THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No.: 2013-000279

The Honorable W. Jeffrey Young,
Charleston County
Trial Court Case No.: 2010-CP-10-9158

JOHNSON KOOLA, Appellant,

vs.

CAMBRIDGE TWO, LLC, ALBERT V. ESTEE, Individually, CAMBRIDGE LAKES, LP, STEPHEN R. HEAPE, Individually and as General Partner of Cambridge Lakes, LP, CAMBRIDGE LAKES APARTMENT HOMES, a/k/a CAMBRIDGE LAKES APARTMENTS, LP, a/k/a CAMBRIDGE LAKES APARTMENT HOMES, LP, CLASSIC PROPERTIES OF CHARLESTON, INC., CAMBRIDGE CONTRACTING, LP, TRADEMARK PROPERTIES, INC., CAROLINA ONE CHARLESTON HOME PROPERTIES, LLC, CHARLESTON HOME TEAM, LLC, CAROLINA ONE, and WILLIAM E. JENKINSON, IV, Individually,

Of Whom CAMBRIDGE TWO, LLC, ALBERT V. ESTEE, Individually, CAMBRIDGE LAKES, LP, STEPHEN R. HEAPE, Individually and as General Partner of CAMBRIDGE LAKES, LP are the Respondents.

REPLY BRIEF OF APPELLANT

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I. KOOLA HAS NEVER ALLEGED THAT RESPONDENTS ARE LIABLE FOR CONSTRUCTION DEFECTS; THEREFORE, WHEN KOOLA DISCOVERED THE EXISTENCE OF CONSTRUCTION DEFECTS IN HIS CONDOMINIUM COMMON AREAS IS WHOLLY IRRELEVANT TO THE ACCRUAL TIME OF KOOLA'S CLAIMS AGAINST RESPONDENTS FOR VIOLATIONS OF THE HPA, UTPA AND FOR COMMON LAW FRAUD, BREACH OF WARRANTY AND NEGLIGENCE.

In his Initial Brief, Koola addressed at length the fact that his claims against respondents never included their alleged liability for construction defects regarding the Cambridge Lakes condominium complex ("Cambridge Lakes"). Koola's Complaint simply alleged that respondents violated the Horizontal Property Act ("HPA"), the Unfair Trade Practices Act ("UTPA") by failing to have an architect or engineer inspect the Cambridge Lakes Apartment complex and report and file a certified report detailing the findings regarding the conditions of the common areas, their useful life expectancy, etc., as required by the HPA. (R. pp. 25-26). Koola also alleged that respondents are liable for fraud in falsely reporting to Koola that they had obtained a certified report from an architect or engineer about the common area conditions when no such report was ever obtained. (R. p. 28).

Respondents' Brief entirely fails to address or respond to Koola's argument on appeal that a claim for construction defects is separate and distinct from a claim for violations of the HPA and, thereby, the UTPA. In South Carolina appellate jurisprudence, when an appellate raises and supports an issue that the respondent fails to argue against, the appellate court may determine that said issue is uncontested and decide the same in favor of the appellant. *E.g.*, *U.S. Fid. & Guar. Co. v. First Nat. Bank of S.C. of Columbia*, 244 S.C. 436, 454, 137 S.E.2d 582, 590 (1964); *see also*, 5 Am.

Jur. 2d Appellate Review § 512 (2013) ("If an appellee fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct.").

Notwithstanding an apparent conscious decision to ignore the critical issue in this appeal, *i.e.*, that a claim for construction defects is separate and distinct from a claim for the violation of the HPA, respondents must admit that Koola's knowledge of the existence of claims for construction defects does not mandate that he had simultaneous knowledge that respondents had also allegedly violated the HPA and, thereby, the UTPA. Reference is made to pages 10-12 of Koola Initial Brief on the distinctions between claims for construction defects and HPA violations. In sum, Koola's admitted knowledge in 2008 that there was a claim for construction defects available against the respondents is irrelevant to the issues on appeal when no such claim was brought against respondents by Koola in the underlying case at bar.

II. THERE WAS A CLEAR, GENUINE ISSUE OF MATERIAL FACT ON THE QUESTION OF WHEN KOOLA DISCOVERED THAT HE HAD A CLAIM FOR VIOLATIONS OF THE HPA AND THE UPTA WHICH PRECLUDED GRANT OF SUMMARY JUDGMENT.

As set forth repeatedly in Koola's submissions to the trial court and at oral argument, Koola did not discover that respondents had allegedly violated the HPA until September 2010, when he reviewed a "Third Amended Complaint" filed on July 14, 2010 by the Cambridge Lakes HOA in its Construction Defects Litigation against the respondents and others. (R. pp. 55, 62-63). Indeed, in the record before this Court, there is no unambiguous or direct evidence that demonstrates that Koola actually knew or should have known – at any time prior to September 2010 – the respondents had

allegedly violated the HPA, the UTPA and committed common law torts related to the false certification with HPA compliance.

In attempt to rebut Koola's clear and unequivocal denial that he knew of respondents' alleged violations of the HPA prior to September 2010, respondents offer citation to Koola's original complaint at paragraph 15, which states in full: "The plaintiff also discovered that the Defendants did not file with the master deed or provide copies of a report required by the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10, et seq." (R. 25). However, nothing in this pleading[1] states when Koola discovered that respondents failed to file a report required by the HPA. *Id.* Certainly, Koola had to have discovered this fact before he could file a Summons and Complaint alleging respondents' HPA violation. In fact, nothing in par. 15 of Koola's complaint make any reference to an actual time period that Koola discovered the irregularities concerning the Master Deed. (R. 23-29). Moreover, respondents offered no evidence to the trail court from either a response to a Request to Admit, Interrogatory or deposition testimony from Koola on the point when Koola discovered he had a claim for a HPA violation -- if not, as Koola maintained, in September 2010.

