UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0847

September Term, 2015

PALISADES OF TOWSON, LLC &
SOUTHERN MANAGEMENT CORP.

v.

ENCORE DEVELOPMENT CORP., INC.
ET AL.

Wright,
Arthur,
Leahy,

JJ.

Opinion by Wright, J.

Filed: December 5, 2016

This case arises from a contractual dispute between Palisades of Towson, LLC ("Palisades"), appellant, and Encore Development Corporation, Inc. ("Encore") and Advanced Window, Inc. ("Advanced"), appellees. Palisades is the owner of an apartment building located at 212 Washington Avenue, Towson, Maryland ("the Project"). Palisades hired Encore to be its project manager. Encore hired Advanced as a subcontractor to install the windows for the building. The dispute arose when the windows began leaking, which was first noticed by workers in September 2010, and was later documented in emails and work order records. Palisades filed its initial complaint on April 23, 2014, against Encore and Advanced for the damages caused by the faulty windows. Encore filed a cross-claim against Advanced on August 20, 2014, and a third-party complaint against Seal-Tech, a caulking contractor on the Project on January 27, 2015. Advanced moved for summary judgment on January 8, 2015, and Encore moved for summary judgment on March 24, 2015. Palisades filed an amended complaint on April 9, 2015.

On May 26, 2015, the Circuit Court for Montgomery County heard arguments on the motions for summary judgment filed by Encore and Advanced. The court granted both motions after finding that the statute of limitations had run. Palisades filed a timely appeal.

Questions Presented

We have reworded and reorganized Pallisade's questions for clarity:[1]

[1] In their brief, Palisades asked: (continued…)

1. Did the circuit court commit reversible error in finding that the statute of limitations began to run in September 2010?

2. Did the circuit court err in allowing appellees to assert the statute of limitations defense?

3. Did the circuit court err in granting appellees' motion for summary judgment?

For the reasons discussed below, we affirm the circuit court's judgment.

Facts

On July 26, 2007, Palisades and Encore entered into a Construction Management Agreement ("the Agreement") to build an eighteen-story apartment building at 212 Washington Avenue, Towson, Maryland. David Hillman, the owner of Palisades, signed the Agreement on behalf of Palisades and Gary Kirstein signed the Agreement on behalf of Encore. Southern Management Corporation ("SMC"), also owned by David Hillman, was the property management company that managed the Project, and was Palisades's

---

1. Did the trial judge commit error by its grant of summary judgment?

2. Did the trial court commit reversible error by not measuring the time of the running of the statute of limitations from the date of completion of warranty work or work performed incident to the change order to the original contract dated June 17, 2011?

3. Where Towson's agent, Encore was contractually responsible for investigating the cause of the water leaks to the project, and it failed to timely ascertain the cause, did the court commit reversible error by allowing Encore to rely on its own negligence or breach of contract as a basis for successfully asserting the statute of limitations defense against is principal, Towson?

representative throughout the construction of the Project. On May 11, 2009, Palisades contracted with Advanced, as a subcontractor, to install windows and doors manufactured by Graham Architectural Products of York, Pennsylvania.

The contract between Advanced and Palisades included a specific section discussing the statute of limitations for bringing claims. It read as follows:

> 13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD
>
> 13.7.1 As between the Owner and Contractor
>
> .1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.
>
> .2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
>
> .3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2 or the date of the actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

Water began leaking into the property as construction progressed. Following the first leak-related work order documented on September 3, 2010, Richard Hillman, an

employee of SMC, emailed David Hillman and Kirstein. The email, dated September 30, 2010, stated in pertinent part:

> Palisades is leaking due to window design/manufacturing flaw. We are also leaking due to a caulking issue that seems to stem from a contract issue arising from scope issue that I though was resolved last spring.

SMC maintained a work order history which described in detail the work orders relating to the window leaks. After the first occurrence on September 3, 2010, fourteen more instances were documented through April 16, 2011. During this span, occupancy permits for the property were issued on November 8, 2010, and Advance did warranty work on the windows in the Spring of 2011. Lastly, a change order, dated June 17, 2011, expanded the scope of work in the original contract to effectuate the repair of leaking from an unknown source.

