STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0929

Day Masonry,
Respondent,

vs.

Independent School District 347,
Appellant,

Commercial Roofing, Inc.,
Respondent,

GenFlex Roofing Systems, LLP,
Respondent,

Lovering-Johnson Construction,
Respondent.

Filed May 5, 2009
Affirmed in part and reversed in part
Bjorkman, Judge

Kandiyohi County District Court
File No. 34-CV-07-199

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Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's decision to stay arbitration of its contract and warranty claims in this construction-defect case. Because the district court properly exercised its jurisdiction and determined that appellant's contract claims are time-barred under Minn. Stat. § 541.051, subd. 1 (2002),[1] we affirm the decision to stay arbitration of those claims. But because the district court erred in determining that appellant's warranty claims are time-barred under Minn. Stat. § 541.051, subd. 4 (2002), we reverse the decision to stay arbitration of those claims.

FACTS

In late 1992 and early 1993, appellant Independent School District 347 (the school district) contracted with respondents Lovering-Johnson Construction and Commercial

[1] The district court applied Minn. Stat. § 541.051, subd. 1 (2004), and Minn. Stat. § 541.051, subd. 4 ("prior to August 1, 2004"). Because subdivision 1 has not changed since before 2002 and to avoid confusion, we refer herein to the 2002 version of the statute.

Roofing, Inc. for the construction of a new high school. Both contracts incorporated the American Institute of Architects' General Conditions of the Contract for Construction, including an arbitration clause:

> All claims, disputes and other matters in question between the Contractor and the Owner arising out of or relating to the Contract Documents or the breach thereof, . . . shall be decided by arbitration . . . .
>
> . . . The demand for arbitration shall be made within the time limits specified . . . and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

Lovering-Johnson subsequently subcontracted with respondent Day Masonry to perform masonry work for the project. The high school was substantially completed by September 1, 1994.

Shortly thereafter, numerous leaks developed throughout the high school building. In June 2004, an architectural firm performed a district-wide building assessment and concluded that there were problems with the flashing work on the high school, which caused water infiltration into the building. On the recommendation of the architectural firm, the school district hired Inspec, an independent forensic engineering and testing firm, to further examine the leaks in the building. In a November 2, 2004 report, Inspec confirmed the conclusion of the architectural firm and recommended repairs with an estimated cost of approximately $1,961,000. The school district sent copies of the Inspec report to the three companies that had expressly warranted their work or product:

Lovering-Johnson, Commercial Roofing, and respondent GenFlex Roofing Systems, the manufacturer of the roofing membrane.

On March 13, 2006, the school district filed a demand for arbitration against Lovering-Johnson, Commercial Roofing, and GenFlex. Lovering-Johnson joined Day Masonry in the action. Day Masonry filed an action in district court seeking to stay arbitration pursuant to Minn. Stat. § 572.09(b) (2006). Day Masonry, joined by the other respondents, argued that the statute of limitations set forth in Minn. Stat. § 541.051 (2002), was incorporated into the parties' arbitration agreement and barred the school district's claims. The parties submitted evidence to the district court by way of numerous affidavits, depositions, and exhibits. The district court made detailed findings of fact, concluded that the arbitration demand was untimely, and stayed arbitration of all claims except the school district's claim under the GenFlex membrane warranty.[2] This appeal follows.

D E C I S I O N

I. The district court properly exercised its jurisdiction to determine whether the school district's claims fall within the scope of the arbitration provision.

The school district asserts that the district court lacked jurisdiction to decide whether the statute of limitations barred the school district's claims because resolution of the issue requires factual determinations, which should be decided in arbitration. "Subject matter jurisdiction is a question, which we review de novo." *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002).

[2] GenFlex does not contest the district court's determination that the school district may arbitrate its claims under the roofing membrane warranty.

In an action to stay arbitration, the district court's role is limited to determining the existence and scope of the arbitration agreement. *United States Fidelity & Guaranty Co. v. Fruchtman,* 263 N.W.2d 66, 71 (Minn. 1978). A district court may protect a party from arbitration "if there is no agreement to arbitrate, or if the controversy sought to be arbitrated is not within the scope of the contract's arbitration clause." *Cmty. Partners Designs, Inc. v. City of Lonsdale*, 697 N.W.2d 629, 632 (Minn. App. 2005); *see also* Minn. Stat. § 572.09(b) (requiring district court to "summarily" try the issue when the existence of an arbitration agreement is in "substantial and bona fide dispute"). We need not defer to the district court's interpretation of an arbitration agreement. *Millwrights Local 548, United Brotherhood of Carpenters & Joiners, AFL-CIO v. Robert J. Pugleasa Co., Inc.,* 419 N.W.2d 105, 107 (Minn. App. 1988).

