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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1230**

Town Center Office Plaza Association, Inc.,
Appellant,

vs.

Carlson Real Estate Ventures, LLC,
Respondent,
The Bainey Group, Inc.,
Respondent,
ABC Corporation, et al.,
Defendants,
and Carlson Real Estate Ventures, LLC,
third party plaintiff/cross-claimant, Respondent,

vs.

Mohagen/Hansen Architectural Group, Ltd.,
third party defendant, Respondent,
AMBE, Ltd., third party defendant, Respondent,
and The Bainey Group, Inc.,
defendant and third party plaintiff, Respondent,

vs.

Kelly Stucco Systems, Inc.,
third party defendant, Respondent,
Dalco Roofing & Sheet Metal, Inc.,
third party defendant, Respondent,
The Caulkers Company, Inc., et al.,
third party defendants,
Artic Glass Company,
third party defendant, Respondent,
and AMBE, Ltd.,
third party defendant and fourth party plaintiff, Respondent,

vs.

Braun Intertec Corp.,
fourth party defendant, Respondent

Filed April 17, 2017
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Hennepin County District Court
File No. 27-CV-15-1694

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Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges the district court's grant of respondents' summary-judgment motion. Appellant argues that (1) genuine issues of material fact preclude application of the two-year statute of limitations to its defective-construction claims not arising out of an express warranty (non-express-warranty claims); (2) the district court applied the incorrect statute of limitations to appellant's express-warranty claims; (3) the district court misapplied the statute of repose; (4) the district court disregarded evidence that

would toll or equitably estop respondents from asserting the statutes of limitations and repose; (5) the district court erroneously disregarded evidence supporting its express-warranty claims; (6) the district court erred in concluding that appellant failed to plead its fraud and misrepresentation claims with particularity; and (7) the district court disregarded evidence of appellant's third-party-beneficiary breach-of-contract claims. We affirm on all issues except issue two, on which we reverse and remand for a trial.

FACTS

On June 8, 2004, respondent-developer Carlson Real Estate Company, Inc. (Carlson) entered into a contract with respondent-general contractor The Bainey Group, Inc. (Bainey) whereby Bainey agreed to construct the shell of six commercial buildings, each containing six units (the project). Also in 2004, Carlson created appellant Town Center Office Plaza Association (the association) and began to sell the project's units.

Beginning in 2006, unit owners complained of leaks in their units. In the summer of 2006, Carlson retained AMBE Ltd. to inspect the project. AMBE reported to Carlson that caulking was missing in certain areas of the exterior insulation finishing system (EIFS). After AMBE's report, discussions about the water-intrusion problem continued between Carlson, Bainey, and the association. At an owners' meeting in late 2006, the association's president and Carlson's property manager told unit owners that Carlson and Bainey were assessing the problem.

On December 15, 2006, representatives from AMBE, Braun Intertec,¹ Bainey, and Carlson conducted water testing on one of the units. In a follow-up letter, AMBE suggested repairs to the EIFS system. Braun also wrote Carlson and noted that “some flashings between the [EIFS] system and the brick veneer . . . seemed to slope backwards toward the building.” Carlson sent a letter to the association’s president in February 2007, which contained the results from the water testing and stated that Bainey “ha[d] agreed to make the recommended repairs to all of the buildings.”

On May 7, 2007, Bainey began making repairs on the project. Upon review of the details for the repairs, Braun suggested to Carlson that the metal flashing be removed from the buildings and replaced with an EIFS band to reduce the possibility of future water intrusions. Carlson forwarded Braun’s suggestion to the association and recommended keeping the metal flashing for aesthetic consistency because “[r]eplacing it with flashing pitched appropriately and regular maintenance caulking should be enough to prevent future water infiltration issues.” Carlson later informed Bainey that the association decided not to remove the metal flashing.

After the 2007 repairs were completed, units still experienced leaks. One unit owner reported that a leak occurred “in the same place as before” the repairs. In 2009, a unit owner filed a claim with the association’s insurer. The insurer denied the claim, asserting that the leakage was the result of a construction defect and suggested that the unit owner “contact the general contractor or their insurance company regarding the

¹ Bainey retained Braun as a consultant to observe AMBE’s water testing and suggest repairs.

damage.” The unit owner forwarded this information to Carlson. After water testing, the cause of the leak was determined to be a need for caulking maintenance. Carlson also sent a letter to the association’s president, stating that it was not liable for any damage caused to the units because “the source of the water infiltration was failed caulking and poor maintenance.”