An investigation revealed that the windows were not properly sealed to the window receivers, thus allowing water to enter the building. On March 27, 2013, counsel for Palisades sent an email to David Hillman and copied Richard Hillman and Kirstein addressing the leaks. The email proposed two methods for repairs to the leaking issue. That email read in pertinent part:

> If the experimental approach would take claims matters past the statute of limitations before it is known whether that approach will work, then the concept of extending the statute of limitations by agreement with the potential targets for such claims should be explored. They should have an incentive to agree given the apparent relative cost of two approaches.

Palisades filed its initial complaint on April 23, 2014, against Encore and Advanced for the damages caused by the faulty windows. Encore filed a cross-claim against Advanced on August 20, 2014, and a third-party complaint against Seal-Tech on

January 27, 2015. Advanced moved for summary judgment on January 8, 2015, and Encore moved for summary judgment on March 24, 2015. Palisades filed an amended complaint on April 9, 2015.

On May 26, 2015, the circuit court heard oral arguments on the motions for summary judgment filed by Encore and Advanced. The court granted both motions, finding that "the controlling law in this particular case upon these particular facts indicates that, without any material dispute of fact, that the statute of limitations had run prior to the filing . . . ." Palisades filed a timely appeal.

Standard of Review

Maryland Rule 2-501 states that "[a]ny party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." "With respect to the trial court's grant of a motion for summary judgment, the standard of review is *de novo*." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006) (citations omitted). Upon review of a grant of summary judgment, we "must make the threshold determination as to whether a genuine dispute of material fact exists, and only where such dispute is absent will we proceed to review determinations of law." *Jurgenson v. New Phoenix Atlantic Condo. Council of Unit Owners*, 380 Md. 106, 114 (2004) (citations omitted). Facts are construed "in the light most favorable to the non-moving party." *Id*. (citation omitted).

Discussion

I. Triggering the Statute of Limitations

Palisades avers that the question of when the limitations period began to run should be determined by the trier of fact, with the potential accruing dates being (1) when the occupancy permits were granted; (2) when the warranty work was undertaken; or (3) on June 17, 2011, the date of the change order. Palisades further avers that the issue of the statute of limitations is a mixed question of law and fact and, therefore, summary judgment was inappropriate.

The determination of which day the statute of limitations began to run "may be solely one of law, solely one of fact or one of law and fact." *Poffenberger v. Risser*, 290 Md. 631, 634 (1981). "There being an absence of statutory direction, the question when an action accrues is left to judicial determination." *Id*. at 633 (citation omitted). Palisades presented a legal argument based on differing dates which required a judicial determination. Because it is a judicial determination, upon review, we must determine the date the statute of limitations began running. *Id*.

There are a number of ways that the statute of limitations may begin to run on a given claim. According to the Maryland Code, a "civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("C&J") § 5-101. The statutory period by which a party may bring a claim "reflects a policy decision regarding what constitutes an adequate period of time for a person of ordinary diligence to pursue his

claim." *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 442 (2000) (citation omitted).

At common law, the statute of limitations begins to run at the date of the alleged wrong, not when it was or should have reasonably been discovered by the affected party. *See, e.g.*, *Hahn v. Claybrook*, 130 Md. 179 (1917) ("The general rule, as to when the statute of limitations begins to run is . . . to be as soon as the cause of action accrues . . . ."). Realizing that accrual beginning at the date of the wrong may not always yield the most equitable result, Maryland created the discovery rule as an exception to the general rule. *Lumsden*, 358 Md. at 442. At first, the discovery rule only provided relief for parties involved in malpractice suits, but after *Poffenberger*, the rule was applied to all civil suits. *Poffenberger*, 290 Md. at 636 ("Having already broken the barrier of confining the discovery principle to professional malpractice . . . we now hold the discovery rule to be applicable generally in all actions . . . .").

The discovery rule states that a cause of action begins to accrue when "the claimant in fact knew or reasonably should have known of the wrong." *Id*. Once the claimant receives inquiry notice, the statute of limitations will begin to run. *Pennwalt Corp. v. Nasios*, 314 Md. 443, 448 (1988). The claimant has inquiry notice when he has "knowledge of circumstances which would cause a reasonable person in the position of the [claimant] to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [wrong]." *O'Hara v. Kovens*, 305 Md. 280, 302 (1986).

