STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1396

Grant Park Association,
Appellant,

vs.

Opus Northwest, LLC,
a Delaware limited liability company, et al., defendants
and third party plaintiffs,
Respondents,

vs.

Northeast Insulation, Inc., a Delaware corporation, et al.,
third party defendants,
Respondents,

Dalco Roofing and Sheet Metal., Inc., third party defendant,
Respondent.

Filed May 1, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-15-15312

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Jennifer R. Olson, Bradley D. Fisher, Douglas J. MacArthur, Fisher, Bren & Sheridan, LLP, Minneapolis, Minnesota (for respondents Opus Northwest)

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Jennifer C. Moreau, Joan M. Quade, Barna, Guzy & Steffen, Ltd., Coon Rapids, Minnesota (for respondent Dalco Roofing and Sheet Metal)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Klaphake, Judge.*

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this construction-defects litigation, a homeowners' association challenges the district court's summary-judgment dismissal of its claims against the developer and original owner of homes, arguing that the district court erred in defining the injury for purposes of determining when the statute of limitations began to run. We affirm.

FACTS

Appellant Grant Park Association (the association) is a nonprofit corporation whose members include the owners of 13 townhomes in the Grant Park Development. Respondents Opus Northwest and Urban Condos are the original owner and developer of the townhomes. Respondents Northeast Insulation and Dalco Roofing and Sheet Metal Company (Dalco) are subcontractors that performed work during construction of the townhomes.

In 2005, construction of the townhomes was completed, and buyers of individual units took possession of them. Water-intrusion problems began the same year. Some repairs were performed, including insulating metal boxes on the roof in 2007, but the water-

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

intrusion problems continued. The metal boxes, referred to as doghouses, contained air vents for the dryer, furnace, and water heater in each unit.

Early in 2011, unit-owner John Olson leased his townhome to two tenants. In February 2011, the tenants reported water coming from a ceiling fan in the master bedroom, similar to a leak that had occurred in 2007. Olson notified the association's property manager, William Hauge, of the leak, and Hauge sent the complex's caretakers to inspect the leak.

Also in February 2011, the property-management company for the development contacted Dalco about "water entry" at the townhomes. Dalco inspected the roof above three units and "[f]ound condensation inside metal pipe boxes" above each unit and concluded that the "[l]eakage was not related to the roof system." The metal pipe boxes were understood to be the doghouses, and Dalco did not make a repair recommendation. The association's in-house engineer consulted two insulation companies about the water intrusion, both of which suggested removing the insulation from the doghouses and replacing it with spray foam insulation to prevent warm air from meeting cold air and causing condensation. In response to an inquiry from Olson, Hauge acknowledged that changing the insulation "may not work," but he believed that it was the most "economical way to accomplish the solution." The association approved the insulation work, and it was completed in July 2011.

Olson testified that in the winter of 2012, his tenants reported water intrusion "through the ceiling fan opening through the fan." Olson testified that he notified Hauge about the water intrusion but no investigation was performed. Olson testified that the water

intrusion occurred again in 2013 and 2014 during the winter. Hauge's log of complaints from homeowners confirms that Olson reported water intrusion or leakage in January 2012 and December 2013. Hauge's log states that in 2012, Olson reported that the water was entering through a hallway vent and that in 2013, he reported that it was entering from the doghouse area. A January 17, 2014, entry in Hauge's log states, "Ceiling leaks – townhomes."

On July 30, 2012, Infrared Consulting Services Inc. (ICS) performed a third infrared roof-evaluation survey at the development. The survey identified three areas of suspected wet roof insulation at the townhomes, two of which were the same areas identified in surveys that ICS performed in 2009 and 2011. Moisture-meter probes confirmed that the three areas were wet.

In a July 2013 survey, ICS identified seven suspected areas of wet roof insulation and used moisture-meter probes to confirm that the areas were wet. The association then hired Encompass, an engineering firm, to evaluate the townhome roof. In October 2013, Encompass issued a report that concluded that there was no evidence that the roof membrane was leaking and that the suspected wet areas identified by ICS were "actually pockets of water between the cap sheet and roof membrane." Encompass did not find wet insulation in invasive openings. Encompass opined that water was not likely migrating below the membrane but noted that "significant water migration below the cap sheet for prolonged periods of time can expedite deterioration of the membrane."

