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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0668**

John Moore,
Appellant,

vs.

Robinson Environmental, et al.,
Respondents,

Century Surety, Defendant.

**Filed January 27, 2020
Affirmed
Klaphake, Judge***

Hennepin County District Court
File No. 27-CV-18-6506

John Moore, Minneapolis, Minnesota (pro se appellant)

Robert E. Kuderer, Thomas C. Brock, Erickson, Zierke, Kuderer & Madsen, P.A.,
Minneapolis, Minnesota (for respondents)

Considered and decided by Reyes, Presiding Judge; Jesson, Judge; and Klaphake,
Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant John Moore challenges the district court's dismissal for failure to state a claim upon which relief can be granted of his claims against respondents Robinson Environmental, Inc. and Tim Robinson for damage allegedly caused by respondents' removal of an asbestos-insulated boiler and asbestos insulation from the pipes in Moore's basement. Moore argues that the district court erred in dismissing most of his claims as barred by the two-year statute of limitations for improvements to real property, his federal Racketeer Influenced and Corrupt Organizations Act (RICO) claim as barred by the four-year statute of limitations, and his remaining claims as inadequately pleaded. Because the district court properly dismissed Moore's claims, we affirm.

DECISION

We review a district court's dismissal for failure to state a claim upon which relief can be granted de novo. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We review "whether the complaint sets forth a legally sufficient claim for relief." *Id.* The parties agree that Moore's "First Amended Complaint Abridged" is the operative pleading, so we will consider only the facts alleged in that complaint and accept them as true, construing all reasonable inferences in Moore's favor. *See id.*

The district court relied on three bases to dismiss Moore's claims for failure to state a claim upon which relief could be granted: (1) most of Moore's claims were barred by

Minnesota Statutes section 541.051, subdivision 1(a) (2016),¹ which imposes a two-year statute of limitations for damages arising out of a defective and unsafe condition of an “improvement to real property”; (2) Moore’s claim under the federal RICO statute was barred by the four-year statute of limitations; and (3) Moore’s false-advertising and deceptive-trade-practices claims, though not barred by the statute of limitations because they sought purely injunctive relief, were not actionable based on Moore’s allegations. We examine each of these bases in turn.

Improvement to Real Property

Moore argues that the district court erred in dismissing most of his claims as barred by the two-year statute of limitations in Minnesota Statutes section 541.051 (2016). The statute provides in relevant part:

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, or for bodily injury or wrongful death, 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

¹ The statute was amended in 2018 to change the language regarding the running of the limitations period from “two years after discovery of the injury” to “two years after the cause of action accrues.” Minn. Stat. § 541.051, subd. 1(a) (2018). The amendment took effect on May 9, 2018, and applies to causes of action accruing on or after that date. 2018 Minn. Laws ch. 116, § 1, subd. 1, at 50. Because Moore filed his complaint on April 20, 2018, the 2018 amendment does not apply, and we refer to the language of the previous version.

Minn. Stat. § 541.051, subd. 1(a). It is alleged that Moore was aware of the damage to his property no later than March 12, 2014, when he received a lab report showing that his property tested positive for asbestos, but he did not file his complaint until April 20, 2018, more than four years later.² Moore argues that section 541.051 does not apply to his claims, in which case his claims would be governed by the ordinary six-year statute of limitations period in Minnesota Statutes section 541.05 (2018). The construction and applicability of a statute of limitations is a question of law that we review de novo. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

Moore argues that Robinson’s work falls outside the statute because it did not constitute “construction of the improvement,” nor did the alleged damage arise out of a “defective and unsafe condition” of an improvement to real property. We are not persuaded by Moore’s assertion that Robinson’s work is not “construction.” Moore points to *Brandt v. Hallwood Mgmt. Co.*, in which we held that section 541.051 did not apply to a contractor that performed solely demolition work, without building or adding anything new to the space. 560 N.W.2d 396, 400 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). Robinson’s asbestos-abatement work does not qualify as demolition.

