STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0889
A12-0890

Sterling Heights, LLC,
Appellant,

vs.

Vaughn Veit,
Respondent (A12-0889),

Vaughn Properties, LLC,
Respondent (A12-0890),

Granite City Innovative Builders, Inc.,
Defendant (A12-0890),

Duffy Engineering & Associates, Inc., et al.,
Respondents (A12-0890),

and

Granite City Innovative Builders, Inc.,
Third Party Plaintiff (A12-0890),

vs.

Kasella Concrete, Inc., et al.,
Third Party Defendants (A12-0890)

Filed December 3, 2012
Affirmed
Connolly, Judge

Sherburne County District Court
File No. 71-CV-11-1708

Karl E. Robinson, Kathleen M. Loucks, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellant)

Timothy R. Murphy, Cara C. Passaro, O'Neill & Murphy, LLP, St. Paul, Minnesota (for respondents Vaughn Veit and Vaughn Properties)

Holly J. Newman, Marilyn J. Rosberg, Daniel J. Sathre, Mackall, Crounse & Moore, PLC, Minneapolis, Minnesota (for respondents Duffy Engineering & Associates)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and Rodenberg, Judge.

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

CONNOLLY, Judge

Appellant, the owner of an apartment complex, brought an action against the seller of the apartment and an engineering firm, both of whom were granted summary judgment on the ground that the statute of limitations barred appellant's claims against them. Appellant also brought an action against the seller's president and owner, alleging a claim of negligent misrepresentation and a claim of intentional misrepresentation and fraud. The negligent-misrepresentation claim was dismissed as barred by the statute of limitations; the intentional-misrepresentation-and-fraud claim was dismissed for failure to state a claim on which relief could be granted. Because we see no error in the application of the statute of limitations or of Minn. R. Civ. P. 12.02 (e), we affirm.

FACTS

In December 2001, respondent Vaughn Properties LLC (Vaughn), through its president and owner, respondent Vaughn Veit (Veit), purchased a piece of real estate on

which to build an apartment complex (the property). Vaughn hired respondent Duffy Engineering (Duffy) to work on the property.

In the spring of 2003, Vaughn was told of problems with shrinkage, settlement cracks, frost action, ponding water, and other code violations with the buildings, but, by May 2003, construction was substantially completed and certificates of occupancy were issued. In June 2003, TE Miller Development (Miller) issued a letter of intent to purchase the property from Vaughn for $7,296,000.

Vaughn, through its attorney, replied in a letter dated July 31, 2003, telling Miller of an ongoing lawsuit concerning the property: the general contractor and some subcontractors had brought a mechanic's lien action against Vaughn, and Vaughn had counterclaimed, alleging deficiencies in design and construction.

The lawsuit eventually settled, and, in April 2006, Vaughn and Miller entered into a purchase agreement whereby Miller purchased the property for $6,625,000. Miller terminated that agreement in May 2006, but entered into a reinstatement and amendment of the purchase agreement in June 2006 whereby the purchase price was lowered to $6,325,000. Miller hired Duffy to inspect the property. At the closing, Miller assigned all its rights, title, and interest in the property to appellant Sterling Heights, LLC.

In the spring of 2009, two posts and six floor trusses in one building snapped and partially failed. Appellant discovered multiple other cracks in the walls and ceilings of the buildings, as well as defects related to the property's underground drainage system.

In May 2010, appellant brought this action against Vaughn, alleging breach of contract. Appellant later moved to amend the complaint by adding Duffy and Veit as

defendants. In August 2011, the district court granted the motion with respect to Duffy but denied it with respect to Veit.

In September 2011, appellant filed an amended complaint against Vaughn, alleging design and construction defects, and against Duffy, alleging negligent misrepresentation and negligence in the June 2006 inspection based on Duffy's failure to discover defects in the structural support systems.

Vaughn moved for summary judgment on appellant's breach-of-contract claim, arguing that Minn. Stat. § 541.051 (2010) (providing a two-year statute of limitations for actions arising out of improvements to real property) applied; Duffy moved for summary judgment on appellant's negligent misrepresentation and inspection claims.[1] In February 2012, the district court in a comprehensive and well-reasoned opinion rejected appellant's argument that Minn. Stat. § 541.051 applies only to claims for defective workmanship, granted Vaughn's and Duffy's summary judgment motions, and dismissed appellant's claims against them.

Appellant moved for reconsideration, arguing for the first time that Minn. Stat. § 541.051 did not apply because Vaughn was not the owner of the property. The district court denied the motion.

