

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

WILLIAM C. CARPENTER, JR.
JUDGE

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RE: Roberta Kozak-Biasotto v. Cherrington Service Corp., *et al.*
 C.A. No. N21C-10-234 WCC

Letter Opinion

Defendant J&M Industries's Motion to Dismiss – DENIED

Defendant and James R. Maddox, Jr's Motion to Dismiss – DENIED

Defendant Cherrington Service Corporation's Motion to Dismiss – DENIED

**Defendant Maddox Enterprises, Inc. and James R. Maddox, III's Motion to
Dismiss – DENIED**

Dear Counsel:

The Court is in receipt of Defendants' Motions to Dismiss pursuant to Delaware Superior Court Rule 12(b)(6). For the reasons set forth in this Letter Opinion, Defendants' Motions are **DENIED**.

This dispute concerns work performed on Plaintiff, Roberta Kozak-Biasotto's ("Plaintiff") property located at 113 Haywood Road, Wilmington, Delaware 19807 (the "Property") in the Cherrington Subdivision in New Castle County, Delaware.¹ Defendants include Cherrington Service Corporation, J & M Industries, Inc., James R. Maddox, Jr., and James R. Maddox, III ("Defendants").²

In May of 2017, Defendants performed work on the Property with the belief they held an easement.³ More specifically, Defendants removed a berm, placed rocks from the street onto the Property, and sought to drain water from the neighborhood and cul-de-sac over the Plaintiff's Property, under her drive, and through a pipe out to the west side of the Property.⁴

On July 23 or 24, 2017, during a significant storm event, Plaintiff's house flooded and the drainage pipe exploded out of the side, causing structural damage to the Plaintiff's house, destruction of exterior landscaping, and erosion of the Property and grading.⁵ Plaintiff's home had approximately six inches of standing water in the first floor of the home, and it caused a harsh and unpleasant odor which aggravated Plaintiff's asthma.⁶ Prior to this storm and the changes Defendants made, the house

¹ Am. Compl., D.I. 13, at ¶¶8-9 (Dec. 28, 2021).

² *Id.* at ¶23.

³ *Id.* at ¶¶23-26.

⁴ *Id.* at ¶2727.

⁵ *Id.* at ¶35.

⁶ *Id.* at ¶37.

on the Property never experienced flooding nor had the drainage pipe ever clogged.⁷ Defendant Cherrington Service Corporation informed Plaintiff that the damage was not the result of the drainage pipe malfunction during a heavy rainstorm but cited to an opening in the drainage pipe.⁸ Again, in August of 2020, the Property and Plaintiff's house flooded, resulting in extensive damage, including ten inches of standing water inside the first floor of the home.⁹ The harsh and unpleasant odor returned, limiting Plaintiff's use of her home.¹⁰

On October 27, 2021, Plaintiff filed a Complaint that asserts counts of trespass and negligence against the Defendant based on damages caused by their work on the Property.¹¹ Defendants move to dismiss the Complaint arguing that it is barred by the three-year statute of limitations period under 10 *Del. C.* §8106.¹² Defendants assert that the limitations period began to run on July 23 and 24, 2017, when the first flood occurred and, thus, Plaintiff was required to assert her claim by or on July 23 or 24, 2020.¹³ Conversely, Plaintiff argues it was not until the second flood in August of 2020 that the Plaintiff was on inquiry notice of her injury and/or that the Defendants' work was defective.¹⁴ Plaintiff asserts that the statute of limitations was

⁷ *Id.* at ¶33.

⁸ *Id.* at ¶39.

⁹ *Id.* at ¶¶47-48.

¹⁰ *Id.* at ¶¶49-50.

¹¹ *Id.* at ¶¶85-105.

¹² Def.'s Mot. to Dismiss, D.I. 8, at ¶3 (Nov. 23, 2021) (hereinafter "Def.'s Mot.").

