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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001305-MR

LORE, LLC; THOMAS R. BAEKER, M.D.; COMMONWEALTH HEMATOLOGY-ONCOLOGY, P.S.C., D/B/A COMMONWEALTH CANCER CENTER OF LONDON — APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 10-CI-00029

MOONBOW INVESTMENTS, LLC; BRANSCUM CONSTRUCTION COMPANY, INC.; SHERIDAN L. SIMS/ARCHITECT P.S.C.; QORE, INC.; JOHNS CREEK PARKWAY, INC. AS SUCCESSOR IN INTEREST TO QORE, INC.; AND ADVANTAGE GROUP ENGINEERS, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Appellants, Thomas R. Baeker, M.D., Lore, LLC, and Commonwealth Hematology-Oncology, P.S.C. d/b/a Commonwealth Cancer Center of London, brought fraud, breach of contract, and professional negligence claims against Appellees, Moonbow Investments, LLC; Branscum Construction Company, Inc.; Sheridan L. Sims/Architect P.S.C.; Advantage Group Engineers, Inc.; and QORE, Inc.[1] Appellants' claims arose from the design and construction of an oncology center in London, Kentucky. The circuit court granted summary judgment, on various grounds, in favor of all Appellees. We find the circuit court committed no error in so awarding summary judgment. Accordingly, we affirm.

I. Facts and Procedure

In early 2006, Appellants expressed interest in purchasing from Moonbow two lots located in the Moonbow Investments Development (the Property). They intended to construct a medical office building on the Property (the Project). Moonbow allegedly represented to Appellants that the land consisted of "great lots" suitable for the construction of the planned building.

Appellants assembled a team of professionals to assist in the design and construction of the Project. Appellants first contacted Branscum about being the general contractor for the Project; however, no formal contract was signed at the time. Branscum then involved Sims, a licensed architect, to provide architectural

[1] During the course of the proceedings before the circuit court, Johns Creek Parkway, Inc. filed motions and other documents as "a successor in interest to QORE, Inc." Both QORE and Johns Creek are appellees to this appeal. Any reference in this opinion to QORE necessarily includes both entities.

design services, and Sims retained Advantage to provide structural engineering services.

Concerns quickly arose about the potential for severe differential settlement under the building's slab foundation. Accordingly, prior to Appellants' purchase of the Property, they retained QORE, a geotechnical engineering firm, to provide geotechnical exploration services. Based on its geotechnical testing and analysis, QORE advised Appellants in an April 2006 report that "they have several concerns about the project site" but also stated that "the project is adaptable for the proposed construction" provided certain stabilization measures were undertaken. Notably, QORE warned Appellants there was a risk of soil settlement which could result in significant structural damage to the building.

Appellants next retained S&ME, Inc. to provide additional geological testing and engineering drawings to stabilize the Property's rear slope. S&ME issued its slope stability report in June or July 2006. S&ME found the slope was placed over organic materials, and recommended that it be removed and replaced with new, compacted engineered fill.

Based on the QORE and S&ME reports, Branscum, Sims, and Advantage revised the site plan to alleviate, to the extent possible, the potential for stability problems,[2] and relayed their plan to the Appellants. Appellants were allegedly told

[2] The modifications included: (i) moving the building forward to be on less fill and further away from the rear slope; (ii) placing the X-Ray vault on a caisson foundation system; and (iii) redesigning the parking layout to allow for better water drainage. (R. 1547-54).

to expect some cracking and agreed to a minimal settlement range of ¼ to ½ inch. Sims then reported to Advantage that "we [Sims and the Appellants] are a go with this site, if cracking is a minimum and easily reparable."

In June 2006, Appellants entered into a contract of sale with Moonbow to purchase the Property. Moonbow executed a deed transferring the Property to the Appellants.

The design phase of the Project wrapped up in September 2006. At that time, Appellants entered into an AIA "Standard Form of Agreement Between Owner and Contractor" with Branscum to perform the construction work.

The building was completed in late summer 2007, and Appellants took beneficial occupancy. According to the Appellants' complaint, they observed that the building was moving due to "significant settlement" which, according to the Appellants, resulted in "structural distress." (R. 11). Appellants observed wall cracks in the rear of the building in June 2008.

In August 2008, Appellants requested that Charles Maus, the Advantage structural engineer, visit the site to ascertain the cause of the foundation movement and of the wall cracking. Maus performed a field investigation and issued a report dated September 4, 2008. Therein, Maus first recorded his observations as follows:

> The cracks are occurring along the wall adjacent to the patio common with the exterior wall of the clean and dirty storage room and continue back to the northwest corner and along the west elevation of the medical

> offices, the conference/break room, and to the southwest corner at the radiation oncology office.
>
> The north wall of the storage room and rear medical office contains "stair step" cracks that are consistent with vertical foundation movement. The cracks at the west wall of this wing include separation of the interior drywall at the base of the wall where intersecting with the exterior wall and a crack between the floating slab on grade and the foundation wall along the entire wall length.

