

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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OCT 29 2015

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-03857 and 2012-CP-10-03858
Appellate Case No: 2015-001644

Shipwatch Condominium Association,.....Appellant,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corporation; 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.; Spectech, Inc.; Sonneborn, Inc.; EFCO Corporation; 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 the.....Respondents.

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

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corporation; 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.

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RESPONDENT, CHARLESTON GLASS COMPANY, INC'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON CAROLINA CONCRETE'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

This case stems from alleged construction defects at the Shipwatch Condominiums located on the Isle of Palms. Shipwatch was originally constructed in 1985. None of the defendants were involved in original construction. Rather this suit stems from a series of repairs conducted over the 2002 through 2011 time period

Charleston Glass Company, Inc., ("Charleston Glass"), replaced certain sliding glass doors and windows at the direction of Carolina Concrete, the general contractor for the repairs, and the on-site property managers for Shipwatch. Charleston Glass' work on the project occurred primarily between 2003 and 2005, with a limited amount of additional work in 2008-2011.

Appellant Oscar Mendiondo, as class representative and a companion case by the HOA was filed against Carolina Concrete, Charleston Glass and other defendants involved in the repairs on June 13, 2012. (Summons and Complaint)

On September 12, 2014, Carolina Concrete filed a motion for summary judgment based on the statute of limitations. (Carolina Concrete MSJ) A supporting memorandum with exhibits was filed on October 27, 2014. (Carolina Concrete Memorandum in Support of MSJ with exhibits)

A hearing on Carolina Concrete's motion was held before Judge Dennis on October 27, 2014. At the hearing, counsel for Carolina Concrete and Appellant presented arguments with regard to the motion for summary judgment.

Judge Dennis issued an oral ruling granting Carolina Concrete partial summary judgment passed on the statute of limitations for any work performed at the property prior to 2010. (Hearing Transcript, p.6, lines 20-22) Judge Dennis also signed a Form 4 Order granting partial summary judgment to Carolina Concrete. (Order filed July 28, 2015). While the Form 4 stated formal order to follow, prior to the submission of the formal order

to the court, Appellant filed a motion to reconsider. (Appellant's Motion for Reconsideration) On December 1, 2014, the court issued an order denying Appellant's motion for reconsideration. (Order denying Motion for Reconsideration)

Appellant then filed a notice of appeal on December 30, 2014, appealing the order granting partial summary judgment.

Respondent Charleston Glass filed motions for summary judgment on November 18, 2014, and a memorandum in support. (Charleston Glass motion for summary judgment and memorandum in support of summary judgment). Various other parties' motions for summary judgment were also pending at this time. The motions were scheduled for a hearing on January 15, 2015. However, counsel for Appellant took the position that the motions had been stayed by this appeal because the order dismissed a substantial portion of damages claimed against each defendant. (Email from Flyn to Caroline Leonard dated January 6, 2015).

Judge Dennis instructed the parties to be prepared to argue their respective motions in the event he found a stay was not applicable. However, Judge Dennis ruled that the matter was stayed and did not hear arguments on any of the pending motions.

On July 2, 2015, this Court issued an order dismissing the appeal as a formal order had not yet been signed by Judge Dennis. (Order dated July 2, 2015). On July 28, 2015, Judge Dennis signed a formal order granting partial summary judgment to Carolina Concrete on certain claims based on the statute of limitations. (Order dated July 28, 2015). This appeal followed.

As Appellant has named Charleston Glass as a Respondent in the appeal, and has taken the position that the order dismisses claims against Charleston Glass, Charleston Glass hereby submits this brief in support of the order granting partial summary judgment to Carolina Concrete. Carolina Glass also incorporates the arguments contained in the

other respondent's brief by reference.

STATEMENT OF FACTS

As stated above, Shipwatch consists of four oceanfront buildings constructed around 1985 with EIFS exterior cladding. None of the Respondents/Defendants in this litigation had any involvement with the original construction.

From 2002-2010, Carolina Concrete acted as the general contractor for various piece-meal repairs and renovations to the buildings at the direction of the Shipwatch Homeowners' Association ("HOA") and various on-site property managers. Charleston Glass was a subcontractor of Carolina Concrete who replaced certain sliding glass doors and windows, primarily in 2003-2005, with a limited amount of work performed in 2008-2011.

Specifically, the buildings contain 344 windows and 264 sliding glass doors. Charleston Glass's scope of work consisted of the following: **2003** – replace 12 small windows on 5th floor endwalls; **2004** – replace 36 small sliding glass windows (endwalls), and 16 bays windows; **2005** – remove and replace 72 master bedroom sliders floors 1-3 all buildings; **2008** – remove and replace 14 sliders; **2009** – remove and replace 17 sliders; **2010** – remove and replace 72 store front windows, install 11 sliders, **2011** – reflash sliders in units 412 and 413.

While the problems with the sliding glass doors were well known prior to Charleston Glass's involvement, Appellants were on notice that leaking sliding glass doors continued to be a problem after Charleston Glass began to work on the project.

