

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Judge

Case No. 2015-CP-38-01199
Appellate Case No. 2017-000618

James E. Hensley

Appellant

Giles Home, LLC f/k/a Giles Industries of Tazewell, Inc

Respondent

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT ON MATTERS NOT RAISED BY ITS MOTION FOR SUMMARY JUDGEMENT?

II. DID THE TRIAL COURT ERR IN ITS INTERPRETATION OF SOUTH CAROLINA CODE SECTION 15-3-670, AS AMENDED TO REQUIRE THE PLAINTIFF TO MAKE A PRIMA FACIE SHOWING OF THE DEFECTIVE CONDITION OF THE DEFENDANTS CONSTRUCTION OF HIS HOME BEYOND THE ALLEGATION OF THE RECKLESSNESS IN ITS CONSTRUCTION CONTAINED IN HIS COMPLAINT SINCE THE DEFENDANT DID NOT RAISE THE QUALITY OF ITS CONSTRUCTION AS AN ISSUE?

STATEMENT OF THE CASE

On October 13, 2015 the Plaintiff brought this action against the Defendant because the modular home manufactured by the Defendant in 2006 and purchased by the Plaintiff in December of 2006 was uninhabitable because of significant water damage and mold caused by rain water.

The Plaintiff among other allegations alleged that the Defendant's construction of the home was negligent, careless, reckless, willful and wanton in the following particulars:

- A. In failing to adequately supervise the work and construction of the residence.
- B. In constructing the subject residence in violation of applicable building codes standard building practices and accepted construction industry standards and practices.
- C. In failing and neglecting to properly and reasonably construct the home to prevent and eliminate water and moisture from intrusion into the home.
- D. In constructing the home in such a manner that water entered into the walls, floors and joist of the home.
- E. And other deficiencies or failures as will be proved at trial.

See Plaintiff's Complaint pages 2 and 3.

The Defendant raised as one of its defenses code section 15-3-640 of the South Carolina Code of Laws which had been amended in 2006 to reduce the time a homeowner had to raise construction defects from thirteen years to eight years.

Following limited discovery the Defendant then filed its Motion for Summary Judgment based solely on its defense of the statute of limitations found at section 15-3-640 of the Code of Laws.

By Order dated July 27, 2016 the trial Court granted the Defendant's Motion but not on the statute of limitations defense raised by the Defendant but on the Plaintiff's failure to submit any evidence to substantiate his claim that South Carolina Code Section 15-3-670 was applicable in this matter even though the Defendant did not raise the quality of its construction of the home as an issue and submitted no evidence by affidavit or deposition testimony as to the quality of its construction of the Plaintiff's home. See Defendant's Motion for Summary Judgment with supporting documents.

The trial Court affirmed its decision in its Order dated November 28, 2016 denying the Plaintiff's Motion for reconsideration. The parties were not given Notice of the trial Court's decision on the Plaintiff's Motion for reconsideration until March 1, 2017. The Plaintiff filed and served his Notice of Appeal on the Defendant on March 10, 2017.

STATEMENT OF FACTS

The Plaintiff purchased a 2007 Gile Mobile Home from CMH Homes, Inc. doing business as Oakwood Homes, on December 1, 2006 for a total sales price of \$102,650.40. Included in the material provided to the Plaintiff by the dealer was the Home Owner's Manual provided by the manufacturer of the home, Giles Industries of Tazewell, Inc. now known as Giles Homes, LLC, a Tennessee Corporation which had been and remains licensed by the State of South Carolina to sell its products in the State of South Carolina.

After the purchase of the home by the Plaintiff, the home was moved onto and set up on the Plaintiff's property. The home was purchased by the Plaintiff as his only residence and was used for that purpose until it became uninhabitable in 2015.

After moving into the home the Plaintiff noticed that when it rained the water appeared to enter the walls of the home and over a few years the floors of the home became weakened, also by rain water. The Plaintiff and his wife repeatedly contacted the manufacturer over the years, up to and including shortly before seeking assistance of counsel, to tell them about the mounting problems they were having with the house as it continued to deteriorate.

The Defendant's representatives have always acknowledged the Defendant built the home and spoke kindly to the Plaintiff and/or his wife up until December of 2015. But never took any action to remedy the complaints the Plaintiff had about the construction of his home.

