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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ROCK RIVER WATER RECLAMATION DISTRICT,)	Appeal from the Circuit Court of Winnebago County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09-L-238
)	
COMMONWEALTH EDISON COMPANY,)	Honorable
)	Eugene G. Doherty,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendant summary judgment and dismissed plaintiff's complaint as time-barred: although defendant allegedly damaged plaintiff's pipe and concealed the damage, the concealment was part of the completion of the project and was not fraudulent.

¶ 2 Plaintiff, Rock River Water Reclamation District, sued defendant, Commonwealth Edison Company, for negligently damaging one of its water pipes while installing an electrical conduit in 1972. The trial court dismissed the action as barred by the 10-year statute of repose governing construction actions. 735 ILCS 5/13-214(b) (West 2012). Plaintiff appeals,

contending that its complaint should not have been dismissed, because defendant fraudulently concealed the cause of action. We affirm.

¶ 3 Plaintiff filed its complaint in 2009, alleging that defendant negligently damaged plaintiff's sewer pipe. The pipe in question is a 24-inch clay pipe near the intersection of State and Wyman streets in Rockford. Plaintiff alleged that defendant installed electrical conduit under that intersection in July 1972 and that, while doing so, it crushed plaintiff's pipe.

¶ 4 Defendant moved for summary judgment, contending that plaintiff could not prove that defendant was responsible for damaging the pipe. Defendant further contended that the action was barred by the 10-year statute of repose governing construction activities. In response, plaintiff asserted that defendant had fraudulently concealed its cause of action.

¶ 5 To support its response, plaintiff alleged that it first discovered the damage earlier in 2009 when it inspected the pipe using a video camera. The inspection showed that the top of the pipe had been fractured, with the damage extending approximately 13 feet along the pipe's length. Plaintiff classified the break as an emergency, meaning that the pipe was in danger of collapse. Plaintiff hired Stenstrom Excavation to repair it.

¶ 6 The crack in the pipe was 12 to 18 inches from the east edge of defendant's conduit. The conduit was directly on top of and crossed over the pipe, with concrete connecting the two structures. At the east edge of the conduit, the concrete from the conduit was poured directly onto and halfway around the pipe, forming a collar.

¶ 7 Once Stenstrom had excavated the area, plaintiff discovered that the entire portion of the pipe underneath the conduit had been crushed from its normal 24-inch diameter to 16 inches. Stenstrom also discovered two pieces of tin laid directly between the conduit and the pipe, with concrete poured over the tin.

¶ 8 Plaintiff's response included affidavits. Dana Carroll, plaintiff's engineering department manager, opined that, based on his experience and viewing of the site, the pipe was broken while defendant was excavating to install the conduit. The tin was placed over the pipe to cover a hole in the pipe and to prevent the concrete from the conduit running down into the pipe. Pouring concrete over the top of the tin caused the pipe to collapse. When a clay pipe breaks, cracks will run to the next joint, which is what happened here, causing a second break in the pipe 18 inches east of the conduit. The use of tin for the repair was improper because plaintiff would not have authorized it. Instead, it would have authorized a full concrete encasement of the pipe with enough width on either side to support the weight of the concrete conduit above it.

¶ 9 David Cook, plaintiff's supporting systems manager, similarly opined that the pipe was damaged during excavation for the conduit. When defendant realized that the pipe was damaged, it tried to repair the pipe with a tin patch—which is not a proper method of repairing a hole in a sewer pipe—then covered it up with concrete. Defendant must have been aware of the condition of the pipe when it poured the concrete for the conduit.

¶ 10 Tom Morgan, Stenstrom's foreman for the State and Wyman project, averred that the only reason the tin was placed over the pipe was that the pipe was either cracked or broken before the concrete was poured. The pipe was crushed immediately, because there would have been cracks in the concrete if the conduit had settled slowly and crushed the pipe over time.

¶ 11 Tim Weitzel, a Stenstrom project superintendent, agreed that the only reason to place a piece of tin over a sewer line is to try to cover up a break in the line. Defendant should have better protected the sewer pipe by using steel casing or PVC to eliminate the settlement at the top of the pipe. The weight of the concrete crushed the pipe, in turn causing the pipe outside the conduit to break, creating a second hole.

¶ 12 The trial court granted defendant's motion and dismissed the action as time-barred. The court found that placing the tin over the broken pipe was an ineffectual attempt at repair rather than an attempt to conceal the damage. The court further noted that the attempted repair was of little consequence because "ComEd's work in 1972 would necessarily have involved, in the District's words, 'pouring 13 feet of dirt back over the entire excavation site.' " This would have been true even had defendant undertaken a repair to which plaintiff had agreed. The court further noted that none of the witnesses claimed to have been present in 1972 and that they could not have testified about defendant's intent at that time. Thus, the jury would have had to speculate that defendant's work, which it would have done anyway, was intended to fraudulently conceal the damaged pipe. Plaintiff timely appeals.

¶ 13 The trial court granted defendant summary judgment. The purpose of summary judgment is not to try questions of fact, but rather to decide whether any genuine issues of fact exist. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). We review *de novo* the grant of summary judgment. *Adams*, 211 Ill. 2d at 43.

