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Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1010, A11-1021

Thomas Stojsavljevic, et al.,
Appellants,

vs.

Trumpy Construction, LLC,
Defendant,

Steve Stoltman, et al.,
Respondents/Cross-Appellants.

Filed February 6, 2012
Affirmed
Minge, Judge

Carver County District Court
File No. 10-CV-09-1509

J. Robert Keena, E. Curtis Roeder, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellants)

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Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

MINGE, Judge

These consolidated appeals arise from litigation involving a home constructed by respondent Trumpy Construction, inhabited for about three years by respondents/cross-appellants the Stoltmans, and sold by the Stoltmans to appellants the Stojsavljevics. When the Stojsavljevics discovered undisclosed drainage problems in the yard and associated structural damage to the home, they commenced suit against Trumpy for negligent construction and against the Stoltmans for failure to disclose the defects. The district court summarily dismissed the Stojsavljevics' suit against Trumpy as time-barred. The Stojsavljevics' suit against the Stoltmans went to arbitration pursuant to the purchase agreement, and the arbitrator awarded the Stojsavljevics $67,000 based on a finding that the Stoltmans fraudulently concealed the defects. The district court confirmed the arbitration award. The Stojsavljevics now challenge the district court's grant of summary judgment to Trumpy and the Stoltmans challenge the district court's judgment confirming the arbitration award. We affirm.

FACTS

In July 2003, Steve and Rebeka Stoltman purchased a new home constructed by Trumpy Construction, LLC. The Stoltmans chose not to have Trumpy grade the property, install sod, or perform any landscaping. The building contract stated that "[t]he home buyer shall be responsible for assuring proper drainage before sod is laid. If drainage problems exist after sod is in it is the homeowners responsibility." The Stoltmans occupied the home in January 2004 and had landscaping, sod, a sprinkler

system, and underground gutter drains installed that summer. In the early fall of 2004, the Stoltmans notified Trumpy that the home "had wet mushy areas in [the] backyard near [the] deck." Steve Stoltman went to the Trumpy office in October 2004 to discuss a "continual wet spot in [the] back yard" and the possibility that there might be a spring under the ground. In February 2005, the Stoltmans notified Trumpy that two of the back deck footings were shifting on the ground and that the deck support posts were lifting and no longer on the footings. The Stoltmans said they were nervous about using the deck.

In March 2005, Trumpy responded that the deck footings had "lifted due to excessive frost penetration and ground swell," which in turn is "caused by overly wet, excessively saturated soils." In the same letter, Trumpy stated that it had not noticed and was never notified of any drainage problems before the Stoltmans had work performed in the backyard in the summer of 2004, and refused to warrant any problems associated with drainage occurring after that time.

In a fax dated April 2, 2005, the Stoltmans acknowledged Trumpy's refusal to provide a warranty and described the drainage issues this way:

> [E]ven during the 45+ day dry spell we had in the summer of 2004, the water standing in the back of our yard never dissipated. During the dry spell, we placed a sump pump in a hole near the largest concentration of standing water to pump the water out, but the water kept coming back—even after we turned off our sprinkler system and re-routed gutter drains.

The Stoltmans informed Trumpy that they planned to address the standing water in the backyard themselves by installing a drain tile, which they did in the summer of 2005.

In December 2005, while putting the home on the market, the Stoltmans signed a Seller's Property Disclosure Statement indicating that the home had no soil problems. In January 2006, the Stoltmans contracted to sell the home to Thomas and Mary Stojsavljevic. On the advice of their relator, the Stoltmans never disclosed, orally or in writing, the standing water issues to the Stojsavljevics prior to the sale. The purchase agreement provided that binding arbitration was the sole means to resolve any dispute between them about the property. The agreement states: "[A] request for arbitration must be filed within 24 months of the date of the closing on the property or else the claim cannot be pursued. In some cases of fraud, a court or arbitrator may extend the 24-month limitation period provided herein."

In the summer of 2006, Mary Stojsavljevic could not operate a lawn mower in the backyard because it was so wet. Thomas Stojsavljevic noticed crayfish in the backyard. Over Labor Day weekend 2007, while installing a new deck on the back of the home, the Stojsavljevics found that the holes they were drilling for the deck footings filled with water so quickly that they needed to be drained with an electric pump so the concrete could be poured.

