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Unpublished Disposition
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Appeals Court of Massachusetts.

CEDAR CREST CONDOMINIUM TRUST
v.
COSMO CAPOBIANCO & another. [1]

18-P-905
|
Entered: April 12, 2019.

By the Court (Green, C.J., Shin & Englander, JJ. [6])

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** This is a malpractice action against a former engineering firm and its owner, in which the plaintiff raises claims of negligence, negligent misrepresentation, and G. L. c. 93A violations in connection with an environmental site assessment that the defendants conducted in 1985. On the defendants' motion, a Superior Court judge dismissed the complaint under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), finding all the claims barred by the statute of limitations. The plaintiff appeals.

We take the allegations of the complaint as true. See Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998). In 1985 Leonard Frisoli, one of the individual trustees of the plaintiff, hired the defendants to perform a surface and subsurface investigation of a property he was contemplating purchasing. At the end of the investigation, the defendants certified that the site was "clean according to acceptable limits" despite the fact that a commercial laundry repair business had been operating there for many years. Relying on the defendants' certification, Frisoli purchased the property and built on it a multiunit residential building, which was later converted to a condominium. [2]

In 2014 a prospective buyer of the property retained IES, Inc. (IES), to perform another environmental assessment of the site. This assessment, dated August 8, 2014, identified reportable releases of hazardous materials in the soil and the groundwater. The plaintiff avers that until this point it "was never aware that, contrary to the [defendants'] certification, the site in 1985 was contaminated by hazardous oil and/or waste materials beyond acceptable limits." The plaintiff filed this action on August 4, 2017.

In moving to dismiss, the defendants argued among other things that the statute of limitations began running no later than 2004 when two firms, IES and EBI Consulting (EBI), assessed the site, observed potential environmental threats, and recommended further investigation. The judge agreed, concluding that under the discovery rule the plaintiff's claims accrued in 2004 because the IES and EBI assessments conducted that year put the plaintiff on inquiry notice that there might be hazardous materials on the property. [3] The judge dismissed the complaint in its entirety on this basis. [4]

***2** We review the judge's decision de novo. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). A three-year and four-year statute of limitations applies to the negligence claims and the 93A claim, respectively. See G. L. c. 260, §§ 4, 5A. All the claims are thus time barred if, as the judge found, they accrued in 2004.

Under the discovery rule, "a cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." Harrington v. Costello, 467 Mass. 720, 727 (2014). We agree with the judge that the plaintiff was on reasonable notice of its claims at least by 2004. In October of that year, EBI conducted an initial environmental screening of the site and prepared a report noting "evidence of **recognized environmental conditions** ... at the [s]ubject [p]roperty" and "recommend[ing] that a subsurface investigation be performed ... to determine

whether the past uses of the [s]ubject [p]roperty have impacted the soil and/or groundwater." EBI's report was then provided to IES, which conducted a limited assessment of the site in November 2004. IES similarly concluded that the site was a "[h]igh [c]leanup [r]isk" and a "[h]igh [e]nvironmental [r]isk ... regarding soil and/or groundwater contamination" and stressed that "[f]urther [i]nquiry [was] necessary to determine" the environmental conditions at the site. Of particular note, IES observed that "no groundwater testing was performed as part of the 1985 investigation."

These reports put the plaintiff on inquiry notice of the alleged errors in the defendants' 1985 certification. "Reasonable notice that ... a particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations." Bowen v. Eli Lilly & Co., 408 Mass. 204, 210 (1990). Though the plaintiff contends that it was not until 2014 that it learned with certainty that the 1985 certification was erroneous, "[t]he 'notice' required is not notice of every fact which must eventually be proved in support of the claim," but rather "simply knowledge that an injury has occurred." White v. Peabody Constr. Co., 386 Mass. 121, 130 (1982). The 2004 IES and EBI reports alerted the plaintiff to the significant possibility that there was contamination on the property and recommended further investigation, including groundwater testing, which IES expressly noted was not done during the defendants' 1985 assessment. We think these reports were sufficient to place a duty of inquiry on the plaintiff in 2004. As the plaintiff did not file this action until 2017, its claims are time barred and were appropriately dismissed.

For the first time on appeal, the plaintiff contends that there is a disputed factual question whether it ever received or had knowledge of the 2004 reports. The plaintiff may not present an argument on appeal that was not raised or argued before the judge. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006). While the plaintiff alluded to the issue at the very end of the hearing, it is apparent that the judge was not put on notice of any such argument, as she did not address it in her decision. The plaintiff did not raise the argument in its opposition to the motion to dismiss, mentioned it only in passing at the hearing, and did not pursue it in any postjudgment motions. We therefore deem the issue waived. See id. [5]

***3** Judgment affirmed.

All Citations

Slip Copy, 2019 WL 1768802 (Table)

Footnotes

1 Somerville Engineering, Inc. The complaint alleges that this defendant was dissolved in 1998 but was "revived" in 2017 "for the purpose of asserting against it the plaintiff'[s] claims."

6 The panelists are listed in order of seniority.

2 The plaintiff is the organization of the condominium unit owners.

3 The judge determined that she could consider the 2004 reports, which were attached to the defendants' motion to dismiss, without converting the motion to one for summary judgment. The plaintiff does not argue that this was an abuse of discretion.

4 At the hearing on the motion, the judge also concluded that the economic loss doctrine barred the negligence claim and that the complaint did not plead sufficient facts to state a c. 93A claim. The plaintiff's brief raises no argument regarding the economic loss doctrine and makes only conclusory assertions that the complaint adequately pleaded a c. 93A violation. Thus, these are independent reasons supporting the dismissal of the negligence and c. 93A claims.

5 We deny the defendants' request for appellate attorney's fees and double costs.