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SC Court of Appeals

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STATE OF SOUTH CAROLINA)	BUSINESS COURT CASE
)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FIFTEENTH JUDICIAL CIRCUIT
 Horry Electric Cooperative, Inc.,)	 Civil Action No. 2013-CP-26-0488
)	
Plaintiff,)	
)	
vs.)	<u>ORDER GRANTING</u>
)	<u>PUBLIC SERVICE AUTHORITY'S</u>
South Carolina Public Service Authority)	<u>MOTION TO DISMISS</u>
and Southern Electric International, Inc.,)	<u>(Ending case as to all parties)</u>
)	
Defendant.)	

This matter comes before this Court on Defendant South Carolina Public Service Authority's ("Santee Cooper") Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6), SCRCF. A hearing on the motion was held at 10:00 a.m. on Tuesday, May 27, 2014, at the Horry County Courthouse. Defendant Santee Cooper appeared through counsel and Horry Electric Cooperative's ("HEC") counsel attended via teleconference. Defendant Southern Electric International, Inc., did not appear, having never been served the Summons and Complaint by HEC, and thus this Court will dismiss the claims against that defendant, without prejudice, for lack of prosecution.

HEC's Amended Complaint asserts the following causes of action against Santee Cooper: (1) equitable indemnification; (2) negligence; (3) breach of the covenant of good faith and fair dealing; (4) breach of warranty; and (5) civil conspiracy. Pursuant to each of these theories, HEC seeks reimbursement from Santee Cooper in connection with a class action styled *Ronnie Ferrell, Tammy Vance, and David Montorio, et al. v. Horry Electric Cooperative*, Civil Action No. 2011-CP-26-1266 ("the *Ferrell* action"). In the underlying *Ferrell* action, the plaintiffs were customers of HEC and claimed that HEC's

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requirements for participation in its “Good Cents Program”—an energy efficiency program through which the plaintiffs would modify their homes and in return receive a lower electric rate—incorporated a design specification for a vapor barrier that led to subsequent moisture problems in the plaintiffs’ homes. HEC now sues Santee Cooper, alleging that responsibility for any damages arising from the vapor barrier requirement lies with Santee Cooper.

Santee Cooper moved for dismissal of the Amended Complaint on the following grounds:

- The claims are barred by the statute of repose because the underlying action is based on construction completed in the 1980s and 1990s;
- The claims other than equitable indemnity are barred by the applicable statute of limitations; and
- HEC failed to state facts sufficient to constitute a cause of action against Santee Cooper.

As required by Rule 12(b)(6), SCRPC, the Court confined its decision to the amended Complaint, attachments thereto, matters of which the Court may take judicial notice, and the arguments of the parties at the hearing. All arguments of the parties were carefully considered. After considering all arguments, the Court **GRANTS** Santee Cooper’s motion for the reasons set forth below and dismisses this case in its entirety. The claim for equitable indemnification is dismissed *without prejudice*, as the Court finds it is not yet ripe. All other claims are dismissed *with prejudice*.

1. Equitable Indemnification. As stated above, the claim for equitable indemnification is not yet ripe for adjudication. The parties in the *Ferrell* action have entered into a Settlement Agreement, which will require Court approval, but as of the date of the hearing in this matter, that approval had not yet occurred. Pursuant to the Settlement Agreement, HEC and/or its insurer will pay class members to settle their



damages claims and will pay class counsel their attorneys' fees and costs. In the action at bar, HEC is seeking indemnification for such payments. Counsel for HEC reported that while some class members had submitted claims and class counsel had petitioned for attorneys' fees pursuant to the Settlement Agreement, court approval of the settlement had not been granted as of the date of this hearing.¹ More importantly, no payments had been made pursuant to the Settlement Agreement. Accordingly, this Court finds that HEC's claims for indemnification are not yet ripe. The Court makes this finding after carefully considering and rejecting all of HEC's arguments relevant to the question of ripeness, regardless of whether such arguments are expressly enumerated herein. Finding that dismissal with prejudice would be premature, this Court dismisses the claim for equitable indemnification *without prejudice*.²

2. **Statute of Repose.** The Court finds that the statute of repose bars the remaining claims. These claims are predicated on letters written by a Santee Cooper employee in 1986 concerning, among other things, the vapor barrier design specifications for the Good Cents program. These specifications were then incorporated into construction completed as early as 1988 or, accepting for the sake of argument HEC's position asserted during the hearing, in 1991. (At the hearing, counsel for HEC stated that while the letters were written in 1986, the vapor barrier design specification was not implemented until 1991). HEC further argues that HEC did not discover the existence of these Santee Cooper letters until the *Ferrell* suit was being litigated. HEC further argues

¹ This settlement approval was pending before another Court. Approval was subsequently granted on May 30, 2014.

² The Court does not reach Santee Cooper's other arguments for dismissal of the equitable indemnification claim and, therefore, this ruling is without prejudice to Santee Cooper's raising those arguments in a subsequent action, if any.

that the 1986 letters demonstrate that Santee Cooper had knowledge about the vapor barrier design specification that it should have disclosed to HEC in 1986 (or 1991). Santee Cooper disputes these arguments. Reading the Amended Complaint and drawing all inferences in the light most favorable to HEC, the Court concludes that these claims are based on the theory that if HEC had been informed of the contents of the letters when they were written, HEC would not have adopted the vapor barrier design specifications and, consequently, these design specifications would not have been incorporated into the homes of its customers. As noted above, counsel for HEC argued that the operative date for incorporation of the design standards into customers' homes was 1991, rather than 1986 (the date of the letter) or 1988 (the date construction commenced according to the underlying complaint). Even if 1991 were the operative date on which the design specifications were incorporated into the construction of class members' homes, the statute of repose would bar the claims for negligence, breach of the covenant of good faith and fair dealing,³ breach of warranty, and civil conspiracy.

In candor, HEC concedes that the statute of repose applies but contests the period asserted by Santee Cooper. The statute of repose currently states that "no actions to recover damages based upon or arising out of the defective . . . condition of an improvement to real property may be brought more than eight (8) years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640. Prior to July 1, 2005, the statute of repose cut off all claims after thirteen (13) years. HEC argues that the 13-year

³ The Court recognizes that this is not a freestanding claim under South Carolina law. "[T]he implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). HEC does not assert a breach of contract claim. Consequently, there is no basis for the claim for breach of the covenant of good faith and fair dealing.

statute and not the 8-year statute applies. See S.C. Code Ann. § 15-3-640, Editor's Notes. Again construing the matter in the light most favorable to HEC, without deciding the issue, this Court applies the 13-year statute of repose.

According to the Amended Complaint and attachments, HEC adopted the Good Cents program and offered the program to customers in 1987. Complaint ¶¶ 4-7. Construction of Good Cents homes began in 1988. *Id.*, Exhibit D. Even if the design specifications were not included in homes until 1991, as argued by counsel for HEC, homes constructed in 1991 would be far outside the period allowed by the statute of repose for a suit filed in 2013. The statute of repose creates an absolute, substantive right to be free from suit after a period of time set by the General Assembly. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). "[S]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants, struck by determining a time limit beyond which liability no longer exists." *Id.* at 404, 438 S.E.2d at 244. "A statute of repose . . . is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (internal citations omitted). Because the time limit is absolute, a statute of repose may extinguish a claim before it is discovered or even arises. *Id.* Based on the pleadings, HEC is seeking damages related to construction completed as early as 1988, arguing that it would not have adopted the vapor barrier design specifications of the Good Cents program if it had been informed of the information contained in the 1986 letters. Even if the 13-year period from the former statute of

repose is used and even if, as HEC argues, the design specifications were incorporated into Good Cents homes in 1991, the statute of repose bars HEC's claims for negligence, breach of the covenant of good faith and fair dealing, breach of warranty, and civil conspiracy. The Court so rules after carefully considering and rejecting all of HEC's arguments relevant to the statute of repose, regardless of whether such arguments are expressly enumerated herein. Accordingly, these claims are dismissed *with prejudice*.

3. Statute of Limitations. The Court notes that Santee Cooper also moved for dismissal of HEC's claims for negligence, breach of the duty of good faith and fair dealing, breach of express and implied warranties, and civil conspiracy on the basis of the two-year statute of limitations contained in the Tort Claims Act ("TCA"). See *S.C. Code Ann. § 15-78-110*; see also *Hodges v. Rainey*, 341 S.C. 79, 91-92, 533 S.E.2d 578, 584 (2000) (recognizing TCA applies to Santee Cooper). The Court finds that the statute of limitations provides an additional reason for dismissal of these claims.

In oral argument, HEC asserted that actions brought under the TCA are subject to the discovery rule, *Joubert v. S.C. Dep't. of Soc. Services*, 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000), and that it did not have knowledge of the 1986 letters until discovery began in the underlying *Ferrell* case. "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Id.* See also *Anonymous Taxpayer v. S.C. Dep't. of Revenue*, 377 S.C. 425, 661 S.E.2d 73 (2008) ("The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist."). "The date on which discovery should have been made is an objective rather than subjective question." *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct.

App. 1998). “The critical inquiry, then, is whether [HEC] *could* have discovered its claim against the defendant.” See *Republic Contracting Corp. v. S.C. Dep’t of Highways & Public Trans.*, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (Cl. App. 1998) (emphasis added).

On their face, argues Santee Cooper, the 1986 letters show that HEC could have discovered the information that HEC alleges Santee Cooper should have divulged to HEC, because the letters show that this information was contained in engineering standards and a trade publication, and was the subject of some discussion in the local building community. According to this argument, the statute of limitations began to run in 1986. The Court agrees. Alternatively, argues Santee Cooper, the Amended Complaint alleges that Santee Cooper later altered the vapor barrier design specifications in 2003 and this change put HEC on notice to inquire about the reasons for the change. Thus, under this argument, the statute of limitations began to run in 2003. The Court finds that this alternative argument from HEC actually supports dismissal of the claims other than equitable indemnification. The Court so rules after carefully considering and rejecting all of HEC’s arguments relevant to the statute of limitations, regardless of whether such arguments are expressly enumerated herein.

Finally, as to both defenses upon which this Court is dismissing this lawsuit, HEC argues that the issues raised by Santee Cooper are affirmative defenses, and in a 12(b)(6) motion, the Court cannot reach beyond the Complaint and consider evidence of affirmative defenses. Even though this motion has not been converted to a summary judgment motion under Rule 56, SCRPC, this Court is unpersuaded by this argument. “Most courts allow such [affirmative] defenses to be raised in a motion to dismiss under

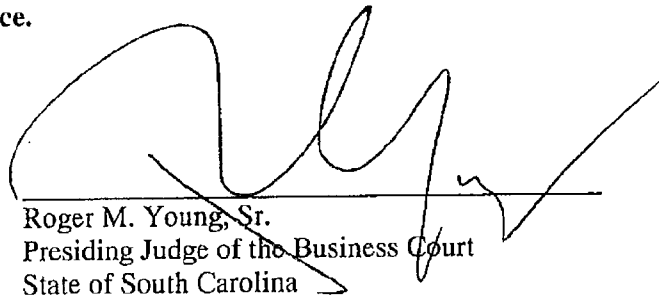


Rule 12(b) ‘when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense.’” *Spence v. Spence*, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006) (citations omitted). *See also Goodman v. PraxAir*, 494 F.3d 458, 464 (4th Cir. 2007) (“[I]n the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the [statute of limitations] defense may be reached by a motion to dismiss filed under Rule 12(b)(6).”). This is clearly such a case.

CONCLUSION

For the foregoing reasons, this Court **dismisses** the claim for equitable indemnification **without prejudice**, and **dismisses** all other claims asserted in the Amended Complaint, **with prejudice**.

IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Judge of the Business Court
State of South Carolina

JUDGE ROGER YOUNG
CIRCUIT COURT
OF SC #2134

Charleston, South Carolina

June 11, 2014

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
FIFTEENTH JUDICIAL CIRCUIT)

Horry Electric Cooperative, Inc.,)
)
Plaintiff,)

Civil Action No. 2013-CP-26-0488

vs.)

ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER

South Carolina Public Service Authority)
and Southern Electric International, Inc.,)
)
Defendant.)

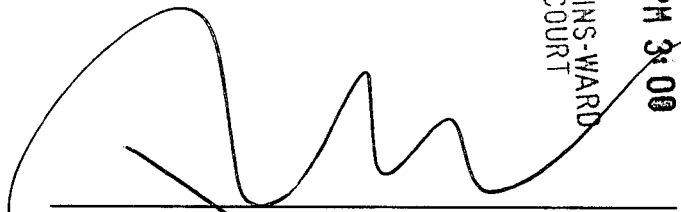
This matter originally came before this Court on Defendant South Carolina Public Service Authority's Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6), SCRCF. A hearing on the motion was held on Tuesday, May 27, 2014, at the Horry County Courthouse, and this Court granted Defendant's Motion to Dismiss and issued an Order on June 11, 2014. Now comes Plaintiff Horry Electric Cooperative's Motion to Reconsider.

I have thoroughly considered Plaintiff's motion, supporting material, evidence produced at trial, and arguments and based on the same deny Plaintiff's Motion to Reconsider.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Reconsider this Court's June 11, 2014 Order is DENIED.

IT IS SO ORDERED!

July 10, 2014
Horry, South Carolina



Roger M. Young, Sr.
Circuit Court Judge

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CLERK OF COURT

JUDGE ROGER YOUNG
CIRCUIT COURT
OF SC #2134