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2012 IL App (3d) 120144-U

Order filed December 20, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

EUGENE M. SWEENEY and DONNA D. SWEENEY, Individually and as Trustee of the Donna D. Sweeney Living Trust dated February 13, 2001,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
)	
Plaintiffs-Appellants,)	
)	
v.)	
)	
NOAH HERMAN SONS, INC., a Delaware corporation, and WOODS BASEMENTS SYSTEMS, INC., an Illinois corporation,)	
)	
Defendants-Appellees.)	Appeal No. 3-12-0144
)	Circuit No. 07-L-367
)	
<hr/> NOAH HERMAN SONS, INC., a Delaware corporation,)	
)	
Defendant and Third-Party Plaintiff,)	
)	
v.)	
)	
MJE CONSTRUCTION CO., an Illinois corporation,)	Honorable
)	Michael E. Brandt,
Third-Party Defendant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.

Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* In a suit alleging faulty construction and repair of a home, under the particular facts that were present, the trial court erred in determining as a matter of law the discovery date for the purpose of starting the statute of limitations to run and in granting the first defendant summary judgment based upon the statute of limitations. However, as to the second defendant, who prevailed in arbitration, the trial court properly upheld the arbitrator's award of legal fees and denied plaintiffs' motion to strike or modify the award. The appellate court, therefore, reversed the trial court's grant of summary judgment for the first defendant, affirmed the trial court's denial of plaintiffs' motion to strike or modify the arbitration award, and remanded the case for further proceedings.

¶ 2 Plaintiffs brought suit against two defendants for faulty construction and repair of their home. Plaintiffs were compelled to arbitrate their claims against one of the defendants and did not prevail. Summary judgment was granted in favor of the other defendant. Plaintiffs appeal, contesting the grant of summary judgment and the denial of their motion to vacate or modify the arbitration award. We reverse the trial court's grant of summary judgment, affirm the trial court's denial of plaintiffs' motion to strike or modify the arbitration award, and remand this case for further proceedings.

¶ 3 **FACTS**

¶ 4 Plaintiffs, Eugene and Donna Sweeney (individually and in her capacity as trustee of her living trust), owned real property in Peoria County, Illinois. In July 1994, they entered into a contract with defendant, Noah Herman Sons, Inc. (Herman), for the construction of a single family home on the property. The construction began later that year. Plaintiffs were present occasionally during construction and took photographs of their house being built. The work was completed by Herman in March 1995, and plaintiffs moved into the home in July 1995. Shortly

thereafter and for the next eight years, plaintiffs saw numerous problems develop with the home, including: nails popping out from the gypsum board in various locations; doors becoming no longer square, opening on their own, and not latching closed; windows binding and being difficult to open; and cracking in the gypsum board and in the exterior brick work. Plaintiffs called Herman several times over that period about the problems and were repeatedly told that the problems were caused by normal settling.

¶ 5 In about Spring 2003, the problems seemed to accelerate as new cracks developed, existing cracks worsened, and one of the basement walls shifted both horizontally and vertically within a short period of time. Plaintiffs called Herman, and a representative from Herman was sent to inspect the problems. After viewing the problems, Herman's representative again told plaintiffs that the problems were normal and that no action needed to be taken. Plaintiffs told Herman's representative that they did not believe that normal settling was the cause of the problems and later brought in other contractors to determine the source of the problems.

¶ 6 In November 2003, plaintiffs entered into a contract with defendant, Woods Basement Systems, Inc. (Woods), to have a pier system installed, which was supposed to address the problems with the home by stabilizing the home's foundation. The contract price was \$21,000 and the work was completed in January 2004. The contract between plaintiffs and Woods contained an arbitration clause. The contract also contained a legal fees provision, which entitled the prevailing party in arbitration to recover their legal fees.

¶ 7 In September 2004, after a section of the patio was removed, plaintiffs saw an open crack in an area of the frost wall. Upon inspecting the crack, plaintiffs noticed that no reinforcing bar (rebar) was visible in that area. Plaintiffs spoke to Herman and were told by a Herman

representative that it was not Herman's practice to put rebar in residential foundations. That statement was later contradicted by another Herman representative. Plaintiffs reviewed the pictures they had taken when the home was being built and allegedly noticed for the first time various problems, including a possible lack of rebar in the foundation walls.

¶ 8 Despite having the pier system installed by Woods, plaintiffs' problems with the foundation of their home grew worse. On October 5, 2007, plaintiffs brought the instant action against Herman and Woods for faulty construction and repair, alleging various causes of action against each. Pursuant to the terms of their contract, Woods filed a motion to compel arbitration, which the trial court granted. During the arbitration hearing, each party requested that they be awarded legal fees. After the hearing had concluded, the arbitrator found in favor of Woods and ordered plaintiffs to pay Woods's legal fees. The legal fees had been paid by Woods's insurance company under a reservation of rights.