(R. 828). He then stated, "These cracks depict both a vertical and horizontal movement of the foundation." (*Id.*). Ultimately, he concluded that "the foundation movement may be due to the base of the foundation being placed on some of the questionable un-engineered fill. Further geotechnical exploration would be required to determine this." (R. 829). He then opined what the future might hold, stating:

> I fear that over time this fill material may continue to move due to varying moisture contents as it is subjected to the wet and dry cycles of the local climate. These varying moisture contents may continue to subject the foundation to movement if the soil has properties that cause it to shrink and swell. If this is the case, [a] foundation stabilization system will likely need to be installed at this foundation to control that movement.

(R. 829). Maus recommended Appellants monitor the foundation for additional movement over the next six to nine months to determine the propriety of installing a foundation stability system and, if cost feasible, repairing the cracking.

The extent to which the parties, individually or collectively, monitored the building's movement from this point forward is unclear. However, the record does

reveal that on December 20, 2008, Sims sent an email to all the involved parties detailing the timeline relating to the building's design relative to the soil issues encountered on the site. Therein, Sims stated that, "based on what I have read surrounding this issue[,] I believe one of the related settlement issues is a deep layer of poor quality fill below the foundation that is compressing leading to the building cracks." (R. 843).

Next, a meeting was held on February 26, 2009, among Appellants, Branscum, QORE, and S&ME to discuss the building's status. At that meeting, Branscum requested that QORE conduct an engineering site visit to observe the building's distress. Following the site visit, QORE issued a report on March 3, 2009. Although QORE opined that the "building distress does not appear to be structurally significant [and is] currently cosmetic in nature[,] QORE also said,

> The building does appear to be experiencing settlement of the foundation along the back . . . wall. The outside edge of the footing seems to have rotated downward creating a rotation of the exterior wall. . . . A topographic survey of the floor slab should be performed to document the actual movement of the slab. . . . Retain an engineering firm to evaluate the building distress and develop remedial measures to fix the observed distress.

(R. 1019).

Appellants then hired AGE Engineering Services, Inc. to monitor the building's foundation and assess its current movement patterns. On May 12, 2009, AGE notified Appellants that the building was still moving. At this point,

Appellants installed a helical pier foundation to underpin the structure and took other remedial measures, thereby incurring $188,363.02 in remediation costs.

On January 11, 2010, Appellants filed suit against the Appellees. In their complaint, Appellants alleged Branscum "breached its contract agreement with [the Appellants] by providing a building that was designed with and constructed on a foundation system that was not proper or sufficient for the support of the structural loads imposed by the building." Appellants also claimed QORE, Sims, and Advantage were negligent in that they "knew or should have known that the fill material was not suitable to support a shallow foundation system for the building." Finally Appellants asserted Moonbow fraudulently misrepresented that the Property was suitable for the construction of the oncology center.

In addition to Appellants' claims, a web of cross-claims and counterclaims emerged among the parties. Discovery ensued.

In November 2011, QORE, Advantage, and Sims moved for summary judgment arguing Appellants had filed suit beyond the one-year statute of limitations set forth in Kentucky Revised Statute (KRS) 413.245. The circuit court agreed and, on January 19, 2012, granted summary judgment in favor of these three defendants. The circuit court also granted QORE's motion for fees and costs and, by order entered June 28, 2012, found that QORE was entitled to recover attorney's fees in the amount of $11,500.00 from the Appellants.

Moonbow also moved for summary judgment, arguing Appellants' fraud claim failed as a matter of law because any reliance by Appellants on Moonbow's

alleged "great lots" statement was unreasonable in light of the independent report issued by QORE, which detailed the potential stability issues associated with the Property and advised of possible, structurally-significant settlement. The circuit court agreed and, on January 19, 2012, granted summary judgment in favor of Moonbow.

Finally, Branscum moved for summary judgment, arguing it did not breach its contract with Appellants. Branscum asserted the contract was only for the construction-phase of the Project, and that it contained no provision requiring Branscum to provide soil compaction testing or soil removal. Branscum argued the damages incurred by Appellants fell outside the scope of work contained in the contract. The circuit court agreed and, on June 28, 2012, granted summary judgment in favor of Branscum.

This appeal followed. We will discuss additional facts as they become relevant to our review.

II. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). We must "view the evidence in the light most favorable to the nonmoving party," and we will only sustain the circuit court's grant of summary judgment "if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R*

Corp., 56 S.W.3d 432, 436 (Ky. App. 2001). "[S]ummary judgments involve no fact finding[.]" *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 61 (Ky. 2010). Our review is *de novo*. *Id.*

Additionally, this appeal involves the interpretation of a contract, which is a matter of law and is also reviewed under the *de novo* standard. *Coleman v. Bee Line Courier Serv., Inc.*, 284 S.W.3d 123, 125 (Ky. 2009).

