Opinion issued May 10, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00427-CV

MARY M. IACONO, Appellant

V.

STANLEY BLACK & DECKER, INC. AND STANLEY ACCESS TECHNOLOGIES, LLC, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2013-29901A

MEMORANDUM OPINION

This is an appeal from the trial court's order granting summary judgment in favor of appellees, Stanley Black & Decker, Inc. and Stanley Access Technologies, LLC (collectively "Stanley") on appellant, Mary M. Iacono's suit for personal

injury. In two issues, Iacono contends that the trial court erred in granting summary judgment dismissing her negligent servicing claim because it is not barred by the statute of repose or the statute of limitations. We affirm in part and reverse and remand in part.

Background

Stanley manufactures and sells automatic sliding glass doors that are used in a variety of commercial settings. In 1994 or 1995, Stanley manufactured and installed an automatic sliding door, model Dura-Glide 2000, at the Omni Hotel in Houston. The door provides access between the hotel and the garage.

The automatic door operates through the use of a controller. The system uses three sensors to detect motion to open the doors. Motion sensors located on each side of and above the door detect the movement of a person entering or leaving the hotel from the garage. There is also a threshold sensor that is located in the frame above the door, which also detects movement. Although the controller, threshold sensor, and automatic sliding glass door at issue here were designed, manufactured, and installed by Stanley, the motion sensors were manufactured and designed by a separate and unrelated company, BEA Inc.

Stanley's automatic doors, like the one at issue here, are made and sold to customers on an order-by-order basis. Date codes on the component parts indicate that the door, threshold sensor, and controller were installed by Stanley no later than

the fourth quarter of 1994 or the first half of 1995. The threshold sensor and controller are original parts, and the door would have been made at the same time as the component parts. Because of the custom nature of the manufacture of the automatic door, the door would have been shipped to the hotel or installed by Stanley within a few months of its manufacture in 1994 and, thus, the latest date of installation would have been early 1995.

According to the deposition testimony of David J. Sitter, Stanley's Senior Safety Assurance Manager, the hotel would have performed all service for the door after installation, including routine inspections and maintenance, except when a broken part needed replacement. Since the automatic door's installation in 1995, Stanley serviced the door on two occasions—in 2006, a technician replaced the original exterior motion sensor and, in 2008, the door's roller wheels were replaced.

On April 6, 2013, Iacono attended a wedding at the hotel. As she exited the hotel with her walker, the automatic door closed on her causing her to fall and sustain injuries. On August 29, 2013, Iacono sued Stanley asserting causes of action for negligence, products liability, breach of warranty, and gross negligence.[1] Stanley

[1] Iacono also asserted claims against the hotel which are not part of this appeal and are still pending in the trial court.

pleaded several affirmative defenses, including that Iacono's claims were barred by the statute of limitations[2] and the statute of repose.[3]

On December 24, 2014, Stanley moved for partial summary judgment on traditional grounds, arguing that Iacono's claims of negligence, strict products liability, breach of warranty, and gross negligence were based on allegations that the door was defective and, therefore, constituted products liability claims barred by the statute of repose. It also argued that Iacono's negligence claims were barred by the statute of limitations, and that she lacked standing to bring a breach of warranty claim.

On January 9, 2015, Iacono filed her fourth amended petition and summary judgment response.[4] In her response, Iacono argued that her negligence claims were not based on a defective product theory or negligence in the manufacturing, design, or marketing of the door; rather, they were based on Stanley's acts and omissions during service calls years after the door was installed and, therefore, were not barred

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2 TEX. CIV. PRAC. & REM. CODE ANN. §16.003 (West Supp. 2015).

3 TEX. CIV. PRAC. & REM. CODE ANN. §16.012 (West Supp. 2015).

4 In her fourth amended petition, Iacono further alleged that Stanley had (1) failed to perform an annual inspection of the door as required by the American Association of Automated Door Manufacturers; (2) failed to bring the door in compliance with the applicable ANSI standard and building code; (3) failed to turn off the door until it was compliant; (4) failed to inform the hotel that the ANSI standard required the door to have additional safety beams installed on the door; (5) left the door in an unsafe condition; and (6) failed to inform the hotel that an annual compliance inspection should be performed.

by the statute of repose. She further argued that her negligence claims were not barred by the statute of limitations and that she had standing to bring a breach of implied warranty claim.