¶ 9 In the trial court, plaintiffs filed a motion to vacate or modify the arbitration award. The trial court denied the motion. Herman filed a motion for summary judgment as to the claim against it, asserting that the claim was barred by the statute of limitations. Following a hearing, the trial court granted Herman's motion. Plaintiffs appealed.

¶ 10 ANALYSIS

¶ 11 As their first contention on appeal, plaintiffs argue that the trial court erred in finding that their claim against Herman was barred by the statute of limitations and in granting summary judgment for Herman on that basis. Plaintiffs assert that the discovery date, which would have triggered the four-year statute of limitations period to start running, cannot be determined as a matter of law under the facts of the present case. Plaintiffs assert further, therefore, that the trial

court's grant of summary judgment should be reversed and the case should be remanded for a determination of the discovery date by the trier of fact. Herman argues that the trial court's ruling was proper and should be affirmed.

¶ 12 The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Adams*, 211 Ill. 2d at 43. In appeals from summary judgment rulings, the standard of review is *de novo*. *Adams*, 211 Ill. 2d at 43.

¶ 13 Section 13-214 of the Code of Civil Procedure provides a four-year statute of limitations for actions based upon faulty construction. 735 ILCS 5/13-214(a) (West 2010).¹ The language

¹ Section 13-214 also provides for a 10-year statute of repose wherein an action based upon faulty construction may not be brought more than 10 years after the faulty act or omission occurred, unless the faulty construction is discovered within the 10-year period. 735 ILCS 5/13-214(b) (West 2010). If the faulty construction is discovered during the 10-year period, the person bringing the suit has four years from the point of discovery to bring the action, even if the end

of the statute itself incorporates the discovery rule. See 735 ILCS 5/13-214(a) (West 2010).

Thus, the statute of limitations starts to run in a faulty-construction case when the person bringing the action knows or reasonably should know of his injury and that it was wrongfully caused. 735 ILCS 5/13-214(a) (West 2010); *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 414-16 (1981). A person has knowledge that an injury is wrongfully caused when he possesses "enough information about the injury to alert a reasonable person to the need for further inquiries to determine if the cause of the injury is actionable at law." *LaSalle National Bank v. Skidmore, Owings & Merrill (LaSalle)*, 262 Ill. App. 3d 899, 901-04 (1994). A determination of the date of discovery is generally a question of fact for the trier of fact to decide and is not appropriate for summary judgment. *LaSalle*, 262 Ill. App. 3d at 902. However, the discovery date may be determined as a matter of law if two conditions are satisfied: (1) the facts known by the plaintiff are not in dispute; and (2) only one conclusion can be drawn from those facts. *LaSalle*, 262 Ill. App. 3d at 903. That the plaintiff was provided with non-actionable explanations for the problem may be a significant factor in determining the discovery date. See, e.g., *Du Page County v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 153-54 (1985) (in a faulty-construction case involving moisture problems in a county building, the supreme court reversed an order dismissing the action, even though the county had known about the moisture problems for eight years before the suit was filed, because the county had been provided with non-actionable explanations for those problems by the architect); *LaSalle*, 262 Ill. App. 3d at 901-06 (in a faulty-construction case involving heating problems in a commercial building, the appellate court reversed a grant of summary judgment for the defendant, even though the plaintiff bank had

date extends past the end of the 10-year period. 735 ILCS 5/13-214(b) (West 2010).

known about the heating problems for several years, where the bank had been provided with several non-actionable explanations for the heat loss and it was possible that those explanations were enough to assuage the bank's concern over the cause of the heating problem); *Society of Mount Carmel v. Fox (Mount Carmel)*, 31 Ill. App. 3d 1060, 1061-63 (1975) (in a faulty-construction case involving cracks and defects in a school building, the appellate court held that the statute of limitations started to run when the school received a report concluding that the cracks were caused by defects in the design of the building and did not start to run at a much earlier time, more than five years before the suit was filed, when the school initially began noticing the cracks, where the school was repeatedly told by the architect that the cracks and defects were caused by maintenance problems).

¶ 14 In the present case, over the eight-year period from the time that construction was finished until the time that the instant action was brought, plaintiffs had ample evidence that a problem existed with the foundation of the home. Plaintiffs observed numerous cracks in the interior and exterior walls, nails popping out, and windows and doors going out-of-square. The ultimate source of those problems, however, was unknown. The alleged act or omission that caused those problems was under the ground and buried in concrete, and Herman continually assured plaintiffs throughout the eight-year period that the problems were caused by mere settling. It was only after plaintiffs learned of the possible absence of rebar in the home's foundation that plaintiffs were aware that the problems may have been wrongfully caused. Under the circumstances of the present case, the discovery date should not have been fixed as a matter of law by the trial court. See *Du Page County*, 109 Ill. 2d at 153-54; *LaSalle*, 262 Ill. App. 3d at 901-06; *Mount Carmel*, 31 Ill. App. 3d at 1061-63. While it is clear that at some point plaintiffs

possessed sufficient information to conclude that the problems were wrongfully caused, it is for the trier of fact to determine whether that point occurred more than four years before the instant action was filed. See *Du Page County*, 109 Ill. 2d at 153-54; *LaSalle*, 262 Ill. App. 3d at 901-06; *Mount Carmel*, 31 Ill. App. 3d at 1061-63.

