THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2014-002765

Circuit Case No. 2012-CP-10-3858

Oscar Mendiondo, individually and as representative of a class of similarly situated owners of condominium units in the horizontal property regime known as Shipwatch Condominiums,.....Appellant,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectec, Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; Gary Freeman, individually, ... Defendants,

Of Which Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Sonneborn, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; Gary Freeman, individually, are ..... Respondents.

FINAL BRIEF OF RESPONDENT BASF CORPORATION

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June 4, 2015

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STATEMENT OF ISSUES ON APPEAL[1]

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II. Did the lower court properly grant summary judgment in favor of Respondent Carolina Concrete Services, Inc. ("CCS"), based on the statute of limitations, in light of the doctrine of equitable tolling?

III. Was the statute of limitations equitably tolled as to Appellant's claims against Respondent BASF Corporation?

STATEMENT OF THE CASE

This is an appeal from a grant of partial summary judgment in favor of CCS based on the statute of limitations. Appellant initiated this lawsuit by Summons and Complaint filed June 13, 2012 against CCS and others, including BASF, alleging damages arising from alleged defects in construction performed at the Shipwatch condominium complex, located on the Isle of Palms, South Carolina. BASF responded to Appelant's Complaint, essentially denying any fault or liability as to it and asserting various defenses, including that Appellant's claims were barred by operation of the applicable statute of limitations.

Shipwatch consists of four buildings, containing a total of one hundred and four units. The original construction of Shipwatch was completed during the mid-1980s. Respondents did not participate in original construction. Appellant alleges that Respondents conducted repairs and renovations between the years 2002 and 2011, for which CCS served as the general contractor.

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[1] As BASF was not a party to the motion leading to the order on appeal, it had no opportunity to present evidence or make arguments during the hearing below. Thus, it is taking a position now only to the extent necessary to protect the record and ensure no findings by this Court adversely affect it.

On September 12, 2014 CCS filed a motion for summary judgment on the basis that Appellant's claims were barred by the applicable statute of limitations. CCS's motion was heard on October 27, 2014. The lower court granted CCS's motion in part, ruling that any claims by Appellant for defects related to construction occurring before 2010 were barred. The lower court issued a form order, dated October 27, 2014 and filed October 30, 2014, noting that the motion was granted in part and that a formal order was to follow. On November 11, 2014, prior to a formal order being submitted for the court's review, Appellant moved the lower court to reconsider its ruling. By order dated November 24, 2014 and filed December 1, 2014 the lower court denied Appellant's Motion for Reconsideration.

Appellant filed its Notice of Appeal on December 30, 2014. That Notice was amended on January 8, 2015 to remove as Respondents certain parties who had not appeared in the case. Nonetheless, virtually all Defendants remain captioned as Respondents in this matter, notwithstanding the fact that this appeal arises solely from CCS's Motion for Summary Judgment. Appellant argues that the lower court erred by failing to apply the proper standard when considering a motion for summary judgment, by failing to appropriately apply the discovery rule, and by failing to apply the doctrine of equitable tolling of the statute of limitations.

ARGUMENT

I. The lower court correctly found that the statute of limitations began running on certain of Appellant's claims more than three years before Appellant initiated its lawsuit against Respondents.

While generally a cause of action accrues and the statute of limitations begins to run the moment a duty owed is breached, the "discovery rule" found in S.C. Code §15-3-535 provides for a delayed triggering of the statute of limitations. Under the discovery rule, actions "must be

commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." Id. Thus, the dispositive question here is when Appellant knew, or should have known, of the defects complained of in this litigation.

This litigation has been made somewhat complex due to the interplay between original construction issues and subsequent repairs and renovations. The buildings at Shipwatch were originally constructed in the mid-1980s and were clad with an exterior insulation and finish system (commonly referred to as "EIFS" or synthetic stucco).[2] Between the years 2002 and 2012 CCS served as the general contractor for various renovations and repairs at Shipwatch, including removing and replacing certain areas of EIFS with a direct applied exterior finish system, or "DEFS."[3] Repairs and renovations performed by CCS, its subcontractors and material suppliers, included resloping balconies, repairing windows and doors, removing and replacing EIFS, and coating balcony and corridor decks. (R. p. 122 – p. 131). CCS later oversaw the removal and replacement of additional areas of EIFS, as well as sliding glass door repairs and other miscellaneous projects.

