THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Tanya A. Gee, Fifth Circuit Court

Case No. 2016-000464

Elizabeth Box,..... Appellant,

v.

Sparrow Group, LLC and Bryan S. Jones,..... Respondents.

FINAL BRIEF OF RESPONDENTS, THE SPARROW GROUP, LLC AND BRYAN C. JONES

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE EXPIRATION OF THE STATUTE OF LIMITATIONS?

STATEMENT OF THE CASE

This appeal arises from the grant of Respondent's Motion to Dismiss Plaintiff's Complaint. On July 8, 2015 Appellant filed a Complaint for breach of contract, among many other claims, against Respondents. (R.pp. 4-22). Thereafter Respondent was served with the Complaint and filed a Motion to Dismiss. (R.pp. 51-52). The motion hearing was held before the Honorable Tanya A. Gee, presiding in the Richland County Circuit Court. (R.pp. 25-50). The motion was commuted to a Motion for Summary Judgment. (R.p. 40 ¶1-2). After hearing arguments from the parties and reviewing the relevant evidence, the court granted summary judgment in favor of Respondents on the grounds that the statute of limitations had expired for all of Appellant's claims. (R.pp. 1-3). This appeal followed.

FACTS

In July of 2010 Elizabeth Box entered into a contract with Sparrow Group, LLC to purchase a home in Irmo, South Carolina. (R.p. 81 ¶1). Sparrow Group provided Ms. Box with a South Carolina Residential Property Condition Disclosure Statement. (R.pp. 19-22). In the section titled "AS SELLER OF THE PROPERTY HEREIN IDENTIFIED, DO YOU HAVE ANY KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING:" Mr. Jones, as acting agent for Sparrow Group, checked "Yes" to item one, foundation. (R.p. 20). In a box underneath that section provided for explanation of any problem, malfunction or defect Mr. Jones wrote "Foundation/Slab stabilization by Ram Jack in November

2009." (R.p. 21). Appellant reviewed, signed and dated each page, including an acknowledgement that, *inter alia,* stated: "Purchaser(s) acknowledge. . . (the disclosure) is not a warranty by owner or owner's agent; ... is not a substitute for any inspections he/she may wish to obtain. . . Purchaser(s) are encouraged to obtain his/her own inspection by a licensed home inspector or other professional." (R.p. 22). The disclosure was signed by Appellant on July 8, 2010. (R.p. 22). Appellant alleges that she became aware of a cost estimate provided to Defendants on July 11, 2012. (R.p. 82 ¶6). Appellant sued the defendants on July 8, 2015. (R.pp. 4-22).

Defendants filed a motion to dismiss that was heard on November 3, 2015. (R.pp. 51-52). Counsel for Respondents argued that Appellant did not file her action within the statute of limitations, and was therefore barred from recovery. (R.p. 37 ¶21- R.p. 38 ¶1). Respondents asserted that Appellant knew or should have known that there was a possible defect in the foundation on July 8, 2010, when she signed the disclosure which made note of an issue with the foundation. (R.p. 37 ¶21- R.p. 38 ¶1). Counsel for Appellant argued that the statute had not run as she allegedly discovered the defect on July 11, 2012. (R.p. 40 ¶17-20). The Court ruled in favor of Respondents, finding that Appellant knew, or through the exercise of reasonable diligence, should have known that there was a defect to the foundation in July 2010. (R.pp. 1-3). Specifically, the disclosure revealed the issues and did not affirmatively state that the foundation had been corrected. (R.p. 3).

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by

the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

ARGUMENT

I. Appellant is Barred from Bringing an Action Against Respondents Due to Her Failure to Timely Commence Her Action Within the Statute of Limitations.

a. Despite Appellant's numerous arguments concerning whether the conduct of the Defendants was actionable, the trial court did not reach a determination on the merits.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." Id. Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

The issues raised by Appellant in the instant appeal repeatedly make arguments concerning duties Respondents allegedly owed to Appellant, the right of Appellant to rely on

representations of Respondents, and Respondents' alleged requirements of disclosure. However, the trial court did not reach any of these issues. The trial court's ruling simply found

> [A]s a matter of law the statute of limitations began to run as of the date of the disclosure, which was signed by Plaintiff on July 8, 2010. The Disclosure Statement revealed foundation issues on the property on that date, not in 2012 as Plaintiff alleges. **While Defendant's failure to attach the Ram Jack report may have been actionable within three years' after Plaintiff's receipt of the Disclosure Statement, the inquiry before me today is a different one**. (emphasis added) (R.p. 3).

Consequently, the trial court concluded that an action concerning Respondents' alleged misrepresentation or other liability owed to Appellant was time barred as the Disclosure Statement revealed foundation issues in 2010. Accordingly, the merits of Appellant's claims were not reached by the trial court and are, therefore, not properly before this Court on appeal.

b. The trial court properly construed force and effect of the disclosure's clear and unambiguous language.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). "Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the [contract]". Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." See United Dominion, supra. "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988).

Despite Appellant's assertions to the contrary, the trial court did not weigh evidence but rather interpreted the Disclosure Statement according to its clear and unambiguous language. The unambiguous language contained in the Disclosure Statement provides simple instructions:

> ... an owner of residential real estate (single-family homes and buildings with up to four dwelling units) shall provide to a purchaser this property condition disclosure statement which must be completed prior to signing a contract of sale.
>
> You must check one of the boxes for each of the 24 questions on pages 2 and 3 of this form.
>
> If you check "Yes" for any question you must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator, expert, or public agency.
>
> AS SELLER OF THE PROPERTY HEREIN IDENTIFIED, DO YOU HAVE ANY KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING: ... Foundation, slab fireplace/chimneys, floors, windows (including storm windows and screens), doors, ceilings, interior and exterior walls, attached garage, patio, deck, or other structural components including any modifications?
>
> If you answered "yes" to any of the above questions, please use the following space for your explanation and attach any relevant professional reports.
>
> Purchaser(s) acknowledge. . . this is not a warranty by owner or owner's agent; ... is not a substitute for any inspections he/she may wish to obtain. . . Purchaser(s) are encouraged to obtain his/her own inspection by a licensed home inspector or other professional

(R.pp. 19-22).