¶ 15 Our conclusion on that issue is not changed by the fact that plaintiffs in spring 2003 stopped believing Herman's claim that normal settling of the house was the source of the problems. Plaintiffs were still unaware of the true cause of the problems at that point, and we cannot find that the only conclusion that could be drawn from the facts available at that time was that the problems were wrongfully caused. Accordingly, we must reverse the trial court's grant of summary judgment for Herman and remand this case for further proceedings on plaintiffs claim against Herman.

¶ 16 As their next point of contention on appeal, plaintiffs argue that the trial court erred in denying their motion to vacate or modify the arbitration award. Plaintiffs assert first that the entire award should be vacated because the arbitrator exceeded his authority under the arbitration clause when he awarded legal fees to Woods when those fees were paid for by Woods's insurance carrier. Second, and in the alternative, plaintiffs assert that the award should be modified to remove the legal-fees portion because the issue of reimbursement of those fees to Woods's insurer was not before the arbitrator for resolution. Third, plaintiffs assert that the trial court failed to consider the merits of their argument because it decided at the outset that plaintiffs had not raised any grounds upon which a motion to vacate or strike the award could be granted. Woods argues that the arbitration award was proper and that the motion to strike or modify the award was appropriately denied.

¶ 17 Judicial review of an arbitration award is extremely restricted and is more limited than appellate review of a trial court's decision. *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 394 (1991); *Perkins Restaurants Operating Co., L.P. v. Van Den Bergh Foods Co. (Perkins)*, 276 Ill. App. 3d 305, 308 (1995). When reviewing such an award, a court must presume that the arbitrator did not exceed his authority and, whenever possible, must construe the award in such a manner as to uphold its validity. *Rauh*, 143 Ill. 2d at 386; *Perkins*, 276 Ill. App. 3d at 309. The only grounds for modification or dismissal of an arbitration award are set forth in sections 12 and 13 of the Uniform Arbitration Act, which in this particular case are limited to whether the arbitrator exceeded his authority, a statutory ground for vacating an arbitration award, and whether the arbitrator ruled upon a matter that was not submitted, a statutory ground for modifying an arbitration award. See 710 ILCS 5/12(a)(3), 13(a)(2) (West 2010). A court may not set aside an arbitration award merely because it would have reached a different conclusion or because the arbitrator made an illogical or inconsistent decision. See *Rauh*, 143 Ill. 2d at 393; *Perkins*, 276 Ill. App. 3d at 309-10. Moreover, an arbitration award may not be overturned because the arbitrator made a gross error of law or mistake of fact, unless the error or mistake is apparent from the face of the award. See *Rauh*, 143 Ill. 2d at 393; *Perkins*, 276 Ill. App. 3d at 309. Rather, if the arbitrator ruled upon the disputes that were submitted and the award contains the arbitrator's honest decision made after a full and fair hearing, a court will not set aside an arbitration award for errors of law or fact. See *Rauh*, 143 Ill. 2d at 394-95; *Perkins*, 276 Ill. App. 3d at 310.

¶ 18 Having reviewed the record in the present case, we find that the trial court properly denied plaintiff's motion to strike or modify the arbitration award. Despite plaintiffs' assertion to

the contrary, it is clear from the record that the arbitrator did not exceed his authority in the instant case when he ordered plaintiffs to pay Woods's legal fees. The arbitration clause in the parties' agreement provided for an award of legal fees to the prevailing party and plaintiffs do not dispute that Woods was the prevailing party in arbitration. As plaintiffs failed to establish any grounds for vacating the award, their request for that relief was properly rejected. In addition, it is also clear from the record that the issue of legal fees was a matter that was submitted to the arbitrator for resolution, as plaintiffs made a request of the arbitrator for an award of legal fees as well. Although on appeal plaintiffs attempt to limit the award of legal fees to those actually paid by a party, the agreement contained no such limitation and did not prohibit an award of legal fees when those fees were paid by the prevailing party's insurance company. The plaintiffs' request for modification of the arbitration award, therefore, was also properly rejected by the trial court.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, we reverse the trial court's grant of summary judgment for Herman, affirm the trial court's denial of plaintiffs' motion to strike or modify the arbitration award, and remand this case to the trial court for further proceedings consistent with this order.

¶ 21 Affirmed in part and reversed in part; cause remanded.