In May 2009, the Stojsavljevics wrote Trumpy to express concerns with the foundation of the home. Trumpy responded to the Stojsavljevics' communication by offering to perform a "cosmetic tuck pointing" to remediate the hairline cracks and suggested caulking the space between the brick veneer and the wall. Trumpy explicitly refused to warrant the more serious problems, which it said were due to frost heave caused by overly saturated and very wet soil.

In June 2009, the Stojsavljevics had Guy Engineering inspect the home to determine the cause of the structural problems. Guy Engineering, like Trumpy, concluded that the problems were associated with frost heave caused by saturated soils due to drainage problems. After that inspection, the Stojsavljevics learned for the first time from neighbors that the Stoltmans had experienced drainage problems when they lived there, and had landscaping and drain-tile work done behind the home.

In October 2009, the Stojsavljevics commenced suit against Trumpy and the Stoltmans. They alleged negligent construction and breach of various warranties against Trumpy and fraud and misrepresentation against the Stoltmans for concealing the water problems. The Stoltmans and Trumpy asserted cross-claims for contribution and indemnity.

The Stojsavljevics' suit against the Stoltmans went to arbitration pursuant to the purchase agreement. The Stojsavljevics' damages expert, a certified real-estate appraiser, estimated that the diminution in value of the property was $68,000, a figure he testified was based in part on a bid prepared by Allstar Construction. The Stoltmans sought a continuance to have their "own expert take a look at the pricing." The arbitrator denied the request, but agreed to keep the record open for another two weeks to allow the Stoltmans to have their experts assess the Allstar Construction bid and propose their own estimates. The Stoltmans subsequently submitted materials from several contractors criticizing and disputing both the scope and cost of the work. The submission included a $16,840 remediation estimate prepared by a contractor retained by the Stoltmans.

The arbitrator awarded $67,000 to the Stojsavljevics after finding that the Stoltmans' actions in failing and refusing to disclose conditions of which they were clearly aware constituted intentional fraud, and that the measure of damages for the harm to the Stojsavljevics was the difference between the amount they paid for the property and its fair market value in light of its true condition.

Twice the Stoltmans requested that the arbitrator change the award. Both requests were denied. The Stojsavljevics moved the district court for confirmation of the arbitration award and for summary judgment. Trumpy moved for summary judgment against the Stojsavljevics, arguing that their claims against it were barred by Minnesota's two-year statute of limitations for improvements to real property. The Stoltmans moved the district court for an order vacating the arbitration award. The Stoltmans and Trumpy also each moved the court for summary judgment on their contribution and indemnity cross-claims.

In an April 2011 order, the district court denied the Stoltmans' motion to vacate the arbitration award, granted the Stojsavljevics' motion to confirm the award and for summary judgment on the arbitrator's denial of the Stoltmans' application to modify the award. The district court also granted Trumpy's motion for summary judgment against the Stojsavljevics, denied the Stojsavljevics' request for leave to move for reconsideration, and denied both the Trumpy and Stoltman contribution and indemnity cross-claims. These consolidated appeals follow.

D E C I S I O N

I. Summary Judgment for Trumpy

At the outset, we consider the statute-of-limitations issue that is the basis of Stojsavljevics' appeal of the district court's grant of summary judgment in favor of Trumpy. On an appeal from summary judgment we ask whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review these questions de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). A party opposing a motion for summary judgment must do more than present evidence "which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "A material fact is one which will affect the result or the outcome of the case depending on its resolution." *Musicland Grp., Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994). In determining whether the district court properly granted the Trumpy's summary-judgment motions, we "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A. The Statute of Limitations Defense

1. Common Law Claims

The Stojsavljevics' suit against Trumpy asserted two common-law claims: negligent construction and breach of the implied warranty of fitness for a particular

purpose. They also assert a claim for breach of statutory warranty pursuant to Minn. Stat. § 327A.02 (2010). The district court granted summary judgment for Trumpy, reasoning the claims were all time-barred.

The statute governing the Stojsavljevics' common-law claims provides:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property . . . 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, subd. 1(a) (2010).

