

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2011-CP-07-02700

RECEIVED

APR 28 2014

SC Court of Appeals

TAD SEGARS,

Plaintiff,

vs.

OCEAN ESTATE BUILDERS, INC.,
ED FLYNN, individually, DAVID
GARCIA d/b/a YINET PLASTERING,
INC., ADVANCED ROOFING, INC.,
and TEOFILO LEZCANO, individually
and d/b/a ADVANCED ROOFING,
INC., a/k/a YUKO CONSTRUCTION,
INC., CMC CONSTRUCTION
COMPANY, INC., and JAGUAR
MASONRY, INC.,

Defendants.

Substitute

ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF
DAVID GARCIA D/B/A YINET
PLASTERING, INC.

*- amending and
substituting for that
certain order filed*

This matter comes before the Court upon motion of the Defendant, David Garcia d/b/a Yinet Plastering ("Yinet"), seeking an Order granting summary judgment on the Plaintiff's claim against Yinet. As discussed herein, Yinet's motion for summary judgment is granted.

BACKGROUND

This case involves alleged construction defects in the Plaintiff's residence on Hilton Head Island. The Plaintiff filed a Summons and Complaint on September 23, 2009, naming the general contractor, Ocean Estate Builders, Inc., as the lone defendant. Within the initial Complaint, the Plaintiff alleged construction defects in the subject residence, including improper installation and failure of the exterior cladding, improper and lack of proper caulking, and other

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construction deficiencies. The Plaintiff contended that those defects resulted in water intrusion into the residence and damage to structural components of the residence.

Following a dismissal and restoration of the Plaintiff's claims pursuant to Rule 40(j), SCRCP, Ocean Estate filed a Third Party Complaint in November 2011, asserting third party claims against Advanced Roofing, Inc. a/k/a Yuko Construction and Teofilo Lezcano, Jaguar Masonry, and Alberto Garcia Stucco. By way of its Third Party Complaint, Ocean Estate alleges that Alberto Garcia installed the stucco at the subject residence.

Ocean Estate dismissed, with prejudice, its third party claims against Alberto Garcia Stucco on April 20, 2012. The Plaintiff never asserted claims against Alberto Garcia Stucco, and therefore, following the filing of the stipulation of dismissal in April 2012, Alberto Garcia Stucco was no longer a party to the case at bar.

Ten months after Alberto Garcia Stucco was dismissed, the Plaintiff filed a Third Amended Complaint on February 13, 2013, and for the first time, David Garcia and Yinet Plastering were named as Defendants. Within his Third Amended Complaint, the Plaintiff identifies Yinet as the stucco installer and contends Yinet was negligent in performing work at the residence. The allegations of construction defects in the Third Amended Complaint are identical to those contained within the original complaint.

Yinet subsequently filed a motion for summary judgment, contending that the Plaintiff's claim was barred by the statute of limitations, as the Plaintiff first

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asserted a claim against Yinet three and a half years after first bringing claims related to construction of the residence.

Ocean Estate, despite having previously agreed to a voluntary dismissal with prejudice of its claims against Yinet, argued in opposition to the Yinet motion for summary judgment as to the Plaintiff's claims. The Plaintiff concurred in the arguments put forth by Ocean Estate (the Plaintiff and Ocean Estate are the referenced "parties opposing the motion" as referenced within this Order). They contend that Rule 15(c), SCRPC, authorizing the substitution of parties and relation back of pleadings, precludes summary judgment, because the Plaintiff's Third Amended Complaint substitutes David Garcia and Yinet for Alberto Garcia Stucco, despite the fact that Alberto Garcia Stucco was dismissed 10 months *before* the Plaintiff asserted claims against Yinet. The parties opposing the motion further contend that because Alberto Garcia Stucco was named as a third party defendant within the period of limitations, the claim against Yinet is not time barred.

The parties opposing the motion for summary judgment further contend that the service of the Third Amended Complaint was accomplished within the parameters established by Rule 3, SCRPC, and therefore the statute of limitations had not expired.

AUTHORITY

Statutes of limitations are designed "to relieve the courts of the burden of trying stale claims when the plaintiff has slept on his rights" and "to protect potential defendants from protracted fear of litigation." Logan v. Cherokee Landscaping and Grading Co., 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App.

2010) (internal quotations omitted). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. "~~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." Hansson v. Scalise Builders of S.C., 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007) (internal citation omitted).

South Carolina applies a three year statute of limitations for civil claims. S.C. Code Ann. §15-3-530. Additionally, South Carolina courts apply the discovery rule, which states that the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). Under the discovery rule, "[t]he statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Id. The "exercise of reasonable diligence" has been defined as requiring an injured party to:

act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist...[N]ot when advice of counsel is sought or a full-blown theory of recovery developed.

Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994).

Further, the critical date is the discovery of the injury, not the discovery of the wrongdoer. Id. It is immaterial whether the injured party fully comprehends the extent of damages. Dean v. Ruscon Corp., 321 S.C. 360, 365, 468 S.E.2d

645, 647 (1996). Upon discovery of an injury, "the statute of limitations begins to run for all claims based on that injury." Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). (emphasis added). Importantly, the date on which the discovery should have been made is an objective, not subjective, standard. Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct.App. 1998) (quoting Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995)).

"South Carolina's statute of limitations requires 'very little to start the clock.'" Maier v. Tietex Corp., 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (quoting Roe v. Doe, 28 F.3d 404 (4th Cir. 1994)).

