

STATE OF SOUTH CAROLINA

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GREENVILLE CO. S.C.  
PAUL B. WICK

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2013 JUL 22 P 2:49

KEVIN MCCARTHY AND COURTNEY  
R. MCCARTHY,

Civil Action No. 2011-CP-23-6376

Plaintiffs,

**ORDER DENYING PLAINTIFFS'  
MOTION TO AMEND**

vs.

THE CLIFFS COMMUNITIES, LLC  
D/B/A THE CLIFFS AT KEOWEE FALLS  
SOUTH; KEOWEE FALLS  
INVESTMENT GROUP, LLC; CLIFFS  
REAL ESTATE, INC., THE CLIFFS  
GOLF AND COUNTRY CLUB, INC.;  
AND S&ME, INC.,

Defendants.

This matter came before the Court on Plaintiffs' Motion to Amend their Complaint to amend the Statement of Facts and to add a cause of action for negligence against Defendants Keowee Falls Investment Group, LLC ("KFIG") and The Cliffs Communities, Inc. ("The Cliffs"). A hearing was held on May 3, 2013. Representing the parties were Thomas E. Dudley, III attorney for Plaintiffs; Elizabeth M. McMillan attorney for Defendants KFIG, The Cliffs, Cliffs Real Estate, Inc., and The Cliffs Golf and Country Club, Inc.; and Stephanie H. Burton attorney for Defendant S&ME, Inc.

**FACTUAL BACKGROUND**

This action arises out of Plaintiffs' 2005 purchase of Lot 32 at the Cliffs at Keowee Falls South. Plaintiffs allege that a deep-seated slope failure is occurring at the lot and that Defendants KFIG and The Cliffs should have investigated their lot for slope failure issues, sold them a lot that had unsuitable soil conditions, and failed to disclose information regarding

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unsuitable soil conditions on their lot. They asserted six causes of action against these defendants: (1) breach of contract regarding the Purchase Agreement; (2) fraud because the defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots, including Lot 32, but they failed to disclose such knowledge and failed to investigate Lot 32; (3) negligent misrepresentation because the defendants never disclosed the existence of an unusual subsurface condition of which they had knowledge; (4) constructive fraud; (5) violation of the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1701 by KFIG, The Cliffs, CRE and The Cliffs Golf and Country Club; and (6) violation of the S.C. Unfair Trade Practices Act.

On June 20, 2005, Plaintiffs executed a contract to purchase Lot 32 from KFIG, the owner of Lot 32. (K. McCarthy Dep. p. 35, Ex. 3; C. McCarthy Dep. Ex. 1). Thereafter, The Cliffs hired S&ME to perform certain geotechnical investigation services on lots in the Jasmine Cove area. (Birdsong Aff. ¶12). The proposal from S&ME called for an investigation of three lots, but S&ME only reported on one lot, adjacent Lot 31.

On July 18, 2005, S&ME issued a report concerning its geotechnical investigation of Lot 31 to The Cliffs. (Birdsong Aff. ¶ 2, Ex. A). On August 5, 2005, the sale between Plaintiffs and KFIG closed and title to Lot 32 was transferred from KFIG to Plaintiffs. (K. McCarthy Dep. p. 51, Ex. 9; C. McCarthy Dep. Ex. 2).

Nearly six years later after they purchased lot 32, in April, 2011, Jack Harrell, the current owner of Lot 31 called Plaintiff Kevin McCarthy and told him: "Well, I'm your neighbor down there, and we got a problem. The lots are falling into the lake." (K. McCarthy Dep. p. 75). Sometime thereafter, Mr. Harrell or his counsel provided Plaintiffs or their counsel with a copy of a portion of the July 18, 2005 S&ME report. (K. McCarthy Dep. p. 89).

On September 27, 2011, Plaintiffs filed their Summons and a Complaint alleging the six causes of action against KFIG and The Cliffs. On June 29, 2012, a status conference was held by this Court at which time certain deadlines were established in this case. On July 9, 2012, this Court issued a scheduling order, which included the following deadlines:

3. Discovery shall be completed no later than **December 31, 2012**. Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of Civil Procedure in which to respond prior to the completion date noted in this paragraph.

4. **All motions**, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than **January 15, 2013**.

5. The parties will mediate the case on or before **January 30, 2013**. All parties are ordered pursuant to Rule 6 of the SCADR, to have a person with settlement authority available at the mediation.

On January 15, 2013, KFIG and The Cliffs filed their Motions for Summary Judgment. On March 20, 2013, Plaintiffs filed their Motion to Amend.

### LEGAL CONCLUSIONS

#### 1. **KFIG and The Cliffs Will be Prejudiced if Plaintiffs Are Granted Leave to Amend.**

Pursuant to Rule 15, this Court must also consider whether KFIG and The Cliffs would be prejudiced by the amendment. Prejudice occurs when an amendment adds a new claim or defense which would require the opposing party to introduce additional or different evidence. Ball v. Canadian Am. Express Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

Plaintiffs did not file their Motion to Amend until nearly three months after the close of discovery established in the Court's scheduling order. If the Motion to Amend were granted, KFIG and The Cliffs would be required to defend the new claim without the benefit of

conducting discovery or this Court would have to allow discovery to be reopened to address this new claim further delaying the ultimate resolution of this case. Accordingly, the Court denies Plaintiffs' Motion to Amend.

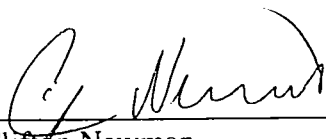
**2. Plaintiffs Inexcusably Delayed in Filing Their Motion to Amend.**

Plaintiffs' inexcusable delay in filing the Motion to Amend also justifies the refusal to grant leave to amend. Crowley v. Spivey, 285 S.C. 397, 414, 329 S.E.2d 774, 784 (Ct. App. 1985) (citing Braudie v. Richland County, 217 S.C. 57, 59 S.E.2d 548 (1950)). A party inexcusably delays when it seeks to amend a complaint well after it becomes aware of an asserted factual basis of a new claim. Id.

Nearly three months after the conclusion of discovery and over two months after KFIG and The Cliffs filed their Motions for Summary Judgment and mediation was held, Plaintiffs filed their Motion to Amend alleging that there were new facts learned during discovery, but any new facts were learned well before March 20, 2013, over two months after the case had been mediated. Plaintiffs have been aware of the factual matter underlying their claim for negligence for some time. Their delay in seeking leave to amend the Complaint until after the discovery and motions deadlines passed is inexcusable in light of this knowledge. Accordingly, Plaintiffs' Motion to Amend is denied.

For the foregoing reasons, the Court DENIES Plaintiffs' Motion to Amend as to Defendants KFIG and The Cliffs.

AND IT IS SO ORDERED.

  
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Clifton Newman  
Presiding Judge

July 9, 2013

Columbia, South Carolina