RECEIVED
Jul 05 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and
Carolyn Nivens, Petitioners,

v.

JB & E Heating & Cooling, Inc.,
a South Carolina corporation, Respondent.

PETITION FOR CERTIORARI

John Martin Foster
SC Bar No. 2086
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Petitioners
jmfoster@comporium.net

STATEMENT OF THE CASE

In or about October, 2010, the Petitioner NIVENS contracted with the Respondent JB & E HEATING & COOLING, INC. (hereafter also JB&E) for the installation of a geothermal system in their home at the price of $15,280.00. The NIVENS allege that the system was never properly completed. JB&E's e-mail to NIVENS dated March 8, 2011 references the parties' continued dealings as to completion.

The Appellants allege repeated promises of examination and repair, and the failure of those promises. In March, 2012, he initiated a complaint with the South Carolina Department of Labor and Licensing Regulation (hereafter also LLR), alleging improper installation of the unit.

Petitioner filed their civil action on August 10, 2017, alleging seven (7) causes of action:

1) Violation of the Magnuson-Moss Warranty Act;
2) Violation of the Unfair and Deceptive Trade Practices;
3) Breach of express warranties;
4) Breach of implied warranty of fitness;
5) Negligence;
6) Nuisance; and
7) Negligent misrepresentation.[1]

Respondent JB&E filed for Summary Judgment, alleging an expired Statute of Limitations and that the claims were barred by *res judicata* and collateral estoppel due to the LLR ruling. The Petitioners argued that their action falls under the U.C.C. Statute of Limitation, S.C. Code § 36-2-725, which allows a six-year period when dealing with a sale of goods.

By its Order of March 18, 2019, the Circuit Court dismissed the action on the basis of an expiration of the applicable Statute of Limitations.

The NIVENS filed their Motion for Rehearing; this Motion was denied. Appeal was filed on June 25, 2019.

By its Order of May 11, 2022, this Court dismissed the appeal, holding that "the predominant purpose of the contract between [the parties] was for services with goods incidentally involved." [ORDER OF MAY 11, 2022, Para. 1.] This Court based its decision upon such precedent as *Plantation Shutter Co.* v. *Ezell*, 328 S.C. 475, 492 S.E.2d 404 (Ct.App. 1997), applying what it sees as the "predominant factor test."

1 The cause of nuisance was dropped at the hearing on Summary Judgment.

ARGUMENT

THE SIX-YEAR STATUTE OF LIMITATIONS SET OUT IN S.C. CODE § 36-2-725 APPLIES TO THIS ACTION.

The Petitioners argue that the U.C.C. Statute of Limitations, S.C. Code § 36-2-725, titled "Statute of limitations in contracts for sale", applies in this action. That Statute states, in relevant part:

> (1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.
>
> (2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.
>
> . . .
>
> (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

In determining whether a particular contract falls within the U.C.C. definition of a "sale of goods", and thus whether § 36-2-725 would apply, some decisions have looked to the "predominant purpose of the transaction." Others have followed the rule as set forth in *Plantation Shutter Co.*, *supra*. That decision stated:

> In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC, courts generally employ the predominant factor test. *Ranger Constr. Co*. v. *Dixie Floor Co*., 433 F.Supp. 442 (D.S.C.1977). Under this test, if the predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. *Id*. at 445. If, however, the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. *Id*. at 444. <u>In most cases in which the contract calls for a [328 S.C. 479] combination of services with the sale of goods, courts have applied the UCC.</u> James J. White & Robert S. Summer, UNIFORM COMMERCIAL CODE § 1-1, at 4 (4th ed. 1995).
>
> [*Plantation Shutter Co.* v. *Ezell*, 328 S.C. 475, 478, 492 S.E.2d 404, 406; <u>emphasis added</u>.]

In this case, the Petitioners contracted for a geothermal *system*. See, *e.g*., the characterization of the parties' dealings in the decision of the LLR Board. The Formal Complaint before that body stated:

1. On or about October 4, 2010, the Respondent [Hutchison Neely, owner of the Respondent company] contracted with a homeowner ("Complainant") [NIVENS] for the installation of a geothermal HVAC unit in a single-family residence located at 105 Mountain View Street, Clover, South Carolina. . . .

[APPENDIX, RECORD ON APPEAL, p. 37; identification added.]

The Hearing Officer's Findings of Fact and Conclusions of Law adopted the same language.

3. On or about October 4, 2010, the Respondent contracted with James (Steve) Nivens ("Homeowner") for the installation of a geothermal HVAC unit ("System") in a single-family residence located at 105 Mountain View Street, Clover, South Carolina ("Subject Property"). . . .

[APPENDIX, RECORD ON APPEAL, p. 43.]

Those Findings and Conclusions were adopted by the LLR Board in their entirety. [APPENDIX, RECORD ON APPEAL, p. 50.]

If the issue of "predominant factor" is not itself precluded by the LLR Order characterizing the contract as one for "the installation of a geothermal HVAC unit" ("System")", the fact remains that the Petitioners contracted for a working and adequate geothermal *system*: that is, one in which the installation, planning and equipment would work to that end. The predominant factor thus was, or unquestionably included, the equipment installed by Respondent and its adequate working.

In the case of *Fournier Furniture, Inc.* v. *Waltz-Blow Pipe Co.*, 980 F.Supp. 187 (W.D.Va. 1997), (cited by this Court's decision of May 11, 2022) the Federal District Court determined that a contract for design, fabrication and installation of a furnace and which provided for sales taxes, as here, was one for the sale of goods. The intent of the contract of the parties in this case was obviously to secure the Petitioner new, properly working geothermal *system* of equipment in the Petitioner' home. Thus, S.C. Code § 36-2-725 applies; since this action was brought within six years of the time to which the parties' actions extended their contract, the relevant Statute of Limitations is satisfied.

Counsel would add that the language of the Circuit Court and of the Court of Appeals seems to base itself, not on the clear language set out in *Plantation Shutter Co., supra,* but on a general feeling that the Petitioners have waited beyond a point where their claim should, in fairness, be considered by the Courts. The Petitioners dealt with the LLR from ca. March, 2012 through its Final Order issued January 27, 2015. The Petitioners, who were not represented by counsel before this action, would not be the first litigants to believe that a complaint to a State Agency would be sufficient to preserve their rights.

CONCLUSION

Counsel would note the discrepancy between the standard set in *Plantation Shutter Co., supra,* and its application in cases of this kind. He also notes the lack of any ruling as to the effect of a regulatory action on the relevant statute of limitations.

With respect to the Court, the Petitioners can only cite, again, the fact which to their knowledge is undisputed in this action: the Petitioner wanted and contracted for a working, adequate geothermal system to heat and cool their house. Installation of that system involved services and equipment. Under the existing and accepted precedent dealing with such a situation, they are entitled to invoke the U.C.C. statute of limitations. They have met that limitation and are entitled to move forward with their action.

July 4, 2022

Respectfully submitted,

/s/ John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100
Attorney for Petitioner
jmfoster@comporium.net

RECEIVED
Jul 05 2022
SC Court of Appeals

CERTIFICATION BY COUNSEL

Pursuant to Rule 242(d)(1), counsel for Petitioners certifies that a petition for rehearing was made and finally ruled on in this case by the Court of Appeals.

/s/ John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100
Attorney for Petitioner
jmfoster@comporium.net

RECEIVED
Jul 05 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and Carolyn Nivens, Petitioner,

v.

JB & E Heating & Cooling, Inc., a South Carolina corporation, Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Petitioners in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Petition for Certiorari;

Appendix; and

this Certificate of Service,

by service to the opposing lawyer's primary e-mail address listed in the Attorney Information System (AIS), as authorized by Section (b)(2) of the Order of the Supreme Court dealing with Electronic Filing and Service issued May 6, 2022.

James W. Boyd
S.C. Bar No. 824
1544 Ebenezer Road
Rock Hill, S.C. 29732
Attorney for Respondent
803 328-2600
jamesboyd@comporium.net

/s/ John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Petitioners

July 4, 2022

Rock Hill, S.C.