No. 3--10--0214

Order filed April 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

SCOTT R. PAULSEN,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois
	)	
v.	)	No. 07--LM--1374
	)	
ANTHONY S. GRACE and MARCIA K. GRACE, a/k/a MARCIA LEVERENZ-GRACE,	)	
	)	Honorable Joe Vespa,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

Held: Trial court's finding that plaintiff failed to prove fraudulent concealment in order to stay the statute of limitations was not against the manifest weight of the evidence. Affirmed.

Plaintiff, Scott Paulsen, filed this action alleging defendants, Anthony and Marcia Grace, negligently misrepresented and fraudulently concealed certain facts pertaining to the sale of their home to plaintiff. The matter proceeded to bench trial in the circuit court of Peoria County. The trial court found that plaintiff failed to prove by a preponderance of the evidence the necessary elements of his causes of action. The trial court further found that plaintiff's actions are barred by the applicable statute of limitations. Plaintiff appeals, claiming the "trial court erred in finding for defendants when they knowingly deceived and withheld information in the sale of the home."

BACKGROUND

Defendants owned a home at 5930 West Ridgecrest Circle, Peoria, Illinois, constructed in 1989. While attempting to sell the home to plaintiff, defendants completed two residential real property disclosure reports. The first, signed by Marcia on April 19, 2000, indicated sellers were "aware of material defects in the basement or foundation (including cracks and bulges)" and "mine subsidence, underground pits, *settlement*, sliding, upheaval, or other earth stability defects on the premises." (Emphasis in the original.) The report further indicated there

"was some cracking in the basement walls due to settlement of the soil but all has been fixed." The disclosure report further stated that the "prospective buyer is aware that the parties may choose to negotiate an agreement for the sale of the property subject to any or all material defects disclosed in this report ('AS IS')." This disclosure form was signed by Paulsen on May 16, 2000.

A second disclosure report is contained within the record on appeal noting the sellers were aware of "settling from any cause, or slippage, sliding, or other soil problems." The second report noted "significant settling after build - repaired." Paulsen signed the second report on May, 19, 2000, the same day he signed and tendered a "Residential Sales Contract" to sellers.

On May 26, 2000, defendants signed the contract to sell the home to plaintiff. The contract contained a handwritten clause noting within 24 hours of sellers' acceptance, sellers were to "supply buyer with all reports, opinions and receipts regarding any previous lower level cracking and movement in and on walls/floor/etc." The contract further noted that Paulsen "has 10 days from receipt to review and accept. If buyer does not accept" the contract would be void and earnest money returned.

In response to the clause in the second disclosure report,

the Graces provided Paulsen with two letters. A March 27, 1992, letter from David Maurer of RAN Consultants that indicated the Graces requested RAN Consultants visit the residence "to observe the construction being performed by the contractor" as the firm had previously visited the property and observed "the cracked masonry wall and cracked slab in October, 1991." The letter from RAN Consultants states that it "is my opinion that the construction is of such a nature as to cause the house masonry wall, the slab, and the wall above the masonry to be structurally sound." The letter detailed measures being taken by the contractor and noted that "these measures will provided structural stability and soundness."

The second letter given to Paulsen is dated November 22, 1999, from Whitney & Associates. It states as follows:

> "Enclosed herewith are the subsurface exploration and laboratory testing information which you recently requested from our geotechnical engineering firm. As may be observed from the enclosed Soil Boring Logs, the soils encountered during this site investigation consisted of primarily dry and very stiff to hard, apparent cohesive

> fill materials and shrinkage of the soils may be a contributing factor to the distress experienced at this residence."

Engineer Richard Whitney authored the November 22 letter. The letter contained a handwritten notation indicating "distress was cracking along mortar lines in foundation walls. Cracks have subsequently been repaired via tuck pointing procedure." Paulsen stated at trial that while he acknowledged receiving these letters prior to closing, he did not contact David Mauer or Whitney & Associates regarding their content. While he hired a home inspector, he did not inform the home inspector about any possible foundation problems prior to the inspection. He acknowledged he did "notice some cracking in the basement floor at the time of purchase, and that is what drew [his] attention to request additional information." He indicated that he employed Richard Unes to inspect the house and Unes's report stated, "Structurally, I found the residence to be in good condition. There was no evidence of major footing failure or foundation settlement." Eventually, Paulsen bought the house and the closing took place in July of 2000.

