

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

Gunnar Palm, Jr. and Patricia Palm,) Civil Action No. 2014-CP-43-00643
)
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Plaintiffs,)
)
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vs.)
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Atlantic Pools and Water Features, Inc.,)
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Defendant.)
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ORDER APR 28 2016
SC Court of Appeals

This matter is before the Court in the motion of Defendant Atlantic Pools and Water Features, Inc. ("Atlantic Pools") to dismiss Plaintiffs' Complaint, with prejudice, under Rule 12(b)(6), SCRCF. The Motion came before the Court for hearing on July 29, 2014. The Court has considered all written materials submitted by the parties before and after the hearing, in addition to the arguments of counsel presented at the July 29, 2014 hearing. For the reasons set forth below, the motion is hereby GRANTED.

FACTUAL ALLEGATIONS

This is an alleged construction defect case involving a swimming pool constructed in the summer of 2005 at Plaintiffs' residence, located at 2025 Horatio-Hagood Road in Sumter County, South Carolina. Pl.'s Compl. ¶ 3. On or around May 16, 2005, Plaintiffs contracted with Atlantic Pools to construct an in-ground swimming pool on the property. *Id.* Plaintiffs allege that the pool was completed, and "[u]pon completion of construction of the swimming pool, the Plaintiffs immediately began to notice several problems and deficiencies with the swimming pool and with the Defendant's work." *Id.* ¶ 7. Plaintiffs have had the use and enjoyment of the pool since it was completed in August 2005.

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Plaintiffs commenced this lawsuit on April 3, 2014, asserting causes of action for: 1) breach of contract; 2) negligence; 3) promissory estoppel; 4) breach of express warranty; and 5) breach of implied warranty of workmanship.

ANALYSIS

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). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Phyer v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

1. All of Plaintiffs' Claims are Barred by the Statute of Repose.

A. The Statute of Repose is an Absolute Bar to All Claims Brought More Than Eight Years After Substantial Completion of the Construction.

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

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Id. The eight-year provision of § 15-3-640 applies to all construction claims where substantial completion occurred after July 1, 2005. There is no allegation that substantial completion of the pool occurred on or before July 1, 2005, so the eight-year provision applies in this case.

The Statute of Repose further provides that:

an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

- (1) an action to recover damages for breach of contract to construct or repair an improvement to real property;
- (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
- ...
- (4) an action to recover damages for economic or monetary loss;
- (5) an action in contract or in tort or otherwise;
- ...
- (9) an action . . . against any person . . . who performs . . . construction of an improvement to real property, or a repair to an improvement to real property.

Id.

The Statute of Repose is intended to protect contractors who construct improvements to real property from being unfairly exposed to potential liability for claims asserted many years after the construction is completed. As the Court of Appeals stated in 2011:


The purpose of the statute of repose is to provide a substantive right to developers to be free from liability after a certain time period. *See Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) (“A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation.”). Further, “[s]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which

liability no longer exists.” *Id.* at 404, 438 S.E.2d at 244.

Holly Woods Ass’n of Residence Owners v. Hiller, 392 S.C. 172, 182, 708 S.E.2d 787, 793 (Ct. App. 2011).

The time period of the Statute of Repose is not dependent on the plaintiff’s knowledge or discovery of the alleged defect. Rather, the Statute of Repose is an absolute bar to any claim more than eight years after substantial completion of the construction, regardless of the plaintiff’s knowledge or discovery of the claim. “[A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.” *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989) (internal citations omitted).

“Substantial completion” is defined as “that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended.” *Id.* § 15-3-630. The South Carolina Supreme Court has held that the Statute of Repose time period in which a plaintiff must commence an action begins to run upon the date of substantial completion, when the project becomes “subject to the forces of nature and the ‘possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair.’” *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 420, 556 S.E.2d 377, 380 (2001) (quoting extensively from preamble to Statute of Repose as set forth in 1985 Act No. 412; finding Statute of Repose began to run for window installation when the installation was substantially completed, although work continued on the project four and a half years longer).

