Affirmed and Opinion filed December 13, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01191-CV

HERBERTS-O'BRIEN, INC., Appellant

V.

LOCKWOOD, ANDREWS & NEWNAM, INC., AND GILBANE BUILDING CO., Appellees

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On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 98-60910

O P I N I O N

This is an appeal from a summary judgment based on the statute of limitations. In three points of error, appellant challenges the trial court's findings that (1) no disputed fact issues exist on appellees' affirmative defense, (2) the "discovery rule" did not toll the statute of limitations, and (3) appellant did not raise a scintilla of evidence to support its claim. We affirm.

Background and Procedural History

Appellant, Herberts-O'Brien, Inc. ("O'Brien"), filed suit against appellees,

Lockwood, Andrews and Newman ("Lockwood") and Gilbane Building Company ("Gilbane"), for breach of contract, breach of warranty, and negligence. O'Brien contracted with Lockwood to design the renovation project of a warehouse for O'Brien's use. O'Brien then contracted with Gilbane to perform the construction. Gilbane completed construction in 1992 and O'Brien first began using the third floor mezzanine.

O'Brien's representative, Joseph McErlane, testified by deposition that O'Brien's employees noticed that the concrete surface of the third floor mezzanine began to degrade "from almost Day 1" and that "deterioration" and "cracking" were seen in 1992. In October of 1995, O'Brien used concrete to patch areas of the degrading and cracked floor, and O'Brien further applied epoxy to the cracks in March of 1996. McErlane testified he began working for the company in 1996, at which time he personally noticed the floor "spalling"[1] and saw the replacement patch of concrete, which he estimated was "probably some 12-foot-by-12-foot." In early 1997, O'Brien installed steel plates over the concrete to reduce the impact of the failure. However, it was not until June of 1997 that O'Brien hired an expert, Michael Lee, to determine why the third floor mezzanine was deteriorating and cracking. On December 28, 1998, O'Brien filed suit against appellees alleging that Lockwood and Gilbane used an incorrect concrete mix, and Gilbane filed a cross action against Lockwood for indemnity and/or contribution.

The trial court granted summary judgment to both appellees based on limitations. Lockwood nonsuited its cross claim and the summary judgment became a final judgment. O'Brien moved for new trial on September 27, 2000, and requested findings of fact and conclusions of law. After a hearing on both motions, the trial court denied the motion for new trial along with the request for findings of fact and conclusions of law. This appeal followed.

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[1] "Spalling" is defined as "loss of spalls from a face or edge (as of brick, stone, or concrete) due to any cause." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2181 (1993). "Spall"is defined as "chip, flake; *esp:* a small fragment broken from the face or edge of a material . . . ." *Id.*

Standard of Review

Lockwood and Gilbane moved for summary judgment under Rule 166a of the Texas Rules of Civil Procedure. The standard for review "is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law." *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Under this traditional standard, this court must take as true all evidence favorable to the nonmovant and must make all reasonable inferences in the nonmovant's favor. *See id*.

When a defendant moves for summary judgment on an affirmative defense, it must conclusively prove all the essential elements of the defense as a matter of law. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984); *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 434-35 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Where, as here, the trial court does not specify the grounds for granting summary judgment, we may affirm the judgment if any of the grounds advanced within the motion are meritorious. *See Cincinnati Life Ins. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996).

Analysis

Because O'Brien's three points of error all touch on the central issue of whether the trial court erred in granting summary judgment on limitations, we will address them together.

Lockwood and Gilbane sought summary judgment on O'Brien's breach of contract, breach of warranty, and negligence claims based on the affirmative defense of limitations. A defendant seeking summary judgment on limitations must prove when the cause of action accrued and must negate the applicability of the discovery rule, if pled by the nonmovant. *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990). A suit for negligence must be brought two years after the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2001). A breach of contract or breach of warranty claim must be filed within four years after the cause of action accrues. *Id*. § 16.004 (Vernon Supp. 2001). It is

undisputed that the renovations and construction were completed in 1992. Lockwood and Gilbane's summary judgment proof established that as early as 1992 and "from almost Day 1," O'Brien was aware of the cracks in the third floor mezzanine; O'Brien did not file suit until 1998.

Limitations commences when a party is aware of enough facts to apprise him of his right to seek a judicial remedy. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 829 (Tex. 1990). O'Brien's pleadings claim the injury suffered was the "mezzanine floor began cracking, spalling, and suffering from other forms of deterioration." The summary judgment proof established that O'Brien's employees visibly noticed the injury complained of when they noticed the floor was "cracking" and "degrading" in 1992. We find these facts establish that O'Brien's right to seek a judicial remedy became apparent in 1992, and the suit filed in 1998 was barred by limitations.