Finally, in or about the spring of 2015 the Plaintiff determined that because of the damage caused to the home by the rain water and the mold that had developed in the home, because of the moisture, the home was unsafe and therefore, he and his wife could no longer live in the home and moved out of the home. They are now renting a home.

ARGUMENT

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT ON MATTERS NOT RAISED BY ITS MOTION FOR SUMMARY JUDGEMENT?

The Defendant manufactured the modular home purchased by the Plaintiff in 2006 for the 2007 sales year. The Plaintiff purchased the home in December of 2006. See Plaintiff complaint at page 1. Following the Plaintiff's purchase of the home, the Plaintiff noticed that the walls, floors and joints of the home would retain water when it rained. The Plaintiff raised these concerns of water retention transitioning to water damage with the Defendant continuously from within a year or two of the home's purchase through and including 2015. The Defendant's agents while listening to the complaints of the Plaintiff took no action to correct the defects in the home complained of by the Plaintiff.

In 2015 the Plaintiff and his wife determined that the house was no longer habitable because of the deteriorated condition of the home and the mold that had developed in the home as a result of the water damage caused by the poor quality of the construction of the home. The home failed to properly drain rain water. See Plaintiff's complaint at page 3.

The Plaintiff filed this action in October of 2015 and among several allegations alleged that the defendant had constructed the home in a negligent, careless, reckless and wanton manner listing several particulars of negligence on the part of the Defendant in its construction of the home and alleging that these areas of negligent and reckless construction were the direct and proximate cause of the damages suffered by the Plaintiff. See Plaintiff's Complaint at pages 2 and 3.

The Defendant raised three affirmative defenses to the Plaintiff's Complaint neither of which alleged that the Defendant's construction of the home was not negligent or that their construction of the home was not the proximate cause of the damage suffered by the Plaintiff. Instead, the Defendant alleged that the Plaintiff's Complaint failed to state a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure See Defendant's Answer at Page 2.

In addition the Defendant alleged that the controversy between the parties is subject to arbitration. See Defendant's answer at page 3. Finally the Defendant alleged that the Plaintiff's action was barred by the statute of limitations. See the Defendant's Answer at Page 3.

The Defendant filed its motion for Summary Judgment pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure. The Defendant's Motion for Summary Judgment was based solely on the statute of limitation contained in section 15-3-640 of the South Carolina Code of laws. The only documents which were filed with the Defendant's motion were the documents confirming the dates of purchase of the home by the Plaintiff and the date the home was placed upon the Plaintiff's property. See the Defendant's motion for Summary judgment with accompanying documents.

Section 15-3-640 of the South Carolina Code of Laws was amended in June of 2006 and reduced the time a land owner had to bring an action against a person or entity which performed construction on his or her property from thirteen years to eight years.

"No action 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. For purposes of this section, 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 a 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;
- (3) an action to recover damages for personal injury, death or damage to property;
- (4) an action to recover damages for economic or monetary loss;
- (5) an action in contract or in tort or otherwise;
- (6) an action for contribution or indemnification for damages sustained on account of an action described in this section;
- (7) an action against a surety or guarantor of a defendant described in this section;
- (8) an action brought against any current or prior owner of the real property or improvement, or against any person who develops real property, or who performs or furnishes the design, plans specifications, surveying, planning, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property."

There was nothing in the Defendant's Motion which brought the quality of the Defendant's construction of the Plaintiff's home into question before the Court. The Defendant never filed or served any affidavits with its motion which claimed anything about the quality of its work, relying instead upon the bar contained in subpart two of the statute.

The defense of the applicability of a limitation statute is a legal question which must be answered by the Court. Indeed our Supreme Court in the cases of Langle v. Pierce, 313 S.C. 401, 404, 438 S.E. 2d 242, 243 (1993) said the following

"...A statute of repose creates a substantive right in those protected to be free from liability after a legislative determined period of time"

Further, our Supreme Court quoted from the case of First United Methodist Church v. U.S. Gypsum Co., 882 F. 2d 862, 866 (4th Cir 1989), the following

"...[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..."

Both of these cases were cited by the South Carolina Court of Appeals in its decision in the case of Virginia L. Marshall and Todd W. Marshall v. Kenneth a. Dodd, M.D., ect. Al .417 SC, 196. Advance Sheets Opinion Number 5403 at page 58 filed May 4, 2016.