Over the years, water intrusion continued at the project. In response to complaints from unit owners, the association would perform caulking maintenance, which it believed resolved the issues. In 2014, the association learned that water was intruding from the ceiling of two units. Upon inspection, the association discovered construction defects and structural damage. The association retained Encompass, Inc., an engineering firm, for assistance. After an investigation, Encompass issued a report noting the factors that were likely to have contributed to the water intrusion, including flashing pitched toward the building. Encompass also recommended repairs, which included removing the EIFS completely, replacing and reconstructing walls, and installing a new weather barrier.

The association put Carlson and Bainey on notice of the defects it discovered. Carlson and Bainey denied responsibility. On January 5, 2015, the association filed a complaint against Carlson and Bainey, alleging against Carlson breach of contract, breach of common-law and statutory express and implied warranties, and breach of the duty of good faith and fair dealing; alleging against Bainey breach of common-law express warranties and negligence; and alleging against both Carlson and Bainey negligent repair, intentional and/or negligent misrepresentation, third-party-beneficiary

breach of contract, and equitable estoppel. The district court granted Carlson's and Bainey's summary-judgment motions. This appeal follows.

D E C I S I O N

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if the evidence “would permit reasonable persons to draw different conclusions.” *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). No genuine issue of material fact exists where the evidence “merely creates a metaphysical doubt as to a factual issue.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). We review de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I. Summary judgment was appropriate on the association's non-express-warranty claims because the statute of limitations had run on these claims.

The association argues that summary judgment based on the running of the statute of limitations on its non-express-warranty claims, including negligence and breach of contract claims, was inappropriate because reasonable minds could disagree about when the association discovered an actionable injury. We disagree.

The statute of limitations for the association’s non-express-warranty claims is set out in Minn. Stat. § 541.051, subd. 1(a):

Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, . . . arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury.

“[A] cause of action accrues upon discovery of the injury.” *Id.*, subd. 1(c) (2016).

The two-year statute of limitations begins to run when an actionable injury is first discovered, not when later inspection is performed to determine the nature of the condition. *Thorp v. Price Bros. Co.*, 441 N.W.2d 817, 821 (Minn. App. 1989), *review denied* (Minn. Aug. 15, 1989). A party only needs to be aware of “some injury,” not the full extent of the injury for the statute of limitations to run. *Minch Family LLLP v. Estate of Norby*, 652 F.3d 851, 858 (8th Cir. 2011) (citing *Day Masonry v. Indep. Sch. Dist.* 347, 781 N.W.2d 321, 333-34 (Minn. 2010)). “We apply an objective standard to determine when a property owner knew or should have known, through the exercise of due diligence, of the injury.” *328 Barry Ave., LLC v. Nolan Props. Grp.*, 871 N.W.2d 745, 751 (Minn. 2015).

The association first asserts that it did not discover an actionable injury until 2014 “when it first discovered leakage, construction defects, and damage unrelated to caulking maintenance.” In support of its assertion, the association cites *Lake City Apartments v. Lund-Martin Co.*, 428 N.W.2d 110, 111-12 (Minn. App. 1988) (holding summary

judgment was inappropriate where company learned true cause of water leaks when leaks restarted two years after initial repairs), *review denied* (Minn. Oct. 19, 1988), and *W. Lake Superior Sanitary Dist. v. Orfei & Sons, Inc.*, 463 N.W.2d 781, 783-85 (Minn. App. 1990) (concluding summary judgment was inappropriate where same segment of sewage pipeline ruptured once per year for three years and, after over three years with no ruptures, ruptured again), *review denied* (Minn. Feb. 20, 1991).

These cases are distinguishable based on the frequency and scale of the water leaks reported at the project. In both *Lake City Apartments* and *W. Lake Superior Sanitary Dist.*, there was a span of at least two years during which there were no leaks after repairs were made. Here, a leak was reported in at least one unit at the project for every year between 2006 and 2014. Further, in *W. Lake Superior Sanitary Dist.*, the ruptures occurred in 16-foot sections of a 22,770-foot-long segment of pipeline, which was one segment of many that spanned hundreds of miles. Here, between 2006 and 2014, leaks were reported in 20 of the 36 units.