 B. Construction of a Swimming Pool is an Improvement to Real Property.

In *S.C. Pipeline Corp. v. Long Star Steel Co.*, the South Carolina Supreme Court recognized that an “improvement to real property” is “something done or put upon land, which the occupant cannot remove or carry away with him, either because it has become physically impossible to separate it from the land or because . . . it has been annexed to the soil and is therefore considered a part of the freehold.” 345 S.C. 151, 154, 546 S.E.2d 654, 656 (2001) (quoting *Dunham v. Davis*, 232 S.C. 175, 183-84, 101 S.E.2d 278, 282 (1957)). In addition, an improvement to real property “involve[s] expenditure of labor and money, enhanced the value of [the property], and ha[s] a lengthy useful life.” *Id.*

In this case, the swimming pool at issue is an improvement to Plaintiffs’ real property for purposes of the Statute of Repose. First, the pool is “annexed to the soil” and is “physically impossible to separate . . . from the land.” *Id.* at 154, 546 S.E.2d at 656. Second, Plaintiffs allege that the pool construction cost over \$64,000. Pl.’s Compl. ¶ 3. Moreover, numerous courts have explicitly held that a swimming pool is an “improvement to real property.” *See, e.g., Luebbers v. Fort Wayne Plastics, Inc.*, 255 Va. 368, 372 (1998) (“There is no dispute that the swimming pool in question constitutes an ‘improvement to real property.’”); *Rose v. Fox Pool Corp.*, 335 Md. 351, 377 (1994) (“The [party’s] pool is a permanent addition, excavated and built into the real property, which enhances the value of the entire premises. Considering those factors, we conclude that the [party’s] swimming pool is an ‘improvement to real property.’”).

C. Plaintiffs’ Claims are Barred Because They Were Commenced More Than Eight Years After Substantial Completion of the Construction.

Plaintiffs allege that they contracted with Atlantic Pools on or around May 16, 2005 to construct the swimming pool at issue. Pl.’s Compl. ¶ 3. Plaintiffs have had the use and enjoyment of the pool since it was substantially completed in August 2005, and the time

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limitation for the Statute of Repose began to run at that time. S.C. Code Ann. § 15-3-640. Therefore, the time period in which Plaintiffs could bring a claim related to any alleged construction defect in the swimming pool expired under the Statute of Repose in August 2013—eight years after substantial completion of the pool. However, Plaintiffs did not commence this lawsuit until April 3, 2014.

Plaintiffs' assertion that an alleged express warranty overcomes their failure to commence this action until after the Statute of Repose expired fails as a matter of law. First, there is no basis for the assertion that an alleged express warranty, or work performed under an alleged express warranty, somehow extends the limitation period set forth by the Statute of Repose. Second, Plaintiffs attached the contract which they allege included an express warranty to their Complaint and incorporated its terms into the Complaint by reference. Pl.'s Compl. ¶ 3. However, on its face, the contract does not include an express warranty.

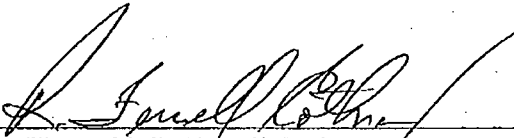
To allow Plaintiffs to benefit from the use and enjoyment of the swimming pool for almost nine years and then attempt to assert claims for alleged construction defects after such an extended period of time would violate South Carolina black letter law. Therefore, because this action was not commenced until more than eight years had elapsed, all of Plaintiffs' claims are completely time-barred by the Statute of Repose and are therefore dismissed.

CONCLUSION

For the forgoing reasons, Plaintiffs have failed to set forth causes of action upon which relief can be granted. All causes of action against Atlantic Pools related to the construction of Plaintiffs' swimming pool are time-barred under the Statute of Repose. Therefore, the Court hereby GRANTS Defendant's motion to dismiss Plaintiffs' claims under Rule 12(b)(6), SCRPC, with prejudice.

ASJ

AND IT IS SO ORDERED.



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

Manning, South Carolina

September 5, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Atlantic Pools and Water Features, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

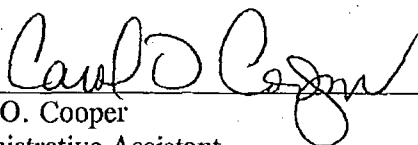
Pleadings:

Order Granting Defendant's Motion To Dismiss With Prejudice

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September 9, 2014