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Case Number 468,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LTL ACRES LIMITED PARTNERSHIP,	)	C.A. No.: 468, 2015
Plaintiff/Appellant,	)	
vs.	)	
BUTLER MANUFACTURING COMPANY, a Delaware corporation, and DRYVIT SYSTEMS, INC., a Rhode Island corporation,	)	Appeal from the Superior Court in and for Sussex County, Case Number S13C-07-025 ESB
Defendants/Appellees.	)	

APPELLEE BUTLER MANUFACTURING COMPANY'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS[1]

LTL filed the underlying action against Butler and Dryvit Systems, Inc. ("Dryvit") in July 2013, alleging water intrusion damages associated with the Johnny Janosik World of Furniture ("Janosik Building") in Laurel, Delaware.[2] Construction of the Janosik Building was completed in October 2006.[3] Accordingly, Butler filed a motion for summary judgment based on Delaware's six-year statute of repose identified in 10 *Del. C.* § 8127 ("Repose MSJ").[4] Butler also filed a motion for summary judgment based on Delaware's four-year statute of limitations identified in 6 *Del. C.* § 2-725 ("Limitations MSJ").[5] Plaintiff filed a consolidated response to the motions, and Butler then filed a reply.[6]

On July 31, 2015, the Superior Court in and for Sussex County granted Butler's Repose MSJ, indicating that, as a result, there was no need to address the Limitations MSJ. (the trial court's ruling is referred to as Summary Judgment herein)[7]. On August 28, 2015, Plaintiff filed a notice of appeal.[8] Plaintiff filed its

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[1] References to LTL Acres Limited Partnership's and Butler Manufacturing Company's respective appendices are designated by citation to relevant page and line (or paragraph) numbers. E.g.: [A-1:2—A-3:15] or [B-1:2—B-3:15]. Butler Manufacturing Company is referred to as "Butler." LTL Acres Limited Partnership is referred to as "LTL" or "Plaintiff."

[2] *See* trial court docket (page 37), Exhibit "A" to Appendix to Appellant's Second Amended Opening Brief; *see also* A-336.

[3] A-337; A-277; B-288-289.

[4] B-188.

[5] B-1.

[6] B-291 and B-313, respectively.

[7] *See* the Summary Judgment at Exhibit "A" to Plaintiff's Second Amended Opening Brief, page 12, stating, "Butler also raised the four-year statute of limitations set forth in *Del. C.* § 2-725. I

Opening Brief on October 12, 2015. On October 19, 2015, this Court corresponded to Plaintiff identifying certain deficiencies with the Opening Brief. As such, Plaintiff filed an Amended Opening Brief, along with an amended supporting appendix, on October 26, 2015. On November 6, 2015, this Court corresponded to Plaintiff identifying deficiencies in the Amended Opening Brief. On November 13, 2015, Plaintiff filed a Second Amended Opening Brief ("Second AOB").

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have not addressed it because it is shorter than the six-year limitation set forth in section 8127 and, even if extended, would not extend beyond the six-year limitation set forth in section 8127."

[8] *See* trial court docket, pg. 2.

SUMMARY OF ARGUMENT

Paragraphs one (1) and four (4) of Plaintiff's Summary of Argument pertain to Butler (and relate to the trial court's statute of repose ruling). As such, Butler addresses those propositions below but does not address Plaintiff's arguments related to Dryvit. Butler also identifies a third proposition, relative to the Limitations MSJ.

1. Butler denies LTL's first proposition. LTL asserts (in paragraph "1") that "The Trial Court Committed Reversible Error on Pages 5 to 10 of the Opinion, When, in the Face of Contested Material Facts, it Granted Butler Summary Judgment Pursuant to § 8127 of the Builder's Statute." The trial court entered the Summary Judgment, however, because there was no genuine dispute as to whether Butler specially engineered and fabricated the Janosik Building pursuant to Plaintiff's specifications (i.e., "furnished construction") or furnished an "improvement" to Plaintiff's real property, as required by § 8127.

2. Butler denies LTL's fourth proposition. LTL asserts (in paragraph "4") that "The Trial Court Committed A Reversible Error as reflected on Pages 10 to 12 of the Opinion When, In The Face Of Contested Material Facts, It Denied that Equitable Estoppel was Not Supported By the Facts." It is well settled, however, that § 8127's repose period cannot be tolled. In addition, Butler's alleged promises to repair, if true, would not toll even a statute of limitations

period. In any event, however, Plaintiff did not argue in the trial court that equitable estoppel tolled the ***statute of repose***. Plaintiff argued only that equitable estoppel tolled the ***statute of limitations***.

3. Plaintiff's claims are also barred as argued in the Limitations MSJ. Although the trial court found it unnecessary to rule on limitations issues, the limitations period is a proper ground upon which to affirm the trial court's Summary Judgment and, as such, this Court's review of same is proper. Plaintiff did not challenge Butler's Limitations MSJ in the trial court, except to argue that the limitations period should be tolled based on equitable estoppel. As such, if this Court concludes that Butler's alleged promises to repair cannot toll the limitations period (as asserted above), this Court should affirm the Summary Judgment without regard to § 8127.