When parties to a contract condition their agreement to arbitrate on compliance with a statute of limitations, that condition affects the scope of the arbitration agreement. *200 Levee Drive Assocs., Ltd. v. Bor-Son Bldg. Corp.,* 441 N.W.2d 560, 563 (Minn. App. 1989) (*Levee*). Accordingly, a district court may decide whether the parties complied with the statute of limitations because that determination is "a proper scope issue which may be effortlessly decided by the trial court during the action to stay arbitration." *Id.* at 563-64; *see also Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating, Inc.*, 660 N.W.2d 146, 149-50 (Minn. App. 2003) (*Holm Bros.*) (adopting *Levee* court's analysis to "conclude that the district court had the jurisdiction to rule on the timeliness of the demand for arbitration pursuant to the statute of limitations clause" in the parties' agreement).

Here, the school district does not dispute that the parties' agreement to arbitrate is conditioned on compliance with the statute of limitations set forth in section 541.051. Rather, it argues that determining whether the statute of limitations bars its claims requires resolution of disputed facts, which the arbitrator must decide. The school district argues that *City of Morris v. Duininck Bros.*, in which we held that the issue of whether the contractor waived its right to arbitration should be left to the arbitrator, is controlling. 531 N.W.2d 208, 211 (Minn. App. 1995). We disagree.

Duininck Bros. did not involve a statute-of-limitations issue like the one presented here. A statute of limitations is unique as a defense to arbitration because it is a procedural limitation that operates to completely bar, not just limit, a party's rights. *See Weston v. McWillams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006) (stating, in discussion of section 541.051, that "statutes of limitations are procedural in nature, intended to deny a remedy even though a right has vested"). We concluded in *Duininck Bros.* that, unlike the limitations question in *Levee*, the waiver issue "required a greater level of inquiry and effort . . . to determine the level of the parties' knowledge, the sequence of events, and whether Contractor had complied with the procedural rules when demanding arbitration." 531 N.W.2d at 211. We specifically confirmed our prior decision that a district court may deny arbitration in the case of "strictly procedural" claims that "operate to bar arbitration all together, and not merely limit or qualify an arbitral award." *Id.* (quotation omitted).

Moreover, our use of the phrase "effortlessly decided" in *Levee* does not limit the district court's jurisdiction over a statute-of-limitations issue. To the contrary, in *Levee*,

we remanded that issue to the district court to engage in the fact-finding necessary to determine the timeliness of the demand for arbitration. 441 N.W.2d at 564-65. And in *Holm Bros.*, we did not condition the district court's jurisdiction on whether the timeliness issue could be "effortlessly decided." 660 N.W.2d at 149-50. A district court's exercise of jurisdiction "to rule on the timeliness of the demand for arbitration pursuant to the [incorporated] statute of limitations clause" may include resolution of attendant factual issues. *Id.* The district court did not err by exercising jurisdiction to determine whether the school district's arbitration demand was timely.

II. The school district's contract claims do not fall within the scope of the arbitration provision because they are barred by the applicable statute of limitations.

Section 541.051 requires a claimant to pursue an action to recover damages for a "defective and unsafe condition of an improvement to real property" within two years after "discovery of the injury." Minn. Stat. § 541.051, subd. 1(a). The limitations period "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, Inc.*, 645 N.W.2d 487, 492 (Minn. App. 2002).

The school district challenges the district court's determination that the school district "had notice of the injuries that form the basis of its claims prior to March 13,

2004."[3] The question when a claimant discovered or should have discovered an injury is one of fact. *Levee*, 441 N.W.2d at 564-65. We will not disturb the district court's findings of fact, whether based on oral or documentary evidence, unless clearly erroneous. Minn. R. Civ. P. 52.01; *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). The inclusion of erroneous findings does not warrant reversal if other findings are supported by sufficient evidence and adequately sustain the district court's conclusion. *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979); *see also* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

We agree with the school district that some of the district court's findings are clearly erroneous. In particular, findings 35 and 37 are based on, but misrepresent, the testimony of Richard Olson, the school district's health and safety director beginning in 2001, regarding his knowledge of leaks in the high school's gymnasium and the relationship between most roof repairs that he organized and leakage in the school. But upon careful review of the record, we conclude that the district court's findings generally are supported by reasonable evidence, and the erroneous findings regarding Olson's knowledge and observations do not warrant reversal of the district court's decision.

The district court based its determination on substantial record evidence that numerous school district employees—including head custodians, a building supervisor, at least one high school principal, and Olson—were aware of efflorescence, water damage, and recurring and severe leaks that occurred throughout the building, practically from the

[3] Although the district court found that the school district knew or should have known of "the injuries" by September 1, 2002, we focus on the district court's March 13, 2004 finding because that is the last date for purposes of the statute of limitations.

time it opened. *See BWBR Architects*, 645 N.W.2d at 493 (stating that "separate injuries must be aggregated under the mantel of defective construction"). For example, the record shows that Olson knew of multiple recurring leaks throughout the high school, including a "waterfall" in the school's trophy case, water-damaged ceiling tiles, and at least two roof repairs performed in 2002 related to leaks. That the numerous school district employees who knew of the leaks may not have known the problem was due to defective flashings is irrelevant. *See id.* at 492 ("[I]t is knowledge of the injury, not the defect, which triggers the statute of limitations."). The evidence amply supports the district court's determination that the school district knew or should have known of an actionable injury by March 13, 2004.