The Stojsavljevics commenced their suit by service on Trumpy on October 5, 2009, meaning that the suit could only be timely if the breach was discovered after October 5, 2007, two years earlier. The record shows that the Stoltmans were aware of construction defects associated with standing water in the backyard and frost heave due to saturated soil in the fall of 2004. Certainly, the Stoltmans were aware no later than their April 2005 letter to Trumpy describing the water problems of the previous summer. The Stojsavljevics' own testimony at arbitration reflects that they were aware of the water issues as early as the summer of 2006 and certainly by Labor Day weekend 2007. These dates are undisputed. Even taking the latest of these dates as the date of discovery, Labor Day weekend 2007, the Stojsavljevics' common-law claims are time-barred.

2. Statutory Warranty

The district court held that the Stojsavljevics' statutory cause of action was also time-barred. Minn. Stat. § 541.051, subd. 4 (2010) (requiring claims of a breach of a statutory warranty to be brought within two years of discovery of the breach). The statute of limitations for a statutory breach-of-warranty claim "begins to run when the homeowner discovers, or should have discovered, the builder's refusal or inability to ensure the home is free from major constructions defects." *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 678 (Minn. 2004).

In its March 2005 letter to the Stoltmans, Trumpy unambiguously refused to warrant any problems caused by frost heave or saturated soil due to landscaping and drain-tile work performed by the Stoltmans. The Stoltmans, in their April 2, 2005 response, confirmed their understanding of Trumpy's refusal to perform remedial warranty work. This meant that to be timely, their law suit would need to have been commenced by April 2, 2007. It was not and is therefore time-barred. When the Stojsavljevics purchased the home from Stoltmans, the statute of limitations was not reset. Rather, the time bar that had run against the Stoltmans precluded the Stojsavljevics from maintaining their statutory-warranty claim against Trumpy.

B. Estoppel/Resetting the Statute of Limitations

The Stojsavljevics contend that because Trumpy promised in a letter dated June 16, 2009, to repair the construction defects and because Trumpy's owner perjured himself in a deposition, Trumpy should be equitably estopped from asserting a statute-of-limitations defense, and the limitation period was tolled or reset.

As a threshold matter, we note that the Stojsavljevics are not alleging that any of Trumpy's acts that arguably reset the limitations period took place before the period expired. Rather, the Stojsavljevics assert that a limitations period that has run can be revived by some act of Trumpy. They provide no legal support, and we are unaware of any, for the proposition that an expired limitations period can be revived by a subsequent act of a party that would give rise to an estoppel claim.

Due to the lack of governing precedent on the issue, we will briefly consider the merits. Estoppel is an equitable doctrine that prevents a party from "taking unconscionable advantage of his own wrong by asserting his strict legal rights." *Mut. Serv. Life Ins. Co. v. Galaxy Builders, Inc.*, 435 N.W.2d 136, 140 (Minn. App. 1989) (quotation omitted), *review denied* (Minn. Apr. 19, 1989). To raise estoppel, one must show representations made by one party that the other has reasonably relied on to his detriment. *Id*. Specifically with regard to Minn. Stat. § 541.051, subd. 1(a), estoppel is pled where, after discovery of a cause of action, the injured party has been induced to forego suit in reliance on the other party's assurances that corrective action would be taken. *Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424, 428−29 (Minn. App. 1999), *review denied* (Minn. Jan. 25, 2000). "The application of equitable estoppel is a question of fact unless only one inference can be drawn from the facts." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 622 (Minn. App. 2000).

1. Repair

The Stojsavljevics assert that in its June 2009 letter, Trumpy "made representations that it would cure the issues with the foundation by performing some

remedial work." The letter in question addressed hairline cracks in the foundation, brick veneer separating from the wall, and "major" concerns with the foundation, including cracking and moving of basement walls due to frost heave and cracks in the walls running up through the house. The only remedial work promised in the letter is "cosmetic tuck pointing" to hide the hairline cracks. Trumpy explicitly denied any liability for the frost heave and saturated soil, stating, "Trumpy Homes is not responsible for and will not warrant foundation problems caused by frost heave due to overly wet, saturated soils." We conclude that the district court did not err in determining that there was not a reasonable factual basis for interpreting the June 2009 letter as a promise to repair the major foundation problems or as anything other than a denial of liability for the frost-heave defects and a commitment to perform cosmetic tuck-pointing.

2. False Statements

The Stojsavljevics further argue that their claim falls within the fraud exception to the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(a) because the owner of Trumpy falsely testified at his deposition that "he did not know of any other homeowners [in the division in which the Stojsavljevics' home was located] who had water problems except for the Stojsavljevics."

