STATE OF MINNESOTA
IN COURT OF APPEALS
A10-874

American Fire and Casualty Co.,
subrogee of Midtown Lofts Condominium Assn., Inc.,
Appellant,

vs.

Kraus-Anderson Construction Co.,
Respondent.

Filed March 1, 2011
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-09-28164

James C. Erickson Sr., Erickson, Bell, Beckman & Quinn P.A., Roseville, Minnesota; and

Kevin P. Caraher (pro hac vice), Cozen O'Connor, Chicago, Illinois (for appellant)

Robert L. McCollum, Cheryl Hood Langel, McCollum, Crowley, Moschet & Miller Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Ross, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's dismissal of its claim against respondent for an alleged breach of a contractual arbitration clause on the basis that appellant did not

demand arbitration within the limitations period provided by the contract and therefore could not state a claim for breach of contract. Appellant argues that: (I) the plain language of the contract contains no limitations period; (II) even if there were a limitations period, appellant's demand was timely, at least with respect to certain issues to be arbitrated; (III) appellant preserved its right to arbitrate by the procedural history of prior litigation; and (IV) respondent waived its right to assert the limitations defense by its conduct in the prior litigation.[1] We affirm in part, reverse in part, and remand.

FACTS

On December 23, 2003, Midtown Lofts LLC contracted with respondent Kraus-Anderson Construction Co. for the construction of a condominium project. The contract includes the following relevant arbitration provisions:

> 4.6.2 Claims not resolved by mediation shall be decided by arbitration . . . . The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.
>
> 4.6.3 A demand for arbitration shall be made . . . within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

The parties struck the body text of Paragraph 13.7, but left the title, "Commencement of Statutory Limitation Period."

[1] Appellant also asserted a tolling argument in its brief but waived this position at oral argument.

On or about December 1, 2004, Midtown Lofts LLC formed Midtown Lofts Condominium Association Inc. (MLCA) under the Minnesota Common Interest Ownership Act, Minn. Stat. §§ 515B.1-101 – .4-118 (2004). Appellant American Fire and Casualty Co. insured MLCA.

On or about December 20, 2005, and February 19, 2006, sprinkler pipes in two of the condominium project's buildings failed, causing $239,701 in damage. Upon discovery of the losses, MLCA notified Kraus-Anderson. American Fire reimbursed MLCA in the amount of $239,701 pursuant to its insurance policy, but Kraus-Anderson did not reimburse MLCA or American Fire.

American Fire, as MLCA's subrogee, sued Kraus-Anderson on or about December 3, 2007 (the first case), asserting causes of action for breach of contract, breach of express, implied, and statutory warranties, and negligence.[2] Kraus-Anderson moved the district court for dismissal under Minn. R. Civ. P. 12.02(a) for lack of subject-matter jurisdiction, and the court dismissed American Fire's claims without prejudice, reasoning that American Fire and Kraus-Anderson were "contractually obligated to arbitrate this dispute" under the contract between Midtown Lofts LLC and Kraus-Anderson. The court administrator entered judgment on July 3, 2008. American Fire did not appeal.

[2] In the first case, American Fire stated in its complaint that when Midtown Lofts LLC incorporated MLCA, Midtown Lofts LLC transferred its rights and liabilities related to the project to MLCA. For the purposes of the present lawsuit, the parties appear to agree that the contract, which was between Kraus-Anderson and Midtown Lofts LLC, governs the relationship between Kraus-Anderson and MLCA, American Fire's subrogor.

On January 16, 2009, American Fire sent Kraus-Anderson a written demand for arbitration. Kraus-Anderson refused to arbitrate, claiming that the contractual limitations period for demanding arbitration had expired.

On November 4, 2009, American Fire commenced this lawsuit against Kraus-Anderson, asserting a single claim for breach of the contractual arbitration provision, and seeking an order compelling arbitration of the underlying claims. Kraus-Anderson moved to dismiss under Minn. R. Civ. P. 12.02(e) for failure to state a claim, arguing that American Fire failed to demand arbitration within the time period agreed upon in the contract. The district court dismissed American Fire's complaint, and this appeal follows.

