STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1050

Daley Farms of Lewiston, LLP,
Appellant,

vs.

Arlo Habben,
d/b/a Southern Minnesota Agronomic
and Environmental Services,
Respondent,

Chosen Valley Testing Associates, Inc.,
Respondent,

Colorado Lining International,
Respondent,

John Heitala,
Respondent,

vs.

Colorado Lining International,
defendant and third party plaintiff,
Respondent,

vs.

Sorenson Bros., Inc.,
third party defendant,
Respondent.

Filed May 20, 2008
Affirmed
Klaphake, Judge

Winona County District Court
File No. 85-CO-05-001100

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Considered and decided by Klaphake, Presiding Judge; Wright, Judge; and Muehlberg, Judge.*

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

KLAPHAKE, Judge

Appellant Daley Farms of Lewiston, L.L.P., (Daley Farms) is a large dairy farm operation located in southeastern Minnesota. It challenges the district court's grant of summary judgment to six respondents, various parties involved in the design, testing, and construction of four manure holding basins built during a 1997-98 expansion of the operation to support 1,400 head of cattle. The district court granted summary judgment to all respondents, concluding that the two-year statute of limitations for improvements to

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

real property set forth in Minn. Stat. § 541.051, subd. 1(a) (2006), bars appellant from recovery. We agree and therefore affirm.

D E C I S I O N

The district court shall grant summary judgment if the pleadings, discovery, and affidavits show that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court asks whether there are any issues of material fact and whether the district court erred in applying the law. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). This court must consider the evidence in the light most favorable to the party against whom summary judgment was granted. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). Construction and application of a statute of limitations is a question of law, which this court reviews de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

The statute of limitations for damages based on improvements to real property provides that a person may not bring an action to recover damages for "any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property . . . more than two years after discovery of the injury." Minn. Stat. § 541.051, subd. 1(a) (2006). The statute begins to run "when an actionable injury is discovered or, with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known." *Dakota County v. BWBR Architects*, 645 N.W.2d 487, 492 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). An improvement to real property is "defective and unsafe if it is incomplete, faulty,

dangerous, and/or insecure." *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 496 (Minn. App. 2003), *review denied* (Minn. Dec. 30, 2003). When reasonable minds can differ about when the injury was discovered, summary judgment is inappropriate. *200 Levee Drive Assocs., Ltd. v. Bor-Son Bldg. Corp.*, 441 N.W.2d 560, 564-65 (Minn. App. 1989). And the party urging application of the statute of limitations "bears the burden of establishing that the claims are time-barred as a matter of law." *Nolan*, 673 N.W.2d at 495.

Appellant claims that a question of fact exists as to the date that it discovered or should have discovered defects in the manure basins. Soon after the first two basins were constructed in 1997, canoe-sized bubbles appeared under the impermeable geosynthetic liners that were placed over clay liners along the sides and bottoms of the basins. Over the course of several years, the bubbles grew in number and size; by 2002, some of the bubbles had grown to the size of a small barn. Daley Farms argues that all parties, including respondents and regulatory agencies that were responsible for inspecting and licensing the operation, reasonably believed that the bubbles would dissipate over time. Daley Farms further urges that the Minnesota Pollution Control Agency (MPCA) did not notify them that the bubbles presented "an unsafe or defective condition" until January 2004 when Daley Farms received a MPCA violation notice, so that its March 2005 complaints should not be barred by the two-year statute of limitations.

Daley Farms relies on *City of Willmar v. Short-Elliot-Hendrickson, Inc.*, 475 N.W.2d 73 (Minn. 1991). In *Willmar*, the supreme court reversed a grant of summary judgment, concluding that there were material facts in dispute on when the city

discovered defective improvements to its waste water treatment facilities because the city was "consistently advised" by the construction company hired to implement waste water treatment facility improvements that odors produced by the improvements were not the result of a design defect. *Id.* at 78. Daley Farms argues that it is in the same position as Willmar because it had no notice until 2004 that the manure basins were defective. Daley Farms' reliance on *Willmar* is misplaced. *Willmar* applied a predecessor statute of limitations that depended on discovery of the defective condition, rather than discovery of the injury. Minn. Stat. § 541.051 (1990). Further, *Willmar* is premised on conduct by the adverse party that would toll the statute of limitations—Daley Farms, by contrast, does not allege facts suggesting that any of the respondents misled it regarding the nature of the defects in the manure basins.

The following chronology of facts are asserted or admitted by Daley Farms: (1) by 1999, Daley Farms noticed that the bubbles had doubled in size and should not have been present in the basins; (2) in 2000, Daley Farms contacted respondent Colorado Lining International about the bubbles, and Colorado Lining stated that "it wasn't their problem[;]" (3) in 2000 or 2001, Michael Daley, a Daley Farms general manager, stated that he knew that he should be doing "something different" to rid the basins of bubbles, but he believed by then that the basin liners had been "compromised[,]" and so he rejected others' remedial advice; (4) in 2002, some of the bubbles had grown to the size of a small barn, and the largest bubble, 30 feet in diameter, stood eight to ten feet above the liquid level; and (5) in July 2002, after the MPCA investigated an anonymous tip regarding the largest bubble in the basins, Daley Farms admitted that it was more likely

than not that the MPCA would require it to reline all four basins. These events occurred more than two years before Daley Farms initiated its action against respondents, and we conclude that they provided Daley Farms with actual or constructive notice of the defective condition of the basins. Under these circumstances, Daley Farms' claims are time-barred as a matter of law because

> [a] party need not know the details of the evidence establishing the cause of action, only that the cause of action exists. When a party has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim.

Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990) (quotation omitted).

Daley Farms further argues that it relied on the MPCA in failing to take action on the defective basins until after the MPCA found Daley Farms in violation of its regulations in 2004. A party who is allegedly responsible for remedying a defect in real property may be estopped from asserting a statute of limitations defense when that party has made "assurances or representations that the injury will be repaired[,]" and the plaintiff has reasonably and detrimentally relied on the assurances or representations. *Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424, 428 (Minn. App. 1999), *review denied* (Minn. Jan. 25, 2000). But the alleged facts do not support application of equitable estoppel here. The MPCA has no duty to remedy any defective condition related to construction of Daley Farms' manure basins, and regulatory action or inaction by the MPCA could not therefore toll the statute of limitations for Daley Farms' injuries. *See* Minn. Stat. § 116.07, subd. 2 (2006) (outlining MPCA duties to promote the reduction of all forms of pollution); *see also Pope County Mothers v. Minnesota Pollution Control*

Agency, 594 N.W.2d 233, 236-38 (Minn. App. 1999) (generally outlining MPCA's administrative duties with regard to feedlots).

Affirmed.