STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	
Ronald E. Price and Diana R. B. Price,	)	C/A No.: 2004-CP-08-1855
	)	AMENDED
	)	ORDER DENYING SUMMARY
Plaintiff(s),	)	JUDGMENT FOR GERRY FOX
	)	
vs.	)	
	)	
Belinda Fox, Gerry Fox et. al.	)	
	)	
Defendant(s).	)	

This matter came before me for a hearing on August 24, 2017 pursuant to a motion for summary judgment filed by Defendant Gerry Fox ("Fox"). Present at the hearing were the Plaintiff Diana Price represented by her counsel, J. Derrick Jackson and Paul B. Ferrara, III representing the movant Defendant Gerry Fox. After carefully considering the briefs with attachments submitted by the parties, the arguments of counsel and the applicable law, this court denies the motion for summary judgment.

FACTUAL/PROCEDURAL BACKGROUND[1]

Gerry Fox along with Danny Gilbert, Heritage Classic Homes, and Eagle Harbor, Inc. decided to develop a subdivision Eagle Harbor, Inc. Gerry Fox purchased 90.96 acres of land which would become Phase I for Eagle Harbor. (Deed, Deposition pp 17-18, 23) Gerry Fox purchased another 62.63 acres of land but placed the land in his wife Belinda Fox's name "for asset protection" because he had "Dr." in front of his name. (Deed, Deposition pp. 42, 45-46, Plat). He opened up a bank account in the name of

[1] These facts are presented in the light most favorable to the Prices as the non-moving party and are based upon and supported by the Deposition excerpts and exhibits attached to the Prices brief. The facts are not binding on the parties in further proceedings.

Heritage Classic Homes, and according to his deposition testimony, Danny Gilbert required Gerry Fox's approval to spend money. (Deposition p. 56, 80-81) Gerry Fox allowed Gilbert to "do all the work" in exchange for a split of the profits. (Deposition p.54) The Foxes specifically allowed Gilbert to market and sell the properties on their behalf. (Deposition p. 77) According to the public records, the Fox sold almost $900,000 in sales of real property in Eagle Harbor Subdivision. (See Sales Summary)

As alleged in the Second Amended Complaint, in the summer of 2003, the Prices were looking for a subdivision lot to build their home on and came across Gilbert at what looked like a sales office in Eagle Harbor Subdivision. Gilbert, in his role as marketing partner, showed the Prices Lot 20. He made several material representations to the Prices including that the Lot 20 (approximately 8 acres) could be subdivided into three, separate residential lots, that the lots would perk, and that the lot would be part of a gated, restricted community with a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits which would enhance the value of their property. On or about September 13, 2003, the Prices, in reliance on the representations of Gilbert entered into an Agreement to Buy and Sell Lot 20 for $90,400. Gilbert explained that the owner of Lot 20, Belinda Fox was his partner. Subsequent to the closing, the Prices learned that the representations by Gilbert as marketing partner were false. The property could not be subdivided into three, separate residential lots because the soil does not perk, a condition known to Gilbert and the partnership as early as February 2002. Also, the lot would not be part of a restricted community with a valid homeowner's association, associated covenants, restrictions, architectural guidelines and other benefits, which would enhance the value of the subject property being purchased by them because valid, restrictive covenants were not properly recorded for the Phase II subdivision. The promised amenities were never developed.

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In addition to these problems, the developers of Phase II of Eagle Harbor Subdivision failed to comply with applicable governmental regulations before selling lots. After wetland studies were conducted by the Army Corp of Engineers, the Prices learned that approximately two acres of Lot 20 were delineated as federally defined freshwater wetlands. Various roads in the subdivision were also impacted by wetlands.

According to his deposition testimony, Gerry Fox didn't know if he made an effort to make sure Gilbert was complying with subdivision regulations (Dep. p. 68), knew about the covenants but made no investigation if they were accurate (Dep. p. 87), made no investigation to see if the property sold to the Prices could be subdivided (Dep. p. 83), was aware that a drain field would be required for certain lots including the Prices, but did not discuss that with them or know if Gilbert did. (Dep. p. 97)

The Prices filed suit on August 23, 2004, against Danny Gilbert and Belinda Fox alleging fraud, negligent misrepresentation, and unfair trade practices. The Prices amended their suit on October 20, 2005 adding Eagle Harbor, Inc. and including the factual allegations about the defective restrictive covenants. On November 29, 2005, the Prices filed a motion to file a Second Amended Complaint. This Second Amended Complaint added Gerry Fox as a party and included the allegations about negligent development. Inexplicably this Second Amended Complaint was withdrawn by Consent Order on February 7, 2006 by a previous counsel of the Prices.

