THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert Bonds, Circuit Court Judge

RECEIVED
May 17 2024
SC Court of Appeals

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Case No. 2023-CP-1003278

Appellate Case No. 2024-000210

_____

Kathy Kennedy, Appellant

v.

Bernard Myatt, III and Myatt Air Conditioning, LLC, Respondents

_____

FINAL BRIEF OF APPELLANT

_____

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Appellant Pro Se

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B. Did the Circuit Court inappropriately determine Appellant Kennedy knew or should have known she had a cause of action for damage to her other property prior to discovery of the hidden defect that caused that damage?

C. Did the Circuit Court inappropriately fail to consider Equitable Tolling and the Covid-19 Pandemic?

STATEMENT OF THE CASE

This case arises out of negligence based construction defects and the damage to other property (sub-floors and floors) caused by those defects, at 774 Norfolk Drive, Charleston SC, Appellant Kennedy's residence. This case is an action against a contractor based upon gross negligence with respect to defective improvement to real property, which resulted in damage to property other than the defective property; therefore, the case falls under S.C. Code Ann. §15-3-630, S.C. Code Ann. §15-3-640 and S.C. Code Ann. §15-3-670. (Complaint)(R. p. 11, lines 7-8).

Appellant Kennedy, a 64 year old disabled individual, entered into a contract with Respondents Bernard Myatt III and Myatt Air Conditioning, LLC (Respondent Myatt), on or about, November 14, 2018, for the fabrication and installation of an entirely metal duct system in the crawl space under her residence. Respondent Myatt failed to follow multiple major applicable building codes and standards in the fabrication and installation of the partial duct system, for which, he was fined by the South Carolina Department of Labor, Licensing and Regulation (SC LLR)(R. p. 68-72). One of the building codes Respondent Myatt failed to follow caused damage to Appellant Kennedy's other property (sub-floors and floors); it was a latent (hidden) defect and was only discovered by destructive means June 2021. Appellant Kennedy filed her complaint April 2023, within three years from the date of discovery of the hidden defect. Further, there was over a one year delay in Appellant Kennedy's case due to the government mandated shutdowns caused by the Covid-19 Pandemic. The facts of the case are outlined in Appellant Kennedy's Circuit Court Brief (R. pp. 34-36).

Appellant Kennedy filed a complaint with the Charleston County Small Claim April 13, 2021. On May 5, 2023, Defendant Myatt, through counsel, filed a motion for Summary Judgment. A Summary Judgment Motion was held in front of Magistrate Court Judge Laura Beck (Magistrate Court) on June 1, 2023. The Magistrate Court ruled for the Respondents on June 26, 2023. Appellant Kennedy filed an appeal with the Circuit Court on July 7, 2023. An appeal hearing was held in front of Circuit Court Judge Robert Bonds (Circuit Court) on January 31, 2024. The Circuit Court affirmed the lower court ruling January 31, 2024. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews the grant of summary judgment by applying the same standard the circuit court applied pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, which provides "the circuit court shall grant summary judgment if 'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.' " Stoneledge at Lake Keowee Owners' Association, Inc. v. Clear View Construction, LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." Id. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Id. (quoting Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)). Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Mulherin-Howell v. Cobb, 362 S.C. 588, 597, 608 S.E.2d 587, 592 (Ct. App. 2005). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn there from. Laurens Emergency Med. Specialists, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." McNair v Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct.App. 1998).

ARGUMENT

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS, DESPITE THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT

A. THE CIRCUIT COURT ERRED IN DETERMINING APPELLANT KENNEDY COULD NOT PROVE GROSS NEGLIGENCE AS A MATTER OF LAW.

SC Code § 15-3-670 provides that violations of building codes can be, per se evidence of gross negligence. Indisputable evidence that show Respondent Myatt was found guilty of violating multiple major applicable building codes and was fined by the South Carolina Department of Labor, Licensing and Regulation (SC LLR) (Myatt Consent Agreement) (R. p. 70). One of the major building codes violated by Respondent Myatt was willfully failing to seal the longitudinal seams, transverse joints and duct wall penetrations (duct system seams); which rendered the entire partial duct system fabricated and installed by Respondent Myatt defective. (SC LLR Addendum) (R. p. 99). See Beck v. Carolina Power & Light Co., 57 N.C. App. 373, 291 S.E.2d 897 (N.C. Ct. App. 1982), where the evidence, which showed numerous violations of the National Electrical Safety Code, was sufficient to show gross negligence and the issue of punitive damages was submitted to the jury.