Thus, the only question raised by the Defendant in its Motion for Summary Judgment was a legal question of the operation of the Statute of limitations contained in 15-3-640(2) in this case. The Defendant has the burden of raising all issues it wishes the Court to consider in a Motion for Summary Judgment. The Plaintiff must then respond to the issues raised by the Defendant. The Plaintiff raised as a defense to this legal question Section 15-3-670 of the South Carolina code of laws.

In the case of Davis v. Dunbay, 316 S.C. 263, 265, 449 SE 2d 495, 496 (1994) our Supreme Court said the following:

"In deciding a Rule 56 Motion, the Court must view the facts and inferences therefrom in the light most favorable to the nonmoving party."

See also Knight v. Austin 396 S.C. 518, 722 SE2d 802 S.C. 2012.

Additionally, the South Carolina Supreme Court in the case of Holmes v. East Cooper Community Hospital Inc., 408 S.C. 138, 758 SE 2D 483 said the following:

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law and should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts."

In this case the Defendant never raised any allegations concerning the quality of its construction of the Plaintiff's home nor did it raise the sufficiency of the Plaintiff's pleading as to the question of gross negligence before the hearing. See transcript at page 4 lines 4 through 24 and page 7 lines 6 through 20.

The Plaintiff objected to these arguments based on the failure of the Defendant to give notice to the Plaintiff in its Motion of these positions as required by Rule 56(c) of the South Carolina Code of Laws. See transcript page 7 lines 21 through 25 and page 8 lines 1 through 8 and lines 12 through 14.

Rule 56(c) states the following:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission 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. A summary judgment, interlocutory in character, may be rendered on issue of liability alone although there is a genuine issue as to the amount of damages."

In this case the Defendant was allowed to raise matters for the very first time at the Summary Judgment hearing and instead of looking at the four corners of the Defendant's Motion the trial Court accepted these arguments and then required the Plaintiff to respond to matters not pled by the Defendant's motion. To add insult to injury the Court obviously presumed the Defendant's construction of the Plaintiff's home was such that grossly negligent or reckless construction as set forth in Section 15-3-670 was required to be proved by affidavit by the Plaintiff in responding to these arguments. Again, no affidavits or deposition testimony supported the Defendant's arguments. The Court then shifted the burden on factual questions not before the Court and ruled that the Plaintiff must present affidavits when the Defendant presented no such affidavits to support its improper arguments.

The Court then adds insult to injury to the Plaintiff by its orders which states that the Plaintiff failed to make a prima facie showing of the defective condition of the Defendant's construction of the Plaintiff's home when the Defendant has presented absolutely no evidence of the quality of its construction and that issue is not even raised by the Defendant except at the

hearing in argument for the first time. Thus, the trial Court in this case reversed the standard a Court must follow in ruling on a Motion for Summary Judgment which requires that all evidence and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. See Davis v. Dunbary (supra)

In this case the Court viewed all arguments of the Defendant and all inferences drawn from those argument in the light most favorable to the Defendant. We cannot say evidence since the Defendant did not submit any evidence only argument to the Court.

II. DID THE TRIAL COURT ERR IN ITS INTERPRETATION OF SOUTH CAROLINA CODE SECTION 15-3-670, AS AMENDED TO REQUIRE THE PLAINTIFF TO MAKE A PRIMA FACIE SHOWING OF THE DEFECTIVE CONDITION OF THE DEFENDANTS CONSTRUCTION OF HIS HOME BEYOND THE ALLEGATION OF THE RECKLESSNESS IN ITS CONSTRUCTION CONTAINED IN HIS COMPLAINT SINCE THE DEFENDANT DID NOT RAISE THE QUALITY OF ITS CONSTRUCTION AS AN ISSUE.

Section 15-3-670 in pertinent part states the following

"The limitations provided by sections 15-3-640 and 15-3-660 are not available as a defense to any person guilty of fraud, gross negligence, or recklessness in providing components, in furnishing materials, in developing real property, in performing or furnishing the designs, plans specifications surveying, planning, supervisions, testing or observations of construction, construction of, or land surveying in connection with such an improvement, or to any person who conceals any such cause of action."

