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20-P-928

Appeals Court

WILLIAM J. SZULC, JR.¹ vs. SICILIANO PLUMBING & HEATING, INC.,
& others.²

No. 20-P-928.

Hampden. April 28, 2021. - June 10, 2021.

Present: Blake, Hanlon, & Shin, JJ.

Wrongful Death. Negligence, Wrongful death, Causing death,
Design, Statute of repose. Repose, Statute of. Practice,
Civil, Claim barred by statute of repose.

Civil action commenced in the Superior Court Department on
May 24, 2019.

A motion for summary judgment was heard by John S. Ferrara,
J., and entry of separate and final judgment was ordered by Mark
D. Mason, J.

Peter A. Slepchuk for the plaintiff.
Mark A. Darling for Siciliano Plumbing & Heating, Inc.

¹ As personal representative of the estate of William J. Szulc, Sr.

² 855 Liberty Springfield LLC and Matthew D. Campagnari.

SHIN, J. This appeal arises from a wrongful death action in which the plaintiff claims that defendant Siciliano Plumbing and Heating, Inc.'s negligent installation of water heaters in a residential property caused the decedent's injuries and ultimately his death.³ The issue is whether G. L. c. 260, § 2B -- the six-year statute of repose that applies to certain actions arising out of improvements to real property -- bars the claims. Concluding that it does, a Superior Court judge allowed the defendant's motion for summary judgment,⁴ and the plaintiff appeals. We affirm.

Background. The following facts are drawn from the summary judgment record and are undisputed, except where otherwise noted.⁵

³ The plaintiff also sued the property owner and the property manager. The claims against these defendants are not at issue on appeal. Our use of defendant in this opinion refers only to Siciliano Plumbing & Heating, Inc.

⁴ The judge ordered the entry of separate and final judgment under Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974), finding no just reason for delay.

⁵ The plaintiff disputed many of the facts in the defendant's Superior Court Rule 9A (b) (5) statement on the basis that "discovery has just begun and [p]laintiff is still in the process of investigating the truth of said allegations." The judge, however, found that "the affidavit and exhibits are sufficient to establish the critical dates and the work performed by [the defendant] to determine the applicability of the statute of repose" and rejected the plaintiff's argument that the defendant's motion was premature. The plaintiff does not argue on appeal that the judge abused his discretion in this regard. We will therefore treat the facts as undisputed.

In September 2012 the property owner hired the defendant to install seven new water heaters and associated piping in a residential building in Springfield. Before performing the work, the defendant's principal, Mark Siciliano, who is a licensed plumber, had to determine how to route the piping "to supply the hot water to the six individual units in the building and the laundry room in a portion of the basement." To do so, Siciliano "analyz[ed] the layout of the new water heaters and what remained of the old piping drops from above as well as the location of the main water pipe coming from the meter." He also made "judgments about the design and flow of the water to maximize the hot water system for the six units in the building and the tank that served the laundry room."⁶

After the installation was complete, Siciliano tested the water temperature in each apartment. He made sure that the

⁶ As the summary judgment record further shows and the judge summarized: "Defendant installed six of the water heaters as replacements for existing water heaters, and installed a seventh water heater for a newly installed laundry room. Defendant had to install new piping connecting each water heater to the proper connection points in the building as all of the previous copper piping had been stolen and removed from the building. The new piping for the . . . six apartments followed a similar path to the layout of the previous piping. The piping for the seventh water heater was necessarily a new layout. Defendant used plastic plumbing pipe where copper piping had existed before. Defendant had to determine where to install additional supports for the plastic piping to avoid any twisting or warping of the pipes as they carried hot water to the various end points, faucets and showerheads."

temperature at each faucet did not exceed 120 degrees Fahrenheit and that the temperature at each showerhead was between 110 and 112 degrees Fahrenheit. Although Siciliano did not have a specific memory of having to adjust any of the shower mixing valves, he would have done so if necessary to achieve the correct temperature, per his usual practice.

On September 17, 2012, the defendant issued an invoice to the property manager for the completed work. Also on that day, a city inspector affixed a tag on each gas meter indicating that the work was "approved." On October 11, 2012, the city issued a certificate of occupancy for the building.

According to the complaint, on May 25, 2016, the decedent was taking a shower in a unit connected to one of the water heaters installed by the defendant when he suffered a seizure and fell. He was discovered slumped in the bathtub in several inches of "steaming hot water," which caused second to third degree burns over much of his body. He later died from his burns.

The plaintiff filed this action on May 24, 2019.

Discussion. We review the grant of summary judgment de novo. See Homeowner's Rehab, Inc. v. Related Corporate V SLP, L.P., 479 Mass. 741, 750 (2018).

"A statute of repose eliminates a cause of action at a specified time, regardless of whether an injury has occurred or

a cause of action has accrued as of that date." Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 352 (2018). General Laws c. 260, § 2B, is such a statute. It provides an absolute six-year time limit on "[a]ction[s] of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property." The six-year period is triggered on the "earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." G. L. c. 260, § 2B.