Moore’s proposed designation of Robinson’s work as not “construction” would require us to adopt a rigid interpretation of the statute distinguishing between contractors that perform different parts of the same project. Even though Robinson did not install

² The district court presumed, for Moore’s benefit, that he served his summons and complaint on this date despite Moore’s failure to provide an affidavit of service demonstrating that fact. We note that Moore eventually provided proof that service was effectuated on November 16, 2018.

anything new, its work was essential to the larger goal of replacing the boiler. Courts have generally refused to interpret section 541.051 in ways that would separate out the various component parts of the same overall project. *See Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 815-16 (8th Cir. 2001) (recognizing that a temporary excavation trench is an “indispensable part” of building a larger complex and sufficiently “construction-like” that section 541.051 should apply); *see also Fiveland v. Bollig & Sons, Inc.*, 436 N.W.2d 478, 479-80 (Minn. App. 1989) (assuming that subcontractor who dug foundation was subject to section 541.051 as part of larger project in constructing new garage and basement), *review denied* (Minn. Apr. 24, 1989). Robinson’s work in taking out the old boiler and removing asbestos insulation from the piping system was necessary for a new boiler to be installed, and it was performed in anticipation of the installation. Since Robinson’s asbestos-abatement work was integral to the construction of the improvement, the fact that another contractor actually installed the new boiler is immaterial. Robinson’s work qualifies as “construction” within the meaning of the statute.

We also reject Moore’s attempt to distinguish a defective and unsafe condition from a negligent construction activity, which he argues is not covered by section 541.051. Moore relies once again on *Brandt*, as well as on *Wiita v. Potlatch Corp.*, 492 N.W.2d 270 (Minn. App. 1992), to support his position. We held in *Brandt* that the statute did not cover injuries arising from an electrical company’s negligence in failing to de-energize a pre-existing electrical wire. 560 N.W.2d at 402. Similarly, in *Wiita* we held that the statute did not apply to the claims of a construction worker who was injured when a crane dropped cement blocks on him during the construction of a wall. 492 N.W.2d at 272.

Moore's alleged injury is distinguishable from those in *Brandt* and *Wiita*. In those cases the defendants' negligence took place outside of work on the actual improvement—in *Brandt*, by the failure to de-energize an already-existing electrical wire, 560 N.W.2d at 400-01, and in *Wiita*, by the inattentive operation of a crane carrying blocks that had not yet been added to a wall, 492 N.W.2d at 272. Here, in contrast, Robinson's alleged negligence was with regard to the way in which Robinson completed its work on the improvement. Unlike in *Brandt* and *Wiita*, Robinson's alleged acts in causing asbestos to be left on the pipes and scattered throughout the basement arose directly from Robinson's work on the permanent improvement, rather than on other activities apart from the construction of the improvement.

Moore's argument is further undermined by the supreme court's decision in *Lietz v. Northern States Power Co.*, in which the court rejected any apparent dichotomy between injuries caused by "negligent construction activities" and those caused by "a defective and unsafe condition." 718 N.W.2d 865, 871-72 (Minn. 2006). The plaintiff in *Lietz* brought suit against a cable company whose employees were installing a utility pole support anchor and pierced a gas line, causing a gas leak and explosion. *Id.* at 868. The court determined that the fact that the employees were negligent in installing the anchor did not mean that the injury could not have arisen from a defective and unsafe condition; rather, the negligence during the installation process created a defective and unsafe condition in the anchor's placement. *Id.* at 872. The same observation is true of Moore's alleged injuries. Robinson's allegedly negligent work created an unsafe condition—the asbestos debris remaining on the pipes and throughout the basement. And the condition of the asbestos

debris caused the property damage that Moore alleges. Moore’s framing of the issue as damage resulting from negligent construction activities does not change the fact that, as the court observed in *Lietz*, such negligent activities resulted in a defective and unsafe condition.