III. Analysis

There are four issues before us. First, did the circuit court err when it found no genuine issue of material fact and granted Branscum's motion for summary judgment? Second, did the circuit court err in finding the applicable statute of limitations barred Appellants' professional negligence claims against QORE, Sims, and Advantage? Third, did the circuit court abuse its discretion in granting QORE's motion for attorney's fees and costs? And fourth, did the circuit court err in finding Appellants' fraud claim against Moonbow failed as a matter of law?

A. Breach of Contract

Appellants first argue that the circuit court mistakenly concluded, as a matter of law, that Branscum was retained only for the construction-phase of the Project and erroneously found that the cause of the damage underlying Appellants' claims fell outside the scope of Branscum's contractual responsibilities.

The contract between Appellants and Branscum, which the parties entered into on September 25, 2006, required that Branscum "fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others." Branscum was responsible for furnishing "materials, labor, equipment, temporary facilities, coordination" and necessary supervision, while Appellants were responsible for providing architectural and engineering designed drawings with state and local approvals. Also among Branscum's responsibilities under the contract was "Site Work" which included stabilizing and constructing slope; clearing and grubbing; stripping top soils; mass earth cut and fill; silt control; replacing top soils; and providing a storm drainage system per the site plans provided by Advantage. Rock excavation and unsuitable soil removal were explicitly ***excluded*** from Branscum's scope of work. The contract further required Branscum to provide: (i) all footing excavation necessary for the building's foundation and flat work; (ii) footings, foundations, and slab under grade; (iii) caissons located under the radiation area; and (iv) insulation around the building and below grade to insure frost and freeze protection. Branscum agreed to furnish and install guttering and downspouts.

In granting Branscum's summary-judgment motion, the circuit court reasoned:

> Contractually, Branscum was hired only to furnish labor, materials, and facilities necessary to complete the project. The architects and engineers were hired to design and engineer the structure. Branscum was never contracted to provide soil compaction testing or soil removal. . . .

> Branscum cannot be held responsible for damages which occur outside the scope of work Branscum was hired to perform.

The circuit court also refused to rely on Appellants' submission of parol evidence of additional communications between the parties which Appellants claim resulted in additional contractual obligations for Branscum.

On appeal, Appellants argue that the circuit court erred by: (1) finding Branscum was not retained to provide design services; (2) refusing to consider parol evidence showing Branscum's design responsibilities; and (3) concluding no genuine issue of material fact existed as to Branscum's liability for breach of its obligation under the parties' contract.

Viewing the evidence and record in a light most favorable to Appellants, we agree that Branscum, as a matter of fact, participated during the design phase of the Project. The circuit court did not find to the contrary for there was no dispute that Branscum's involvement with the Project began in early 2006 and proceeded through both the design and construction phases. However, as is clear from the record and the circuit court's ruling, Appellants only claim against Branscum is for *breach of contract*. And, the only written contract between the parties is the September 25, 2006 contract described above that is wholly silent as to Branscum's design responsibilities, if any were provided by Branscum.

Appellants readily admit that this contract "was entered into after the completion of the *design-phase* of the project and **served only to memorialize the parties' rights and obligations in regards to the final** *construction-phase*."

(Appellants' Brief at 4) (italicization in original; bold emphasis added). Even the affidavit of Melvin Riddle (which alludes to the parol evidence the circuit court declined to consider) states that "Branscum executed a contract agreement with [Appellants] dated September 25, 2006 [and t]hat this document was only for the construction/build phase of the design-build project. At the time this document was executed by the parties, the design phase was complete."[3]

Appellants assert the circuit court erred when it refused to consider parol evidence of Branscum's design responsibilities. They acknowledge that "[t]he parol evidence rule . . . prevents the introduction of oral statements into evidence to alter a written agreement, per force lending integrity to writings." *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007). However, Appellants seek to circumvent the parol-evidence rule by invoking two exceptions to the doctrine: (i) the partially-integrated exception, and (ii) the collateral-contract exception.

