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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

VERONICA HERNANDEZ-KELLER et al., Plaintiffs and Appellants, v. COMSTOCK HOMES, INC., et al., Defendants and Respondents.	B272362 (Los Angeles County Super. Ct. No. KC066700)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dan Thomas Oki, Judge. Affirmed.

John L. Dodd & Associates, John L. Dodd, Benjamin Ekenes; Law Offices of Timothy J. Donahue and Timothy J. Donahue for Plaintiffs and Appellants.

Morris Sullivan Lemkul, Shawn D. Morris, Mark F. Uremovich, and Matthew J. Yarling for Defendants and Respondents.

Plaintiff Veronica Hernandez-Keller (Hernandez-Keller) purchased a home from defendant Holt/Grand LLC in 2004 and almost immediately noticed plumbing problems with the property. She and the other plaintiffs,[1] who lived in the home, submitted repair request forms over several years but the problems never abated. In 2014, plaintiffs filed a lawsuit against Holt/Grand LLC, Comstock Crosser & Associates Development Company, Inc. (Comstock), and Abel Silva (Silva) (collectively defendants). Defendants moved for summary judgment on the grounds that plaintiffs' lawsuit was untimely. The trial court granted the motion, and plaintiffs appeal. We agree with the trial court that plaintiffs knew or should have known of their claims against defendants long before this lawsuit was filed. Moreover, plaintiffs have not shown that defendants are barred from asserting the statute of limitations defense.

Accordingly, we affirm.

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[1] The plaintiffs are identified as Hernandez-Keller, Anthony Keller, Elisa Hernandez-Robertson (Hernandez-Robertson, Hernandez-Keller's sister), Michael Robertson, Angeline Hernandez (Hernandez-Keller's sister), Jessica Hernandez (Hernandez-Keller's sister), Jesus Hernandez (Hernandez-Keller's father), Angelina Hernandez (Hernandez-Keller's mother), Brandon Yau (Yau, Hernandez-Keller's nephew), and Maddix Corral (Corral, Angeline Hernandez-Keller's niece). Yau is a minor. There is no evidence regarding Corral's age. For purposes of this appeal, we assume that she is a minor.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

A. Purchase of Home; Plaintiffs Move in and Notice Leaks

In 2004, Hernandez-Keller purchased and closed escrow on the home that is the subject of this lawsuit from Holt/Grand LLC. Since 2004, plaintiffs have continuously lived in the home.

At the time she purchased the home, Hernandez-Keller received a written warranty, identifying her as the buyer and Comstock as the builder. The warranty period ran from June 10, 2004, to June 10, 2014. Pursuant to the terms of the written warranty agreement, Comstock was required to handle all matters falling under its coverage.

According to plaintiffs, they have seen evidence of leaks in three separate areas of the home.

1. *Kitchen Ceiling*

On November 4, 2004, plaintiffs sent a "request for service" to Comstock, advising that they "noticed a few yellowish stains" on the ceiling in the kitchen, family room, and master bedroom. Plaintiffs wrote, "It looks like they might be caused from a water leaking, we don't know."

Comstock must have responded to the request for service, because the form indicates that the "item" was "completed" and the bottom of the form reflects that "corrections" were made to "our satisfaction." The form is signed by Angelina Hernandez, who is identified as the "homeowner."

On January 30, 2006, plaintiffs sent another "request for service" to Comstock, again identifying a "yellow stain in the ceiling from our kitchen, which right in that direction is our upstairs bathroom. Every time the shower is on it starts leaking

downstairs. This is a continuous problem since we moved in; in summer of 2004."

Comstock must have responded to the request for service because the form indicates that the "item" was "completed" and that "corrections" were made to "our satisfaction." The signature is unclear, but someone signed the form as the "homeowner."

On January 18, 2008, plaintiffs sent another "request for service" to Comstock, stating, "Our kitchen ceiling leaks water every [] time the shower is on upstairs. There's now a few yellow stains and bubbles. This is a problem we've had since the first couple months that we moved into our home."

