

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

AUG 06 2015

SC Court of Appeals

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2010-CP-26-03901
Appellate Case No.: 2015-000249

Rivergate Homeowners' Association, Appellant,
v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction, William C. DeSouza, individually, James Eason, individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferinao, individually, and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmercse d/b/a J.P. construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc. Right Way Group, Inc., Stevens Construction Co., Inc., Geometrics, Inc., Eric Yazwinski, Law Engineering, Inc., D&M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, Defendants,

Of Whom Chuck's Construction, Inc. is the Respondent,

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc.,
Third-Party Defendants.

Rivergate Homeowners' AssociationAppellant,

v.

WW & LB Development Company, LLC, Speedy Concrete, AB
Consulting Engineers, Inc., and Chuck's Construction Co., Inc. Defendants

Of Whom AB Consulting Engineers, Inc. is theRespondent.

INITIAL BRIEF OF RESPONDENT CHUCK'S CONSTRUCTION, INC.

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STATEMENT OF ISSUE ON APPEAL

I. Did the Trial Court Err in Granting Summary Judgment to Respondent Based on the Applicable Three-Year Statutes of Limitation, When the Record Revealed That The Appellant's Ad Hoc Committee Knew of Specific Drainage Problems At Rivergate Approximately Five Years Before Appellant Brought A Claim Against Respondent, and Appellant Presented No Facts Establishing a Claim for Equitable Tolling or Estoppel?

STATEMENT OF THE CASE

Respondent Chuck's Construction Inc. ("Chuck's") adopts the statement of the case provided in the Initial Brief of Appellant.

STATEMENT OF FACTS

Chuck's was a grading subcontractor hired by Defendant/developer WW&LB to perform work at the Rivergate housing development ("Rivergate") in Little River, South Carolina. (Drucker Dep. Ex. 12). Chuck's performed excavation and rough grading at the proposed development site, installation of certain drainage components, and preparation of a limited number of road beds. (Judge Clifton B. Newman's Order granting Summary Judgment to Defendant Chuck's on March 10, 2014 at 2.) A dispute then arose between Chuck's and WW&LB which led to Chuck's leaving the project in late 2000 before finishing additional contracted work. (*Id.*)

Rivergate was developed in phases, with certificates of occupancy showing dates from March 8, 2001 through December 5, 2005. (*Id.*) Several Rivergate homeowners began noticing drainage issues at the project before the final certificate of occupancy was issued. These issues included standing water in the streets and front yards, cracking of driveways, and excessive erosion. (Dunn Dep. at 19 – 20.) The issues led to a group of homeowners requesting the creation of an HOA Ad Hoc Committee in May 2005 to monitor and notify the HOA of problems. (*Id.* at 187 – 89.) This request was approved (Dunn Dep. Ex. 21), and the Ad Hoc Committee began to receive substantial information concerning drainage issues. For example, in May 2005 homeowner Donald Miller wrote to the Ad Hoc Committee that "if some owners believe that areas of Rivergate property has drainage issues . . . I believe we need to hire an engineer familiar with such issues . . . and give the committee a hard report for possible discussion of these issues with Wayne [Winderman]." (Dunn Dep. Ex. 25.) Another homeowner, Pat Connors, wrote the Committee in May 2005 to complain of a "severe drainage

problem running the length of the property. . My back yard is literally eroding away after every heavy rainfall.” (Dunn Dep. Ex. 24).

The Ad Hoc Committee presented its concerns to the manager of the HOA, Wayne Winderman. (Dunn Dep. at 228 – 29.) Winderman was also a principal of the developer, WW&LB. In July, 2005 Winderman acknowledged the drainage concerns, advising the Committee that “We have made inspections of drainage issues and will address the same as quickly as possible.” (Dunn. Dep. Ex. 21.) However, the issues were not addressed and drainage problems continued. Therefore in September 2006, Jim Dunn, chair of the Ad Hoc Committee, filed a complaint with the South Carolina Department of Labor, Licensing and Regulation detailing the drainage and other problems at Rivergate. The Complaint included nine pages of photographs showing standing water, washed out parking pads, and other drainage-related issues. (Dunn Dep. Ex 2.)

Individual homeowners also began to file complaints with the South Carolina Department of Labor, Licensing and Regulation alleging problems with the drainage and roads. (Dunn Dep. Ex. 32.) The HOA Ad Hoc Committee requested copies of these complaints. (Dunn Dep. at 240 – 44.)

