

STATE OF SOUTH CAROLINA)
)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Gunnar Palm, Jr. and Patricia Palm,)
)
Plaintiffs,)
)
vs.)
)
Atlantic Pools and Water Features, Inc.,)
)
Defendant.)

Civil Action No. 2014-CP-43-00643

~~ORDER~~ RECEIVED

APR 28 2016

SC Court of Appeals

Hearing Date: January 6, 2016
Plaintiffs' Attorney: Charles A. Krawczyk, Esquire
Defendant's Attorney: Jay T. Thompson, Esquire

This matter is before the Court on the following motions filed by Plaintiffs Gunnar Palm, Jr. and Patricia Palm and by Defendant Atlantic Pools and Water Features, Inc.:

- (1) Plaintiffs' Motion to Amend the Complaint, filed on or around August 29, 2014;
- (2) Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRPC, filed on or around September 17, 2014, which incorporated both Plaintiffs' prior Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRPC, filed on or around August 29, 2014, and Plaintiffs' prior Motion to Amend the Complaint, filed on or around August 29, 2014; and
- (3) Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike, filed on or around February 23, 2015.

The Court has considered all written materials submitted by the parties and the arguments of counsel presented at the January 6, 2016 hearing. For the reasons set forth below, Plaintiffs' Amended and Renewed Motion for Reconsideration, including the prior incorporated motions, is hereby DENIED. Plaintiffs' Motion to Amend the Complaint is hereby GRANTED only as to the claim for gross negligence and is DENIED as to all other causes of action. Defendant's

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Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is hereby DENIED as to the claim for gross negligence and is GRANTED as to all other causes of action. Plaintiffs are granted leave to file a Second Amended Complaint, which may include only a cause of action for gross negligence.

PROCEDURAL HISTORY

This is an alleged construction defect case involving a swimming pool constructed in the summer of 2005 at Plaintiffs' residence in Sumter County, South Carolina. Plaintiffs filed their original Complaint on April 3, 2014, alleging causes of action for breach of contract, negligence, promissory estoppel, breach of express warranty, and breach of implied warranty of workmanlike service. Defendant filed a motion to dismiss the original Complaint on June 2, 2014, and the Court held a hearing on the motion to dismiss on July 29, 2014.

On August 20, 2014, the Court notified the parties by email that the Court had decided to grant Defendant's motion to dismiss the original Complaint. The same email requested that Defendant's counsel submit a proposed order, which was submitted on August 21, 2014.

Before the Court issued a formal order on the motion to dismiss the original Complaint, Plaintiffs had a substitution of legal counsel. On August 29, 2014, Plaintiffs' new counsel filed two motions: (1) a Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCP,¹ and (2) a Motion to Amend the Complaint.² The Motion to Amend the Complaint included a proposed First Amended Complaint.

On September 10, 2014, the Court issued a written order dismissing all of Plaintiffs' claims with prejudice under Rule 12(b)(6), SCRCP, and the Statute of Repose, S.C. Code

¹ Through no fault of Plaintiffs' new counsel, the Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCP was filed before the Court issued an Order and, therefore, was premature.

² The Motion to Amend the Complaint is one of the three motions currently before the Court in this Order.

Ann. § 15-3-640 (“Statute of Repose”). The Court held that Plaintiffs’ claims were time-barred under the Statute of Repose because Plaintiffs waited more than nine years to assert them. The Court’s September 10, 2014 Order is hereby expressly incorporated herein by reference.

On or around September 17, 2014, Plaintiffs’ counsel filed an Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCP.³ The Amended and Renewed Motion was based on the same grounds as the prior Motion to Seek Rehearing, or in the Alternative, Reconsideration Pursuant to Rule 59, SCRCP and the prior Motion to Amend the Complaint, and it incorporated both prior motions, including the proposed First Amended Complaint.

On January 4, 2015, after consideration of all materials submitted to the Court, including the proposed First Amended Complaint, the Court informed counsel for all parties in an email from the undersigned circuit judge’s law clerk that:

Judge Cothran has decided to allow an Amended Complaint to include gross negligence. However, the previous order is still in effect to the extent that summary judgment still applies to all other causes of action presented by the plaintiff in their earlier pleadings.

See Exhibit A.