The association next asserts that the cases upon which the district court relied are distinguishable from the instant case. These cases, in which the appellate court upheld the district court's determination that the claims were barred by the statute of limitations, are analogous to the instant case. First, like in *Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492-93 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002), there were multiple repairs taken, some of which were successful, and the association held meetings during which the leakage issues were discussed more than two years prior to bringing suit. Second, as in *Hyland Hill N. Condo. Ass'n v. Hyland Hill Co.*, 549 N.W.2d

617, 621 (Minn. 1996), *overruled on other grounds by Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2015), unit owners began to discover leaks in various locations soon after they moved in. In *Hyland Hill*, the supreme court stated, “We view repair and replacement of a roof as different remedies for the same injury, namely, defective construction. . . . To draw a line between . . . defects strikes us as arbitrary.” Third, like in *Day Masonry*, the association hired companies to complete repair work on more than one occasion before the 2014 leakage. See 781 N.W.2d at 333 (noting that school district did not need to be aware of extent of leakage problem, it only needed to be aware that there was a problem). Finally, as in *Metro. Life Ins. Co. v. M.A. Mortenson Cos.*, 545 N.W.2d 394, 399 (Minn. App. 1996), *review denied* (Minn. May 21, 1996), the association received reports and letters detailing water damage and potential construction defects more than two years prior to bringing suit.

In light of the two-year statute of limitations, the association’s claims are barred if it discovered an actionable injury more than two years prior to filing its complaint on January 5, 2015. No genuine issue of material fact exists as to whether the association discovered an actionable injury several years prior to January 5, 2013. Thus, the district court appropriately granted summary judgment on the association’s non-express-warranty claims, including negligence² and breach of contract.³

² The association argues separately that the district court inappropriately granted respondents summary judgment on its negligence claims. The district court, however, correctly determined that the association’s negligence claims were barred by the two-year statute of limitations.

³ Alternatively, the association argues that the district court should have assessed the statute of limitations differently because the association’s “claims reflect separate injuries

II. Summary judgment was not appropriate on the association’s express-warranty claims against Carlson.

The association argues that the district court applied the statute of limitations under Minn. Stat. § 541.051, subd. 1(a), discussed in section I above, to its express-warranty claims, when it should have applied the statute of limitations under Minn. Stat. § 541.051, subd. 4 (2016). We agree.

“For the purposes of actions based on . . . breach of an express written warranty, such actions shall be brought within two years of the discovery of the breach.” Minn. Stat. § 541.051, subd. 4. To determine when a warrantee discovered, or should have discovered, the breach, we focus “on the date the warrantor gives some affirmative indication that it will not or cannot fulfill its obligations under the warranty.” *Day Masonry*, 781 N.W.2d at 328.

Here, the district court applied subdivision 1(a) to conclude that all of the association’s breach-of-warranty claims were barred by the two-year statute of limitations that commences upon discovery of an actionable injury. Carlson acknowledges that the district court did not analyze the association’s express-warranty claims under the appropriate statute. We agree and conclude that the district court erred in failing to analyze these claims in light of the statute of limitations set out in subdivision 4.

distinct from claims relating to the original construction of the buildings.” Arguments that the leaks were “separate and distinct” have been rejected by the supreme court, “which has concluded that separate injuries must be aggregated under the mantle of defective construction and that the statute of limitations begins to run upon discovery of an actionable injury.” *Dakota County*, 645 N.W.2d at 493.

The association contends that the statute of limitations for the statutory express-warranty claims began to run from discovery of the breach of the express warranty when Carlson denied liability in a June 18, 2014, letter from its counsel. That letter stated, “As you may be aware the statute of limitations for alleging construction defects bars your claim. Specifically Minn. Stat. § 541.051 bars a claim that is more than two years old.” That letter had a reference line that read: “The Town Center Office Plaza Association, Inc. (the “Association”) Town Center Office Plaza, 15600 35th Ave North, Plymouth MN (the “Property”).”

By contrast Carlson asserts that the association discovered the breach of the express warranty in April 2009 when it wrote a letter dated April 21, 2009. That letter stated, in part:

[T]he source of the water infiltration was the failed caulking and poor maintenance of the upper windows of the Units and not from the construction of the Building. Therefore, Carlson Real Estate Ventures, LLC (“Carlson”) is not liable for any damage caused to the Units and/or the Building.

The reference line of that letter read: “Water damage in Units 101, 102, 103 (the “Units”) at Town Center Office Plaza, 15600 35th Avenue North, Plymouth, MN (the “Building”).”