On January 12, 2007, Rivergate homeowner Robert Sanger filed a complaint in the Horry County Court of Common Pleas asserting defective roadway construction and drainage (Civil Action No. 07-CP-26-0228). The Rivergate HOA followed suit on June 13, 2008 (Civil Action No. 08-CP-26-4690), and the two actions were consolidated. (Order of March 31, 2009.) A Second Amended Complaint was filed on April 28, 2010, which named Chuck’s Construction for the first time. (Plaintiff’s Second Amended Complaint Para. 44.)

ARGUMENT

I. The Trial Court Properly Granted Respondent's Summary Judgment Motion Because Appellant Asserted Its Claims Against Chuck's Outside of the Applicable Statutes of Limitation, and Appellant Presented No Facts To Support Equitable Tolling of the Statutes or Equitable Estoppel

A three-year statute of limitations applies to the causes of action asserted by Appellant in its civil action against Chuck's. S.C. Code Ann. Section 15 – 3 -530(1) (three year statute for express or implied warranty claims); S.C. Code Ann. Section 15 – 30 – 530(5) (three year statute for negligence claims); S.C. Code Ann. Section 39 – 5 – 150 (three year statute for Unfair Trade Practices claims). Appellant brought its claims against Chuck's in April of 2010, but the Appellant's Ad Hoc Committee knew of specific problems with drainage at Rivergate by at least May, 2005 (Dunn Dep. Ex. 25). The HOA's general manager, Wayne Winderman, knew about drainage issues by at least July, 2005, when he wrote to the Ad Hoc Committee specifically concerning an "inspection" of drainage at Rivergate (Dunn Dep. Ex. 21). Thus, the Appellant's claims were time-barred when brought in 2010 and summary judgment was appropriate in favor of Chuck's.

Appellant hopes to avoid this result by application of the discovery rule. Appellant claims that it did not have sufficient knowledge of the drainage problems at Rivergate prior to receiving a full report from its expert engineer, Kimley-Horn, in June 2010. The Kimley-Horn report goes into expert detail concerning the alleged cause-in-fact of the drainage problems, including esoterica such as obstruction of drainage structures and improper elevation of outfall ditches. (Kimley-Horn and Associates, Inc. report dated June 18, 2010 at 5-6.) An employee of Kimley-Horn, J. Drew Wilkie, executed an affidavit for consideration at the summary judgment

hearing asserting that the Appellant “may have been aware of undesirable symptoms such as standing water, erosion etc.” prior to June 2010. (Affidavit of J. Drew Wilkie P.E. dated January 9, 2014.) Nonetheless, the affidavit optimistically concludes that the HOA “would not have been aware” that the symptoms were caused by civil construction or design defects. (*Id.*) Unfortunately for Appellant, it was not necessary for the HOA to know of specific civil construction defects impacting drainage at Rivergate before the statute of limitations began to run.

“Under the discovery rule, the three-year statute of limitations clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.” *Holly Woods Ass’n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011). It is not necessary for a party to know the full extent of its alleged damages; it is sufficient for the party to be put on notice of such facts as would lead a person of common knowledge and experience to conclude that some claim may exist.” *Hedgepath v. AT&T*, 348 S.C. 340, 355-56, 559 S.E.2d 327, 336 (S.C. Ct. App. 2001).

Here, Plaintiff knew of substantial and ongoing drainage problems at Rivergate nearly five years before an action was commenced against Chuck’s. In its Initial Brief, Appellant concedes that its expert engineer “advised Appellant’s counsel of a potential action against the Respondents” prior to the issuance of the engineer’s June 18, 2010 report. (Br. Appellant at 18). While it is true, as Appellant contends, that the Appellant’s expert may have been the person “most knowledgeable concerning civil construction defects at Rivergate” by virtue of his civil engineering education, *id.* at 17, the discovery rule does not require the “most knowledgeable” actor to discover a potential cause of action. Instead, the rule is triggered whenever an ordinary

party of common experience is put on notice of facts sufficient to alert them that a claim may exist against another. *True v. Moteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). That test was easily satisfied in this case years before Appellant's Second Amended Complaint. A party of average experience would have no trouble recognizing that the conditions brought to the attention of the Ad Hoc Committee in 2005, including standing water and erosion, potentially concerned the grading which Chuck's performed at the outset of the project. Even without the benefit of civil engineering education, people from time immemorial have known that water flows downhill and is trapped in culverts, valleys, and other land masses of uneven grade. Therefore Appellant was on notice of a potential claim against Chuck's in 2005 and was under a duty to act promptly to defend its interests.