STATEMENT OF FACTS

The underlying litigation concerned the design, fabrication, and construction of the Janosik Building, owned by LTL (the "Project").[9] The Project consisted of a uniquely shaped two-story building.[10]

Plaintiff retained The Whayland Company, Inc. ("Whayland") to serve as the Project's construction manager.[11] Whayland was also an authorized "Butler Builder."[12]

A Butler Builder is an independent contractor authorized to order and construct Butler buildings pursuant to a Builder Agreement.[13] Whayland first became a Butler Builder in January 1999, and subsequently executed a Builder Agreement covering October 1, 2004, through September 30, 2007.[14] Butler Builders order and purchase Butler's un-erected metal building systems and assemble or erect those building systems for the Butler Builder's customer.[15]

Butler is in the business of engineering and specially fabricating metal components and related materials that comprise metal building systems, in accordance with order documents received from a Butler Builder.[16] The order

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[9] A-336; B-196-200; B-227-231.
[10] B-330-372; B-379-393.
[11] A-281; B-197: 7-9.
[12] B-197: 7-9.
[13] B-197: 5, 6.
[14] B-197: 7, 8.
[15] B-195: 5.
[16] B-228: 5; B-197-200; B-227-231; B-381.

documents define the desired metal building system.[17] The order documents typically consist of a Butler quote or proposal, a Butler Builder acceptance of the quote or proposal, a purchase order, and other writings, drawings, specifications, or other documents defining the unique and specific metal building system or components desired by the Butler Builder.[18]

Prior to September 4, 2004, Whayland requested that Butler prepare a quote for the Project.[19] Whayland provided Butler with required design criteria and design loads, as well as architectural drawings prepared by GMB Architects & Engineers ("GMB") on or about August 17, 2004.[20] The GMB drawings identified an overall floor plan and elevations that depicted the unique and particular geometric requirements for the Project.[21]

Whayland also provided mechanical specifications and air conditioning roof top unit ("RTU") information on mechanical drawings and RTU cut sheets provided by Allen & Sheriff, dated July 19, 2004.[22] Butler utilized loading information derived from the RTU specifications when engineering the Project to ensure that the Janosik Building's structure could support the RTUs.[23]

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[17] B-228: 8.
[18] *Id.*; B-197: 6.
[19] B-197: 9.
[20] *Id.*; B-67.
[21] *Id.*
[22] *Id.*
[23] B-260.

Based on the design criteria, design loads and other information Whayland provided, Butler issued Quote Number NE044345 ("Quote") for the Project, dated September 7, 2004.[24] Butler's Quote proposed engineering and specially fabricated metal components that would comprise a metal building system that would a) conform to the Project's geometric requirements such as length, width, height, roof shape and slope, and clearance requirements (both vertical and horizontal); b) conform to specified design loads, including live, snow, wind, seismic, collateral, and auxiliary loads (which include loads required by Whayland that are specific to the Janosik Building's use); c) conform to specified local codes and standards; d) conform to the Project's location and intended building use; and e) conform to site-specific and construction conditions that affect design criteria, such as snow drifting and location of adjacent structures.[25]

The specially engineered and fabricated materials that the Quote encompassed included a) the frames for the Project's metal building system; b) horizontal load bracing, purlins, girts, eave members, end wall columns, base angles, and other structural framing required to support the roof and wall panels for the Project's metal building system; c) connections for required structural framing; d) an exterior metal roof; and e) Koreteck/R-Steel ("Koreteck") wall panels for the

[24] B-198: 10.
[25] B-198-199.

metal building system.[26] Butler engineered and fabricated these items to conform to all of the specific structural and dimensional requirements of the Janosik Building.[27] Stated differently, these items that Butler engineered and fabricated, once erected, became the Janosik Building.[28]

Butler had a separate division that engineered and fabricated the aforementioned Koreteck panels.[29] The Koreteck panels create a building's wall system.[30] The Koreteck wall panel is an engineered and insulated structural wall system consisting of expanded polystyrene insulation and a galvanized steel core.[31] The Koreteck panels for the Project were generally 4-feet in width.[32] Odd width panels were fabricated to account for the Project's wall widths not on a 4-foot increment.[33] Butler fabricated each panel to specified lengths to account for the Project's specified wall heights.[34] Butler's Koreteck wall panel was fabricated with factory cut openings for windows, doors, and other wall openings in

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[26] *Id.*

[27] For a full narrative on how Butler engineers and fabricates a metal building system for a particular project, review select portions of testimony from Butler's Engineering Manager/Builder Services Manager, Hazem Mansour, at B-379-393; Butler's Program Lead Engineer, Bryan Lightfoot, at B-330-372; and Whayland's (the Butler Builder) representative, Robert Wheatley, at B-250-257, B-260-265, and B-271: 18—B-272: 19.

[28] *Id.*

[29] B-228: 4.

[30] B-228: 6.

[31] B-229: 13—B-229:

[32] *Id.*

[33] *Id.*

[34] *Id.*

dimensions and at locations that Whayland specified.[35] In addition, Butler engineered and fabricated Koreteck wall panels to include Project-specific reinforcing necessary to meet certain load requirements.[36]

Because the individual components of the Project's building system, including the Koreteck wall panels, were specially engineered and fabricated for erection at specific locations within the building system, Butler marked each component with identifying numbers known as "Piece Mark Numbers."[37] The Piece Mark Numbers identified each specific component and the location where that component was to be installed within the metal building system.[38] Butler shipped the components to the Project site in the exact sequence they were to be erected.[39]

