STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

CYNTHIA COBB,

Plaintiff,

v

File No. 06-7374-CK
HON. PHILIP E. RODGERS, JR.

GENERAL HOUSING CORPORATION, a Michigan corporation, and THOMAS O. MASON d/b/a B & T HOMES,

Defendants.
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Attorneys for Plaintiff

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Attorney for Defendant Mason

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DECISION AND ORDER GRANTING
DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

This action involves allegations that Plaintiff's modular home, manufactured by Defendant General Housing Corporation and constructed by Defendant Thomas Mason d/b/a B&T Homes, was defective and the defects resulted in damage to the modular home and injury to the Plaintiff.

Defendant Mason filed a motion for summary disposition, pursuant to MCR2.116(C)(7), which was scheduled for hearing on April 30, 2007. After the hearing, the Court granted the parties additional time to brief whether MCL § 600.5839 applies to Defendant General Housing Corporation and whether Plaintiff's negligent construction claim is time-barred.

MCL § 600.5839 provides, in pertinent part, as follows:

> Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or **against any contractor** making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. [Emphasis added].

The 10-year statute of repose begins running at the time of occupancy or use or acceptance of the improvement to real property, without regard to when a plaintiff's cause of action accrues. *Abbott v John E. Green Co*, 233 Mich App 194; 592 NW2d 96, appeal denied 461 Mich 868; 603 NW2d 779 (1998). The statute of repose prevents a cause of action from ever accruing when more than ten years elapses from date of occupancy or use or acceptance. *Smith v Quality Const Co*, 200 Mich App 297; 503 NW2d 753 (1993). The Plaintiff filed this action on December 18, 2006, one day less than ten years after she occupied the home on December 19, 1996.

It is undisputed that Defendant Mason was the "contractor" that constructed the modular home on Plaintiff's property. Therefore, MCL § 600.5839 applies to Plaintiff's claims against Defendant Mason. Her claims are time-barred by the six-year statute of limitations in this section, because the damage was sustained within the six-year period of limitation even though the Plaintiff might not have discovered the cause of the damage until after the limitations period had expired. *Fennell v John J. Nesbitt, Inc*, 154 Mich App 644; 398 NW2d 481 (1986).

The only exception to the applicability of the six-year period of limitation is the following language: "one year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the

action is brought **and** is the result of gross negligence on the part of the contractor." [Emphasis added.]

In her supplemental brief, the Plaintiff claims that she discovered on December 29, 2005 that her home was built in 1982 and not 1996. She filed this action on December 18, 2006, less than one year later. However, she did not allege any gross negligence. At the hearing, Plaintiff's counsel argued that the Defendants' deliberate conduct of knowingly selling a 1982 model modular home as a 1996 model when it did not comply with various amendments to the Building Code that had been enacted over the years was tantamount to gross negligence.

"Gross negligence" is defined as conduct so reckless as to demonstrate substantial lack of concern for whether injury results. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). Applying this definition, the question becomes whether reasonable minds could differ regarding whether Defendant's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. This Court does not believe that reasonable minds could differ. No reasonable juror could conclude that by selling Plaintiff a 1982 model modular home even if it was represented as a 1996 model was conduct so reckless as to demonstrate a substantial lack of concern for whether injury resulted. Therefore, the one-year discovery provision for claims of gross negligence does not apply.

The 10-year statute of repose begins running at the time of occupancy or use or acceptance of the improvement to real property, without regard to when a plaintiff's cause of action accrues. *Abbott v John E. Green Co*, 233 Mich App 194; 592 NW2d 96, appeal denied 461 Mich 868; 603 NW2d 779 (1998). The statute of repose prevents a cause of action from ever accruing when more than ten years elapses from date of occupancy or use or acceptance. *Smith v Quality Const Co*, 200 Mich App 297; 503 NW2d 753 (1993). The Plaintiff filed this action on December 18, 2006, one day less than ten years after she occupied the home on December 19, 1996. However, the six-year statute of limitations had already run and the gross negligence one-year discovery rule did not apply, so her claim was already time-barred.

In summary, the six-year period of limitations ran out in 2002. The Plaintiff has not alleged any facts that would trigger application of the one-year discovery rule for claims of gross negligence. Therefore, her cause of action against Defendant Mason is time-barred.

Defendant General Housing Corporation filed a supplemental brief. It argues that it is a "contractor" as that term is used in MCL § 600.5839 and the Plaintiff's claims against it are time-barred for the same reasons that her claims against Defendant Mason are time-barred.

MCL § 600.5839 does not apply, however, unless General Housing is a contractor. If General Housing merely manufactured the home and had no part in its construction on Plaintiff's property, then it would not be a "contractor." See, *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511; 573 NW2d 611 (1998).