While we agree that the June 18, 2014 letter provided clear notice of the breach of an express warranty as to *any* unit at the Property, we cannot say as a matter of law that the earlier letter provided notice of the breach of the express warranty as to the entire property because it only references three units in one building. There are six buildings. Each building contains six units for a total of 36 units.

On summary judgment, we must resolve “all doubts and factual inferences . . . against the moving party.” *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). Consequently, we conclude that claims relating to a breach of express warranty concerning the 33 units not mentioned in the April 21, 2009, letter are not time barred by section 541.041, subdivision 4, because they fall within the two-year statute of limitations. We reverse and remand for a trial on those claims.

III. The district court properly applied the statute of repose.

The association argues that the district court misapplied the statute of repose, including the six-year Minnesota Common Interest Ownership Act (MCIOA) limitations period, in four ways. Because we conclude that the district court appropriately granted summary judgment on the association’s non-express-warranty claims, based on the two-year statute of limitations, we do not address the issue of the statute of repose on those claims. *See Day Masonry*, 781 N.W.2d at 331 (declining to reach statute of repose where statute of limitations barred claims at issue). We address the association’s two remaining statute-of-repose arguments below.

A. The district court properly analyzed the statute of repose for the association’s express-warranty claims.

The association contends that the district court erred when it failed to separately analyze the statute of repose for its express-warranty claims and asserts that the statute runs for ten years from the discovery of the breach. We are not persuaded.

Minn. Stat. § 541.051 does not set out a ten-year statute of repose for actions based on breach of express warranties. *Compare* Minn. Stat. § 541.051, subd. 1(a)

(describing ten-year statute of repose for an action to recover damages for an injury to property), *with* Minn. Stat. § 541.051, subd. 4 (stating that statute of limitations for actions based on breach of express warranty run for two years from discovery of breach). Therefore, the district court did not need to separately analyze the statute of repose for the association's express-warranty claims.

B. The district court appropriately granted summary judgment on the association's MCIOA warranty claims.

The association argues that the district court improperly dismissed its MCIOA claims under the MCIOA's limitations period because Carlson and Bainey did not “present evidence of when the units were conveyed, when possession occurred, or when the period of declarant control terminated.” We disagree.

The limitations period for MCIOA claims is six years. Minn. Stat. § 515B.4-115(b) (2016). “[R]egardless of the purchasers’ lack of knowledge of the breach,” a cause of action accrues, and the limitations period is triggered, when

(1) as to a unit, at the earlier of the time of conveyance of the unit by the declarant to a bona fide purchaser of the unit other than an affiliate of a declarant, or the time the purchaser enters into possession of the unit; and

(2) as to each common element, the latest of (i) the time the common element is completed, (ii) the time the first unit in the common interest community is conveyed to a bona fide purchaser, or if the common element is located on property that is additional real estate at the time the first unit therein is conveyed to a bona fide purchaser; or (iii) the termination of the period of declarant control.

Minn. Stat. § 515B.4-115(c) (2016). The provision providing when a cause of action accrues is subject to Minn. Stat. § 515B.4-115(d) (2016):

If a warranty explicitly extends to future performance or duration of any improvement or component of the common interest community, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

Here, Carlson presented evidence of the sale and closing dates of each unit, with the latest closing date being November 28, 2006. The association has not provided evidence sufficient to permit a reasonable person to draw a different conclusion. Based on the evidence Carlson presented, the MCIOA limitations period expired in November 2012. Because the association brought this action in 2015, the six-year limitations period bars the association's MCIOA claims.

Alternatively, the association asserts "that there is at least a fact issue as to whether the warranties are of future performance." The district court did not address the future-performance provision of Minn. Stat. § 515B.4-115(d); thus, this court need not consider this issue. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

IV. The district court properly declined to apply tolling and equitable estoppel to the statutes of limitations and repose for the association's non-express-warranty claims.

The association asserts that the district court erred in disregarding evidence that would either toll the statutes of limitations and repose or equitably estoppel respondents from asserting these statutes against the association's non-express-warranty claims. Specifically, the association contends that Carlson and Bainey misrepresented known defects and assured the association that caulking maintenance would be sufficient to address water-intrusion issues, which, the association asserts, prevented earlier discovery of its injury. Because we conclude that summary judgment was appropriate on the

association's non-express-warranty claims, based on the two-year statute of limitations, we need not address the association's argument as it relates to the statute of repose. We address the tolling and equitable-estoppel claims in turn.

