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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-595**

Patricia Gearin,
Appellant,

vs.

Bailey's Nurseries, Inc.,
Respondent,

John Roe Companies 1-3, et al.,
Defendants and Third Party Plaintiffs,

Ramsey-Washington Metro Watershed District,
defendant and third party plaintiff,
Respondent,

vs.

F. F. Jedlicki, Inc.,
third party defendant and fourth party plaintiff,
Respondent,

vs.

Sunram Construction, Inc.,
fourth party defendant,
Respondent.

**Filed January 9, 2012
Affirmed
Halbrooks, Judge**

Ramsey County District Court
File No. 62-CV-09-8417

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Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's dismissal of her negligence claim based on the statute of limitations. Appellant urges this court to hold that her claim was not ripe until she knew that her personal injuries were caused by the respondents' negligent act, or alternatively, that the doctrines of equitable tolling, fraudulent concealment, equitable estoppel, or continued activity tolled the statute of limitations. We affirm.

FACTS

In early 2001, respondent Ramsey-Washington Metro Watershed District determined that Carver Pond had "filled up to a degree with sediment" and that "it was necessary to remove the sediment to restore the pond's function to its original design." The Watershed District contracted with respondent F.F. Jedlicki, Inc., who in turn hired

respondent Sunram Construction, Inc., to excavate the pond. Sunram excavated the pond on March 19, 2001, and in doing so, dumped large amounts of soil on or near the property owned by appellant Patricia Gearin.

On March 10, 2003, Gearin appeared at the Maplewood City Council meeting, where she stated:

[T]hey tossed close to over a million pounds of dirt in my backyard and crushed my septic tank, and then they were supposed to take care of it and I haven't addressed it. And my chickens have died and now they move the chicken house a little bit. Now I am down to just a few chickens. They keep on getting disease. You know, I can't—I just can't deal with this.

Gearin also stated that she was suffering from a number of medical problems.

On April 22, 2009, Gearin sued Bailey's and the Watershed District, alleging that the negligent dumping of the soil caused her health problems. The Watershed District brought a third-party claim against its contractor, Jedlicki, who asserted a fourth-party claim against Sunram.

In October 2009, Bailey's, the Watershed District, Jedlicki, and Sunram (hereinafter respondents) moved for summary judgment on statute-of-limitations grounds. The district court initially denied the motions without prejudice to allow Gearin time for discovery on the issue of whether alleged fraudulent concealment by respondents suspended the running of the statute of limitations. Following additional discovery, respondents renewed their motions for summary judgment. The district court granted the motions, concluding that Gearin's negligence action against respondents was barred because it accrued more than six years before April 22, 2009, and that she failed to prove

that the respondents fraudulently prevented her from realizing that she had a cause of action or that the doctrines of equitable tolling or equitable estoppel tolled the statute of limitations. This appeal follows.

D E C I S I O N

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006). In doing so, we “view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

We first address whether Gearin’s claim is barred by the applicable statute of limitations. “The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo.” *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). The party asserting the affirmative statute-of-limitations defense has the burden of establishing the elements. *Id.*

The statutory limitations period for a negligence cause of action is six years. Minn. Stat. § 541.05, subd. 1(5) (2010). The statute does not address when a negligence

cause of action accrues, so the question of when Gearin's claim accrued must be answered by looking to case law.

In *Antone*, the supreme court held that “a cause of action accrues, and the statute of limitations begins to run, on the occurrence of any compensable damage, whether specifically identified in the complaint or not.” 720 N.W.2d at 336; *see also Park Nicollet Clinic v. Hamann*, ___ N.W.2d ___, ___, 2011 WL 6057981, at *3 (Minn. Dec. 7, 2011) (reaffirming that the ability to ascertain exact amount of damages is not required); *Dalton v. Dow Chem. Co.*, 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968) (“[T]he alleged negligence . . . coupled with the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues.”). This rule strikes a balance between the “occurrence” rule, which assumes that the cause of action accrues simultaneously with the negligent act, and the “discovery” rule, under which the cause of action accrues only when a “plaintiff knows or should know of the injury.” *Antone*, 720 N.W.2d at 335.

