THE STATE OF SOUTH CAROLINA
in the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young
Charleston County
Trial Court Case No.: 2010-CP-26-9158

APPELLATE CASE NO.: 2013-000279

Johnson Koola, ... Appellant,

vs.

Cambridge Two, LLC, Albert V. Estee, Individually, Cambridge Lakes, LP, Stephen R. Heape, Individually and as General Partner of Cambridge Lakes, LP, Cambridge Lakes Apartment Homes, a/k/a Cambridge Lakes Apartments, LP, a/k/a Cambridge Lakes Apartment Homes, LP, Classic Properties of Charleston, Inc., Cambridge Contracting, LP, Trademark Properties, Inc., Carolina One Charleston Home Team Properties, LLC, Charleston Home Team, LLC Carolina One, and William E. Jenkinson, IV, Individually

Of Whom CAMBRIDGE TWO, LLC, ALBERT V. ESTEE, Individually, CAMBRIDGE LAKES, LP, STEPHEN R. HEAPE, Individually and as General Partner of CAMBRIDGE LAKES, LP are the Respondents.

RESPONDENTS' FINAL BRIEF

THOMPSON & HENRY, P.A.
Linda Weeks Gangi
Post Office Box 1740
Conway, South Carolina 29528-1740
Telephone No: (843) 248-5741
Fax No.: (843) 248-5112
lgangi@thompsonlaw.com
Attorney for Cambridge Lakes, LP, Stephen R. Heape, Classic Properties of Charleston, Inc.

NEXSEN PRUETT, LLC
David J. Parrish
Post Office Box 486
Charleston, SC 29402
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee
Telephone No: (843) 720-1771
Fax No: (843) 720-1777
dparrish@nexsenpruet.com
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee

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STATEMENT OF FACTS

Plaintiff's claims in this lawsuit are based on his ownership of a condominium unit in the Cambridge Lakes condominium development located in Mount Pleasant, South Carolina. The Cambridge Lakes development was originally constructed and operated as a rental apartment complex. The development was subsequently converted to condominiums and the converted condominium units were sold to individual buyers. Cambridge Lakes Condominium Homeowners Association, Inc. (the "HOA") manages and controls the condominium complex pursuant to its master deed.

On June 16, 2008 the HOA, on behalf of itself and the individual condominium unit owners, filed a lawsuit against the Respondents and other parties. (ROA p. 115) In the lawsuit the HOA asserted claims for alleged defects in the construction of the condominium buildings, garages and pool/clubhouse building, and the HOA asserted claims based on alleged violations of the S.C. Horizontal Property Regime Act, S.C. Code Ann. § 27-31-10 et seq., in connection with the conversion and sale of the condominiums. (ROA p. 115)

The Cambridge Lakes development consists of 104 units, and all but ten or so of the unit owners elected to join the HOA's lawsuit and were named as parties in the HOA's lawsuit. The Plaintiff purchased a condominium unit in Cambridge Lakes in 2004, and Plaintiff was one of the approximately ten unit owners who did not join the HOA's lawsuit. In 2011, the HOA settled the lawsuit on the eve of trial.

STATEMENT OF CASE

The Plaintiff filed this lawsuit on November 4, 2010, alleging that construction defects and violations of the S.C. Horizontal Property Regime Act made his unit not "fit, habitable, and marketable." (ROA pp. 22 - 27) The Plaintiff served his Complaint on the Respondents, Stephen R. Heape, Classic Properties, and Cambridge Lakes, LP, on January 4, 2012, and on the Respondents, Cambridge Two, LLC or Albert V. Estes, on January 17, 2012, fourteen (14) months after suit was brought. (ROA pp. 94 - 95)

The Respondents filed Rule 12(b)(6) motions to dismiss Plaintiff's complaint based on the three-year statute of limitations. (ROA pp. 30 - 33) During the July 25, 2012 hearing on that motion, and with prior notice to the Plaintiff,[1] the Respondents submitted and cited to the discovery responses filed by the Plaintiff with the Court in another lawsuit in which the Plaintiff is a party. The presentation of matters outside of Plaintiff's Complaint in effect converted the Rule 12(b)(6) motion to a motion for summary judgment, and the trial Court treated and disposed of the motion pursuant to Rule 56, SCRCP.[2] Summary Judgment was granted. (ROA p. 1 - 9) This appeal followed.