On direct examination, Paulsen indicated that in 2003, he noticed some settling issues but "nothing significant." On

cross-examination, he admitted to contacting Bix Basement Water Control that same year "because of settlement." Bix came to the property, "did some testing, and in response to that they provided [him] with an estimate that included *** the remedy of piering." Paulsen claimed the first time he heard of piering as a potential to cure his settlement problems was in 2003 from Bix. Bix provided Paulsen with a quote of $17,250 to complete repairs to his property but such repairs were cost prohibitive at the time. He explained the piering process as one in which "a clamp, an L-shaped clamp, that will fit underneath the foundation of the home. A steel rod will be drilled through part of that clamp and will be drilled down to bedrock until it stops, and that's the piering process." Paulsen continued that in 2005, he contacted Woods Basement Systems in relation to dirt washing away from the home.

The next actions taken by Paulsen in regard to his property took place in 2006 after noticing additional cracking that worried him. The additional cracking caused him to further investigate the matter. This investigation led him to contact the Illinois Department of Natural Resources (the Department).

The Department informed Paulsen that it had information on the property. No "Case Name" or "Case No." was assigned to the

matter but the Department did complete a "case data" sheet with regard to the property and inspected the property on February 10, 2000. This "case data" sheet indicated the "homeowner told evidence points to soil creep +/or hydro-consolidation as cause." Paulsen testified that the first time he became aware that the Department inspected or had any information regarding the property was in July of 2006.

However, during discovery, it became known that the Department also inspected the property April 15, 2003, close to three years after Paulsen purchased the home. The case data sheet from that inspection indicates that on December 10, 2002, Paulsen made a report to the Department regarding "settlement." The Department sent the same investigator to the property who inspected it in 2000. The 2003 case data report noted, "new owner not aware of previous AML investigation or insurance claim (denied)" and described the property as "same as last visit (2/10/00) except some patched cracks in c.b. found. have reopened; one new crack in bsmt slab." Paulsen, again, claimed to have no recollection of contacting or speaking to anyone from the Department before 2006.

The sellers also testified at trial. Marcia Grace testified that her husband contacted Whitney & Associates after noticing

cracking in the basement walls. She noted the Graces also contacted Dennis Joos Construction to do some repairs to the house, but did not know the specifics as she was tending to a premature baby at the time and her husband took care of these matters. To her knowledge, "all the cracks in the walls of the foundation were fixed" by the people her husband hired.

Anthony Grace testified that he contacted an engineer in September of 1999 due to stair-step cracking in the basement walls. The engineer provided Anthony with a 31-page written report dated December 20, 1999. Anthony produced the report for the first time at trial. The ultimate conclusion of the report was that the cause of the foundation movement was mine subsidence. The engineer recommended that repairs be made to the foundation bearing soil and the foundation. The 31-page report included the letter given to Paulsen from the Graces, authored by Whitney & Associates, as well as the entire Whitney & Associates' nine-page report. Anthony stated he was aware that the 31-page report existed at the time the sale was being negotiated, but did not recall if he tendered a copy to his real estate agent.

Anthony recalled the conversation he had in February of 2000 with a representative of the Department. The representative told Anthony that the problem with the property was not mine

subsidence but, instead, a problem with the soil. Anthony acknowledged he did not hire anyone to make repairs to the soil. Anthony further indicated he and his wife completed the disclosure forms and acknowledged that potential buyers were entitled to disclosures regarding the house.

As a result of the 31-page report being produced for the first time at trial, Paulsen moved and was allowed to amend his complaint to include additional counts of negligent misrepresentation and fraudulent concealment. Ultimately, however, the trial court ruled in defendants' favor.

The trial court specifically found that the repairs made by sellers "in fact fixed the cracks in the basement walls in 2000" and that defendants made those repairs based on representations made to them that tuck pointing would fix the basement. The court further noted that defendants "reasonably relied on the advice and representations of a structural engineer that tuck pointing would fix the basement walls and foundation" and that defendants "reasonably thought that any problems with cracking in the basement or foundation had been fixed."

