THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Judge

Circuit Court Case No. 2012-CP-10-3857 and 2012-CP-10-3858

Appellate Case No. 2015-001644

Shipwatch Condominium Association, Inc.....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 Corp; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete.....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,

and

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, Appellants,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech Inc.; Sonnebom, 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.; and Gary Freeman, individually; are.....Respondents.

INITIAL BRIEF OF RESPONDENT GLASSTEC, INC.

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STATEMENT OF THE CASE

With the exception of additional facts set forth below, GlassTec, Inc. (hereinafter referred to as "GlassTec") joins in, adopts and incorporates as its own the Background and Facts presented in the Reply Briefs of Respondents EFCO and WCJ and First Exteriors, LLC. Although GlassTec does not agree that it is a proper Respondent in this matter—as it was not a party to Carolina Concrete Systems, Inc.'s motion and was not provided an opportunity to present evidence or argue its position during the hearing—it is nevertheless providing a Reply Brief out of an abundance of caution. GlassTec has filed its own Motion for Summary Judgment (ROA__) and Memorandum in Support (ROA___) that has not yet been heard by the Court below. Nevertheless, relying on the case of *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000), GlassTec is entitled to set forth additional sustaining grounds of the trial court's granting of partial summary judgment as to certain causes of action against Carolina Concrete Systems, Inc. (hereinafter referred to as "CCS").

FACTS

In August of 2001, GlassTec provided two proposals to Bob Clink, then-manager of the Shipwatch Condominium Association (hereinafter referred to as "Shipwatch"), for various window repair work upon the property (ROA____; two proposals dated August 30, 2001 attached). On November 5, 2001, GlassTec provided another proposal for additional work upon the property, to include glass replacement in both windows and sliding glass doors (ROA___; proposal dated November 5, 2001). Throughout 2002, GlassTec purchased and installed a limited number of Starline brand windows for a limited number of units for complete removal and replacement, and also purchased glass for replacement of fogged panels (ROA___; GlassTec's job cost ledger). Based upon this ledger, it appears GlassTec performed work in only

the following units: A106, 301, 306, B107, 108, 207, 212, 307, 312, 410, 411, C114, 118, 213, 218, 313, D124, 219, 224, 319, 353, 324, 429. Further, minimal work was performed by GlassTec from January through March of 2003, appearing to comprise only removal and replacement of one bay window unit in Unit D319. Materials were ordered for Units A206, B112, and D219, but no labor was associated with those units. By January of 2004, GlassTec was no longer performing any work on the project (ROA___; letter dated January 25, 2004 from Ron Weaver of GlassTec to Lester Griffin of Shipwatch).

In 2002, CCS acted as the general contractor for various projects at Shipwatch, which included window and door repair in 2003 and 2004 (ROA___; Application and Certification for Payment dated April 25, 2004). On or about October 22, 2003, Defendant Charleston Glass Co., Inc. performed an inspection of the windows (ROA____; Charleston Glass invoice dated October 22, 2003). Robert Sisnroy inspected the Shipwatch property on December 20, 2003. Mr. Sisnroy produced a memorandum to Lester Griffin of Shipwatch dated January 7, 2004, wherein he states—among other things—that at least some bay windows were apparently inadequately flashed (ROA__; January 7, 2004 memorandum). It is unclear, however, which buildings and/or units were inspected. Charleston Glass provided a proposal for work on bay windows on January 7, 2004 (ROA___; Charleston Glass proposal dated January 7, 2004). According to Charleston Glass documents, at least twelve bay windows were to be replaced, with the remaining to be removed, reflashed and reinstalled (ROA___; March 30, 2004 correspondence from Charleston Glass to CCS). Charleston Glass sent invoices for bay window work to CCS on March 26, 2004 and October 14, 2004 (ROA__). GlassTec was not contacted to inspect the property or provide any repairs as a result of the Sinsroy inspection.

In addition to bay window work, CCS performed other work on various fixed windows

and sliding glass doors, which necessarily included work performed by GlassTec in 2002. At no time did GlassTec perform work on behalf of CCS, nor was GlassTec paid by CCS for work it performed in 2002-03.

Plaintiffs filed these lawsuits on June 13, 2012 alleging defective and deficient construction at the Shipwatch Condominiums. Plaintiffs served GlassTec on or about July 13, 2012.

ARGUMENT

In addition to the arguments asserted herein, GlassTec incorporates by reference those arguments sustaining the grant of Summary Judgment to CCS set forth by CCS, EFCO and WCJ, and First Exteriors, LLC in their respective Reply Briefs, to the extent all are applicable to the position of GlassTec. GlassTec asserts that the grant of partial summary judgment as to CCS should be affirmed on the grounds that the Appellant failed to file suit within the applicable statute of limitations. Though the Court below properly recited the facts, the conclusions drawn therefrom should have been broader, such that any/all causes of action arising on or before 2009 would be eliminated from the suit, not just specific elements of construction.

I. PARTIAL SUMMARY JUDGMENT WAS PROPERLY GRANTED BASED UPON THE LAPSE OF THE APPLICABLE STATUTE OF LIMITATIONS

For the reasons set forth in the initial briefs of CCS, EFCO and WCJ, and First Exteriors, the trial court below properly and appropriately applied the applicable statute of limitations and discovery rule in granting CCS partial summary judgment.