As set forth above, Koola's repeatedly advised the trial court that he discovered a potential claim for violations of the HPA only after reviewing the July 2010 filing of the Third Amended Complaint in the HOA Construction Defect Litigation. (R. 55, 88-92). Indeed, nowhere in the original complaint filed by the HOA in its Construction

[1] Respondents' Brief at page 5 quotes paragraph 14 of Koola's complaint which pleads that Koola learned of claims for construction defects in 2008. However, that fact that Koola admits his awareness in 2008 that the HOA had filed a claim construction defects against respondents does not concede or mandate that Koola discovered or should have known that the respondents had also violated the HPA in 2008. Paragraph 15 of Koola's complaint, discussing Koola's discovery of respondents' failure to file certified architectural or engineering reports, does not include any mention of when Koola gained such knowledge. (R. 25).

Defects Litigation against the respondents is there any mention of alleged violations of the HPA by anyone. (R. 115-120). Clearly, if the HOA did not know that respondents had violated the HPA in June 2008 when it commenced litigation against respondents, Koola cannot be charged with that knowledge absent some affirmative evidence to the contrary. As set forth above, there is no direct evidence contradicting Koola's position that his discovery coincided with and was caused by his review of the HOA's Third Amended Complaint[2] against respondents in September 2010.

Seeking possible inferential value, respondents also cite to the interrogatory responses made by Koola in his lender's mortgage foreclosure action, wherein Koola refers to a 2004 meeting with a Cambridge Lakes HOA Board of Director member, who told him in 2004 that construction defects might by present on the premises. (R. 99-100). Respondents further cite that Koola's same interrogatory responses to show that he knew of actual construction defects in July 2008, when the HOA Construction Defect Litigation commenced. Last, respondents cite that these interrogatory responses also show that Koola had reviewed the Master Deed, which reported (falsely, as Koola later discovered) that respondents had filed the required

[2] Page 2 of respondent's Brief states that "On June 16, 2008 the HOA ... filed a lawsuit claims in against respondents and other entities .... for alleged construction defects. In the lawsuit, the HOA asserted claims based on alleged violations of the S.C. Horizontal Property Act." Significantly, respondents fail to disclose the fact that the HOA's original complaint did not include any claims or even mention of respondent's alleged HPA violations and that a claim for HPA violations was not raised until plead in the Third Amended Complaint filed against respondents on July 14, 2010. (R. 77-83, 115-120). This, of course, is consistent with Koola's position that he discovered a claim for an HPA violation in September 2010 after reviewing the Third Amended Complaint in the HOA Construction Litigation.

certifications[3] with the Master Deed upon the Cambridge Lakes condominium conversion.

However, none of these citations to Koola's discovery responses in his lender's mortgage foreclosure suit shows or provides supporting evidence that Koola knew or should have known before 2010 that the respondents had violated the HPA. In any event, although respondents maintained Koola knew or should have know about a HPA violation, a UTPA violation or alleged fraud by July 2008, while Koola maintained that he discovered such claim only in September 2010, it should have been very clear to the trial court that there was a genuine issue of material fact over time that Koola's claims against respondents accrued, and this issue of fact precluded the availability of summary judgment on the issue of the statute of limitation.

Conclusion

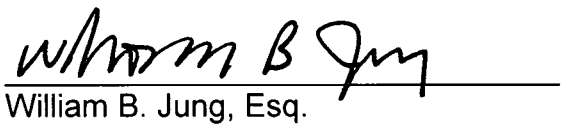
It is possible that the trial court assumed, based upon counsel's hearing argument at motion for summary judgment, that because Koola conceded knowing in 2008 that construction defects claim existed against the respondents, it also is true that 2008 must be the accrual date for any and all claims had by Koola against respondents. It is respectfully submitted that such an assumption was unwarranted and violates the principals of the "discovery rule," whereby the statute of limitations "begins ticking on the date that the injured party either knew or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.'" *Holly Woods Association of Residential Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787

[3] The fact that Koola read respondents' certification that respondents had complied with the HPA provides no support to the respondents' contention that Koola should have known this certification was false without additional evidence offered to show that Koola was previously aware - prior to September 2010 - that respondents' certification in the Master Deed was indeed false. No such evidence was presented by respondents to the trial court.

(Ct.App. 2004) (*Quoting, Martin v. Companion Health Care, supra*). In the case at bar, there is an obvious question of fact over whether - in July 2008 or in September 2010 - Koola discovered or should have discovered the existence claims against respondents for causes of action unrelated to construction defects. This being true, it is respectfully submitted that the trial court erred by granting summary judgment to respondents on this issue.

Dated: November 6, 2013

Respectfully submitted,



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Plaintiff,)
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CAMBRIDGE TWO, LLC, et al.,)
)
Defendants.)

PROOF OF SERVICE OF FINAL BRIEFS

I, William B. Jung, Esq., an attorney admitted to practice before this Court, under penalty of perjury, certify that on November 13, 2013, I served a copy of the appellant's Final Brief and Final Reply Brief Petition by mailing one copy of each to the following counsel of record for the defendants-appellees:

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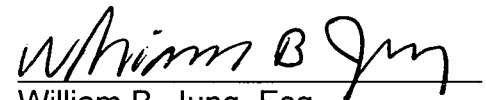
RULE 211(b) CERTIFICATION

I, William B. Jung, Esq., certify that the Final Briefs filed by the appellant comply with Rule 211(b).



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