

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 KATHLEEN M. RANKIN,)
)
 Plaintiff,)
)
 v.)
)
 PALATIAL HOMES, INC. A/K/A)
 PALATIAL HOMES, LLC N/K/A)
 PALATIAL HOMES DESIGN, LLC,)
 et al.,)
)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 CASE NO. 2020-CP-07-00776

**AMENDED
 ORDER GRANTING DEFENDANT
 HILTON HEAD EXTERMINATORS,
 INC.’S MOTION FOR SUMMARY
 JUDGMENT**



THIS MATTER was heard by the undersigned on the Motion for Summary Judgment filed by Defendant Hilton Head Exterminators, Inc. (“HHE”). The hearing took place on August 15, 2022. The Court, having considered HHE’s motion, the briefs submitted, and oral arguments of counsel, grants HHE’s Motion for Summary Judgment for the reasons set forth below.

I. PREAMBLE

This case involves moisture and termite damage discovered by Plaintiff following her “as is” purchase of the residence located at 11 Harrogate Drive, Hilton Head, South Carolina (the “Residence”). Palatial Homes, Inc. constructed the Residence, and Defendant HHE applied the termite pre-treatment to the soil in March 2003, prior to construction. On March 3, 2005, the Town of Hilton Head issued a building permit, and the Certificate of Occupancy for the Residence was issued on January 30, 2006.

HHE provided a termite warranty for prior owners of the Residence from June 1, 2005, to April 27, 2012. The warranty was cancelled on April 27, 2012, when the prior owners elected not to renew the termite warranty. HHE did not provide any further termite services at the Residence after April 27, 2012. The Residence then apparently went uninspected and untreated

for termites for approximately six years and eight months before Plaintiff purchased it.

On or about December 6, 2018, Plaintiff entered into a Contract of Sale (the “Contract”) to purchase the Residence from seller Michael Grondahl for the purchase price of \$1,240,000.00. The Contract expressly states that the Residence was being sold “as-is,” “where-is,” with “no repairs” and “no concessions.” Plaintiff did not obtain a home inspection. Instead, she relied on a previous home inspection report produced by the seller’s real estate agent. Plaintiff testified that she did not even see the previous home inspection report, and she does not know if her real estate agent reviewed it. Plaintiff stated that the seller’s real estate agent represented to Plaintiff’s real estate agent that there were no significant issues with the Residence, even though it “had been vacant at different times,” and Plaintiff’s real estate agent did not believe another inspection was necessary.

Furthermore, the section of the seller’s Residential Property Condition Disclosure Statement regarding wood-destroying insects, which includes termites, was completely blank and did not address whether the Residence had any past or present termite infestations, damage, or termite treatment or coverage. Plaintiff testified this did not raise any red flags for her because she was not aware of the amount of damage termites can do to a house, and she was not surprised the termite section of the disclosure was also blank because the seller “listed no representation on all of the other boxes.” She did not know if the prior owner had a termite warranty for the Residence. Plaintiff obtained an Official South Carolina Wood Infestation Report, or CL-100, prior to closing, and the visual CL-100 inspection did not identify any visible termite activity or damage.

Plaintiff closed on the purchase of the Residence on December 18, 2018. She testified that she moved into the Residence in early January 2019, and shortly thereafter, she claims she observed a substance that she later learned was “termite excrement” at the top of one of the

columns on the first-floor porch on the rear of the residence. She testified that months later, in late spring or early summer 2019, a painter discovered termites in the breakfast nook on the rear of the residence while painting sheetrock. While he was painting, some of the sheetrock crumbled and exposed the termites. During the same timeframe, a repair contractor hired by Plaintiff discovered numerous construction defects at the Residence, including structural stability issues with the second-floor balcony on the rear of the Residence and flashing and waterproofing issues.

On January 15, 2020, more than a year after she purchased the Residence, Plaintiff contacted the Department of Pesticide Regulation (“DPR”), Clemson University, to perform an investigation regarding the CL-100 inspection performed at the Residence by another party and the discovery of termite damage. DPR performed an inspection on January 22, 2020, and DPR Pesticide Investigator Kristin Lenox-Rustin subsequently issued a report dated June 18, 2020, which was amended on June 24, 2020. The June 24th report indicates that during demolition and repairs, certain hidden conditions were revealed, including a form board in the block and rear patio slab. After discussing conditions at the Residence, DPR addressed former and current pest control companies that provided services at the Residence. With respect to HHE, which had not provided any termite services since April 2012, DPR concluded that HHE’s March 23, 2003 pre-treatment did not address Exterior Insulation and Finish System, or EIFS, stucco in contact with the ground. DPR did not require HHE to correct this issue and simply issued an informational letter to HHE on January 15, 2021. DPR instead issued a warning letter to Terminix, the current pest control company at the Residence, for not addressing EIFS-to-ground contact, as well as a termiticide use violation.

