the parties. We think the circuit court erred by so concluding.

Under the contract, Okolona Plumbing had a duty to install underground water pipes for Park Lake without defects. It is objectively reasonable to foresee that Okolona Plumbing's failure to properly install the water pipes could cause leaking of water therefrom over a period of time resulting in excessive water/sewer usage charges to be incurred by Park Lake. Simply stated, we believe damages for excessive water/sewer usage fees were objectively foreseeable upon entering into the contract. Thus, we conclude that the circuit court committed an error as a matter of law by rendering summary judgment that precluded the recovery of excessive water/sewer usage charges as consequential contractual damages. However, we do not address the issue of whether Park Lake presented sufficient evidence below to actually recover damages for its excessive water/sewer usage charge claim, as the circuit court did not rule on that issue. That issue shall be addressed by the circuit court on remand.

CROSS-APPEAL NO. 2012-CA-001083-MR

Okolona Plumbing argues that Park Lake’s breach of contract claim is barred by the two-year statute of limitations set forth in KRS 413.124. Okolona Plumbing maintains that the two-year statute of limitations in KRS 413.124 is applicable for a claim of damage to personal property and is the proper statute of limitations period.

Park Lake asserted both a tort and breach of contract action against Okolona Plumbing. The proper statute of limitations for Park Lake’s breach of contract claim is the fifteen-year statute as set forth in KRS 413.090:

Except as provided in [KRS 396.205](#), [413.110](#), [413.220](#), [413.230](#) and [413.240](#), the following actions shall be commenced within fifteen (15) years after the cause of action first accrued:

.....

(2) An action upon a recognizance, bond, or written contract[.] . . .

KRS 413.090(2). Under KRS 413.090(2), an action upon a written contract must be initiated within fifteen years of the actual date or breach thereof. Thus, we reject Okolona Plumbing’s contention that the two-year limitation period set forth in KRS 413.125 bars Park Lake’s breach of contract claim.

Okolona Plumbing also maintains that “Park Lake’s failure to preserve evidence makes it impossible to determine the cause or amount of lost water without resorting to speculation.” Okolona Plumbing’s Brief at 9. These issues were not decided by the circuit court, and the sufficiency of the “evidence” upon

the cause of the leaking underground pipes and upon the amount of excessive water/sewer usage fees is properly left for determination upon remand.

We view Okolona Plumbing's remaining contentions of error as moot or without merit.

To summarize, we conclude the circuit court properly rendered summary judgment dismissing Park Lake's claim against Metropolitan Sewer District for recovery of payments made for sewer charges. We also hold that the circuit court correctly determined that Park Lake's negligence claim against Okolona Plumbing was time-barred under KRS 413.125. Thus, summary judgment concluding Park Lake's negligence claim was appropriately rendered. However, we conclude that the circuit court erroneously rendered summary judgment precluding recovery against Okolona Plumbing by Park Lake for excess water/sewer charges incurred under its breach of contract claim. Thus, we reverse the circuit court's summary judgment upon the breach of contract claim and remand to the circuit court for further proceedings thereon.

For the foregoing reasons, Appeal No. 2012-CA-000288-MR is affirmed, Appeal No. 2012-CA-001034-MR is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion, and Cross-Appeal No. 2012-CA-001083-MR is affirmed.

ALL CONCUR.

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