On or around January 30, 2015, Plaintiffs’ counsel filed a First Amended Complaint identical to the proposed First Amended Complaint that had been submitted to the Court and considered prior to the January 4, 2015 email. It included causes of action for negligence, gross negligence, breach of contract, negligent supervision, negligence *per se*, breach of express warranty, implied warranty of workmanlike service, unfair and deceptive trade practices and negligent misrepresentation.

³ The Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCP is the second of the three motions currently before the Court in this Order.

On February 23, 2015, Defendant filed a Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike.⁴

ANALYSIS

1. Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRPC

Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRPC asks the Court to reconsider and amend the September 10, 2014 Order, which dismissed with prejudice all causes of action in Plaintiffs' original Complaint under Rule 12(b)(6), SCRPC, and the Statute of Repose, S.C. Code Ann. § 15-3-640.

Plaintiffs' claims are barred by the eight-year Statute of Repose set forth in S.C. Code Ann. § 15-3-640, which 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.

Id. The eight-year provision of § 15-3-640 applies to all construction claims where substantial completion occurred after July 1, 2005.

All legal authorities and arguments that Plaintiffs have asserted in support of this motion, both in their written materials supporting the motion and at the January 6, 2016 hearing, were briefed, argued, considered by the Court, and ruled upon more than a year ago, in the September 10, 2014 Order. This includes, but is not limited to, Plaintiffs' arguments regarding the application of the Statute of Repose, substantial completion of the project, and equitable tolling. Specifically, Plaintiffs have made no allegation that substantial completion of the swimming pool occurred prior to July 1, 2005, when the eight-year Statute of Repose took effect. Plaintiffs

⁴ The Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is the third of the three motions currently before the Court in this Order.

did not assert any new legal theories or arguments and did not identify any previously unconsidered statute, case law, or other legal precedent in support of their motion for reconsideration.

Rather, the primary argument asserted in Plaintiffs' written materials and at the January 6, 2016 hearing was that Plaintiffs' prior legal counsel did a poor job in the pleadings, briefing, and argument of Plaintiffs' claims and, therefore, that Plaintiffs should be allowed a second chance rather than being penalized for the shortcomings of their prior counsel. *See, e.g.*, Pls.' Return to Def.'s Opp. to Pls.' Mot. to Reconsider and Mot. to Amend p. 3 ¶ 3 (9/8/2014) ("Plaintiffs' original Complaint ostensibly failed, not because of legal or factual infirmity, but because it was poorly pled. Allegations establishing equitable estoppels and tolling, gross negligence and liability for contractor negligence beyond the terms of the contract were missing or poorly plead."). However, Plaintiffs cited no legal authority for this premise, and the Court is not aware of any legal authority or any equitable principle supporting the idea that plaintiffs in a civil suit should be entitled to a second bite at the apple simply because they are not satisfied with the performance of their own legal counsel.

Therefore, because Plaintiffs have asserted no legal basis for reconsideration of the dismissal of the causes of action set forth in the original Complaint, Plaintiffs' Amended and Renewed Motion for Reconsideration Pursuant to Rule 59, SCRCP is DENIED.

2. Plaintiffs' Motion to Amend the Complaint

a. Motion Denied as to All Causes of Action Previously Asserted in Original Complaint

The Court's September 10, 2014 Order dismissed with prejudice Plaintiffs' causes of action for breach of contract, negligence, promissory estoppel, breach of express warranty, and

breach of implied warranty of workmanlike service under Rule 12(b)(6), SCRCPP, and the Statute of Repose, S.C. Code Ann. § 15-3-640.

Plaintiffs' Motion to Amend the Complaint seeks to re-assert many of the same causes of action that were previously dismissed with prejudice, specifically breach of contract, negligence, negligence supervision, negligence *per se*, negligent misrepresentation,⁵ breach of express warranty, and breach of implied warranty of workmanlike service. That is, the motion asks the Court to reverse the September 10, 2014 Order that dismissed these causes of action with prejudice. However, as set forth above, Plaintiffs' request to reconsider the September 10, 2014 Order under Rule 59 is denied, so these causes of action remain dismissed with prejudice under the September 10, 2014 Order.

b. Motion Denied as to Proposed Claim Under South Carolina Unfair Trade Practices Act

Plaintiffs' Motion to Amend the Complaint also seeks to include a claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10 *et seq.*, based on the factual allegations set forth in the proposed First Amended Complaint.