Because Butler specially engineered and fabricated the individual components of the building system to conform to the Project's unique structural specifications and geometric requirements, once Butler engineered and fabricated the individual components they were uniquely suited for the Project and could not be utilized elsewhere without substantial modification and waste.[40] Once Butler specially engineers and fabricates components for a particular project, if a Butler Builder is unable or unwilling to take delivery of the building system Butler typically sells

[35] *Id.*
[36] B-334: 24—335: 4; B-341: 3-7.
[37] B-199: 16; B-230: 16; B-344: 12—B-345: 2; B-349; B-355; B-372: 14-24.
[38] *Id.*
[39] B-419.
[40] B-230: 18; B-200: 17.

the components for scrap value due to substantial and prohibitive cost and waste associated with modifying the components.[41]

Whayland accepted Butler's Quote on September 20, 2004.[42] Butler then engineered and specially fabricated all of the component parts of the Project's building system in compliance with the Quote.[43] Butler delivered the building system's components and related materials between March and August, 2005.[44]

Plaintiff retained Merit Builders, Inc. ("Merit") to erect the Janosik Building under Whayland's Project management.[45] Plaintiff retained Advanced Wall Systems to construct a plastic exterior wall coating produced by Dryvit.[46]

The Project achieved substantial completion and was open to the public by October 2006.[47] The Janosik Building experienced water intrusion from certain leaks (of unknown origin) starting prior to when the building was opened in October, 2006, and thereafter.[48]

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[41] B-200: 18.
[42] B-199: 13.
[43] B-199: 14.
[44] B-199: 15.
[45] A-228.
[46] A-338: 5.
[47] A-277; B-154.
[48] A-277; B-154; B-158.

ARGUMENT

I. The Trial Court Correctly Ruled that the Statute of Repose Barred Plaintiff's Action because Butler "Furnished Construction" and Provided an "Improvement" to Plaintiff's Property Pursuant to § 8127.

A. Questions Presented.

The questions presented are i) whether Butler engineered and fabricated the Project's metal building system pursuant to Plaintiff's specifications (i.e., "furnished construction" under § 8127), and ii) whether Butler's metal building system constituted an "improvement" to real property pursuant to § 8127. *See* B-190, B-191, B-315, and B-320, at which Butler asserted/preserved these positions in the trial court.

B. Scope of Review.

Delaware Appellate Courts review orders granting summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395 (Del. 2008). "Summary judgment is a tool used to remove any factually unsupported claims, and is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter of law." *AT & T Wireless v. Federal Ins.*, 2007 WL 1849056 (Del. Super. Ct. June 25, 2007). "Disposing of litigation via summary judgment is encouraged, when possible, to expeditiously and economically resolve lawsuits." *Bayside v. Delaware Ins.*, 2006 WL 1148667 (Del. Super. Ct. February 28, 2006).

C. Merits of Argument.

i. *Butler Specially Engineered and Fabricated the Project's Metal Building System Pursuant to Plaintiff's Specifications and, thus, Furnished Construction Pursuant to § 8127.*

Section 8127 of Delaware Code, Title 10, entitled "Alleged deficiencies in the construction of improvements to real property," is Delaware's statute of repose applicable to construction projects. Section 8127 operates to bar all causes of action six (6) years after the earlier of certain specified trigger dates. 10 *Del. C.* § 8127(b)(6); *see also Cheswold Volunteer v. Lambertson Const.*, 489 A.2d 413 (Del. 1984).

Although a "statute of limitations begins with an injury or the discovery date of an injury," a statute of repose commences "irrespective of the date of injury." *Workers' Comp. v. Kent Const.*, 2008 WL 4335873, *3 (Del. Super. Ct. September 19, 2008) (citing *Cheswold*, 489 A.2d at 421). "[T]he passing of the six (6) year period deprives the injured party of a legal right to redress." *Cheswold*, 489 A.2d at 420.

Under § 8127, the six (6) year repose period for Plaintiff's claims against Butler commenced at the earliest of several dates specified in the statute, including the date of Project substantial completion. *See* § 8127(b)(a)-(h). The Project reached substantial completion in October, 2006.[49] Thus, if Section 8127 applies

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[49] A-277; B-154.

to Plaintiff's claims against Butler, the six (6) year repose period ran by October 2012–approximately nine (9) months before Plaintiff filed the underlying action in July, 2013.

Importantly, there is no dispute over the commencement date of the repose period. Rather, Plaintiff argues that Section 8127 does not apply to its claims against Butler (and that Section 8127, if it applies, should be tolled), as further detailed below.

Section 8127 applies to claims against a party if that party "furnishes construction," or is involved with "designing, planning, supervision, and/or observation of any such construction," and the construction is an "improvement to real property." *See Windley v. Potts Welding*, 888 F. Supp. 610, 612 (D. Del. 1995). Section 8127(a)(2) defines "construction" to "include construction, erection, building, alteration, reconstruction and destruction of improvements to real property." Case law further defines "construction" as an "'act of building; erection; act of devising and forming; fabrication; [or] composition.'" *Windley*, 888 F. Supp. at 612 (citing *Becker v. Hamada,* 455 A. 2d 353, 356 (Del. 1982)).

