

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**ROBERT E. ALBERTS and JANET A. ALBERTS, husband and wife,**  
Plaintiffs,

vs.

**DAVID J. SEADORE, d/b/a SEADORE MASONRY SERVICE,**  
Defendant and Third-Party Plaintiff,

vs.

**EXTERIOR/INTERIOR SYSTEMS, INC.,**  
Third-Party Defendant.  
Defendant.

Case No. 6746

**JUDGMENT OF DISMISSAL**

**DATE OF TRIAL:** February 1, 1999.

**DATE OF DECISION:** February 2, 1999.

**APPEARANCES:**

For plaintiffs: William V. Steffens with plaintiffs.  
For defendant: James G. Kube with defendant.  
For third-party defendant: no appearance.

**SUBJECT OF ORDER:** separate trial on the merits upon issue of statute of limitations to the court without a jury.

**FINDINGS:** The court finds and concludes that:

1. The plaintiffs assert a claim for breach of an express written warranty. The defendant warranted his workmanship in the installation of brick veneer siding to the plaintiffs' home. The plaintiffs claim that the defendant failed to install required flashing above doors and windows. The plaintiffs also claim that the defendant improperly applied adhesive in the weep channels of the flashing. They allege the improperly applied adhesive prevents water from being carried down and out of the wall. In his amended answer, the

defendant asserts the statute of limitations. In response, the plaintiffs' amended petition alleges that the defendant is equitably estopped from asserting the statute of limitations.

2. Pursuant to statute, the defendant requested a separate trial on the issue of the statute of limitations. Both counsel waived a jury on behalf of their clients. The court conducted the trial and took the matter under advisement.

3. The parties agree that the applicable statute of limitations is NEB. REV. STAT. § 25-223 (Reissue 1995). That section provides:

Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

4. The plaintiffs' claim clearly relies upon alleged improper workmanship during the initial installation. The parties stipulated that the installation was completed no later than July 31, 1991. The parties further stipulated that the action was commenced on January 26, 1998. Obviously, the action was not commenced within four years of the date of completion. The first question is, when does the cause of action accrue and, thus, the statute of limitations begin to run.

5. The cause accrues when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Smith v. Butler Mfg. Co.*, 230 Neb. 734, 433 N.W.2d 493 (1988). Conversely, the statute does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). It is not necessary that the plaintiffs have knowledge of the exact

nature or source of the problem, but only knowledge that the problem existed. *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 433 N.W.2d 485 (1988).

6. The first problems with fallen bricks or bulging bricks occurred no later than the “fall” of 1991. At the latest, these conditions were sufficient to place upon the plaintiffs a burden of inquiry to determine the true facts. The cause of action began to accrue no later than December 21, 1991. The case was not filed within four years, i.e. on or before December 21, 1995. Consequently, the court must determine whether the statute was tolled or otherwise does not apply.

7. This is not a “discovery” case. In other words, the express language of the statute regarding discovery does not apply. The cause of action reasonably could have been discovered within five months after the completion of installation. That is obviously within the statutory four-year period, and prior to the start of the statutory period of “one-year preceding the expiration of such four-year period.” Consequently, the “discovery” provision (providing for 2 years after discovery to commence suit) does not apply based on the plain language of the statute.

8. Ordinarily, a defendant alleging the statute of limitations as an affirmative defense bears the burden to prove such defense. *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). However, if a petition on its face shows that the cause of action is barred by the statute of limitations, the plaintiff must allege facts to avoid the bar of the statute and, at trial, has the burden to prove those facts. *Broekemeier Ford, Inc. v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). Even if the amended petition on its face did not show the bar of the statute, the defendant sustained its initial burden to prove the underlying applicability of the statute.

9. The court finds that, disregarding the allegations of equitable estoppel, the amended petition on its face shows the bar of the statute. The plaintiffs were therefore required to allege facts to avoid the bar, and have pleaded an equitable estoppel. The plaintiffs bear the burden of proving those facts. *Id.* The burden of proof rests on the party

who pleads an estoppel to establish the facts upon which the estoppel is based. *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988).

10. In order to avoid the consequences of the statute of limitations, the plaintiffs rely upon the doctrine of equitable estoppel. The rationale supporting the doctrine has been stated:

[E]stoppel precludes a defendant from asserting the statute of limitations when his actions have fraudulently or inequitably invited a plaintiff to delay commencing legal action until the relevant statute of limitations has expired, or when the defendant has done anything that would tend to lull plaintiff into inaction so that his vigilance is relaxed.

Before estoppel can toll the statute of limitations, the party to be estopped must be apprised of the facts; the other party must be ignorant of the true state of facts, and the party to be estopped must have acted so that the other party had a right to believe that the party intended its conduct to be relied upon; and the other party relied on the conduct to its prejudice.