The statute of limitations in section 541.051 permits an action to be brought more than two years after discovery of the injury if fraud is involved. Minn. Stat. § 541.051, subd. 1(a). But "fraud is relevant only to the extent that it postpones the time until a party discovers or in the exercise [of] reasonable diligence, should have discovered, the defective conditions." *Dakota Cty. v. BWBR Architects, Inc.*, 645 N.W.2d 487, 494

(Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). That is, fraud only tolls the statute of limitations until a party discovers an actionable injury. *Id*. "Merely establishing that a defendant had intentionally concealed the alleged defects is insufficient; the claimant must establish that it was actually unaware that the defect existed before a finding of fraudulent concealment can be sustained." *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990). To prove that the false statements constitute fraudulent concealment, a claimant must show (1) the statement "concealed a potential cause of action"; (2) the statement was intentionally false; and (3) "the concealment could not have been discovered by reasonable diligence." *Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. App. 2003) (quotation omitted).

The Stojsavljevics' argument on the fraud issue is almost entirely devoted to attempting to establish that the Trumpy officer was lying when he testified that he was unaware of other homeowners in the same development with water problems. For purposes of this appeal, we assume that this testimony was false. But we note that the Stojsavljevics were demonstrably aware of the actionable defects with their property when the deposition was taken. The officer's testimony about the absence of other water problems did not postpone Stojsavljevics' discovery of the drainage problem or their initiation of this litigation, nor did they rely on the claimed false statement to their detriment. The litigation was already in progress. Thus, we conclude that the district

court did not err in determining that the Stojsavljevics have failed to demonstrate that fraud estops Trumpy from asserting the statute of limitations defense.[1]

II. The Stoltmans' Appeal of Confirmation of Arbitration Award

A. Time-Bar

The next issue is whether the Stojsavljevics' arbitration effort was time-barred. The binding arbitration agreement between the Stoltmans and the Stojsavljevics provides: "[A] request for arbitration must be filed within 24 months of the date of the closing on the property or else the claim cannot be pursued. In some cases of fraud, a court or arbitrator may extend the 24-month limitation period provided herein." The sale closed in March 2006, and the Stojsavljevics commenced suit in October 2009. The Stoltmans argue that because the statute of limitations under Minn. Stat. § 541.051, subd. 1(a) is two years from the date of the discovery of an actionable injury, and because the Stojsavljevics discovered the injury, at the latest, over Labor Day weekend 2007, the claim is time-barred.

"Parties may [contractually] limit the time within which legal claims may be brought provided there is no statute specifically prohibiting the use of a different limitations period in such a case and the time fixed is not unreasonable." *Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 606 (Minn. 2002). "Whether the contractual limitations period is reasonable depends upon the particular facts presented; what is acceptable in one case may be objectionable in another." *Id.* "Given the finality

[1] Of course, we do not condone false testimony in a deposition, nor do we address any consequences for such conduct.

of the determination of rights made in arbitration, we believe that contractual limitations periods for claims to be arbitrated must be reasonable, just as such limitations periods for claims brought in court must be reasonable." *Id*. at 607.

By statute, fraud claims in Minnesota have a six-year statute of limitations, and "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Minn. Stat. § 541.05, subd. 1(6) (2010). One of the reasons for the fraud discovery rule is that "a person should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him." *Schmucking v. Mayo*, 183 Minn. 37, 40, 235 N.W. 633, 634 (1931). While "parties may agree to shorter limitations periods than provided by statute, there is a difference between merely shortening the time within which an existing claim may be brought and altering the date on which a cause of action accrues." *Rose*, 640 N.W.2d at 608−09. This difference can, on occasion, result in a contractual limitations period expiring before the claim accrues, that is, before a party knows or should know that she was harmed by another's conduct.

Here, Mary Stojsavljevic testified that had her neighbors not informed her and her husband that the Stoltmans had performed work in the backyard, including the installation of a drain tile, she and her husband never would have learned that the Stoltmans had misrepresented the property's water problems. The facts of *Rose* are similar, and its reasoning apposite. There, a property buyer and seller signed a binding arbitration agreement with a limitations period ending 18 months from closing. *Id*. at 607. Two years after closing the buyer filed suit, having discovered that the home had

extensive water problems. The buyer alleged that the seller knew of the home's defects at the time of the sale and failed to disclose them. *Id*. The arbitrator found the seller liable because of his fraudulent representations. *Id*. at 603. The supreme court upheld the award on the ground that "where pre-existing water problems led to structural damage," not easily discoverable, an 18-month limitations period running from the date of the real estate closing "is not within the bounds of reasonableness when applied to the claim of fraud." *Id*. at 609.

