

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MICHAEL MARTIN, et al.

C. A. No. 23422

Appellees

v.

DESIGN CONSTRUCTION SERVICES,
INC.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2005-05-2626

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 17, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} The Ohio Supreme Court has remanded this case for this Court to consider Design Construction Services Inc.’s third assignment of error, regarding whether Michael and Jennifer Martin filed their complaint within the applicable statute of limitations. Because this Court sustained Design Construction’s first assignment of error, it had determined that the statute of limitations issue was moot. The Supreme Court, however, reversed this Court’s decision on the first assignment of error. In its third assignment of error, Design Construction has argued that the trial court should have granted it summary judgment because the Martins’ claim was barred by the four-year statute of limitations. It has also argued that the trial court incorrectly granted the Martins a directed verdict on that issue. This Court affirms because, construing the evidence presented at trial in a light most favorable to Design Construction, reasonable minds could only have concluded that the Martins filed this action within four years after they discovered or,

through the exercise of reasonable diligence, should have discovered the problems with Design Construction's work. This case is remanded to the trial court for consideration of the Martins' motion for post-judgment interest and motion for supplemental costs.

FACTS

{¶2} In 1998, Design Construction built the concrete block foundation for a house in Uniontown, Ohio. It applied a coat of mortar to the outside of the concrete blocks where they are above grade. Because of the topography of the lot, the grade of the yard at the rear of the house is approximately three feet lower than the grade of the yard at the front of the house. That meant that, during construction, Design Construction had to backfill the inside of the garage in order to have a level surface upon which to pour the concrete garage floor.

{¶3} As a Design Construction employee was using a bulldozer to backfill the garage, he drove it too close to the foundation walls. The weight of the bulldozer on the dirt inside the walls caused them to flex outward. Don Shultz, Design Construction's president, testified that the damage to the foundation was not substantial enough to require major repairs. Instead, Design Construction dug the backfill out by hand to relieve the pressure on the walls, straightened them, and returned the backfill to the inside of the foundation. It also repaired cracks that had developed in the mortar on the outside of the walls.

{¶4} In 1999, the original owners of the house complained to Design Construction about a crack in the foundation of the garage. In response, Design Construction fixed the crack and filled the inside of the concrete blocks that formed the garage foundation with grout. Mr. Shultz said that Design Construction filled the blocks with grout because it "didn't want to take any more chances with it" and doing so "would make those . . . solid concrete walls and they would never go anywhere or have any concerns with that."

{¶5} The Martins bought the house in July 2000. Before closing, the original owners gave them a residential property disclosure form that indicated that there had been a “[c]rack in the [b]ack garage wall [that] was fixed in May 1999.” The Martins also hired a home inspector to examine the house, who discovered some minor cracking and suggested that the Martins monitor it. Regarding the exterior of the house, the inspector wrote in his report that there was “[m]inor cracking evident. The cracking appeared typical.” Regarding the foundation, he wrote that there was “[m]inor stress cracking evident. It appeared typical for the age and type of construction. There was not visible evidence of significant structural movement at this time. The disclosure stated that a crack at the rear of the garage has been patched. Because of the design of the garage, where the floor is higher than the rear yard, further movement could continue slowly over time. I suggest monitoring. Some reinforcing may need added if movement continues.” Mr. Martin acknowledged that there were cracks in the mortar on the outside of the above-grade concrete blocks at the time he and Mrs. Martin bought the house. He testified, however, that he assumed the cracks were just in the mortar and not in the concrete blocks under the mortar.

{¶6} According to the Martins, after they moved into the house, they followed the inspector’s advice to monitor the cracks. In May 2004, Mr. Martin noticed that the cracks in the mortar were getting wider. He first thought it was only a cosmetic problem and attempted to repair the cracks with additional mortar. While using an angle grinder to widen the cracks as a first step in attempting to fill them, the face of some of the concrete blocks fell off. Inside the blocks, he discovered a powdery material. At that point, Mr. Martin contacted several contractors to have them look at the problem. They suggested that he contact Design Construction, which he did.