Appellants first argue that the construction contract was a partially-integrated agreement. They assert Branscum actually performed under an agreement for the design-phase of the project, and the construction contract was only part of the parties' larger agreement. Based on such assertion, Appellants

[3] The parol evidence the Appellants urged the trial court to consider is primarily contained in Melvin Riddle's affidavit. Riddle worked for Appellants when he made his affidavit. In it, he said he had previously worked "as project manager at Branscum" and "was in charge of and managed the design-build project" commissioned by Appellants. He states "Branscum agreed to provide design-build services to [Appellants and] hired Sheridan Sims / Architect, P.S.C. to work on the Project . . . ." After "Branscum paid Sims' retainage fee of $8,000 . . . [Appellants made] direct payments to Sims . . . for the remainder of Sims' work on the project." Nothing in the affidavit indicates that Appellants ever paid any sum to Branscum for design services. (R. 1514-16).

consider the construction contract as partially integrated and, as a result, they maintain that the circuit court erred in concluding that parol evidence barred all evidence of the parties' actions and agreements in relation to the design-phase of the Project.

"It is a basic tenet of contract law that when a written agreement is not an integrated or complete contract, parol evidence which supplements the writing is admissible." *Kovacs v. Freeman*, 957 S.W.2d 251, 257 (Ky. 1997). Unfortunately for Appellants, the integration exception offers them no footing upon which to admit parol evidence in this case because the contract at issue *is* an integrated agreement. *Coleman*, 284 S.W.3d at 125 ("[T]he interpretation of a contract . . . is a question of law for the courts[.]" (citation omitted)). The contract document states that it "represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either oral or written." Absent an ambiguity, "a written instrument will be enforced strictly according to its terms." *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). Because the contract features an integration clause, it is "unnecessary and impermissible" to resort to parol evidence. *In re Thirteenth Floor Entm't Ctr., LLC*, 507 F. App'x 473, 477 (6th Cir. 2012).

Appellants next argue the collateral-contract exception to the parol-evidence rule. They assert their breach-of-contract claim is founded on an oral agreement with Branscum in relation to the design work and, under the "doctrine of collateral contract," parol evidence is permissible to prove the existence and terms of that

oral agreement. The doctrine of collateral contract provides that "a prior or contemporaneous oral contract which is independent of, collateral to, and not inconsistent with, the written contract, may be proved by parol evidence. A collateral oral agreement is allowed to be proved because it is a thing apart from the one represented by the writing." *Texas Gas Transmission Corp. v. Kinslow*, 461 S.W.2d 69, 71 (Ky. 1970) (citation omitted). The collateral-contract exception offers Appellants no relief and we reject it for two reasons.

First, Appellants' complaint contains no allegation or inference of an oral contract between the parties. Appellants "may not escape summary judgment by raising allegations which [they] might have made in [their] complaint but did not." *Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 253 (Ky. App. 2004).

Second, we have examined the parol evidence submitted by Appellants and find that evidence inadequate to establish an oral contract between Appellants and Branscum. For the doctrine of collateral contract to apply, the oral contract must be independent of the written contract; it must stand on its own. *See Kinslow*, 461 S.W.2d at 71; *Beaver v. Oakley*, 279 S.W.3d 527, 534 n.26 (Ky. 2009) (an oral contract falling outside the statute of frauds is binding and enforceable by both parties). However, simply averring that an oral agreement exists is not enough to defeat summary judgment because "[n]ot every agreement or understanding rises to the level of a legally enforceable contract." *Kovacs*, 957 S.W.2d at 254. Rather,

a valid oral contract, like a written contract, requires "offer and acceptance, full and complete terms, and consideration." *Coleman*, 284 S.W.3d at 125.

In this case, as proof that an oral contract existed between the parties, Appellants submitted two affidavits in which both affiants stated that, in "January 2006, Branscum agreed to provide design and build services to [Appellants] for the Project[.]" (R. 1512, 1515). These, however, constitute the affiants' conclusion that an agreement existed rather than indicators that the Appellant could produce evidence creating a genuine fact issue regarding any element of an oral contract.

Ironically, Appellants also offered as proof of Branscum's oral agreement Architect Sims' proposal to provide design services, wherein Sims requires as a condition of his service that "the Client [Appellants] agree to limit the Design Professional's [Sims'] liability for the Client's damages to the sum of the Design Professional's Architectural fee . . . regardless of the cause of action or legal theory pled or asserted." (R.1519). Furthermore, Sims proposed that his architectural renderings and designs, "as instruments of the Architect's . . . professional service, shall become the property of the client [Appellants] upon completion of the project and payment in full of the Architect's service fee." (*Id.*).

In short, Appellants offered proof supporting all elements of a contract for design services with Sims, but no evidence as to the terms of Branscum's alleged oral agreement, its duration, or any independent consideration. "[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine

issue of material fact requiring trial." *Burton v. Ky. State Police*, 341 S.W.3d 589, 592 (Ky. App. 2011) (citation omitted). We find the evidence submitted by Appellants insufficient to create a jury issue as to whether Branscum and Appellants had a separate agreement consisting of the requisite contractual elements – offer, acceptance, consideration, and mutual assent. *Veluzat v. Janes*, 462 S.W.2d 194, 196-97 (Ky. 1970) (for an oral contract claim to proceed, "[t]here must be least some semblance of definiteness as to what services were to be rendered, when they were to begin and how long they were to last, and what was promised in recompense for the services"). In sum, we find that while Branscum participated in assessing the viability of the Project prior to entering into its written construction contract with Appellants, there is no evidence it acted pursuant to a contract which is necessary to Appellants' breach-of-contract claim. The circuit court properly denied Appellants' attempts to introduce impermissible parol evidence.