At the hearing on Respondents' Motion for Summary Judgment, Appellant contended that the statute of limitations should not bar its claims because it could do nothing to enforce its rights until October, 2007, when the Developer ceded control of the HOA to the Rivergate homeowners. Respondent AB Consulting Engineers presented a rebuttal, in which Chuck's joined. (Transcript of Hearing dated January 17, 2014 at 38.) At that hearing, and again in its Initial Brief, Appellant argues that the statute of limitations should be tolled because the HOA was powerless to act while the developer alone could determine whether to bring suit.

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of a statute of limitations. *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008). The doctrine may be invoked only when (a) extraordinary circumstances prevented the party from filing despite due diligence, (b) the party actively pursued his remedies by filing a defective pleading during the statutory period or was induced or tricked by the defendant into allowing the deadline to pass, and (c) the party is unable to obtain vital information bearing on the existence

of his claim despite due diligence. *Hooper v. Ebenezer Senior Serv. & Rehab Center*, 386 S.C. 108, 687 S.E.2d 29 (2009).

Here, the HOA - whether controlled by the developer or some other party - had ample capacity to bring suit against third parties such as Chuck's at any time prior the turnover in October, 2007. The pre-turnover HOA had both the incentive and knowledge to bring an action to recover for construction defects brought to light in 2005. Appellant posits no confidential relationship, collusion, or other factual scenario which would have prevented the developer-controlled HOA from proceeding against third parties who allegedly performed negligent services at Rivergate. Thus, there are no facts sufficient to satisfy the equitable tolling factors set forth in *Hooper*.

Appellant cites *Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) in support of its equitable tolling claim, but that case is inapposite. In *Magnolia North*, this Court held that the statute of limitations was tolled during the period that the defendant developer controlled the plaintiff homeowner's association. By contrast, the Respondent in this action is not the developer but a third party, and neither controlled nor had any representation on Appellant's board while the statute ran. Thus, the Appellant was not faced with the peculiar prospect of "initiat[ing] an action against itself" during the relevant period - the action would have commenced against an arm's-length actor. (*Id.* at 372.)

Similarly, there are no facts supporting Appellant's claim that Respondent is equitably estopped from asserting the statute of limitations. A defendant may be estopped from asserting a statute of limitations when the defendant's conduct induces delay which prevents the plaintiff from timely asserting a claim. *Dillion County School Dist. No. Two v. Lewis Sheet Metal*

Works, Inc., 286 S.C. 207, 218 -19, 332 S.E.2d 555, 561 (Ct. App. 1985). Appellant has asserted various misrepresentations by the developer's representative, Wayne Winderman, as grounds for equitable estoppel. (Appellant's Initial Br. pages 23-24.) However, Appellant has failed to cite any conduct by a representative of Chuck's. This omission is fatal to Appellant's equitable estoppel claim.

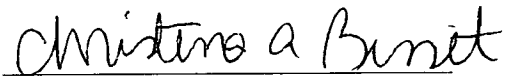
Even assuming for the sake of argument that the conduct of Wayne Winderman could be attributed to Chuck's, equitable estoppel would remain unavailable to Appellant. Appellant has introduced no facts supporting the proposition that Mr. Winderman's representations actually induced delay to the detriment of the HOA. To the contrary, the record shows that the Appellant's Ad Hoc Committee proceeded to take independent action on the drainage issue, filing a complaint with the South Carolina Department of Labor Licensing and Regulation well after Winderman's July, 2005 promise to repair. (Dunn Dep. Ex. 2) (Complaint filed September 2005). The Appellant continued to receive specific complaints about drainage over a year after Winderman's July, 2005 letter. (Dunn Dep. Ex. 36) (Minutes of November 2006 HOA meeting noting "flooding and washout at the corner of Baker street . . . the last heavy rain you could see water just flowing down Rivergate . . . the water doesn't go into any of the drains due to the grade being above street level.") Thus, no evidence in the record establishes that the Appellant did, or reasonably could have, relied upon the promises of Wayne Winderman. Application of equitable estoppel against Chuck's is, therefore, inappropriate.

CONCLUSION

For the reasons stated above, the Order of the Trial Court granting summary judgment in favor of Respondent should be affirmed. Further, this Respondent adopts by reference the arguments of Co-Respondent AB Consulting Engineers, Inc. as permitted by Appellate Court Rule 208(b)(6).

Respectfully submitted,

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