Appellant has argued that it did not know of any actionable deficiencies in the work orchestrated by CCS until its present engineers, SKA Consulting Engineers, Inc. ("SKA"), issued building evaluation reports in 2012 and documented what appear to be a significant number of construction deficiencies. The truth is, however, that potential problems with CCS's repair and

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[2] EIFS is an exterior wall cladding system that consists of an insulation board attached either adhesively and/or mechanically to a substrate (e.g., plywood). An integrally reinforced base coat is then applied, with a textured protective finish coat generally completing the installation.

[3] DEFS is generally comprised of a water-resistive barrier applied over an approved sheathing, with a cement board attached over the water-resistive barrier. A coating system, consisting of a base coat, mesh, and a finish coat is then applied to complete the product.

renovation work were brought to the attention of Appellant much earlier, and Appellant could just have easily retained a firm like SKA to evaluate the work of CCS and its subcontractors and material suppliers to find the alleged deficiencies prior to June 13, 2009, more than three years before initiating this litigation.

The following are some examples of evidence that put Appellant on notice of potential problems with the work and materials provided by CCS and others prior to June 13, 2009.

1. Robert Sisnroy, P.E., who served as a consulting engineer to Shipwatch, noted on July 10, 2006 "chronic water intrusion is occurring adjacent to the sliding glass door (SGD) installations. . . ." (R. p. 77 – p. 79).
2. Appellant's property manager, Linda Jernigan, testified to receiving information from Mr. Bob Wiggins of CCS in 2007 that leaks continued to be a problem at sliding glass doors where new DEFS had been installed. Deposition of Linda Jernigan, page 114, line 7 - page 115, line 4. (R. p. 101). Ms. Jernigan confirmed that these same issues were present in CCS's 2011 inspection. Deposition of Linda Jernigan, page 115, line 12 - page 116, line 6. (R. p. 101).
3. Ms. Jernigan confirmed that Shipwatch had been experiencing problems with leaking at sliding glass doors since 2005. Deposition of Linda Jernigan, page 219, lines 8 - 23. (R. p. 103).
4. The Shipwatch Building Committee Report of January 20, 2007 (R. p. 85 – p. 87) noted chronic leaking at certain doors and that **they were attempting to determine if the leakage was from the doors themselves or from other sources**. (R. p. 86).
5. CCS's inspection report of May 9, 2007 (R. p. 88 – p. 89) notes that "leaks continue to be a problem at and around the old sliding glass doors" and that the leakage is causing

damage to the new metal stud walls with the DEFS system installed by CCS. (R. p. 89).

6. CCS's inspection report of May 9, 2007 also noted cracks in the stucco. (R. p. 88).
7. Ms. Jernigan recommended to the Shipwatch Board of directors that the decks needed to be recoated in 2008, and that sliding glass doors needed replacement. Deposition of Linda Jernigan, page 329, lines 8 - 25. (R. p. 109). Deposition of Linda Jernigan, page 330 line 1 - page 333 line 13. (R. p. 55).
8. Commercial Building Consultants ("CBC"), Limited Property Assessment Report prepared for Appellant and dated January 30, 2008 (R. p. 186 – p. 192), noted that recent capital improvements consisted of replacement of large portions of EIFS with "dura-rock." (R. p. 191). It also noted that there were moisture issues at each building end, at the lower termination edge, where the wall cladding was missing an appropriate termination edge. (R. p. 191). The report went on to note that the parapet walls were poorly adhered at time of installation, that the lower edge of the sheet metal mansard roofs were missing kickout flashing, and that there was moisture penetration. (R. p. 191).
9. Appellant's consulting engineer, Robert Sisnroy, P.E., published a Roof Flashing Installation Deficiencies and Exterior Cladding Failure Investigation report on August 23, 2008. (R. p. 196 – p. 202). Mr. Sisnroy found that the DEFS applied by CCS was integrated with the metal roof without proper flashings in certain areas, which was leading to moisture intrusion. (R. p. 198 – p. 199). Additionally, he found improperly sealed flashing at certain corners on the face of the stucco and improper caulking. (R. p. 199). He also discovered raised joint lines in the field of the DEFS cladding at the ends and edges of the cement panel boards. (R. p. 201). He also found failed and blistering

DEFS lamina. (R. p. 200). In summary, Mr. Sisnroy concluded that there were areas of failed parged stucco and failed DEFS. (R. p. 201.)

10. Further, what apparently led to the SKA investigation and report was that Shipwatch had been effecting piecemeal upgrades (and repairs), and before starting a new phase of the project the board president wanted to ensure they were doing everything right. Deposition of Linda Jernigan, page 27, lines 5 - 23. (R. p. 100).

Each of the foregoing are particularly important because they establish knowledge of several of the same issues reported by SKA in its April 5, 2012 report, which Appellant regards as having provided it notice of the alleged defects leading to this lawsuit. Among other items, the April 5, 2012 SKA report noted water infiltration around windows and doors, improperly installed DEFS, cracks in DEFS, and failure of the DEFS lamina.

Thus, contrary to Appellant's assertion that it was first put on notice of the issues giving rise to this litigation in 2012, it is clear that it knew or should have known of these issues in 2008, at the latest. Therefore, the statute of limitations began running prior to June 13, 2009. While this has the effect of barring certain of Appellant's claims against certain parties, it is necessary to bear in mind that "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (internal citations omitted). "Statutes of limitations are, indeed, fundamental to our judicial system." Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (internal citations omitted) (internal quotation marks omitted).

The case of Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996), provides guidance in this matter. Ms. Dean owned a building located on King Street in downtown Charleston. She initiated a lawsuit against Ruscon Corporation in April of 1991. Dean alleged that Ruscon's pile driving work at a nearby construction site caused structural damage to her building. The lower court directed verdict for Ruscon, finding the action barred by the statute of limitations. The Court of Appeals reversed, finding that there was a question of fact regarding whether Dean was reasonably diligent in determining whether damage to her building was attributable to Ruscon. The South Carolina Supreme Court reversed the ruling of the Court of Appeals, finding the action barred by the statute of limitations.

Dean purchased the subject building in September of 1984. At the time of purchase Dean noticed no cracks in the building's façade, and it was inspected and found to be structurally sound. Ruscon performed pile driving during October and November of 1984 at a nearby construction site, and in early November of 1984 Dean observed a fine three foot long crack on the corner of the building and believed it was caused by Ruscon's pile driving. Dean quickly hired an expert to investigate, and gauges were placed on the crack to monitor any changes. During the summer of 1985 Ruscon resumed pile driving nearby, and Dean noticed the crack had enlarged, that there was additional damage around the crack, and that an additional crack had manifested on the opposite side of the building.

In agreeing with the circuit court that Dean brought the lawsuit outside of the statute of limitations, the Supreme Court reasoned that Ms. Dean knew, by her own admission, that she may have had a claim for damage against someone in 1984. Thus, the Supreme Court found that Dean had notice of an injury in 1984, that she failed to act with reasonable diligence in pursuing recourse for the injury, and that her lack of knowledge of the extent of the injury was

immaterial. Id. at 365, 366.

Likewise, in this matter the record is with replete with evidence that Appellant knew or should have known of the complained of deficiencies in work overseen by CCS well before 2009. As demonstrated by the materials outlined above, Appellant was on notice of potential problems as early as 2005, and certainly by 2007 and 2008. It must be remembered that "the discovery rule does not require actual notice of anything, or knowledge of the full extent of the damage." Ashley River Indus., Inc. v. Mobil Oil Corp., 135 F. Supp. 2d 733, 743 (D.S.C. 2000) aff'd, 245 F.3d 849 (4th Cir. 2001) (citing Dean v. Ruscon Corp. 468 S.E. 2d at 467). And, "[i]t requires a party to act promptly to investigate the existence of a claim where 'the facts and circumstances' indicate that a claim 'might exist.'" Id. Therefore, the statute of limitations began running in relation to Appellant's claims well in advance of three years prior to it initiating this litigation.

II. Did lower court properly grant summary judgment in favor of Respondent Carolina Concrete Services, Inc. ("CCS"), based on the statute of limitations, in light of the doctrine of equitable tolling?

Whether some action by CCS worked to toll the running of the statute of limitations as to it is not germane to BASF's position, but as discussed below there is no evidence of BASF doing, or failing to do, anything that would stop the statute of limitations from running as to it.

III. The statute of limitations was not equitably tolled as to Appellant's claims against Respondent BASF Corporation.

"In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit." Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001) (citations omitted).

Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, S.E.2d 555 (Ct. App. 1985)[4] is instructive on this issue. In Dillon the County School District brought suit seeking recovery for losses resulting from allegedly defective roofing materials and work. The circuit court granted summary judgment to all defendants based on the statute of limitations, but the South Carolina Court of Appeals reversed in part, finding that there was an issue of fact as to whether numerous attempts to repair the roof, coupled with assurances that the roofing problems would be corrected, tolled the statute as to certain defendants.

The School District contracted with Dargan to construct a building for Dillon County High School in 1970. Work began the same year, including the completion of the roof. Other parties involved in construction included G.M.K. as the project architect, Johnson and King as engineers, Bonitz and Lewis as roofing installers, Grace as roofing material supplier, and Celotex as manufacturer of the roofing.

The roof began to leak immediately, and leaks became a chronic problem. G.M.K., Dargan, and Lewis made numerous attempts to correct the roof issues, making certain assurances that the problem would be resolved to the School District's satisfaction. The Court of Appeals agreed with the lower court that the School District knew, or should have known by 1972 that it had an actionable problem stemming from the roof's construction. The Court of Appeals, however, determined that the actions of G.M.K., Dargan, and Lewis presented a jury question as to whether the statute of limitations was equitably tolled as to them. The Court reasoned that "[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

[4] Overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995).

defendant's conduct." Id. at 218 (citations omitted). The Court stated that 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." Id.

Importantly, the Court of Appeals noted that though "the circuit court erred in granting G.M.K., Dargan, and Lewis summary judgment, the record contains no evidence that either Bonitz, King, Celotex or Grace somehow induced the School District within the limitations period to delay bringing its action." Id. at 220. That is precisely the case here. There is no evidence that BASF induced Appellant to delay bringing suit against it. BASF did nothing to lull Appellant into a "false sense of security." Id. at 219. Consequently, the statute of limitations never stopped running as to any claims Appellant may have against BASF.

CONCLUSION

Appellant had knowledge more than three years prior to it initiating this litigation that it might have a claim against some person or persons for injuries occasioned by alleged construction deficiencies. The statute of limitations began running at that time, and there is no evidence that BASF did anything upon which this Court could premise a finding that the statute of limitations was tolled as to it. BASF therefore respectfully requests that this Court make no findings inconsistent with those facts.

Signature on Following Page

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent BASF Corporation complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 9, 2015 it served a copy of the foregoing **Final Brief of Respondent BASF Corporation** by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

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Appellate Case No.: 2014-002765
Our File No. 8092-2

Dear Ms. Kitchings:

In regards to Appellate Case No. 2014-002765, enclosed for filing please find an original and fifteen (15) copies of Respondent BASF Corp.'s Final Brief, together with an original and one (1) copy of a Certificate of Service.

Upon filing, please return one (1) clocked copy of the Initial Brief and Certificate of Service to me in the enclosed, self-addressed, stamped envelope provided for your convenience.

Thank you for your consideration in this matter, and with kindest regards, I remain

Very truly yours,

David A. Root

DAR/mlj

Enclosures: *As stated herein.*

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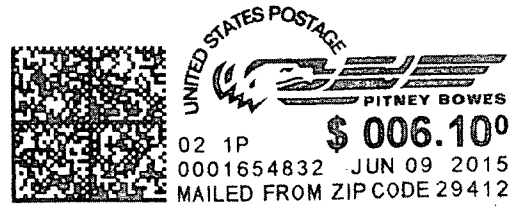

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