{¶7} Representatives of Design Construction examined the Martins' garage and denied responsibility for the problem. They acknowledged that, during construction, the bulldozer had caused the walls to flex. They suggested, however, that the problem with the concrete blocks had been caused by Mr. Martin painting the foundation in 2003 and his use of the angle grinder on the cracks in the mortar. They further told the Martins that, despite the cracks and crumbling blocks, they did not feel that "there [was] a concern for structural failure."

{¶8} The Martins hired a company named Master Masonry to repair the foundation of the garage. David Moody, the president of Master Masonry, testified that, as his company excavated around the foundation, it discovered that the footers were not below the frost line as they should have been. He also testified that the grout with which the concrete blocks were filled had never cured. He suggested that the grout mixture had not contained enough concrete. Although he acknowledged that he does not recommend painting a concrete block foundation because doing so holds moisture inside the concrete blocks, he said that he did not believe that the problems with the garage foundation were caused by Mr. Martin having painted it. He noted that the moisture in the foundation had to have come from somewhere. He said that he believed the concrete blocks crumbled because the grout inside them had not cured.

{¶9} In 2005, the Martins sued Design Construction for the cost of repairing the foundation, alleging negligence and breach of warranty. Design Construction moved for summary judgment, arguing that the Martins' claims were barred by the four-year statute of limitations. It argued that there was no genuine issue of material fact that the Martins knew there might be an issue with the foundation when they bought the house in 2000. The trial court denied Design Construction's motion and the case proceeded to trial before a jury. At the conclusion of the evidence, the trial court granted the Martins a directed verdict on Design

Construction's statute of limitations defense. The jury found in favor of the Martins, and Design Construction appealed, assigning three errors. On appeal, this Court sustained Design Construction's first assignment of error and denied its other assignments of error as moot. The Ohio Supreme Court reversed this Court's decision regarding Design Construction's first assignment of error and remanded for consideration of its third assignment of error.

STATUTE OF LIMITATIONS

{¶10} Design Construction's third assignment of error is that the trial court incorrectly denied its motion for summary judgment and incorrectly directed a verdict for the Martins on its statute of limitations defense. "The application of a statute of limitations presents a mixed question of law and fact. Determination of when a plaintiff's cause of action accrues is to be decided by the factfinder. But, in the absence of such factual issues, the application of the limitation is a question of law." *Cyrus v. Henes*, 89 Ohio App. 3d 172, 175 (1993), rev'd on other grounds, 70 Ohio St. 3d 640 (1994).

{¶11} The parties agree that a four-year limitations period applies to the Martins' claims. See *Velotta v. Petronzio Landscaping Inc.*, 69 Ohio St. 2d 376, paragraph one of the syllabus (1982) ("An action by a vendee against the builder-vendor of a completed residence for damages proximately caused by failure to construct in a workmanlike manner using ordinary care . . . is an action in tort to which the four-year statute of limitations set forth in R.C. 2305.09(D) applies."). "[T]he four-year statute of limitations . . . commences . . . when it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property." *Harris v. Liston*, 86 Ohio St. 3d 203, paragraph two of the syllabus (1999).

DIRECTED VERDICT

{¶12} Design Construction has argued that the Martins knew or should have known of the damage to the garage foundation at the time they bought the house. Regarding the trial court's decision to direct a verdict for the Martins on that issue, Rule 50(A)(4) of the Ohio Rules of Civil Procedure provides that a motion for directed verdict should be granted if, "after construing the evidence most strongly in favor of the party against whom the motion is directed, . . . reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to [the nonmoving] party" "A motion for directed verdict . . . does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb*, 29 Ohio St. 2d 215, paragraph three of the syllabus (1972). This Court, therefore, reviews the trial court's decision de novo. *Groob v. KeyBank*, 108 Ohio St. 3d 348, 2006-Ohio-1189, at ¶14.

{¶13} Mr. Martin testified that, when he looked at the house before he and Mrs. Martin bought it, he did not notice anything unusual about the foundation. He acknowledged that the home inspector found minor stress cracks in the foundation, but noted that the inspector also wrote that the cracks were typical for the age of the house and the type of construction. While Mr. Martin admitted that the residential property disclosure form he received from the original owners of the house indicated that a crack in the back wall of the garage had been fixed in May 1999, the notice did not say that the crack had been in the foundation. Mr. Martin further said that, although there were "several small stress cracks" in the mortar covering the foundation when they bought the house, the cracks did not widen until 2004, which is when he contacted Design Construction. According to Mr. Martin, he did not discover that there might be something wrong with the foundation until he attempted to repair the cracks after they had

widened, and it was not until he received a letter from Design Construction that he learned that the foundation for the garage had been damaged during construction.