After the Foxes and the Winns transferred the roads in Eagle Harbor while still in a defective state, the Prices filed a motion on September 23, 2011 to amend and supplement the Amended Complaint to add the Winns and Gerry Fox and include a declaratory judgment cause of action related to the roads. The court granted the motion and the Second Amended and Supplemental Complaint was filed and served.

Gerry Fox has filed the present motion seeking summary judgment based on the statute of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear 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 evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. "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." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d331, 333 (2002)

DISCUSSION

Fox argues that the Prices individual claims against him are barred by the three year statute of limitations set forth in South Carolina Code Annotated §15-3-530. Fox asserts the Prices knew about their claims for damages in 2004 and that at least by 2005 knew about their claims against Gerry Fox. The Prices do not contest that they knew about their claims in 2004 or that they filed a Second Amended Complaint which included Gerry Fox in 2005, but assert that under the relation back provisions of Rule 15(c) their claims against Fox relate back to the original pleadings.

RELATION BACK UNDER RULE 15(c) SCRCP

Rule 15(c) SCRP provides as follows:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment *changing* the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such *notice* of the institution of the action that he will not be *prejudiced* in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(Emphasis added).

All these factors have been satisfied in this case. There is no dispute that the Second Amended Complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings relating to misrepresentations made to the Prices and lack of disclosure, the failure to properly develop the subdivision, the defective covenants and the presence of wetlands on the property.

Also, there is no prejudice for Gerry Fox as his wife (who he put forth as the proper party by buying the land in her name) was an original Defendant from the beginning of the lawsuit. Finally, he had sufficient knowledge that he should have been included as a Defendant during the limitations period.

Fox does not contest these elements, but rather relies on a line of cases going back to *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000). In *Jackson* the court states, "The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of party. See *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 635 N.E.2d 323 (1994) (determining that Ohio's Rule 15(c), which is similar to our Rule 15(c), allows for relation back when a party is substituted but not when a party is added while retaining a party named in the original suit).

The court notes that even in that case, there was a split in authority on whether *adding* a party was a change under Rule 15(c). The *Jackson* court notes, " *But see Harding*

v. Godwin, 238 Ga. App. 432, 518 S.E.2d 910 (1999) (noting the Georgia relationship back statute, which contains essentially the same language as our Rule 15(c), authorizes the addition of a new party under certain circumstances if the requirements of the statute are strictly met), cert. denied(Oct. 22, 1999)(emphasis added). *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000). The other cases cited by the Fox all rely on this single 2000 Court of Appeals decision.

The Prices submit that the interpretation of the relation back doctrine under Rule 15(c) has changed or evolved in the seventeen years since *Jackson* . This court agrees. The modern interpretation of Rule 15(c) is that an amendment adding a party relates back if the new party received adequate notice within the limitations period and suffers no prejudice in its defense. This modern rule can be seen in the following cases[2].

In *Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007) the court states,

> In light of these policies, Rule 15(c) must be understood to freely permit amendment of pleadings and their relation-back so long as the policies of statutes of limitations have been effectively served. *See* 3 James Wm. Moore, et al., *Moore's Federal Practice* § 15.19[3][a] (3d ed. 1997) ("The purpose of Rule 15(c) is to provide the opportunity for a claim to be tried on its merits, rather than being dismissed on procedural technicalities, when the policy behind the statute of limitations has been addressed"). And that is accomplished in Rule 15(c) by requiring that a new party have had adequate notice within the limitations period and by assuring that the new party not be prejudiced by the passage of time between the original pleading and the amended pleading.

In *Goodman*, the lower district court ruled -similar to the citations by the Fox in his brief-, "(1) that the amended complaint did not "change the party or the naming of the party against whom the claim [was] asserted," but rather added Praxair Services,

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[2] The court is aware and the Prices disclosed these cases are based on federal law and application of the federal rules of civil procedure; however, our Rule of Civil Procedure is based on the Rule 15 of the federal rules of civil procedure and typically the federal courts and especially the Fourth Circuit for our jurisdiction point the way to the developing interpretations of the law.

Inc.; (2) that Goodman "was fully aware of the existence of [Praxair Services, Inc.] and its correct name," and therefore his mistake in naming only Praxair, Inc., in the original complaint was not the type of mistake on which Rule 15(c)(3) acts..." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007).