Comstock must have responded to the request for service because the form indicates that the "item" was "completed" and that "corrections" were made to "our satisfaction." The signature is unclear, but someone signed the form as the "homeowner."

Hernandez-Keller testified that she first saw water damage in the form of staining on the ceiling in the kitchen around June 2004. The kitchen ceiling is just below the second floor guest bathroom. According to Hernandez-Keller, the stain on the kitchen ceiling has become larger since 2004. She also testified that when someone ran the shower in the guest bathroom, water would come through the recessed light in the kitchen.

She further stated that the first time she actually saw water coming through the recessed lights in the kitchen was in 2012 or 2013.

2. *Family Room Ceiling*

As set forth above, on November 4, 2004, plaintiffs sent a "request for service" noting "yellowish" stains on the family room ceiling. On May 31, 2007, plaintiffs sent another "request for service" to Comstock, stating, "There's a round yellow stain in the

family room ceiling and now leaking water and [it's] now expanding making water bubbles throughout our family room ceiling. This was a problem that we have requested service for since we initially moved in (2004)."

The "item" was "completed" on June 9, 2007.

Hernandez-Keller testified that she first saw water damage in the form of staining in the family room within the first two years of moving into the home. According to Hernandez-Keller, there were stains and drips, and the staining grew over time, damaging the ceiling.

In November 2013, plaintiffs experienced flooding through the ceiling down into the kitchen and living room.

3. *Family Room Wall*

Hernandez-Keller identified a third leak at the wall of the family room. According to Hernandez-Robertson, they noticed the leak "[r]ight after [they] moved in."

B. Alleged Mold

Hernandez-Keller believes that there is mold in the house as a result of the leaks; she claims that she can see and smell it. She believes that she saw mold at the home prior to when she lived in the house. Her family has wondered since the beginning whether there was mold behind the walls.

A medical report prepared for plaintiffs' counsel discloses that Jessica Hernandez began experiencing allergies, skin hives, and nasal drip "[s]oon after moving in" and has had a "runny nose, cough with occasional wheezing since moving into this house 10 years ago."

C. Silva's Visits to the Home in 2013

Silva began working as a customer service representative for Comstock in 2013. He first visited plaintiffs' home in October

2013. Hernandez-Keller only spoke to him on one occasion when he was going door-to-door in the community. He told Hernandez-Keller that he was going door-to-door to see if anyone had any issues that needed to be fixed before the warranty expired.

Elisa Hernandez-Keller spoke with Silva for the first time in the fall of 2013.

Silva appeared at plaintiffs' home a second time and explained that in order for Comstock to do any repairs, a release needed to be signed.

Procedural Background

Plaintiffs initiated this lawsuit on February 28, 2014.

Plaintiffs filed their first amended complaint (FAC), the operative pleading, on October 6, 2014, alleging causes of action for negligence, strict liability, breach of warranty, unfair business practices, and fraud. Their claims rest upon damage to the home as a result of water leaks. Moreover, plaintiffs allege that Silva lied to them and tried to trick them into signing a full release in order to prevent them from filing a lawsuit.

On December 23, 2015, defendants filed a motion for summary judgment. They argued that each cause of action was barred by the statutes of limitations set forth in Code of Civil Procedure sections 337 and 338 and Business and Professions Code section 17208. Plaintiffs opposed the motion, arguing, inter alia, that defendants are estopped from raising the statute of limitations as a defense and that the delayed discovery rule applies.

After entertaining oral argument, the trial court granted defendants' motion. It found that "[t]he evidence submitted by [d]efendants demonstrate[s] that [p]laintiffs were or should have been aware of the alleged construction defects on the subject

property since 2004, but that they did not file this action until 2014." The trial court rejected plaintiffs' estoppel and/or delayed discovery rule arguments, finding that they "fail[ed] to contradict the evidence submitted by [d]efendants that [p]laintiffs first experienced and reported to [d]efendants problems with the home in 2004." And, plaintiffs "failed to allege or prove that any actions of [d]efendants which could form the basis of equitable estoppel occurred prior to the running of the limitations periods."