As to the written contract for construction, Appellants argue genuine issues of material fact remain as to whether Branscum was in breach. They claim clear questions of fact exist as to what part of the damages resulted from negligent design and what part resulted from Branscum's failure to abide by the terms of the construction contract. Branscum counters that Appellants' argument fails because they did not plead a negligent-construction claim. Instead, Branscum argues, Appellants' breach-of-contract claim is premised solely on its belief that Branscum

committed a design error, not a construction error, which ultimately led to Appellants' damages.

As we previously touched upon, Appellants alleged in their complaint that Branscum "breached its contract agreement with [Appellants] by providing a building that was designed with and constructed on a foundation system that was not proper or sufficient for the support of the structural loads imposed by the building." Notably absent from this allegation is any claim that Branscum did not construct the building as designed. Stated differently, Appellants failed to plead and, further, failed to produce evidence that the damages they suffered were caused, at least in part, because Branscum failed to construct the building in conformity with the plans and specifications provided by the engineering and architecture professionals. Therefore, the circuit court properly granted summary judgment in favor of Branscum.

B. Statute of Limitations

Appellants next argue that the circuit court erroneously entered summary judgment in favor of QORE, Sims, and Advantage. The circuit court's order did not address the merits of the underlying dispute, but rather found that Appellants' professional-negligence claims against these entities were not timely filed within the one-year statute of limitations set forth in KRS 413.245.

The parties are in agreement as to the legal principles that guide our decision. First, KRS 413.245 contains a one-year statute of limitations for actions

"whether brought in tort or contract" that arise "out of any act or omission in rendering, or failing to render, professional services for others[.]"

Second, engineering and architecture are "professional services" that fall within the ambit of KRS 413.245. KRS 413.243; *Matherly Land Surveying, Inc. v. Gardiner Park Development*, LLC, 230 S.W.3d 586, 589 (Ky. 2007) ("[E]ngineering is a professional service under KRS 413.245."); *Old Mason's Home of Ky., Inc. v. Mitchell*, 892 S.W.2d 304, 306 (Ky. App. 1995) (a cause of action against an architect is covered by KRS 413.245).

Third, KRS 413.245 contains two different measures of the limitations period: the occurrence rule and the discovery rule. Thus, under this statute, an aggrieved party must commence a professional malpractice cause of action within one year from either the date of: (a) occurrence, or (b) "actual or constructive discovery of the cause of action." *Queensway Fin. Holding Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 148 (Ky. 2007); KRS 413.245. The dispute in this case centers on the discovery component.[4]

The discovery rule serves to toll the limitations period until the aggrieved party discovers "or, in the exercise of reasonable diligence, should have" discovered both his injury and the responsible party. *Queensway*, 237 S.W.3d at 148; *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982) (explaining the limitations period begins "with the discovery that a wrong has been committed"). The

[4] Appellants make no claim that they filed suit within one-year from the date of occurrence. Instead, the discussion centers on whether they filed suit within one-year from the date on which they actually or constructively discovered a cause of action against these professionals. We confine our analysis accordingly.

discovery rule is often invoked "where the injury and the discovery of the causal relationship do not necessarily occur simultaneously." *Blanton v. Cooper Industries, Inc.*, 99 F. Supp. 2d 797, 801 (E.D. Ky. 2000). "This rule entails knowledge that a plaintiff has a basis for a claim before the statute of limitations begins to run. The knowledge necessary to trigger the statute is two-pronged. One must know: (1) he has been wronged; and (2) by whom the wrong has been committed." *Wilson v. Paine*, 288 S.W.3d 284, 286 (Ky. 2009).

Appellants maintain they filed their complaint within one year of May 2009, which was the date on which they discovered, or reasonably should have discovered, their cause of action against QORE, Sims, and Advantage. Appellants argue the discovery of cracks in 2008 did not alert them to the fact that a wrong had been committed or that the injury may have been caused by the professionals' conduct because some cracking was customary and anticipated. Cosmetic cracking, Appellants contend, was simply not cause for alarm. Appellants assert it was not until May 2009 that they discovered settlement and damage beyond the ordinary and beyond that which was agreed to by the parties. Accordingly, Appellants maintain they did not know their injury was indeed caused by the Appellees' conduct until they learned in May 2009 of the abnormal and continuing settlement attributable to design flaws. We are not persuaded by this argument because there was more than mere cosmetic cracking in 2008 to alert the Appellants to their cause of action.