Estoppel to plead limitations may arise from agreement of the parties, or from the defendant's conduct or representations, including those of his agent or representative, or even from his silence when under an affirmative duty to speak. The issue is whether the conduct and representations of the parties are so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions.

While estoppel will lie in cases of fraud or deception, or fraudulent concealment, courts have not required fraud in the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception. Nevertheless, a defendant must have done something amounting to an affirmative inducement to plaintiff to delay bringing the action. *Before the doctrine of estoppel may be used to bar the defendant's use of the statute of limitations, the fraud must be of such character as to prevent inquiry, or to elude investigation, or to mislead the party who claims the cause of action. Equitable estoppel will not toll a limitations statute when parties possess timely knowledge sufficient to place them under a duty to make inquiry and ascertain all the relevant facts.*

54 C.J.S. *Limitations of Actions* § 24 (1987) (emphasis supplied) (footnotes omitted).

11. In *State on Behalf of Hopkins v. Batt*, 253 Neb. 852, \_\_\_ N.W.2d \_\_\_ (1998), the Nebraska Supreme Court again stated that the elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of

material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; and as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

12. The elements of equitable estoppel must be established by clear and convincing evidence. *Commerce Sav. Scottsbluff, Inc. v. F.H. Schafer Elev., Inc.*, 231 Neb. 288, 436 N.W.2d 151 (1989). Each element of equitable estoppel, i.e. all six elements, must be proved by clear and convincing evidence. *Agrex, Inc. v. City of Superior*, 7 Neb. App. 237, \_\_\_ N.W.2d \_\_\_ (1998); *Cavanaugh v. Debaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992). Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Agrex, Inc. v. City of Superior, supra*.

13. The court has considered each element as follows:

a. *Conduct Amounting to False Representation or Concealment or Calculated to Convey False Impression.* The plaintiffs do not rely upon, nor have they established, any statements of the defendant constituting false representations. They have not shown any concealment or effort at concealment by the defendant. The court finds that the defendant's conduct in attempting repairs is consistent, not inconsistent, with the plaintiffs' contention that the defendant improperly installed the siding. Although the defendant initially told the plaintiffs that he would fix the problem, it was evident by the fall of 1992, well within the statute of limitations, that he had not cured the problem. The recurrence of symptoms during the fall of 1992, after the repairs attempted during the spring

or summer of 1992 had failed, plainly demonstrated that the defendant had not fixed the problem. The defendant's conduct did not fulfill the first element of estoppel.

b. *Intention or Expectation to Influence.* The evidence does not show that the defendant intended to influence the plaintiffs not to investigate further. The defendant made no promises that the problem had been fixed. As noted above, events well within the statute indicated otherwise.

c. *Actual or Constructive Knowledge of Facts.* Because the defendant performed the installation, the plaintiffs satisfied their burden on this element.

d. *Lack of Knowledge or Means of Knowledge.* The plaintiffs failed to establish this element. There is simply nothing to show that they could not have investigated in 1991, 1992, or at the latest, 1993, the real cause of their problem. There is nothing to show that the expert opinion on which they now rely was not then available or that they could not have obtained that information. Equitable estoppel will lie only where the party asserting estoppel does not have the same knowledge of the facts that the party being estopped has, and does not have the ability to ascertain or is not chargeable with notice of those facts. *Agrex, Inc. v. City of Superior, supra.* While the plaintiffs might not have initially possessed that knowledge, they had the ability to ascertain those facts. The law charges them with such knowledge as they might, in the exercise of reasonable diligence, have obtained.

e. *Good Faith Reliance.* In much the same way that the plaintiffs failed to establish conduct of the defendant justifying reliance, they have failed to establish this element. Reliance cannot be supported when the underlying conduct does not support estoppel.

f. *Inaction to their Detriment.* The plaintiffs have established this element.

14. The court accordingly finds that the plaintiffs have failed to meet their burden of proving an estoppel by clear and convincing evidence. The action is therefore barred by the statute of limitations and must be dismissed with prejudice.

15. The defendant's third-party petition is rendered moot by the dismissal of the plaintiffs' amended petition.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. JUDGMENT is entered in favor of the defendant and against the plaintiffs on the issue of the statute of limitations, and the plaintiffs' amended petition is dismissed with prejudice at the plaintiffs' cost.

2. The defendant's third-party petition is dismissed as moot.

3. Costs in the amount of \$200.60 are taxed to the plaintiffs and judgment entered in favor of the defendant and against the plaintiffs for such amount. Such judgment shall bear interest at 5.545% per annum from date of judgment until paid.

Entered: February 2, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_\_.
- : Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_\_.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: 2/2/99 Signed "Judgment of Dismissal" entered dismissing plaintiffs' amended petition with prejudice, dismissing third-party petition as moot, and taxing costs of \$200.60 to plaintiffs.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_\_.

Mailed to:

**BY THE COURT:**

\_\_\_\_\_  
William B. Cassel, District Judge