THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No. 2016-000464

The Sparrow Group, LLC and Bryan C. Jones..Respondent,

v.

Elizabeth Box...Appellant.

[INITIAL] BRIEF OF APPELLANT

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I. ISSUES ON APPEAL

1. In deciding a motion for summary judgment the court must view the evidence in the light most favorable to the non-moving party. Elizabeth Box purchased a home from the Sparrow Group, who represented that there had been foundation stabilization in November 2009, but withheld a report which recommended more extensive repairs. Box did not discover the report until July 11, 2012. The court weighed the evidence when it held that there was no representation that the foundation defects had been corrected and granted summary judgment based on the statute of limitations. Was this error?

2. Where an individual possesses special or superior knowledge that would affect a person's decision to purchase real property, there is a duty to disclose it. The South Carolina Residential Property Condition Disclosure Act required the seller to attach the report which recommended additional foundation repairs that were not done. Did the court err in granting summary judgment by holding that Box should have inquired about an undisclosed Ram Jack foundation report which was withheld?

3. A buyer has a right to rely on statements of pre-existing fact pertaining to the condition of property where there the seller has special or superior knowledge, which would require disclosure. Sparrow and Jones

did not inform Box about the Ram Jack report which recommended additional foundation repairs. Did the trial court err when it held Box should have inquired further?

4. "An owner who knowingly violates or fails to perform any duty prescribed by [S.C. Code § 27-50-10, et seq.] or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs." Box did not discover the Ram Jack report, which revealed previously undisclosed and recommended foundation repairs, until July 11, 2012. Did the court err in granting summary judgment based on the statute of limitations by failing to apply the discovery rule?

II. Statement of the Facts

This case concerns the purchase of a home in the New Friarsgate subdivision in Irmo, S.C., which Elizabeth Box purchased from the seller, The Sparrow Group, LLC, after a home inspection (Box Aff. ¶ 1, 2). An ordinary home inspection did not reveal any problems with the foundation of the home (Box Aff. ¶ 3). Prior to the closing, Jones provided Box with a copy of a South Carolina Residential Property Condition Disclosure Statement (Property Disclosure Statement), which led Box to believe that

the foundation had been properly stabilized, when in fact it had not been (Box Aff. ¶ 5). On July 11, 2012, after experiencing problems with her house, including increased cracking and separation of the sheetrock, she contacted Ram Jack– the same service company that apparently had performed some foundation repairs that it had recommended, but left others undone (Box Aff. ¶ 7 – 8).

Although Ram Jack had recommended repairs to areas B, C, and E of the foundation, Jones declined these services.[1] Though Jones received a copy of the prior Ram Jack report as reflected by his signature on November 12, 2009, he did not provide a copy to Box prior to closing. Had Box been given this report, she may not have purchased this home (Box Aff. ¶ 9-10). The report which Ram Jack provided to Box after she contacted them identified exactly the same areas for repair that Ram Jack had recommended to Jones. Ram Jack report dated July, 11, 2012 recommending repairs (steel piers) to areas B, C, D, and E (see Ram Jack report of July 11, 2012[2] and Box Aff. ¶ 11).

This information, material to the purchase of the home, was withheld from Box. Had she been benefited by such knowledge, she would likely not have purchased this home unless the seller agreed to make repairs prior to

[1]**Exhibit B** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.
[2]**Exhibit C** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

closing (Box Aff. ¶ 10). Moreover, Box exercised reasonable diligence by ordering home inspections which noted that the foundation was "acceptable" (Box Supp. Aff. ¶ 6).

III. Statement of the Case

The Appellant, Elizabeth Box, filed this action in the Court of Common Pleas for Richland County on July 8, 2015. The action arose out of the purchase and sale on July 3, 2010 of Box's first home. Box sued the Respondents, The Sparrow Group, LLC, a single member limited liability company, and Brian S. Jones for breach of contract, accompanied by fraud, common law fraud, and violation of the South Carolina Unfair Trade Practices Act based on the failure to disclose a report from the foundation repair company Ram Jack, which identified areas of the foundation needing repair, less than half of which Jones authorized.