Judgment was entered, and this timely appeal ensued.

DISCUSSION

I. *Standard of review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Like the trial court, "[w]e first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

II. *The trial court properly granted defendants' motion for summary judgment*

"Generally, a plaintiff must file suit within a designated period after the cause of action *accrues*. (Code Civ. Proc., § 312.) A cause of action accrues 'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation. [Citation.]" (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

The parties here seem to agree on which applicable statutes of limitation apply to plaintiffs' causes of action: (1) Negligence, two years for personal injury and three years for damage to real property (Code Civ. Proc., §§ 335.1, 338, subd. (b)); (2) Strict liability, three years from the date of discovery of a latent defect (Code Civ. Proc., § 338, subd. (b); *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 647); (3) Breach of warranty,[2] four years (Code Civ. Proc., § 337, subd. (1)); (4) Unfair business practices, four years (Bus. & Prof. Code, § 17208); and (5) Fraud, three years (Code Civ. Proc., § 338, subd. (d)).

Applying these statutes of limitation, plaintiffs' causes of action against defendants are barred. The longest statutory period is four years, and their claims accrued far more than four years before this lawsuit was initiated in 2014.

A. Delayed discovery rule

Plaintiffs contend that their action is not time-barred pursuant to the delayed discovery rule. "The most important

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[2] When discussing which statutes of limitation govern, plaintiffs direct us to California Commercial Code section 2725. Because there was no sale of "goods" in this case, the Commercial Code does not apply. (Com. Code, §§ 2102, 2105, subd. (1).)

exception to that general rule regarding accrual of a cause of action is the 'discovery rule,' under which accrual is postponed until the plaintiff 'discovers, or has reason to discover, the cause of action.' [Citation.] Discovery of the cause of action occurs when the plaintiff 'has reason . . . to suspect a factual basis' for the action. [Citations.]" (*Pooshs v. Philip Morris USA, Inc.*, *supra*, 51 Cal.4th at p. 797.) "[T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof — when, simply put, he at least 'suspects . . . that someone has done something wrong' to him [citation]." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*).) The plaintiff "has reason to suspect" when he has notice or information of circumstances to put a reasonable person on inquiry. (*Id*. at p. 398.) The plaintiff need not know "'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place — he 'cannot wait for' them 'to find' him and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does [citation]." (*Ibid*.; see also *Mills v. Forestex Co.*, *supra*, 108 Cal.App.4th at p. 648 ["the limitations period begins to run when the circumstances are sufficient to raise a suspicion of wrongdoing, i.e., when a plaintiff has notice or information of circumstances sufficient to put a reasonable person on inquiry"].)

Here, plaintiffs had reason to suspect a factual basis for their action well before 2010 (four years before the original complaint was filed). The undisputed evidence shows that the plumbing defects manifested in 2004, almost immediately after

plaintiffs took possession of the house. The same leaks were noticed from 2004 through 2008. In light of this uncontroverted evidence, a reasonable person would have had a suspicion of wrongdoing perhaps in 2004, but certainly by 2008. Yet, plaintiffs here did not file this lawsuit until 2014. It follows that, even under the delayed discovery rule, their action is time-barred.

Relying upon *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231 (*Oakes*), plaintiffs contend that their causes of action could not have accrued until their damage was "sufficiently appreciable to a reasonable [person]" and that issue is not appropriate for summary judgment. *Oakes* is readily distinguishable. In that case, a latent construction defect did not immediately manifest itself (*id.* at pp. 255–256); in contrast, in the instant case, the plumbing problems and leaks manifested themselves almost immediately and on numerous occasions, which would have caused a reasonable person to suspect a problem with the property.