We agree with Appellants that mere cosmetic cracking – without more – would not have been enough to trigger the discovery rule and commence the running of the statute of limitations. The record indicates clearly that, even before the Appellants purchased the lot, they were concerned enough about the possibility of structural stress to engineer the site to avoid it. While cosmetic cracking was expected and anticipated, as with any new construction, Appellants readily admit in their complaint that, after taking beneficial occupancy of the building, they "noticed that the building began to move, *experiencing structural distress due to significant settlement*." (R. 11)(emphasis added).

"Structural distress" is more than cosmetic cracking. In August 2008, the cracking was of such a degree that Appellants summoned Maus to investigate and identify the cause of the damage. The mere fact their concern was sufficiently aroused to call in Maus indicates they considered the degree of cracking more than they agreed to accept as "anticipated" and cosmetic. The September 4, 2008 memorandum Maus sent to the Appellants following that investigation, in fact, described far more than mere cosmetic cracking. Maus explained:

> The cracks are occurring along the wall adjacent to the patio common with the exterior wall of the clean and dirty storage room and continue back to the northwest corner and along the west elevation of the medical offices, the conference/break room, and to the southwest corner at the radiation oncology office.
>
> The north wall of the storage room and rear medical office contains "stair step" cracks that are consistent with vertical foundation movement. The cracks at the west wall of this wing include separation of the interior

> drywall at the base of the wall where intersecting with the exterior wall and a crack between the floating slab on grade and the foundation wall along the entire wall length. *These cracks depict both a vertical and horizontal movement of the foundation.*

(R. 828)(emphasis added). Maus then addressed the root cause of the foundation's movement, concluding: (i) the movement may have been caused by the foundation being placed on some of the "questionable un-engineered fill" identified in the April 2006 QORE report; and (ii) excessive moisture to the fill could be aiding in the movement and/or settlement of the building.

We acknowledge that Maus used qualifying language in his report such as "may have been" and called for "further geotechnical exploration." This language, however, is legally insufficient to warrant disregarding the facts that put the Appellants on notice of the claim or to prevent the trial court from applying the statute of limitations as it did here. *Cf. Mitchell*, 892 S.W.2d at 308 (indicating that the statute of limitations will not be tolled absent a potential defendant's "false representations, fraudulent[] conceal[ment of] his alleged negligence, or . . . promises in exchange for [a claimant's] forbearance in filing a claim"; applying KRS 413.190(2)).

Based on Maus's report, Appellants certainly had cause to doubt the professional workmanship offered by these appellees. Furthermore, on December 20, 2008, Sims reiterated that "poor quality fill" was causing the foundation's movement and leading to the building cracks. Even if the Appellants failed to find Maus's report sufficient, by itself, to arouse their suspicion that the engineering

and architectural services provided were substandard, Sims' assessment that came on the heels of Maus's report surely should have been. "Any fact that should excite his suspicion is the same as actual knowledge of his entire claim . . . *[and] the means of knowledge are the same thing in effect as knowledge itself*." *Hazel v. General Motors Corp.*, 863 F. Supp. 435, 440 (W.D. Ky. 1994) (emphasis added). At least by December 2008, Appellants were under an affirmative duty "to use diligence in discovering [their] cause of action" and to file suit within the one-year limitations period. *Id.*

Once the suspicion of harm arises, the aggrieved party must be diligent in disabusing himself of the unfounded concern, or confirming his suspicion of wrongdoing.

> The discovery rule focuses not on when a plaintiff has actual knowledge of a legal cause of action, but whether a plaintiff acquired knowledge of existing facts sufficient to put the party on inquiry. "Reasonable diligence" is required of plaintiffs.

Blanton, 99 F. Supp. 2d at 802 (internal citations omitted).

We recognize that QORE stated in its March 3, 2009 report that the "building distress does not appear to be structurally significant[.]" However, that report does not affect our analysis. First, the remainder of the report, some of which is set out in this opinion, substantiates rather than refutes the report Maus made many months earlier.

Second, we have concluded that when QORE issued its report, the limitations period had already begun to run. The question becomes whether this

QORE report was sufficient to estop the appellees from claiming the limitations defense, or to toll the running of the limitations period.[5] The answer is no. For such an argument to be successful there must be more than is present in this case. For example,

> Mere negotiations looking toward amicable settlement do not afford a basis for estoppel to plead limitations. [Numerous citations omitted]. Instead, there must be 'some act or conduct which in point of fact misleads or deceives the plaintiff *and* obstructs or prevents him from instituting his suit while he may do so." [Citations omitted]

Gailor v. Alsabi, 990 S.W.2d 597, 603 (Ky. 1999)(emphasis added).

