2014 IL App (2d) 140300-U
No. 2-14-0300
Order filed December 29, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STEPHANIE HUGHES, KURT DIEDRICK, GRETCHEN DIEDRICK, KENNETH FRANCESCONI, ANGELA LUCCA, NATALIE WHITE, and OTHER SIMILARLY SITUATED HOMEOWNERS, Plaintiffs-Appellants, v. CENTEX HOMES, Defendant-Appellee.	)	Appeal from the Circuit Court of Kane County. No. 10-L-348 Honorable James R. Murphy, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly granted summary judgment for the defendant because certain plaintiffs could not show that any fraudulent statements were made to them and the other plaintiffs' claims were not timely filed.

¶ 2 The plaintiffs—Stephanie Hughes, Kurt and Gretchen Diedrick, Kenneth Francesconi, Angela Lucca, and Natalie White—are the owners of homes in the Westridge subdivision in Bartlett. The homes were constructed by the defendant, Centex Homes. The plaintiffs sued the defendant, alleging that it made fraudulent statements relating to the windows installed in the homes, which leak. The circuit court of Kane County granted summary judgment in favor of the

defendant on the basis that the plaintiffs' claims were barred by the relevant statutes of limitations. The plaintiffs appeal, and we affirm.

¶ 3 BACKGROUND

¶ 4 The following facts are drawn from the exhibits submitted in connection with the motion for summary judgment and are undisputed.

¶ 5 Between 1994 and 2004, the named plaintiffs[1] bought homes built by Centex. Several of them (Hughes, Lucca, and the Diedricks) bought their homes in 1994, immediately after the homes had been constructed. Lucca and Ms. Diedrick noticed water leaking into their home as soon as they moved in. Hughes noticed water leaking into her home through the windows no later than December 1995. All three contacted Centex about the problem.

¶ 6 Hughes wrote Centex in 1997 and 1998 to complain about the leaking problems. At that point, she knew that the leaking should not be happening. Centex performed various repairs between 1995 and 1999, including replacing a windowsill and some brick. Centex told her that the condensation on the inside of her windows after their initial repairs was due to humidity in her home. However, Hughes continued to believe that water was coming in through the windows. She did not communicate with Centex after 2002.

¶ 7 Ms. Diedrick thought the windows should not be leaking as they were, and thought Centex had done something wrong that caused the leaks. In 1998 or so, Centex told her that the problem was caused by clogged "weep holes" beneath the windows. Centex performed "extensive" repairs on the Diedricks' home, including caulking and sealing the windows. At some point, Centex also told her that the window company had gone out of business and the

[1] Although the suit was brought as a class action, the trial court denied class certification. That ruling is not challenged in this appeal.

warranty period had expired. Ms. Diedrick testified that, after that, she thought she had no more options for getting the windows repaired. However, Ms. Diedrick continued to believe that Centex was responsible for fixing the problem. Ms. Diedrick believed that water still leaks into their home. She last communicated with Centex in 2003 or 2004 when it replaced her front door.

¶ 8 As to Lucca, Centex attempted to repair her windows "several" times, ending in 1996. According to Lucca, Centex also told her that the problem was caused by clogged "weep holes" beneath the windows, and no later than 1998 it sent someone to her house to unclog the holes. Although she initially believed this explanation for the leaking, she knew within six months that unclogging the weep holes had not fixed the problem. After that, she never discussed the cause of the leaking with Centex. She last had contact with Centex in 2001, when it replaced the brick front of her home. However, she continued to experience water infiltration after that date. She thought the water infiltration meant there was something wrong.

¶ 9 Francesconi bought his home in 1997. He experienced one problem with water leaking through a window, which he resolved himself by caulking. He also experienced fogging of his windows because of water between the panes of glass. He replaced many of the window panes, which resolved the issue for a few years. Francesconi contacted Centex once, in 2003, to find out how to replace windows that were still under warranty. Someone from Centex told him who the window manufacturer was and how to contact it. He was able to obtain many of the new panes used to repair the windows within the 10-year warranty on the windows. He did not complain to Centex about water leaking through the windows. He did not ask Centex to replace the windows and did not expect them to do so. Centex did not make any representations to him about the cause of the water infiltration in his home.

