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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr.

Court of Appeals Case No.: 2020-000985
Unpublished Opinion No. 2023-UP-132 (S.C. Ct. App. Filed April 5, 2023)

MONICA BROWN-GANTT Petitioner

v.

CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA
GENERAL PARTNERSHIP Respondent

And

CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA
GENERAL PARTNERSHIP Third-Party Plaintiff

v.

FLOORS, INC., successor by merger to RICE PLANTERS CARPETS, INC., subsequently
known as CREATIVE TOUCH INTERIORS, INC. d/b/a HD SUPPLY INTERIOR SOLUTIONS
and now known as ISI DESIGN AND INSTALLATION SOLUTIONS, INC., J.H. LEE
CONSTRUCTION CO., LLC a/k/a MCDANIEL CONSTRUCTION, INC., MCDANIEL
CONSTRUCTION CO., LLC a/k/a MCDANIEL CONSTRUCTION, INC., and ALL-
AMERICAN ROOFING, INC. Third-Party Defendants

Of which CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA
GENERAL PARTNERSHIP are the Respondents

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals
on May 18, 2023.

s/William K. Kalivas

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QUESTION PRESENTED

Did the Circuit Court and the Court of Appeals commit error by failing to find any evidence of gross negligence sufficient to overcome summary judgment on the issue of the applicability of the statute of repose where there existed genuine issues as to material facts and discovery had not concluded?

INTRODUCTION

The Court of Appeals committed legal error by wrongfully affirming the Order of the Circuit Court and overlooking or misapprehending the legal errors and material facts of that ruling and those contained in the record. Specifically, the Circuit Court's decision and the Court of Appeals opinion were based on the erroneous conclusion that Petitioner failed to present any evidence to show that Respondent was grossly negligent in the construction of her home and failed to show that further discovery would uncover additional relevant evidence and create a genuine issue of material fact. As stated in more detail below, the Court of Appeals overlooked material facts in affirming the Circuit Court's order. For that reason, and those articulated below, Petitioner respectfully requests the Court grant this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari stems from an appeal by Petitioner Monica Brown-Gantt (hereinafter referred to as "Brown" or "Petitioner") of the order granting Respondent Centex Real Estate Company, LLC and Centex Homes, a Nevada General Partnership's (hereinafter referred to as "Centex" or "Respondent") Motion for Summary Judgment on October 18, 2019. Brown filed her Complaint on August 8, 2018 alleging, among other things, construction defects for work performed by Centex. Centex filed an Answer and Third-Party Complaint on October 12, 2018 denying the allegations in the Complaint and naming all the subcontractors on the project as Third-Party Defendants. Centex then filed its Motion for Summary Judgment on March 21, 2019.

A motion hearing was held on April 11, 2019, within six (6) months of the filing of its Third-Party Complaint, in Dorchester County before the Honorable George M. McFaddin, Jr., with the parties submitting memorandums in opposition to and in support of the motion on April 8 and

April 11, respectively. After oral arguments, the motion was taken under advisement, and Brown and Centex filed additional memorandums on April 12 and April 15, respectively. On October 18, 2019, Judge McFaddin, Jr. filed the Order Granting Summary Judgment. Brown timely filed a Motion to Reconsider on October 25, 2019, and the same was denied by order on June 17, 2020. The Notice of Appeal to the Court of Appeals was filed on July 8, 2020, seeking review of the Circuit Court's decision.

On April 5, 2023, the Court of Appeals filed its decision affirming the Circuit Court's order and holding that the circuit court did not err in granting summary judgment to Centex based on the statute of repose because Brown failed to file her lawsuit within eight years of the issuance of the certificate of occupancy. This Court also found that the gross negligence exception to the statute of repose does not apply because Brown failed to present any evidence to show Centex was grossly negligent in the construction of the home, and that it was not error to grant summary judgment even though discovery had not been completed because Brown failed to show further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

FACTS

Brown contracted with Centex for the purchase of a newly constructed home in a planned unit development community, located in Dorchester County. (R. p. 35). The home was to be constructed in accordance with all applicable building codes and industry standards, including approval by the Department of Housing and Urban Development (HUD). (R. p. 35). Brown's home was completed in 2005, with a Certificate of Occupancy being issued by the Town of Summerville on November 15, 2005. (R. p. 5).

Shortly after moving in, and continuing until present day, Brown experienced problems with the home. (R. p. 68, lines 10-21). Among the problems experienced by Brown was water

intrusion at the chimney, roof and windows from improperly installed flashing and siding, and shaking of the second story floors. (R. pp. 105-106 -p. 238, lines 16-18). Those issues led to Brown filing an insurance claim, which resulted in an engineer inspection to review the work performed by Centex and/or its subcontractors and a stamped engineer report being produced on January 4, 2016. (R. p. 107 -pp. 168-174).