With respect to fabrication of products, common law indicates that mere suppliers of raw materials are not covered by Section 8127. *Windley*, 888 F. Supp. at 612. However, fabricators that design or fabricate products pursuant to owner specifications (i.e., for a specific project) are covered. *Id.* (finding defendant

"furnished construction" when it designed, manufactured and sold a power plant preheater "to the specifications of the buyer"); *City of Dover v. International Tel.*, 514 A.2d 1086 (Del. 1986) (holding § 8127 applied where defendant manufactured utility pole to project specifications); *Hiab Cranes v. Services Unlimited*, 1983 WL 875126 (Del. Ch. August 16, 1983) (holding § 8127 applied where defendant designed, manufactured, and sold heating system oil furnace pursuant to project specifications); *Standard Chlorine v. Dover Steel*, 1988 WL 32044, *2 (Del. Super. Ct. March 31, 1988) (holding § 8127 applied where defendant designed and fabricated liquid storage tank according to project specifications, because it "cannot be said [that] the [fabricator] only supplied the raw materials").

The rationale in these cases is buttressed by opinions finding that mere raw material suppliers are not covered by Section 8127. *See Becker*, 455 A. 2d at 355-56 (holding defendant mere supplier of roofing material which it did not fabricate); *Kirkwood Dodge v. Krapf,* 1989 WL 48639 (Del. Super. Ct. May 9, 1989) (holding manufacturer of circuit breaker panel box did not "furnish[] construction" where box not manufactured to specifications, but generally available item); *Schermerhorn v. Anchor Elec. Co.,* 1992 WL 301636 (Del. Super. Ct. October 5, 1992) (holding manufacturer of meter pan and receptacle not protected by Section 8127 where not fabricated to specifications, stating, "[t]he public policy behind the statute of repose does not apply to items manufactured by a general supplier not

designed for ***specific application to a particular construction project***") (emphasis added). Thus, where a party is more than a mere supplier of the materials in question, because that party fabricates materials to the specifications of a buyer for a ***particular construction project***, the party "furnishes construction." *Windley*, 888 F. Supp. at 612. Moreover, "[t]he [materials] need not be unique in order for its builder to qualify for coverage under § 8127. Rather, [a party] need only show that it manufactured the [materials] and was not just a supplier of [materials] it obtained from another source." *Id.* at 613-14; *see also Hiab Cranes, supra.*

As identified above, Butler not only specially fabricated the Project's building system, but it specially engineered it as well. This included ensuring that the metal building could withstand specified loading requirements. Section 8127 expressly applies to "those performing or furnishing ***any design***, plan, supervision, or observation of such improvement." (emphasis added); *see also Cheswold*, 489 A.2d at 420-21. The trial court record clearly establishes (without genuine dispute) that Butler both engineered ***and*** fabricated the Project's metal building system pursuant to Plaintiff's specifications.[50]

As outlined in the above Statement of Facts, Butler specially engineered and fabricated an entire metal building system according to Plaintiff's unique specifications which, when erected, became the two-story Janosik Building. The

[50] B-330-372; B-379-393; B-250-257; B-260-265; B-271: 18—B-272: 19.

building system included engineered primary steel frames, secondary steel such as girts and purlins, a roof system, and exterior wall cladding.[51]

Butler's engineering and fabrication of the metal building included ensuring that wall panels and other metal components, once erected as a system, 1) adequately accounted for applicable design loads unique to the Janosik Building, and 2) met the Janosik Building's unique dimensional parameters and window, door, and other cutout placement.[52] With respect to Butler's engineering of the Janosik Building's structural capacity, Butler determined how each metal component would combine and connect to meet loading requirements.[53] Butler engineered and then fabricated the Koreteck wall panels to include reinforcing specifically required by the Project.[54] Once fabricated to structural and dimensional requirements, Butler applied Piece Mark Numbers to each component part so that Merit would know how to erect the Janosik Building.[55] None of these facts can be reasonably disputed, and are in no way contradicted in the record.

Plaintiff argues that Butler merely supplied generic construction materials used by Merit to furnish construction. Plaintiff's argument completely ignores the above aspects of Butler's services and, instead, highlights irrelevant Butler testimony about generic fasteners (not incomparable to screws or nails) and certain

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[51] B-198-199.
[52] B-330-372; B-379-393; B-250-257; B-260-265; B-271: 18—B-272: 19.
[53] *Id.*
[54] B-334: 24—335: 4; B-341: 3-7.
[55] B-199: 16; B-230: 16; B-344: 12—B-345: 2; B-349; B-355; B-372: 14-24.

stock details associated with the specially engineered and fabricated building system.[56]

For example, Plaintiff cites testimony of Butler's Program Lead Engineer, Mr. Bryan Lightfoot, acknowledging that certain types of fasteners or connection methods are the same from project to project. Plaintiff then argues "that what varies from one building to the next is nothing more than the number and placement of the Koreteck component parts."[57] Plaintiff's position would be akin to arguing that a certain screw within the *Hiab Cranes* furnace or a valve within the *Windley* preheater is generally available and, as such, those specially tailored products are outside of Section 8127's grasp.

Moreover, although fabrication that incorporates a design for the unique placement of component parts would meet the common law definition of "furnishing construction," Plaintiff's conclusion completely ignores the fact that 1) Butler's building system contains many more parts than the Koreteck wall panels, 2) Butler alters the wall panels themselves for each project by the addition of reinforcement necessary for a particular project, and 3) Butler fabricates the component parts to Project-specific geometry and to account for unique Project wall openings (such as doors and windows). In addition, as seen from Mr. Lightfoot's testimony within Plaintiff's appendix, the spacing and connection

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[56] Second AOB, pg. 14 (citing A-16—A-20).
[57] Second AOB, pg. 6.

devices change based on loading requirements of a particular project.[58] Plaintiff's assertion in the Second AOB, page 4, that the design does not change from one building to the next is simply untrue.

Plaintiff's Second AOB does not reference and Plaintiff's supporting appendix blatantly omits the germane and unrefuted portions of Mr. Lightfoot's testimony that elaborate on and detail the process through which Butler engineers and fabricates an entire custom building. For example, Mr. Lightfoot testified as follows:[59]

> A. Each building has a specific location in the country. And those locations have jurisdictions that are responsible for ensuring their safe construction. And so each jurisdiction requires that each building be designed to a particular code. So you have to take the code into account. The environmental loading that's going to be on the building is going to be different in different locations. So the panels would require separate, different analysis to determine which panel would be reinforced in one location versus another. Also, the building's geometry would not be the same. So you would have different-length buildings requiring different, special-width panels. You may have a different slope, which would require a different miter.[60]
>
> . . .
>
> A: If – if additional stiffness or strength were required [in the Koreteck panels], we added internal members to reinforce the panel. . . .[61]

[58] *See*, e.g., A-13: 5-17.

[59] Mr. Lightfoot, as stated above, is a Butler engineer. He is experienced with Butler's Koreteck division. B-227: 3 and B-228: 4.

[60] B-332: 17—B-333: 11.

[61] B-334: 24—335: 4. This testimony alone highlights Plaintiff's misrepresentation of the record on page fourteen (14) of the Second AOB, which states "[Mr. Lightfoot's] articulation of

. . .

A: Openings would greatly affect the panel's strength capability. The more panel you cut out, the weaker the panel is, the more reinforcement you have to put in. . . .[62]

. . .

A: -- openings, doors, locations of all those would have to be taken into account, whenever you design each panel, to carry the load that it's required to carry.[63]

. . .

Q: The placement of the panels, it's important that one panel be put – that all the panels be put in the right place relative to each other, isn't it?
A: That's correct.
Q: Why is that?
A: Because every panel was designed and detailed specific to that location.
Q: And that's true because of load considerations?
A: Partially.
Q: Slope considerations?
A: Correct.
Q: Anything else?
A: Other geometry, such as openings, building width and length, building height.[64]

. . .

'specially engineered' has ***absolutely nothing*** to do with the actual design of the Koreteck parts." (emphasis added). Further, at B-335, Mr. Lightfoot identified various ways in which the Koreteck panels change from project to project, including the addition of project-specific reinforcement. Plaintiff's counsel's response to the testimony encapsulates Plaintiff's general approach of ignoring relevant aspects of Butler's services. Plaintiff's counsel stated, "I don't want to talk about reinforcement." B-335: 17.

[62] B-341: 3-7.

[63] B-334: 3-6.

[64] B-334: 12—B-345: 3.

Q: Placement of the girts may be different from one job to the next?

A: Placement of the girt, whether it stops under the panel, whether it parapets, if there's a stack joint or not.[65]

. . .

A: Every panel has a unique spot on the building. Every unique building has unique panels to that building, and everyone has to be in a certain spot. And instructions have to be made so that the installer knows where to place those. That's what we refer to as detailing. So we're creating not only a manifest to make and manufacture the panels, but detailing also creates the installation drawings so that they can be installed properly.[66]

Whayland's corporate representative, Mr. Robert Wheatley, testified as follows:

A: Butler would have been given whatever we had at that stage. It is not unusual for them to quote a building from stage prints, from a sketch that a builder makes and gives to them. And then what typically happens is that the Butler package actually drives the rest of the design. In other words, it's more or less designed with whatever – whatever Butler's, you know, whatever Butler's doing, because Butler is the designer of the structure, they're designing it. GMB doesn't design that; Butler designed the, you know, the structure itself within the parameters that were either shown on the drawings or conveyed to them some other way.[67]

. . .

[65] B-347: 8-12.

[66] B-372: 14-24.

[67] B-251: 4-17. This undisputed testimony alone soundly dispels Plaintiff's unsupported position that Butler merely dropped raw materials off at the Project site.

A: . . . . Butler as the designer, they're going to – they're going to give you the design, and as long as it, you know, conforms to what you order, there's really no point.[68]

. . .

Q: And, again, is this just an example of the design process that you as a Butler builder would go through by identifying various point loads that the owner would require so that Butler could design its building to accommodate those unique needs or characteristics?

Mr. Conway: Objection as to form and foundation.

A: Yes.[69]

. . .

Q: Okay. Just to be clear, the Butler building itself was designed by Butler, correct?

A: Yes.

Q: It was designed based on GMB's drawings, those drawings were more of a frame work upon which Butler was then to design the Butler building?

A: Correct. Butler does the structural design for the materials they furnish; they design the wall panels, the roof panels, the flashings that go between them.[70]

The fact that Butler's design calls for specific types, numbers, and locations of connection devices to be coupled with specially reinforced, dimensioned, shaped, and located primary building components, only supports the indisputable fact that the subject Project was specially designed and fabricated. Plaintiff's position that Butler merely supplied generic building materials fit for any project,

[68] B-258: 21-24.
[69] B-260: 2-10.
[70] B-271: 18—B-272: 3.

such as an electrical box, roof shingles, or nails you might find at a hardware store, is absurd.