The Sparrow Group and Jones moved to dismiss the case, or in the alternative for summary judgment, based on, among other grounds, the running of the three year statute of limitations. The circuit court granted summary judgment on February 5, 2016. The clerk entered the judgment on February 12, 2016. Box timely filed and served Notice of Appeal on February 29, 2016.

IV. Argument

i. The Trial Court Improperly Weighed Evidence From Which a Reasonable Inference Arose That the Foundation Had Been Stabilized or Corrected. The Withholding of the Ram Jack report, Which Recommended Additional Repairs, Invoked the Discovery Rule as to the Three Year Statute of Limitations. The Trial Court Erred in Not Applying the Discovery Rule to Deny Summary Judgment.

Plaintiff filed this action within the statute of limitations based on the discovery rule, and therefore, Defendant's Motion for Summary Judgment based on the running of the limitations period should have been denied. The court in its Order which granted summary judgment found that, "the [Property Disclosure Statement] disclosed a problem with the foundation and did not affirmatively state the foundation had been corrected" (Order Granting Summary Judgment at p. 3). This was error. The word stabilize means: to make stable, steadfast or firm.[3] A reasonable juror could construe the Property Disclosure Statement, which affirmatively stated that there had been foundation stabilization in November 2009, to have affirmatively represented that the foundation defect had been stabilized or "made firm," and therefore, corrected. Moreover, admission of "stabilization" was reiterated by opposing counsel (Tr. p.15, ll. 1-2, 8-9).

[3]http://www.merriam-webster.com/dictionary/stabilize.

The circuit court improperly weighed the evidence when it held there was no affirmative statement that the foundation defects had been corrected. If the foundation was "made firm," a reasonable buyer or juror could conclude this corrected the foundation issues. As alleged in her pleadings, Box did not discover until July 11, 2012 the fact that a prior report from the foundation repair company known as Ram Jack had been withheld from her (Complaint, ¶ 9). She filed this present action in circuit court on July, 8 2015, three days prior to the running of the three year statute of limitations as codified in S. C. Code Ann. § 15-3-530 (Supp.1988), based on the discovery rule. Upon filing of an action, the statute of limitations is tolled for a period of 120 days if the complaint has not been served within the statute of limitations as per Rule 3(a)(2), SCRCP. The complaint in this action was served on July 13, 2015 as appears from the affidavit of service filed with the court on July, 22, 2015,[4] well within the 120 day tolling period. Moreover, the statute of limitations for a breach of contract action does not commence from the date of the breach, but rather from the date the breach is discovered.

> An action for breach of contract must be brought within three years from the date the action accrues. S.C. Code Ann. § 15-3-530(1) (Supp.1997). The discovery rule determines the date of accrual for a breach of contract action. *Santee Portland Cement Co. v. Daniel Int'l*

[4]**Exhibit A** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

> *Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), *overruled on other grounds by Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div.*, 319 S.C. 556, 462 S.E.2d 858 (1995). Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. dismissed by* 288 S.C. 468, 343 S.E.2d 613 (1986), *and overruled on other grounds by Atlas Food,* 319 S.C. 556, 462 S.E.2d 858.
>
> *Maher v. Tietex Corp.*, 331 S.C. 371, 376-77, 500 S.E.2d 204, 207 (Ct. App. 1998).

The same is true for an action for breach of contract accompanied by fraudulent act. See, e.g. *Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F. Supp. 416 (D.S.C. 1995). The discovery rule also applies to actions in tort or an action on a liability, as the statute reads. It provides that an action must be brought in part:

> Within three years:
> (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520;
> (2) an action upon a liability created by statute other than a penalty or forfeiture;
> (3) an action for trespass upon or damage to real property;
>
> S.C. Code Ann. § 15-3-530

Under the discovery rule, the statute of limitations begins to run when the cause of action reasonably ought to have been discovered. *Hedgepath v. American Telephone & Telegraph Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.