However, O'Brien claims the statute of limitations was tolled by the discovery rule. Generally, a cause of action accrues when a wrongful act causes an injury, regardless of when the plaintiff learns of the injury. *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998). An exception to this rule occurs when "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994). Under this exception, known as the discovery rule, "a cause of action does not accrue until a plaintiff knows or, through the exercise of reasonable care and diligence, 'should have known of the wrongful act and resulting injury'." *Childs*, 974 S.W.2d at 37 (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)). In cases where the discovery rule applies, accrual occurs when the plaintiff knew or should have known of the wrongfully caused injury, not when the plaintiff knew of the specific nature of each wrongful act that may have caused injury. *See KPMG*, 988 S.W.2d at 749.

O'Brien relies on *Thomson v. Espey Huston & Assoc., Inc.*, in arguing the discovery rule should be applied in this case. 899 S.W.2d 415 (Tex. App.—Austin 1995, no writ).

However, that case is distinguishable. In *Thomson,* appellants brought suit alleging negligent design of a defective drainage system more than two years after construction was completed. *Id*. at 417-18. The *Thomson* court held the discovery rule applied in that case because the injury was "inherently undiscoverable" until the drainage and water runoff system was flooded; that is, until appellants were afforded an opportunity "to test the final product." *Id*. at 422-23. In this case, O'Brien began testing the final product when it began using the completed floor in 1992, at which time they noticed "cracking" and "degrading" from "almost Day 1." Thus, the summary judgment evidence shows the problem was not "inherently undiscoverable" but rather was discovered by O'Brien as early as 1992.

We find this case to be similar to *Bayou Bend Towers Council of Co-Owners v. Manhattan Construction Company*, 866 S.W.2d 740 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Like Bayou Bend, O'Brien claims the concrete used was not of a correct mixture and that its cause of action did not accrue until a hired expert determined the cause of the problem. This court rejected a similar argument in *Bayou Bend*, holding that the discovery rule did not apply and that the statute of limitations began to run when appellant discovered the existence of water leakage and cracks in precast panels, even though it did not know the cause of the cracking problem. *Id*. at 744. In these circumstances, the relevant issue for limitations is the knowledge of the existence of a problem and not the cause. *See id*.

Here, as noted above, O'Brien discovered the "cracking" and "degrading" problem in 1992. The fact O'Brien did not attempt to discover the cause for five years does not trigger the discovery rule and therefore the statute of limitations was not tolled. O'Brien's expert, Michael Lee, testified and produced notes from his June 1997 conversation with McErlane that show Lee was informed that the third floor mezzanine had been "degrading over three years." Thus, based on O'Brien's statement to its expert in July 1997, at the latest, O'Brien discovered the cracking and degrading problem by mid-1994. Knowledge of facts, conditions, or circumstances that cause a reasonable person to make an inquiry leading to the discovery of the cause of action is, in the law, equal to knowledge of the cause

of action itself for limitations purposes. *Stewart Title Guar. Co. v. Becker,* 930 S.W.2d 748, 756 (Tex. App.—Corpus Christi 1996, writ denied). The summary judgment evidence shows that O'Brien had knowledge of such circumstances as early as 1992, and no later than mid-1994. However, O'Brien failed to file suit until December 28, 1998, by which time limitations had run on all of O'Brien's claims.

O'Brien further argues a fact issue exists as to when it should have known the cracking was more than normal wear and tear. However, no evidence supports the suggestion that these cracks, "probably some 12-foot-by-12-foot," could be considered normal. *See Bayou Bend*, 866 S.W.2d. at 746. Existence of cracks is enough to put a reasonable person on notice of his injury. *Id.* at 744; *see Polk Terrace, Inc. v. Curtis*, 422 S.W.2d 603, 605 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.) (finding a reasonably prudent person would make inquiry after masonry cracks appeared in house within first year of home ownership). Further, the summary judgment evidence indicates O'Brien's problem was more than mere cracking, it was "spalling," "cracking," and "degrading" to a point that required a "12-foot-by-12-foot" concrete replacement patch, epoxy coating, and steel beam supports. In summary, we hold O'Brien should have discovered the nature of its injury by the use of reasonable diligence when it became aware of "degrading" and "cracking" in 1992 and at the very latest by mid-1994. However, suit was not filed until December 28, 1998, outside the applicable statute of limitations. Accordingly, O'Brien's points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 13, 2001.

Panel consists of Justices Yates, Edelman, and Wittig[2].

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[2] Senior Justice Wittig sitting by assignment.