Master Piece

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Honorable Roger M. Young, Circuit Judge
Civil Action No.: 2009-CP-10-267

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3 Chisolm Street Homeowners Association, Inc., Plaintiff-Appellant,

v.

Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a Masonry Brickwork and Stucco, John Doe #1, John Doe #2, and Brock Green Architects and Planners, LLC, Defendants,

Of whom Genoa Construction Services, Inc., Masterpiece Millwork, Inc., and Brock Green Architects and Planners, LLC, are the Respondents.

Genoa Construction Services, Inc., Third-Party Plaintiff,

v.

The Fox Steel Company, Carolina Services, Inc., Lesco Restoration, Inc., Ferst Plastering, Inc., Charleston Glass & Mirror Company, 3d Renovations, Williams Mechanical, Mastercraft Interior & Exterior, Coastal Glass and Block, Adams Davis & Partners, and Troy Pardee Heating and Air Conditioning (d/b/a Pardee Heating and Air), CT Windows Limited, and Architectural Materials & Systems, Third-Party Defendants,

Lesco Restoration, Inc., Fourth-Party Plaintiff,

v.

Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc., Fourth-Party Defendants.

FINAL BRIEF OF RESPONDENT MASTERPIECE MILLWORK, INC.

Jenny Costa Honeycutt, Esquire
BEST HONEYCUTT, P.A.
PO Box 13466
8 Sawgrass Road, Suite A (29412)
Charleston, SC 29422
(843) 793-4744
Attorneys for Respondent
Masterpiece Millwork, Inc.

Other Counsel of Record:

David J. Parrish, Esquire
NEXSEN PRUET, LLC
PO Box 486
Charleston, SC 29402
(843) 720-1771
Attorneys for Appellant
3 Chisolm Street Homeowners Association, Inc.

Franklin H. Turner, Esquire
ROGERS TOWNSEND & THOMAS, PC
PO Box 100200
Columbia, SC 29202
(803) 744-1826
Attorneys for Respondent
Genoa Construction Services, Inc.

Kent T. Stair, Esquire
Paul E. Sperry, Esquire
J. Patrick Norris, Esquire
CARLOCK COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29403
(843) 727-0307
Attorneys for Respondent
Brock Green Architects and Planners, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO ALL CLAIMS AGAINST MASTERPIECE MILLWORK, INC. BASED ON THE STATUTE OF LIMITATIONS IN LIGHT OF THE TRIAL COURT'S EARLIER ORDER AS TO LACY PAINTING AND THE EVIDENCE IN THE RECORD SHOWING THAT 3 CHISOLM STREET HOMEOWNERS ASSOCIATION, INC. WAS ON NOTICE OF CONSTRUCTION DEFECT CLAIMS STEMMING FROM THE 2000-2002 RENOVATIONS IN THE SUMMER OF 2003?

STATEMENT OF THE CASE

This case arises from alleged construction defect claims brought by Appellant 3 Chisolm Street Homeowners Association, Inc. ("the HOA") against the developer of the Chisolm Street Condominiums ("Condominiums" or "Project") and other entities involved in the 2000-2002 condominium conversion of a vocational school into luxury condominiums. Among other things, the HOA appeals the trial court's order granting summary judgment in favor of Respondent Masterpiece Millwork, Inc. ("Masterpiece") based on the statute of limitations.

The HOA filed a Summons and Complaint on January 16, 2009 against Chisolm Street Partners, LLC and Murray School Partners, LLC (the Project's developers), general contractor Genoa Construction Services, Inc. ("Genoa"), window manufacturer and supplier Masterpiece, and masonry subcontractor Allen Roper, Jr. d/b/a Masonry-Brickwork and Stucco. (R. pp. 094-112).

The HOA subsequently filed a First Amended Complaint on January 20, 2009 and then a Second Amended Complaint on April 8, 2010, adding claims against the architect Brock Green Architects and Planners, LLC ("Brock Green"). (R. pp. 113-131, 162-184). Genoa filed an Answer to both Appellant's Amended Complaint and Second Amended Complaint and asserted cross claims against Masterpiece and Third-Party Claims against various subcontractors. (R. pp. 132-161, 198-229).

On February 1, 2011, Genoa filed a Motion for Summary Judgment to dismiss the HOA's Complaint and all causes of action against it because the HOA's claims were barred by the statute of limitations. (R. pp. 237-442). Other parties to the action, including Lacy Painting, subsequently filed similar motions for summary judgment

raising the same arguments.[1] (R. pp. 595-97). The trial court heard Genoa's summary judgment motion on March 28, 2011. (R. pp. 443-91).

By order dated June 9, 2011, the trial court granted Genoa's summary judgment motion relating to the original construction of the Condominiums and denied Genoa's motion as to claims arising from later repairs performed by Genoa. (R. pp. 11-18). On June 9, 2011, the trial court also issued orders granting summary judgment to other parties involved in the original construction, including Lacy Painting. (R. pp. 19-24). These orders were not challenged.

On June 24, 2011, the HOA filed a motion to reconsider the trial court's order granting partial summary judgment to Genoa. (R. pp. 536-44). The trial court held a hearing on August 12, 2011. (R. pp. 545-89). By order dated January 10, 2012, the trial court denied the HOA's motion to reconsider its ruling granting partial summary judgment to Genoa. (R. pp. 69-80). The HOA thereafter filed a notice of appeal as to the orders relating to Genoa. (R. pp. 610-44). Neither the HOA nor Genoa appealed the grant of summary judgment as to Lacy Painting.

Masterpiece made its initial appearance in this suit on May 25, 2011. (R. pp. 492-507, 508-24). In its answer to the Plaintiff's Complaint, Masterpiece denied the substantive allegations against it and asserted numerous defenses, including the statute of limitations. (R. pp. 492-507). Likewise, Masterpiece denied the substantive allegations of Genoa's cross claims and asserted numerous defenses, including the statute of limitations. (R. pp. 508-24).

[1] For purposes of this brief, Lacy Painting is treated as a first-party defendant originally identified in Plaintiffs Second Am. Summons and Compl., Apr. 8, 2010 as John Doe #1. This fact was included in the unchallenged Order Granting Lacy Painting's Motion for Summary Judgment (R. pp. 19-24; p. 485, lines 5-11).

On September 1, 2011, Masterpiece filed a motion for summary judgment based on the statute of limitations and incorporated into its motion Lacy Painting's Memorandum in Support of its Motion for Summary Judgment and the trial court's Order Granting Lacy Painting's Motion for Summary Judgment. (R. pp. 590-609). On May 25, 2012, the trial court issued an order granting summary judgment in full to Masterpiece as to all claims against Masterpiece asserted by the Plaintiff, Genoa and Chisolm Street Partners. (R. pp. 85-90). The HOA filed a motion to reconsider on June 18, 2012. (R. pp. 645-50). The trial court denied the HOA's motion by order dated July 16, 2012. (R. pp. 91-93).

The HOA then filed a notice of appeal as to the Masterpiece orders. (R. pp. 651-61). The Court of Appeals granted the HOA's motion to consolidate the appeals relating to the various grants of summary judgment into one consolidated appeal. (Letter Consolidating Appeals, Sept. 20, 2012).

FACTS

This case involves alleged construction deficiencies discovered by the HOA in 2003 at the Chisolm Street Condominiums arising from its conversion from a vocational school to luxury condominiums. (R. p. 166, ¶10; p. 663 ¶7; p. 678, line 14-25). The 2000-2002 conversion included the renovation of three adjacent buildings: the main building, gym, and cottage. (R. p. 165, ¶4). Genoa acted as the general contractor for the Project. (R. p. 166, ¶15; p. 667, ¶2). Masterpiece's sole involvement in the Project was to manufacture and supply wood windows to Genoa for use in the gym and cottage buildings during the condominium conversion. (R. p. 167, ¶17).

Shortly after construction was complete the HOA discovered roof leaks; so, it retained forensic architect, Myles Glick, to investigate the issues. (R. p. 663, ¶7). On January 30, 2003, Glick conducted a visual inspection of the property with the HOA's attorney Joe Dapore and contractors Tom and Brett Carlson of Calibogue Construction. (R. pp. 392-96; p. 686, line 22-24). Glick drafted a detailed letter to the HOA Board President Jack Burnett dated April 8, 2003 ("the Glick Report"), citing numerous, significant and pervasive deficiencies, including water intrusion and sealant failures at the windows, condensation on the inside of the glass window panes, problems with the roof, and cracks in the stucco in the courtyard area. (R. pp. 393-396).

The Glick Report concluded:

> All of the above issues are significant and were persuasive [sic] throughout the entire building. I would recommend that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. Without correction, the issue of sales of unsold units and resales will come into play. **I recommend that the board seek legal counsel relative to the impacts of the above issues as well as, pursuing a forensic report documenting and recording the above issues.** This report only represents observations during a limited site visit and other construction deficiencies may exist.

(R. p. 396, lines 5-13)(emphasis added).

Minutes recorded during the May 6, 2003 meeting of the Board of Directors for the HOA ("Board") reflect that the Board received a copy of the Glick report and discussed its findings as well as the need to conduct an additional inspection of the cottage and gym buildings. (R. pp. 384-85). At that meeting, the property manager for the HOA, Mike Parades, specifically discussed the steps that should be taken following the issuance of Glick's April 8, 2003 report:

> Mike discussed the typical sequence of steps that should be followed including:

1. Inspection of the cottage and gym building.
2. Some destructive testing will be needed to document cause of damage and what should be done to correct the problems.

It was agreed that proposals should be solicited from Glick/Boehm and Calibogue Construction for the next phases of investigation....

(R. p. 384, lines 19-24).

At its next meeting on June 10, 2003, the meeting minutes reflect that the Board reviewed proposals for the "additional investigation" deemed necessary at the Project:

> Copies of the proposals from Glick/Boehm and Calibogue Construction related to additional investigation were distributed. Costs associated with proposed work could reach several thousand dollars. Discussion followed...

(R. p. 862, lines 14-16).

Genoa returned to the Project to make limited repairs. (R. p. 663, ¶9). Genoa completed its repair efforts and left the site for good in February 2004. (R. p. 667, ¶¶3-4). Masterpiece was not involved in any repairs after completion. (R. p. 86, lines 11-12, p. 167, ¶17).

More than three years after Glick's inspection, at the February 6, 2006 Board meeting, the minutes reflect that the Board president, Jack Burnett, informed the Board that counsel for the HOA warned that the statute of limitations for claims arising from the construction defects would expire in April 2006:

> Jack reported he spoke with Joe Dapore, the association's lawyer, and he said that they had until April 2006 to take action against Purdue, the developer. Mike [Parades] suggested using diplomacy rather than a lawsuit. A lawsuit will probably not be worth the money it would require....

(R. p. 390, lines 16-19).

Notwithstanding the advice of their forensic architect, the advice of counsel, and multiple Board meetings in which the Board discussed the known construction issues and the need for additional investigation in all three buildings, the Board did not file suit until January 2009. (R. p. 396, lines 5-13; p. 390, lines 16-19; p. 862, lines 14-16; p. 95).

STANDARD OF REVIEW

This Court "reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 576, 735 S.E.2d 528, 532 (Ct. App. 2012). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A grant of 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." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008). When a properly supported motion for summary judgment is presented, the nonmoving party must establish specific facts showing that there is a genuine issue of material fact for trial, or the court must grant summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE STATUTE OF LIMITATIONS BEGAN RUNNING IN 2003 WHEN THE BOARD OF THE HOA KNEW OF ALLEGED CONSTRUCTION DEFECTS AND ACKNOWLEDGED THE NEED TO INVESTIGATE ALL THREE BUILDINGS TO DETERMINE THE FULL EXTENT OF THE DAMAGE.

The trial court, citing S.C. Code Ann. § 15-3-530, found that "South Carolina law imposes a three-year statute of limitations on actions concerning damages to real

property, general negligence claims, and claims arising out of a 'contract, obligation, or liability, express or implied.'" (R. p. 88, lines 20-22).

The application of the statute of limitations in a construction case is best summarized by this court in *Barr v. City of Rock Hill,* 330 S.C. 640, 644-45, 500 S.E.2d 157, 159-60 (Ct. App. 1998).

> Generally, a cause of action accrues under South Carolina law 'the moment the defendant breaches a duty owed to the plaintiff.' The 'discovery rule' provides an exception to the general rule and tolls the statute of limitations until a 'person knows or by the exercise of reasonable diligence should . . . know[] that he has a cause of action.' The statute starts to run upon discovery of 'such facts, as would have led to the knowledge thereof, if pursued with reasonable diligence.' A party has constructive notice if the party knows of 'facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist.' Failure of the injured party to comprehend the full extent of damages, however, is immaterial. 'The date on which discovery should have been made is an objective, not subjective, question.'

(citations omitted). "When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406-07, 680 S.E.2d 778, 782 (Ct. App. 2009).

The South Carolina Supreme Court has "interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Dean v. Ruscon*

Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The critical inquiry is whether a party is on notice of a possible claim, and "the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Id.* 321 S.C. at 364, 468 S.E.2d at 647. Stated differently, the statute of limitations begins to run from the point a party is on notice of a claim and "not when advice of counsel is sought or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

A. In 2003, the HOA knew of the alleged construction deficiencies and acknowledged the need to investigate all three buildings to determine the full extent of the damage.

The trial court properly found that the Board of the HOA had actual knowledge of the alleged problems in 2003, and acknowledged the need to investigate all three buildings to determine the full extent of the damage. (R. p. 89, lines 10-14). There is no question of fact as to when the HOA was put on notice of possible claims relating to the work done at the time of the conversion, including the windows supplied by Masterpiece in 2000-2001.

This Court affirmed a similar grant of summary judgment on the statute of limitations in *Barr*. There, as here, the Plaintiff asserted causes of action for negligence, breach of implied warranty of workmanlike service, breach of implied warranty of habitability, breach of implied warranty of fitness for an intended use, and violation of the South Carolina Unfair Trade Practices Act arising out of the construction and sale of a house, and the defendants moved for summary judgment on the ground the statute of limitations had expired. *Barr*, 330 S.C. at 641, 500 S.E.2d at 158. The Barrs purchased the home in 1985 and obtained annual termite inspections from 1987-1990 revealing

excessive moisture under the home. *Id.* The inspectors suggested repairs, including adding vents, back-filling footers, and installing a polyethelene vapor barrier. *Id.* The Barrs did not act on these recommendations until 1992 when they sought additional expert opinions, and they did not file suit until 1994. *Id.*, 330 S.C. at 643, 500 S.E.2d at 159. The Court held that the applicable statute of limitations for all of the Barrs' claims (except those arising under the South Carolina Tort Claims Act) was S.C. Code Ann. § 15-3-530 and affirmed the grant of summary judgment, reasoning that if the Barrs had exercised reasonable diligence and investigated the problems noted in the termite inspection reports, they would have realized the magnitude of the problem and brought suit before the statute of limitations ran. *Id.*, 330 S.C. at 645-646, 500 S.E.2d at 160.

Like the Barrs, the HOA in the instant case obtained a report from an expert, which revealed construction deficiencies, including water intrusion and sealant failures at the windows, condensation on the inside of the glass window panes, problems with the roof, and cracks in the stucco in the courtyard area. (R. pp. 393-96) Similarly, rather than exercising reasonable diligence and acting with some promptness, the Board elected not to pursue the recommended additional inspections which would have revealed the extent of the construction defects throughout the Project. (R. p. 384, lines 19-25; p. 862, lines 14-18). In 2003, the Board had sufficient knowledge to put it on notice that potential claims existed at all three buildings at the Project. As further evidence of the Board's intentional inaction, they did not file suit even when confronted with a warning from their attorney advising that the statute of limitations was going to expire in April 2006. (R. p. 390, lines 16-19). Only one reasonable inference can be drawn from the evidence, which is that the HOA knew of the claims it had in 2003 and chose not to

pursue them; thus, allowing the statute of limitations to expire. The HOA's argument that it did not comprehend the full extent of the damage at that time is unavailing in light of the fact that it was clearly on notice of existing claims for construction deficiencies and acknowledged the need to investigate further.

This Court also affirmed another similar grant of summary judgment on the statute of limitations in *Watters v. Terminix Serv., Inc.*, 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008), a case arising from the 1997 sale of a moisture-damaged home. There, the defendant seller provided the plaintiff purchaser with a report noting conditions in the crawlspace and recommending an inspection of the house structure. *Id.*, 376 S.C. at 634, 658 S.E.2d at 111. The plaintiff discovered damage, and his attorney wrote a letter to the defendant advising of moisture intrusion in 1997. *Id.* In 1998, the Plaintiff hired an engineer who evaluated the moisture level and issued a report. *Id.* The Plaintiff did not file suit against the defendant until 2002. *Id.* In affirming the grant of summary judgment on the statute of limitations, this court reasoned that

> [e]ven measured against the exacting summary judgment standard, it seems an insurmountable hurdle for Watters to delay the start of the statute of limitation after his attorney's 1997 letter referencing moisture damage. At that time, when viewed objectively, one would reasonably conclude that a claim must exist. Nevertheless, under no circumstances could Watters claim he lacked knowledge of his potential cause of action after August 1998 when he received the report of *his* expert.

Id., 376 S.C. at 635, 658 S.E.2d at 112.

In the instant case, the HOA received notice of a potential cause of action when it received the Glick Report. (R. pp. 393-396). Moreover, it seems an insurmountable hurdle for the HOA to claim it was not on notice in light of Board discussions in May and

June 2003 acknowledging the need to conduct inspections of the cottage and gym buildings and obtaining proposals for the same. (R. p. 384, lines 19-25; p. 862, lines 14-18). At that time, when viewed objectively, one would reasonably conclude that a claim must exist. Nevertheless, under no circumstances can the HOA claim it lacked knowledge of its potential cause of action after February 2006, when it received the explicit instruction from its attorney that the statute of limitations would expire in April 2006. (R. p. 390, lines 16-19). Therefore, this Court must affirm the grant of summary judgment to Masterpiece.

B. The statute of limitations is not tolled because Masterpiece did not participate in any repairs after supplying the windows for original construction and claims for defective repairs do not apply to Masterpiece.

The trial court denied Genoa's Motion for Summary Judgment in part based on the fact that it made some repairs, the failure of which did not manifest and become known by the HOA until later. (R. p. 16, lines 10-19).[2] While "a defendant may be estopped from claiming the statute of limitations as a defense if **the defendant's conduct** induced the delay," Masterpiece's conduct did not induce the HOA to delay filing suit. *Watters*, 376 S.C. at 636, 658 S.E.2d at 112 (emphasis added). The later repairs by Genoa and others do not impact the accrual date for the statute of limitations as to Masterpiece because it was not involved in any repairs. The HOA's remedy as to claims for defective repairs lies exclusively with Genoa and the repair contractors it used, not Masterpiece. Accordingly, even if the HOA's claims related to the defective repairs are not barred by the statute of limitations, the trial court correctly granted summary judgment in favor of Masterpiece.

[2] This argument is in the nature of estoppel; however, Masterpiece notes that the HOA has not expressly argued estoppel in its brief or before the trial court.

II. THE HOA DID NOT APPEAL THE FINDINGS IN THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO LACY PAINTING, AND THOSE FINDINGS ARE NOW THE LAW OF THE CASE.

"A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); *see also Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 355-356 n.9, 628 S.E.2d 902, 910 n.9 (Ct. App. 2006) (noting that the Court's ruling on a previous grant of summary judgment represents the law of the case). Likewise, "[a]n unappealed order becomes the law of the case." *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 377, 597 S.E.2d 181, 184 (Ct. App. 2004); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, , 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003).

Masterpiece incorporated into its Motion for Summary Judgment by reference the facts and arguments set forth in Lacy Painting's Memorandum in Support of Motion for Summary Judgment and the trial court's subsequent Order Granting Lacy Painting's Motion for Summary Judgment. (R. p. 591, lines 4-7). The trial court based its ruling as to Masterpiece on its earlier order as to Lacy Painting. (R. p. 86, fn. 1).

In granting Lacy Painting's Motion for Summary Judgment, the trial court ruled that, "[i]n this instance, the Board of the HOA had actual knowledge of leaking windows and sealant failures identified in the Myles Glick report, but also, in May and June of 2003, acknowledged the need to investigate all three buildings to determine the full extent of the damage. This acknowledgement starts the statute running." (R. p. 606, lines 11-14).

The HOA failed to challenge this ruling. Thus, the unchallenged order ruling that the statute of limitations began running in June of 2003 presents no issue for determination for this Court and constitutes the law of the case. *See Ulmer*, 369 S.C. at 490, 632 S.E.2d at 861. Accordingly, the Court should uphold the trial court's order granting summary judgment because the HOA cannot now allege that the statute of limitations began running for original construction defects at any time differing from the unchallenged order of the trial court.

CONCLUSION

The trial court properly granted summary judgment to Masterpiece because the statute of limitations began running in 2003 when the HOA acknowledged that there were construction deficiencies and additional investigation of all three buildings was necessary. The HOA Board declined to follow the advice of its forensic architect and counsel who indicated that the statute of limitations would run in 2006 and waited to bring this action until 2009. Accordingly, the judgment as to Masterpiece should be affirmed.

Respectfully submitted,

Jenny Costa Honeycutt
Best Honeycutt, P.A.
PO Box 13466
8 Sawgrass Road, Suite A (29412)
Charleston, SC 29422
(843) 259-1245
Jenny@besthoneycutt.com
Attorneys for Respondent Masterpiece Millwork, Inc.

July 16, 2013

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Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc., Fourth-Party Defendants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Jenny Costa Honeycutt, Esquire
BEST HONEYCUTT, P.A.
PO Box 13466
8 Sawgrass Road, Suite A (29412)
Charleston, SC 29422
(843) 793-4744
Attorneys for Respondent Masterpiece Millwork, Inc.

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PROOF OF SERVICE

I have served a copy of the Final Appellate Brief of Respondent Masterpiece Millwork, Inc. upon the attorneys of record by depositing a copy of same in the United States Mail, postage prepaid, to the addresses below on July 17, 2013.

Jenny Costa Honeycutt, Esquire
BEST HONEYCUTT, P.A.
PO Box 13466
8 Sawgrass Road, Suite A (29412)
Charleston, SC 29422
(843) 793-4744
Attorneys for Respondent Masterpiece Millwork, Inc.

Other Counsel of Record:

David J. Parrish, Esquire
NEXSEN PRUET, LLC
PO Box 486
Charleston, SC 29402
(843) 720-1771
Attorneys for Appellant 3 Chisolm Street Homeowners Association, Inc.

Franklin H. Turner, Esquire
ROGERS TOWNSEND & THOMAS, PC
PO Box 100200
Columbia, SC 29202
(803) 744-1826
Attorneys for Respondent Genoa Construction Services, Inc.

Kent T. Stair, Esquire
Paul E. Sperry, Esquire
J. Patrick Norris, Esquire
CARLOCK COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29403
(843) 727-0307
Attorneys for Respondent Brock Green Architects and Planners, LLC

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FINAL REPLY BRIEF OF APPELLANT

David J. Parrish
NEXSEN PRUET, LLC
PO Box 486
Charleston, SC 29402
Direct phone: (843) 720-1771
Fax: (843) 414-8214
Email: dparrish@nexsenpruet.com
Attorneys for Appellant 3 Chisolm Street Homeowners Association, Inc.

Other Counsel of Record:

Franklin H. Turner, Esquire
Rogers Townsend & Thomas, PC
PO Box 100200
Columbia, SC 29202
Phone (803) 744-1826
Attorneys for Respondent Genoa Construction Services, Inc.

L. Dean Best, Esquire
Jenny Costa Honeycutt, Esquire
BEST HONEYCUTT, P.A.
P.O. Box 13466 (29422)
8 Sawgrass Road, Suite A (29412)
Charleston, South Carolina
Jenny@besthoneycutt.com
Dean@besthoneycutt.com
Attorneys for Respondent Masterpiece Mill Work, Inc.

Kent T. Stair, Esquire
Paul E. Sperry, Esquire
J. Patrick Norris, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29403
Phone (843) 727-0307
Attorneys for Respondent Brock Green Architects and Planners, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

ARGUMENT

Though each of the three Respondents submitted separate Appellate Briefs, those three Briefs contain the same arguments. For purposes of brevity in this consolidated appeal, this Reply Brief is intended as a consolidated reply to all three Briefs.

I. THE INJURY OR DAMAGE TO THE WOOD WINDOWS IN THE OTHER TWO BUILDINGS DID NOT EXIST WHEN THE 2003 GLICK REPORT WAS ISSUED REGARDING THE METAL WINDOWS IN THE MAIN BUILDING.

When boiled down to its essence, the circuit court concluded that the 2003 Glick report, which pertained only to the main building, started the statute of limitations as to claims pertaining to all other aspects of the construction of the three separate buildings that comprise the HOA's property. Under the discovery rule, the statute does not begin to run from the date the negligent act or the breach of contract occurred; rather, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981).

The problems with the three buildings involve different issues and damages that occurred at different times. The main building has a problem with water intrusion occurring around the metal frame windows; however, the metal window frames themselves remain fully intact. In contrast, the wood frames in the wood windows in the gym and cottage building are rotting. The 2003 Glick report does not identify any problems, or even mention, the wood windows in the gym and cottage building. In 2003 the wood windows were essentially brand new (the developer

was still selling unsold condominium units in 2003) (Aff. of Jack Burnett, R. p. 663 at ¶ 7). The record is devoid of any evidence that the wood windows had sustained any injury or damage at that time of the Glick report. To the contrary, the HOA's handyman testified that in 2004 the wood windows in the gym building were "fine, they were all right." (Dep. Jerry Huddleston, R. p. 709, lines 9-12).

