[Cite as *OH Dev., L.L.C. v. Centimark Corp.*, 2010-Ohio-3245.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

OH DEVELOPMENT, LLC fka OHIO DEVELOPMENT, LLC	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23758
v.	:	T.C. NO. 07 CV 10700
CENTIMARK CORPORATION fka NORTHERN INDUSTRIAL MAINTENANCE	:	(Civil appeal from Common Pleas Court)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 9th day of July, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of OH Development, LLC, fka Ohio Development LLC ("OH Development"), filed November 23, 2009. OH Development appeals from the trial court's grant of summary judgment in favor of

Centimark Corporation, fka Northern Industrial Maintenance ("Centimark"), a commercial roofing company, on OH Development's claims of breach of contract, breach of warranty and negligence. We herein affirm the judgment of the trial court, concluding that OH Development's claims are time-barred.

{¶ 2} OH Development owns and operates several buildings at the Southpark Complex, located at Senate Drive and McEwan Road in Dayton, and it contracted with Centimark, for the installation of roofs on four buildings in the complex. The buildings are designated as Buildings I, III, IV and V. The roof on Building I was installed and inspected on December 11, 1987; the roofs on Buildings III and IV were installed and inspected on September 30, 1986; and the roof on Building V was installed and inspected on January 22, 1988. It is not disputed that Centimark issued 20 year warranties for each roof, agreeing to repair any leaks resulting from defects in materials or workmanship.

{¶ 3} OH Development filed its complaint against Centimark on December 21, 2007. Regarding its claim for breach of contract, the Complaint provides in part: "* * * 10. At all times pertinent since the installation at each of those locations, each building has been forced to endure numerous leaks, service calls and deficiencies in installation and performance of the roof structures provided by [Centimark]. * * * 12. Plaintiff has repeatedly complained to the Defendant and asked the Defendant [to] address their deficient performance under their contract, but the Defendant has at all times pertinent herein failed and refused to remedy their breach." Regarding the claim for breach of warranty, the Complaint provides in part: "15. Defendant expressly warranted the roofs they provided to be free from defects in the materials or workmanship and that Defendant would repair any

defects in materials or workmanship pursuant to their warranty. 16. Despite numerous claims by the Plaintiff, Defendant has failed and refused to honor the warranty, * * * ." Regarding the negligence claim, the complaint provides in part: "19. At all points in time herein, Defendant has negligently failed to discharge [its] duty, thereby accelerating, exacerbating and creating conditions which require constant repair and/or attention, as well as causing damage to the Plaintiff's property by virtue of the roofs not being water tight." OH Development argued below that the various and ongoing leaks over many years were not the "triggering events" for its contract, negligence and warranty claims.

{¶ 4} In granting summary judgment in favor of Centimark, the trial court relied upon "various pieces of correspondence between [the parties] over the last ten to twelve years documenting numerous problems with the roofs * * * ," along with the deposition testimony of Douglas Cramer, an employee of OH Development, and Robert Hunter, an employee of Centimark.

{¶ 5} Douglas Cramer began working as a subcontractor for OH Development in 1991, and he worked in OH Development's maintenance department in 1992. At the time of the trial court's decision, Cramer was employed as a manager at OH Development. Cramer testified in deposition that in September, 2006, he drafted a letter to Centimark regarding continual roof leaks as follows:

{¶ 6} "Q. And what is that?

{¶ 7} "A. It's a letter that I had sent to Centimark.

{¶ 8} "Q. * * * And you did that on behalf of Ohio Development?

{¶ 9} "A. And the tenants, yes.

{¶ 10} "Q. And the date of that is September 15th, 2006?

{¶ 11} "A. Correct.

{¶ 12} "Q. And it says [']during the fifteen years I've worked at Ohio Development, there have been complaints of roof leaks from tenants on every occasion it's rained.['] Is that what it says?

{¶ 13} "A. Yes.

{¶ 14} "Q. * * * And those are your words that you used?

{¶ 15} "A. Yes.

{¶ 16} "Q. And you were the one who typed this up, typed this letter?

{¶ 17} "A. Yes.

{¶ 18} "Q. * * * And you communicate that the service people are quick to respond, but the repairs do not last.

{¶ 19} "A. Correct."

{¶ 20} Cramer also testified that he believed, in the time period of 1997, that Centimark was "negligent" in their maintenance, "as far as not being able to stop the leaks."

{¶ 21} Also in the record is a proposal completed by Brian Fox, a Centimark employee, who inspected the buildings in August, 2007, preparing a report for Cramer that notes "excessive wrinkles" in the EPDM covering of the roof on Building V, caused by "improper installation or poor workmanship." According to Cramer, Fox recommended that the roof be completely replaced at that time.