In the *Frankenmuth* case, the issue was whether the manufacturer of a modular home was a "contractor" as that term is used in MCL § 600.5839. The Court of Appeals held that the manufacturer of a prefabricated, mass-produced modular home who provided no individualized expertise to construct the particular improvement on the real estate was not a "contractor" entitled to assert the statute of repose concerning improvements to real property as an affirmative defense to an action asserting that a fire which destroyed the home 20 years after it was delivered was caused by a defective ceiling vent fan installed by the manufacturer as original equipment. The Supreme Court reversed, saying that the statute does not make a distinction on the basis of whether a defendant offers a mass-produced product. Instead, the focus is on whether a defendant "makes an improvement to real property." Since the manufacturer of the home in *Frankenmuth delivered the modular home and placed it on a foundation on the plaintiff's property*, the manufacturer made an improvement to the real property, was a "contractor" within the meaning of the statute of repose, and the action was time-barred.

In the instant case, General Housing manufactured the modular home, but did not provide any individualized expertise to construct this particular improvement on the real estate. General Housing merely delivered the modular home to Plaintiff's property. It did not even place it on a foundation.[1] Defendant Mason, who installed the modular home, made all of the improvement to the real estate.

Taken to its extreme, Defendant General Housing's argument would result in every supplier who delivers supplies to a construction site being deemed a "contractor." This Court does not think that was what the legislature had in mind when it enacted MCL § 600.5839.

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[1] The parties submitted contradictory affidavits regarding who placed the modular home on the foundation. The affidavit submitted by General Housing was not signed and, therefore, is rejected by the Court.

Since Defendant General Housing is not a "contractor" and MCL § 600.5839 does not apply, what statute of limitations does apply?

Plaintiff has alleged that she purchased a modular home from Defendant General Housing that was supposed to be new in 1996 when it was actually built in 1982. She claims that the defect in the modular home is "the date on which her house was built." And that she did not discover this "manufacturing-date defect" until December 29, 2006. She further alleges that this "manufacturing-date defect" was the proximate cause of at least two of her injuries: (1) she paid for a new modular home but received a 14-year old home so she is entitled to the difference in value and (2) she suffered mold damage because the modular home was built according to the requirements of the 1981 building code which did not require the ice shield that is required by the 1993 code.

While the Plaintiff's argument is creative, the Court is not persuaded that a "manufacturing date" is a "defective and unsafe condition of an improvement to real property" covered by MCL § 600.5839. Instead, the facts alleged by the Plaintiff support a breach of contract action, an action under the Michigan Consumer Protection Act, and an action for fraud.

The general statute of limitations for breach of contract actions is six years. MCL § 600.5807(8). The cause of action accrues when the breach occurs. MCL § 600.5827. Thus, any breach of contract action is time-barred.

Under the Michigan Consumer Protection Act ("MCPA"), MCL 445.903,

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
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> * * *
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> (d) Representing that goods are new if they are deteriorated, altered, reconditioned, used, or secondhand.
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> * * *
>
> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

And MCL 445.911(7) provides as follows:

> An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date. However, when a person commences an action against another person, the defendant may assert, as a defense or counterclaim, any claim under this act arising out of the transaction on which the action is brought.

Therefore, the statute of limitations for a cause of action under the MCPA is six years and the cause of action accrues at the time of the transaction, not when the injury occurs. MCL § 600.5827; *Laura v DaimlerChrysler* Corp, 269 Mich App 446; 711 NW2d 792 (2006); *Boyle v Gen Motors Corp*, 468 Mich 226, 230; 661 NW2d 557 (2003).

As for any alleged causes of action based on fraud, the claim accrues when the wrong is done. MCL § 600.5827. The discovery rule does not apply to the accrual of actions for fraud. *Boyle v General Motors Corp*, 468 Mich 226, 231-232; 661 NW2d 557 (2003). See, MCL § 600. 5813 and § 600.5827; *Ramsey v Child, Hulswit & Co*, 198 Mich 658; 165 NW 936 (1917) and *Thatcher v Detroit Trust Co*, 288 Mich 410; 285 NW 2 (1939) which are cited by the Court in *Boyle*. Therefore, Plaintiff's causes of action for fraud accrued when the wrong was done, and she had six years thereafter to file her complaint. Because Plaintiff failed to do so, her causes of action against Defendant General Housing are barred.

In conclusion, the causes of action the Plaintiff alleges against Defendants Mason and General Housing are barred by the applicable statutes of limitations. The Defendants' Motions for Summary Disposition should be and hereby are granted. This action is dismissed with prejudice.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/15/07