The Plaintiff in response to the Defendant's claim of the applicability of the limitation contained in section 15-3-640 of the South Carolina Code of Laws raised this code section as his defense to the Summary Judgment motion of the Defendant. See transcript page 5 lines 13 through 22.

The Court in this case did not apply section 15-3-670. It obviously ruled that this section, even when not put in issue by the Movant, requires some prima facie showing on the part of the non moving party to prove negligent or reckless construction. This requirement by the Court is inconsistent with the clear, unambiguous language of the section.

Our Courts have ruled that under Rule 56(c) of the South Carolina Rules of Civil Procedure that the party seeking summary judgment has the initial burden of demonstrating the

absence of genuine issue of material fact see George v. Empire Fire and Marine Ins. Co. 344 S.C. 582, 592, 545 SE 2d. 500, 505 (2001). In this case the only factual issue raised by the Defendant's summary judgment motion was the applicability of the statute of limitation found at section 15-3-640 of the South Carolina Code of Laws. Therefore, the date of purchase and the date the Plaintiff's home was set up on his property.

The response of section 15-3-670 should have been the end of the Defendant's summary judgment motion with the Motion being denied.

However, because this was not the path followed by the Court below and the Court in its decision in this case did not explain its interpretation of section 15-3-670. We are left to speculate as to that interpretation.

In the case of Kirven v. Central States Health and Life Co., of Omaha 409 S.C. 30, 38, 760 S.E.2D 794, 798 (2014) citing Grier v. Amisub of S.C. Inc. 397, S.C. 532, 535, 725 S.E.2d 693, 695 (2012) said the following

"It is well established that [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."

The Supreme Court also said in the case of Wade v. Berkley County, 339 S.C 513, 525, 529 S.E.2d 743, 749 (2000) said the following

"When construing a statute, the primary function of the court is to ascertain the intention of the legislative.... A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."

The Court goes on to say the following.

"If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing Rules of statutory interpretation and the Court has no right to impose another meaning."

In this case the Plaintiff pled that the Defendant was grossly negligent in its construction of the Plaintiff's home and that negligence was the proximate cause of the damages suffered by the Plaintiff. The Defendant in its Motion for Summary Judgment did not contest these allegations by affidavit or any other manner other than its counsel's arguments. See transcript page 4 lines 4 through 24. Thus, under the Rules of Summary Judgment the only reasonable inference to be drawn would have been the allegations in the Plaintiff's Complaint are true since nothing submitted by the Defendant brings these allegations into question.

The South Carolina Court of Appeals cites Georgia-Carolina Bail Bonds, Inc v. City of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003) for the following:

"Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statutes operations."

Also cited Sloan v. Hardee, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007)

The words of section 15-3-670 are clear they say:

"The limitations provided by sections 15-3-640 and 15-3-660 are not available as a defense to any person guilty of fraud, gross negligence or recklessness...construction of , or land surveying in connection with such improvement...".

In the case of Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 and 368 (1991) our Supreme Court Said the following:

"In determining whether summary judgment is appropriate, a court must not try issues of fact, but must discern whether genuine issues of fact exist to be tried. Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972). If triable issues exist, those issues must go to the jury. Id. In making its determination, the court must view the evidence in the light most favorable to the party opposing the motion. Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law."

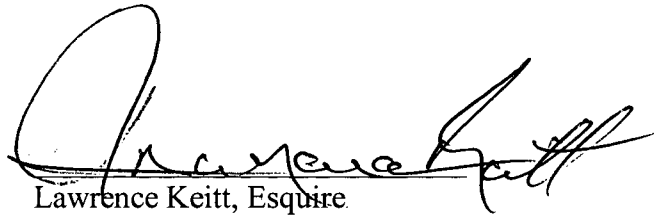
In this case it is clear that the Court tried the case without a jury or evidence and rule it preferred the Defendant's argument over the law.

CONCLUSION

In this case the Court below allowed the Defendant to argue matters not raised by its Motion and failed to properly apply the Rules of Summary Judgment and Section 15-3-670 of the South Carolina Code of Laws. Because of these failures the Court's decision should be reversed.

Respectfully Submitted

LAW OFFICE OF LAWRENCE KEITT

A handwritten signature in black ink, appearing to read "Lawrence Keitt", written over a horizontal line.

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