II. THE APPELLANTS' CLAIMS AGAINST GLASSTEC, INC. ARE BARRED BY THE APPLICABLE 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. In order to determine when the cause of action accrues, South

Carolina has adopted the "discovery rule" which provides that "the statute begins to run from the date the injury resulting from the wrongful conduct is either discovered or may be discovered by the exercise of reasonable diligence." *Dillon School District Number Two v. Lewis Sheet Metal Works*, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985). An owner can be put on notice that some claim might exist when the owner observes a construction defect and retains a consultant. See *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996) (Court held that the statute of limitations began to run when the owner observed a building crack and retained a consultant). "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 "[f]ailure of the injured party to comprehend the full extent of damages ... is immaterial." *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169, 170 (1994).

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. As indicated above, GlassTec completed its work on the subject property by March of 2003. By January of 2004, Shipwatch had received a report from Robert Sisnroy regarding alleged flashing deficiencies within at least some bay windows. In October of 2004, it appears most if not all bay windows were removed and replaced or removed and reflashed by an entity other than GlassTec. Additionally, CCS performed other window work on the property from 2004 through at least 2008, to include sliding glass door repairs. To the extent GlassTec performed any sliding glass door work, its work was likely removed and replaced no later than 2008.

Since the Plaintiffs were placed on notice as early as January 7, 2004 of alleged deficiencies in bay window flashing, they arguably had until January 4, 2007 to file suit against

GlassTec. However, Plaintiffs did not file and serve their complaint against GlassTec until July 12, 2012, over five years past the applicable statute of limitations. Further, by the time the suit was filed, all of GlassTec's work had been removed or was otherwise altered, such that any alleged problems were not the result of work performed by GlassTec. At the outside, Plaintiffs would have had until 2011 to file claims against GlassTec (based upon 2008 work performed on various windows and doors by CCS), but the July 12, 2012 filing and service date is still well beyond the limitations.

Although the Court below noted in its Order that "the Plaintiffs clearly knew about possible claims for damage from water intrusion before July 12, 2009..." (ROA___; Order Granting Defendant Carolina Concrete Systems, Inc. Partial Summary Judgment, filed July 28, 2015), the Court concluded that only certain elements of construction were subject to dismissal from the suit rather than any claim that arose on or before July 12, 2009 . Specifically, the Court struck claims associated with EIFS, originally-installed sliding glass doors and windows, deck coatings, balcony ceiling coatings, handrails, metal framing behind originally-installed EIFS adjacent to originally-installed sliding glass doors and windows, and lack of kickout flashing or drip edge flashing (ROA___; Order Granting Defendant Carolina Concrete Systems, Inc. Partial Summary Judgment, filed July 28, 2015).

As discussed above, the Plaintiff was clearly aware of alleged issues with bay windows in 2004, and had work performed in 2004. Further, any work performed by GlassTec in 2002 or early 2003 has been removed or otherwise modified by others. Any claims the Plaintiffs assert cannot be associated with GlassTec because its work is no longer present on the project.[1] Therefore, any claims associated with any bay or fixed windows must necessarily also be

[1] Indeed, none of the Respondents' work is currently on any of the four buildings, as all buildings have been repaired.

excluded from the Plaintiff's suit. Additionally, any work associated with any CCS contract entered prior to July 12, 2009 should be excluded. Thus, Court's ruling below should be affirmed, but modified to include the dismissal of any claims associated with any bay or fixed window, and/or any claims associated with any work performed pursuant to any contract CCS entered with the Plaintiff prior to July 12, 2009.

III. CCS'S CROSS-CLAIMS AGAINST GLASSTEC SHOULD BE DISMISSED

In addition to affirming the lower court's grant of partial summary judgment based upon the applicable statute of limitations, GlassTec is also entitled to a dismissal of CCS's cross-claims for negligence, breach of contract, breach of warranty and indemnity. As indicated above, GlassTec had no contract, oral or otherwise, with CCS. Further, all of CCS's claims sound in indemnity; specifically, for each cause of action CCS claims it is entitled to "...actual damages (collectively or individually) against Other Defendants in the amount of any monies that it is adjudged to owe Plaintiff or which it pays Plaintiff in settlement of Plaintiff's claims as well as fees and costs incurred in the investigation, defense and settlement of this claim." (ROA__; CCS's Answer and Cross-Claims). "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss of damage the second party incurs to a third party." *Town of Winnsoboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct.App. 1990), aff'd 307 S.C. 128, 414 S.E.2d 118 (1992). "The character of an action is not to be determined by the terminology which the pleadings may chance to give it. On the contrary, the character of an action is fixed by the events which the pleader has cited..." *Walsh v. Evans,* 112 S.C. 131,136, 99 S.E.2d 546 (1919).

Clearly, in seeking the damages enumerated above, CCS is pleading a claim for indemnity rather than for negligence, breach of warranty or breach of contract. Because

GlassTec had no contract with CCS and at no time ever performed any work on behalf of CCS, the only kind of indemnity that could be sought would be for equitable indemnification. Such a claim can only be brought where some special relationship between the parties exists such that there is an obligation on one party to indemnify the other. *Stuck v. Pioneer Logging Machinery, Inc.*, 301 S.E.2d 552, 53 (S.C. 1983). As indicated, no contract or any special relationship existed between GlassTec and CCS such that CCS is now able to maintain a cause of action for equitable indemnification against GlassTec. GlassTec, therefore, is entitled to summary judgment as to CCS's claims against it for negligence, breach of warranties, breach of contract and indemnity.

CONCLUSION

Based upon the above and forgoing, GlassTec respectfully requests the ruling of the trial court be affirmed, though modified as discussed in order to fully encompass all causes of action that should be excluded prior to July 12, 2009.

Respectfully submitted,

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