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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-296 (S.C. Ct. App. Filed July 19, 2017)
Appellate Case No. 2017-002133

Rivergate Homeowners' Association, Petitioner

v.

WW&LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction, William C. DeSouza, individually, James Eason individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferino, individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometrics, Inc., Eric Yazwinski, Law Engineering, Inc., D & M

Builders, Inc., Hill Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, Defendants,

Of Whom

Speedee Concrete, Inc. and Chuck's Construction, Inc. are the Respondents,

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc., Third-Party Defendants,

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc., Defendants

Of Whom
AB Consulting Engineers, LLC, Inc. is the Respondent.

RETURN OF RESPONDENT SPEEDEE CONCRETE, INC. TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES

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2. AS AN ADDITIONAL OR COUNTER ISSUE, WHETHER THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS?

COUNTER STATEMENT OF THE CASE

Robert Sanger, a homeowner at Rivergate, filed a complaint on January 12, 2007, which contained allegations regarding the design and construction of Rivergate. (Sanger Complaint) Notably, the complaint included allegations regarding improper driveway slopes and drainage issues. Id. Speedee Concrete, Inc. (incorrectly named Speedy Concrete) was not named as a defendant in that lawsuit. Id. Sanger then filed an Amended Complaint on April 20, 2008 where he named additional subcontractors and design professionals as defendants. (Sanger Amended Complaint). Speedee Concrete, again, was not named as a defendant. Id.

On June 13, 2008, the Appellant filed a complaint against various subcontractors alleging construction defects similar to those alleged in the Sanger lawsuit, including allegations regarding the sidewalks, driveways and drainage system. (Complaint). Speedee Concrete was not named as a defendant in that action. Id.

On March 21, 2009, Appellant filed a First Amended Complaint, and Speedee Concrete was again not named as a defendant. (First Amended Complaint). On March 31, 2009, the Sanger case and the Appellant's case were consolidated. (Order filed March 31, 2009). The case was stricken pursuant to Rule 40(j) of the South Carolina

Rules of Civil Procedure on August 18, 2009. (Order dated August 18, 2009). When the case was restored on April 28, 2010, the Appellant filed a Second Amended Complaint, which named Speedy Concrete (sic) as a defendant for the first time. (Second Amended Complaint). The Second Amended Complaint contained the same allegations regarding the driveways and drainage that were set forth in the Appellant and Sanger's prior Complaints. Id. Speedee Concrete then filed an Answer and asserted various defenses, including the statute of limitations as a defense. (Speedee Answer).

STATEMENT OF FACTS

The Rivergate subdivision is located in Little River, South Carolina. The developer, WW&LB Development Company, LLC, was a company owned by Wayne Winderman and Luther Bellamy. (Bellamy Dep. 25). Winderman hired AB Consulting to prepare plans and specifications for the site work, including the grading and stormwater management plans. (Drucker Dep. Ex. 3). Chuck's Construction Co. performed the site grading and installed the storm water management system. (Drucker Dep. Ex. 12). Speedee Concrete constructed the concrete parking pads and driveways to the individual units from 2004 to 2007. (Drucker Dep. pp. 68-72 & Speedee Invoice).

On March 16, 2001, the Master Deed for Rivergate Horizontal Property Regime was filed. (Master Deed). The Master Deed defines limited common areas as follows:

> **Limited common elements** as to the term is used herein shall mean and comprise the following: (A) attic space, if any, and **grade level concrete driveways**, patios, or stoops…(emphasis added).
>
> Section IV of the Master Deed, Page 4.

The Master Deed also provides that it is the responsibility of the owner to take care of the maintenance and repair of the limited common elements. (Master Deed, Section XXII) The owner is also responsible for any damages caused by the limited common

areas. (Master Deed, Section XXII). Section XXII of the Master Deed declares as follows:

> Every **owner** must perform promptly all maintenance and repair work within his unit and of all limited common elements to which such unit has exclusive use which, if omitted, would affect the condominium in its entirety or any part belonging to other owners, and **shall be expressly responsible for the damages and liability** which his failure to do so may engender (emphasis added).

Article IV of the Master Deed states, "**In all other respects, and except as specifically provided in this Master Deed**, LIMITED COMMON ELEMENTS shall be treated as, and included within the definition of the term 'Common Elements." (Master Deed, emphasis added).

Additionally, Speedee Concrete advised the developer/general contractor of the project, WW&LB Development, Inc., through its representative Wayne Winderman, that the driveways were too steep. (Dunn dep. p. 69, ln. 2 - p. 70, ln. 8). This conversation took place in the presence of owner representative Jim Dunn in 2004 or 2005. Id.

Furthermore, it is not disputed that the slope of the driveways has been consistent since they were originally poured in 2004 through 2007, and Speedee Concrete's last invoice is dated March 22, 2007 (Speedee Invoice).

