

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

IN THE COURT OF COMMON PLEAS  
C/A No.: 2014-CP-07-0829

Jerrold France, )

Plaintiff, )

Club Development, Inc., John H. )  
Barrett, individually, Barrett Investment )  
Properties, LLC, Woodbury Properties, )  
Inc., Taliaferro Corp., Taliaferro Corp., )  
d/b/a Woodbury Properties, Coastal )  
Foundation, Inc., Harbor Homes, and )  
John Does I - 10, )

Defendants. )

ORDER GRANTING CLUB  
DEVELOPMENT, INC., JOHN H.  
BARRETT, AND BARRETT  
INVESTMENT, INC.'S MOTION  
TO DISMISS.

RECEIVED

JUL 16 2015

SC Court of Appeals

This matter comes before the Court upon motion by defendants Club Development, Inc., John H. Barrett and Barrett Investment Properties (collectively "Defendants"), seeking to dismiss the claims asserted by Plaintiff in the above-captioned case, for a failure by Plaintiff to assert those claims within the relevant period of repose, pursuant to S.C. Code Ann. §15-3-640. A hearing on Defendants' motion was conducted on May 13, 2015. Based upon that hearing and applicable South Carolina law, this Court finds that Club Development, Inc., John H. Barrett and Barrett Investment Properties are entitled to a dismissal of all claims except for gross negligence.

#### FACTS

Plaintiff, by way of a Summons and Complaint filed April 7, 2014, alleges various

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The Parties agree that the statute of repose established in S.C. Code Ann. §15-3-640 does not apply to Plaintiff's claim of gross negligence.

defects in the design and construction of Plaintiff's home on Hilton Head Island. Club Development, Inc. sold the Subject Property to Plaintiff.

The Town of Hilton Head Island issued a certificate of occupancy on July 20, 2005, following the final inspection of the residence by its codes official. The certificate of occupancy references August 24, 2004, as the date of substantial completion.

Defendants' filed a motion to dismiss, contending that Plaintiff's claims were subject to an eight year period of repose. Defendants' argue that the eight year period of repose applies to all structures for which certificates of occupancy were issued after July 1, 2005. Plaintiff contends that the August 2004 date of substantial completion controls which period of limitations length applies. Consequently, Plaintiff argues, the thirteen year period of repose is effective.

Additionally, Plaintiff claims that the Defendants' use of the statute of repose is limited by S.C. Code Ann. §15-3-670 for two reasons: (1) Plaintiff claims Defendants should be classified as a developer under S.C. Code Ann. §15-3-670(A), and as a developer the statute of repose does not apply; and (2) Plaintiff alleges that S.C. Code Ann. §15-3-670(C) limits the application of the statute of repose when property damage is not discoverable, with the exercise of reasonable diligence, at the time of its occurrence and the damage is a result of exposure to an injury producing substance, element or particle over a period of time. Defendants argue that there is not a specific exclusion carved out under S.C. Code Ann. §15-3-670(A) for developers and that a clear reading of "developing real property" should not be read as excluding developers from the statute of repose. Further, Defendants argue that S.C. Code Ann. §15-3-670(C) specifically provides for an exclusion from the statute of repose for personal injuries. Defendants argue such a broad reading of S.C. Code Ann. §15-3-670(C) as an exclusion for latent property damage would eviscerate the protections set forth in S.C. Code Ann. §15-3-640, creating an absurd result.



Plaintiff further argues that various questions of fact revolve around the issuance of the certificate of occupancy, and that those questions preclude the granting of Coastal Foundation's motion.

### STANDARD OF REVIEW

A granting of a motion to dismiss under Rule 12(b)(6), SCRPC, is proper "when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. "The question is whether in the light most favorable to plaintiff, and with every doubt resolved in [his] behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). A Rule 12(b)(6) motion is "directed to the factual and legal sufficiency of the complaint..." Woodell v. Marion School Dist., 307 S.C. 297, 298, 414 S.E.2d 794 (Ct. App. 1992).

A motion to dismiss premised upon Rule 12(b)(6) is converted to a motion for summary judgment if the moving party submits matters outside the pleadings to, and not excluded by, the Court. Rule 12(b), SCRPC. 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.

### ANALYSIS

Notwithstanding the arguments presented by Plaintiff, the issues before this Court are clear:

1. Whether Plaintiff's claims are subject to an eight or thirteen year period of repose. If the period is thirteen years, Plaintiff has clearly asserted his claims within the statute of repose, and the claims will be allowed to proceed. Conversely, if the claims are subject to the eight year period, Plaintiff's claims have been asserted clearly outside of the statute, and are therefore subject to dismissal.

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2. Whether the statute of repose is applicable to a developer.
3. Whether the exclusion from the statute of repose outlined in S.C. Code Ann. §15-3-670(C) is limited to an action for personal injury or whether an action for property damage is also excluded. The present action is not one for personal injury, and if the exclusion listed in S.C. Code Ann. §15-3-670(C) is only applicable to actions in personal injury, then the Plaintiff's claims against Defendants are subject to dismissal.

Consequently, the questions before the Court are based in the law, and the outcome of the within motion can be determined merely by deciding which period of repose applies and whether S.C. Code Ann. §15-3-670 applies under the present circumstances. Therefore, it is appropriate for this Court to rule on the within motion at this time.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Chern-Nuclear Systems, LLC v. S.C. Board of Health and Environmental Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). All rules of statutory construction are subordinate to this rule if the legislative intent can be reasonably determined in the language used, and that language must be construed in light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002). "The language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." Chern-Nuclear, 374 S.C. at 205, 648 S.E.2d at 603.

When construing statutory language, the statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Duvall v. S.C. Budget and Control Board, 377 S.C. 36, 659 S.E.2d 125 (2008). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose,

design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words." Floyd v. Nationwide Mutual Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2006).

Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

1. Application of eight or thirteen year statute of repose

Defendants assert that §15-3-640, as amended in 2005, plainly applies to the claims asserted in the instant litigation, because the Certificate of Occupancy was issued on July 20, 2005, after the effective date of the amended statute. Defendants further assert that the eight year period of repose expired, at the very latest, on July 20, 2013, eight years after the Certificate of Occupancy was issued, and nine months before Plaintiff filed his Summons and Complaint.

Plaintiff contends that the August 2004 date of substantial completion controls; and therefore, the claims are subject to the thirteen year period of repose. Plaintiff also raises other issues regarding purported questions of fact, but as previously stated, because the question presented is solely one of law, those matters are irrelevant to this Court's determination of the motion before it.

Section 15-3-640 currently provides:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

(1) an action to recover damages for breach of a contract to construct or repair an

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improvement to real property;

(2) an action to recover damages for the negligent construction or repair of an improvement to real property;

(3) an action to recover damages for personal injury, death, or damage to property;

(4) an action to recover damages for economic or monetary loss;

(5) an action in contract or in tort or otherwise;

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section;

(7) an action against a surety or guarantor of a defendant described in this section;

(8) an action brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest in the real property or improvement;

(9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

This section describes an outside limitation of eight years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.

A building permit for the construction of an improvement to real property must contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement. The Department of Consumer Affairs shall publish in conspicuous places the right of an owner or possessor to contract for extended liability under this section. Nothing in this section prohibits a person from entering into a contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement or component.

For any improvement to real property, a certificate of occupancy issued by a county or municipality, in the case of new construction or completion of a final inspection by the responsible building official in the case of improvements to existing improvements, shall constitute proof of substantial completion of the improvement under the provisions of Section 15-3-640, unless the contractor and

owner, by written agreement, establish a different date of substantial completion. Section 15-3-640 was most recently amended by 2005 South Carolina Laws Act 27. The 2005 Act reduced the period of repose from thirteen to eight years, and added a final paragraph establishing the Certificate of Occupancy issuance date as the "default" date for Substantial completion. The statute was otherwise largely unchanged.

Section 16 of Act 27 addresses the date of enactment, and establishes that the amendments to §15-3-640 "take effect on July 1, 2005, and appl[y] to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible, local building official after the effective date."

Plaintiff, in arguing that the date of substantial completion controls the length of the period of repose, conflates when the period of repose begins to run with the length of the period of repose. By the plain language of §15-3-640, the period of repose (whether eight or thirteen years) begins to run at the date substantial completion is achieved. However, according to the plain language of Act 27, the certificate of occupancy issuance date determines whether the period of repose is eight or thirteen years. These provisions are unambiguous and capable of only one interpretation. Therefore, because the certificate of occupancy was issued after the eight year period of repose took effect; Plaintiff's claims are subject to that eight year period and therefore must be dismissed.

To further demonstrate the distinction between the certificate of occupancy issuance date and the date of substantial completion, the General Assembly explicitly recognized distinctions between the two. Notably, the final sentence of the amended statute states:

[A] certificate of occupancy issued by a county or municipality, in the case of new construction or completion of a final inspection by the responsible building official in the case of improvements to existing improvements, shall constitute proof of substantial completion of the improvement under the provisions of Section 15-3-640, unless the contractor and owner, by written agreement, establish a different date of substantial completion.

This sentence clearly demonstrates that the General Assembly was aware of distinctions between the two terms. Had, as Plaintiff suggests, the General Assembly considered substantial completion to be the same as the issuance date of the certificate of occupancy, the above sentence would be superfluous. Courts must presume that the legislature intended to accomplish something when enacting a statute. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002).

Keeping in mind the recognized distinction between the certificate of occupancy issuance date and the date of substantial completion, this Court returns to the enactment language of Act 27, which provides that the eight year period of repose applies to all improvements for which certificates of occupancy were issued after July 1, 2005.

2. Applicability of the statute of repose to a developer

Plaintiff argues Defendants should be classified as a developer under S.C. Code Ann. §15-3-670(A), and as a developer the statute of repose does not apply because the Plaintiff alleges that Defendants were engaged in “developing real property” at time the defective improvements occurred. While no evidence has been provided establishing Defendants as a developer, the question before the court is simply whether the exclusion under §15-3-670(A) applies to developers as a whole, and is therefore proper to consider as a matter of law.

Section 15-3-640(A) provides:

The limitation provided by Sections 15-3-640 through 15-3-660 may not be asserted as a defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or

furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

It is clear from the plain language of the statute that the General Assembly intended that an action in “fraud, gross negligence, or recklessness” occurring at the time of the listed activities is excluded from the statute of repose. If the court were to accept the argument of Plaintiff, then land surveyors, engineers, contractors, land planners and almost every other individual involved in the construction of an improvement to real property would be excluded from the statute. When read in context with the subject matter of the statute, it is clear that the General Assembly would not provide a limitation on a cause of action against a class of people, only to exclude that very action in the same title. Such an interpretation leads to an absurd result because and would eviscerate § 15-3-640. The rules of statutory interpretation will not allow such a reading. Therefore, this court finds that the exclusions from the statute of repose listed in § 15-3-670(A) are solely for claims of “fraud, gross negligence, or recklessness,” and a separate exclusion for developers does not exist.

3. Applicability of the statute of repose to actions for property damage resulting as described in S.C. Ann. § 15-3-670(C)

Plaintiff alleges that S.C. Code Ann. §15-3-670(C) limits the application of the statute of repose when property damage is not discoverable, with the exercise of reasonable diligence, at the time of its occurrence and the damage is a result of exposure to an injury producing substance, element or particle over a period of time.

Section 15-3-640(A) provides:

The limitation provided by Section 15-3-640 may not be asserted as a defense to an action for personal injury, including a personal injury resulting in death, or

property damage which is:

(1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and

(2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma.

Similar to the court's earlier analysis, reading §15-3-670(C) to create an exclusion for latent property damage would completely obviate the effect of the statute of repose for improvements to real property. By parsing §15-3-670(C), Plaintiff has argued that a cause of action for "property damage" is excluded. However, when §15-3-670(C) is read in its entirety, it is clear that the intent of the exclusion therein is for actions arising in personal injury. The references to "ingestion," "toxic" and "injury producing" substances, and "trauma" all suggest personal injury. Additionally, if both latent personal injury claims and property damage claims are excluded from the statute of repose, as Plaintiff suggests, then the statute of repose would be inapplicable to actions resulting from defects in improvements to real property, which is itself the purpose of the statute. Such a broad reading of §15-3-670(C) as an exclusion for latent property damage would completely rid all defendants of the protections set forth in §15-3-640, creating an plainly absurd result. When considered as a whole and in context with the other code sections referenced, the only reasonable interpretation of §15-3-670(C) is that it provides for an exception in the case of a personal injury arising out of the circumstances stated in §15-3-670(C)(1) and (2).

In applying the rules of statutory construction, the unambiguous interpretation of the Act requires finding that the General Assembly clearly and unequivocally established an eight year period of repose for all improvements whose Certificates of Occupancy were issued after July 1, 2005. Therefore, because the Certificate of Occupancy for the subject residence was issued July

20, 2005, the eight year period of repose must apply to the subject residence. Further, the exclusions raised by Plaintiff are inapplicable in this case. The motion of Club Development, Inc., John H. Barrett and Barrett Investment Properties hereby is granted as to all causes of action except for Plaintiff's claim in gross negligence. IT IS SO ORDERED!

Dated: 6/16/17

Beaufort, South Carolina

By: 

The Honorable Marvin H. Dukes, III  
Master in Equity for Beaufort County