Rule 3(a), SCRPC, states:

A civil action is commenced when the summons and complaint are filed with the clerk of court if: 1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or 2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 15(c), SCRPC, states:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

ANALYSIS

Construing the facts in the light most favorable to the nonmoving party, the Plaintiff was aware of a potential claim no later than September 23, 2009, when the original summons and complaint was filed. Therefore, the Plaintiff's time to assert claims related to alleged construction defects began to run no later than the filing of the summons and complaint. The Plaintiff did not assert a claim against Yinet until February 2013, some three years and a half years after the filing of the complaint, and outside the three year period of limitations imposed by S.C. Code Ann. §15-3-530.

The Plaintiff and Ocean Estate appear to acknowledge that Yinet was first named as a Defendant three and a half years after the original complaint was filed. However, they contend that Rule 15(c) allows the Plaintiff to sidestep the three year period of limitations, because they argue Yinet was substituted for a party that was named within the three year period of limitations. Although the parties opposing the motion contend this raises a question of fact for a jury, their argument is premised upon a procedural matter, which presents a question for the Court. In this instance, based upon the filings to date and evidence submitted to the Court, it is clear that Rule 15(c) does not provide an avenue by which claims may be asserted against Yinet.

Rule 15(c) only applies in cases where a party is being changed. A review of the filings in this matter reveals that Alberto Garcia Stucco was dismissed, with prejudice, in a consent Order filed April 20, 2012, nearly a full year *before* claims were asserted against Yinet Plastering. Consequently, Rule 15 cannot apply, because there was not a change in parties.

However, even assuming, *arguendo*, that it is possible to construe Yinets addition was merely a substitution for another party, the requirements of Rule 15(c) have not been satisfied.

Rule 15(c) requires the following elements be satisfied before a pleading is allowed to relate back when a party is substituted:

- 1) the claim asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;
- 2) the party to be substituted has received such notice that it will not be prejudiced in maintaining its defense;
- 3) the party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
- 4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Rule 15(c), SCRPC. See Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994). The parties opposing the motion failed to satisfy these requirements.

First, they provided no testimony, affidavit, or other evidence to demonstrate that Yinets knew or should have known that, but for a mistake concerning identity, the claim would have been asserted against Yinets within the three year period of limitations. Moreover, the parties opposing the motion offered no evidence to demonstrate Yinets even knew of the instant litigation prior to being served with the Third Amended Complaint. It is plainly obvious that a party unaware of pending litigation cannot be aware that he would have been a

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party to that litigation but for a mistake concerning identity. Therefore, the Rule 15(c) requirements are not satisfied, the Third Amended Complaint (as to Yinet) does not relate back, and Yinet is entitled to summary judgment as a matter of law.

The Plaintiff's wife, Kellie Segars, testified on February 10, 2012—a full year before David Garcia and Yinet Plastering were named as Defendants—that David Garcia was involved in the stucco installation at the subject residence. Additionally, Mrs. Segars' testimony, along with a March 2012 email, establish that the Plaintiff maintained a construction file containing paperwork that identified Yinet Plastering. Therefore, the late addition of Yinet Plastering and David Garcia does not appear to be a result of a mistake concerning identity, but rather a failure to determine the appropriate parties within the period of limitations. Accordingly, Rule 15(c) is also inapplicable for this reason.

The Plaintiff and Ocean Estate further argue that Rule 3, SCRPC, authorizes service within 120 days following the expiration of the statute of limitations. This is a gross misreading of Rule 3. As clearly explained in Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012), Rule 3 "provide[s] a safety net for cases where filing of the summons and complaint occurs near the end of the statute of limitations and service is made after the limitations period has run." Mims at 346, 732 S.E.2d at 397. As discussed in Mims, the application of Rule 3 is predicated on a timely filing of the summons and complaint, and allows for a party to still achieve service after the statute of limitations expires. Mims, 399 S.C. 341, 732 S.E.2d 395. Rule 3, SCRPC does not alter the deadline by which a claim must be asserted. Here, the Third Amended Summons and

Complaint was filed six months *after* the latest possible expiration of the period of limitations. Therefore, because the statute of limitations expired before the Third Amended Complaint was filed, Rule 3 is inapplicable and cannot be used to resuscitate a claim that was dead on arrival.

Consequently, based upon the statutory and legal authority cited herein, the Plaintiff's claim against Yinet is time barred, and Yinet's motion for summary judgment must be granted. Neither Yinet Plastering nor David Garcia was named until three and half years after the initial complaint was filed. Although the parties opposing the motion argue that Yinet was substituted for Alberto Garcia Stucco and therefore Rule 15(c) applies, Alberto Garcia Stucco was dismissed from the action ten months before claims were asserted against Yinet. Therefore, no substitution occurred, and Yinet was added as a new party. Additionally, Rule 3 is inapplicable to the facts here. Accordingly, for these reasons, Yinet's motion is granted.

IT IS SO ORDERED!

By: 
Marvin H. Dukes III
Beaufort County Master in Equity and
Special Circuit Court Judge

Beaufort, South Carolina
March 7th 2014.

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Defendants.

CERTIFICATE OF SERVICE OF
ORDER GRANTING SUMMARY
JUDGMENT

The undersigned counsel hereby certifies that he has served the foregoing Order Granting Summary Judgment to David Garcia d/b/a Yinet Plastering, Inc. upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 27 day of March, 2014 addressed to the following:

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Beaufort, South Carolina

March 20, 2014