ARGUMENT FOR DENYING CERTIORARI

I. **THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE THE APPELLANT DOES NOT HAVE STANDING IN THAT THE MASTER DEED DECLARED DRIVEWAYS TO BE LIMITED COMMON ELEMENTS AND THUS THE RESPONSIBILITY OF THE OWNERS**

The Appellant lacks standing to bring a lawsuit against Speedee Concrete for the alleged defects to the driveways because the driveways are defined as limited common elements in the Master Deed (Section IV of the Master Deed) and are thus the responsibility of the individual homeowners, not the homeowner's association (Section XXII of the Master Deed). The Appellant even admits that the driveways are limited common elements pursuant to the Master Deed. Therefore, the Appellant does not have standing to bring a lawsuit regarding alleged defects to the driveways. See Roundtree Villas Association, Inc. v. 4701 Kings Corp., 282 S.C. 415, 421, 321 S.E.2d 46 (1984), in which the Supreme Court of South Carolina held that a homeowners association did not have the authority to bring suit for defects to balconies because they were limited common elements. The court also said that "neither the Act nor the deed imposes upon the Regime the duty to maintain" what the court found to be a limited common area. Such was the finding in this case.

The Appellant cites Article IV of the Master Deed for the proposition that the limited common elements are to be treated as

common elements giving the Appellant standing to bring suit regarding alleged defects with those limited common elements. The referenced section states: "In all other respects, and except as specifically provided in this Master Deed, LIMITED COMMON ELEMENTS shall be treated as, and included within the definition of the term 'Common Elements". However, this assertion by the Appellant is misguided in that it ignores the clear and unambiguous language of the clause. The Appellant fails to appreciate the expressed limiting language: "except as specifically provided in this Master Deed…."

Further, any damages created by the slope of the driveways are the responsibility of the owner of the unit to which the driveway is appurtenant. Thus, the Appellant's claims against Speedee Concrete for any damages caused by the slope are misdirected since such damages would be each driveway owner's responsibility. To ignore this conclusion is to torture the plain meaning of the Master Deed. In support of this assertion, the Master Deed provides in Section XXII:

> Every **owner** must perform promptly all maintenance and repair work within his unit and of all limited common elements to which such unit has exclusive use which, if omitted, would affect the condominium in its entirety or any part belonging to other owners, and **shall be expressly responsible for the damages and liability** which his failure to do so may engender (emphasis added).

Restrictive Covenants in a master deed are contractual in nature. Watson's Orchard Property Owners Association v.

Property Owners in Watson's Orchard Subdivision: Poe, et. al., 412 S. C. 387, 772 S. E. 2d 528 (Ct. App 2016). When interpreting contracts, the court is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract. If a "contract's language is clear and capable of legal construction", the court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement. "A clear and explicit contract must be construed according to the terms the parties have used with the terms to be taken and understood in their plain, ordinary and popular sense." Cullen v. McNeal, 390 S. C. 470, 702 S. E. 2d 378 (Ct. App. 2014). Whether the language of a contract is ambiguous is a question of law for the court. The construction of a clear and unambiguous contract is also a question of law for the court. Wallace v. Day, 390 S. C. 69, 700 S. E. 2d 446 (Ct. App. 2012).

In this case, the Master Deed explicitly declared the driveways are limited common elements, it states the unit owners are responsible for the maintenance of the limited common elements and states the unit owners are responsible for any damages caused by the limited common elements. Thus, it was the individual unit owners that had the duty to bring any action related to the driveways as limited common elements, not the HOA.

II. AS AN ADDITIONAL OR COUNTER ISSUE, THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Pursuant to South Carolina Code Sections 15-3-510 and 15-3-530, Appellant's causes of action for negligence, breach of warranty, and breach of contract must be commenced within three years of when the Appellant knew, or should have known by the exercise of reasonable diligence, that a claim against Speedee Concrete may exist. S.C. Code Ann. §§ 15-3-510 and 15-3-530.

Speedee Concrete completed its work on the project by March 22, 2007, the date of Speedee's last invoice. (Speedee Invoice). The homeowners had knowledge of the driveways' slope and the cracking of driveways in 2004 or 2005 (Dunn depo. P. 69, ln. 2 - p. 70, ln. 8). Both are more than three years before Speedee Concrete was named in the Appellant's Second Amended Complaint filed in April, 2010.

"Under the discovery rule, the three-year statute of limitations clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011). "It is not necessary for a party to know the full extent of its alleged damages; it is sufficient for the party to be put on notice of such facts as would lead a person of common knowledge and experience to conclude that

some claim may exist." Hedgepath v. AT&T, 348 S.C. 340, 355-56, 559 S.E.2d 327, 336 (Ct.App. 2001). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333, 334 (1981).