{¶ 22} Robert Hunter is a national accounts sales representative for Centimark, whom the trial court misidentified in its Decision as "Plaintiff's expert." Hunter was

employed by Centimark for 28 years, beginning his employment as a laborer on a roofing crew. According to Hunter, OH Development's buildings at issue initially bore "Trocal PVC nonreinforced membrane roof[s], and it's an industry standard. You can check with anybody that the old Trocal roofs typically lasted ten years and one day, and as soon as they hit the end of their warranty, they would shatter. * * * It's a phenomenon known as plasticizer migration. PVC is a rigid material, like PVC pipe in your house, and to make it flexible, they put plasticizers in it.

{¶ 23} "Well, over time, the plasticizers leach out and leave the membrane very brittle and then something as simple as a temperature change, a sudden drop in temperature, will cause that roof to shatter, and that's what happened with [OH Development] and it's what happened with thousands of Trocal roofs around the country." Hunter testified that he was aware of the problem with Trocal roofs in 1986, and that to repair the OH Development roofs, Centimark contracted to install a type of roof called an "EPDM ballast." Hunter stated, "It's an EPDM membrane where we sweep back the existing gravel and then we install EPDM membrane over the existing [Trocal membrane] and then put the gravel back." According to Hunter, "Typically back in that time frame, we would sweep the gravel back, we would cut the [Trocal] membrane so that it would - - if it continued to shrink - - the thought process back then was that if you cut the membrane, it would limit the amount of shrinkage and what would happen underneath the EPDM, and that was typically what we followed then as well." Hunter stated that there were specific techniques employed to cut the Trocal membrane in specific areas. Hunter admitted that he recalled "performance-based issues" arising with the roofs that Centimark installed for OH

Development.

{¶ 24} In his deposition, Hunter identified a letter, dated February 9, 1995, written to him by Cramer, regarding vent pipe damage, which provides in part, "During the past several weeks a serious problem has developed with the roof systems on the buildings at our South Park Complex. Apparently the cold weather has allowed the rubber roof membrane to shift or move several inches. * * * ."

{¶ 25} The record contains an inspection report, dated March 11, 1997, that provides, "Same leak over much building area. Found leaks were caused by 21 small holes in rubber. Holes were caused by debris under rubber (rocks). Need to reroof a 10 sq area. Leaks are temped. Incomp." The following exchange occurred regarding the report during Hunter's deposition:

{¶ 26} "THE WITNESS: It means that it's leaked there before.

{¶ 27} "Q. * * * It should not if it's been appropriately repaired, correct?

{¶ 28} "A. Depends. Correct."

{¶ 29} Hunter also identified a letter that he authored to Thomas Williams, a former owner of the Southpark Complex, confirming a "rooftop" meeting that was held on April 29, 1997, along with a "log" written by Cramer (that Cramer also identified in his deposition) that provides as follows:

{¶ 30} "After the April 29 meeting between Centimark [and] O.D.C., I believe we both agree that the main cause for so many documented roof leaks over the years stem from un-supervised or unprofessional application.

{¶ 31} "Here are the basis (sic) for this comment:

{¶ 32} "(1) Centimark is currently replacing large portions of the roof on BLDG I. Reason: Debris left under the rubber membrane is pokeing (sic) small holes thru. We have taken photos and pointed out these same problems on Bldgs III, IV, [and] V. When we suggested a plan to expose these problem areas so they may be repaired, Centimark[']s response was to just leave it alone until the warranty expires.

{¶ 33} "* * *

{¶ 34} "(3) * * * Bob Hunter claims he was not aware of the various problems until we presented him with photos. My Question - how can a Centimark service tech Not see these problems. They are on the roofs repairing leaks after every rain. * * *

{¶ 35} "Over the years, O.D.C. has absorbed the cost of replacing stained ceiling pads. We have passified (sic) tenants who complained of water leaking onto their desks, floors, equipment and walls. * * * We have even lost prospective tenants who asked, (while being showed (sic) a space) Why are there so many stained ceiling pads?"

{¶ 36} Charles Painter, who is the President of NationsRoof Ohio ("Nations`Roof"), and who previously worked for Centimark until 2001, testified in deposition that he previously performed roofing repair services for OH Development as a Centimark employee, and that he replaced the roofs on all four buildings while at NationsRoof. Painter identified his affidavit in deposition which provided in part, "Affiant states that when performing repairs on the Ohio Development roofs Affiant observed that relief cuts had not been made in the Trocal membrane."

{¶ 37} Painter testified as follows regarding the above statement in his affidavit:

{¶ 38} "Q. * * * In regards to that paragraph, what repairs are you talking about?

When did that occur?

{¶ 39} "A. When I worked for Centimark * * * as well as working here at Nations Roof.

{¶ 40} "Q. * * * And tell me how you came to that conclusion * * * .