Respondent Myatt provided no evidence to dispute that he was guilty of violating multiple major applicable building codes and standards or that those code violations gave rise to gross negligence; thereby, failing to establish the lack of a genuine issue of material fact. Moore v. Crumpton, 306 N.C. at 624, 295 S.E.2d at 441 (1982). The indisputable evidence in Appellant Kennedy's case states a claim for gross negligence and raises genuine issues of material fact; do any or all of Respondent Myatt's multiple violations of applicable building codes amount to "*wanton conduct done with conscious*

or reckless disregard for the .safety of others" such that it cannot be said Respondent Myatt was not grossly negligent as a matter of law. Cullen v. Logan Developers, Inc., 887 S.E.2d 455 (N.C. Ct. App. 2023).

The Circuit Court erred by making its decision not on the evidence, but on its erroneous determination that the Magistrate Court's findings of law were correct, simply because it felt the Magistrate Court's Return was well-written. The Magistrate Court inappropriately alleged that Respondent Myatt was guilty of only one minor applicable building code violation; failed to consider all of the evidence and failed to view that evidence in the light most favorable to Appellant Kennedy. Further, the Magistrate Court erroneously determined that the Court in Allwin, changed S.C. Code Ann. §15-3-670, whereby the stature of limitations is now available as a defense to a person guilty of gross negligence. Contrary to the Magistrate Court's assertion, S.C. Code Ann. §15-3-670 has not changed and still clearly states that the statute of limitations is not available as a defense to a person guilty of gross negligence. The Magistrate Court inappropriately alleges:

> *"In Allwin v. Russ Cooper Association, Inc., 426 S.C. 1, 825 SE2d 707(S.C. Ct. App. 2019), the Court held that the three-year statute of limitations is applied in a property owner's suit against an architectural firm and general contractor for negligence,* ***gross negligence****, and breach of warranty stemming from alleged construction defects in a house built for the property owner*." (M.J. Ret.)(R. p. 6, lines 20-23, p.7, line 1)

This Court should find that the statute of limitations is not available as a defense to a person guilty of gross negligence. Also, this Court should find, as the court in Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs., 2018 WL 2305658 (D.*S.C.* May 21, 2018), that evidence of a building code violation can be evidence of gross negligence, thus creating triable issues of material fact; and summary judgment should be reversed.

B. THE CIRCUIT COURT INAPPROPRIATELY DETERMINED APPELLANT KENNEDY KNEW OR SHOULD HAVE KNOWN SHE HAD A CAUSE OF ACTION FOR DAMAGE TO HER OTHER PROPERTY PRIOR TO DISCOVERY OF THE HIDDEN DEFECT THAT CAUSED THAT DAMAGE.

At issue is whether or not Appellant Kennedy knew or should have known about a hidden defect prior to March 2021. This Court should find that discovery of a hidden defect and the date when it could have been discovered raises triable issues of material facts and deny summary judgment, as it did in Stoneledge at Lake Keowee Owners' Association, Inc. v. Clear View Construction, LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). The statute of limitations begins to run when the plaintiff knows all of the essential elements of a cause of action, that is, the injury, what caused the injury and who caused the injury. Hickman v. Grover, 178 W.Va. 258, 358 S.E.2d 810 (1987). The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of the plaintiff's injury and its negligent cause. Jolly v.Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1109 (245 Cal.Rptr. 658, 751 P.2d 92).

Respondent Myatt's assertion that Appellant Kennedy knew or should have known about the hidden defect is without merit. No evidence has been provided that shows Appellant Kennedy knew or should have known about the hidden defect prior to March 2021. See Gonzalez v. Banzer, 2004 N.Y. Slip Op. 51509 (N.Y. Sup. Ct. 2004). This Court should find, as did the Court in Gonzalez, quoting Ferris v County of Suffolk, 174 AD2d 70, 76 [1992], that "*Constructive notice will not be imputed where the defect is latent, i.e., where, as here, the defect is of such a nature that it would not be discoverable even upon a reasonable inspection*." This Court should find, as did the Court in Gonzalez, "*If a defect could not have been discovered by a layman, even by a reasonable inspection, it is considered a latent defect*." (Rapino v City of New York, AD2d 470 (2002)). The defect in