In this case, the evidence shows that the Appellant was aware of the slope of the driveways and drainage issues as early as 2004. Homeowner Jim Dunn admitted in his deposition that he heard Speedee Concrete tell Wayne Winderman of WW&LB in 2004 or 2005 that the slope of the driveways was too steep. (Dunn depo. P. 69, ln. 2 - p. 70, ln. 8). Furthermore, in May 2005, the homeowners formed the Ad Hoc Committee to address multiple construction issues, including the slope of the driveways. (Dunn Dep. Ex. 21).

The Appellant argues that its claims against Speedee Concrete did not accrue until Drew Wilkie, Appellant's expert, issued his report on June 18, 2010. That argument is not factually or legally sound. The slope of the individual driveways was immediately known to the purchaser upon arrival to the property. The Appellant did not need to know the full legal extent of the injury and did not need to hire an expert for the statute of limitations to begin to run. (Hedgepath v. AT&T, 348 S.C. 340, 355-56). The legal standard

is that a person of common knowledge and experience would be put on notice that some claim may exist. (Id.) The Appellants had knowledge that a claim may exist in 2004 or 2005 when Jim Dunn heard Speedee Concrete' representative tell Winderman that the driveway slopes were too steep. The Appellants knew that they had a potential claim against Speedee for more than three years before the Second Amended Complaint was filed; therefore, there is no genuine issue of material fact that exists regarding this issue, and the trial court was proper in granting summary judgment.

The equitable tolling argument against Speedee is wholly without merit. First, it was the individual unit owners that had the duty to raise any claims regarding the driveways. Second, the doctrine itself is not applicable to Speedee as a subcontractor.

"[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Hooper v. Ebenezer Senior Serv. & Rehab Center, 386 S.C. 108, 116, 687 S.E.2d 29 (2009).

> Equitable tolling has been deemed available where:
>
> 1. Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> 2. The Plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.

3. The Plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. Pelzer v. State, 378 SC 516, 662 S.E.2d 618 (Ct.App. 2008)

The Appellant cites Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct.App. 2012) to support its argument that equitable tolling applies. However, that case is distinguishable from this one. In Magnolia North, the Court held that equitable tolling applied as to toll the statute of limitations against the developer where the developer controlled the homeowner's association and the developer would not have initiated an action against itself. Id. Furthermore, the homeowners were diligent in filing a lawsuit only eight months after assuming control. Id.

In this case, there was nothing to prevent the Appellant from timely filing suit against Speedee. Speedee was never part of the homeowner's association board. Additionally, the Appellant knew the driveway slopes were allegedly too steep, they knew Speedee Concrete constructed the driveways, and they still waited nearly five years to file suit against Speedee after learning of the issues with the driveway slope. Furthermore, there is no evidence Speedee Concrete mislead the Appellant. There is no evidence that Speedee did anything to cause the Appellant's delay in naming Speedee as a defendant.

The Appellant cites a letter from Winderman, the developer, stating that he would address the drainage, road, and maintenance issues. Speedee Concrete did not make any representations to the Appellant that it would make repairs. Furthermore, Winderman is not an agent of Speedee and the acts of Winderman cannot at all be attributed to Speedee. Speedee did not cause the delay and did not induce the Appellant to believe that Speedee would make repairs.

CONCLUSION

The trial court correctly granted Speedee Concrete's Summary Judgment motion in this case and the Court of Appeals properly affirmed the order. The Appellant has no standing to bring suit against Speedee Concrete because it is not in control of the driveways. Under the Master Deed, the driveways are limited common elements and as such are the responsibility of each unit owner to maintain or repair. The Master Deed clearly says each owner is liable for any damages caused by their driveways to other property.

Further, because the Appellant (and individual members) had notice of the issues pertaining to the driveways more than three years prior to suit being brought against Speedee Concrete, the Order granting summary judgment was proper due to the application of the statute of limitations.

The Supreme Court should not issue a writ of certiorari to review this case. In addition to the foregoing, this case involves no novel questions of law, there was no dissent in the decision of the Court of Appeals, the decision is not in conflict with any other decisions of the Supreme Court, there are no constitutional issues involved, and there is no federal question presented.

Respectfully submitted,

Dated: November 29, 2017

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Builders, Inc., Hill Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, Defendants,

Of Whom

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Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc., Third-Party Defendants,

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v.

WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc., Defendants

Of Whom
AB Consulting Engineers, LLC, Inc. is the Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent Speedee Concrete's Return to the Petition for a Writ of Certiorari on the following Appellant and Respondents AB Consulting Engineers, Inc. and Chuck's Construction Co., Inc. by depositing the same in the United States Mail, postage prepaid, on the 29th day of November, 2017, addressed to their attorneys of record as follows:

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