Similarly, in another construction design defect case the owner "claim[ed] that [the architect] continued to inform it that he was investigating the cause of the problems[,]" thereby lulling the owner into inaction. *Mitchell*, 892 S.W.2d at 308. We declined to rule that the limitations period was tolled, stating "there is absolutely no evidence that [the architect] made any false representations, fraudulently concealed his alleged negligence, or made any promises in exchange for [the owner's] forbearance in filing a claim." *Id.* In this case, QORE admitted to the "building distress" but simply did not yet ascribe "structural[] significan[ce]" to it. In light of the other statements contained in that report, we cannot say that QORE made a false representation, or concealed any negligence, or made a

[5] Appellants do not make a tolling or estoppel argument. However, they do urge us to consider the impact of the appellees' conduct and communications subsequent to Maus's September 4, 2008 report and Sims' December 20, 2008 correspondence. We have done so in a light most favorable to the Appellants.

promise in exchange for Appellants' agreement to delay filing a lawsuit. The limitations period in this case was never tolled.

An aggrieved party cannot sit on his rights. Accordingly, we find, under the facts of this case that, exercising reasonable diligence, Appellants reasonably should have discovered that they had been wronged at the hands of these professionals by at least December 20, 2008, at which time the statute of limitations began to run. Again, it is "knowledge that one has been wronged[,]" not "knowledge that the wrong is actionable" that triggers the running of the limitations period. *Conway*, 644 S.W.2d at 334. Despite such knowledge, Appellants failed to file suit until January 11, 2010, which was beyond the one-year limitations period. Appellants' complaint was untimely. The circuit court properly granted summary judgment in favor of QORE, Sims, and Advantage on statute-of-limitations grounds.

C. Attorney's Fees and Costs

Appellants contend the circuit court improperly granted QORE's motion for attorney's fees. "[A]n award of attorney fees is within the sound discretion of the trial court, and its decision will not be disturbed absent a finding of abuse of discretion." *Golden Foods, Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 240 S.W.3d 679, 683 (Ky. App. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

The parties do not dispute that the contract between the Appellants and QORE provided that, "should either party resort to dispute resolution procedures, including . . . litigation . . . the non-prevailing party shall reimburse the prevailing party's documented legal costs[,]" including attorney's fees. Instead, Appellants assert that the fee award sprung from the circuit court's erroneous conclusion that their claims against QORE are barred by the statute of limitations. In light of our analysis regarding the statute, we reject this argument. As discussed, we have found Appellants' professional-negligence claim against QORE was filed outside the one-year statute of limitations. Pursuant to the terms of the contract between QORE and Appellants, QORE, as the prevailing party, is entitled to recover costs, including attorney's fees, from the Appellants.

Appellants also claim the circuit court abused its discretion in determining the fee amount to award. They characterize the fee award as excessive. In support, Appellants argue it was unreasonable for QORE to participate in this litigation for nearly two years before raising the statute-of-limitations defense by way of a summary-judgment motion. We disagree.

Resolution of the statute-of-limitations inquiry was fact-intensive. Despite the seemingly long passage of time, discovery was still in its infancy but proceeding at a reasonable pace. Indeed, Appellants did not submit their first discovery requests until almost a year after filing suit. We simply see nothing in the record indicating QORE was inappropriate in the manner in which it conducted

discovery, or that it failed for an unreasonable period of time to move for summary judgment.

Moreover, QORE demonstrated its requested fees and costs were reasonable and reflected the "value of bona fide legal expenses incurred." *Capitol Cadillac Olds, Inc. v. Roberts*, 813 S.W.2d 287, 293 (Ky. 1991). QORE initially sought attorney's fees and costs in the amount of $22,667.84. It submitted invoices and at least one affidavit in support of and attesting to the accuracy of its request. The circuit court awarded QORE roughly half of the fee amount sought. "The trial judge is generally in the best position to consider all relevant factors and require proof of reasonableness from parties moving for allowance of attorneys fees." *Roberts*, 813 S.W.2d at 293. We cannot say the circuit court's fees and costs award represents an abuse of discretion. On this issue, we affirm.

D. Fraud

Finally, Appellants argue that the circuit court erred by dismissing upon summary judgment their fraud-by-misrepresentation claim against Moonbow. In their complaint, Appellants alleged Moonbow fraudulently misrepresented the condition of the Property. Appellants framed their claim as follows:

> At the time of the sale of the property to [Appellants], Moonbow Investments represented that Lots 4 and 5 were "great lots" suitable for the construction of a medical office building. Upon information and belief, prior to the sale of Lots 4 and 5 to [Appellants], Moonbow Investments had performed some limited construction to provide a structural subgrade sufficient to support the planned oncology center facility on a shallow spread foundation system. [Appellants] relied upon the

> representations of Moonbow Investments in arriving at its decision to purchase Lots 4 and 5.
>
> [Moonbow] knew or should have known that the property on which the Project was constructed was not improved as was represented to [Appellants] prior to the sale of the property.

