STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1619

Rodney Lee, et al.,
Appellants,

vs.

Gorham Builders, Inc.,
Respondent,

Brian Peterson Stucco, Inc.,
Defendant,

and

Gorham Builders, Inc.,
Respondent,

vs.

Andersen Corporation,
Respondent,

Tempesta Masonry, Inc., et al.,
Third Party Defendants,

Greg Chismar d/b/a Chismar Construction,
Respondent.

Filed April 22, 2013
Affirmed; motion denied
Kalitowski, Judge

Anoka County District Court
File No. 02-CV-11-5536

J. Robert Keena, Kathleen M. Loucks, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellants)

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Michael R. Moline, Kristin Kingsbury, Monroe Moxness Berg, Minneapolis, Minnesota (for respondent Andersen Corporation)

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Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

Appellants, homeowners Rodney and Pamela Lee (the Lees), challenge the district court's order granting summary judgment in favor of respondent-contractor Gorham Builders Inc. (Gorham), arguing that the district court erred by concluding that their statutory-warranty and common-law claims were barred by the applicable statutes of limitations. We affirm.

D E C I S I O N

Summary judgment is appropriate when there are no genuine issues as to any material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. "We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation

omitted). We must view the evidence in the light most favorable to the party against whom judgment was granted. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

Statutory-Warranty Claim

Minn. Stat. § 327A.02, subd. 1(c) (2010), states that contractors must provide to homeowners a warranty ensuring a residential dwelling will be free from major construction defects for a ten-year period. "Major construction defect" is defined as follows:

> actual damage to the load-bearing portion of the dwelling or the home improvement, including damage due to subsidence, expansion or lateral movement of the soil, which affects the load-bearing function and which vitally affects or is imminently likely to vitally affect use of the dwelling or the home improvement for residential purposes. "Major construction defect" does not include damage due to movement of the soil caused by flood, earthquake or other natural disaster.

Minn. Stat. § 327A.01, subd. 5 (2010).

Minn. Stat. § 541.051, subd. 4 (2010), requires that statutory-warranty claims "be brought within two years of the discovery of the breach" of the statutory warranty under Minn. Stat. § 327A.02 subd. 1(c). The two-year limitations period "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 construction defects." Minn. Stat. § 541.051, subd. 4.

The Lees initiated their statutory-warranty claim in June 2011, over two years after they received a May 2009 inspection report that identified several defects to their home. The Lees argue that the May 2009 inspection report did not trigger the running of

the two-year statutory period because it did not notify them of a "major construction defect." We disagree.

The May 2009 inspection report identified several defects to the Lees' home. The report indicated that the exterior of the home lacked various devices, such as kick-out flashings and weep screeds, designed to prevent moisture from entering the stucco cladding, wood framework, and foundation. The report also identified numerous areas of the house that had moisture readings of 20% or greater, which may indicate "mold growth" and "wood rot." And, most importantly, the report identified several possible structural defects: (1) "cracks in the stucco which could indicate a structural condition or seismic movement"; (2) "structural or stress relief cracks" in the stucco that "should be closely monitored and repaired if conditions worsen"; and (3) a "possible structural crack" in the stucco next to a window frame.

Additionally, the report stated, "Contact your builder in writing of the findings, and discuss your options with an attorney." We conclude that the 2009 inspection report placed the Lees on notice of a "major construction defect" for purposes of Minn. Stat. § 327A.01, subd. 6, and a "breach" under Minn. Stat. § 541.051, subd. 4.

The Lees argue that, even if they were on notice of a major construction defect in May 2009, there are material issues of fact as to whether they knew or should have known that Gorham would not fulfill its obligations under the warranty. We disagree.

There is evidence, including Rodney Lee's deposition testimony, that indicates the Lees knew or should have known that Gorham would not fulfill its obligations under the warranty in May 2009. Rodney Lee testified that by the end of May 2009, he "became

aware" that Gorham could not or would not perform the repairs to his home. He also testified that "somebody from the Gorham's or somebody else" told him that Gorham "can't come and fix the problems himself, it has to be turned over to [the] insurance company." After learning that Gorham would not repair his home, Rodney Lee testified that he had two choices: pay an attorney to sue Gorham, or, for the same amount of money, pay outside contractor Brian Peterson Stucco Inc. (Peterson) to repair the home. Instead of suing Gorham, the Lees opted to hire Peterson.

Thus, by the end of May 2009, Rodney Lee was aware that Gorham would not make the necessary repairs to his home. Because the Lees did not file suit against Gorham until June 2011, the district court did not err by granting Gorham summary judgment on the Lees' statutory-warranty claim.

Common-law claims

Minn. Stat. § 541.051, subd. 1(a) (2010), provides a two-year statute of limitations for common-law claims alleging injury to property arising out of defective and unsafe conditions. A common-law "cause of action accrues upon discovery of the injury." Minn. Stat. § 541.051, subd. 1(c). When reasonable minds may differ about the discovery of the injury, summary judgment is not appropriate. *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 497 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004).

"Estoppel is an equitable doctrine that prevents a party from taking unconscionable advantage of its own wrong by asserting his strict legal rights." *Dakota Cty. v. BWBR Architects*, 645 N.W.2d 487, 493 (Minn. App. 2002) (quotation omitted),

review denied (Minn. Aug. 20, 2002). A builder may be estopped from asserting a statute-of-limitations bar if its conduct satisfies the elements of equitable estoppel:

> 1. There must be conduct—acts, language or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped . . . . 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him*. 4. The conduct must be done with the intention, or at least with the *expectation*, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse . . . .

Lunning v. Land O'Lakes, 303 N.W.2d 452, 457 (Minn. 1980) (quotation omitted). "Estoppel depends on the facts of each case and ordinarily presents a question for the jury." *Brenner v. Nordby*, 306 N.W.2d 126, 127 (Minn. 1981). "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).

The Lees initiated their common-law claims in June 2011, over two years after they received the May 2009 inspection report. The district court concluded that the Lees' common-law claims were time barred. As discussed above, we agree with the district court that after receiving the 2009 inspection report, the Lee's discovered or should have discovered a defective condition that caused an actionable injury.

But the Lees' argue that Gorham should be estopped from asserting a statute-of-limitations defense because the Lees relied on Peterson to repair the home in the summer of 2009; therefore, the repairs tolled the statute of limitations. We disagree.

The Lees relied on Peterson—not Gorham—to correct the defects revealed by the 2009 inspection report. Peterson—not Gorham—made about $25,000 in repairs to the Lees' home. Rodney Lee testified that "based on Mr. Peterson's expertise and his specific representations to us, my wife and I believed that Brian Peterson Stucco made all the repairs that were necessary." Thus, the Lees have failed to articulate how or when *Gorham*, rather than Peterson, represented or concealed material facts that caused the Lees to act to their detriment.

The Lees argue that an equitable claim may nonetheless arise through a negative omission or silence, or where a party responsible for remedying a defect in real property makes assurances that the defect will be repaired. We agree that an estoppel claim arises when a party, "by its silence when it ought to speak, intentionally or through culpable negligence, induces another to believe certain facts to exist." *Birch Publications, Inc. v. RMZ of St. Cloud, Inc.*, 683 N.W.2d 869, 873-74 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004). And the Lees are correct that Gorham was essentially silent when notified about the defects in the 2009 inspection report. But there is no evidence that the Lees relied on Gorham's silence to invoke equitable estoppel. By its silence, Gorham did not induce the Lees to believe that it would repair the home, and therefore it did not induce the Lees to not bring suit. As the district court stated, "[Gorham's] silence under

these circumstances does not provide a reasonable and good faith basis for reliance by [the Lees] to not bring suit."

Additionally, Gorham never made assurances that it would cure the defects to the home. Rather, Gorham was silent after the Lees delivered to it a copy of the 2009 inspection report, and it later told the Lees that any problems have to be "turned over to [the] insurance company." And as discussed above, by May 2009 the Lees "assumed" or "became aware" that Gorham would not repair the defects. Therefore, the Lees' equitable-estoppel argument is unavailing and the district court did not err by granting Gorham summary judgment on the Lees common-law claims.

The Lees alternatively argue that their common-law claims are timely because they did not discover structural defects to their home until they had an additional home inspection in March 2011. This argument was not presented to the district court.

Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The Lees concede that they did not argue this issue to the district court. Thus, we need not consider this issue on appeal.

Moreover, even if this argument was properly before us, it is without merit. The 2011 inspection report does not identify any new defects or structural issues not already identified in the 2009 inspection report. The 2011 inspection report identifies problems with numerous devices designed to prevent moisture-related problems; notes that the stucco cladding has "structural or stress relief cracks" that "should be closely monitored";

and identifies several areas of the home that have elevated moisture levels. All of these problems were previously identified in the 2009 inspection report.

Finally, Gorham filed a separate motion to strike respondent Andersen Corporation's request for affirmative relief. Because we affirm the district court's order granting summary judgment, we deny Gorham's motion to strike as moot.

Affirmed; motion denied.