In December 2011, appellant brought a separate action against Veit, alleging (1) negligent misrepresentation and (2) intentional misrepresentation and fraud. Veit moved to dismiss under Minn. R. Civ. P. 12.02(e). In April 2012, his motion was granted

[1] Appellant had conceded that all its other claims against Vaughn and Duffy were time-barred.

on the grounds that the negligent-misrepresentation claim was barred by the statute of limitations and the intentional-misrepresentation-and-fraud claim failed to state a claim on which relief could be granted, and the claims were dismissed.

Appellant filed one notice of appeal challenging the summary judgment dismissing its claims against Vaughn and Duffy (A12-0890) and another (A12-0889) challenging the summary judgment dismissing its claims against Veit. An order of this court consolidated the two appeals.

Appellant now challenges the determinations that bar its claims against Vaughn and Duffy, arguing that (A) the claims did not arise out of the defective and unsafe conditions of an improvement to real property; (B) Vaughn is not an "owner" within the meaning of Minn. Stat. § 541.051; (C) its claim against Vaughn was not brought more than two years after discovery of the injury, and (D) the amended complaint adding Duffy as a defendant related back to the original complaint against Vaughn. Appellant also challenges the dismissal of its claims against Veit, arguing that its negligent-misrepresentation claim was not barred by Minn. Stat. § 541.051 and relief could be granted on its intentional-misrepresentation-and-fraud claim.

D E C I S I O N

I. Application of Minn. Stat. § 541.051

This court reviews the construction and application of statutes of limitations de novo. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008).

> [N]o action . . . 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.

Minn. Stat. § 541.051. Two phrases of the statute are at issue here: "arising out of the defective and unsafe condition of an improvement to real property" and "against the owner of the real property."

A. "Defective and Unsafe Condition of an Improvement"

Appellant's breach-of-contract claim against Vaughn was that Vaughn failed to disclose the condition of the property in order to make the property appear fit for its intended purpose, free of defects and building code violations, and free of industry standard violations. Appellant sought damages for injuries to the property resulting from alleged defects relating to the structural support systems, the underground drainage systems, and the site preparation; all these defects were ascribed to Vaughn's failure to properly select and supervise subcontractors. The district court concluded that the claim "arises out of the defective or unsafe condition of an improvement to real property" and that Minn. Stat. § 541.051 therefore applied. Similarly, the district court concluded that Minn. Stat. § 541.051 applied to appellant's misrepresentation and negligence claims against Duffy because those claims were based on Duffy's alleged failure to design the property in accord with the prevailing standard of care and its negligence in failing to discover and disclose the internal defects in the structural support system and the damages appellant sought were for defective conditions resulting from errors in

"construction, design, development, workmanship, and supervision and selection of workers."

Appellant argues that Minn. Stat. § 541.051 does not apply to its claims because they did not arise out of a defective and unsafe condition of an improvement to real property. To support this argument, appellant relies on *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396 (Minn. App. 1997) (holding that Minn. Stat. § 541.051 did not apply), *review denied* (Minn. June 11, 1987), and *Wiita v. Potlatch Corp.*, 492 N.W.2d 270 (Minn. App. 1992) (same). Appellant's reliance is misplaced; both cases are distinguishable because they concern injuries to individuals. *See Brandt*, 560 N.W.2d at 400-01 (concerning a carpenter injured by electric wire left from demolition work in a situation where "no improvement was made to the real property"); *Wiita*, 492 N.W.2d at 272 (holding that there was "no causal connection" between injuries sustained by a bricklayer when bricks fell from a crane and the improvement to real property). The district court correctly concluded that appellant's claims arose out of a defective and unsafe condition to an improvement of real property within the meaning of Minn. Stat. § 541.051.

B. "Owner of the Real Property"

Appellant argues that Minn. Stat. § 541.051 applies to actions against only two entities: (1) those who performed or furnished services in design or construction, and

(2) owners, and that Vaughn neither performed or furnished such services nor owned the property, having sold it to Miller, who assigned its interest to appellant, in 2006.[2]

But appellant's claims were based on the condition of the property at the time it was purchased from Vaughn; thus, Vaughn was the owner of the property at the relevant time. Moreover, Minn. Stat. § 541.051 was designed to "eliminate suits against [those who] no longer have any interest or control in [an improvement to real property]." *Red Wing Motel Investors v. Red Wing Fire Dept.*, 552 N.W.2d 295, 296 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996). Appellant provides no support for the view that the statute would not apply to actions against former owners who have sold the improved property. Thus, appellant's argument that Minn. Stat. § 541.051 does not apply fails.