App. 2001). In this case, Box had no idea that Jones had within his possession a report from Ram Jack which recommended very extensive repairs which were not completed. The report,[5] which bears Jones' signature, shows that he declined over half of the recommended repairs- precisely the same repairs which Ram Jack recommended to Ms. Box as of July 11, 2012, when Ram Jack provided her with the report given to Jones in November, 2009.[6] The Ram Jack report of November 2009 clearly shows that Jones knew the majority of necessary or recommended repairs were still incomplete. Instead of attaching the report to the S. C. Residential Property Condition Disclosure Statement (Disclosure Statement or SCRPCD), as required, Jones withheld the report.[7] The Disclosure Statement's instructions where Jones provided his explanation of "Foundation/Slab stabilization" clearly mandate that property owners provide an "explanation *and* attach any relevant professional reports" (emphasis added).[8] Moreover, the statute from which the Property Disclosure Statement arises, The Residential Property Condition Disclosure Act, holds liable any owner who knowingly discloses "false, incomplete, or misleading" information. S.C. Code Ann. § 27-50-65 (Supp.2002).

[5]**Exhibit B** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.
[6]See **Exhibit C** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.
[7]See **Exhibit D** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.
[8]Page 3 of **Exhibit D** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

Additionally, the instructions under section 2, page 1, of the disclosure form provide in pertinent part that:

> a. If you check "Yes" for any question, you must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator or other expert or public agency. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in the report as long as you were not grossly negligent in obtaining or transmitting the information.

Taken together, the instructions at pages 1 and 3 of the Disclosure Statement clearly indicate that, where owners have knowledge of reports, they must attach them. While an owner lacking knowledge of such reports is permitted to "explain" problems in accordance with the statutory mandate of S.C. Code § 27-50-65 (Supp.2002), owners with knowledge of reports must attach them to avoid providing "incomplete" or "misleading" information. Jones manifestly had knowledge of the Ram Jack report, which he himself signed on November 9, 2009, but withheld it from the Disclosure Statement.

The 2009 Ram Jack report did not resurface until Ram Jack provided Box a copy after she contacted them about problems with her home in July 2012. This is when she discovered the fraud and the breach of contract. Because the discovery rule applies to all claims Box asserted, and because she filed within the statute of limitations given the tolling period of 120 days from the filing of the action, the court should have denied the

summary judgment motion. A genuine issue of material fact existed- that is whether it was it fraud or a breach of contract accompanied by fraud to conceal the Ram Jack report, which was not discovered until July 11, 2012. The grant of summary judgment should be reversed on these grounds.

ii. An Individual Who Possesses Special or Superior Knowledge That Would Affect a Person's Decision to Purchase Real Property Has a Duty to Disclose Such Information. The South Carolina Residential Property Condition Disclosure Act Required the Seller to Attach the Report Which Recommended Additional Foundation Repairs That Were Not Done. The Trial Court Erred in Requiring Further Inquiry by the Buyer.

As pled in the complaint Jones and Sparrow had pre-existing knowledge that extensive repairs had been recommended by Ram Jack according to the November 9 proposal which recommended steel piers be added to the foundation in areas B, C and E, which Jones declined. In the Disclosure Statement he gave, Jones did not attach this report and affirmatively represented that the foundation had been stabilized.[9]

Where one party possesses superior knowledge than the other party with respect to a transaction, the person with lesser knowledge, or means of knowledge, has a right to rely on the representations of the one who possesses special information. *Giles v. Lanford and Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985). The court in Giles noted:

[9]Page 3 of **Exhibit D** in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

> Whether or not reliance upon a representation in a particular case is justifiable or excusable, what constitutes reasonable prudence and diligence with respect to such reliance, and what conduct constitutes a reckless or conscious failure to exercise such prudence, **will depend upon the various circumstances involved,** such as the form and materialty [sic] of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, **and the relation and respective knowledge and means of knowledge of the parties**, citing *Thomas v. American Workmen,* 197 S.C. 178, 182, 14 S.E.2d 886, 888, 136 A.L.R. 1, 4 (1941). (emphasis added)
>
> *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 289, 328 S.E.2d 916, 918 (Ct. App. 1985).