The issues raised by Brown and the January 4, 2016 inspection report were consistently raised with Centex and, until as recently as May 2018, Centex assured Brown that they would inspect and/or repair the various issues and, in some cases, made repairs to the home. (R. p. 79, lines 9-19). However, after the last offer to assist Brown with the issues, Centex notified her by letter dated May 23, 2018 that it would no longer offer to repair the issues with the home. (R. p. 36). After Brown received the letter, and it was clear Centex was not going to cure the defects, Brown was forced to file suit. (R. p. 36).

Brown filed her Complaint against Centex on August 8, 2018, alleging causes of action for negligence/gross negligence/defective construction, breach of implied warranties, breach of contract, unfair trade practices, and negligent misrepresentation. (R. p. 5.). On March 8, 2019, after all the Third-Party Defendants had been served, Brown served discovery requests on Centex. (R. p. 164). Centex filed its Motion for Summary Judgment on March 21, 2019, two days after the final Third-Party Defendant filed its responsive pleading. (R. p. 164). Centex has never responded to Brown's discovery requests. (R. p. 153, lines 3-9).

ARGUMENT

- I. The Circuit Court and The Court of Appeals Erred in Finding That the Statute of Repose Barred Petitioner's Claims Because Petitioner Failed to Present Any Evidence to Show that Respondent Was Grossly Negligent in the Construction of the Home.**

The statute of repose is not applicable to all of the Petitioner's claims because "[t]he limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, *gross negligence*, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement..." S.C. Code Ann. § 15-3-670(A). Petitioner alleges gross negligence in her first cause of action against Respondent and, therefore, the statute of repose is not an available defense in this action. (R. p. 167). Moreover, Petitioner has provided evidence of gross negligence beyond the mere allegation contained in the Complaint.

A. Petitioner Presented Evidence of Gross Negligence and Created a Genuine Issue of Material Fact as to the Application of the Statute of Repose.

In Petitioner's deposition testimony, she points to numerous times where Respondent allegedly addressed certain issues, and yet the problems persisted. (R. p. 74, lines 13-21 -p. 83, lines 1-3). The fact that Centex may have made repairs to certain of the issues complained of by Petitioner and that those issues continue to exist is evidence of gross negligence. (R. p. 154, lines 8-16). Further, Petitioner addressed some of the specific defects that provide further evidence of gross negligence. (R. p. 264, lines 10-16 -p. 298, lines 7-12). Petitioner specifically notes that "flashing was never installed on the house" and "there's no insulation", and states that the same conditions exist with "several houses on the street". (R. p. 242, lines 8-15 -p. 282, lines 11-21). The lack of flashing and insulation, and the reference to those conditions existing throughout the neighborhood is evidence of gross negligence as that is the failure of Centex to do something which it is incumbent upon it to do in the construction of a home.

There were a number of issues uncovered and referenced in the January 2016 engineer report that further provides evidence of gross negligence. (R. pp. 168-174). Those issues include

a summary of significant damages to Petitioner's property, which include: deteriorated sheathing in the attic, leaking windows, and buckling floors. (R. p. 171). The engineer noted that the "flashing around the chimney and windows was improperly installed with loose sections of flashing and gaps adjacent to the siding", and specifically notes that "[t]hese construction defects were the cause of the water entering the house and damaging the shutters and flooring" and "were not a result of wind damage." (R. p. 173). The engineer also found that the "pavers and the grout joints were improperly installed" and that this defect was not caused by rainwater. (R. p. 173). The report notes "defective installation of flashing or siding around windows and around the roof" with observable damage to the sheathing in the attic that corresponds with those defects. (R. p. 173). The report specifically states that "[t]he cause of the leaks was the inadequate and improperly installed flashing around the chimney and windows." (R. p. 173).

The engineer report was stamped by the engineer, H. William Chandler, P.E., and specifically notes that "[t]he conclusions, analysis, and opinions expressed herein have been prepared within a reasonable degree of engineering certainty" and "are based on the results and interpretations of the testing and/or data collection activities performed at the site," "and the education, training, knowledge, skill, and experience of the author and licensed professional engineer." (R. p. 168 -p. 174). The conclusions and analysis contained in the engineer report, along with the supporting testimony of the Respondent presents a mere scintilla of evidence of gross negligence and enough to create a genuine issue of material fact.

Additionally, Petitioner presented evidence that Centex could have made repairs to the home as late as 2017, well after the issuance of the certificate of occupancy. (R. p. 237, lines 11-14). Petitioner also provided testimony that Centex, or one of its subcontractors, "came out at some point and said they installed the flashings around the house", which is further evidence of

work performed subsequent to the issuance of the certificate of occupancy. (R. p. 241, lines 10-13). If any repairs or subsequent work performed by Centex was defective, that would be relevant to the statute of repose as it would constitute new work and improvements performed by Centex and the statute should run from the completion of that work and not from the issuance of the certificate of occupancy, as held by the Court of Appeals.

B. Petitioner Showed that Further Discovery Could Uncover Additional Relevant Evidence and Create a Genuine Issue of Material Fact.