The statute of limitations on a breach of warranty claim is two years. Md. Code (1974, 2010 Repl. Vol.), Real Property Article § 10-204(d) ("Any action arising under this subtitle shall be commenced within two years after the defect was discovered or should have been discovered or within two years after the expiration of the warranty, whichever occurs first."). This statute in part codifies Maryland's discovery rule, while also laying out the limitations period for a warranty claim. Stated plainly, the limitations period begins either (1) when the injury and its general cause are discovered or (2) should have been discovered, or (3) within two years of the expiration of the warranty, whichever is first. *Lumsden*, 358 Md. at 447.

Finally, parties can enter into a contract that alters the limitations period, so long as the period is reasonable. *College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.,* 132 Md. App 158, 174 (2000) ("parties may agree to a provision that modifies the limitations result that would otherwise pertain provided (1) there is no controlling statute to the contrary, (2) it is reasonable, and (3) it is not subject to other defenses such as fraud, duress, or misrepresentation").

Having laid out the relevant law, we now turn to the issue before us. Palisades proposes three possible dates for when the statute of limitations began to run - (1) when the occupancy permits were granted; (2) when the warranty work was undertaken; or (3) on June 17, 2011, the date of the change order. Each of the identified dates is examined below, as is September 10, 2010, the date that Palisades was put on notice of the leak. After assessing the various dates and applicable law, we conclude that the circuit court correctly found that the limitations period had run. Therefore, regardless of which of the

dates the court chose, it did not commit reversible error in its ruling. Even if the court selected the wrong date, the error was harmless as the outcome would not have been altered by the alternate finding.

First, putting aside any issues regarding Palisades's knowledge, we look to the contract and, accordingly, the date that the occupancy permits were granted. The parties agreed by contract that limitations started to run, for any actions based upon acts or failures to act occurring before the date of substantial completion, no later than the date of substantial completion. Substantial completion is defined as the date on which the owner can occupy or utilize the work for its intended use. At the latest, this date would be the date of issuance of the occupancy permit, which was November 8, 2010.

However, it is possible that substantial completion could be determined to be prior to the date of the occupancy permits, as the work was finished prior to this date. For the ease of argument, we use November 8, 2010, as the latest possible date for this legal analysis. Even if we start the beginning of the limitations period from the contract date, at the latest limitations would have expired on November 8, 2013, some seven months prior to when Palisades filed its claim.

Palisades appears to have considered their the legal option to contract regarding limitations, as evidenced by the email dated March 27, 2013, but failed to amend or enter a "tolling" contract that would extend the limitations period. *Derrickson v. Circuit City Stores, Inc.,* 84 F.Supp.2d 679, 685 (D. Md. 2000) ("Agreements to toll applicable statutes of limitations are not unusual and are generally upheld."); *see also Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 117-18 (1998)

(holding that a "tolling agreement" entered into by parties to suit involving construction may toll all warranty claims). Had Palisades followed through on "exploring" this option as suggested in the email, perhaps they could have obtained a more favorable outcome, but that is not the question before us today.

Turning briefly from the contract to the common law, without the contract provision regarding limitations, the discovery rule would control and the limitations period would have begun in September of 2010, when the leak was first discovered. *Sisters of Mercy of Union in U.S. v. Gaurdreau, Inc.,* 47 Md. App. 372 (1980). It was Palisades's burden, as a reasonable and diligent party, to act once the defects were discovered, not when it learned of the cause of the leak. The discovery rule mandates that the date from which we must determine the start of the statute of limitations period is the date where Palisades knew or reasonably should have known of the wrong, not the date where it was able to obtain the reason for the wrong. *Id.* As the Court of Appeals affirmed in *Lumsden*, "The beginning of limitations is not postponed until the end of an additional period deemed reasonable for making the investigation." 358 Md. at 445 (citation and emphasis omitted). Therefore, as to the statute of limitations, it does not matter when Palisades knew what caused the leak, only that in September of 2010, they knew the leak existed. Once the statute of limitations began to run, the aggrieved party had three years to file a claim, as provided by C&J § 5-101.