Nonetheless, the school district contends that it did not reasonably know of an actionable injury until its superintendent received Inspec's report. The school district does not deny that the employees who observed leakage and water damage well before March 13, 2004, were its agents, responsible for making decisions regarding the care and upkeep of the high school. Nor does the school district point to any law requiring a superintendent to have knowledge before a school district is deemed to have constructive knowledge. We decline to impose such a requirement. The district court's findings that the school district had constructive knowledge of the leaks based on the knowledge of numerous employees responsible for building maintenance is not clearly erroneous and is consistent with the law. *See Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895-96 (Minn. 2006) (charging corporation with constructive

knowledge of material facts that become known to its agent in the course of employment).

Because the record supports the determination that the school district, through its agents, knew or should have known of an actionable injury at least two years before it demanded arbitration, the district court did not err by staying arbitration of the school district's contract claims because they are time-barred.

III. The school district's warranty claims are subject to arbitration.

The school district also challenges the district court's determination that the statute of limitations bars its warranty claims, arguing that the district court made erroneous findings of fact and applied the wrong legal standard.

Minn. Stat. § 541.051, subd. 4, requires that all express-warranty claims "be brought within two years of the discovery of the breach." "[F]or purposes of actions based on breach of . . . express written warranties, it is discovery of the breach that triggers the running of statutes of limitation." *Gomez v. David A. Williams Realty & Constr., Inc.*, 740 N.W.2d 775, 782 (Minn. App. 2007). A breach may occur because of the warrantor's refusal or inability to honor the warranty. *Id.* But "there is no breach until the person relying on the warranty discovers, or should have discovered, that the warranty will not be honored." *Id.* (citing *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 678 (Minn. 2004)). Consequently, "the failure to pursue legal action does not trigger the running of the statute of limitations." *Vlahos*, 676 N.W.2d at 679.

The district court found that the school district had notice of the leaks by September 1, 2002, but never notified the warrantors of the problem or demanded

remedial action. The district court also found that the school district "had every opportunity to contact Gen-Flex, Commercial Roofing and Lovering-Johnson about the problem . . . and thus would have known whether they were intending on performing or breaching their respective warranties." On this basis, the district court determined that the warranty claims were time-barred.

But the record reflects that the school district did notify Lovering-Johnson, GenFlex, and Commercial Roofing of the problem by sending them the Inspec report. The district court's finding to the contrary is clearly erroneous. Indeed, the school district sent its initial notice in December 2004, less than two years before the school district demanded arbitration. There is no record evidence of how the warrantors responded. Consequently, the record does not support a determination that the school district should have known before March 13, 2004, that the warrantors would not honor their warranties. The district court's finding that the school district's warranty claims are untimely because if the school district had notified the warrantors sooner it would have learned of their breach earlier, imposes a burden the law does not require and runs afoul of the rule that failure to take legal action with respect to a known injury, standing alone, does not trigger the statute of limitations on a warranty claim. *Vlahos,* 676 N.W.2d at 679. The district court thus applied the wrong legal standard and erred in concluding that the school district's warranty claims are barred by the statute of limitations.[4]

[4] GenFlex seeks to distinguish itself from the other warrantors on the basis of a November 1996 letter from the head custodian that notified GenFlex of leaks in the school. But because the district court did not address whether the 1996 letter and any response (or lack thereof) was an adequate basis for finding that the school district

Respondents argue, however, that the district court correctly stayed arbitration of the warranty claims because the claims did not accrue within the ten-year repose period that applies to express-warranty claims by virtue of the legislature's 2004 amendments to Minn. Stat. § 541.051, subd. 4. 2004 Minn. Laws ch. 196, § 1, at 356-57; *see also Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 842 (Minn. App. 2007) (addressing retroactivity of 2004 amendments to section 541.051). But the district court determined that the school district's warranty claims are governed by the version of the statute in effect before 2004 that did not include a repose period. Respondents did not file a notice of review on this issue. "Even if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the district court's ruling on a particular issue." *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). Because the applicable version of the statute does not contain a period of repose, respondents' arguments on this issue are unavailing.

Because the district court applied the wrong legal standard and its determination that the school district's warranty claims are time-barred is clearly erroneous, we reverse. The school district is entitled to proceed with arbitration as to its warranty claims against GenFlex, Commercial Roofing, and Lovering-Johnson.

Affirmed in part and reversed in part.

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discovered or should have discovered that GenFlex had breached its warranty, GenFlex's argument is not properly before this court. *See Vlahos*, 676 N.W.2d at 679 (timing of discovery of breach of warranty is fact issue); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (limiting appellate review to issues presented to and considered by the district court).