STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1467

Julie Hartigan f/k/a Julie Atkinson,
Appellant,

vs.

Jeffrey D. Robinson, et al.,
defendants and third party plaintiffs,
Respondents,

vs.

William Wilson,
third party defendant,
Respondent,

C. Marroquin,
Third Party Defendant.

Filed April 27, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-08-12754

Julian Janes, Gislason, Gislason, Martin, Varpness & Janes, Minneapolis, Minnesota (for appellant)

Richard I. Diamond, Minnetonka, Minnesota (for respondents)

Kathyrn R. Burke, Bassford Remele (for respondent Wilson)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Johnson, Judge.

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

WRIGHT, Judge

Appellant challenges the summary judgment granted to respondents, arguing that the district court erred by concluding that her claims were barred because the statute of limitations has run. We affirm.

FACTS

In February 2000, appellant Julie Hartigan hired respondent Kingdom Exteriors Ltd. (Kingdom), owned by respondent Jeffrey Robinson (collectively respondents), to replace the roof and siding on her home for $18,000. Between March 4, 2000, and April 10, 2002, Hartigan signed four additional agreements for Kingdom to perform additional improvements to the home. The total cost for Kingdom's work was $37,671.17. In March 2001, Robinson sent Hartigan a letter thanking her for choosing Kingdom.

On March 20, 2001, Hartigan completed a Kingdom customer survey in which she rated the workmanship as poor and stated that there were several leaks, the soffits were not properly secured, insulation was not properly installed, and there was damage to the inside and outside of her home that she wanted Kingdom to repair. Hartigan contacted respondents about these same problems in June 2001. In July 2001, Hartigan showed Robinson several areas that were damaged by water intrusion. Respondents attempted to fix the problems in August 2001 by replacing 12 feet of gutter, fascia, and soffit, and by repairing a ledger board. In spring 2003, Hartigan again advised respondents of water intrusion and a leaking roof. Respondents cleaned out one end of a gutter and "caulked everything [they] could on the roof" in June 2003.

Between 2004 and 2006, Hartigan informed respondents "numerous times" that the roof was leaking and that she smelled mildew. In response to Hartigan's complaints about water stains and mildew, Robinson came to Hartigan's home in April 2006 and told her that the problems were caused by her failure to clean the gutters and that he would have someone from a sheet-metal company contact her about replacing them.

In October 2007, Hartigan contacted respondents to notify them that the roof was leaking and left a message asking for resolution regarding the defects. The home was inspected by Kingdom's insurance company, which denied Hartigan's claim. Hartigan continued to find water damage and mold in her home during the first three months of 2008.

By a complaint dated March 18, 2008, Hartigan sued respondents regarding the allegedly defective work, claiming breach of contract, negligence, breach of express warranty, misrepresentation/fraud, breach of statutory warranty, and consumer fraud. Hartigan also claimed that the corporate veil should be pierced to reach Robinson. Respondents moved for summary judgment; and the district court granted the motion, concluding that Hartigan's claims were barred by the statute of limitations relating to improvements to real property. This appeal followed.

D E C I S I O N

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary

judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A district court's grant of summary judgment will be affirmed if it can be sustained on any ground. *Horton v. Twp. of Helen*, 624 N.W.2d 591, 594 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

The statute of limitations for actions arising from improvements to real property states:

> 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 . . . construction of the improvement to real property . . . more than two years after discovery of the injury[.]

Minn. Stat. § 541.051, subd. 1(a) (2008). The statute of limitations "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." *Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

I.