To the extent plaintiffs suggest that the issue of delayed discovery cannot be resolved on summary judgment, we disagree. (See, e.g., *Mills v. Forestex Co.*, *supra*, 108 Cal.App.4th at pp. 640, 650 ["'While resolution of the statute of limitations is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.' [Citations.]"].)

B. Progressively developing harm doctrine

For the first time on appeal, plaintiffs assert that the "progressively developing harm" doctrine applies. "A '"progressively developing or continuing wrong"' may give rise to a new cause of action, and start a new limitations period running,

with each successive manifestation of a latent defect. [Citation.] The test is whether a reasonable inspection and further inquiry after discovery of the initial defect would have disclosed the full extent of the problem. [Citations.]" (*Mills v. Forestex Co.*, *supra*, 108 Cal.App.4th at p. 650, fn. 15.) But, this doctrine "does not alter the rule that a cause of action accrues when the plaintiff discovers, *or has the opportunity to discover*, the necessary facts underlying his or her claim." (*Id.* at p. 650.) As set forth above, plaintiffs had the opportunity to discover the necessary facts underlying their claims against defendants—they noticed the water damage in 2004 yet did not file suit until 2014. Thus, their claims are time-barred.

Even though (1) Hernandez-Keller did not see water coming through the recessed lights in the kitchen until around October 2012 through October 2013, and (2) plaintiffs' home experienced flooding in November 2013, our analysis is unchanged. These were the same leaks that plaintiffs had been witnessing since around the time that they moved into the home.

Plaintiffs further argue that their causes of action did not accrue until Comstock refused to continue making repairs in 2013, even though it had made multiple repairs between 2004 and 2008. Plaintiffs offer no legal authority in support of this novel proposition. Plaintiffs' reliance upon *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205 is misplaced for the simple reason that the California Uniform Commercial Code, which governs the sale of goods, does not apply to this case.

C. Fraud

Moreover, plaintiffs argue that their fraud claim can proceed because "Comstock had persuaded them the problem had been fixed after each service request." There are several

problems with this argument. First, this claim conflicts with the allegations of the FAC. "The admission of fact in a pleading is a 'judicial admission.'" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 (*Valerio*).) "'It is a *waiver of proof* of a fact by conceding its truth,'" and "is *conclusive* on the pleader." (*Id*. at pp. 1271, 1272.) The pleader "'cannot offer contrary evidence *unless permitted to amend*, and a judgment may rest in whole or in part upon the admission without proof of the fact.'" (*Id*. at p. 1272; see also *Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 613 ["[A] judicial admission cannot be rebutted: It estops the maker"].) "Thus, the trial court may not ignore a judicial admission in a pleading, but must conclusively deem it true as against the pleader. [Citation.]" (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1155.)

In moving for summary judgment or summary adjudication, a defendant "'may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues.'" (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324 (*Castillo*); see also *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747 ["In moving for summary judgment, a party may rely on the doctrine of judicial admission by utilizing allegations in the opposing party's pleadings to eliminate triable issues of material fact."]; *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248 ["In summary judgment or summary adjudication proceedings, '[a]dmissions of material facts made in an opposing party's pleadings are binding on that party as "judicial admissions"'"].) "'"While inconsistent *theories* of recovery

are permitted [citation], a pleader cannot blow hot and cold as to the facts positively stated.'" [Citation.]" (*Castillo*, *supra*, at p. 1324.)

In the FAC, plaintiffs allege fraud and concealment "in 2013 and after." They are bound by this admission and cannot alter their theory to avoid judgment by now arguing that the fraud and concealment occurred at the time of the service requests and follow-up visits, which occurred in 2004 through 2008.[3]

Even though plaintiffs allege fraud and concealment in 2013 and after, they fail to offer any evidence of any fraudulent statement or misrepresentation made to them by anyone during this time frame. There is no evidence that Silva or any representative of defendants made any sort of misrepresentation to them.