Here, Box was at a distinct disadvantage and did not possess equal knowledge or information about the past Ram Jack report withheld from her, while Jones had special or superior knowledge in relation to Box about what repairs had been recommended to the foundation. Under these circumstances, Box had right to rely. "Where a party to a transaction conceals some material fact within his own knowledge, which is his duty to disclose he is guilty of actual fraud." *Aiken County v. BSP Div. of Envirotech Corp.*, 886 F. Supp. 2d 661 (D.S.C. 1989), citing *Lawson v. Citizens & Southern National Bank of South Carolina,* 259 S.C. 477, 193 S.E.2d 124, 126 (1972).

There is no question here that Jones had a duty to disclose this information according to the SCRPCD Act, as well as by common law, because of his relationship with Box as a prospective purchaser of this

home and his superior knowledge of additional repair recommendations never completed. See, e.g. *Aiken County v. BSP Div. of Envirotech Corp.*, *supra* (affirming verdict of fraud in connection with false representations made concerning the testing of a sludge system designed to separate sludge from water so that cleansed water could be discharged into the Savannah River upon proof that the system in fact had not been tested, which was not disclosed).

The trial court here erred in finding that Box had a further duty of inquiry, especially since she had in fact inquired via an independent home inspection revealing no foundation deficiencies. Indeed the foundation was found to be acceptable.[10]

While it is true that there is no right to rely upon a representation between educated people who are negotiating *at arm's length and on equal footing*, it is equally true that, where one party has knowledge superior to the other, there is a corresponding right to rely upon the one who has superior knowledge and means of knowledge but does not disclose it. See, e.g. *Florentine v. Peda I., Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985); *Giles v. Lanford and Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985).

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[10]See **Exhibit 1** p. 6 in Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss.

The case of *Byrn v. Walker*, 275 S.C. 83, 88, 267 S.E.2d 601, 603-04 (1980) is precisely on point with regard to the right to rely where one party holds special or superior knowledge and the parties are not on equal footing.

As to the reliance element of fraud:

> It is generally held that one has no right to rely on representations as to the condition, quality or character of property . . . where the parties stand on an equal footing and have equal means of knowing the truth. The contrary is true, however, **where the parties do not have equal knowledge and he to whom the representations are made** has no opportunity to examine the property, or by fraud is prevented from making an examination, **or where an ordinary inspection would not have disclosed the condition with respect to which the representation was made**. 37 Am.Jur.2d, 363, Fraud and Deceit, Section 273.
>
> Applying the aforementioned, we hold that where, as here, the agent asserts special knowledge of the property and makes representations of facts, the truth of which are not reasonably ascertainable by the purchaser due to their latent nature, the purchaser can justifiably rely on those representations.

Byrn v. Walker, 275 S.C. 83, 88, 267 S.E.2d 601, 603-04 (1980).

Under these facts, there is undisputed and direct evidence that Sparrow and Jones knew that Ram Jack had recommended extensive repairs to the foundation that were knowingly declined but not disclosed to the plaintiff, Box. In oral argument before the trial court, the judge inquired as to whether Jones and Sparrow had disclosed the defect. Jones did not

disclose the defect, and to the contrary, Jones represented that the defect with the foundation had in fact been stabilized.