Specifically, the trial court noted that "the plaintiff had knowledge of prior cracking issues and that repairs were made to the property in 2000 and became aware in 2002 of defendants

contacting the Department of Natural Resources. That when the plaintiff thought or should have thought there was a cause of action, there was still a reasonable amount of time remaining on the statute of limitations and therefore the discovery rule does not apply and the actions are barred." The court also held that plaintiff failed to prove the substance of his negligence counts by a preponderance of the evidence or his fraud counts by clear and convincing evidence. Plaintiff appeals the order of the court entering "judgment in favor of the defendants."

ANALYSIS

A. Statute of Limitations

Generally, we review *de novo* a circuit court's finding that a plaintiff's complaint is time barred. *Turner v. Nama*, 294 Ill. App. 3d 19 (1997). However, when a plaintiff asserts the discovery rule to delay commencement of the statute of limitations, he has the burden of proving the date of discovery which is a factual question for the trial court to resolve. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72 (1995). When reviewing a trial court's findings of fact made following a bench trial, we must defer to the findings of the trial court unless they are against the manifest weight of the evidence. *People v. A Parcel of Property Commonly Known as 1945*

North 31st Street, Decatur, Macon County, Illinois, 217 Ill. 2d 481, 507 (2005) (citing *Chicago Investment Corp. v. Dolins*, 107 Ill. 2d 120 (1985)).

Before determining whether the trial court properly found plaintiff's action barred by the statute of limitations, we must first determine, obviously, which statute of limitations applies to plaintiff's action. Citing to section 13-202 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/13-202 (West 2008)), plaintiff claims a two-year statute of limitations applies to his negligent misrepresentation counts. He also cites to section 13-215 (735 ILCS 5/13-215 (West 2008)) of the Code for the proposition that the statute of limitations is five years for his fraudulent concealment counts. Defendants apparently take the position that the applicable statute of limitations in this matter is two years for plaintiff's negligent misrepresentation counts and five years for his fraudulent concealment counts. We disagree with both sides.

Section 13-202 of the Code is titled "Personal injury-Penalty" and states that it applies to actions "for damages for an injury to the person ***." 735 ILCS 5/13-202 (West 2008). This is not an action for personal injury to the plaintiff. Nowhere in plaintiff's complaint does he allege he suffered

injury to his person. He simply claims as a "result of" his reliance on sellers' "negligent representations," he "has and will suffer damages" and that he "has been damaged by the Sellers' non-disclosure in the amount of actual damages exceeding $20,000." We find what has been termed the "catch all" provision of section 13-205 of the Code's five-year statute of limitations applies to plaintiff's action. 735 ILCS 5/13-205 (West 2008); see also *Peregrine Financial Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill. App. 3d 659, 661 (2010) and *Blacke v. Industrial Comm'n,* 268 Ill. App. 3d 26, 30 (1994) (Catch-all provision of 13-205 applies to all civil actions not otherwise provided for.). Section 13-205 reads:

> "Except as provided in Section 2-725 of the 'Uniform Commercial Code', approved July 31, 1961, as amended, and Section 11-13 of 'The Illinois Public Aid Code', approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or

> conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2008).

At oral argument, Paulsen conceded that the negligent representations were made to him, and the "fraud was committed in 2000," the date of the transaction to buy the house. Paulsen did not file his complaint until August 29, 2007. He acknowledges in his reply brief that the timeliness of his complaint hinges on an application of the discovery rule.

B. The Discovery Rule

In *Rozny v Marnul*, our supreme court adopted the discovery rule which postpones the commencement of the statute of limitations until a plaintiff knows or reasonably should know that he has been injured and his injury wrongfully caused. *Rozny v. Marnul*, 43 Ill. 2d 54, 72-73 (1969). This has led courts to conclude that a "cause of action accrues, within the meaning of the statute, when the plaintiff 'knew or reasonably should have known that it was injured and that the injury was wrongfully caused.' " *Lubin v. Jewish Children's Bureau of Chicago*, 328 Ill. App. 3d 169, 171-72 (2002) (quoting *Superior Bank FSB v. Golding*, 152 Ill. 2d 480, 488 (1992)). The phrase "wrongfully

caused" does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action. *Castello v. Kalis*, 352 Ill. App. 3d 736 (2004) (citing *Knox College v. Celotex Corp.*, 88 Ill. 2d 407 (1981)). Rather, the term refers to when an injured party "becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Knox College*, 88 Ill. 2d at 416. It is well settled that once a party knows or reasonably should know both of his injury and that it was wrongfully caused, "the burden is upon the injured person to inquire further as to the existence of a cause of action." *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981). As this court noted in *Blair v. Blondis*, 160 Ill. App. 3d 184 (1987), the time at which a party knows or reasonably should have known of his injury and that his injury was wrongfully caused is "to be resolved by the finder of fact." *Blair*, 160 Ill. App. 3d at 189 (citing *Lipsey v. Michael Reese Hospital*, 46 Ill. 2d 32 (1970)).