Plaintiff filed her original Complaint on March 26, 2020. Plaintiff filed an Amended Complaint on October 19, 2020, naming additional defendants. In her Amended Complaint,

Plaintiff asserts claims for Negligence/Gross Negligence and Breach of Implied Warranty of Workmanship against HHE.

II. SUMMARY JUDGMENT STANDARD

South Carolina Rule of Civil Procedure 56(c) states that summary judgment is appropriate when “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 the moving party is entitled to a judgment as a matter of law.”

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” [*Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002)] (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). However, “[o]nce the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 [(Ct. App. 2003)].” *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). “The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. [*Rife v. Hitachi Cont. Machinery Co., Ltd*, 363 S.C. 209, 214, 609 S.E.2d 565, 568. (Ct. App. 2005)].” *Id.*, 377 S.C. at 198, 659 S.E.2d at 203.

III. CONCLUSIONS OF LAW

A. No Evidence Exists Regarding the Conditions at the Residence, Whether Conditions were Waived, or Any Alleged Deficiencies in HHE’s Pretreatment and Inspections at the Residence.

Page three of the June 24, 2020 DPR report states that DPR Regulation § 27-1085(G)(2)(b)—addressing EIFS-to-ground contact—was “neither met nor wa[i]ved during

[HHE's] March 23, 2003 pretreatment." Plaintiff relies on this statement from Investigator Lenox-Rustin as her only evidence of a deficiency in HHE's pretreatment and warranty services which may have allowed termites to enter the Residence. However, aside from the March 23, 2003 HHE invoice for a termite pretreatment of the soil that occurred prior to construction, it is undisputed that no other documents regarding HHE's termite services at the Residence exist. Accordingly, DPR Structural Program Manager and Investigator Lenox-Rustin's supervisor, Mr. Kevin DeLorenzo, readily admits in his affidavit that DPR does not know whether the alleged EIFS-to-ground contact was waived, or what conditions existed at the Residence up until 2012. DPR has no way of making such a determination because according to Mr. DeLorenzo, DPR can only report what its investigator observes at the time of its inspection. In this case, the inspection occurred on January 22, 2020, approximately seven years and nine months after HHE's involvement at the Residence ended.

HHE clearly satisfied the DPR regulation regarding the retention and destruction of records by waiting five years before destroying the records in 2017. Mr. DeLorenzo, who is an expert in the field of termite treatments, inspections and regulation, agrees that HHE's destruction of records for the Residence was proper following cancellation of termite services in April 2012.

Neither Plaintiff nor DPR has any evidence showing that the termite pretreatment performed on March 23, 2003, was in any way incorrect or deficient in the amount of termiticide applied. In fact, due to the passage of time, it is impossible to test the soil to determine whether the pretreatment was deficient. Mr. DeLorenzo testified that DPR is only able to test the soil within six months following application of termiticide. Mr. DeLorenzo's affidavit reflects that DPR issues informational letters to pest control companies with previous involvement at a property for the sole purpose of increasing termite technician awareness of such issues when

performing future inspections and treatments at other properties. As such, the informational letter issued to HHE is not tracked against HHE's enforcement history. Mr. DeLorenzo states that he would have also agreed not to issue an informational letter in this case due to the lack of available records.

B. Plaintiff's Claim for Negligence/Gross Negligence Fails as HHE Did Not Owe Plaintiff a Duty of Care, and Plaintiff's Damages were Caused by the Intervening Negligence of Prior Owners.

In her Amended Complaint, Plaintiff claims that HHE had a duty and standard of care to properly perform its work on the Residence "in a good and workmanlike manner, free of defects, and in conformance with the applicable building codes and industry standards." Plaintiff claims that HHE breached its alleged duty and standard of care in a reckless manner that caused damage to Plaintiff.

A plaintiff must prove the following elements to recover on a claim for negligence: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 112 (2013) (citing *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011)). "If any of these elements is absent a negligence claim is not stated." *Chakrabarti*, 403 S.C. at 314, 743 S.E.2d at 112 (quoting *Summers v. Harrison Constr.*, 298 S.C. 451, 455, 381 S.E.2d 493, 495 (Ct. App. 1989)). "A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing." *Jackson v. S.C. Dep't of Corr.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989) (internal citation omitted). "Gross negligence involves a conscious failure to exercise due care." *Jackson*, 301 S.C. at 126-27, 390 S.E.2d at 468 (internal citation omitted).