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[1] The Motion filed by Albert Estee and Cambridge, Two, LLC states: "This motion is based on the pleadings and other matters of record in this case, and may be supplemented by matters filed by the Plaintiff in Case Number 2010-CP-10-6060 and Case Number 2010-SC-87-1646[.]"

[2] See Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.")

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE APPELLANT'S CLAIMS AGAINST THE RESPONDENTS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Appellant's claims are governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530. The three-year limitations period is governed by the "discovery rule," under which a claim must be brought within three-years from the date a plaintiff knew or, with the exercise of reasonable diligence, should have known that a right had been violated or that a claim existed. S.C. Code Ann. § 15-3-535. The statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005). The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of the wrongdoer. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Under the discovery rule, the statute of limitations begins to run when the facts and circumstances 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); Burgess v. American Cancer Society, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989). The statute of limitations begins to run at that point and not when advice of counsel is sought or a full-blown theory of discovery is developed. Id. "The date on which discovery should have been made is an objective rather than subjective question." Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct App. 1998).

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (citation omitted). Statutes of limitations promote justice by forcing parties to pursue a case in a timely manner and to act before memories dim, before evidence grows stale or becomes nonexistent, and before people act in reliance on what they believe is a settled state of affairs. State ex. rel. Condon v. City of Columbia, 339 S.C. 8, 528 S.E.2d 408, 413-14 (2000).

In the present matter, and after viewing the Appellant's evidence and all reasonable inferences therefrom in the light most favorable to the Appellant by June 2008 at the latest, the Appellant was on notice of the claims he is asserting in this lawsuit. For example, Plaintiff's Complaint states:

> 14. In 2008 Plaintiff learned that the Cambridge Lakes Homeowners Association and several individual unit owners filed a lawsuit against the defendant's named in this matter (excluding William E. Jenkinson, IV, and Carolina One) and various contractors and subcontractors for various construction defects. (ROA P. 25)
>
> 15. The Plaintiff also learned that the Defendants named herein did not file with the master deed or provide copies of a report required by the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10 *et. seq.* (ROA p. 25)

The interrogatory responses filed by the Appellant in his lender's mortgage foreclosure lawsuit[3] on his condominium unit include the following assertions by the Appellant:

> • "Defendant Koola had a meeting with Mr. Fisher [a member of the POA board] on November 20, 2004 and asked him about rumors of construction defects in Cambridge Lakes condominiums. My immediate neighbor, who was working for the architect firm, which oversaw the construction of Cambridge Lakes apartments, told me in private that some of the construction defects might be for real." (ROA p. 99)
>
> • On November 20, 2004, Mr. Koola sent a letter to one of the HOA's board members, which states in pertinent part:
>
> > 2. Defective Construction. Please contact the architectural firm or consultants that built this complex. It is learnt that various building code

[3]BAC Home Loans Serving v. Johnson D. Koola, et al., Case No.: 2010-CP-10-6060.

difficulties were identified at the time of construction. There were difficulties to get insurance for the building complex. . . ." (ROA p. 106)

- "Defendant Koola listed the property for sale in June/July 2008 . . . . Defendant Koola did not receive any offer from prospective buyers. . . . Under information and belief, defendant Koola alleges that the ongoing lawsuit (case #2008-cp-10-3506) and the massive construction defects claims as alleged in the lawsuit were the prime factors why defendant Koola did not receive a single offer." (ROA pp. 102 - 103)

- "On June 25, 2008, the defendant HOA and HOA's attorney sent a letter (Exhibit 5) to the homeowners informing the homeowners that a lawsuit (#2008-cp-10-3506) has been filed against the builder, developer, and others. . . . ." (ROA p. 103)

- "Defendant Koola studied the "Builder's Certification again when the Defendant HOA filed the lawsuit # 2008-cp-10-3506 against the builder, developer/seller and others. Then I studied the Master Deed of the Cambridge Lakes Horizontal Property Regime, filed in Book T437, Charleston County RMC Office very, very carefully. The said Master Deed stated that "developer submits the Property to the provision of the Horizontal Property Act, section 27-1-31-10, et seq., South Carolina Code of Laws 1975....." Now it was clear the developer/seller understood the provisions of South Carolina Horizontal Property Act." (ROA P. 104)