In support of its argument, Plaintiff attempts to distinguish the products manufactured in *Hiab Cranes* (an oil furnace), *City of Dover* (a utility pole), *and Standard Chlorine* (a liquid storage tank), from the metal building system Butler engineered and fabricated. Plaintiff argues the products manufactured in those cases were "either completely assembled when delivered or required very little assembly," unlike Butler's product. There are obvious problems with this argument.

First, whether a fabricator or designer of a product also installs or erects the product is not determinative of whether the fabricator "furnished construction" under the statute. The courts look to whether a manufacturer fabricated the product for a specific project pursuant to owner specifications. Second, the very cases Plaintiff cites belie its argument. In *Standard Chlorine*, the court highlighted that the liquid storage tank was delivered "knocked down" (in multiple pieces) and needed to be erected on site. Nevertheless, the court found that the tank constituted "furnished construction" because it was fabricated pursuant to project specifications and was not simply "raw materials."

In *Porter v. Delmarva*, 1985 WL 1219231 (Del. Super. Ct. December 5, 1985), the plaintiff attempted LTL's argument by asserting that *Hiab Cranes* was

distinguishable because the *Hiab Cranes* oil furnace was fabricated offsite and then delivered virtually complete, whereas the *Porter* utility pole had to be connected to electrical lines and hardware, and a cement foundation had to be erected for the pole following delivery. The Superior Court rejected the argument, stating, "I do not find that the fact that a unit which has been ***created off the property*** site and ***conforms to the quoted definition*** must be installed and connected to utilities or otherwise made functional on the site removes its fabricator from the coverage of § 8127." (emphasis added).

The purpose of the "furnishing construction" or "design" concept under § 8127 is to exclude raw material suppliers, but to include those that fabricate and/or design a product for a specific application. Nowhere within its Second AOB does Plaintiff dispute the fact that Butler specially engineered and manufactured the metal building system pursuant to Project requirements. Underscoring the fact that Butler did just that is ***undisputed*** Butler testimony explaining that once a metal building system is manufactured it cannot be used for another project.[71]

ii. *Butler Furnished an "Improvement" to Real Property Pursuant to § 8127.*

In addition to the "furnishing construction" and/or "designing" requirement, Section 8127 requires that the construction constitute an "improvement" to real property. 10 *Del. C.* § 8127(b)(1). Section 8127(a)(5) provides, in relevant part:

[71] B-200: 17; B-200: 18. B-230: 18.

"'Improvement' shall include buildings . . . of any type constructed thereon, and other structures affixed to and on land, as well as the land itself." *See Windley*, 888 F. Supp. at 613 (noting "improvement" is "a permanent addition to or betterment of real property that enhances its capital value and that involved the expenditure of labor and money and is designed to make the property more useful or valuable ***as distinguished from ordinary repairs***.") (emphasis added) (citing *Standard Chlorine*, 1988 WL 32044 at *2); *see also City of Dover*, 514 A.2d at 1089.

The Janosik Building is clearly a permanent addition and betterment. Plaintiff acknowledges as much in its trial court opposition to Butler's motions.[72] Plaintiff's argument, however, is that Merit, not Butler, provided the improvement.

Plaintiff fails to cite any case law finding that specially engineered and fabricated goods must be erected by the manufacturer to be deemed an improvement. In fact, Plaintiff ignores case law demonstrating that who installs the product has no bearing on whether the product is an "improvement." *See City of Dover* (holding utility pole was "improvement" even though fabricator did not install it), *Standard Chlorine* (holding liquid storage tank was "improvement" even though fabricator delivered individual pieces "knocked down" for installer to erect on site), and *Hiab Cranes* (holding oil furnace was "improvement" even though

[72] B-305.

fabricator did not install it).[73] In *Windley*, the court determined that a fabricator "furnished construction" and then analyzed whether the construction improved the real property. The Court indicated that a preheater, an oil distribution system, and a liquid storage tank are all improvements to real property as a matter of law (without regard to who constructed or installed each).

Who designs, fabricates, and/or erects a building may be relevant to a "furnishing construction" analysis, but it is irrelevant when assessing whether particular construction is an improvement. Plaintiff's argument simply confuses the concepts of "furnishing construction" and "improving" real property.

As discussed in *Kirkwood, supra*, an "improvement' is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable ***as distinguished from ordinary repairs***." (emphasis added). Obviously, Butler's building system was not an ***ordinary repair*** adding no meaningful value to real property.

Plaintiff's argument that "heaping" or "plunk[ing] down" a "pile of parts" does not constitute an improvement to real property is, again, mixing the

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[73] *See also Thompson v. Murata*, 2011 WL 5624374 (Del. Super. Ct. November 17, 2011) (holding that even an industrial metal cutting machine was an improvement where it was a permanent structure).

"improvement" and "furnishing construction" analyses.[74] Further, designing and fabricating an entire metal building pursuant to client specifications, along with specifically identifying where and how each part is to be constructed, is clearly not "heaping" a "pile of parts" onto a construction site. Plaintiff's repeated and clearly demonstrable mischaracterizations have forced Butler, and now this Court, to incur unnecessary time and resources.

[74] Second AOB, pgs. 19 and 20.

II. The Trial Court Correctly Ruled that the Repose Period Cannot be Tolled and that Butler's Alleged Actions Would Not, in Any Event, Toll a Filing Deadline.