Appellants received communication from their expert, Robert Sisroy in 2006, that water intrusion at sliding glass doors continued to be a "chronic" problem. (Sisroy's report

dated July 10, 2006, attached as exhibit to Carolina Concrete's memorandum in support of Motion for Summary Judgment)

On January 20, 2007, the Shipwatch Building Committee issued a report stating that a number of units on the fourth and 5th floors were experiencing leaking sliding glass doors. (Shipwatch building committee report dated January 20, 2007 attached as exhibit to Carolina Concrete's memorandum in support of motion for summary judgment).

Plaintiffs also had notice of other construction defects not related to Charleston Glass's scope of work, including problems with the originally installed EIFS, the leaks to DEFS which was installed as part of the ongoing repairs, roof flashing deficiencies. (See Exhibits to Carolina Concrete's Memorandum in support of Motion for summary Judgment). Despite this knowledge Appellant's elected not to investigate the extent of the problems or to address the problems with complete repairs until January 2012, when it hired SKA, its expert in the current litigation.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON CAROLINA CONCRETE'S MOTION FOR SUMMARY JUDGMENT.

A. Standard of Review

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the circuit court under Rule 56, SCRPC. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Pringle v. SLR, Inc.*, 382 S.C. 397, 403 (S.C. Ct. App. 2009). Rule 56(c), SCRPC. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable

to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

B. The trial court properly granted Carolina Concrete's motion for partial summary Judgment based on the Statute of Limitations.

The statute of limitations starts to run when the "cause of action shall have accrued." S.C. Code Ann. § 15-3-20. "Generally, a cause of action accrues under South Carolina law 'the moment the defendant breaches a duty owed to the plaintiff.'" *Barr v. City of Rock Hill*, 330 S.C. 640, 644, 500 S.E.2d 157, 159-60 (Ct. App. 1998). In some circumstances, however, the "discovery rule" provides an exception to the general rule and tolls the statute of limitations until such time as "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535.

A person has constructive notice of a cause of action if he or she knows of "facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist." *Id.* "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." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

The analysis is an objective one, focusing not on the subjective knowledge of the individual plaintiff, but on whether a reasonable person with knowledge of the facts and circumstances should have been placed on notice of an injury. As stated in *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994), the "[f]ailure of the injured party to comprehend the full extent of damages ... is immaterial." *Wiggins*, 442 S.E.2d at 170. In *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), the Court wrote:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote response by giving security and stability to human affairs.” The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, “statutes of limitations provide potential defendants with certainty that after a period of time, they will not be hailed [sic] into court to defend time-barred claims. Moreover, limitation periods discourage plaintiffs from sitting on their rights.” Statutes of limitations are, indeed, fundamental to our judicial system. Id., 363 S.C. at 175-176, 609 S.E.2d at 552 (citations omitted).

The applicable statute of limitations is three years.¹ Charleston Glass does not dispute that any work performed after the applicable date for statute of limitations purposes should not be included with the lower court’s order.

However, as detailed above, Appellants had knowledge of numerous construction problems with the buildings over the years, including Mr. Sisnroy’s July 10, 2006 report (report dated July 10, 2006, exhibit to Carolina Concrete’s memorandum in support of summary judgment); Shipwatch Building Committee Reports (Report dated January 20, 2007 and Report dated March 9, 2007 attached to Carolina Concrete’s memorandum in support of summary judgment); Carolina Concrete’s Exterior Building inspection report dated May 10, 2007 (building inspection report attached to Carolina Concrete’s memorandum in support of summary judgment); Mr. Sisnroy’s August 23, 2008 report to Appellant entitled “Roof Flashing Installation Deficiencies and Exterior Cladding Failure investigation. (Sisnroy Report dated August 23, 2008, Exhibit to Appellant’s supplemental response in Opposition to Carolina Concrete’s motion for reconsideration).

¹ S.C. Code Ann. § 15-3-530 applies a three-year statute of limitations to Plaintiffs’ claims of negligence, breach of contract, common-law warranty, and strict liability in tort.

On August 28, 2008, at the latest, Appellant clearly had notice that there were continued construction issues at the project well after repairs had begun. Whether Appellants fully comprehended the extent of the claims or extent of damage is immaterial. See Wiggins, 442 S.E.2d at 170; *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). Appellants failure to investigate or take action with regarding to the known construction issues until January 2012, nearly six (6) years following Mr. Sisnroy's July 10, 2006, report on continued "chronic leaking" at sliding glass doors, does not constitute the exercise of reasonable diligence as contemplated by S.C. Code Ann. § 15-3-535.

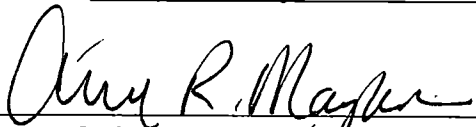
As such, the lower court properly granted Carolina Concrete's motion for partial summary judgment. (Order Granting Defendant Carolina Concrete Systems, Inc. Partial Summary Judgment filed July 28, 2015)

CONCLUSION

Based on the reasons set forth above, as well as the briefs filed by other Respondents, Charleston Glass, respectfully requests that the decision of the trial court be affirmed.

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on October 28, 2015 a true and correct copy of *Charleston Glass Company's Initial Brief and Designation of Matter* was served and delivered by depositing a copy in the U.S. Mail, postage paid addressed to the following:

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