¶ 10 White bought her home in 2004, paying about $340,000. Within two months of moving in, she noticed problems with water leaking through some of the windows, and those problems

persisted throughout her residency in that home, especially during winter and spring. She did not think that the windows should leak, and she discussed her window problems with her neighbors, many of whom "hated their windows." However, she did not contact Centex about the problem. In fact, she has never had any contact with anyone from Centex. In 2007 she obtained a bid to replace the windows in one room, but she and her husband did not end up doing this. Her husband attempted to caulk the windows to fix the problem, and they would regularly wipe off the condensation. When she sold the house in 2011 (for $225,000), she disclosed the leaking problem.

¶ 11 In deposition, White, Diedrick and Lucca testified that their first contact with a lawyer regarding the windows was in 2009 or 2010.

¶ 12 The plaintiffs filed suit in June 2010. Their second amended complaint, filed in December 2010, contained two claims: a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act (Act) (815 ILCS 505/1 *et seq*. (West 2008)) and a common law fraud claim. The plaintiffs were deposed as part of discovery relating to the issue of class certification. The trial court denied the plaintiffs' motion to certify a class.

¶ 13 In April 2013, Centex filed a motion for summary judgment, arguing that all of the plaintiffs' claims were untimely, as none of the plaintiffs had spoken to Centex (and thus Centex could not have made any fraudulent statements to them) during the relevant limitations periods. Centex also argued that, even if the trial court did not accept the limitations argument, Francesconi and White had never spoken with anyone from Centex at all about the cause of the leaking windows and thus Centex had not made any fraudulent statements to them and their claims of fraud should be dismissed. In response, the plaintiffs argued that the "discovery rule" applied and that they had not discovered their cause of action until shortly before they filed suit. After briefing and oral argument, the trial court granted the motion for summary judgment,

agreeing with both arguments advanced by Centex. Subsequently, the trial court denied the plaintiffs' motion for reconsideration, and they appealed.

¶ 14 ANALYSIS

¶ 15 On appeal, the plaintiffs argue that questions of fact about the application of the discovery rule preclude a finding that their suit was untimely. However, they make no argument regarding the trial court's second, simultaneous finding that Francesconi and White could not sue Centex for fraudulent statements about the cause of the window leaks, because it was undisputed that Centex had never discussed this issue with either of these plaintiffs. (Both the common-law fraud claim and the claim under the Act require a plaintiff to show that the defendant made a fraudulent or deceptive statement to the plaintiff. *McCarthy v. Pointer*, 2013 IL App (1st) 121688, ¶ 17; 815 ILCS 550/2 (West 2008).) Our own review of the record confirms that White testified that she had never spoken with anyone from Centex at all, and Francesconi testified that Centex had never made any statements to him about the cause of the windows' leaking. Accordingly, we affirm the entry of summary judgment in favor of Centex as to the claims brought by Francesconi and White. We turn to the issue of whether the claims of Hughes, Lucca, and the Diedricks were brought within the applicable statutes of limitation.

¶ 16 "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Therefore, summary judgment is proper only when the pleadings, depositions and admissions on record, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). Although summary judgment has been called a "drastic measure," it is an appropriate tool to employ where " 'the

right of the moving party is clear and free from doubt.' " *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)).

¶ 17 Here, the plaintiffs bear the burden of proving that their claims were timely filed under the discovery rule. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). Accordingly, in order to defeat a motion for summary judgment, the plaintiffs must show the existence of facts which could support judgment in their favor on this issue. "Although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Land v. Board of Education for the City of Chicago*, 202 Ill. 2d 414, 432 (2002). We review the grant of summary judgment under a *de novo* standard. *Morris*, 197 Ill. 2d at 35.