Based on the principles articulated by the supreme court in *Antone*, we conclude that Gearin's claim accrued more than six years before she brought her lawsuit. The transcript from the city council meeting on March 10, 2003, evidences that Gearin knew that respondents' dumping of the soil (the negligent act) had caused her septic tank to break (some compensable damage). While Gearin urges this court to hold that the accrual date for personal-injury negligence actions is the date on which a plaintiff knows of her physical injury, the supreme court has explicitly rejected a discovery accrual date.

Gearin argues alternatively that the six-year statute of limitations does not apply to her because her claim is not based on a “single act,” but rather two separate acts (the initial dumping and the subsequent moving of the soil to her neighbor’s yard) or continuing violations. We disagree. The district court correctly concluded that this argument lacks merit because the negligent act was the dumping. The other “acts” that Gearin alleges are related to mitigating that damage (moving the soil) or the progression of damages related to that initial act (the alleged toxins seeping into the well). The negligent act occurred when the soil was dumped on Gearin’s property.

II.

Having concluded that respondents established a valid statute-of-limitations defense, we next examine whether Gearin has established a case of fraudulent concealment, equitable estoppel, or equitable tolling that is sufficient to toll the statute of limitations. We review de novo whether a party established an equitable-tolling claim. *See Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. App. 2003) (analyzing whether the undisputed facts sufficiently meet the elements of fraudulent concealment to toll the statute of limitations).

Fraudulent Concealment

Fraudulent concealment shifts the inquiry in a statute-of-limitations case “to include not only an examination of the plaintiff’s knowledge, but also an examination of the defendant’s conduct.” *Williamson*, 661 N.W.2d at 650. “To establish fraudulent concealment, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action, that the statement was known to be false, and that

the concealment could not have been discovered by reasonable diligence.” *Id.* (quotation omitted).

Gearin’s fraudulent-concealment claim rests on her version of events, part of which is supported by the record, part of which is not, and most of which occurred after March 10, 2003. She essentially alleges that respondents, in collaboration with the city of Maplewood (which she plans to join as a defendant if the action survives), actively thwarted her ability to bring her claim within six years by failing to provide her with relevant documentation, by actively misleading her into thinking that her health problems were unrelated, and by targeting her for code violations, thereby distracting her (and financially draining her) so that she could not timely bring her claim. Whether or not these allegations are true, none of these acts *concealed* Gearin’s claim. *See Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990) (holding that a claim of fraudulent concealment requires the party to show that the cause of action was actually concealed). As of March 10, 2003, Gearin knew that she had a claim against respondents. Fraudulent concealment therefore does not apply.

Equitable Estoppel

Gearin cites no Minnesota cases recognizing equitable estoppel as a doctrine that is distinct from fraudulent concealment, and the district court, citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990), concluded that equitable estoppel and fraudulent concealment are the same. Equitable estoppel, like fraudulent concealment, “comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations.” *Cada*, 920

F.2d at 450-51 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97, 66 S. Ct. 582, 584-85 (1946)). Because Gearin offers no basis on which to treat these two doctrines differently, and we see none, we conclude that the district court properly treated them as the same. Because Gearin does not have a viable fraudulent-concealment claim, she does not have one based on equitable estoppel either.

Equitable Tolling

Equitable tolling “permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence [she] is unable to obtain vital information bearing on the existence of [her] claim.” *Id.* at 451 (citing *Holmberg*, 327 U.S. at 397, 66 S. Ct. at 585). Equitable tolling differs from fraudulent concealment “in that it does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing.” *Id.* There are two reasons why Gearin’s equitable-tolling argument fails. First, she has not shown that her cause of action was concealed. Second, the *Cada* court emphasized that in equitable-tolling cases, the statute of limitations typically has run before the plaintiff knew of her claim. *Id.* at 453. But when “the necessary information is gathered after the claim arose *but before the statute of limitations has run*, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so.” *Id.* (emphasis added). Gearin offers no explanation for why she did not bring her claim immediately upon suspecting that her personal injuries could be caused by the alleged toxins in the soil.

Affirmed.