¶ 14 The parties agree that this action would normally be governed by a 10-year statute of repose. However, plaintiff contends that the repose period was tolled because defendant fraudulently concealed the cause of action by covering the crushed pipe with 13 feet of dirt. Generally, an action involving the construction of an improvement to real property must be brought within 10 years. 735 ILCS 5/13-214(b) (West 2012). However, "[i]f a person liable to an action fraudulently conceals the cause of action," an action may be brought "within 5 years

after the person entitled to bring the same discovers that he or she has such cause of action.” 735 ILCS 5/13-215 (West 2012).

¶ 15 “Concealment” means affirmative acts or representations calculated to lull or induce a claimant to delay filing his claim or to prevent it from discovering its claim. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1154 (2011). To establish fraudulent concealment, a plaintiff must plead and prove that the defendant made misrepresentations that it knew to be false or performed acts intending to deceive the plaintiff, and upon which the plaintiff detrimentally relied. *Orlak v. Loyola University Health System*, 228 Ill.2d 1, 18 (2007). A defendant’s mere silence and a plaintiff’s failure to learn of the cause of action do not establish fraudulent concealment. *Wisniewski*, 406 Ill. App. 3d at 1154. Where the conduct allegedly constituting fraudulent concealment also forms the basis of the underlying cause of action, the plaintiff must show that the defendant intended the conduct, at least in part, to conceal the cause of action. See *Smith v. Cook County Hospital*, 164 Ill. App. 3d 857, 862 (1987).

¶ 16 Before addressing the main issue, we note that defendant devotes much of its brief to arguing that it did not damage the pipe in the first place and, thus, could not have fraudulently concealed it. This argument appears more properly directed to the merits of the underlying action. Moreover, it ignores plaintiff’s experts’ opinions that defendant did cause the damage. In any event, as the summary judgment movant, defendant had to present evidence to show that it was entitled to judgment as a matter of law on that issue. As defendant points to no evidence that it did *not* cause the underlying damage, plaintiff could rely solely on its pleadings to oppose summary judgment on that issue. *Rice v. AAA Aerostar, Inc*, 294 Ill. App. 3d 801, 805 (1998) (only if defendant satisfies its initial burden of production does the burden shift to the plaintiff to present some factual basis that would arguably entitle it to judgment); see also *Williams v.*

Covenant Medical Center, 316 Ill. App. 3d 682, 688-89 (2000) (party opposing summary judgment may rely solely on its pleadings to create fact question until movant supplies facts that would clearly entitle it to judgment as a matter of law). However, plaintiff went further and submitted affidavits, which defendant did not controvert. Thus, we may not affirm the summary judgment for defendant on this basis.

¶ 17 Turning to the primary issue that the parties discuss, plaintiff insists that, by backfilling the site, defendant fraudulently concealed its negligence in breaking the pipe. Citing its experts' affidavits, plaintiff argues that placing the tin patch over the hole must have been an attempt at repairing the damage. However, defendant must have been aware, before it backfilled the site, that its attempted repair had failed. Plaintiff's apparent point is that, because defendant knew that the pipe was still broken and proceeded to backfill the site, it must have intended to cover up its negligent breaking of the pipe. Defendant responds that it had to backfill the site in order to complete the project and that plaintiff cannot prove any fraudulent intent.

¶ 18 Here, plaintiff cannot show that defendant did anything intended to conceal the cause of action. Of course, it concealed the broken pipe in a very literal sense by covering it with dirt, but, as the trial court observed, it would have backfilled the excavation site to complete the project anyway. As the trial court further noted, none of the potential witnesses was present in 1972 and, thus, they could not testify to defendant's intent at that time. That would have left the jury to speculate whether defendant's actions were intended to fraudulently conceal a potential cause of action.

¶ 19 The trial court observed that plaintiff's principal complaint seems to be that defendant failed to inform plaintiff of the damage in 1972. In its brief, plaintiff argues that defendant "proceeded to backfill its site and never told [plaintiff] about its damaged pipe." However, mere

silence by a defendant is not fraudulent concealment. *Wisniewski*, 406 Ill. App. 3d at 1154. Looked at another way, defendant did nothing to conceal the break beyond what it would have done anyway to complete the project. Nothing prevented plaintiff from learning of the break other than its failure to inspect the pipeline for more than 30 years.

¶ 20 In *Eickmeyer v. Blietz Organization, Inc.*, 284 Ill. App. 3d 134 (1996), the court held that the defendant's act of extensively repairing the faulty foundation did not fraudulently conceal the plaintiff's cause of action where the original owners continued to live in the house for 5½ more years with no further problems. *Eickmeyer* is distinguishable in several ways, but supports the trial court's judgment to the extent of holding that attempted remediation of the defective construction, without more, does not establish fraudulent concealment.

¶ 21 The case on which plaintiff primarily relies, *Reichelt v. Urban Investment & Development Co.*, 577 F. Supp. 971 (N.D. Ill. 1984), does not help its cause. There, for purposes of a motion to dismiss, the district court took as true the complaint's allegations that the defendant's acts of concealing a home's inadequate foundation by covering the "highly compressible" soil base with three to six inches of clay, and filling cracks in the basement walls with cement and covering the walls with fiberglass and paint, were in fact fraudulent. *Id.* at 974.

¶ 22 In its reply brief, plaintiff argues that a reasonable jury could conclude that defendant's placing tin over the break was an attempt to conceal the cause of action rather than an ineffectual attempt at repairing the damage. However, plaintiff's own experts averred that the tin did not cover the entire break, and, in any event the entire area was later to be covered with dirt. Thus, the tin could not have concealed the cause of action.

¶ 23 The judgment of the circuit court of Winnebago County is affirmed.

¶ 24 Affirmed.