STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1612

A & T Development, LLC,
Appellant,

vs.

Lester Building Systems, a Division of Butler Manufacturing Company,
Respondent.

Filed June 20, 2011
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-08-29214

Mark N. Stageberg, Minnetonka, Minnesota (for appellant)

Michael S. Kreidler, Louise A. Behrendt, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellant challenges the district court's grant of judgment as a matter of law (JMOL) to respondent on the basis of the statute of limitations, arguing that respondent is equitably estopped from raising the statute of limitations as a defense or, in the alternative, that the statute-of-limitations issue should be remanded for a jury trial. We affirm.

FACTS

Appellant A & T Development (A&T) ordered two buildings from respondent Lester Building Systems (LBS) in 1999, and LBS constructed the buildings on a site prepared by A&T in 2000.

In March or April 2005, A&T discovered that the walls of the buildings had partially separated from the floors. In September 2005, A&T hired a soil expert to investigate; in 2006, A&T hired an attorney to represent them in the matter.

On April 2, 2007, A&T's attorney had a phone conversation with the attorney then representing LBS.[1] A&T's attorney's handwritten memo of that conversation says in part: "Suggested meeting. Agrees that is the best way to handle it--delay lawsuit [drawing of an arrow] S/L." On May 30, 2007, the two attorneys met at the building site. Their conversation included a reference to the statute of limitations.[2]

[1] LBS has been represented by a different attorney throughout this action.

[2] The statute of limitations for improvements to real property is two years from discovery of the injury. *See* Minn. Stat. § 541.051, subd. 1(a) (2010).

Almost eight weeks later, the attorneys began a correspondence. On July 23, 2007, LBS's attorney wrote to A&T's attorney apologizing for the delay and denying any liability for LBS, but offering $10,000 in settlement. On July 24, A&T's attorney wrote back, rejecting the offer and saying the repair estimate for one building alone was $60,000. On July 26, LBS's attorney replied that they should work together to resolve the matter and agreed to toll the statute of limitations. On July 31, A&T's attorney wrote back to LBS's attorney, confirming that the statute of limitations was being tolled.

Nothing happened for more than three months. On November 9, 2007, LBS's attorney wrote to A&T's attorney asking for information about any soil testing A&T had done at the building site and about the $60,000 bid for repairing one building. On November 27, 2007, A&T's attorney replied that he would get the information on the soil.

A six-month delay ensued. On June 2, 2008, LBS's attorney again wrote to A&T's attorney, asking for information regarding the soil tests and the bid to repair the building. On July 8, 2008, A&T's attorney replied by asking if LBS would repair the buildings or if A&T should hire someone else and then litigate the costs of repair. On July 11, 2008, LBS's attorney wrote back to A&T's attorney, asking why he had received no information regarding the soil tests or the $60,000 repair bid and terminating the agreement tolling the statute of limitations.

A&T then brought this action against LBS, alleging negligence. In its answer, LBS raised the affirmative defense of the statute of limitations. A month before trial, on August 17, 2009, A&T moved to amend its complaint by adding claims for breach of

contract and breach of express and implied warranty.[3] The motion was granted on September 14, 2009, at the beginning of the four-day trial.

At the close of evidence, LBS moved for a directed verdict on the basis of the statute of limitations. A&T opposed the motion, saying the statute of limitations had been tolled. The motion was denied. LBS asked that the special-verdict form include questions relating to the statute of limitations. The district court determined that there was no issue as to when the injury was discovered and that the district court, not the jury, would decide whether LBS had delayed A&T's commencement of the action because that issue was not presented to the jury.

The jury returned a verdict for A&T on the negligence, breach of contract, and breach of warranty claims, awarding $126,579 to repair the buildings and $18,000 for lost rental income for the buildings.

LBS moved for a new trial or for JMOL, claiming, inter alia, that the statute of limitations had expired before A&T brought the lawsuit. The district court denied the motion for a new trial but noted that "[i]t is not clear whether at the time of the agreement [to toll the statute of limitations] in July 2007, the statute of limitations had already expired" and directed the parties to appear for an evidentiary hearing on the statute-of-limitations issue.