¶ 18 The parties agree that the limitation period applicable to a claim under the Act is three years (815 ILCS 505/10a (West 2008)), and the limitation period for a common-law fraud claim is five years (735 ILCS 5/13-205 (West 2008)). Thus, for the plaintiffs' claims to be timely filed, Centex's fraudulent statements to the plaintiffs must have occurred on or after June 16, 2005, five years before the suit was filed.

¶ 19 It is undisputed that Centex did not communicate with any of the plaintiffs after 2004, and thus it could not have made any fraudulent statements to them after that date. Accordingly, the suit was not timely filed under the applicable statutes of limitation.

¶ 20 The plaintiffs argue, however, that the discovery rule applies here with the result that their suit was timely filed. The discovery rule "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994). "This rule developed to avoid mechanical application of a statute of limitations in situations where an individual would be barred from suit before he was aware that

he was injured." *Hermitage Corp.*, 166 Ill. 2d at 77-78. The rule does not extend the limitations period until the plaintiff knows that the defendant's conduct amounts to a legally valid cause of action. *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170 (1981). Rather, once the plaintiff knows or reasonably should know (1) that he or she has been injured and (2) that the injury was wrongfully caused, the plaintiff "is under an obligation to inquire further to determine whether an actionable wrong has been committed." *Id*. at 171. Although the application of the discovery rule is generally a question of fact, it may be resolved on summary judgment if the facts are undisputed and support only one conclusion. *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 28.

¶ 21 The plaintiffs do not dispute that Centex did not make any fraudulent statements to them within the applicable limitations periods. Similarly, they concede that they knew that they had been injured (*i.e.*, that their windows leaked) more than five years before they filed suit. However, they argue that Centex's earlier statements that clogged weep holes or internal humidity was the cause of the water infiltration prevented them from realizing that the leaking was "wrongfully caused" by Centex. They suggest that the leaking was similar to the injury experienced by the plaintiff in *Janetis v. E.M. Christensen*, 200 Ill. App. 3d 581, 586-87 (1990), in that it was an aggravation of an injury that could naturally develop in the absence of negligent causes and thus its wrongful character was not immediately apparent. They assert they were unable to learn that the leaking was "wrongfully caused" until shortly before they filed suit, when they consulted with a lawyer.

¶ 22 We reject this argument because the plaintiffs have failed to present any evidence supporting it. The plaintiffs did not testify that they thought that the water infiltration into their homes was a natural or normal condition. Moreover, they did not testify that Centex's statements about the cause of the problem prevented them from realizing that something was

wrong or that Centex might be responsible. To the contrary, Hughes stated that she wrote to Centex in 1997 and 1998 to complain about the windows because she did not believe that the leaking should be happening and she thought it was Centex's responsibility to repair the problem. Although Centex told her in 2002 that the continued condensation on the windows was due to the humidity in her home, she continued to believe that water was infiltrating through the windows. Similarly, although Ms. Diedrick testified that she thought she had no more options once Centex told her (sometime before 2004) that the window warranty expired and the manufacturer had gone out of business, she continued to believe that the windows should not be leaking and that Centex should fix the problem. Lucca testified that, although she initially believed Centex's statement that the leaking was caused by clogged weep holes, she knew within six months of Centex's work unclogging the weep holes (which occurred in 1998) that the unclogging had not fixed the problem and that the continued water infiltration meant that something was wrong.

¶ 23 The testimony described above constitutes admissions by the plaintiffs. None of the facts established by this testimony are disputed, and only one conclusion can be drawn from them: long before 2005, the plaintiffs (a) knew that the water infiltration was not a normal condition and (b) had sufficient facts that would put a reasonable person on notice that Centex's explanations for the water infiltration were not correct. At that point, the plaintiffs had "an obligation to inquire further to determine whether an actionable wrong ha[d] been committed." *Nolan*, 85 Ill. 2d at 171. Their failure to consult a lawyer until 2009 or 2010 cannot be laid at the feet of Centex. Accordingly, the trial court did not err in finding that the claims of Hughes, Lucca, and the Diedricks were not timely filed, and in granting summary judgment in favor of the defendant.

¶ 24 CONCLUSION

¶ 25 For all of these reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 26 Affirmed.