{¶ 41} "A. With Centimark when we were doing the repairs, we had a problem with the wall flashings tenting * * * well, what they look like from the outside is the membrane was just shrinking and pulling away, but actually, when you cut the rubber, the EPDM, the problem was the Trocal roof was shrinking and pulling away underneath.

{¶ 42} "Q. So your observations when you worked for Centimark is that the Trocal roof itself was shrinking?

{¶ 43} "A. Correct.

{¶ 44} "Q. Okay. And how did you come to the conclusion, then that relief cuts weren't made?

{¶ 45} "A. When we took off the EPDM at that time, the Trocal - - what they did was they ran their EPDM up over the Trocal and at the base wall they ran a batten bar and a screw through the EPDM, through the Trocal, into the wood nailer.

{¶ 46} "* * *

{¶ 47} "A. * * * So they ran this bar through, and what it was is when the PVC was shrinking and pulling, it started pulling the decking and wood nailer up, and it was pulling also the membrane. The EPDM had separated from the Trocal.

{¶ 48} "So what we had to do was take the rubber, the EPDM off, cut the Trocal, and then reattach the decking and the wood nailing and install new wall flashings, new

anchor bar, new termination bar.

{¶ 49} "Q. * * * I guess the next question is how do you know that in the other parts of the roof, that there wasn't relief cuts made?

{¶ 50} " * * *

{¶ 51} "A. What I'm trying to say is before I only knew when I did the repair. The rest I assumed or what I heard from people talking, the foreman that installed the roof, maybe what he may have said or things like that. So I was assuming it wasn't cut everywhere.

{¶ 52} "It was proven when we took off the roofs for Nations Roof that it was not cut."

{¶ 53} Thomas Williams testified that, prior to contracting with Centimark, the original roofs on the buildings "failed." According to Williams, "They failed in particular on Building II during a storm - -not a storm, but a snow load. In other words, they contracted and had a freeze, and when they freeze, they lose their elasticity, they become brittle, and that roof fractured in many, many small pieces all at once." The following exchange occurred later in the deposition:

{¶ 54} "Q. When did you first notice that there was a problem with the installation of the roofs on Buildings I, III, IV, and V?

{¶ 55} "A. Probably at the time we * * * had the problem with Building II. Then we started investigating all the buildings to see if we had problems with those also.

{¶ 56} "* * *

{¶ 57} "A. * * * but it's only logical that one would do an investigation immediately.

{¶ 58} "Q. Right. And you're talking about before Centimark's work; is that correct?

{¶ 59} "A. Yes."

{¶ 60} The contracts issued to OH Development provide that Centimark would carry out the following actions for the four roofs:

{¶ 61} "1) Sweep back existing gravel.

{¶ 62} "2) Remove existing PVC wall and projection flashing and dispose of properly.

{¶ 63} "3) Roll out and position the E.P.D.M. Rubber sheeting directly over the existing PVC membrane.

{¶ 64} "4) Flash all projections and perimeter flashings with our rubber flashing.

{¶ 65} "5) Seal and caulk all seams.

{¶ 66} "6) Spread the original gravel over the rubber for ballast."

{¶ 67} OH Development's first assignment of error is as follows:

{¶ 68} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST [OH] DEVELOPMENT, LLC ON [OH] DEVELOPMENT'S CLAIM FOR BREACH OF WARRANTY."

{¶ 69} "Civ. R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made.

(Internal citations omitted). Our review of the trial court's decision to grant summary judgment is de novo." *Cohen v. G/C Contracting Corp.*, Greene App. No. 2006 CA 102, 2007-Ohio-4888.

{¶ 70} The warranties for Buildings III and IV expired on September 30, 2006. The warranty for Building I expired on December 11, 2007. These three buildings' warranties expired prior to the filing of the complaint. Further, each of the warranties for Buildings I and V contain a provision that states:

{¶ 71} "TIME LIMIT FOR BRINGING SUIT: ANY ACTION FOR BREACH OF WARRANTY MUST BE COMMENCED WITHIN ONE (1) YEAR FROM THE DATE THAT A DEFECT IN MATERIALS OR WORKMANSHIP, OR OTHER BREACH OCCURS."

{¶ 72} OH Development directs our attention in part to the 2007 proposal completed by Brian Fox and asserts that it filed its Complaint within four months of the report. According to OH Development, "there is no basis to conclude that this warranty claim for Building V was time barred." The record clearly reflects, as the trial court noted, that OH Development had numerous and recurring leaks on all four buildings from the time of their installation, or at least as early as 1991. As Williams indicated, it would be "logical" for OH Development to investigate the cause of the ongoing problems "immediately," as it did when the roof on Building II initially failed, and OH Development cannot rely upon an inspection report completed in 2007 to assert a timely breach of warranty claim. The breaches herein occurred when Centimark failed to adequately install the roofs and repair the ongoing leaks, and OH Development failed to bring suit within the one year period

specifically set forth in the warranty for Building V. The other warranties expired before the complaint was filed. The trial court correctly determined, there being no genuine issue of material fact, that Centimark was entitled to summary judgment on OH Development's breach of warranty claim.

