COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-90

WAYNE SAKER & others,[1] trustees,[2]

vs.

STEFFIAN BRADLEY ASSOCIATES, INC., & others;[3] JOHN HENRY ROOFING, INC., & others,[4] third-party defendants; THE ARCHITECTURAL TEAM, INC., & others,[5] fourth-party defendants.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case involves allegations of defective construction against contractors involved in the construction of a condominium development known as Longyear at Fisher Hill. The plaintiffs, trustees of the Longyear at Fisher Hill Condominium

[1] William Karlyn, Samuel Bloomberg, and Barbara Davis.
[2] Of the Longyear at Fisher Hill Condominium Trust.
[3] Columbia Construction Co., The Architectural Team, Inc., HDS Architecture, Inc., Columbia Longyear Manor, LLC, Columbia Longyear Building D, LLC, C. Stumpo Development Corp., D'Agostino Associates, Inc., Michael Noel, Michael E. Liu, Hans D. Strauch, Wozny/Barbar & Associates, Inc., Zbigniew M. Wozny, The Waterproofing Co., LeClair Roofing, MacKay Construction Services, and Stanley Roofing Co., Inc.
[4] Preferred Mechanical Services North, LLC, Exterior Designs, M.P. Masonry, Inc., Monroe Plumbing & Heating, Inc., The Waterproofing Co., Forge Industries, Mainstone, Inc., Pella Windows & Doors, Stanley Roofing Co., LeClair Roofing, and MacKay Construction Services.
[5] Steffian Bradley Associates, Inc., and Wozny/Barbar & Associates, Inc.

Trust, appeal from a final judgment entered after many of their negligence and negligent misrepresentation claims were dismissed on summary judgment as time barred.[6] We affirm.

Background. We construe the facts in the summary judgment record in the light most favorable to the trustees. See Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Longyear at Fisher Hill consists of four new buildings known as buildings A, B, C, and D and one century old manor known as building E that a developer[7] constructed or renovated between 1999 and 2009. This appeal concerns alleged construction defects at buildings C and E.

As to building C, Steffian Bradley Associates, Inc., and Michael Noel (collectively, SBA) provided architectural services; The Architectural Team, Inc., and Micahel E. Liu (collectively, TAT) provided architectural services and construction oversight; and Columbia Construction Co. (Columbia Construction) was the general contractor. Construction of

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[6] The following claims were all dismissed as time barred: (1) the trustees' negligence and negligent misrepresentation claims against Steffian Bradley Associates, Inc., Michael Noel, The Architectural Team, Inc., and Michael E. Liu and (2) the trustees' negligence claims against Columbia Construction Co., Columbia Longyear Manor, LLC, Stanley Roofing Co., Inc., and C. Stumpo Development Corp. All of the trustees' other claims were also dismissed, whether by stipulation or otherwise, and are not at issue on appeal.

[7] The developer, Longyear Properties, LLC, is not a party to this case.

building C was substantially completed by October 1, 2004, and residents began occupying units no later than December 2005. In 2005 and 2006, unit owners complained to the developer about various construction defects that, among other things, caused building C to leak.[8] In 2006, unit owners also commissioned a third-party inspection report, which detailed many leaks at building C.

As to building E, Columbia Longyear Manor, LLC (Columbia Longyear), was the general contractor.[9] Columbia Longyear subcontracted certain roofing work to Stanley Roofing Co., Inc. (Stanley Roofing), and certain masonry work to C. Stumpo Development Corp. (C. Stumpo).[10] The developer terminated Columbia Longyear for convenience on December 31, 2006, but Stanley Roofing and C. Stumpo continued working on building E after that. In March and April 2007, the developer sent two different e-mails to Columbia Longyear detailing water issues. Construction on building E was not fully completed until sometime in 2008 at the earliest.

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[8] Other construction defects -- specific mechanical and masonry defects -- discovered at a later point in time are not at issue on appeal.

[9] The trustees assert that the general contractor of building E was Columbia Longyear "and/or" Columbia Construction. This appears to be based on the trustees' claim that Columbia Construction controlled Columbia Longyear and that Columbia Longyear's veil should be pierced. The trustees' veil piercing claim against Columbia Construction is not at issue on appeal.

[10] C. Stumpo has not filed a brief in this matter.

A developer-appointed trustee was the sole trustee of the condominium trust when the above concerns were discovered and raised in 2005 to 2007. On September 21, 2009, several unit owners were also elected as trustees. The unit owner trustees filed their complaint a year later on September 20, 2010.[11] The following month, on October 21, 2010, the developer-appointed trustee was removed as trustee.

