IN THE TRIBAL COURT OF THE OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

STATE OF MINNESOTA COUNTY OF SCOTT

Katerina Anderson,

Plaintiff,

v.

Performance Construction, LLC,

Defendant,

v.

Krech Exteriors, Inc., Bruce Sames, Lyman Lumber Company, Integrity Windows, Inc., and Hawk Drywall, Inc.,

Tribal Court File: 721-12

Third-Party Defendants,

and

Krech Exteriors, Inc.,

Fourth-Party Plaintiff,

v.

Daniel Zhakevich, personally and d/b/a as A Wall Remodeling,

Fourth-Party Defendant.

MEMORANDUM OPINION AND ORDER

Before Judge Terry Mason Moore.

Introduction

This is a case involving claims of defective construction at a house located on tribal trust land and within the Reservation at 2475 Paha Circle, Shakopee, Minnesota. Plaintiff, Community member and homeowner Katerina Anderson, contracted with general contractor Performance Construction to build the house and paid approximately $670,000. The parties entered a two-page written contract for the work dated December 14, 2006.[1] Ms. Anderson claims that after completion of construction, problems arose relating to the siding, driveway, tile, trim, countertops, sliding doors, and cabinets. Ms. Anderson brought suit against Performance on January 24, 2012. Performance denied all liability and brought a third-party indemnity action against various suppliers and subcontractors, including window and door supplier Integrity Windows, siding subcontractor Krech Exteriors, and others.

Currently before the Court are two primary motions for summary judgment, one by Performance (which Krech fully incorporated into its own summary-judgment motion) and one by Integrity, both of which were heard on July 12. The following attorneys appeared at the hearing on behalf of the parties: Kurt Mitchell for Plaintiff Katerina Anderson; Nicole Delaney on behalf of Defendant Performance Construction; Michael E. Obermueller on behalf of Third-Party Defendant Integrity Windows; Michael S. Rowley on behalf of Third-Party Defendant and Fourth-Party Plaintiff Krech Exteriors; and Michael M. Skram on behalf of Third-Party Defendant Lyman Lumber.

Lyman did not file any motions. As its attorney reiterated at the hearing, and as demonstrated by the record, in 2011, Lyman declared voluntary bankruptcy in the United States Bankruptcy Court for the District of Minnesota, resulting in an automatic stay of this and any

[1] Attached as Ex. C to Aff. of N. Delaney in Support of Performance Constr.'s Mot. for S.J. (June 19, 2013).

other pending litigation against Lyman. In May 2013, the Bankruptcy Court lifted the stay, but ordered that any claims against Lyman in this or any other case can only proceed to the extent of any available insurance.

Based upon Lyman's recent correspondence, however, the Court understands that Lyman on July 19 settled with Ms. Anderson and that the Court will shortly receive dismissal papers. This does not affect the disposition of either of the pending motions, however.

In the first motion, Performance moves to dismiss on the grounds that the suit is barred due to the Minnesota statute of limitations for construction-defect claims at Minnesota Statute Section 541.051, which provides a potential claimant only two years from discovery of a defect to bring suit.[2] Third-Party Defendant Krech Exteriors, the siding-installation subcontractor, also filed its own motion for summary judgment, but fully incorporated Performance's substantive arguments, and so Krech's motion can be decided on the same grounds.[3]

In the second motion, Third-Party Defendant Integrity Windows moves to dismiss Defendant Performance's claim against Integrity for contribution and indemnity on grounds of failure to state a claim, arguing that Performance has failed to present any evidence of defects in the products Integrity provided for use on the project.

Relevant Facts

Relevant to the statute-of-limitations issue in Performance's motion are certain communications between the parties. It is undisputed that, after completion and at various times in 2008, 2009, and 2010, Ms. Anderson and Kevin Boyd (another resident of the home acting on Ms. Anderson's behalf) , communicated with Performance regarding at least some of the alleged defects. The record presented to the Court to date shows that Performance made certain efforts

[2] *See* Performance Constr.'s Mot. for S.J. (June 19, 2013).
[3] *See* Krech Mot. for S.J. (June 23, 2013).

to address those requests, including coordinating delivery of new siding in 2009.

The very last communication that is on record is an October 2010 letter from Performance's chief operating officer and owner James Michka to Ms. Anderson.[4] Therein, Mr. Michka states Performance would "like to help you get the siding issue resolved and any other items in the home that you feel need attention."[5] There is no evidence in the record regarding whether Ms. Anderson relied on this letter for any purpose.[6] Nor does Mr. Boyd assert that Performance made any promises to repair any of the defects, although he did provide an affidavit alleging that he had some contact with Performance in 2010.[7]

Relevant to the windows and doors defect issue in Integrity's motion are several other documents. The only expert report to date (and discovery closed in May, per the parties' own stipulation) is the "Residential Construction Inspection" dated July 22, 2011 from Advanced Consulting & Inspection ("ACI").[8] Ms. Anderson obtained the report, which discusses issues with the windows and doors.[9] But the report solely discusses what appear to be window and door *installation* problems.[10] In fact, the only time an Integrity product is expressly mentioned therein is to note there was an installation rather than a defect in the product: "Marvin Integrity installation instructions required a backer rod and tooled sealant joint between the window frame and cladding. The caulk joints were not *installed*."[11] Regarding the sliding patio doors Integrity

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[4] Attached as Ex. 1 to Ex. A (Depo. of J. Michka) to Aff. of K. Mitchell in Support of Plaintiff's Memo. of Law in Opp. to Def. Performance Constr.'s Mot. for S.J. (July 3, 2013).
[5] *Id.*
[6] Aff. of K. Anderson, attached to *id.*
[7] Aff. of K. Boyd, attached to Pl.'s Memo. of Law in Opp. to Third-Party Krech Exterior's Motion for S.J. (July 3, 2013).
[8] ACI Rep. at 48, attached as Ex. 1 to Aff. of N. Delaney in Opp. to Integrity Windows' Mot. for S.J. (July 9, 2013).
[9] *Id.*
[10] *Id.*
[11] *Id.*

supplied, the ACI report states that they are "difficult to operate and have become damaged as a result," but the report also states that "[t]he failure of the caulk joint at mid-height indicates the bowing occurred *after construction was completed*" and points to improperly installed headers as a cause of the problem.[12]

Also on record is Ms. Anderson's remediation proposal from Residential Improvement Contractors, Inc. ("RIC"), dated January 29, 2013, which states only that RIC advises it would "remove and reset all windows" and that existing trims and windows will be "save[d] for re-installation."[13] RIC states that the windows "will be inspected prior to re-installation,"[14] but does not state there are any known defects in them.[15]

Finally, in deposition, Performance's chief operating officer and owner James Michka testified that he had no evidence that there was a defect in either Integrity's windows or doors.[16]

Analysis and Order

I. Standard of review.

This Court follows the Federal Rules of Civil Procedure, including 56(e), which states that summary judgment is proper when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." It is only "where the record as a whole could not lead a rational trier of fact to find for the non-moving party" that a court can conclude that there is no genuine issue as to material fact.[17] A responding party must "set forth specific

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[12] *Id.* Emphasis added.
[13] RIC Rep at 2, attached as Ex. F to Aff. of N. Delaney in Support of Performance Constr.'s Mot. for S.J. (June 19, 2013).
[14] *Id.*
[15] The RIC proposal states that the total estimate for all repair work comes to $137,840.
[16] *See* J. Michka Depo. at 58, attached as Ex. B to Aff. of M. Obermueller in Support of Integrity Windows, Inc.'s Mot. for S.J. (June 19, 2013).
[17] *Matsushita Elec. Indus., Inc. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

facts showing that there is a genuine issue for trial."[18] And "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."[19]

II. Analysis.

A. Jurisdiction and choice of Minnesota law.

It is unquestioned that this Court has both subject-matter and personal jurisdiction over this matter and these parties, and that the parties have submitted to this Court's jurisdiction. The Court notes, however, that the contract between Ms. Anderson and Performance does not include a choice-of-law clause, which would normally lead to the Court applying Community law to the dispute. But the parties to the contract stated in pleadings and in the summary-judgment hearing that they agree that Minnesota common law should apply to the contract, along with one aspect of Minnesota statutory law, the two-year, construction-defect statute of limitations at Minnesota Statute Section 541.051.[20] Therefore, based upon this express agreement, the Court applies both Minnesota common law and Minnesota's construction-defect statute of limitations.[21]

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[18] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).
[19] *Liberty Lobby*, 477 U.S. at 252.
[20] *See generally*, Performance Constr. Memo. in Support of Mot. for S.J. at 6-7; Pl.'s Memo. of Law in Opp. to Def. Performance Constr.'s Mot. for S.J. (July 3, 2013) at 4-5.
[21] While it is true that the Court has discretionary authority to look to the common law of other jurisdictions for guidance, as the parties have suggested, the parties here ask the Court to apply a foreign *statute of limitations*. Statutes of limitations are not creatures of common law, although they may control whether common-law claims may be brought. Furthermore, the Court notes that Minnesota views statutes of limitations as typically procedural (rather than substantive). *See, e.g., Commandeur, LLC v. Howard Hartry, Inc.*, 2007 WL 4564186 (Minn. Ct. App. Dec. 21, 2007), citing *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 5 (Minn. Ct. App. 2003) (stating that a limitation period is only substantive "when it applies to a right created by statute, as opposed to a right recognized at common law.'") (internal citations omitted). Here, Ms. Anderson's claims against Performance unquestionably arise under common law (including negligence, negligence *per se*, breach of contract, and breach of implied warranty of fitness for a particular purpose), as do Performance's third-party claims against Integrity and Krech (including contribution and indemnity). So without the parties' express request to apply this

B. Performance Construction's (and Krech Exteriors's) summary-judgment motion.

The state construction-defect statute of limitations at Minnesota Statute Section 541.051 states:

> Except where fraud is involved, no action by any person in contract, tort or otherwise to recover damages for any injury to property, real or personal,...arising out of the defective and unsafe condition of an improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property...more than two years after discovery of the injury.

Minnesota case law strictly construes this two-year limitation, and a cause of action accrues upon discovery.[22] And this means only discovery of the "symptoms" of the defects, not the underlying causes.[23] Promises to repair can toll the statute of limitations under equitable estoppel principles, but only if the injured party reasonably and detrimentally relied on the promises, which is a fact-specific inquiry:

> ..."[w]hen a party allegedly responsible for remedying a defect in real property makes assurances or representations that the defect will be repaired, that party may be estopped from asserting a statute-of-limitations defense if the injured party reasonably and detrimentally relied on the assurances or representations." *Rhee v. Golden Home Builders,* 617 N.W.2d 618, 622 (Minn.App.2000) (citations omitted). Such assurances may toll statutes of limitation on the theory of equitable estoppel. *U.S. Leasing Corp. v. Biba Info. Processing Servs., Inc.,* 436 N.W.2d 823, 826 (Minn.App.1989), *review denied* (Minn. May 24, 1989). Whether equitable estoppel applies is a question of fact unless only one inference can be

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purely procedural Minnesota statute of limitations, the Court would likely be without authority to do so.

[22] Minn. Stat. § 541.051 subd. 1(c).

[23] *See, e.g., Oreck v. Harvey Homes*, 602 N.W.2d 424, 428 (Minn. Ct. App. 2000) (statute begins to run upon discovery "of an injury sufficient to entitle him or her to maintain a cause of action") (internal citations omitted); *Greenbrier Village Condo Two Ass'n, Inc. v. Keller Inv., Inc.*, 409 N.W.2d 519, 524 (Minn. Ct. App. 1987) (statute begins to run "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action."); *Hyland Hill N. Condo Assoc., Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996), *overruled in sep. pt. by Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004) (knowledge of full extent of injury not necessary to trigger statute of limitations).

drawn from the facts. *Rice St. VFW, Post No. 3877 v. City of St. Paul,* 452 N.W.2d 503, 508 (Minn.App.1990).[24]

Here, Performance argues, based upon Ms. Anderson's own admissions in deposition, that, at the latest, Ms. Anderson knew of all the housing defects by May 2009. Performance further claimsthat by September 2009 it had stopped responding to her (much less making any promises to repair).[25] Therefore, Performance reasons, Ms. Anderson had until May 2011 at the latest to file a complaint against Performance. Because Ms. Anderson did not file until January 2012, Performance argues that Minnesota's construction-defect statute of limitations bars her claims and requires dismissal.

But this ignores the October 2010 letter that Performance owner Mr. Michka sent to Ms. Anderson where he stated he would "like to help you get the siding issue resolved and any other items in the home that you feel need attention." One permissible reading of this letter (although admittedly not the only reading) is that Performance is promising to return to repair the problems.[26] This could serve to push the limit out far enough to make Ms. Anderson's January 2012 filing timely.

But even if this letter does constitute a promise to repair (which is Ms. Anderson's burden to prove at trial), Ms. Anderson will also have to show that she (or Mr. Boyd on her behalf) reasonably relied on that promise. There is nothing before the Court on this point. As counsel for Performance admitted at the hearing, in deposition, Ms. Anderson was not asked

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[24] *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.,* 715 N.W.2d 458, 473 (Minn. Ct. App. 2006).

[25] *See, e.g.*, Performance Constr.'s Memo. in Support of Mot. for S.J. at 3-6 (citing K. Anderson Depo.).

[26] *See* Pl.'s Memo. of Law in Opp. to Def. Performance Constr.'s Mot. for S.J. at 3-4. The Court notes, however, that the affidavits Ms. Anderson and Mr. Boyd offer as their primary support in opposition to Performance's motion are not very helpful. Neither states whether they relied on the letter and neither include any specific dates or the content of other alleged communications between Mr. Boyd and Performance in 2010.

about her reliance on the letter either way.[27]

Whether the letter is a promise, and if so, whether Ms. Anderson reasonably relied on it, constitute threshold fact issues to be decided at trial before any other aspects of the defect claims can be considered. Construing the facts in the most favorable light to Ms. Anderson as the nonmovant, Performance has failed to meet its burden to justify summary judgment and its motion is denied. Correspondingly, Krech's motion incorporating Performance's arguments is denied.[28]

C. Integrity Windows's summary-judgment motion.

Conversely, Integrity *has* met its burden show that there remains no genuine issue of material fact that remains for trial regarding whether the products Integrity supplied to the project contributed to the damages. Performance has not met its burden to show there is any evidence upon which the Court as the factfinder could reasonably find in Performance's favor at trial. Performance has simply offered no evidence of any defects in the products, much less that these defects contributed to any damages Ms. Anderson suffered for which Performance may be liable. The Court therefore grants Integrity's summary judgment motion and dismisses Integrity from the case.

1. Late service and filing.

First, the Court addresses Performance's argument that Integrity's admittedly-late filing delay justifies denial on purely procedural grounds. The summary-judgment hearing was set for August 12, and dispositive motions were due 28 days earlier, or by Friday, June 14. Integrity instead filed on Monday, June 17, and due to a service-list omission, also failed to serve

[27] Nor does Mr. Boyd's affidavit regarding some contact with Performance in 2010 support a claim of estoppel, as Mr. Boyd never asserts that Performance made him any promises to repair.
[28] The Court need not reach the question of whether Krech was entitled to bring this motion on a "pass-through" basis in the first place,.

Performance until on or about Friday, June 21.

But there has been no showing of prejudice to Performance. Moreover, the late service appears to have genuinely been an oversight, and Performance was still served a full three weeks before the hearing. Most importantly, Integrity's motion has merit and granting it will serve to efficiently manage this case by dismissing an unnecessary party. Under these circumstances, the Court can and does accept this late filing.

2. Claims of defects in Integrity products.

Integrity has met its burden to show there is no factual basis for Performance to claim there were any defects in Integrity's products. Performance had the entire discovery period to obtain evidence regarding alleged defects in the Integrity window and door assemblies if Performance wished to proceed to trial. For example, it is not enough, as Performance argues, that Ms. Anderson has experienced problems operating the patio doors, or that "Plaintiff's expert has also identified issues with components of the patio doors coming loose and difficulty in operating the patio doors properly."[29] These facts do not logically lead to the sole conclusion that the patio door *components* are defective, only that *something* is wrong, whether the problem is with manufacture, installation, or something else. Moreover, neither ACI or RIC conclude that there were defects in the windows and doors themselves, only highlighting problems with their installation, in which Integrity had no role. And ACI goes on to identify a number of *specific* door and window installation problems--including a failure to follow Integrity's manufacturer instructions. In other words, the evidence on record, while not conclusive, indicates that Integrity's products are likely *not* the source of Ms. Anderson's damages.

Under these circumstances, to defeat summary judgment, Performance needed to provide

[29] Performance Constr.'s Memo. in Opp. to Integrity Windows' Mot. for S.J. at 5.

at least some evidence suggesting that Integrity's products were defective and that they contributed to Ms. Anderson's damages, likely including expert testimony.[30] Performance did not do so. Therefore, Performance has failed to meet its burden to raise any material fact in support of its third-party claims against Integrity. The Court grants Integrity's motion and Integrity is dismissed from the case.

[30] *See, e.g., Mozes v. Medtronic, Inc.*, 14 F. Supp. 2d 1124, 1128 (D. Minn. 1998) (stating expert testimony may be needed in product-liability cases, as in negligence cases, and where "the acts or omissions complained of are within the general knowledge and experience of lay persons").

Order

For the foregoing reasons, and based on all the files and pleadings herein, it is herewith ORDERED:

1. Defendant Performance Construction, Inc.'s motion for summary judgment is DENIED;

2. For the same reasons, Third-Party Defendant Krech Exteriors, Inc.'s motion for summary judgment is also DENIED; and

3. Third-Party Defendant Integrity Windows, Inc.'s motion for summary judgment is GRANTED and Integrity Windows is dismissed from the case.

This matter will be set on for trial as to all the remaining parties.

Date: August 9, 2013

Terry Mason Moore
Tribal Court Judge, *Pro Tem*