STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	FOURTEENTH JUDICIAL CIRCUIT
	CASE NO.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	
Plaintiffs,	
vs.	**ORDER GRANTING DEFENDANTS J.K. COWARD, JR. AND COWARD, HICKS & SILER, P.A.'S MOTION FOR SUMMARY JUDGMENT**
BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.	
Defendants.	

This matter comes before the Court on Defendants J.K. Coward, Jr. and Coward, Hicks & Siler, P.A.'s motion for summary judgment. A hearing was held on June 13, 2016. Defendants submitted a supporting memorandum and exhibits prior to the hearing. The Court subsequently reviewed a response memorandum and exhibits submitted by Plaintiffs, and Defendants' reply memorandum. For the reasons stated herein, the Court grants Defendants' motion.

Introduction

This lawsuit arises out of Plaintiffs William and Leslie Loflin's purchase of an undeveloped lot in Jackson County, North Carolina in 2002. The Loflins have asserted a variety of claims against the developer/seller, the title insurer, the title agency, and the closing attorney and his law firm. All of the claims stem from a dispute over the size and configuration of the lot they purchased. Defendant J.K. Coward, Jr. is an attorney in Sylva, North Carolina who represented the Loflins in their purchase of the lot in 2002. His firm, Defendant Coward, Hicks & Siler, P.A., subsequently handled two refinance closings for the Loflins in 2004 and 2006.

The lot that is the subject of this lawsuit is Lot 108 in Balsam Mountain Preserve. The Loflins contracted to purchase Lot 108 with the understanding that it consisted of approximately

1.9 acres as shown on a plat prepared for the developer/seller. Defendant J.K. Coward represented the Loflins in the closing on February 15, 2002. In that closing, the Loflins received title to Lot 108 consisting of 1.837 acres as shown in a plat recorded at the same time as their deed (the "Recorded Plat").

Four years later, in 2006, the Loflins were approached by the developer/seller, who claimed that Lot 108 was not 1.837 acres as shown in the Recorded Plat, but was actually 1.4 acres, and that a road shown in the Recorded Plat as bordering their lot actually encroached onto their property. The Loflins were shown another unrecorded plat depicting what the developer represented to be the actual size and configuration of Lot 108 (the "Unrecorded Plat"). The developer asked the Loflins to sign a quit claim deed to make their title consistent with the lot shown in the Unrecorded Plat. The Loflins refused, and the ensuing dispute between the Loflins and the developer/seller is what ultimately gave rise to this litigation.

In March of 2012, the Loflins made a claim under their title insurance policy. Chicago Title denied the claim, finding that the Loflins held title to Lot 108 as depicted in the Recorded Plat, and that the Unrecorded Plat did not create a title defect. In July 2013, the Loflins filed this lawsuit against the developer/seller, Chicago Title, and Counsellor Title, asserting claims for trespass, encroachment, and breach of contract.

In January 2015, the Loflins amended their complaint to assert claims against J.K. Coward, Jr. and Coward, Hicks & Siler, P.A. The Loflins' claims against the Coward Defendants were brought based on their belief that the Coward Defendants knew about the Unrecorded Plat when they closed in 2002 and when they refinanced in 2004 and 2006, but failed to disclose it to the Loflins. It has since been shown in discovery and is undisputed that Coward Defendants first learned about the existence of the Unrecorded Plat after this lawsuit was filed.

The Coward Defendants filed the instant motion on April 5, 2016 asserting, *inter alia*, that the Loflins' claims are barred by North Carolina's four-year statute of repose and South Carolina's three-year statute of limitations.

Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (1988).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991). "Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." Id. (internal citations and quotations omitted).

Findings and Conclusions

I. North Carolina's statute of repose

The Coward Defendants have asserted that the claims against them are barred by North Carolina's four-year statute of repose, which runs from "the last act of the defendant giving rise

to the cause of action" N.C. Gen. Stat. § 1–15(c) (2013) ("in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action.").

A. Choice of law

The Court must first determine whether North Carolina law applies. The application of North Carolina law and this statute of repose in particular was the subject of a recent decision by the South Carolina Court of Appeals. In Rogers v. Lee, 414 S.C. 225, 777 S.E.2d 402, 405 (Ct. App. 2015), the court held that claims against an attorney and his law firm arising out of the attorney's representation of his client in a North Carolina workers' compensation proceeding were governed by North Carolina law, notwithstanding that the client resided in South Carolina and felt the consequences of the alleged conduct in South Carolina. The Rogers court applied the long-standing principle of *lex loci delicti* and found that because the injury occurred in North Carolina, North Carolina law governed.

The Coward Defendants are a North Carolina attorney and his North Carolina law firm. They are being sued by the Loflins for alleged acts and omissions that occurred in North Carolina in the course of representing the Loflins in their purchase and refinancing of real property in North Carolina. The Court finds that the alleged wrongful conduct on the part of the Coward Defendants and any resulting injury sustained by the Loflins occurred in North Carolina, and therefore, North Carolina law governs. As the Rogers court observed, to hold otherwise would subject South Carolina attorneys representing out-of-state clients in South Carolina matters to the laws of another jurisdiction simply by virtue of the client's residence. Id. at 407 n. 2.