Discussion. The pertinent three-year statute of limitations for all of the trustees' claims at issue is set forth in G. L. c. 260, § 2B. In determining whether the statute of limitations had run by the time the trustees filed their complaint, we first look to when the trustees' claims accrued and also address whether the statute of limitations was tolled.

1. Accrual dates. As a general rule, tort actions accrue at the time of injury. Silvestris v. Tantasqua Regional Sch. Dist., 446 Mass. 756, 766 (2006). Where an injury is "inherently unknowable," however, a cause of action does not accrue until the plaintiffs knew, or reasonably should have known, that they were harmed by the defendants' conduct. Id. "One need not apprehend the full extent or nature of an injury in order for a cause of action to accrue" (quotation and citation omitted). Id.

[11] The developer-appointed trustee was never named as a plaintiff.

a. Negligence claims. As noted above, the trustees brought negligence claims against many contractors for defective construction. The trustees' primary argument with respect to when these claims accrued pertains solely to their negligence claims for injuries arising out of leaks at building E. The trustees argue that the injuries giving rise to these claims were inherently unknowable until construction was fully completed sometime in 2008 at the earliest.

We focus our discussion, as did the trustees, on the trustees' negligence claim against Stanley Roofing. The trustees contend that building E was plagued by leaks prior to construction, that those leaks continued during construction simply because Stanley Roofing had not yet finished its work, and that the trustees' injuries arising out of those leaks were therefore unknowable until construction was fully completed. The trustees are incorrect as a matter of fact and as a matter of law.

Stanley Roofing was hired to perform specific roof work, included placing shingles on new dormers, installing new rubber roofs over certain areas, and replacing valleys, flashings, and damaged shingles as required. By the end of February 2007, as evidenced by the fact that Stanley Roofing had been paid over eighty-five percent of its contract, most of that work was completed. In March 2007, the developer e-mailed a leak summary

to Columbia Longyear. In response, Columbia Longyear ascribed some of those leaks, including leaks that were penetrating around flashing and through one of the new rubber roofs, to Stanley Roofing's work. Then, in April 2007, the developer sent Columbia Longyear an e-mail complaining about ponding on some of the new rubber roofs that Stanley Roofing had installed. Even construing the evidence in the light most favorable to the trustees, the leaks and ponding identified in March and April 2007 were the result of work already performed, not the result of an unfinished work product as the trustees contend, and were thus not inherently unknowable. See, e.g., Melrose Hous. Auth. v. New Hampshire Ins. Co., 402 Mass. 27, 33-34 (1988) (construction defects are not inherently unknowable when someone has ability to inspect and detect those defects during construction).

While, as the trustees note, Stanley Roofing performed additional work on the roof after April 2007, this does not alter our conclusion. The additional work that Stanley Roofing performed was either unrelated to the leaks and ponding identified in March and April 2007 or was treated as "warranty work" to address the leaks and ponding. As this court has previously acknowledged, a plaintiff's cause of action for a leaking roof accrues when the leak is discovered, not when a plaintiff realizes that the roof cannot be repaired. See

Mansfield v. GAF Corp. 5 Mass. App. Ct. 551, 554-555 (1977) (rejecting argument that date of discovery was date plaintiff realized roof could not be repaired).

As to the remainder of the trustees' negligence claims for injuries arising out of leaks at building E, the trustees do not raise any specific arguments as to why these claims were inherently unknowable until after construction was fully completed. To the extent the trustees rely on a general argument that none of their negligence claims for injuries arising out of leaks at building E could have accrued until after construction was fully completed, this argument fails for reasons discussed above.

The trustees raise a separate argument with respect to when their negligence claims for injuries arising out of leaks at both buildings C and E accrued. The trustees argue that information received by the developer-appointed trustee in 2005 to 2007 should not be imputed to the condominium trust for purposes of determining when these claims accrued. The trustees base this argument on their contention that the developer-appointed trustee had an interest that was adverse to the condominium trust. See GTE Prods. Corp. v. Broadway Elec. Supply Co., 42 Mass. App. Ct. 293, 299-300 (1997) (knowledge of agent not imputed to principal where agent concealed knowledge from principal and acted against interests of principal). For

reasons that we discuss more fully, infra, we do not agree. The developer, and thus the developer-appointed trustee, had the same interest as the condominium trust in holding the contractors accountable for defective construction.

We thus conclude that the trustees' negligence claims for injuries arising out of leaks at building C accrued no later than sometime in 2006 and that the trustees' negligence claims for injuries arising out of leaks at building E accrued no later than April 2007. The developer, and thus the developer-appointed trustee[12] and the condominium trust, knew about the leaks by then.

b. Negligent misrepresentation claims. The trustees also brought negligent misrepresentation claims against SBA and TAT based on statements made in construction control affidavits that SBA and TAT filed with the town of Brookline in 2002 and 2004 and that pertained to their work on building C.[13] The trustees argue that these claims were inherently unknowable until after the trustees hired counsel in connection with this case in June

[12] The trustees do not dispute that when the developer knew about the leaks, so did the developer-appointed trustee.