{¶ 73} OH Development's second assignment of error is as follows:

{¶ 74} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT ON [OH] DEVELOPMENT'S CLAIM FOR BREACH OF CONTRACT."

{¶ 75} R.C. 2305.06 provides, "Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued." As the trial court noted, R.C. 2305.06 limits a plaintiff's right to sue for damages allegedly resulting from a leaky roof in breach of a written contract. *Kocisko v. Charles Shutrump & Sons Co.* (1986), 21 Ohio St.3d 98.

{¶ 76} Despite its assertions to the contrary in its Brief, OH Development argued below that the numerous and ongoing leaks were minor, "technical" violations of the contracts, and that OH Development did not "discover Centimark's breach of contract until it hired Nations[Roof]", and "actual damages were not suffered until Plaintiff was forced to replace the leaky roofs." The trial court correctly concluded that the "evidence presented, however, demonstrates that the leaks on each were numerous, and based on the allegations in the Complaint and the deposition testimony of Cramer, that Defendant was on notice of an ongoing problem as early as 1991. To now assert that numerous leaks and problems caused

by those leaks were merely technical violations of the contract [is] problematic. Plaintiff argues that its cause of action did not accrue until it replaced the roof and thereby suffered actual damage. * * * However, there is unrefuted evidence before the court that the Plaintiff had numerous problems with the four roofs upon installation. By 1991, three to five years after the initial installation of the roofs on Buildings I, III, IV and V, there is evidence that the problems were recurring and not being addressed to Plaintiff's satisfaction by Defendant. Thus, the court finds that as a matter of law, Plaintiff's cause of action arose not later than December 31, 1991."

{¶ 77} OH Development asserts in its appellate brief that Centimark failed to sweep off the existing gravel as required by contract on one of the buildings, and it directs our attention to the 1997 inspection report to establish breach of contract. We agree with the trial court that OH Development was on notice of an ongoing problem with its roofs as early as 1991, and that the problems were not being addressed appropriately by Centimark. The1997 inspection report, identifying a large recurrent leak, the repair of which was incomplete, supports the trial court's reasoning. We agree with the trial court that OH Development's cause of action for breach of contract accrued no later than December 31, 1991. There being no genuine issue of material fact, the trial court correctly concluded that OH Development's claim for breach of contract was barred by the statute of limitations. OH Development's second assignment of error is overruled.

{¶ 78} OH Development's third assignment of error is as follows:

{¶ 79} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT ON OHIO DEVELOPMENT'S CLAIM FOR

NEGLIGENCE."

{¶ 80} "It is well settled that once a builder undertakes a construction contract, common law imposes upon him a duty to perform in a workmanlike manner." *Hortman v. Miamisburg*, 161 Ohio App.3d 559, ¶ 24. A claim for failure to perform in a workmanlike manner sounds in negligence. Id. "An action for negligence which alleges that the obligation to perform in a workmanlike manner was breached is one governed by R.C. 2305.09(D). *Velotta v. Landscaping Inc.* (1982), 69 Ohio St.2d 376; *Kirk v. Jim Walter Homes, Inc.* (1987), 41 Ohio App.3d 128. The accrual of the four year limitation period does not begin until the actual injury or damage occurs. *Id.* at 379; see *State ex rel. Local Union 377 v. Youngstown* (1977), 50 Ohio St.2d 200." *Bd. of Educ. v. Dela Motte-Larson* (1989), Cuyahoga App. No. 56775. "However, when an injury does not result immediately, the cause of action will accrue when the actual injury or damage ensues. (Citation omitted) Therefore, for purposes of R.C. 2305.09, an action will accrue and commence the running of the statue of limitation when the wrongful act is committed, unless the wrongful act does not give rise to injury immediately. (Citation omitted)." Id. (affirming dismissal of negligence cause of action that accrued when plaintiff discovered roof leakage, not ten years later when an engineer determined that the leak was due to the improper design of the building and improper installation of sections of the roof.)

{¶ 81} OH Development argues that its claim for negligence is based upon the discovery that came to its attention once Chuck Painter from NationsRoof was hired to investigate the issues with the roofs and advised OH Development that relief cuts had not been made in the Trocal membrane during the installation. We agree with the trial court,

again, that OH Development's cause of action for negligence accrued in 1991, and the four year time period expired prior to the filing of the Complaint. There being no genuine issue of material fact, OH Development's third assigned error is overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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