There is no genuine issue of material fact as to Plaintiff's negligence/gross negligence claim because no evidence exists regarding HHE's termite pretreatment and subsequent warranty inspections except for the March 23, 2003 pretreatment invoice for work performed by HHE, *before a structure was even built*. The affidavit of DPR's Structural Program Manager, Mr. DeLorenzo, reflects that there is no way to determine whether the EIFS-to-ground condition was waived by a prior owner, or the conditions at the Residence, when HHE's termite warranty was in effect because no records exist, and DPR did not inspect the Residence years earlier during HHE's involvement at the property. Thus, there is no way to determine whether HHE breached any standard of care to a prior owner of the Residence.

HHE retained the services of termite expert Dr. Maxcy Nolan, III, and after a review of relevant case documents and a site inspection at the Residence, Dr. Nolan concurs with Mr. DeLorenzo's testimony. Dr. Nolan has extensive education and experience in the areas of termite treatments, inspection and regulation, and he has served as an expert in numerous termite damage cases in South Carolina.

Both Mr. DeLorenzo and Dr. Nolan also agree that HHE does not owe Plaintiff a standard of care because HHE cancelled its termite warranty on the Residence six years and eight months prior to Plaintiff's purchase of the Residence. Prior to her purchase, HHE never had any contact or relationship with Plaintiff regarding termite services at the Residence. Terminix, not HHE, has the current termite warranty on the Residence and received a warning letter from DPR. HHE destroyed records properly pursuant to DPR regulations. Dr. Nolan has provided testimony that no evidence exists showing that HHE violated any state laws, regulations, standards of care, or industry standards as they relate to pest control operators. Since there is no evidence that HHE breached a duty of care to a prior owner, and never owed a duty of care to Plaintiff, Plaintiff's negligence claim must fail. Furthermore, there is absolutely

no evidence demonstrating that HHE consciously failed to exercise due care, as is required in a claim for gross negligence.

Plaintiff's negligence claim also fails because the six year and eight-month period prior to Plaintiff's purchase of the Residence, in which apparently no termite inspection or treatment services were provided, is an intervening or superseding cause of Plaintiff's termite damage attributable to the prior owners of the residence. "For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated." *Dawkins v. Sell*, 434 S.C. 572, 581, 865 S.E.2d 1, 6 (Ct. App. 2021) (*Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 205, 781 S.E.2d 534, 536 (2015) (quoting *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997)). Certainly, HHE could not have reasonably foreseen or anticipated that individuals who owned the Residence prior to Plaintiff's purchase would fail to have the property inspected and treated for termites, thus causing damage to Plaintiff. Based on the testimony of Mr. DeLorenzo and Dr. Nolan, it is widely known that Hilton Head Island is an area with significant Formosan termite pressure, and termite treatments and inspections are considered necessities by termite experts. These experts also recommend termite re-treatments, or boosters, to protect against termite infestation. If prior owners failed to re-treat or inspect the Residence for termites for a period of almost seven years before Plaintiff purchased it, Dr. Nolan opines that it is likely that the termite infestation began during this time period. HHE cannot reasonably have any duty to Plaintiff almost seven years later for termite damage caused during a period of time when HHE did not provide any termite services. That liability rests with the prior owners and Plaintiff's due diligence in the course of purchasing the Residence.

C. Plaintiff Failed to Submit Evidence in Support of Her Implied Warranty Claim against Hilton Head Exterminators.

Plaintiff brought a separate cause of action against HHE alleging that HHE breached an implied warranty of workmanship. HHE alleges that such a cause of action does not apply to pest control companies in South Carolina, and even if it did, that Plaintiff did not submit any evidence that HHE breached that alleged cause of action.

The Court agrees with HHE that Plaintiff failed to submit any evidence that would support her contention that HHE breached any implied warranty, if one exists. The Court does not need to address whether an implied warranty arose to decide this motion. HHE is hereby granted summary judgment on Plaintiff's implied warranty claim on the grounds that Plaintiff did not submit any evidence of breach of this alleged implied warranty.

IV. CONCLUSION

For the foregoing reasons, HHE's Motion for Summary Judgment is **GRANTED**.

AND IT IS SO ORDERED.

The Honorable Bentley Price

Charleston, South Carolina



Beaufort Common Pleas

Case Caption: Kathleen M Rankin VS Palatial Homes Inc , defendant, et al

Case Number: 2020CP0700776

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766