Surveys by ICS in 2014 and 2015 identified multiple suspected areas of wet roof insulation, including the two areas recurring each year. Unit owners continued to report

water intrusion during 2013 and 2014. In February 2014, Dalco inspected the roof and found no problem with it but found condensation when it removed the metal sheet.

In March 2014, the association hired Encompass to perform a preliminary inspection to determine the source of the water intrusion. Encompass inspected seven townhome units. In a June 6, 2014 report, Encompass noted evidence of water intrusion at the roof and floor rim joists, copper bump-outs, and roof parapets, caused by condensation formation within the building envelope. Encompass concluded that condensation was occurring throughout the building due to deficiencies in the vapor barrier and roof parapets.

On April 17, 2014, the association gave written notice about the water-intrusion problems to Opus, Urban Condos, and Northeast Insulation. On June 6, 2014, the association sent a copy of Encompass's preliminary report to Dalco and Northeast Insulation and sent follow-up letters to Opus and Urban Condos. On October 20, 2014, the association and its members entered into a tolling agreement with Urban Condos, Opus, and Northeast Insulation. Dalco was not a party to the agreement.

On March 12, 2015, the association brought this action alleging claims for negligence and breach of a statutory warranty under Minn. Stat. § 327A.02 (2014) against Opus and Urban Condos and a claim against Opus that it breached its construction contract with Urban Condos and that the association was an intended third-party beneficiary of the contract. Urban Condos and Opus brought third-party actions against Northeast Insulation

and Dalco. The district court granted summary judgment for respondents. This appeal followed.[1]

D E C I S I O N

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. We review the district court's grant of summary judgment de novo, to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 627 (Minn. 2012). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002)

Minn. Stat. § 541.051, subd. 1(a) (2016) states:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise 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, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury . . . .

The limitations period "begins to run when an actionable injury is discovered or, with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known." *Dakota County v. BWBR Architects, Inc.*, 645

[1] By order filed October 16, 2016, this court dismissed a notice of related appeal by Opus challenging the dismissal of its third-party claims.

N.W.2d 487, 492 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). "Expert knowledge is unnecessary . . . because it is knowledge of the injury, not the defect, which triggers the statute of limitations." *Id.* "When reasonable minds can differ about when the injury was discovered, summary judgment is inappropriate because the issue should be left to the trier of fact." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 472-73 (Minn. App. 2006), *review denied* (Minn. Aug. 26, 2006).

Because the association asserted a statutory breach-of-warranty claim, the statute of limitations was tolled for 180 days when the association provided written notice of the water-intrusion problems to Opus, Urban Condos, and Northeast on April 17, 2014. Minn. Stat. § 327A.02, subd. 4(b)(2) (2016). This 180-day period ended on October 14, 2014, and the statute of limitations ran for six days until October 20, when the parties entered into a tolling agreement. Therefore, if the evidence shows that, as a matter of law, the association knew or should have known about a water-intrusion problem before April 23, 2012 (two years minus six days before April 17, 2014), the district court properly concluded that this action was barred by the statute of limitations.

In *Dakota County*, maintenance employees were notified about leaks in a building in 1992 and received numerous work orders to repair or inspect water-intrusion issues. *Dakota County*, 645 N.W.2d at 490. In 1994, Dakota County provided notice of the leaks to contractors who were involved in the construction of the building, but it did not conduct a formal investigation into the leaks until 1997 and did not begin a lawsuit until 1998. *Id.* at 491. The supreme court determined that the statute of limitations may have been triggered in 1992 but, as a matter of law, was triggered in 1994 when the contractors were

notified about the leaks. *Id.* at 492. In affirming a summary judgment for the contractors, the court stated, "Had Dakota County undertaken an inspection in 1994 as thorough as that undertaken in 1997, the same problems surely would have been revealed." *Id.* at 493; *see also Day Masonry v. Indep. Sch. Dist.* 347, 781 N.W.2d 321, 334 (Minn. 2010) (concluding that statute of limitations barred a construction-defect claim begun in 2006 when school district was aware of leakage problem well before 2004).

The association argues that the district court erred in failing to distinguish between different types of water-intrusion injuries. Citing *328 Barry Ave., LLC v. Nolan Props. Grp., LLC*, 871 N.W.2d 745 (Minn. 2015), the association argues that the injury for purposes of this lawsuit is the condensation that occurred at the rim-joist areas, copper bump-outs, and roof parapets, because that injury was a different injury than the condensation caused by the doghouses.