¹³ *Id.*

¹⁴ Pl.'s Resp. to Defs.' Mot. to Dismiss, D.I. 28, at ¶5 (Feb. 21, 2022) (hereinafter "Pl.'s Resp.").

tolled under the theories of (1) inherently unknowable injury, (2) fraudulent concealment, and/or (3) equitable tolling and that her Complaint is timely.¹⁵

The Court agrees that the causes of action in Plaintiff's complaint are governed by 10 *Del. C.* §8106, "which requires that a plaintiff bring an action to recover damages within three years of the 'accruing of the cause of action.'"¹⁶ The statute of limitations will begin to accrue "'at the moment of the wrongful act and not when the effects of the act are felt,' even if the plaintiff is ignorant of the cause of action."¹⁷ A "wrongful act" is a general concept which varies depending upon the nature of the claims at issue.¹⁸ Generally, a cause of action for negligence accrues at the time of the alleged injury.¹⁹

But, under Delaware law, the statute of limitations may be tolled when "no observable or objective factors...put a party on notice of an injury, and plaintiff[] must show that they were blamelessly ignorant of the act or omission and the injury."²⁰ "Inquiry notice" means "the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of

¹⁵ *Id.* at ¶¶5, 8, 10.

¹⁶ *Banner v. Hockessin Chase, L.P.*, 2022 WL 1537382, at *5 (Del. Super. Ct. May 12, 2022).

¹⁷ *Id.* at *6.

¹⁸ *Id.* at *5.

¹⁹ *Id.*

²⁰ *Crest Condo. Ass'n v. Royal Plus, Inc.*, 2017 WL 6205779, at *3 (Del. Super. Ct. Dec. 7, 2017).

such facts.”²¹ Blameless ignorance can be established by showing “justifiable reliance on a professional or expert whom [the plaintiff] had no ostensible reason to suspect of deception.”²² The party asserting the application of a tolling doctrine “bears the burden of pleading specific facts to demonstrate that the statute of limitations is, in fact, tolled.”²³

To evaluate a plaintiff’s objective awareness of the facts giving rise to the injury, the Court examines whether there are “red flags” that “clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire further and by determining if plaintiff gained ‘possession of facts sufficient to make him suspicious, or that ought to make him suspicious.’”²⁴

Viewing the evidence in the light most favorable to the Plaintiff, the Court finds that the Plaintiff pleads specific facts to support that the statute of limitations was tolled because Plaintiff did not have inquiry notice until August of 2020, when the second flood occurred. Plaintiff adequately pleads that she relied on statements and representations made by Defendants that would reasonably delay notice of her injury. Likewise, a layperson would not have reasonable knowledge of the nature

²¹ *Washington House Condo. Ass’n of Unit Owners v. Daystar Sills, Inc.*, 2017 WL 3412079, at *18 (Del. Super. Ct. Aug. 8, 2017).

²² *Crest Condo.*, 2017 WL 6205779, at *3.

²³ *Reid v. Thompson Homes at Centerville, Inc.*, 2007 WL 4248478, at *8 (Del. Super. Ct. Nov. 21, 2007).

²⁴ *Banner*, 2022 WL 1537382, at * 6.

of the work performed by the Defendants on the drainage basin, pipe, and berm, especially when the Defendants unilaterally performed the work, without Plaintiff's permission. Also, it is not unreasonable for the Plaintiff to have believed that the flooding in 2017 was an isolated incident caused by an unusual storm and the Defendants' representations that followed, including a forensic investigation by the Defendants which concluded that the drainage basin operated as anticipated.

Moreover, after the August 2020 incident, the Defendants appear to disavow any responsibility for the drainage pipe and basin on the Property because it was discovered that the easement was in a different location. Similarly, Plaintiff has adequately plead facts that she was blamelessly ignorant as her reliance on the Defendants' representations is reasonable because Defendants are construction professionals. Thus, the Plaintiff's complaint is timely.

Accordingly, Defendants' Motions to Dismiss are **DENIED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.