To conclude the Stojsavljevics were time-barred from asserting their claim would penalize them for failing to know facts that were fraudulently concealed from them and to reward the Stoltmans for their fraudulent conduct. We conclude that the district court appropriately determined that the limitations period in the agreement did not preclude Stojsavljevics' claim of misrepresentation.

B. Continuing Hearing for Evidence

The next issue raised in this appeal is whether the arbitrator acted improperly in certain respects. An arbitration award will be vacated "only upon proof of one or more of the grounds stated in Minn. Stat. § 572.19." *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd*., 356 N.W.2d 295, 299 (Minn. 1984). The district court shall vacate an award where "[t]he award was procured by corruption, fraud or other undue means"; "[t]here was evident partiality by an arbitrator appointed as a neutral . . . or misconduct prejudicing the rights of any party"; or the arbitrator "refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy . . . [so] as to prejudice substantially the rights of a party." The arbitrator has

authority to rule on requests for continuance under Minn. Stat. § 572.12(c) (2010), and has "broad scope of authority to determine admissibility of evidence." *Minn. State Patrol Troopers Ass'n v. State, Dep't of Pub. Safety*, 437 N.W.2d 670, 676−77 (Minn. App. 1989), *review denied* (Minn. May 24, 1989).

On review, "[e]very reasonable presumption must be exercised in favor of the finality and validity of the arbitration award, and courts will not overturn an award merely because they disagree with the arbitrator's decision on the merits." *State, Office of State Auditor v. Minn. Ass'n of Prof'l Employees*, 504 N.W.2d 751, 754-55 (Minn. 1993) (citation omitted). "The arbitrators make the final determination of all questions submitted to them whether legal or factual." *Grudem Bros. Co. v. Great W. Piping Co*rp., 297 Minn. 313, 316, 213 N.W.2d 920, 922−23 (1973). "Thus, the scope of judicial review of an arbitration award is extremely narrow." *State Auditor*, 504 N.W.2d at 755. This court is "bound to accept" the arbitrator's findings. *Id*. at 758.

The Stoltmans argue that the award must be vacated because the arbitrator refused to continue the hearing to give them an opportunity to subpoena and cross-examine the author of the disputed Allstar Construction bid. But the arbitrator granted the Stoltmans two weeks after the arbitration hearing to review the Allstar bid, have their experts examine and prepare statements rebutting it, and conduct further research about damages. The Stoltmans' allegation of the arbitrator's prejudice, as well as their contention that the award was grossly excessive, are in fact challenges to the arbitrator's determination about the credibility and weight of certain evidence. We defer to those determinations.

C. Impartiality

The Stoltmans also argue that the arbitrator was not impartial in rendering his decision. Whether challenged conduct constitutes evident partiality is a legal question, which we review de novo. *Aaron v. Ill. Farmers Ins. Grp.*, 590 N.W.2d 667, 669 (Minn. App. 1999). "The party challenging the award must establish facts that create a reasonable impression of partiality." *Id*. (quotation omitted). Minnesota case law directs a finding of evident partiality in only a limited number of circumstances, such as when an arbitrator has contacts that might create an impression of bias, or if a substantial relationship exists between a party and the arbitrator. *See id*. ("[e]vident partiality generally arises when a neutral arbitrator has contacts with a party or another arbitrator that might create an impression of possible bias." (quotation omitted)).

Here, the Stoltmans have presented no evidence that the arbitrator's contacts with the parties created an impression of bias. And there is no evidence that the arbitrator has a substantial relationship with any of the parties. Rather, the Stoltmans assert that the partiality "was driven by [the arbitrator's] interest in getting the arbitration concluded rather than in moving toward a just decision." In support, they refer to the arbitrator's refusal to grant a continuance and his finding that they committed fraud. These assertions do not constitute a prima facie showing of arbitrator partiality.

Affirmed.

Dated: