THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-128 (S.C. Ct. App. filed March 26, 2014)

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3 Chisolm Street Homeowners Association, Inc.,.....Petitioner,

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.

MASTERPIECE MILLWORK, INC.'S RETURN IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

INTRODUCTION

This Petition arises from a unanimous opinion issued by the Court of Appeals. It does not present any novel questions, does not raise a substantial constitutional issue and is not in conflict with any prior decisions of this Court of the Court of Appeals. The uncontroverted evidence is clear that the Petitioner was on inquiry notice of claims more than three years prior to filing suit. The Petitioner does not present any argument as to why this Petition should be granted, and instead presents very nearly the same brief he submitted to the Court of Appeals with no new analysis. Per Rule 242, SCACR, "a writ of certiorari in not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons." Given the foregoing, this is not a case that warrants discretionary review by this court pursuant to Rule 242, SCACR.[1]

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals correctly apply the discovery rule in upholding the trial court's grant of summary judgment as to all claims against Masterpiece Millwork, Inc. based on the three year statute of limitations in light of clear and uncontroverted evidence that 3 Chisolm Street Homeowners Association, Inc. was on inquiry notice of construction defect claims stemming from 2000-2002 renovations more than three years prior to filing suit?

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[1] While the Court of Appeals declined to address the "law of the case" argument, it should be noted that this appeal is barred by the "law of the case" set forth in the trial court's unchallenged Order Granting Lacy Painting's Motion for Summary Judgment. "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). The trial court based its summary judgment 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 found 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).

COUNTER-STATEMENT OF THE CASE

The basic statement of the case is not in dispute and is as set forth in the Opinion of the Court of Appeals. This case arises from alleged construction defect claims brought by Petitioner 3 Chisolm Street Homeowners Association, Inc. ("the HOA") against the developer of the Chisolm Street Condominiums and other entities involved in the 2000-2002 condominium conversion of a vocational school into luxury condominiums ("Project"). (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 Construction Services, Inc. ("Genoa") acted as the general contractor for the conversion of all three buildings. (R. p. 166, ¶15; p. 667, ¶2). Brock Green Architects and Planners, LLC ("Brock Green") served as the architect and designed the entire conversion. Masterpiece Millwork, Inc.'s ("Masterpiece") sole involvement in the Project was to manufacture and supply wood windows to Genoa for use in the gym and cottage buildings during the Project. (R. p. 167, ¶17).

Shortly after the Project was complete, the HOA discovered roof leaks; so, it retained forensic architect, Myles Glick, to investigate. (R. p. 663, ¶7). On January 30, 2003, Glick conducted a preliminary, visual inspection of the main building 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)(emphasis added).

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).

The Board chose not to move forward with the additional testing that would have revealed the defects later discovered. In fact, Glick later testified that if he had been retained to conduct the additional investigations he recommended, he would have found and brought to the HOA's attention the same issues later raised in subsequent reports commissioned by the HOA. (Glick Dep. 33:1-34:23).

The Board convinced Genoa to return to the Project to make limited repairs. (R. p. 663, ¶9). Masterpiece was not involved in any repairs after completion of the conversion project. (R. p. 86, lines 11-12, p. 167, ¶17). Genoa completed its repair efforts and left the site for good in February 2004. (R. p. 667, ¶¶3-4). Several months after Genoa left, in August 2004, the HOA's attorney sent a letter to the developer outlining additional known and unresolved defects. (R. pp. 882-883).

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 wherein 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).

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, 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. (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.[2] (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

[2] Despite some confusion, Lacy Painting is a first-party defendant originally identified in Plaintiff's 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).

parties involved exclusively in the original construction, including Lacy Painting. (R. pp. 19-24). Those 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).

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). Only 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 order. (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). The Court of Appeals affirmed the trial court in Unpublished Opinion No. 2014-UP-128 filed March 26, 2014.

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPLIED THE DISCOVERY RULE IN UPHOLDING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS BECAUSE THE FACTS VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF CLEARLY SHOW THE HOA WAS ON INQUIRY NOTICE OF ALLEGED CONSTRUCTION DEFECTS MORE THAN THREE YEARS PRIOR TO FILING SUIT.

The Court of Appeals, citing S.C. Code Ann. § 15-3-530, held that South Carolina law "sets forth a three-year statute of limitations for actions based in negligence and contract." (R. p. 88, lines 20-22). "While the general rule is that a cause of action accrues the moment the defendant breaches a duty to the Plaintiff, the discovery rule is an exception 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." *Barr v. City of Rock Hill*, 500 S.E.2d 157, 159-160, 330 S.C. 640,644 (Ct. App. 1998).

The court correctly applied the well-settled discovery rule set forth by the South Carolina Supreme Court, in *Dean v. Ruscon Corp.*, holding that "a claim begins to run when a cause of action reasonably ought to have been discovered." 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). In *Dean*, this Court "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." *Id.* The critical inquiry is whether a party could have discovered 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; See also, *Republic Contracting Corp. v. SC Dept. of Highways and Public Transport.*, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (S.C. App. 1998)(holding that "the test of whether a person should have known the operative facts is objective, rather than subjective. That an injured party may not comprehend the extent of the injuries is immaterial." The critical inquiry is whether the Plaintiff could have discovered its claims.)[3]

While the Petitioner argues the Court of Appeals erred because it purportedly ignored the "mere scintilla" of evidence summary judgment standard, the Petitioner fails to point to a scintilla of conflicting evidence that might create a genuine issue of material fact. Instead, the Petitioner simply ignores the following uncontested facts contained within the record and set forth by the Court of Appeals, which conclusively establish the HOA was on inquiry notice of defects in all three buildings more than three years prior to filing suit.

1. The conversion of all three buildings occurred at the same time, the conversion was designed by the same architect, and the construction was carried out by the same general contractor.

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[3] The Petitioner misconstrues the holding of *Snell v. Columbia Gun Exchange, Inc.* 278 S.E.2d 333, 276 S.C. 301 (1981). Nowhere in the *Snell* opinion does this Court state that the statute runs from the date of "injury" as the Petitioner argues. It specifically states "The exercise of reasonable diligence means simply that an injured party must act with some promptness where 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. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed."

2. In April 2003, the HOA's forensic expert advised the board to seek legal counsel relative to the impacts of the main building issues as well as, pursuing a forensic report documenting and recording the issues. (R. p. 396, lines 5-13).

3. The HOA met in May 2003 to discuss the Glick report and the need for additional inspections of the gym and cottage and obtaining proposals for same. (R. pp. 384-85); and, the HOA met in June 2003 to review proposals for the "additional investigation" deemed necessary at the Project (R. p. 862, lines 14-16).

4. The HOA met in February 2006 and counsel for the HOA warned the Board that the statute of limitations for claims arising from the construction defects would expire in April 2006. (R. p. 390, lines 16-19).

The HOA had sufficient information more than three years prior to filing suit to put it on inquiry notice, which if developed, would have revealed the defects in the appellants' work. 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 chose not file suit until January 2009. (R. p. 396, lines 5-13; p. 390, lines 16-19; p. 862, lines 14-16; p. 95). Considering the totality of the circumstances and all of the evidence presented in the light most favorable to the Petitioner, the Court of Appeals correctly applied the discovery rule in upholding the trial court's grant of summary judgment.

CONCLUSION

The Petitioner has failed to present any argument for this Court that warrants the consideration listed in Rule 242 (b), SCACR. Therefore, the Petition must be denied.

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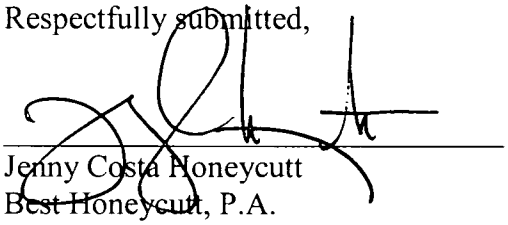
Respectfully submitted,



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September 5, 2014

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Waterproofing, Inc.,.....Fourth-Party Defendants.

PROOF OF SERVICE

I have served a copy of the Masterpiece Millwork, Inc.'s Return in Opposition to Petitioner's Petition for Writ of Certiorari upon the attorneys of record by depositing a copy of same in the United States Mail, postage prepaid, to the addresses below on September 5, 2014.

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