[2] Arguably, this issue is not properly before us because appellant first raised it in the district court in a motion for reconsideration. "Motions for reconsideration are not opportunities for presentation of facts or arguments available when the prior motion was considered" and they "will not be allowed to 'expand' or 'supplement' the record on appeal." Minn. R. Gen. Pract. 115.11 1997 advisory comm. cmt. (citing *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 715-16 (Minn. App. 1997) (holding that material not presented to the district court on a motion for summary judgment may not be considered on a motion for reconsideration), *review denied* (Minn. Apr. 27, 1997)). Nor did appellant merely advance a "refinement" of its original argument. *See Jacobson v. $55,900*, 728 N.W.2d 510, 523 (Minn. 2007) (holding that, when a party argued to the district court that he had rebutted a presumption of forfeitability with a witness's testimony, then argued on appeal that the district court erred in considering that witness's credibility in determining that the party had not rebutted the presumption, the party "[had] refined the argument . . . to the district court . . . [and was] not raising a new argument on appeal"). The argument that Minn. Stat. § 541.051 does not apply because Vaughn is not the owner is a completely different argument, not a "refinement" of the argument that appellant's "claims do not relate to or otherwise arise out of an improvement to real property, but are instead breach of contract [claims] relating to a purchase agreement." We nevertheless address the issue in the interest of completeness.

C. Vaughn's Discovery of the Injury

The two-year limitation period of Minn. Stat. § 541.051 begins to run with discovery of the injury, i.e., "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action." *Greenbrier Village Condo. Two Ass'n, Inc. v. Keller Investment, Inc.*, 409 N.W.2d 519, 524 (Minn. App. 1987); *see also Dakota Cnty. v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492 (Minn. App. 2002) (two-year limitation 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"), *review denied* (Minn. Aug. 20, 2002). Appellant brought its action alleging the breach-of-contract claim against Vaughn in May 2010; therefore, the issue is whether appellant knew or, in the exercise of reasonable care, should have known of the injury prior to May 2008.

The record shows that, in 2003, Vaughn received reports of defects, including shrinkage and settlement cracks, block veneer, vertical cracks, ponding water, framing problems, and problems with stoops from one source and reports of cracks, settlements, and sealant omissions from another source. Prior to the sale in 2006, Duffy had been hired to inspect the building. Duffy found shrinkage cracks in the brick veneer and small cracks in entryway slabs.

Appellant argues that its discovery of the injury did not occur until the spring of 2009, when someone from Miller heard the cracking or snapping noise of six floor trusses breaking off. But the fact that further damage was discovered in 2009 does not

negate the fact that appellant was informed of defects in the property in 2003 and in 2006, nor does it create a genuine issue of material fact with regard to appellant's knowledge in 2003 and 2006.

The district court did not err in concluding that Minn. Stat. § 541.051 applied to bar appellant's claims against Vaughn.

D. Relation back of the claims against Duffy

Appellant argues that its August 2011 claims against Duffy relate back to its May 2010 complaint against Vaughn, made within two years of the time when appellant claims to have discovered the injury. *See* Minn. R. Civ. P. 15.03 (providing that when a claim asserted in an amended pleading arises out of the conduct set forth in the original pleading, the amendment relates back to the date of the original pleading).[3]

But "[when a plaintiff] knew all along a claim could be asserted against [a defendant, a]pplication of the relation-back doctrine is not justified simply because [the plaintiff] waited until the limitations period expired before it asserted a claim against [that defendant]." *Olmscheid v. Paterson*, 440 N.W.2d 124, 128 (Minn. App. 1989) (quotation omitted), review denied (Minn. July 12, 1989); *see also Leaon v. Washington Cnty.*, 397 N.W.2d 867, 872 (Minn. 1986) (affirming denial of permission to amend

[3] This issue also is arguably not properly before us. Appellant first raised it to the district court in the motion for reconsideration. As previously noted, "[m]otions for reconsideration are not opportunities for presentation of facts or arguments available when the prior motion was considered" and "will not be allowed to 'expand' or 'supplement' the record on appeal." Minn. R. Gen. Pract. 115.11 1997 advisory comm. cmt.; *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("[A] party [may not] obtain review by raising the same general issue litigated below but under a different theory."). Again, we address the issue in the interests of completeness.

complaint to add a defendant when plaintiff chose, for unspecified reasons, not to make a known defendant a party until the statute of limitations had expired). Appellant does not explain why it delayed over a year to add Duffy to the lawsuit.

The district court did not err in concluding that Minn. Stat. § 541.051 applied to bar appellant's claims against Duffy.