For the reasons set forth in the September 10, 2014 Order, the proposed claim for unfair and deceptive trade practices, if allowed, would be subject to dismissal under the Statute of Repose. The eight-year Statute of Repose applies to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property where substantial completion occurred after July 1, 2005. There is no allegation that substantial completion of the pool occurred before July 1, 2005, so the eight-year provision applies to Plaintiffs' claims. The facts alleged and the inferences reasonably deducible from the pleadings show that Plaintiffs' claims

⁵ Negligent supervision, negligence *per se*, and negligent misrepresentation are variations of the previously dismissed negligence claim for purposes of the current motions and are subject to the same principles under the Statute of Repose.

were first asserted more than eight years after substantial completion of the pool. There is no allegation of facts that would support a claim for equitable tolling.

Therefore, the Court finds that it would be futile to allow the proposed claim for unfair and deceptive trade practices, and the Motion to Amend the Complaint is denied as to this cause of action. *See Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 482, 191 S.E. 337, 338 (1937) (affirming denial of leave to amend complaint because claims in proposed amended complaint would be barred by statute of limitations).

c. Motion Granted as to Proposed Claim for Gross Negligence

Plaintiffs' Motion to Amend the Complaint also seeks to include a claim for gross negligence based on the factual allegations set forth in the proposed First Amended Complaint. In support of the gross negligence claim, Plaintiffs cite the statutory exception of S.C. Code Ann. § 15-3-670(A), which provides that the Statute of Repose is:

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.

The Court agrees with Plaintiffs' argument regarding the application of this statute. Under § 15-3-670(A), the Court finds that a well-pled claim for gross negligence survives dismissal under the Statute of Repose and a Rule 12(b)(6) motion to dismiss. Therefore, Plaintiffs are hereby granted leave to file a Second Amended Complaint that includes only a claim for gross negligence.

3. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike

Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike asks the Court to dismiss the First Amended Complaint that Plaintiffs filed on or around January 30, 2015, on the basis that Plaintiffs' claims have already been briefed, argued, considered by the court, and ruled upon in the September 10, 2014 Order.

Under Rule 12(b)(6), the Court must dismiss a plaintiff's claims when the pleadings fail to state facts sufficient to constitute a cause of action as a matter of law. *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004); *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (citations omitted) (holding the court must dismiss a plaintiff's complaint under Rule 12(b)(6) if the facts alleged and the inferences reasonably deducible from the pleadings would not entitle a party to relief under any theory of the case).

As set forth above, the Court has previously considered Plaintiffs' legal authorities and arguments and concluded that Plaintiffs' claims are barred by the Statute of Repose, with the exception of the gross negligence claim. The eight-year Statute of Repose applies to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property where substantial completion occurred after July 1, 2005. There is no allegation that substantial completion of the pool occurred before July 1, 2005, so the eight-year provision applies to Plaintiffs' claims. The facts alleged and the inferences reasonably deducible from the pleadings show that Plaintiffs' claims were first asserted more than eight years after substantial completion of the pool. There is no allegation of facts that would support a claim for equitable tolling.

Therefore, Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is as to all claims in the First Amended Complaint other than gross negligence. Defendant's motion is denied as to the gross negligence claim.

CONCLUSION

For the forgoing reasons, Plaintiffs' Amended and Renewed Motion for Reconsideration, including the prior incorporated motion, is hereby DENIED. Plaintiffs' Motion to Amend the Complaint is hereby GRANTED only as to the claim for gross negligence and is DENIED as to all other causes of action. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint and Alternatively Motion to Strike is hereby DENIED as to the claim for gross negligence and is GRANTED as to all other causes of action. Plaintiffs are granted leave to file a Second Amended Complaint, which may include only a cause of action for gross negligence.

IT IS SO ORDERED.

The Honorable R. Ferrell Cothran, Jr.
South Carolina Circuit Judge

Manning, South Carolina

_____, 2016



Sumter Common Pleas

Case Caption: Gunnar Palm Jr , plaintiff, et al VS Atlantic Pools And Water Features, Inc.
Case Number: 2014CP4300643
Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144