Setting aside this procedural obstacle, plaintiffs' claim for fraud fails because, as set forth above, the alleged fraud and/or concealment occurred more than three years before this lawsuit was instituted. According to plaintiffs' evidence, the leaks were never fixed. When the repair attempts failed and the leaks continued to manifest, plaintiffs were on inquiry notice, thus triggering the statute of limitations.

D. Continuing accrual doctrine

Next plaintiffs assert that their action is not time-barred pursuant to the continuing accrual doctrine. "Generally

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[3] The fact that the fraud cause of action incorporates all preceding paragraphs does not change our analysis. The prior paragraphs of the FAC do not allege any other fraudulent misrepresentations and/or when they were made.

speaking, continuous accrual applies whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.' [Citation.] Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation (citation)—each may be treated as an independently actionable wrong with its own time limit for recovery." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1199.)

"However, unlike the continuing violation doctrine, which renders an entire course of conduct actionable, the theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period." (*Aryeh v. Canon Business Solutions, Inc., supra,* 55 Cal.4th at p. 1199.)

This doctrine is inapplicable here. Defendants' obligation was to build a house within the standard of care, and that obligation was breached, if at all, when the house was built and sold to plaintiffs. There is no recurring obligation here, like a lease or a situation with recurring rent or other payment obligation.

To the extent plaintiffs contend that the 10-year warranty somehow tolled the statute of limitations and/or was breached anew in 2013, when Silva allegedly asked for a release before making repairs, we are not convinced. Aside from failing to raise this argument in the trial court, plaintiffs offer no legal authority in support of this claim, thereby waiving it on appeal. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

E. Equitable estoppel

Plaintiffs argue that even assuming that their causes of action accrued outside the limitations period, defendants are estopped from relying upon a statute of limitations defense.

Procedurally, plaintiffs are barred from making this argument. "[T]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.) Moreover, "'[t]o establish estoppel as an element of a suit the elements of estoppel must be especially pleaded in the complaint with sufficient accuracy to disclose facts relied upon. [Citation.]' [Citation.]" (*Sofranek v. County of Merced* (2007) 146 Cal.App.4th 1238, 1250–1251.) Equitable estoppel is not alleged in the FAC. Thus, plaintiffs cannot rely upon it to oppose defendants' motion for summary judgment.[4]

Setting this issue aside, our Supreme Court has summarized the doctrine of equitable estoppel as follows: "(1) [I]f one potentially liable for a construction defect represents, *while the limitations period is still running*, that all actionable damage

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[4] In their reply brief, plaintiffs assert that this argument should have been raised in a demurrer. That argument does not preclude summary judgment. Plaintiffs also contend that they could amend their FAC at any time. Perhaps, but they never sought to amend their pleading, and they do not argue or show how an amendment based upon equitable estoppel would have been appropriate.

has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered [citation], the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384, italics added.)

Plaintiffs make two main assertions in support of equitable estoppel:

First, plaintiffs contend that defendants made assurances that the leak problem would be fixed, thereby dissuading them from filing a lawsuit. For example, they point to Silva's statement in 2013 that Comstock would make any necessary repairs. That statement was not made until 2013, after the statutory period expired. Plaintiffs also assert that defendants made various assurances "on numerous occasions." Without any specific reference to when those alleged assurances were made, it is impossible to discern if they were made during the limitations period. And notably, as set forth above, the FAC alleges that assurances were made in 2013, again outside the limitations period.

Second, plaintiffs claim that defendants "must be estopped from asserting a statute of limitations defense because they made false representations and concealed information concerning the leaks and alleged repairs." But there is no evidence of concealment. Not fixing the leaks does not amount to concealment.

F. Minority of Yau and Corral

Finally, for the first time on appeal, plaintiffs argue that the claims asserted by Yau and Corral are not time-barred because they are minors. This argument is barred as plaintiffs failed to raise it below. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9.) The passing remark in their opposition that "several plaintiffs are minors" was insufficient.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT