

STATE OF MICHIGAN
COURT OF APPEALS

DAVID STIELER and DONNA STIELER, f/k/a
DONNA MARCANTONIO,

UNPUBLISHED
April 23, 2009

Plaintiffs-Appellants,

v

No. 282430
Oakland Circuit Court
LC No. 2005-071262-CK

ROBERTSON ORION, L.L.C., and
ROBERTSON BROTHERS COMPANY,

Defendants-Appellees,

and

SOULLIERE DECORATIVE STONE, INC.,

Defendant.

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiffs, David and Donna Stieler, appeal as of right the trial court's order granting summary disposition of their breach of contract and negligence claims against defendants Robertson Orion, L.L.C., and Robertson Brothers Company pursuant to MCR 2.116(C)(7), (8), and (10). Because the trial court properly dismissed the breach of contract claim against defendant Robertson Orion, and properly dismissed the negligence claim and the third-party beneficiary claim against defendant Robertson Brothers, we affirm.

This case arises out of the collapse of a retaining wall on plaintiffs' residential property in the Shores of Long Lake Subdivision in Orion Township. Defendant Robertson Orion was the subdivision developer, and defendant Robertson Brothers was the company that built plaintiffs' home. The retaining wall was built by defendant Soulliere Decorative Stone, Inc., pursuant to a subcontract with Robertson Brothers.¹ Plaintiffs entered into a purchase agreement with Robertson Orion for the purchase of their home on March 30, 2001, and the closing took place

¹ Plaintiffs settled with Soulliere, and it is not a party to this appeal.

on May 18, 2001. Plaintiffs thereafter complained about problems with the retaining wall and a section of the wall (referred to as “wall A”) was rebuilt in the latter part of 2001. Despite plaintiffs’ request, a second section of the retaining wall (referred to as “wall B”) was never rebuilt. In July 2005, wall B collapsed. On December 19, 2005, plaintiffs filed this action, alleging claims for breach of contract and negligence against defendants Robertson Orion and Robertson Brothers. The trial court granted defendants’ motion for summary disposition and plaintiffs now appeal.

Plaintiffs first argue that the trial court improperly relied on the one-year limited warranty provision of the purchase agreement to conclude that dismissal of their breach of contract claim against Robertson Orion was proper because the claim was not timely filed. Plaintiffs assert they did not allege a breach of the limited warranty, but rather a breach of Robertson Orion’s promise to construct the dwelling in accordance with specified plans and specifications, and a breach of its independent duty to construct the home in a good and workmanlike manner.

We examine a complaint as a whole to determine the nature of the claim alleged. *Adams v Adams (On Rehearing)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Plaintiffs’ complaint alleged that they entered into the purchase agreement in reliance on Robertson Orion’s representations that the property would be free of defects and that any defects would be timely repaired. These allegations clearly implicate the limited warranty provision, which sets forth Robertson Orion’s representations concerning the condition of the home and its obligations with respect to any defects in materials or workmanship. The warranty provision provides:

11. Limited Warranty.

a. Coverage. Subject to the exclusions from coverage set forth below, Builder hereby warrants that the dwelling shall be free from any defect in materials or workmanship for a period of one year following the date of closing or the issuance of a certificate of occupancy, whichever shall occur first.

* * *

f. Repairs. If a defect exists which is covered by this Limited Warranty, Builder will repair or replace it at no charge to Purchaser within 60 days after Builder’s inspection (longer if weather conditions, labor problems or materials shortages cause delays). The work will be done by Builder or subcontractors chosen by Builder. The choice between repair or replacement is Builder’s.

But regardless of whether plaintiffs’ breach of contract claim was based on the warranty provision or some other provision of the contract, plaintiffs’ claim was properly dismissed in light of the limitations provision in paragraph 12 of the purchase agreement, which provides that “[n]o action, regardless of form, arising out of the transactions under this agreement may be brought by purchaser more than one year after the cause of action has accrued.”

A cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003). In this case, plaintiffs notified Robertson Brothers of the problems with the retaining wall shortly after they moved into their home in

2001, and requested that both wall A and wall B be rebuilt. Defendants agreed to rebuild wall A, which was rebuilt in the latter part of 2001, but never rebuilt wall B. In addition, after wall A was rebuilt, plaintiffs informed Robertson Brothers that they still had concerns about the integrity of the retaining wall and requested an unlimited ten-year warranty, which Robertson Brothers informed plaintiffs in January 2002 that it would not provide. Thus, plaintiffs' claim accrued, at the latest, in January 2002, when plaintiffs were aware of the problems with the retaining wall, including that defendants had refused their request to rebuild wall B, which later collapsed. Because plaintiffs did not file this action until December 2005, more than three years later, it was barred by the limitations provision in paragraph 12. Although the trial court relied on the one-year warranty provision instead of the one-year limitations provision, it reached the right result in dismissing the breach of contract claim against Robertson Orion and, accordingly, we affirm its decision. *Beyer v Verizon North, Inc*, 270 Mich App 424, 436; 715 NW2d 328 (2006).