The trial court simply found that the act of checking yes to the question concerning knowledge of the existence of a foundation/slab problem (malfunction or defect) had the consequence of placing Appellant on notice of the defect(s) complained of in Appellant's Complaint.

> Specifically, I find that Plaintiff knew or should have known that there was a prior defect to the house's foundation in July 2010. That explanation did not affirmatively state that the foundation defects had been corrected, and Plaintiff/Buyer at that point had reason to inquire further of the status of the foundation or whether a report should have been attached. (R.pp. 2-3).

The trial court's ruling was not a determination on the merits as to whether there was or was not an actionable misstatement or concealment. "While the Defendant's failure to attach the Ram Jack report may have been actionable within three years' after the plaintiff's receipt of the Disclosure Statement, the inquiry before me today is a different one." (R.p. 3). The trial court was not concerned with what Appellant could or should have done at the time of the disclosure, but at what point Appellant was on notice of a potential defect in the slab/foundation.

The trial court specifically made this clear on multiple occasions in the hearing:

> [B]y virtue of checking yes he's saying he is aware of a defect and his explanation - - it says explain the problem or attach a descriptive report. So - - ...- - he writes there have [sic] been foundation/slab stabilization which would be a defect and Ram Jack came in November of 2009." (R.p. 34 ¶24- R.p. 35 ¶1-6).

Counsel for Appellant acquiesced to this understanding in a brief exchange with the trial judge:

> The Court: Where does he say that [stabilization] is completed?
>
> Ms. Cooper: It says stabilization, in other words, he had the home stabilized by Ram Jack in November 2009. That's an affirmative false representation, Your Honor.
>
> The Court: But the question that he's answering isn't about what you did to correct the problem. The question he's answering is what is the defect.
>
> Ms. Cooper: That's correct, Your Honor. (R.p. 36 ¶16-23)

The trial court interpreted the plain language of the disclosure. The question in the disclosure was whether the seller knew of a problem with the slab/foundation and the answer given by Respondents was "yes". (R.p. 20). The court determined the explanation of the

problem did not amount to a representation that all defects had been corrected, but such disclosure was an explanation of the problem. The court did not weigh evidence but instead interpreted a document within the four corners of that document.

c. Plaintiff's causes of action are time-barred.

Statutes of limitations are not simply technicalities. Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Hooper v. Ebenezer Senior Serv. & Rehab. Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008). Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Moates, 322 S.C. at 172, 470 S.E.2d at 404. One purpose of a statute of limitations is "to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights." McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989) (internal quotations and citations omitted). Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) (internal citation omitted). "Statutes of limitations are, indeed, fundamental to our judicial system." Hooper, 377 S.C. at 228, 659 S.E.2d at 219 (internal citation omitted).

A cause of action for damage to real property must be brought within three years of when the damage occurred. S.C. Code Ann. § 15-3-530(3) (2005). The South Carolina Unfair Trade Practices Act has a three-year statute of limitations, as section 39-5-150 of the South Carolina Code provides that "[n]o action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit." Pursuant to the discovery

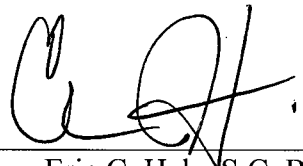
rule, the limitations period commences when the facts and circumstances would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc'y, S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see also S.C. Code Ann. § 15-3-535 (2005). The standard as to when the limitations period begins to run is objective rather than subjective. Burgess, 300 S.C. at 186, 386 S.E.2d at 800. Furthermore, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (internal citations omitted). "Specifically, the discovery rule focuses upon whether the complaining party acquired knowledge of any existing facts 'sufficient to put said party on inquiry, which, if developed, will disclose the alleged fraud.'" Burgess, 300 S.C. 182 at 186, 386 S.E.2d at 800 (quoting Walter J. Klein Co. v. Kneece, 239 S.C. 478, 484, 123 S.E.2d 870, 874 (1962)).

As set forth *supra*, the trial court did not reach a conclusion as to whether the failure to attach the estimate was an act or omission that would give rise to potential liability. Rather the court ruled that Appellant was on inquiry notice when the disclosure indicated there was a problem. The inquiry here is not what exactly Appellant should have or could have done, but when Appellant should or could have known to inquire further. Because the disclosure identified in the affirmative a known problem (defect or malfunction) the trial court concluded that "as a matter of law the statute of limitations began to run as of the date of the disclosure, which was signed by Plaintiff on July 8, 2010. The Disclosure Statement revealed foundation issues on the property on that date, not in 2012 as Plaintiff alleges." (R.p. 3). Thus the statute of limitations to

commence the causes of action expired in 2013. This action was filed in 2015, well after the expiration of the statute of limitations.

CONCLUSION

The plain language of the Disclosure Statement notified Appellant of a known problem (defect or malfunction) concerning the slab/foundation. Consequently, the trial court properly concluded that as a matter of law the statute of limitations began to run on the date of the disclosure. Regardless of the merits of Appellant's claims, a matter not reached by the trial court, Appellant failed to timely assert her claims against Respondents. Accordingly, the ruling of the trial court should be affirmed.

By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b), SCAR.

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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief by depositing a copy of it in the U.S. mail, postage prepaid, on October 13, 2016 addressed to Appellant's attorney of record as follows:

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