A. The district court properly declined to toll the statute of limitations for fraudulent concealment.

The statute of limitations for non-express-warranty claims is tolled where fraud is involved. Minn. Stat. § 541.051, subd. 1(a). "To prove fraudulent concealment, tolling any statute of repose or limitations, a party must show (1) the defendant made a statement that concealed plaintiff's potential cause of action, (2) the statement was intentionally false, and (3) the concealment could not have been discovered by reasonable diligence." *Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 846 (Minn. App. 2007). Once the party discovers the actionable injury, fraudulent concealment no longer tolls the statute of limitations. *See Dakota County*, 645 N.W.2d at 494.

Here, AMBE emailed Carlson after reviewing its inspection findings in 2006.

AMBE informed Carlson that

[a]lthough the leak was located we feel that the problem will only be resolved by removing the brick and replacing the through wall flashing which is a repair that should be completed in the spring. Efforts to resolve this with caulking could be attempted but may make the problem worse, could make permanent repairs more difficult and would be unattractive.

The association asserts that Carlson did not share this information with it. Even assuming, as we must on appeal from summary judgment, that Carlson intentionally

concealed the association's cause of action, the association's injury could have been discovered by reasonable diligence.

The AMBE report occurred in 2006; however, the association should have discovered that it faced more serious issues than caulking maintenance when units continued to experience leaks after Bainey performed repairs on the project in 2007. In addition, there is no evidence that Bainey made any representations to the association after it performed the 2007 repairs. Based on the evidence in the record, reasonable minds could not reach different conclusions about the fact that water intrusion continued after Bainey's repairs, which is an actionable injury that would end any tolling of the statute of limitations. Further, the district court did not misapply the law with respect to the statute of limitations. Therefore, the district court did not err when it declined to toll the statute of limitations on the basis of fraudulent concealment.

B. The district court properly declined to equitably estop respondents from asserting the statute of limitations.

"To raise estoppel, one must show representations made by one party that the other has reasonably relied on to his detriment." *Dakota County*, 645 N.W.2d at 493.

"The application of equitable estoppel is a question of fact unless only one inference can be drawn from the facts." *Rhee*, 617 N.W.2d at 622.

The analysis of the association's equitable-estoppel claim is similar to that of fraudulent concealment. Even assuming that Carlson and Bainey made assurances to the association with regard to the repairs upon which the association relied, the association could not have reasonably relied on these assurances when the water intrusion continued

after the 2007 repairs. Thus, the district court did not err when it rejected the association's claim that Carlson and Bainey were equitably estopped from asserting the statute of limitations. *See Dakota County*, 645 N.W.2d at 490 (affirming district court's grant of summary judgment to respondents where "any fraud or misrepresentation by respondents . . . occurred before the discovery of the actionable injury").

V. Summary judgment was appropriate on the association's express-warranty claims against Bainey.

The association argues that the district court ignored evidence supporting its express-warranty claims against Bainey. We disagree.

"To establish a warranty claim the plaintiff must basically prove: the existence of a warranty, a breach, and a causal link between the breach and the alleged harm."

Peterson v. Benix Home Sys., Inc., 318 N.W.2d 50, 52-53 (Minn. 1982). An express-warranty claim must be brought before the warranty expires. *Liedtke v. Cloquet Serv. Ctr., Inc.*, 367 N.W.2d 117, 118 (Minn. App. 1985), *review denied* (Minn. July 11, 1985).

Here, an email indicates that Bainey provided a one-year warranty on the shell work and a ten-year warranty on the roofs to Carlson and the project's architect. However, there is no evidence that Bainey's warranty transferred from Carlson and the architect to the association. As a result, there is no genuine issue of material fact on the existence of a warranty between Bainey and the association.

VI. Summary judgment was appropriate on the association's fraud and misrepresentation claims.

The association argues that the district court erred by concluding that the association failed to plead its misrepresentation claims with particularity because the

district court did not discuss the association's allegations that Carlson and Bainey failed to disclose known deficiencies or AMBE's recommended repairs to the association. We are not persuaded.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Minn. R. Civ. P. 9.02. Particularity requires that the association allege "ultimate facts." *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 182 (Minn. App. 2012). The ultimate facts are the "who, what, when, where, and how." *Id.* at 184 (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549-50 (8th Cir. 1997)). A fraud claim requires that

(1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Grp., LLC, 736 N.W.2d 313, 318 (Minn. 2007).