On January 16, 2015, the trial court granted Stanley's partial summary judgment motion. In its order, the court stated that (1) Iacono's claims of negligence, strict products liability, breach of warranty and gross negligence "pertaining to the products manufactured by Stanley" were barred by the statute of repose; (2) Iacono's negligence claim was barred by the statute of limitations; and (2) Iacono lacked standing to bring a breach of implied warranty claim against Stanley.

On January 26, 2015, Stanley filed a final summary judgment motion on both traditional and no-evidence grounds. Noting that the trial court had previously dismissed Iacono's claims pertaining to Stanley's products, Stanley argued that because the only possible remaining claims against it were products liability claims based on the motion sensors manufactured by another company, Stanley, as the non-manufacturing seller, could not be held liable for a claim based on the product. On February 16, 2015, the trial court granted Stanley's final summary judgment motion.[5] Iacono timely filed this appeal.

[5] The court severed the claims against Stanley into a separate action, making the summary judgments final.

Discussion

On appeal, Iacono does not challenge the summary judgments granted on her causes of action for strict products liability, breach of warranty, or gross negligence. She is also not appealing the summary judgment on her negligence claims related to the design, manufacture, or marketing of the automatic door. Iacono challenges only the portion of the trial court's order granting summary judgment on her negligent servicing claim on the grounds that it is not barred by the statute of repose or the statute of limitations.[6]

A. Standard of Review

We review a trial court's decision to grant a motion for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Under the traditional summary judgment standard, the movant has the burden to show that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In determining whether there are disputed issues of material fact, we take as true all evidence favorable to the nonmovant and indulge

[6] Iacono is not appealing the portion of the trial court's orders granting summary judgment on her negligence, strict products liability, breach of warranty, and gross negligence claims "pertaining to the products manufactured by Stanley," or on her products liability claims based on the sensors manufactured by BEA Inc.

every reasonable inference in the nonmovant's favor. *Nixon*, 690 S.W.2d at 548–49. Traditional summary judgment for a defendant is only proper if the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997).

B. Is Iacono's Negligent Servicing Claim Barred by the Statute of Repose?

In her first issue, Iacono contends that the trial court erred in granting summary judgment on her negligent servicing claim because the claim is not barred by the statute of repose. Specifically, she argues that her claim does not allege negligence in the manufacturing or design of the door, rather, it alleges negligence in Stanley's servicing of the door. Stanley asserts that Iacono's negligent servicing claim is, in effect, a products liability claim and is barred by the statute of repose.[7]

[7] The record reflects that Iacono filed her fourth amended petition after Stanley filed its first amended partial motion for summary judgment. Although Stanley objected to the fourth amended petition as untimely and as having been filed without leave of court or by agreement of the parties, the trial court did not rule on the objection. We note that the fourth amended petition is a part of the record that was before the trial court and the trial court's order states that it considered all matters of record. Because the record does not reflect that the fourth amended petition was not considered by the trial court, and Stanley has not shown surprise or prejudice, we presume that the trial court granted leave to file the late pleading. *See Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988) (directing appellate courts to presume trial court granted leave to file late pleading even if filer did not ask for leave when record does not reflect trial court did not consider amended pleading and no surprise or prejudice is shown).

Section 16.012(b) of the Texas Civil Practice and Remedies Code states that, absent an exception not at issue in this appeal, "a claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant." TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (West Supp. 2015). Section 16.012(a)(2) defines a "products liability action" as "any action against a manufacturer or seller for recovery of damages or other relief for harm allegedly caused by a defective product, whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories, and whether the relief sought is recovery of damages or any other legal or equitable relief . . . ." *Id.* at §16.012(a)(2).

It is undisputed that Stanley manufactured and sold the automatic door at issue to the hotel in 1994 or 1995. It is further undisputed that Iacono filed this action more than fifteen years after the sale of the door. The issue before us is whether Iacono's negligence claim related to Stanley's servicing of the door is a products liability action subject to the statue of repose.