D E C I S I O N

American Fire challenges the district court's dismissal of its complaint under rule 12.02(e) for failure to state a claim. On appeal, "we review the legal sufficiency of the claim de novo." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). "A pleading must 'contain a short plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.'" *Id.* (quoting Minn. R. Civ. P. 8.01). "When conducting our review, we consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Id.* (quotation omitted). We may also consider the terms of a contract central to the dispute. *In re Hennepin Cnty. 1986 Recycling Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). We will affirm dismissal under rule 12.02(e) "only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist

which would support granting the relief demanded" in the complaint. *Bahr*, 788 N.W.2d at 80 (quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)).

I. Contract Language

American Fire first argues that the plain language of the contract does not include a limitations period for demanding arbitration. Interpretation of an unambiguous contract is a question of law that we review de novo. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009); *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). Our primary goal in contract interpretation "is to ascertain and enforce the intent of the parties." *Valspar*, 764 N.W.2d at 364. If the contract is memorialized in a written instrument, we determine the parties' intent "from the plain language of the instrument itself." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). Contract language is given its plain and ordinary meaning, read in the context of the instrument as a whole. *Brookfield Trade Ctr. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). "A contract must be interpreted in a way that gives all of its provisions meaning." *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

Paragraph 4.6.3 of the contract in this case provides that "in no event shall" a demand for arbitration "be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7." American Fire argues that because the parties struck the body text of Paragraph 13.7, the remaining plain language of the

contract reflects that the parties intended that no limitations period apply to demands for arbitration. But American Fire ignores the fact that the parties did not strike the title of Paragraph 13.7, which plainly states that the body text of the paragraph related only to the *commencement* of the limitations period. The parties also did not strike the language in Paragraph 4.6.3, stating that a demand for arbitration must be made within "the applicable statute of limitations" for a corresponding court action.

To interpret the contract in a way that gives meaning to this language, which the parties chose to include, we must conclude that the parties intended that the limitations period apply, but that the commencement of that period would not be governed by the struck provisions in Paragraph 13.7. The district court therefore correctly concluded that the contract includes a limitations period for arbitration demands.

II. Application of Limitations Period

American Fire argues that even if the limitations period applied, the demand was timely, at least with respect to the statutory and express breach-of-warranty claims. The construction and application of a statute of limitations, including the law governing the accrual date of a cause of action, is a question of law that we review de novo. *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 326 (Minn. 2010).

The contract provides that a party must demand arbitration of a claim by "the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations." The parties agree that the applicable statute of

limitations for the underlying claims in this case is Minn. Stat. § 541.051 (2008),[3] which provides:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, . . . 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). The "cause of action accrues upon discovery of the injury." *Id.*, subd. 1(c). But "[f]or the purposes of actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, such actions shall be brought within two years of the discovery of the breach." *Id.*, subd. 4.

American Fire seeks to arbitrate claims against Kraus-Anderson sounding in breach of contract, breach of express, implied, and statutory warranties, and negligence. The injuries giving rise to the claims occurred on or about December 20, 2005, and February 19, 2006. The complaint is not explicit as to when the injuries were "discovered," but the only reasonable inference, given the nature of the injuries, is that they would have been discovered within a short time of the damage occurring. The

[3] The parties cite to the 2008 version of this statute, which incorporates the legislature's 2007 amendments. The legislature provided that the amendments were retroactively effective from June 30, 2006. 2007 Minn. Laws ch. 105, § 4, at 625–26, ch. 140, art. 8, § 29, at 1535–36. Whether the 2006 or 2008 version applies depends on whether appellant's causes of action accrued before or after June 30, 2006. But because the substance of the changes has no bearing on the issues in this case and does not affect the portions quoted here, we cite to the 2008 version, as did the parties.

limitations period for an arbitration demand based on American Fire's breach of contract, breach of implied warranty, and negligence claims, therefore, expired on or about December 20, 2007, for the first injury, and on or about February 19, 2008, for the second injury. American Fire did not demand arbitration until January 16, 2009. The district court therefore correctly concluded that American Fire's demand on these claims was time barred under the terms of the contract.