The applicable statute of limitations in this matter is five years from the time Paulsen knew or should have known that he was injured. Inherent in the trial court's holding that Paulsen's action is barred by the statute of limitations is a finding that

Paulsen knew or should have known of the injury and that the injury was wrongfully caused before August 29, 2002. We cannot say such a finding is against the manifest weight of the evidence. A trial court's ruling is against the manifest weight of the evidence only when an opposite conclusion is apparent or when its findings appear to be unreasonable, arbitrary or not based on the evidence. *Rolando v. Pence*, 331 Ill. App. 3d 40 (2002).

On direct examination, Paulsen admitted that he observed "a crack in the floor that basically went from one, almost two-thirds the distance of the basement floor" prior to submitting his bid for the house. He continued that given this observation, "one of the conditions of the offer for the house had to do with a crack on the basement floor in the basement of the house." Paulsen reiterated that he "was concerned about the crack in the floor." Paulsen also acknowledged receiving various real estate disclosure forms prior to the sale that indicated the sellers were aware of material defects in the basement foundation and that those defects were disclosed. He emphasized to the court that the cause of "settlement" was underlined on one of the disclosure forms. Paulsen further stated that he lived in the house since the time of purchase and in "2000 and 2003 I noticed

some settling issues just consistent with what I had been told."

Paulsen's testimony alone makes it impossible for us to conclude that a finding that he knew or should have known of his injury and that his injury was wrongfully caused prior to August 29, 2002, is against the manifest weight of the evidence. Again, the phrase "wrongfully caused" does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action, but rather refers to when an injured party becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. *Castello,* 352 Ill. App. 3d at 744; *Knox College,* 88 Ill. 2d at 415; *Witherell,* 85 Ill. 2d at 156.

C. Fraudulent Concealment

Plaintiff also asserts that he was unaware of defendants' fraudulent concealment of known defects in the property until he contacted the Department in 2006. Therefore, plaintiff posits, the five-year "fraudulent concealment" statute of limitations did not begin to run until the Department informed him it was at his residence prior to his purchase and, as such, his complaint was timely filed.

Section 13-215 of the Code of Civil Procedure states:

> "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2008).

Fraudulent concealment, as codified in section 13-215, is not a cause of action in and of itself; rather, it acts as an exception to the time limitations imposed on other, underlying causes of action. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446 (2006). The concealment contemplated in section 13-215 must consist of affirmative acts or representations which are calculated to lull or induce a claimant into delaying filing of his claim or to prevent a claimant from discovering his claim. *Smith v. Cook County Hospital*, 164 Ill. App. 3d 857 (1987). A plaintiff must plead and prove that the defendant made misrepresentations which were known to be false, with the intent to deceive the plaintiff, and upon which the plaintiff detrimentally relied. *Orlak v. Loyola University Health System*, 228 Ill. 2d 1 (2007).

While plaintiff has undoubtedly showed that defendants failed to turn over all reports in their possession concerning the settlement of the property, he has failed to identify any representations made by defendants that they knew to be false. The trial court specifically found that plaintiff "failed to prove by clear and convincing evidence that the defendants made a representation which they knew was false or should have known was false regarding cracking in the basement because they reasonably relied on the representation of experts." The trial court also specifically found that plaintiff "failed to prove that he could not have reasonably discovered any other issues with the basement"; that "it was uncontested that Tony Grace was told by a structural engineer that tuck pointing would fix the cracking problem in the basement"; that "defendants reasonably relied on the advice and representations of a structural engineer that tuck pointing would fix the basement walls and foundation"; and, that "based upon the advice of engineers and an employee of the Department of Natural Resources the defendants reasonably thought that any problems with cracking in the basement or foundation had been fixed." We cannot say these findings are against the manifest weight of the evidence and, as such, hold that plaintiff cannot take safe harbor under the fraudulent concealment

exception to the underlying statue of limitations.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.