Here, the district court did not provide a separate discussion of the alleged omissions. However, the association presented its misrepresentation claims in general terms, without specifying dates, without indicating who made the misrepresentations, and without differentiating between Carlson and Bainey in the allegations. Because the association failed to plead its fraud and misrepresentation claims with sufficient particularity, there is no genuine issue of material fact, and summary judgment was appropriate.

VII. The district court appropriately granted summary judgment on the association’s third-party-beneficiary contract claims.

The association argues that the district court erred in determining that the association was not a third-party beneficiary to the contract between Carlson and Bainey (the contract) because the district court misstated the record, ignored facts, and misapplied the facts to the law. We disagree.

To determine whether the association may bring a claim on the contract, we apply the intended-beneficiary approach that the supreme court adopted in *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135 (Minn. 1984). Under this approach, a third party to a contract is an intended beneficiary if either the “duty owed” or the “intent to benefit” test is met. *Id.* at 139.

A. The association failed to satisfy the “duty owed” test.

The association asserts that the “duty owed” test is met because “Bainey’s performance of the contract satisfied duties that Carlson owed to the association.” To satisfy the “duty owed” test, “the promisor’s performance under the contract must discharge a duty otherwise owed the third party by the promisee.” *Cretex*, 342 N.W.2d at 138. Generally, this test applies where a promisor contracts to pay the promisee’s debt to another party. *Minn. Laborers Health & Welfare Fund v. Granite RE, Inc.*, 826 N.W.2d 210, 214 (Minn. App. 2012), *aff’d*, 844 N.W.2d 509 (Minn. 2014); *see also* Restatement (Second) of Contracts § 302(1)(a) (1981) (noting that “duty owed” test is satisfied where “performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary”).

Here, in the purchase agreement between Carlson and unit purchasers, Carlson warranted that it “complied with all applicable laws, codes, ordinances and regulations with respect to the Property and the Property is in compliance with all subdivision, platting and other regulations of any governmental authority having jurisdiction over the Property.” In the contract, Bainey agreed to typical conditions of a construction contract, including to notify Carlson of violations of “applicable laws, statutes, ordinances, building codes, rules or regulations.” In doing so, Bainey did not assume Carlson’s position in warranting to purchasers that the units were in compliance with all laws. Bainey agreed only to construct the shell of the project’s buildings and notify Carlson of violations. Thus, Bainey’s role could not have discharged Carlson from its purchase-agreement obligations. Moreover, Bainey did not contract to pay money to the association. Accordingly, the association did not meet the “duty owed” test.

B. The association failed to satisfy the “intent to benefit” test.

The association asserts that it is an intended beneficiary because the “[p]roject was being built for the ownership, use, and occupancy of third persons—the unit owners.” To satisfy the “intent to benefit” test, “the contract must express some intent by the parties to benefit the third party through contractual performance.” *Cretex*, 342 N.W.2d at 138.

“Any intent to benefit the third party must be found in the contract as read in light of all the circumstances at the time of contracting.” *Concordia Coll. Corp. v. Salvation Army*, 470 N.W.2d 542, 545 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991).

Typically, when the contract does not reference a third party, there is no intent to benefit that party; however, the absence of a reference to a third party does not preclude a finding

that the third party was an intended beneficiary. *614 Co. v. Minneapolis Cmty. Dev. Agency*, 547 N.W.2d 400, 410 (Minn. App. 1996).

Here, none of the unit owners nor the association are mentioned in the contract. In addition, the contract states that “the Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.” When the contract is read in light of all of the circumstances, the association did not meet the “intent to benefit” test.

In sum, the district court appropriately granted respondents’ summary-judgment motion on the association’s non-express-warranty claims, having found that the claims were barred by the two-year statute of limitations. Accordingly, the district court did not need to consider the association’s statute-of-repose arguments on these claims. The district court’s grant of summary judgment was also appropriate on the association’s MCIOA warranty claims, express-warranty claims against Baaney, fraud and misrepresentation claims, and third-party-beneficiary contract claims. Further, the district court properly analyzed the statute of repose for the association’s express-warranty claims and declined to apply tolling and equitable estoppel to the statute of limitations for the association’s non-express-warranty claims. Summary judgment, however, was not appropriate on the association’s express-warranty claims against Carlson. On this issue, we reverse and remand to the district court for a trial concerning the 33 units at the property noted in section II.

Affirmed in part, reversed in part, and remanded.