Plaintiffs alternatively argue that Robertson Orion is equitably estopped from relying on any contractual limitations provision. Equitable estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 203-204; 702 NW2d 106 (2005). For equitable estoppel to apply, plaintiffs must establish (1) that Robertson Orion's acts or representations induced them to believe that any contractual limitations provision would not be enforced, (2) that plaintiffs justifiably relied on this belief, and (3) that plaintiffs were prejudiced as a result of their reliance on the belief that any contractual limitations provision would not be enforced. *Id.* at 204.

Plaintiffs rely on a January 29, 2002, letter from Robertson Brothers as support for their equitable estoppel argument. That letter was sent in response to plaintiffs' request for an ten-year unlimited warranty on the rebuilt retaining wall. The letter stated:

In response to your request, the enclosed warranty has been provided by Soulliere. The warranty is limited because what is being placed next to the wall cannot be monitored over and (sic) extended period of time.

Without this control Robertson Brothers cannot guarantee anything beyond what is given by Soulliere. However, if an issue of original workmanship should arise Robertson Brothers will stand behind its work.

Even if these representations may be attributable to Robertson Orion, plaintiffs were not justified in believing that the one-year limitations provision would not be enforced, given that Robertson Brothers expressly declined plaintiffs' request for an unlimited ten-year warranty, explicitly stated that it could not provide anything beyond what was provided by Soulliere (a limited two-year warranty), and it never mentioned extending any warranty or limitations provision. Accordingly, Robertson Orion is not equitably estopped from relying on the one-year limitations period.

Next we are called on to address the trial court's dismissal of plaintiffs' negligence claim against Robertson Brothers. The trial court concluded that plaintiffs failed to state a claim against Robertson Brothers on which relief could be granted because the retaining wall was constructed by Soulliere, a subcontractor, and Robertson Brothers, as general contractor, cannot

be held liable for its subcontractor's alleged negligence. Thus, the court appears to have granted summary disposition of this claim under MCR 2.116(C)(8), which tests the legal sufficiency of a claim by the pleadings alone. *Jackson v Detroit Police Chief*, 201 Mich App 173, 174; 506 NW2d 251 (1993). In reviewing whether summary disposition is warranted under MCR 2.116(C)(8), all factual allegations in a complaint are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

Generally, in the absence of its own active negligence, a general contractor is not liable for its subcontractor's negligence. *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008); *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004); *Reeves v Kmart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998). There are two exceptions to this rule, namely, (1) the common work area or retained control doctrine, and (2) where inherently dangerous work is involved, *Ormsby, supra* at 49; *Reeves, supra* at 471, but neither exception is applicable here. However, plaintiffs were not attempting to hold Robertson Brothers liable for Soulliere's negligence. Instead, plaintiffs alleged that Robertson Brothers was independently negligent. Thus, we conclude that summary disposition was not appropriate under MCR 2.116(C)(8).

But Robertson Brothers also moved for summary disposition under MCR 2.116(C)(10), and we conclude that summary disposition was appropriate under this subrule. "If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart." *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). Summary disposition is appropriate under subrule (C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). It is undisputed that Soulliere built the retaining wall, and plaintiffs failed to submit any evidence to support an inference that Robertson Brothers caused any of the conditions that could have contributed to the alleged defects with the retaining wall. Thus, Robertson Brothers was entitled to summary disposition of plaintiffs' negligence claim under MCR 2.116(C)(10).

Finally, plaintiffs argue that the trial court erred in dismissing their breach of contract claim against Robertson Brothers, which was based on plaintiffs' assertion that they were third-party beneficiaries to a contract between Robertson Orion and Roberson Brothers. Contrary to plaintiffs' argument, the trial court was authorized to grant summary disposition on this claim in the absence of a specific request if the pleadings showed that Robertson Brothers was entitled to judgment as a matter of law or the affidavits or other proofs showed that there is no genuine issue of material fact. *Boulton v Fenton Twp*, 272 Mich App 456, 462; 726 NW2d 733 (2006).

MCR 2.113(F) required plaintiffs to attach a copy of the alleged agreement to their complaint, or state in the complaint why a copy could not be attached. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). These requirements are mandatory. See *Stocker v Clark Refining Corp*, 41 Mich App 161, 165; 199 NW2d 862 (1972). Plaintiffs did neither, thereby warranting dismissal of their third-party beneficiary claim. *English Gardens Condo, LLC v Howell Twp*, 273 Mich App 69, 81; 729 NW2d 242 (2006), rev'd in part on other grounds 480 Mich 962 (2007). Although plaintiffs assert that discovery

was not complete, plaintiffs did not make any showing that further discovery would stand a fair chance of uncovering factual support for their claims that a contract actually existed, or that they were third-party beneficiaries under any alleged contract. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Accordingly, the trial court did not err in dismissing plaintiffs' third-party beneficiary claim.

Affirmed.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Pat M. Donofrio