A. Question Presented.

The question presented by Plaintiff is whether the trial court erred in ruling that Whayland was not Butler's agent and that Butler did not promise to fix the subject leaks. However, the more salient questions are i) whether § 8127's filing deadline can be tolled, and ii) whether the alleged Butler actions can, in any event, toll a filing deadline. *See* B-192, B-4, and B-321, at which Butler asserted/preserved these positions in the trial court.[75]

B. Scope of Review.

Delaware Appellate Courts review orders granting summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395 (Del. 2008). "Summary judgment is a tool used to remove any factually unsupported claims, and is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter of law." *AT & T Wireless v. Federal Ins.*, 2007 WL 1849056 (Del. Super. Ct. June 25, 2007). "Disposing of litigation via summary judgment is encouraged, when possible, to expeditiously and

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[75] Plaintiff's Second AOB (page three (3)) states that Plaintiff pled various tolling doctrines in the trial court. However, Plaintiff only argues equitable estoppel on appeal. Moreover, Plaintiff only argued estoppel in the trial court briefs. As such, any other legal theories have been waived. *See* Supreme Court Rule 14(b)(A)(3); *see also* the Summary Judgment, page 10, footnote 16, at Exhibit "A" to the Second AOB, stating, "LTL also raised fraudulent concealment in its complaint, but did not pursue it in its answer to Butler's Motion for Summary Judgment. Therefore, I have not considered it."

economically resolve lawsuits." *Bayside v. Delaware Ins.*, 2006 WL 1148667 (Del. Super. Ct. February 28, 2006).

C. Merits of Argument.

i. *Section 8127 is Jurisdictional and Cannot be Tolled.*

Butler's Repose MSJ argued that the repose period cannot be tolled. Plaintiff's response, titled "Consolidated Response to the Defendants' Motions for Summary Judgment on the Statutes of Repose and Limitations," did not argue that Section 8127's repose period *can* be tolled. Plaintiff only argued that "Butler is estopped from asserting the ***statute of limitations*** as a defense," and that "Butler cannot now hide behind the ***statute of limitations***." (emphasis added).[76] As such, Plaintiff's estoppel argument was limited to Butler's limitations defense. *See* Supreme Court Rule 8 ("Only questions fairly presented to the trial court may be presented for review. . . .").

Notwithstanding this preservation issue, case law is entirely clear in holding that the subject statute of repose cannot be tolled. *See Fountain v. Colonial Chevrolet*, 1988 WL 40019 (Del. Super. Ct. April 13, 1988) (holding § 8127 cannot be tolled, even by fraudulent concealment) (citing *Cheswold, supra*); *see also Scott v. Delaware*, 1985 WL 22033 (Del. Ch. September 25, 1985) ("In

[76] B-307 and B-309, respectively. In fact, the final paragraph of Plaintiff's trial court response (B-308-309) is identical to the final paragraph of the Second AOB (pg. 34), and discusses only the statute of limitations.

summary, since we are dealing here with a statute of repose and not a statute of limitation, equitable estoppel will not serve to preserve Del Tech's claim for arbitration.").

As explained by the *Cheswold* court, "the statute of repose is a substantive provision which may not be waived because the time limit expressly qualifies the right which the statute creates . . . Moreover, because the statute of repose is a substantive provision, it relates to jurisdiction of the court; hence 'any failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction which it might otherwise have.'").

Where subject matter jurisdiction is lacking, it cannot be conferred by estoppel. *See Scott v. Delaware*, 1985 WL 22033 at *2 ("Moreover, because the statute of repose is a substantive provision, it relates to the jurisdiction of the court; hence '**any** failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction which it might otherwise have.'") (emphasis added) (citing *First Savings v. First Federal,* 547 F.Supp. 988, 995 (D. Haw. 1982)); *see also Bruno v. Western Pacific*, 498 A.2d 171 (Ch. Ct. 1985).

Plaintiff's Second AOB focuses primarily on whether Whayland was an agent of Butler and whether the parties made certain promises to repair. Plaintiff

has only one paragraph in its Second AOB (page 32) in which Plaintiff states that Section 8127 can be tolled. Interestingly, Plaintiff cites only two cases, each of which hold Section 8127 cannot be tolled. In addition, although never presented to the trial court below, Plaintiff cites the Delaware Constitution, Article I, Section 9, as apparent support for its argument. Multiple courts, however, have already addressed constitutional arguments attacking Section 8127, including arguments based on Section I, Article 9, and have concluded that Section 8127 is constitutional. *See Cheswold,* 489 A.2d at 420-21 (Del. 1984) (holding Section 8127 constitutional under Article I, Section 9); *see also City of Dover*, 514 A.2d at 1089 (Del. 1986) (upholding Section 8127 as constitutional under Article II, Sections 16 and 19).

ii. *Promises to Repair Do Not Toll a Filing Deadline.*

Although common law indicates the statute of repose cannot be tolled, Plaintiff re-asserts its equitable estoppel argument from the trial court relative to tolling a ***statute of limitations*** period, and argues estoppel should toll Section 8127 (as stated above, Plaintiff did not argue in the trial court that the repose period can be tolled). Plaintiff argues that Butler, through its alleged agent Whayland, promised to repair leaks and, as a result, the repose period should be tolled.

Plaintiff describes alleged communications Whayland had with Butler regarding water leaks at the Janosik Building and further states that Butler sent

engineers to the building back in 2006. Plaintiff argues that "frequent email communication" and a Butler letter to Plaintiff dated July 24, 2012, "reaffirming [Butler's] willingness to work on the problem," somehow supports estoppel-based tolling.