No repairs were performed to the wood windows following the Glick report because no problems existed with the windows at that time. Years later in 2007 or 2008 the wood windows frames began to rot, at which point the HOA hired forensic engineering firm Applied Building Sciences, Inc. ("ABS") to investigate the cause of the rotting. (Aff. of Jack Burnett, R. p. 663 at ¶ 11; Aff. of Scott Harvey, R. p. 664 at ¶ 4). Prior to that point no injury or damage to the wood windows existed, so in 2003 the HOA could not have been placed on notice of a then non-existent injury of a different nature pertaining to different types of windows located in different buildings.

In considering the summary judgment motions, the circuit court was required to view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the HOA, and summary judgment should have been denied if even a mere scintilla of conflicting evidence exists. *See* Rule 56(c), SCRCP (stating summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330,

673 S.E.2d 801, 803 (2009) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

In granting summary judgment against the HOA, the circuit court disregarded conflicting facts and ignored material facts indicating that the injury to the wood windows did not exist prior to 2007 or 2008. Accordingly, the circuit court erred in concluding that the 2003 Glick report regarding the main building somehow placed the HOA on notice on an injury or damage to the wood windows in the other two buildings that did not exist at that time. Because the record contains genuine issue of material fact regarding when the injury to the wood windows first occurred and regarding when the HOA discovered or reasonably could have discovered that injury, the circuit court erred in granting summary judgment on that issue.

II. A REASONABLE INFERENCE EXISTS THAT THE HOA WAS JUSTIFIABLY INDUCED TO BELIEVE THAT THE PROBLEMS HAD BEEN REPAIRED AND THE CIRCUIT COURT ERRED IN DECIDING THE ISSUE ON SUMMARY JUDGMENT.

The circuit court erred by summarily concluding the Respondents are not equitably estopped from asserting the statute of limitations as a bar to the HOA's claims pertaining to the main building. Genuine issues of fact exist regarding whether the repair work performed on the main building to address the issues identified in the 2003 Glick report justifiably induced the HOA to refrain from filing suit concerning those repairs.

This Court has stated that attempts to investigate and repair construction problems toll the statute of limitations under the doctrine of equitable estoppel:

In South Carolina,

> [a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been *induced by the defendant's conduct.*
>
> The doctrine is, of course, most clearly applicable where the aggrieved party's delay in bringing suit was caused by his opponent's *intentional* misrepresentation; *but deceit is not an essential element of estoppel.* It is sufficient that the aggrieved party *reasonably relied* on the words and conduct of the person to be estopped in allowing the limitations period to expire.
>
> The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue. Some courts hold that repairs by a defendant may toll the statute of limitations. One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that may lead the injured party to *reasonably believe that it will receive satisfaction without resort to litigation.*

Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372-73, 725 S.E.2d 112, 125-26 (Ct. App. 2012) (quoting *Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218–19, 332 S.E.2d 555, 561 (Ct. App. 1985), *overruled on other grounds, Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) (citations and quotation marks omitted) (additional emphasis added).

In *Dillon County School District No. Two*, this Court concluded that investigation and attempts to repair the roof on the school building, and assurances that the problem would be corrected, induced the school district to refrain from filing suit. *Id.* at 219-20, 332 S.E.2d at 562. This Court also observed that, "The question of whether a defendant's conduct lulled a plaintiff into a false sense of security and thereby prevented the plaintiff from filing suit within the

statutory period is ordinarily one of fact for a jury to determine." *Id.* at 219, 332 S.E.2d at 561 (citing *Lovell v. C.A. Timbes, Inc.*, 263 S.C. 384, 210 S.E.2d 610 (1974)).

In the present matter, following transfer of control from the developer to the HOA in 2003, the HOA hired Glick to investigate potential water issues in the main building. The 2003 Glick report identified some issues in the main building only, namely issues related to cracks in the stucco and weather stripping on the metal frame windows. Genoa proceeded to address the items listed in the report by repairing the cracks in the stucco cladding on the main building and by checking and re-seating the weather stripping around the metal windows on the main building. (Aff. of Mike Parades, Second Supplement Record. p. 4 at ¶ 5; Aff. of Jack Burnett, R. p. 663 at ¶ 9; Dep. of Mike Parades R. p. 722, lines 12-17; Parades Dep. Ex. 244, R. p.732). Genoa performed the repair work over the course of a year or more (Aff. of Jack Burnett, R. p. 663 ¶ 9). Upon completion Genoa reported that the metal windows were not leaking and that the problems on the main building had been occurring because of the cracks in the stucco, which Genoa has repaired (Parades Dep. Exhibit 244, R. p. 732).