[13] The SBA affidavit, filed in 2002, certified that the building plans complied with building codes, that the affiant would be present on the construction site on a regular basis, and that the affiant would be responsible for reviewing certain work. The TAT affidavit, filed in 2004, certified that the affiant had inspected building C and found that it complied with all "[r]ules and [r]egulations of the codes of the Town of Brookline and the Commonwealth of Massachusetts."

2010 because the trustees, as laypeople, were not knowledgeable of such affidavits. The trustees primarily rely on Hendrickson v. Sears, 365 Mass. 83, 90-91 (1974), a case in which the plaintiffs were aware of the statements giving rise to their misrepresentation claims but had no basis to investigate whether those statements were false until a later point in time. Unlike in Hendrickson, the trustees were fully aware of the leaks at building C no later than sometime in 2006. There is no reason they could not have investigated at that time and discovered, with due diligence, that statements in publicly available documents were, as they allege, false. See, e.g., Friedman v. Jablonski, 371 Mass. 482, 486 (1976) (buyers could have discovered that sellers' statements regarding right of way were false at purchase when those statements could have been confirmed through title search).

2. Equitable tolling. Where the trustees' claims all accrued before September 20, 2007, the three-year statute of limitations had run on all of these claims, absent some form of tolling, before the trustees filed their complaint on September 20, 2010. The trustees argue that their claims should be equitably tolled during the period that the developer-appointed trustee was the sole trustee -- and thus in control of the condominium trust -- until the independent, unit owner trustees were elected on September 21, 2009.

The trustees rely on cases involving complaints brought by condominium trustees against developers or developer-affiliated entities. See, e.g., Beaconsfield Townhouse Condominium Trust v. Zussman, 49 Mass. App. Ct. 757, 757-758 (2000); Libman v. Zuckerman, 33 Mass. App. Ct. 341, 342-343 (1992).[14] Neither Beaconsfield Townhouse Condominium Trust nor Libman, however, held that the plaintiffs' claims were tolled until independent trustees were elected. In Beaconsfield Townhouse Condominium Trust, supra at 761, we did not address a tolling argument because we concluded that more than three years had elapsed between when independent trustees knew or should have known of the injury and when the complaint was filed. Libman, supra at 345, involved a master's report that pointed to the defendants' control of the condominium owners' association as additional support for the master's decision that the defendants were estopped from raising the statute of limitations. On appeal, however, we did not address that issue because we concluded that the record supported the master's primary basis for deciding that the defendants were estopped from raising the statute of limitations, which pertained to statements made by the

[14] We note that the trustees also rely on cases from other jurisdictions involving claims against developers and developer-affiliated entities.

defendants inducing the plaintiffs to forbear from bringing suit. Id. at 346-347.

Even were we to accept the plaintiffs' premise that policy considerations might in some circumstances support tolling condominium trustees' claims against a developer until independent trustees are elected -- a question we need not decide -- those policy considerations do not extend to the claims here against contractors who were not affiliated with the developer. The rationale for tolling claims against developers or developer-affiliated entities until independent trustees are elected is that developers are unlikely to sue themselves through developer-appointed trustees. See, e.g., Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372 (S.C. Ct. App. 2012). But the contractors here were not affiliated with the developer, and the developer, who was also subject to liability for defective construction, had an interest in holding the contractors accountable to pay for any repairs.[15] See Trustees of Cambridge Point Condominium Trust v.

[15] We are not persuaded by the trustees' argument that the developer would have exposed itself to liability by suing the contractors. The developer was already exposed to liability as a result of the alleged construction defects; suing the contractors would have been a way for the developer to reduce its exposure. In any event, we note the availability of Mass. R. Civ. P. 23.1, 365 Mass. 768 (1974), for the individual unit owners to bring a derivative action in circumstances where the association of unit owners fails to do so on their behalf. See,

Cambridge Point, LLC, 478 Mass. 697, 705-707 (2018). We thus discern no reason why the statute of limitations should be equitably tolled in the circumstances of this case. See Halstrom v. Dube, 481 Mass. 480, 485 (2019) (equitable tolling is to be used sparingly).

Judgment affirmed.

By the Court (Green, C.J., Henry & Sacks, JJ.[16]),

Joseph F. Stanton

Clerk

Entered: June 23, 2020.

e.g., Cigal v. Leader Dev. Corp., 408 Mass. 212, 218 & n.10 (1990).

[16] The panelists are listed in order of seniority.