Appellant Kennedy's case was not discovered by professionals; neither the Town of James Island Inspector nor the first SC LLR Inspector (R. p. 24, lines 25-26; R. pp. 35-36; R. p. 47, lines 13-20; R. p. 67, 70, 99); therefore, there should be no question as to it being a latent defect. The entire partial duct system fabricated and installed by Respondent Myatt in the crawl space under Appellant Kennedy's residence was completely covered with insulation, mastic and tape; thereby, rendering the entire unsealed duct system a hidden defect. The fact that neither the Town of James Island Inspector, nor the first SC LLR Inspector found the hidden defect, clearly shows the hidden defect could not be found by reasonable diligence. (R. p. 35, lines 13-18; R. p. 59, lines 5-6, 16-19; R. pp. 67, 70, 99). Further, as Appellant Kennedy has stated and testified, the James Island Inspector told her that there was nothing that he could see in Respondent Myatt's fabrication and installation that could cause the damage to Appellant Kennedy's sub-floors and floors; that it could be caused by a water pipe leak. (R. p. 35, lines 11-13, R. p. 47, lines 13-20; R. p. 59, lines 5-6, 16-19; R. pp. 67, 96).

The Circuit Court's decision "*that the statute of limitations had run*" (R. p. 61, line 25), was made without any evidence that Appellant Kennedy knew or could have known by reasonable inspection about the hidden defect prior to May 2021. Further, the Circuit Court's determination that Appellant Kennedy was wrong to rely on the Town of James Island Inspector and the SC LLR Inspector is completely unfounded. The Circuit Court in making its decision:

> "*… I think that, perhaps, some of the information that you got and was provided to you (indiscernible) may have been the right information or may have been the wrong information, or they didn't know, or they were telling you things that they weren't sure, or we didn't think this was related. And, you know, I think that you did what a lot of people would do, and that is you relied on what they told you." (*R. p. 61, lines 10-18).

No evidence was provided that supports the Circuit Court's determination that

Appellant Kennedy knew or could have known about the hidden defect by reasonable diligence. No evidence has been provided that support the Circuit Court's determination that Appellant Kennedy was wrong to rely on the Town of James Island Inspector and the SC LLR Inspector; especially, since they are the entities given the responsibility (established by statute) of enforcing the applicable building codes (established by statute), which were violated by Respondent Myatt. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) (stating that abuse of discretion occurs where trial court is controlled by error of law or where trial court's order is based on factual conclusions without evidentiary support).

Evidence was provided that the hidden defect was not discoverable by reasonable diligence. Respondent Myatt has provided no evidence that shows Appellant Kennedy knew or should have known about the hidden defect prior to March 2021; thereby, failing to negate discovery and failing to establish the lack of a genuine issue of material fact regarding discovery of the hidden defect. Moore v. Crumpton, 306 N.C. at 624, 295 S.E.2d at 441 (1982).

C. THE CIRCUIT COURT FAILED TO CONSIDER EQUITABLE TOLLING, DESPITE THE FACT THE COVID-19 PANDEMIC CAUSED OVER A ONE YEAR DELAY IN APPELLANT KENNEDY'S CASE.

Appellant Kennedy repeatedly raised the issue that the Covid-19 Pandemic (Pandemic) shutdowns caused over a year delay in her case (R. p. 19; R. p. 24, R. p. 59, lines 13-16). The Magistrate Court states, "*She filed the formal complaint in January of 2020 with LLR, due to COVID the inspector come in March 2021*" (M.J. Ret.)(R. p. 4), thereby acknowledging there was an over one year delay in Appellant Kennedy's case that was due to the Pandemic; however, the Magistrate Court failed to recognize the applicability

of equitable tolling to remedy the exigencies created by the Pandemic, unlike many others who did. See Jahagirdar v. The Comput. Haus NC, Inc., 1:20-cv-33-MOC-WCM, 3-4 (W.D.N.C. Feb. 15, 2022), ("*This Court joined "many others in recognizing the applicability of equitable tolling to remedy exigencies created by COVID-19*." See Zuniga v. Bean, Case No. 2:20-cv-00619-GMN-BNW (D. Nev. Apr. 20, 2021)").

This court should take judicial notice, as the Court in Jahagirdar,

> "*…the onset of the pandemic's disruption in the United States was in February and March 2020 and continued for much of that year. In other words, severe disruptions induced by the pandemic began almost immediately after Plaintiff Jahagirdar initiated this action and persisted for months thereafter*."

Appellant Kennedy contacted the SC LLR January 2020; however, due to the Pandemic shutdowns, it was over a year before SC LLR inspected Appellant Kennedy's residence, in March 2021. Appellant Kennedy exercised reasonable diligence as is evidenced by her contacting the Town of James Island and the SC LLR.

This Court should, as did the Court in Jahagirdar, find that Covid-19 amounted to an "*extraordinary circumstance*." and "*that it would be unconscionable and grossly injustice for Plaintiffs to be unduly prejudiced by their unfortunate timing*." and grant equitable tolling.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this court reverse the decisions of the Circuit Court.

May 17, 2024

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