The Legislature's objective in enacting § 2B was "to protect providers of 'individual expertise' in the business of designing, planning, constructing, and administering improvements to real estate." Dighton v. Federal Pac. Elec. Co., 399 Mass. 687, 696, cert. denied, 484 U.S. 953 (1987). Without such protection, those engaged in designing and constructing improvements to real property would be "subject to possible liability throughout their professional lives and into retirement." Klein v. Catalano, 386 Mass. 701, 708-709 (1982). Thus, "[i]n establishing the six-year limit, the Legislature struck what it considered to be a reasonable balance between the public's right to a remedy and the need to place an outer limit on the tort liability of those involved in construction." Id. at 710. Courts have enforced this legislative determination

strictly, "despite the hardship [it] may impose on plaintiffs." Bridgwood, 480 Mass. at 353.

Here, the plaintiff does not dispute that the work performed by the defendant constituted an improvement to real property within the meaning of § 2B. He contends, however, that the work did not involve the "individual expertise" or "particularized services" necessary to trigger the repose period. Dighton, 399 Mass. at 696. In support, the plaintiff relies on Colomba v. Fulchini Plumbing, 58 Mass. App. Ct. 901 (2003), where we held that the "mere installation" of a replacement boiler did not "involve[] the type of 'design, planning, construction or general administration' required by the statute of repose." Id. at 902, quoting G. L. c. 260, § 2B.

Colomba is not controlling, as it is distinguishable on its facts. There, the defendant "filed nothing" at the summary judgment stage to show that it provided individual expertise in installing the replacement boiler. Colomba, 58 Mass. App. Ct. at 902. The plumber who performed the installation also conceded in his deposition "that he did no structural work, designed nothing, and did no customization work of any kind." Id. In contrast, here, the defendant offered undisputed evidence that Siciliano designed and installed the piping system and, in doing so, had to make professional judgments about how to maximize the hot water reaching the units and the laundry

room in the most efficient manner. Colomba expressly notes that there may be "situations where a plumber would perform more expanded services that might bring him within the statute of repose." Id. This is such a situation. The facts established by the summary judgment record compare favorably to those of cases deeming a defendant's design and construction activities to be covered by the statute of repose. See, e.g., McDonough v. Marr Scaffolding Co., 412 Mass. 636, 642 (1992) (defendant "performed particularized construction services in assembling and installing the bleachers" for skating rink); Fine v. Huygens, DiMella, Shaffer & Assocs., 57 Mass. App. Ct. 397, 403 (2003) (defendant "collaborated in the design and erection of the [wall] panels" and was thus "entitled to the protection of the statute of repose"); Rosario v. M.D. Knowlton Co., 54 Mass. App. Ct. 796, 801 (2002) (defendant "provided individual expertise and rendered particularized services in connection with the design and construction of the [hydraulic] lift").⁷

The plaintiff argues in the alternative that his claims should be allowed to go forward because they do not "aris[e] out of" the design of the piping system. G. L. c. 260, § 2B. As the plaintiff describes his claims, their crux is that the

⁷ Because we conclude that the defendant's designing and installing of the piping system brought the project within the statute of repose, we need not address the defendant's argument that Colomba was wrongly decided.

defendant was negligent in installing the single water heater connected to the decedent's unit or that he was negligent in calibrating the water temperature in the decedent's shower. These acts, the plaintiff argues, did not require individual expertise and are therefore not protected by the statute of repose.

We agree with the judge that the plaintiff cannot avoid application of the statute of repose by recharacterizing his claims in this manner. The statute "contemplates the occurrence of three phases to any improvement to real property: the design phase, the construction phase, and the administration phase following the completion of construction." Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Eng'rs, Inc., 45 Mass. App. Ct. 120, 126 (1998). "All three phases . . . are part of the same continuous construction project." Penn-America Ins. Co. v. Bay State Gas Co., 96 Mass. App. Ct. 757, 760 (2019). There is no dispute here that the installation of each water heater and the calibration of the water temperature in each unit were part of the same continuous project. We conclude that the totality of that project is covered by the statute of repose. Cf. id. at 761 (no basis to conclude that defendant's failure to maintain service line, which defendant installed nearly two decades prior and continued to own, "was part of the same continuous construction project"). Were we to conclude otherwise,

plaintiffs could easily circumvent the statute by focusing their claims on a single component of a larger project. This would in turn contravene the Legislature's intent to place an absolute outer limit on the liability of those involved in the design and construction of improvements to real property. See Bridgwood, 480 Mass. at 351, 356 (statute of repose barred claims arising from subcontractor's replacement and repair of ceiling light fixtures, performed as part of renovation project). Cf. id. at 356 (although claim brought under G. L. c. 93A, "it sound[ed] in tort" and was barred because "otherwise, no contractor would ever be able to 'put a project to rest'"); McDonough, 412 Mass. at 642 ("The result urged by the plaintiffs is one which would undermine the purpose of the statute by allowing them to maintain a cause of action . . . beyond the date of repose simply by identifying [defendant] only by reference to its limited status as a supplier"); Dighton, 399 Mass. at 692 (defendant could not escape statute of repose by characterizing claim as third-party defendant's "misuse" of product).

Accordingly, because G. L. c. 260, § 2B, applies to the plaintiff's claims, he was required to bring them, at the latest, by October 2018 -- six years after the date that the city issued the certificate of occupancy for the building. The complaint, filed in May 2019, was correctly dismissed as untimely.

Judgment affirmed.