Palisades's final proposed date is the date of the change order, June 17, 2011. However, it is well-settled law that once limitations begin to run, it is not tolled by a defendant's efforts to remedy the alleged harm. *Booth Glass Co. v. Huntingfield Corp.,*

304 Md. 615, 624-25 (1985). This case is similar to *Booth Glass,* where the plaintiffs' claims were based on the defendant's defective installation of exterior windows, and where the plaintiff argued that subsequent repair efforts "suspended" the statute of limitations. There, the Court of Appeals disagreed and held that the plaintiffs' claims were barred by the applicable statute of limitations. *Id.* at 625. The Court noted that the claim itself was for the issues upon installation, not for the subsequent negligent acts committed during the repair process. *Id.* The same is true here. Palisades does not contend that the leaking was caused by the repairs or by action following the June 17, 2011 contract, but it attempts to persuade us that the statute of limitations began to run at a future contract or work date. Following the dictates of *Booth Glass,* we find no merit in this argument.

The only way Palisades's claim can survive the limitations period is for us to set aside their actual knowledge of the leak beginning in September 2010. However, what is apparent is that no Maryland law allows the trial court or this Court to do so. In spite of this obvious obstacle, Palisades attempts to persuade this Court that we should interpret the very plain language providing a three-year limitations period in C&J § 5-108 to instead allow a repose ten-year statute of limitations. Palisades relies only on the argument that many other jurisdictions have adopted this approach based on a public policy concern for hidden defects. It is not this Court's role to rewrite legislation. That is especially true when legislation is crystal clear and unambiguous as C&J § 5-101. Further, Palisades's proposition as to hidden defects is untenable when there is clear evidence of actual knowledge beginning in September 2010. For these reasons, we

disagree with Palisades's attempt to extend the statute of limitations from three years to ten years.

Because Palisades neither entered into a tolling agreement to extend the statute of limitations nor acted within the three-year statutory period following the discovery of the leak, the discovery rule would trigger the statute of limitations in September 2010 and the period would run out in September 2013. Under the contract, the limitations period would begin on November 8, 2010, and would run out on November 8, 2013. Applying the warranty date does not revive the claim, because Palisades still had actual knowledge of the issue prior to the accrual date under the warranty. Further, we find no merit in Palisades's position that the change contract date should be considered, or that the statute of limitations should be ten years rather than three years. Therefore, September 2013 and November 8, 2013 are the only two possible accrual dates under Maryland law. Palisades first filed the complaint on April 23, 2014, months after both of these dates.

Considering the two accrual dates and the date Palisades filed the complaint, we hold that the circuit court correctly found that the statute of limitations had run. While the court determined that the limitations period began in September 2010, the only other plausible date to find as the trigger date of November 8, 2010, would still have resulted in a dismissal. Therefore, even if the court committed an error in the determination of the starting date, it is harmless error and therefore not reversible. *Harris v. Harris*, 310 Md. 310, 319 (1987) (We will not reverse a lower court's judgment when the complaining party has failed to show prejudice as well as error).

II. Statute of Limitations Defense

Palisades further contends that the circuit court erred in allowing the statute of limitations defense to be asserted because appellees failed, through negligence or breach of contract, to complete an investigation into the cause of the window leaks until 2013. This argument incorrectly asserts that only actual knowledge can trigger the statute of limitations. As discussed above, Palisades had inquiry notice as to the leaks on September 30, 2010. Such notice should cause a reasonable person "to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [wrong]." *O'Hara*, 305 Md. at 302.

It is beyond cavil that once a party has inquiry notice, the statute of limitations begins to run. *Pennwalt Corp.*, 314 Md. at 448. Assuming Palisades did delegate the investigation to Encore, Palisades was not reasonably diligent because it is not reasonable to delegate such an investigation to a potentially culpable party, nor is it diligent to allow that investigation to continue on, unchecked, for three years beyond the limitations period. Palisades filed a complaint on April 23, 2014, more than three years and six month after being placed on inquiry notice. Thus, the circuit court did not commit error.

Having held that the circuit court did not commit reversible error in measuring the trigger date nor in allowing appellee to assert the statute of limitations, we affirm the circuit court's grant of Encore's and Advance's Motions for Summary Judgment.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.