The limitations period for American Fire to demand arbitration on its statutory and express written warranty claims, however, did not expire until two years after "discovery of the breach." *See id.* Discovery of the breach of a warranty occurs when the warrantee has reason to know that the warrantor is unable or unwilling to honor the warranty. *Day Masonry*, 781 N.W.2d at 329. In discerning this date, courts focus on "the date the warrantor gives some affirmative indication that it will not or cannot fulfill its obligations under the warranty." *Id.* at 328. This rule applies to claims under both statutory and express written warranties. *Id.* at 327. The date that a warrantee discovers a breach is a question of fact. *See Gomez v. David A. Williams Realty & Constr., Inc.*, 740 N.W.2d 775, 783 (Minn. App. 2007) (stating that a genuine issue of material fact existed as to when warrantees "knew or should have known that the builder would not or could not honor its warranties").

The complaint does not reveal when American Fire first discovered that Kraus-Anderson would not honor its warranties. But taking all inferences in the complaint in American Fire's favor, Kraus-Anderson's affirmative statement that it would not honor the warranties, if such a statement were made at all, may have come as late as American

Fire's commencement of its breach-of-warranty claim in the first case, on or about December 3, 2007. The limitations period may therefore have expired as late as December 3, 2009, rendering American Fire's January 16, 2009 demand for arbitration timely. We therefore conclude that the district court erred by dismissing American Fire's complaint in this case with respect to arbitration of the statutory and express written warranty claims. We reverse and remand the issue of the arbitrability of these claims for further proceedings to ascertain when Kraus-Anderson gave American Fire an affirmative indication of its refusal to honor its warranties.

III. Preservation of Right to Arbitrate

Next, American Fire argues that it "repeatedly and properly preserved its right to arbitrate this matter throughout the procedural history of the underlying subrogation case." American Fire points out that as early as its February 29, 2008 memorandum in opposition to Kraus-Anderson's motion to dismiss in the first case, it requested that in the alternative to denying the motion, the court stay the action pending the outcome of arbitration. American Fire asserts that this request should be deemed a timely demand for arbitration on all its claims.

American Fire acknowledges that the contract requires a demand for arbitration to take a specific form, including filing with both Kraus-Anderson and the American Arbitration Association (AAA). But American Fire argues that it attempted to "petition AAA in order to demand arbitration" in March 2008, and that AAA refused on the ground that American Fire was not a party to the contract; therefore, American Fire argues, it could never have formally complied with the demand requirements in the

contract, and its request for a stay in a memorandum should be deemed a sufficient, good-faith demand.

Even if we agreed that American Fire's request for a stay in its February 29, 2008 memorandum in the first case were a sufficient demand for arbitration, the demand would still have been untimely for the breach-of-contract, negligence, and implied warranty claims, because the limitations period for those claims expired on or about December 20, 2007, for the first injury, and on or about February 19, 2008, for the second injury. Moreover, the express terms of the contract did not require that American Fire obtain AAA's approval before demanding arbitration—it required only that American Fire file its demand with Kraus-Anderson and also with AAA. Nothing in the complaint supports an inference that American Fire filed a demand with Kraus-Anderson prior to January 16, 2009. American Fire's assertion that its February 29, 2008 request for a stay constituted an arbitration demand fails.

IV. Waiver

Finally, American Fire argues that Kraus-Anderson waived its right to assert the limitations period as a defense by filing its motion to dismiss in the first case. Kraus-Anderson based its motion to dismiss in the first case on Minn. R. Civ. P. 12.02(a), arguing that the arbitration clause deprived the district court of subject-matter jurisdiction. Kraus-Anderson filed the motion on December 28, 2007, after the limitations period for demanding arbitration on the breach-of-contract, negligence, and implied warranty claims related to the December 20, 2005 injury expired.

"Waiver is the voluntary and intentional relinquishment of a known right." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 798 (Minn. 2004). Nothing in Kraus-Anderson's motion to dismiss in the first case suggests that it intended to relinquish its right to assert the contractual limitations period for demanding arbitration—it was simply arguing that the district court was deprived of jurisdiction because of the arbitration clause, regardless of when a demand should have been made. And nothing in American Fire's complaint supports a reasonable inference that waiver was intended. The district court correctly rejected this argument.

Affirmed in part, reversed in part, and remanded.