In *328 Barry Ave.*, the supreme court stated:

> 328 LLC claims that it did not discover its injury—described as "water infiltration" problems—before August 2010. There is no question that 328 LLC was aware of a water leak near one of the windows in the fall of 2009. The district court concluded that there is no fact issue regarding 328 LLC's discovery of the injury because the water intrusion in August 2010 was the same injury as the water intrusion in the fall of 2009; therefore, 328 LLC was aware or should have been aware of its injury in the fall of 2009, more than 2 years before 328 LLC brought this action against NPG. 328 LLC argues that the district court erred in determining that the fall-2009 leak was the same injury as the widespread water intrusion discovered in August 2010. 328 LLC claims that the fall-2009 leak was "an isolated leak," which was addressed to the general contractor's satisfaction during construction.
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> . . . .

> . . . [C]onstruction was ongoing when 328 LLC first discovered the water leak in the fall of 2009. As described by 328 LLC, the contracts between the general contractor NPG and the subcontractors provided that the building would be built "in a good and workmanlike manner, free from faults and defects." After discovering the water leak in the fall of 2009, NPG contacted one of the subcontractors, who came to the area of the leak on more than one occasion. On one of these visits, the subcontractor applied additional sealant. Although the subcontractor stated that it told NPG (and therefore 328 LLC) that the sealant would not solve the problem, Nolan testified on behalf of both 328 LLC and NPG that he believed that all minor defects had been corrected during what he termed "the punch list" phase of construction, before the certificate of occupancy was issued in January 2010. . . . Finally, the record contains no evidence of additional leaks for a period of approximately 10 months. On these alleged facts, one could conclude that the fall-2009 window leak had been repaired, so the actionable injury did not occur, and was not discovered, until August 2010. Considering the record as a whole and construing the evidence in the light most favorable to 328 LLC, we therefore conclude that there is a genuine issue of material fact concerning when 328 LLC discovered the injury.

Id. at 751-52.

The doghouse repairs were completed in July 2011. But Olson testified that water continued coming into his unit after those repairs were completed, and the district court cited Olson's deposition testimony in the memorandum accompanying its summary-judgment order. Specifically, Olson testified:

> Q. Did the spray foam then get added to the doghouse?
> A. I believe it was.
> Q. After that spray foam was added to the doghouse, Mr. Olson, did you have any other issues with leakage through that ceiling fan?
> A. Yes.
> Q. And when?
> A. There were incidences of it in 2012 and '13 – I don't have the exact dates – and in 2014.

Q. What happened in 2012?
A. The same thing. Some water came in through the ceiling fan opening through the fan.
Q. This also was in the master bedroom?
A. Yes.
. . . .
Q. Okay. And did you observe the same issue in the 2012 time frame that you did in 2011, water dripping through the ceiling fan?
A. Yes.
. . . .
Q. Did you have any concern regarding water coming through the ceiling fan the second time?
A. Yes.
Q. And what were your concerns?
A. My concern was that perhaps the doghouse fix was not effective.
. . . .
Q. So you mentioned another incident of water dripping through that ceiling fan in 2013, is that correct?
A. Right.
Q. And can you tell me about the 2013 incident?
A. It was similar to the others. Water came in and it was not long duration. It was a one-time incident, as I recall.
Q. Do you remember the season of the 2012 incident?
A. It was – it was wintertime, but exact date or month, I don't recall.
Q. How about the 2013 incident, do you recall what season that was?
A. Yeah. All of those incidents took place in the winter season.
Q. Okay. So then same with 2014?
A. (Witness indicating in the affirmative.)

Although Olson testified that the water was coming in through the ceiling fan each time and Hauge's report states that it was coming in through a vent in the upstairs hallway in January 2012, whether the water was entering through the ceiling fan or a vent is not material. The material fact is that Olson's unit continued to experience water intrusion, always during the winter months, after the doghouse repairs were completed. Given the

ongoing nature of water-intrusion problems and the results of the repeated evaluation surveys performed by ICS, we conclude that *Dakota County* controls this case. Therefore, at the latest, the January 2012 water intrusion was an injury that triggered the running of the statute of limitations even though the precise nature of the defect causing the injury was not known. Because this injury was discovered more than two years before April 23, 2014, the district court properly granted summary judgment for respondents.

Because the triggering event occurred after the doghouse repairs were completed and more than two years before April 23, 2014, we need not address the association's tolling arguments.

Affirmed.