In the trial court below, Iacono alleged that Stanley was the last company to work on the door prior to Iacono's injury; that it owed a duty of reasonable care to people using the door; that it breached that duty by failing to properly inspect and repair the automatic door and its components and to repair and replace the motion

sensors in the door, and that its breach proximately caused her injuries.[8] In her summary judgment response and on appeal, Iacono argues that her negligent servicing claim is not based on a defective product theory or negligence in the manufacturing, design or marketing of the door. Rather, she asserts that her claim is against Stanley in its role as service provider, not manufacturer, and thus does not constitute a products liability action.

In its summary judgment reply and on appeal, Stanley argues that Iacono's allegations that Stanley failed to properly inspect and repair the door and failed to repair and replace the motion sensors are allegations that the door was defective, and therefore, constitute a products liability action barred by the statute of repose. In support of its argument, Stanley relies on *Saporito v. Cincinnati Inc.*, No. 14-03-00226-CV, 2004 WL 234378 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (mem. op.). In that case, Saporito injured his hand at work while using a press break machine manufactured and sold by Cincinnati in 1953. *See id.* at *1. Saporito sued Cincinnati asserting various products liability and negligence claims. *See id.* Cincinnati moved for summary judgment on Saporito's negligence claims, arguing that they were barred by the statute of repose because they constituted a products

[8] The elements of negligence are the existence of a duty, a breach of that duty, and damages proximately caused by the breach. *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006).

liability action as defined in former Civil Practice and Remedies Code section 82.001[9] (currently section 16.012). *See id.* Saporito responded, limiting his allegations of negligence to Cincinnati's post-sale failures to (1) warn that the automatic feature violated Office of Safety and Hazard Administration regulations, was unsafe, and should be removed, and (2) inspect properly. *See id.* at *2. The trial court granted Cincinnati's motion for summary judgment. *See id.*

On appeal, Saporito argued that his claims for negligent failure to warn and inspect did not constitute products liability actions. *See id.* at *4. Noting the expansive definition of "any action" in section 82.001 and that such an action may be based on one of the specifically enumerated theories or "any other theory or combination of theories," the court of appeals concluded that Saporito's claims constituted a products liability action subject to the fifteen-year statute of repose. *See id.* at *5.

Stanley asserts that *Saparito* is analogous to this case because both Saporito and Iacono argued that the supplier of the product was negligent for not informing

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[9] Under former section 82.001(a), "products liability action" was defined as "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." Act of February 24, 1993, 73d Leg., R.S., ch. 5, § 1, sec. 82.001(2), 1993 TEX. GEN. LAWS 13, 13 (amended and renumbered 2003, current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(a)(2) (West Supp. 2015)).

the customer about regulatory changes and failing to inspect the product after the sale. Thus, it argues, this Court should likewise find that Iacono's claims are subject to section 16.012. We find Stanley's argument unpersuasive because Saporito did not allege negligent repair or that subsequent service calls took place. In this case, Iacono alleged that Stanley was negligent because of a post-sale failure to repair the door including the motion sensors. This claim does not allege a defective product; rather, it alleges a failure to properly service the door after its sale to the customer. Because we conclude that Iacono's negligent servicing claim does not constitute a products liability action, it is not barred under section 16.012. The trial court erred in granting summary judgment on Iacono's negligent servicing claim. We therefore sustain Iacono's first issue.

C. Is Iacono's Negligent Servicing Claim Barred by the Statute of Limitations?

In her second issue, Iacono contends that the trial court erred in granting summary judgment on her negligent servicing claim because it is not barred by the statute of limitations. She argues that her cause of action accrued on the date of her injury and not the date Stanley last serviced the door.

"A person must bring suit for . . . personal injury not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West Supp. 2015). Generally, a cause of action accrues when a wrong produces an injury. *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005).

Here, Iacono was injured on April 6, 2013 and filed suit on August 29, 2013, well within the two-year limitation period.[10] Therefore, Iacono's negligent servicing claim is not barred by section 16.003. Because we conclude that the trial court erred in concluding that Iacono's negligent servicing claim was barred by the statute of limitations, we sustain her second issue.

Conclusion

We reverse the portion of the trial court's order granting summary judgment to Stanley on Iacono's negligence claim based on Stanley's servicing of the door, and remand for further proceedings on this claim. We affirm the remainder of the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

[10] In its brief, Stanley acknowledges that Iacono's cause of action accrued on the date of her injury rather than the date it last serviced the door as it previously asserted.