At the hearing, A&T argued for the first time that equitable estoppel prevented LBS from raising a statute-of-limitations defense. In support of this argument, A&T

[3] The statute of limitations for breach of warranty is two years from discovery of the breach. S*ee* Minn. Stat. § 541.051, subd. 4 (2010).

introduced its attorney's handwritten memo of the April 2, 2007, phone conversation with LBS's attorney.[4]

The district court granted JMOL to LBS, finding that A&T discovered the injury in March or April 2005 and discovered the breach of warranty in September 2005 and that the parties' agreement to toll the statute of limitations was made in July 2007 and terminated in July 2008. A&T does not challenge these findings.

As to the negligence claim, the district court concluded that the two-year statute of limitations for actions on improvements to real property, *see* Minn. Stat. § 541.051, subd. 1(a), had expired in March or April 2007, months before the parties agreed to toll the statute of limitations and more than a year before A&T brought its action. As to the breach of warranty claim, the district court found that the limitation for actions on breach of warranty is two years after discovery of breach, *see* Minn. Stat. § 541.051, subd. 4; it concluded that the statute of limitations would have expired in September 2007 if it had not then been tolled by the parties' July 2007 – July 2008 agreement and that it had expired by the time A&T, in August 2009, sought to add its claim for breach of warranty. The district court also ruled that the breach-of-warranty claim could not relate back to the original negligence claim under Minn. R. Civ. P. 15.05 because the statute of limitations for the negligence claim had already expired at the time of the amendment. *See Van*

[4] The memo was admitted over the objection of LBS's new attorney: "This is the first time . . . he's ever brought up [that] he's got these notes that he supposedly prepared of telephone calls. . . . [T]his is [the] first [time] I've ever been provided with these types of communications, his handwritten notes, and I haven't had a chance to look at all these documents yet . . . ."

Slooten v. Estate of Schneider-Janzen, 623 N.W.2d 269, 271-72 (Minn. App. 2001). A&T does not challenge this decision.

A&T requested rehearing and reconsideration. The district court denied the request, saying that it had previously considered A&T's claim of equitable estoppel and did not find facts to support the claim and that its "decision that equitable estoppel was inappropriate must stand."

A&T challenges the JMOL, arguing that LBS was equitably estopped from raising the statute-of-limitations issue because of the discussions between the parties' attorneys regarding the possibility of settlement and that, in any event, the equitable-estoppel issue should have been tried to the jury rather than to the court.[5]

D E C I S I O N

1. Equitable Estoppel

"[A] district court's conclusion on equitable estoppel after a bench trial is reviewed for abuse of discretion." *City of N. Oaks v. Sarpal*, __ N.W.2d __, __ 2011 WL 1775532, at *5 (Minn. May 11, 2011).

LBS's former attorney was asked, "[W]hen is the first time the subject of the statute of limitations was ever brought up . . . ?" and he answered, "At the site visit [A&T's attorney] said that he was pushing up against the statute of limitations and needed a response quickly." LBS's former attorney was later asked, "[When] the subject

[5] By notice of related appeal, LBS challenges the denial of its motion for JMOL or a new trial on the ground that the verdict was contrary to the evidence. Because we affirm the grant of JMOL, we do not reach this issue.

of the tolling of the statute first came up" and answered, "In July 2007." He was also asked if his July 26, 2007 letter to A&T's attorney saying "I will agree to a tolling agreement whereby your client will not waive his claim under the statute of limitations" indicated that he and A&T's attorney "had discussed a tolling agreement before July 26th." He answered, "No, I think no, I don't agree . . . that's what it does. . . . We had in no way discussed the actual tolling of the statute. . . . [I]n your response to me you accepted the offer to toll the statute. So I don't think there was any signs (sic) that we had discussed actually tolling the statute of limitations before the 26th [of July]."

A&T's attorney testified about his notes of a phone conversation with LBS's former attorney

> on April 2nd of 200[7]. It was at this time, as the note says, there was a suggested meeting and [he] agrees that is the best way to handle it so this was trying to figure out between [LBS's former attorney] and I what was going to be the best way to resolve the problem. My note there says delayed lawsuit which would have been our discussion of why we [were] doing this notion we should be delaying the commencement of a lawsuit [sic]. When I see S/L that's my abbreviation for statute of limitations and an arrow to it indicates that that was discussed to some extent. I do not recall to what extent on that phone conversation of April 2nd, 2007.