Furthermore, in its brief to this Court, Appellants assert Moonbow falsely represented that it tested the fill during placement, and falsely represented that the fill was properly engineered.

If a seller such as Moonbow perpetuates fraud, thereby inducing a person to purchase real property, the purchaser may be entitled to recover from the seller on the basis of that fraud. *Yeager v. McLellan*, 177 S.W.3d 807, 809 (Ky. 2005) (explaining false and fraudulent misrepresentations made to persuade a purchaser to enter into a contract do not merge into a deed of conveyance so as to preclude an action for fraud). In Kentucky, a party claiming fraud must establish six elements by clear and convincing evidence: (1) a material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon; and (6) which causes injury. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). With regard to the reliance element, the plaintiff "must prove that his reliance on the misrepresentation was reasonable, and in making this determination, the Court should consider the plaintiff's knowledge and experience." *Bassett v. National Collegiate Athletic Ass'n.*, 428 F. Supp. 2d 675, 682 (E.D. Ky. 2006);

Radioshack Corp., 222 S.W.3d at 262 (the aggrieved party must "prove that it reasonably relied on the representations"). The "very essence" of a fraud claim "is the belief in and reliance upon the statements of the party who seeks to perpetrate the fraud. Where the plaintiff does not believe the statements – or where he has knowledge to the contrary – recovery is denied." *Wilson v. Henry*, 340 S.W.2d 449, 451 (Ky. 1960) (internal citations omitted).

In granting summary judgment on this claim, the circuit court found persuasive Moonbow's argument that, even if Appellants could prove that Moonbow falsely represented the suitability of the Property for the proposed construction, Appellants' reliance thereon was unreasonable in light of QORE's pre-purchase report. In support, the circuit court cited to *Sanford Construction Company v. S&H Contractors, Inc.*, 443 S.W.2d 227 (Ky. 1969), which stated that:

> where the person who claims that he was defrauded made an investigation that was free and unhampered, and conditions were such that he might have obtained the information desired, or if the facts were [as] obvious to him as to the person making the representation, and the means of knowledge equal, he is presumed to have relied on his own judgment and not on the representation.

Id. at 233. Appellants counter, as they did before the circuit court, that nothing in QORE's report alerted them to the falsity of Moonbow's representations concerning the Property's suitability for the proposed medical center. Appellants further argue that had it known of the fill's instability – an issue Appellants claim was within Moonbow's knowledge – it would not have purchased the Property.

The circuit court's reasoning is sound. Appellants hired QORE, a geotechnical engineering firm, to conduct a pre-purchase evaluation of the Property. QORE concluded the Property was not sufficient, in its pre-purchase state, to support the proposed construction. Instead, QORE found the Property was *adaptable* provided certain geotechnical engineering steps were taken, explaining:

> [B]ased on the results of our drilling, our site observations and our experience, *we have several concerns about the project site.*
>
> A large volume of fill material has been placed at the project site. QORE did not observe or test the placement of the fill material, thus *in our opinion it is undocumented fill* [thus, calling into question whether the fill was, in fact, engineered]. We understand that a testing firm did perform periodic testing during placement of the fill. However, based on our observations and the results of the drilling, *we have concerns with the condition of the fill material*. Our borings encountered organic material (ie – roots), inconsistent stiffness (SPT blow counts) and moisture contends across the site. The variable nature and stiffness of the encountered material makes estimating the settlement potential of the existing fill mass difficult. Based on our experience with similar sites, *structurally significant settlement is a concern*. . . .
>
> Due to the steep angle of the fill material and the type of material encountered in our borings, *we believe there is a potential for slope stability problems of the fill slope*. A deep seated slope failure could cause significant damage to the proposed structure. As was discussed in our proposal, we recommend that the structure be shifted toward the front of the site (ie – near the roadway).

(R. 823-24) (emphasis added). In the face of QORE's warnings, Appellants cannot reasonably claim that, based Moonbow's alleged "great lots" statement, they

believed the Property was suitable at the time of purchase to support the planned medical building. We do not see how Appellants could refute the trial court's conclusion that the QORE report should have alerted Appellants to the falsity of Moonbow's representations. *Wilson*, 340 S.W.2d at 451 (indicating that an aggrieved party who is in possession of knowledge that is contrary to the false representation upon which the aggrieved party allegedly relied cannot sustain a claim of fraud). Accordingly, we find Appellants' fraud claim against Moonbow fails as a matter of law. On this issue, we find no error.

IV. Conclusion

The orders of the Laurel Circuit Court granting summary judgment in favor of the Appellees are affirmed.

ALL CONCUR.

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