II. Negligent Misrepresentation Claim Against Veit[4]

In a careful and detailed analysis, the district court concluded that the negligent misrepresentation claim was barred by Minn. Stat. § 541.051 because: (1) Minn. Stat. § 541.051 applies specifically to tort actions "arising out of the defective and unsafe condition of an improvement to real property"; (2) appellant's amended complaint stated that, "[i]n the spring of 2009 [appellant] discovered that there were structural defects with the property"; (3) appellant's brief in opposition to Veit's motion to dismiss stated that "the facts that predicate this claim occurred in 2006"; and (4) appellant's action against Veit began on November 2, 2011, more than two years after either spring 2009 or 2006. Because no relief could be granted on a barred claim, the district court granted Veit's motion to have the claim dismissed under Minn. R. Civ. P. 12.02 (e).

Appellant argues that the district court's reasoning leads to an absurdity because, "[i]f the statute of limitations on a negligent misrepresentation [claim] regarding the condition of real property starts at the time of construction or improvement, the statute of limitations could theoretically expire before misrepresentations are even made . . . ." But

[4] Appellant does not challenge the district court's conclusion that this claim is also barred because the claims against Vaughn were dismissed so, even if the corporate veil were pierced and Veit were found liable for Vaughn's acts, no liability exists.

Minn. Stat. § 541.051 does not say the statute begins to run at the time of construction or improvement; it says it begins to run at the discovery of the injury.

Appellant's negligent misrepresentation claim against Veit was properly dismissed.

III. The Intentional Misrepresentation and Fraud Claim Against Veit

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Minn. R. Civ. P. 9.02. The district court concluded that appellant's intentional-misrepresentation-and-fraud claim against Veit failed because it did not state the circumstances with particularity. A fraud claim requires a showing that:

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Group, LLC, 736 N.W.2d 313, 318 (Minn. 2007).

Appellant offered two documents to support its allegation of Veit's fraud. The first was a letter written by counsel for Vaughn to counsel for Miller on July 31, 2003. The letter stated that "Vaughn Properties has corrected or is in the process of correcting most of the items set forth in the enclosed documents that were not properly completed or not completed by the general contractor." The letter neither mentions Veit nor lists him as receiving a copy of the letter. Thus, the letter cannot be construed as a false

representation made by Veit with knowledge of its falsity. Moreover, it says Vaughn "has corrected or is in the process of correcting" various defects. Vaughn's intent to correct defects is not a statement of fact.

The second document introduced to support the fraud allegation was the Purchase Agreement signed by Veit, specifically the assertions that "To Seller's [i.e., Veit's] best knowledge," the property was, "in all material respects, in compliance with all applicable laws, codes, ordinances and regulations" and the buildings and all their systems and components were "in good condition and in proper working order [and] free from material defects." The district court concluded that the statements beginning "[t]o Seller's best knowledge" had to be read in context with the rest of the agreement, which included an

> "As-Is" Clause. Notwithstanding anything to the contrary contained herein, Seller is selling and Purchaser is buying the Buildings, Improvements, Real Property and Personal Property 'as is' with all faults and virtues. . . . Purchaser assumed all risk concerning the condition of the Real Property, the materials, design and construction of the Buildings and improvements and, except to the extent the same constitutes a breach of a representation, warranty or covenant contained in this Agreement or a closing document, agrees not to hold Seller responsible for any existing or future condition or defect in the Buildings or the Improvements and hereby releases Seller from all further obligations effective on the Closing Date concerning the Buildings or the Improvements on the Real Property.

The district court ruled that the purchase agreement, "read as a whole, does not constitute a false representation made to [appellant.] The clauses cited by [appellant] begin with 'to

the best of Seller's knowledge' and must be read in conjunction with the 'as-is' statement."

Appellant claims that the district court failed to consider a 2011 affidavit from the president of Miller, stating in effect that the "To Seller's Best Knowledge" statements superseded the "As-Is" clause. The affidavit said, "we wanted to make sure that Vaughn fixed any structural issues with the property. . . . [T]he As-Is clause specifically states that any representations made in the Purchase Agreement are exceptions."[5] But the As-Is clause begins with "Notwithstanding anything to the contrary contained herein," and the "To Seller's best knowledge" statements were "contained herein." This supports the district court's view that "read as a whole, [the purchase agreement] does not constitute a false representation made to [appellant]."

The district court did not err in dismissing the intentional-misrepresentation-and-fraud claim on the ground that "[appellant] has not alleged the ultimate facts with particularity, and . . . even if all allegations in the Amended Complaint are accepted as true, [appellant] has not plead[ed] a claim sufficient to grant the relief demanded."

The claims against Vaughn and Duffy and the negligent-misrepresentation claim against Veit are barred by the statute of limitations; the intentional-misrepresentation-and-fraud claim against Veit fails to state a claim on which relief could be granted.

Affirmed.

[5] Appellant does not explain why a 2011 affidavit purporting to construe a 2006 Purchase Agreement would be admissible to create a genuine issue of material fact about the meaning of the agreement.