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. 2015-001644

Circuit Case Nos. 2012-CP-10-3857 and 2012-CP-10-3858

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.; 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; GlassTec, Inc.; Sonneborn, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; BASF Corp.; Gary Freeman Architect, Inc.; and Gary Freeman, individually, are ..... Respondents.

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.

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FINAL BRIEF OF RESPONDENT BASF CORPORATION

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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. based on the statute of limitations, in light of the doctrine of equitable tolling?

III. Was the statute of limitations equitably tolled as to Appellants' claims against Respondent BASF Corporation "(BASF")?

STATEMENT OF THE CASE

This is an appeal from a grant of partial summary judgment in favor of Carolina Concrete Services, Inc. ("CCS") based on the statute of limitations. Appellants initiated their lawsuits on 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 Appellants' Complaints, essentially denying any fault or liability as to it and asserting various defenses, including that Appellants' 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. Appellants allege that Respondents performed repairs and renovations between the years 2002 and 2011, for which CCS served as the general contractor.

[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 Appellants' 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 Appellants 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, Appellants moved the lower court to reconsider its ruling. By order dated November 24, 2014 and filed December 1, 2014 the lower court denied Appellants' Motion for Reconsideration.

Appellants filed Notices of Appeal on December 30, 2014. On July 2, 2015 this Court dismissed those appeals on the basis that the order from which the appeals were taken was not a final judgment, inasmuch as it stated that a formal order was to follow; the cases were remitted to the trial court. On July 17, 2015 a formal order was submitted to the trial court and signed by the presiding judge on July 27, 2015. Appellants filed Notices of Appeal of that order on July 28, 2015.

Appellants argue 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 Appellants' claims more than three years before Appellants initiated their lawsuits 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 Appellants knew, or should have known, to some degree 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. pp. 168-177). CCS later oversaw the removal and replacement of additional areas of EIFS, as well as sliding glass door repairs and other miscellaneous projects.

Appellants have argued that they did not know of any actionable deficiencies in the work orchestrated by CCS until their present engineers, SKA Consulting Engineers, Inc. ("SKA")

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[2] EIFS is an exterior wall cladding system that consists of an insulation board attached 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.

issued building evaluation reports in 2012 and documented what appeared to be a significant number of construction deficiencies. The truth is, however, that potential problems with CCS's repair and renovation work were brought to the attention of Appellants much earlier, and Appellants could just as easily have 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 the evidence that put Appellants 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. pp. 123-128).
2. Appellants' 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. 147). 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. 147).
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. 149).
4. The Shipwatch Building Committee Report of January 20, 2007 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. pp. 131-133).

5. CCS's inspection report of May 9, 2007 stated 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 clad with the DEFS system installed by CCS. The report also described cracks in the stucco. (R. pp. 134-135)..

6. 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. 155). Deposition of Jernigan, page 330 line 2 - page 333 line 13. (R. pp. 656-659). These portions of Ms. Jernigan's deposition include a discussion of the Shipwatch Board of Director's meeting minutes dated September 12 and 13, 2008 (R. pp. 783-791), which establish that, contrary to Appellants' assertion, the decks were not recoated on or around March 20, 2008.[4] Rather, the Board had, in fact, "passed on coating the decks because [they] needed to have money to do other projects (mainly the beach) and let the warranty expire." (R. p. 789).

7. Commercial Building Consultants' ("CBC") Limited Property Assessment Report, prepared for Appellants and dated January 30, 2008, noted that recent capital improvements consisted of replacement of large portions of EIFS with "dura-rock." 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. The report

[4] See Initial Brief of Appellants, page 13, wherein Appellants reference a March 20, 2008 invoice from CCS as evidence that the decks were recoated (R. p. 233). That invoice, however, describes partial deck coating that was performed in conjunction with door repairs, which is consistent with a CCS proposal to perform such work, dated September 6, 2007. (R. p. 1028).

went on to note that portions of 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. pp. 234-240).

8. Appellants' consulting engineer, Robert Sisnroy, P.E., published a Roof Flashing Installation Deficiencies and Exterior Cladding Failure Investigation report on August 23, 2008. (R. pp. 243-249). 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. Additionally, he found improperly sealed flashing at certain corners on the face of the stucco and improper caulking. He also discovered raised joint lines in the field of the DEFS cladding at the ends and edges of the cement panel boards. He also found failed and blistering DEFS lamina. In summary, Mr. Sisnroy concluded that there were areas of failed parged stucco and failed DEFS.

9. 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 "just right." Deposition of Linda Jernigan, page 27, lines 5 - 23. (R. p. 647). 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 Appellants regard as having provided them with 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 Appellants' assertion that they were first put on notice of the issues giving rise to this litigation in 2012, it is clear that they knew or should have known of some

measure 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 Appellants' 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).

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 narrow 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, the record in this matter is with replete with evidence that Appellants 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, Appellants were 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 Appellants' 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. 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 Appellants' 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, 332 S.E.2d 555 (Ct. App. 1985)[5] 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 of limitations 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.

[5] 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).

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 determined, however, 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 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 Appellants to delay bringing suit against it. BASF did nothing to lull Appellants into a "false sense of security." Id. at 219. Consequently, the statute of limitations never stopped running as to any claims Appellants may have against BASF.

CONCLUSION

Appellants had knowledge more than three years prior to initiating this litigation that they 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.

Respectfully Submitted,

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December 23, 2015

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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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