South Carolina courts have continuously held that summary judgment is a “drastic remedy”, which should be cautiously invoked to avoid severing a person’s right to a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend Ltd. P’ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); *Baril v. Aiken Reg’l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2022); *Trivelas v. South Carolina Dep’t of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998).

Because it is such a “drastic remedy”, summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 112, 410 S.E.2d 537 (1991)). See also *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). After the initial pleadings in this case, Petitioner and Respondent agreed to undergo brief initial discovery, to include Centex’s discovery requests and a deposition

of Brown, to see if this matter might settle prior to Centex serving the Third-Party Defendants. (R. p. 152, lines 10-14).

After the deposition, a settlement was not reached, and Centex began serving the Third-Party Complaint on the individual Third-Party Defendants. (R. p. 152, lines 15-18). The final Third-Party Defendant filed an Answer on March 19, 2019, two (2) days before the Motion for Summary Judgment was filed by Centex. (R. p. 152, lines 17-20). Petitioner served her initial discovery requests on Centex on March 8, 2019, after she learned which Third-Party Defendants were going to be involved in the case. (R. p. 152, lines 17-24 -p. 153, lines 5-6). The discovery requests were served almost two (2) weeks before the Motion for Summary Judgment was filed, and over thirty (30) days before the hearing on the Motion. (R. p. 152, lines 18-20 -p. 153: 5-6).

South Carolina courts have definitively required “full and fair” discovery before disposing of cases. *Baird v Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 112, 410 S.E.2d 537 (1991)). See also *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). At this point, neither party has had the opportunity to conduct full and fair discovery, as many of the Third-Party Defendants had only recently filed responsive pleadings by the time the motion hearing took place. (R. p. 152, lines 17-20). Discovery is critical to the merits of Centex’s motion for summary judgment as many of the issues raised by Petitioner in the Complaint may have been repaired by Centex and/or its subcontractors after the original construction, and therefore the date of any repairs or improvements would be relevant to the applicable limiting statutes. (R. p. 152, lines 1-8).

Further, there was no opportunity to conduct discovery with the subcontractors who may have firsthand knowledge of the construction of Petitioner’s home because they were only

identified and brought into the lawsuit just before the motion was heard. (R. p. 152, lines 15-20). Critically, this was a new construction and Petitioner is inherently without the information needed to determine what scope of work or requirements each party was to perform, and further discovery is needed to determine what, if any, intentional acts or conscious failures were performed that could be considered gross negligence. Petitioner admits that she “can’t tell you if [Centex] literally fixed anything”, and “didn’t know it wasn’t fixed because Centex is telling me they fixed it”, when asked whether she knew problems existed and whether Centex had made any repairs. (R. p. 236, lines 11-15 -p. 243, lines 12-18). Whether, and to what extent, Centex made any repairs is a question of fact that would be answered with further discovery, specifically with Centex producing records of what, if any, repairs it made and when those repairs took place.

Moreover, if Centex actually performed repairs, which Petitioner notes could have been as late as 2017, and those repairs were defective, that would be relevant to the statute of repose as that constitutes new work and improvements performed by Centex. (R. p. 237, lines 11-14). Petitioner specifically notes that Centex, or one of its subcontractors, “came out at some point and said they installed the flashings around the house”, which is another issue requiring further discovery and relevant to the statute of repose. (R. p. 241, lines 10-13). That Centex “came out [to the property] several times trying to patch it”, and “trying to repair it” requires further discovery and will, at a minimum, uncover additional relevant facts related to the work performed by Centex and/or its subcontractors, which would constitute an improvement on real property under the statute of repose. (R. p. 251, lines 13-16).

Accordingly, it was legal error for the Circuit Court and the Court of Appeals to conclude that Petitioner failed to show that further discovery would uncover additional relevant evidence

and create a genuine issue of material fact. Denying Petitioner the right to full and fair discovery prior to disposing of the case by summary judgment conflicts with prior decisions of this Court.

CONCLUSION

The Circuit Court and Court of Appeals decisions overlooked and/or misapprehended the legal errors in this case, and the material facts contained in the Record on Appeal. Holding that Petitioner did not provide any evidence of gross negligence, while also denying Petitioner the right to full and fair discovery is in direct conflict with this Court's prior decisions. Therefore, Petitioner respectfully requests that this Court to grant Certiorari due to the legal errors committed by the Court below and because the Court of Appeals overlooked material facts presented by the Petitioner.

The decision of the Court of Appeals should be reversed and the case remanded to the Court of Appeals to consider the remaining arguments on appeal before remand to the Circuit Court for full and fair discovery, and final adjudication on the merits of the case. Because the Court of Appeals found that the statute of repose bars Petitioner's claims, it declined to address her remaining arguments on appeal. Therefore, if this Petition is granted and the Court of Appeals decision reversed, rehearing is warranted to consider all of Petitioner's arguments regarding the statute of limitations, equitable estoppel and equitable tolling.

Respectfully submitted,

s/William K. Kalivas

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