The district court resolved the fact issue presented by the conflicting testimony and found that "In a letter dated July 26, 2007, [LBS] agreed to toll the statute of limitations while the parties continued attempts to resolve the dispute." The two-year statute of limitations for A&T to bring an action on an improvement to real property expired in March-April 2007, two years after its discovery of the defect in March-April

2005. As the district court concluded, because the statute of limitations had already expired before the parties agreed to toll it, their agreement had no effect. *See Miernicki v. Duluth Curling Club*, 699 N.W.2d 787, 789 (Minn. 2005) (holding that "[b]ecause appellants' ratification of the action filed in their name occurred after the statute of limitations had expired, the filing was ineffective").

A&T argues that "[b]ecause there was continuous settlement discussion between counsel for the parties in this dispute from April 2, 2007, until July 11, 2008, to try and resolve the claim by settlement, this presents a perfect fact situation for equitable estoppel" and that "[r]epresentations about settlement of a dispute relied upon by a plaintiff will estop a defendant from asserting a statute of limitations defense." But the cases on which A&T relies for this argument are distinguishable.

Sohns v. Pederson, 354 N.W.2d 852, 853-54 (Minn. App. 1984), sets out the elements of estoppel (defendant made representations on which plaintiff reasonably relied and plaintiff will be harmed if estoppel is not invoked) and holds that "Defendant is estopped from asserting the statute of limitations when plaintiff reasonably relied on defendant's representations." In *Sohns*, the defendant, who had unknowingly purchased a stolen Bobcat, sold it to the plaintiff. After the Bobcat was impounded, the plaintiff notified the defendant, who "over a period of one to two years, . . . repeatedly promised to provide a replacement Bobcat." *Id.* at 855. The plaintiff relied on these promises and delayed his lawsuit until after the statute of limitations had expired. The defendant was estopped from asserting the statute of limitations as a defense because, although the plaintiff had not explicitly raised the issue of estoppel, the defendant had notice of the

underlying facts, and the defendant had not objected to trial testimony relevant only to the issue of estoppel. *Id.*

Here, LBS never promised to provide relief as the defendant in *Sohns* repeatedly did. Nor did LBS promise to settle the matter without litigation; thus, A&T could not have relied on such a promise. Finally, although LBS had argued that the statute of limitations precluded the action in its answer, when it moved for a directed verdict, in discussing special-verdict questions, and in moving for JMOL or a new trial, A&T did not raise the equitable-estoppel argument until the posttrial evidentiary hearing. *Cf. Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971) (stating that a claim was made "too late" when it was made for the first time in a motion for a new trial). Thus, A&T implicitly consented to LBS's reliance on the statute-of-limitations argument.[6]

The district court did not err in its implicit determination that LBS is not estopped from asserting a statute-of-limitations defense, and A&T does not challenge the district court's factual findings or its conclusion that the statute of limitations barred A&T's claims.

[6] The other cases on which A&T relies, *Brenner v. Nordby*, 306 N.W.2d 126 (Minn. 1981); *Rhee v. Golden Home Builders*, 617 N.W.2d 618 (Minn. App. 2000); and *Mutual Serv. Life Ins. Co. v. Galaxy Builders, Inc*., 435 N.W.2d 136 (Minn. App. 1989), *review denied* (Minn. Apr. 19, 1989); are all distinguishable procedurally because they reversed summary judgments after finding factual issues and substantively because they concern builders who had given repeated assurances that they would do repairs.
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2. Jury Trial

A&T raised no objection to participating in the evidentiary hearing before the district court, to the district court's statement during the special-verdict-form discussion that evidence relevant to the statute-of-limitations issue had not been presented to the jury and the issue would therefore be decided by the court, or to the district court's statement in its posttrial memorandum that an evidentiary hearing would be held on the issue. A&T now argues that "[w]ith hind-sight it is now clear that the [district court] should have submitted the statute of limitation[s] and estoppel issue to the jury at the initial trial" and asks this court, as an alternative to reversing the JMOL, to remand for "a jury trial on the single issue of whether equitable estoppel applies." But A&T gives no legal or factual explanation as to why "with hind-sight it is now clear" that the issue should have gone, or should now go, to a jury and has therefore waived the issue. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (holding that an assignment of error in a brief based on a mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

The district court did not abuse its discretion in concluding that LBS was not equitably estopped from asserting that the statute of limitations barred A&T's action, and A&T presents no reason to remand for a jury trial.

Affirmed.