In response to the district court ruling, the 4th Circuit Court of Appeals found that the *addition* of parties to a complaint may be broadly construed as a *change* of parties. *See Goodman*, 494 F.3d at 468 (accepting plaintiff's interpretation of Rule 15(c) that an " 'an *addition* to something is generally regarded as a *change* to that thing' "). The court wrote, "[W]e can discern no policy that would be served by the ... defendants' restrictive reading of 'changes,' which would force the amending party to drop a defendant for each defendant he adds." *Id.* at 469. This appears to be what Fox is contending, that the Prices must drop a Defendant (presumably Ms. Fox) to add him to the complaint.

The *Goodman* court also clarified the "mistake" language of Rule 15(c), "The "mistake" language is textually limited to describing the notice that the new party had, requiring that the new party have expected or should have expected, within the limitations period, that it was meant to be named a party in the first place, although it also implies that the plaintiff in fact made a mistake. No policy supports permitting relation-back for typographical mistakes, but not for oversights or mistakes of inclusion or omission. The policy considerations of Rule 15(c) concern whether the repose granted by statutes of limitations is preserved for parties named in amended pleadings. And that depends on the notice to and effect on the new party. The limitations of Rule 15(c)(3) thus only apply when the policies underlying limitations rules may be trampled. As Justice Holmes explained:

> Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

New York Cent. & Hudson River R.R. v. Kinney, 260 U.S. 340, 346, 43 S.Ct. 122, 67 L.Ed. 294 (1922) (emphasis added); *see also* Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 Calif. L.Rev. 1549, 1573–78 (2001) (advocating liberal construction of "mistake" language in Rule 15(c)(3))." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 471 (4th Cir. 2007). In this case, Fox had notice from the beginning of the Prices claim.

The *Goodman* case has been cited and followed by the district court for South Carolina in a product liability case, "Based on this evidence, Mid–Continent should have known that, as the chair manufacturer, it would be included in McKnight's complaint. When an added party "has been given fair notice of a claim within the limitations period and will suffer no improper prejudice in defending it, the liberal amendment policies of the Federal Rules favor relation back." *Goodman*, 494 F.3d at 471. *McKnight v. Iceberg Enterprises LLC*, No. 9:10-CV-03248-DCN, 2012 WL 2418870, at *4 (D.S.C. June 26, 2012).

The present case provides a good illustration of the application and intent of the rule. Gerry Fox had full notice of the claims against him from the beginning of this litigation. He was not named as a party initially because of his own design to place the Phase II property in his wife's name for asset protection. He is not prejudiced in his defense in this matter because his wife Belinda Fox was named in the original pleadings and Mr. Fox has had a front row seat to monitor the course of this litigation. Furthermore, this case has not been scheduled for trial and this court can enter an appropriate scheduling order to mitigate any prejudice. This court finds that policies behind the statute of limitations have been satisfied as to Gerry Fox and that the amended pleadings relate back under the modern interpretation of Rule 15(c). Therefore, Fox's motion for summary judgment based on the statute of limitations is denied.

EQUITABLE ESTOPPEL

The Prices also assert that summary judgment should be denied because there is a least a scintilla of evidence to create a genuine issue of material fact as to the issue of equitable estoppel. The court notes that Gerry Fox testified he placed the Phase II property in his wife's name despite her lack of involvement or knowledge of the project.

Application of equitable estoppel does not require an intentional misrepresentation. It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218–19, 332 S.E.2d 555, 561 (Ct.App.1985) (overruled on other ground by *Atlas Food Sys. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)); *Brown v. Pearson*, 326 S.C. 409, 419, 483 S.E.2d 477, 482 (Ct.App.1997). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) (citation omitted). Whether the actions lulled the plaintiff into "a false sense of security" is usually a question of fact. *Dillon County Sch. Dist. No. Two*, 286 S.C. at 219, 332 S.E.2d at 561.

Here, Gerry Fox testified in his deposition he intentionally put his wife Defendant Belinda Fox forward so as to protect his assets from claims like the Prices. This court finds there is at least a scintilla of evidence on this issue, that it is usually a question of fact and therefore denies summary judgment.

THEREFORE, IT IS HEREBY ORDERED, that Gerry Fox's motion for summary is denied.

Dale Van Slambrook
Master-in-Equity, Berkeley County

Dated: 10/19/17