{¶14} Mrs. Martin testified that she did not have any idea that there were major problems with the foundation when they bought house. She said that, although she knew there was some cracking, she relied on the opinion of the home inspector that the cracks were minor and normal for the age of the house. She said that nothing “put a red flag up that said there’s something majorly wrong with this house.” She said she was not aware that there might be a problem until the spring of 2004 when Mr. Martin pointed out to her that the cracks were getting bigger.

{¶15} Viewing the evidence in a light most favorable to Design Construction, this Court agrees with the trial court that reasonable minds could come to but one conclusion: that the Martins did not discover and, despite the exercise of reasonable diligence, could not have discovered that there was a problem with the garage foundation until the cracks in the mortar covering it began to widen in 2004. The Martins did not learn anything from the original owners of the house or from the report of the professional home inspector that informed them that there were problems with the garage foundation or should have caused them to further investigate whether there were any such problems. Although there were some small cracks in the mortar that covered the concrete blocks at the time the Martins bought the house, there was no evidence offered by Design Construction to suggest that the Martins knew or should have known that those cracks were anything more than “[m]inor stress cracking . . . typical for the age and type of construction,” as found by the home inspector.

{¶16} Design Construction has also argued that the original owners’ knowledge of problems with the foundation can be imputed to the Martins. Even assuming that is true, Design

Construction did not present any evidence that the original owners knew that the garage foundation flexed outward during construction. Furthermore, while the previous owners did know about a crack in the back wall of the garage, Mr. Schultz testified that Design Construction repaired that crack. He also testified that Design Construction took steps to prevent other problems by filling the concrete blocks with grout. There was no evidence to suggest that the original owners knew or should have known that the repairs it made were inadequate. This Court, therefore, concludes that the trial court correctly directed a verdict for the Martins on Design Construction's statute of limitations defense.

SUMMARY JUDGMENT

{¶17} Design Construction has also argued that the trial court incorrectly denied its motion for summary judgment on the statute of limitations issue. The Ohio Supreme Court has held, however, that “[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made.” *Cont’l Ins. Co. v. Whittington*, 71 Ohio St. 3d 150, syllabus (1994). It reasoned that, even if the trial court should have granted summary judgment, it would be a “greater injustice” to deprive the party that won a judgment at trial “after the evidence was more completely presented.” *Id.* at 157 (quoting *Home Indem. Co. v. Reynolds & Co.*, 187 N.E.2d 274, 278 (Ill. App. Ct. 1962)). The Martins not only demonstrated that “there were genuine issues of material fact” regarding Design Construction’s statute of limitations defense, they established that they were entitled to a directed verdict on that issue. See *id.* at syllabus. Accordingly, even if the trial court incorrectly denied Design Construction’s motion

for summary judgment, the error was, at most, harmless. See *id.* at 157. Design Construction's third assignment of error is overruled.

POST-REMAND MOTIONS

{¶18} After the Ohio Supreme Court remanded this case, the Martins moved to present supplemental authority, for post-judgment interest and supplemental costs. In their motion to present supplemental authority, the Martins have argued that Design Construction abandoned its statute of limitations defense. The motion to present supplemental authority is granted, but this Court concludes that Design Construction did not abandon its defense. Regarding the Martins' motion for post-judgment interest and motion for supplemental costs, this Court concludes that they raise factual questions that must be resolved by the trial court. Accordingly, this matter is remanded to the trial court for consideration of the Martins' motion for post-judgment interest and motion for supplemental costs.

CONCLUSION

{¶19} The trial court did not err by directing a verdict for the Martins on Design Construction's statute of limitations defense and, if it erred by denying summary judgment to Design Construction on that same defense, its error was harmless. The judgment of the Summit County Common Pleas Court is affirmed, and this matter is remanded to the trial court for consideration of the Martins' motion for post-judgment interest and motion for supplemental costs.

Judgment affirmed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

CRAIG G. PELINI, and KRISTEN E. CAMPBELL, attorneys at law, for appellant.

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