Hartigan argues that the district court erred by concluding that, once the statute of limitations has run, it cannot be revived by a subsequent act of the contractor that would give rise to an estoppel claim. As Hartigan acknowledged at oral argument, the facts are

undisputed that between 2003 and 2006 respondents did not perform any repairs on Hartigan's house and "there is no question that the statute of limitations has been violated on its face." But Hartigan contends that her claim can be revived. In support of this contention, Hartigan relies on cases recognizing the ability of the legislature to amend a statute of limitations to revive a claim that was time-barred. Although "there can be no doubt that the legislature has the power to amend a statute of limitations to revive a claim that was already barred under the prior limitations period," *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 418 (Minn. 2002), that has not happened here. Moreover, Hartigan fails to cite, and our research has not produced, any legal authority for the proposition that the statute of limitations can be revived by the actions of an individual.

An appellant has the burden to demonstrate that the district court erred. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). Error is never presumed. *Id.* Having failed to meet her burden of demonstrating that the district court erred by concluding that the statute of limitations had run and was not "revived" by respondents' actions in 2006, Hartigan is not entitled to relief on this ground.

II.

Hartigan also argues that respondents fraudulently concealed their knowledge that they had not adequately repaired the home, which precludes her claim from being barred. The two-year statute of limitations bars a claim "[e]xcept where fraud is involved." Minn. Stat. § 541.051, subd. 1(a). To prove fraudulent concealment, a party must

establish that (1) the defendant made a statement that concealed plaintiff's 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).

Hartigan's fraudulent-concealment claim is founded on a work order regarding a subcontractor's visit in June 2003, which was respondents' last attempt to address Hartigan's concerns about the repairs.[1] The work order states: "Roof still leaks on rear of house along side of rear patio door at triple beam on interior of main level. I inspected this job [and] did not find anything obvious[.] I did seal around the roof vent, dormer [and] anything in the immediate area." There is no evidence that the subcontractor told Hartigan that the leak had been fixed. Rather, the subcontractor told her that he had cleaned the gutter and "caulked everything that he could." Without more, the first element of fraudulent concealment has not been satisfied.

Even if the subcontractor had told Hartigan that the problem had been fixed, the work order does not provide evidence necessary to establish the second element of fraudulent concealment—that respondents knew the roof continued to leak and intentionally withheld that knowledge. Although the work order states that the "[r]oof

[1] Respondents contend that Hartigan did not argue that the work order was evidence of fraud before the district court and that it should not be considered here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)). But Hartigan referred to the work order as evidence of fraudulent concealment in her memorandum of law in opposition to respondents' motion for summary judgment. The work order also is in the record. Thus, Hartigan has adequately preserved this issue for appeal.

still leaks," the statement appears to be a reference to the reason for the call, not an indication that the roof continued to leak after the subcontractor's repairs. Even when viewed in the light most favorable to Hartigan, the evidence is not sufficient to establish intentional concealment of a potential claim.

Finally, even if the work order is evidence that respondents were aware that the roof still leaked, Hartigan must demonstrate that "the concealment could not have been discovered by reasonable diligence." *See Williamson*, 661 N.W.2d at 650. "Merely establishing that a defendant had intentionally concealed the alleged defects is insufficient." *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990), *as amended* (Minn. Jan. 30, 1990). The plaintiff also must establish that she was unaware that the defect existed. *Id*. Here, it is undisputed that Hartigan was aware of the alleged defects between 2001 and 2003. Her complaint alleges that the leaks persisted and that Hartigan "informed [respondents] numerous times that the roof was severely leaking" between 2004 and 2006. Although Hartigan subsequently stated that she did not experience leakage between 2003 and 2006, a party cannot create a genuine issue of material fact by contradicting her earlier statements. *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). Therefore, Hartigan has not demonstrated that she was unaware that the roof continued to leak after 2003, which is required to establish the third element of her fraudulent-concealment claim.

Because Hartigan has failed to present evidence that (1) respondents made a statement that concealed her potential cause of action; (2) the statement was intentionally false; and (3) the concealment could not have been discovered by reasonable diligence,

Williamson, 661 N.W.2d at 650, the district court did not err by concluding that the statute of limitations has not been tolled by fraudulent concealment. Accordingly, summary judgment was properly granted in favor of respondents.

Affirmed.