Moore appears willing to acknowledge that the asbestos residue left on the pipes constitutes a defective and unsafe condition, but nonetheless focuses on the alleged damage caused by the workers ripping the polyethylene sheeting down from the ceiling, arguing that that damage did not arise from a defective and unsafe condition. Such an interpretation of the statute would mean that some of Moore’s claims are subject to section 541.051, while others are not, even though both arose out of the same course of conduct—with a two-year statute of limitations period applying to some damage and the ordinary six-year limitations period applying to other damage. Courts have refused to interpret section 541.051 in ways that would trigger different statutes of limitations based on fine distinctions. *See Lederman*, 247 F.3d at 817 (rejecting application of different statutes of limitations against contractor who demolished a wall and contractor who rebuilt wall); *Griebel v. Andersen Corp.*, 489 N.W.2d 521, 523 (Minn. 1992) (rejecting interpretation of “defective and unsafe condition” as encompassing only something that poses risk of bodily injury, based on legislature’s intention to provide for a single limitations period). Moore’s proposed distinction is likewise contrary to the legislative intent to provide for a single limitations period for damage arising out of the same conduct. We therefore conclude that all of Moore’s alleged injuries arose out of a defective and unsafe condition—namely, the asbestos debris left on the pipes and scattered throughout the basement.

Moore raises two other arguments regarding the application of section 541.051, one asking us not to apply the statute at all and the other asking us to overrule a previous decision regarding the statute's applicability to fraud claims. He does not cite any recognized basis for challenging the statute, and we decline to overrule our previous decisions. For all these reasons, section 541.051 applies to most of Moore's claims, and the district court properly dismissed those claims as barred by the two-year statute of limitations.

Federal RICO Claim

Moore argues that the district court erred in dismissing his federal RICO claim as barred by the statute's four-year limitations period, insisting that the limitations period should be tolled based on the doctrine of equitable estoppel. He maintains that the limitations period should be tolled during the time when Robinson's insurer, Century Surety, was investigating Moore's claim, and that the limitations period did not begin to run until June 4, 2014, when Century Surety informed him that it was closing his claim file.

In the context of improvements to real property, courts have applied the doctrine of equitable estoppel to toll the statute of limitations where a party responsible for remedying a defect in real property has made assurances that the defect will be repaired, and the injured party reasonably and detrimentally relied on such assurances. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 620-22 (Minn. App. 2000). Here, Robinson made no promises that it would actually *repair* any damage. In fact, the alleged representations were

made by Robinson's insurer, not by Robinson itself. The district court properly concluded that this claim was barred by the four-year statute of limitations.

False-advertising and Deceptive-trade-practices Claims

Moore argues that the district court erred in dismissing his claims under the Minnesota False Statements in Advertisement Act (MFSAA), Minn. Stat. § 325F.67 (2018), and the Minnesota Deceptive Trade Practices Act (MDTPA), Minn. Stat. § 325D.44, subd. 1 (2018).

Moore's claims are based on the theory that Robinson's statement on its website that it performs "asbestos abatement" constitutes a false statement because Robinson's performance did not comply with the requirements for asbestos abatement as provided by law. The statement that Moore points to is not false. The Minnesota Department of Health defines "abatement" as "the performance of asbestos-related work," including "area preparation, containment removal, and cleanup." Minn. R. 4620.3100, subp. 1a (2019). Robinson's representation that it performs asbestos-related work is not necessarily a representation of compliance with state law. There is no dispute that Robinson in fact performs asbestos-related work; Moore's allegation is merely that Robinson's performance was shoddy. His claims are not actionable under either statute.

Moore argues finally that the district court erred in determining that the false-advertising and deceptive-trade-practices claims could not be brought against Tim Robinson as an individual because he was protected by the corporate shield. We do not

reach this issue because the claims fail regardless of whether they are brought against Tim Robinson as an individual or Robinson as a corporation.

Affirmed.