Although Plaintiff's argument that Whayland was Butler's agent is irrelevant (because promises to repair do not toll a limitations period, as discussed below, and because Section 8127 cannot be tolled), it is also unsupported by the record. The Builder Agreement between Butler and Whayland states, in relevant part:

> **Article X, Section 1. Builder not an Agent of Butler** – [Whayland] is an independent contractor. This Agreement does not in any way create the relationship of principal and agent between Butler and [Whayland]. [Whayland] shall not act or represent itself as an agent of Butler nor in any manner assume or create any obligation on behalf of or in the name of Butler.[77]

Further, Whayland's corporate representative, Robert Wheatley, testified during his deposition that Whayland was not acting as Butler's agent on the Project.[78] As the trial court pointed out, Whayland was Plaintiff's construction manager on the Project, not Butler's agent.

Even if Whayland was Butler's agent and made a promise to repair, Delaware common law dictates that promises to repair or remedy an alleged defect do not toll a limitations period (let alone a repose period). *See Techton v. GP*

[77] A-310.
[78] B-400: 15-23.

Chemicals, 2004 WL 2419129, *2-3 (Del. Super. Ct. October 25, 2004) ("Defendant's promise to make repairs or remedy the alleged breach is insufficient to toll the statute of limitations."); *Ontario Hydro v. Zallea Sys.*, 569 F. Supp. 1261, 1272 (D. Del. 1983) ("a promise to repair defective goods does not preclude the running of applicable limitation periods"); *Burrow v. Masten Lumber,* 1986 WL 13111, *2-3 (Del. Super. Ct. October 14, 1986) ("Mere attempts to repair or a promise to repair do not preclude the running of the statute."). Further, as the trial court identified, there is no record evidence of promises or assurances to repair, and at no time did Butler acknowledge any responsibility or liability.[79]

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[79] *See* deposition testimony of Plaintiff's representatives David Khoeler (A-186 and B-177, 180, and 182) and Frank Gerardi (B-144, 145, 153, 155, and 156); and Whayland representative, Mr. Wheatley (B-64, 105-106, 114-115, 121-122).

III. This Court Should Affirm the Trial Court's Summary Judgment Because the Statute of Limitations Bars Plaintiff's Claims.

A. Question Presented.

The question presented is whether the statute of limitations also bars Plaintiff's claims. *See* B-2, at which Butler asserted/preserved this position in the trial court.

B. Scope of Review.

Delaware Appellate Courts review orders granting summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395 (Del. 2008). Although the trial court chose not to rule on Butler's Limitations MSJ, this Court should affirm the Summary Judgment based on same. *See Unitrin v. Am. Gen.,* 651 A.2d 1361, 1390 (Del.1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court. We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court.") (citing *Standard Distrib. v. Nally,* 630 A.2d 640, 647 (Del. Super. Ct. 1993); *Standard Distrib. v. Nally,* 630 A.2d at 647 ("Notwithstanding the Superior Court's failure to rule on the matter, we may dispose of it, in the interests of judicial economy, since the issue was "fairly presented to the trial court.") (citing Supreme Court Rule 8 and *Cannelongo v. Fidelity America*, 540 A.2d 435, 440 n. 5 (Del Super. 1988)); *Webster v. State*, 795 A.2d 668 (Del. 2002); *Bailey v. State,* 588 A.2d 1121, 1122-23 (Del.1991).

C. Merits of Argument.

As Butler argued below, Plaintiff's claims are also barred by the four-year statute of limitations period identified in 6 *Del. C.* § 2-725.[80] In opposition to the Limitations MSJ, Plaintiff did not oppose the applicability of Section 2-725, the timing of when Butler delivered its product, the timing of when Plaintiff learned of the subject water leaks, or the dates Butler identified for the commencement of the limitations period.[81] Accordingly, Butler will not re-argue the Limitations MSJ, but would refer the Court to same at B-1, as well as Butler's reply brief at B-321. Plaintiff's only opposition to the Limitations MSJ was that equitable estoppel should toll the limitations period.[82] For the reasons articulated above, equitable estoppel does not toll the limitations period.[83] As such, this Court should affirm the Summary Judgment based on the above Section 8127 analyses ***and*** because the statute of limitations bars Plaintiff's claims (without regard to a "furnishing construction" analysis).

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[80] 6 *Del. C.* § 2-725 applies to actions based on the sale of goods. Plaintiff's action would also be barred if it was governed by the three-year statute of limitations identified in 10 *Del. C.* § 8106. As stated above, the Janosik Building leaks commenced in 2006, and Plaintiff testified that it knew the leaks were a problem. B-154; *see Becker*, 455 A.2d at 354 ("Even in malpractice and fraud cases where a discovery rule is applied it is not the actual discovery of the reason for the injury which is the criteria . . . [D]iscovery means 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 the discovery.")

[81] *See* Plaintiff's consolidated response to Butler's Repose MSJ and Limitations MSJ at B-307.

[82] B-307.

[83] The only specific conduct Plaintiff attributed directly to Butler is the authoring of a July 24, 2012, letter regarding the subject leaks. However, as identified in the trial court briefs, said letter is dated approximately three (3) years after the limitations period had already run.

CONCLUSION

Based upon the undisputed record, Delaware's statute of repose and statute of limitations bar Plaintiff's claims. The statute of repose cannot be tolled and Butler's alleged promises to repair, in any event, do not a filing deadline. Accordingly, this Court should affirm the trial court's Summary Judgment.

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