Fraud can be active concealment of the truth and nondisclosure may serve as the representation in a number of ways. For example, if the defendant chooses to speak, he or she must disclose enough of what they know to prevent their words from being misleading. *Giles* v. *Lanford*, *supra*; and *Aiken County v. BSP Division of Envirotech Corp.*, 657 F. Supp. 1339 (D.S.C 1986). And fraud is not limited to oral or written words, but may be the exhibition or withholding of a document. See *Farmers' Bank of McCormick v. Talbert*, 97 S.C. 74, 81 S.E. 305 (1914) (sustaining a finding of fraud in the defendant's obtaining credit of $500 on a draft attached to a bill of lading for cotton worth less than $300).

A half-truth told as the whole truth is an untruth. At least half of the necessary or recommended repairs were left undisclosed on the statement offered by Sparrow. This is manifestly gross fraud. Not only did Box have a common law right to rely upon Jones and Sparrow, who had superior knowledge, she had a statutory right to rely on the disclosure statement required by The Residential Property Condition Disclosure Act. The Act provides that:

> An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any

> material information on the disclosure statement that he knows to be **false, incomplete, or misleading** is liable for actual damages proximately caused to the purchaser and court costs. The court may award reasonable attorney fees incurred by the prevailing party. (emphasis added)
>
> S.C. Code Ann. § 27-50-65 (Supp.2002).

There would be no actionable relief under this proviso if there were no right to rely upon the disclosure statement. While Box had a statutory obligation to inspect under §27-50-80, she complied with this obligation and the ordinary inspection noted the foundation to be acceptable.[11] Home Inspection report. Again, the trial court erred in holding that Box had a further duty of inquiry, which is tantamount to holding she had no right to rely at all.

iii. "An Owner Who Knowingly Violates or Fails to Perform Any Duty Prescribed by [S.C. Code § 27-50-10, et seq.] or Who Discloses Any Material Information on the Disclosure Statement That He Knows to Be False, Incomplete, or Misleading is Liable for Actual Damages Proximately Caused to the Purchaser and Court Costs." Box Did Not Discover the Ram Jack Report, Which Revealed Previously Undisclosed and Recommended Foundation repairs, Until July 11, 2012. Therefore, the Circuit Court Erred in Granting Summary Judgment Based on the Statute of Limitations.

[11]See **Exhibit 1** p. 6 in Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss. This foundation is not of the common "brick curtain wall" type. Thus, while the "Foundation" is listed as "not inspected" (NI) on page 6 of the inspection report, the relevant descriptor on page 6, "Floor/Slab," is marked "acceptable" (A).

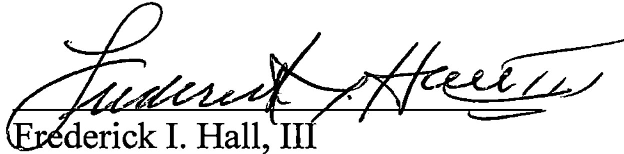
Box alleged in her complaint a violation of the statutory obligations under the South Carolina Residential Property Condition Disclosure Act for Sparrow's and Jones' failure to disclose or provide complete information (Complaint ¶ 30). Specifically, she alleged that Sparrow had made a false and misleading statement about the condition of the property and the foundation's stabilization. She also alleged that the Ram Jack report had been withheld which, had it been given initially, would likely have dissuaded her from purchasing the property.

Sparrow and Jones had apparently painted over prior cracks and calked to cover up hidden defects which might have led to the discovery of additional need for repair (Box Supp. Aff. ¶ 3). This statutory cause of action is also subject to the three year statute of limitations and the discovery rule, as set forth above in S.C. Code § 15-3-530 (2), which provides a three year statute of limitations for a liability created by statute.

V. Conclusion

Because Box had a right to receive the report as complete information and did not discover it was unlawfully withheld by Jones and Sparrow until July 11, 2012, the circuit court erred in granting

summary judgment based on the statute of limitations and its decision should be reversed.

BY: 

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