The Loflins' attempts to distinguish Rogers are unavailing. The Rogers court did not resolve the choice of law dispute by weighing the connections with the respective states as a court might do if applying some other choice of law test. Nor did the holding in Rogers turn on the presence of a choice of law provision. Although the Rogers court separately addressed the impact of a choice of law provision, the court held that North Carolina law applied because the injury occurred in North Carolina. To read Rogers in such a way would require departing from South Carolina's long-standing principle of *lex loci delicti*.

The Court finds that the Loflins' claims against the Coward Defendants are governed by the substantive law of North Carolina, including North Carolina's four-year statute of repose.

B. Application of North Carolina's statute of repose

The Loflins first asserted claims against the Coward Defendants in their Second Amended Complaint filed on January 6, 2015. To be timely under North Carolina's statute of repose, the last act giving rise to the claims must have occurred no earlier than January 6, 2011. N.C. Gen. Stat. § 1–15(c) (2013) ("... in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action.").

The Loflins' claims against the Coward Defendant arise out of a real estate closing that occurred on February 15, 2002. The Coward Defendants subsequently represented the Loflins in refinancing their loan on the property in 2004 and 2006, the last of which occurred on April 28, 2006. It is undisputed that the Coward Defendants have not represented the Loflins in connection with any other matters and they have not provided any legal advice to the Loflins in the four years preceding the Second Amended Complaint.

The Loflins argue that by previously representing them, the Coward Defendants became obligated to assist the Loflins in all future issues arising from the transaction, and their failure to

do so constitutes some "act" within the four years preceding the Second Amended Complaint. The Loflins' argument amounts to what would be a continuing duty arising out of a real estate transaction that, if correct, would render the statute of repose meaningless. North Carolina courts have considered what constitutes "the last act of the defendant giving rise to the cause of action" and rejected this very proposition.

In Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735, 737-38 (Ct. App. 1997), the plaintiffs filed a legal malpractice suit in 1995 arising out of a 1980 closing. To avoid the four-year statute of repose, the plaintiffs argued that the last act for purposes of the statute was the attorney's alleged failure and refusal to correct the error in 1992 when the attorney filed an allegedly false affidavit. The court rejected this argument, and instead held that the last act that triggered the statute was the drafting and delivery of the deeds in 1980. Id. The court found that the "defendant's legal duty to the grantor ended upon the drafting and delivery of the deeds" Id. at 739. The court observed that accepting the plaintiffs' argument "would forever stay the applicable statutes of limitations and repose for actions involving errors in deeds . . . ." Id. at 739.

The Loflins' claims against the Coward Defendants arise out of closings that occurred in 2002, 2004 and 2006. The Court finds that the last act giving rise to their claims occurred more than four years prior to January 5, 2015. Accordingly, their claims against the Coward Defendants are barred by North Carolina's four-year statute of repose.

II. South Carolina's three-year statute of limitations.

The Coward Defendants have also moved for summary judgment based on the expiration of South Carolina's statute of limitations. All of the Loflins' claims against the Coward Defendants are subject to a three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(5) (2005). The statute of limitations is subject to the discovery rule, which requires commencement

of an action "within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005).

"Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." Cline v. JE Faulkner Homes, Inc., 359 S.C. 367, 597 S.E.2d 27, 29 (Ct. App. 2004) (*citing* Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36, 40 (1987). "Under this objective test, one is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist." Id. (*citing* Austin v. Conway Hosp., Inc., 292 S.C. 334, 356 S.E.2d 153, 156 (Ct. App. 1987).

The Loflins' pleadings demonstrate that they have known, since 2006, that a dispute exists over the size and configuration of Lot 108. Specifically, the Loflins allege that beginning in 2006, they were aware of the developer/seller's claim about the size and configuration of the lot, they were aware of the alleged road encroachment, they were aware of the Unrecorded Plat, and they knew that the developer/seller refused to remedy the problem. *See* Third Am. Compl. ¶ 20. The Loflins knew or objectively should have known at that point that a claim might exist.

The Loflins do not dispute that they were on notice of claims against the developer/seller beginning in 2006, but they argue that the statute of limitations did not begin running on their claims against other defendants in this lawsuit until 2012. However, "under South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations." Cline, 597 S.E.2d at 29.

The focus of the discovery rule is "the date of discovery of the injury, not the date of discovery of the wrongdoer." Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169, 170 (1994).

The injury that the Loflins complain of in this lawsuit is the same injury arising out of the same dispute that the Loflins have had actual knowledge of since 2006. The statute of limitations began running at that point for all of the Loflins' claims. *See* id. ("If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.").

The Loflins did not file suit against the Coward Defendants until January 6, 2015, almost nine years after they knew or objectively should have known that the claims might exist. The Court finds that their claims against the Coward Defendants are barred by South Carolina's three-year statute of limitations.

Conclusion

Based on the foregoing, the Coward Defendants are entitled to judgment as a matter of law as to each cause of action against them.

Accordingly, Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

This 15 day of August, 2016

C Mullen

Carmen T. Mullen
Circuit Court Judge

Beaufort, South Carolina