When Genoa completed the repair work the HOA was informed and believed that the issues identified in the Glick report had been repaired. (Aff. of Mike Parades, Second Supplemental Record p.5 at ¶ 6; Aff. of Jack Burnett, R. p. 663 at ¶ 10). As to the architect, Glick's report does not mention any design defects, and in the course of performing the repair work on the main building Genoa did not notify the HOA of any design issues involving the architect. Moreover, at that time no problems existed with the wood windows on the other two buildings and no repair work was needed or performed on those buildings. After Genoa

completed the repairs to the main building, the HOA had no reason or cause to file suit, because all identified problems had been repaired and no other problems had been identified or existed.

Under these facts, a reasonable inference exists that the HOA was justifiably induced to believe that the problems had been repaired. Therefore, a jury issue exists regarding whether reasonable men could differ on the issue of equitable estoppel in this case, and the circuit court erred in deciding the issue on summary judgment.

III. THE ORDERS GRANTING SUMMARY JUDGMENT ON GENOA'S THIRD-PARTY CLAIMS AGAINST ITS SUBCONTRACTORS DO NOT PERTAIN TO THE HOA'S CLAIMS AGAINST RESPONDENTS.

Genoa filed third-party claims against its various subcontractors, and those subcontractors then filed motions to dismiss Genoa's third-party claims based on the statute of limitations. At the motions hearing (March 28, 2011, Hearing Transcript, R. p. 443), Genoa did not oppose the subcontractors' motions and the circuit court granted summary judgment to the subcontractors and dismissed Genoa's third-party claims. Genoa did not appeal the orders applicable to the subcontractors and those orders are not at issue in this appeal. Respondents now incorrectly contend that this Court should affirm the summary judgment orders pertaining to the HOA's claims against Respondents based on the "unchallenged orders" pertaining to Genoa's third-party claims against its subcontractors.

It is axiomatic that a party cannot appeal from a decision that does not affect his or her interest. *Shaw v. City of Charleston*, 351 S.C. 32, 37, 567 S.E.2d 530, 532 (Ct. App. 2002); *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App.2001); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App.1998). As stated by this Court:

> Rule 201(b), SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." We recently reiterated that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct.App.2001). "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." *Id.; see Parker v. Brown*, 195 S.C. 35, 44-45, 10 S.E.2d 625, 629 (1940) ("An aggrieved party or person is one who is injured in a legal sense; one who has suffered an injury to person or property."). "A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589-590; *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct.App.1998).

Shaw, 351 S.C. at 36-37, 567 S.E.2d at 532.

Here, Genoa filed third-party claims against a number of its subcontractors, but Genoa subsequently elected to abandon those claims when it made no effort to oppose their motions for summary judgment. The HOA has not asserted claims against Genoa's subcontractors and the HOA was not aggrieved or injured by the orders granting summary judgment on Genoa's claims against its subcontractors. The HOA had no reason, basis, or standing to argue against those motions or to challenge those orders in this appeal. Moreover, Genoa's subcontractors are not co-defendants with HOA, and the narrow exception recognized by this Court in *Shaw* regarding a co-defendant's right to appeal the grant of summary judgment to its co-defendant does not apply here.

The HOA has not asserted claims against Genoa's subcontractors, and Genoa's decision to abandon those third-party claims does not affect the HOA's claims, rights or interests. The summary judgment orders regarding Lacy Painting and the other subcontractors as referenced by the Respondents pertain only to Genoa's third-party claims against its subcontractors, and those orders have no relevance or binding effect as to the HOA's claims.

CONCLUSION

The circuit court erred by granting summary judgment in the face of conflicting facts and by failing to construe the facts and inferences drawn therefrom in the light most favorable to the HOA. Accordingly, the circuit court's orders granting summary judgment to Respondents should be reversed and the case remanded for a jury trial on these issues.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Reply Brief of Appellant complies with Rule 211, SCACR.

Respectfully submitted,

David J. Parrish
NEXSEN PRUET, LLC
PO Box 486
Charleston, SC 29402
Direct phone: (843) 720.1771
Fax: (843) 414.8214
Email: dparrish@nexsenpruet.com
Attorneys for 3 Chisolm Street Homeowners Association, Inc.

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