The above-quoted allegations contained in the Appellant's Complaint in this action and the Appellant's discovery responses in the foreclosure action indicate that as early as 2004, but certainly by 2008, the Appellant was on notice that some right of his had allegedly been invaded by the Respondents or that some claim against the Respondents might exist. The three-year statute of limitations began to run at that point. The Plaintiff filed this lawsuit in 2010; however, the Plaintiff failed to serve his Complaint on the Respondents until January 2012, at which point the three-year statute of limitations had expired. (ROA pp. 23 - 29, 94 and 95) See Mims v. Babcock Center, Inc., 379 S.C. 341, 732 S.E.2d 395(2012) (holding that under S.C. Code Ann. § 15–3–20 and Rule 3(a), SCRCP, if a complaint is filed but not served within the statute of limitations, then service must be made within 120 days of filing).

II. THE TRIAL COURT APPLIED THE CORRECT STANDARD GOVERNING THE GRANTING OF SUMMARY JUDGMENT IN THIS ACTION.

Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if 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 evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). When, as here, the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror is the evidence required to meet the scintilla standard. Young v. Hyman Motors, Inc., 199, S.C 233, 242, 19 S.E. 2d 109 (1942). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548,558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Id. Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. at 558-59, 671 S.E.2d at 85.

Rather, the nonmoving party must present specific facts showing a genuine issue for trial. Id. at 559, 671 S.E.2d at 85.

In the case at bar, the Plaintiff plead in his Complaint that he learned in 2008 that Cambridge Lakes Homeowners Association and several individual unit owners filed a lawsuit against the Respondents. (ROA p. 25). The Plaintiff also alleges in his Complaint in this action that he learned that the Respondents did not file with the Master Deed or provide copies of a report required by the South Carolina Horizontal Regime Act, S. C. Code Ann. § 27-31-10 et seq. (ROA p. 25) The Plaintiff also filed answers to discovery requests in the foreclosure action brought against him regarding his condominium. In those answers, the Plaintiff admits that as early as November 20, 2004, he sent a letter to the Property Owners Association Board Members regarding the defective construction. (ROA p. 106) He also readily admits in those answers that on June 25, 2008, the Homeowners Association and its attorney sent a letter to the homeowners informing them of the construction defect's lawsuit. (ROA p. 103) The Respondents relied on the Plaintiff's Complaint and the Plaintiff's answers to discovery requests in the foreclosure action as the basis for the Motion to Dismiss for failure to timely commence this action. There is no question but that the statute of limitations ran prior to the service of the Complaint on the Respondents in January of 2012. There is no evidence contradicting that conclusion. There is no material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. Thus, the scintilla standard was not met by the Plaintiff. The trial Court's granting of summary judgment was appropriate.

CONCLUSION

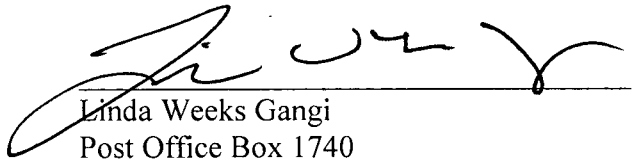
Based on the Plaintiff's Complaint and the Plaintiff's answers to discovery requests in the foreclosure action filed against the Plaintiff, the Plaintiff clearly had knowledge that he had a potential claim against the Respondents as early as 2004. Thus, the statute of limitations ran prior to the Plaintiff bringing this suit. If this Court believes that the Plaintiff did not know or should have known that he had claims against the Respondents until 2008, the statute of limitations still ran before service of process on the Respondents. The Complaint was filed in November of 2010 but was not served on the Respondents until January of 2012, fourteen (14) months after this action was commenced. The Plaintiff's claims against the Respondents are barred by the statute of limitations based on his failure to file and serve his Complaint within the statute of limitations or within 120 days of the filing of his Complaint. Accordingly, the Respondents are entitled to summary judgment, and the trial Court's decision should be upheld.

Respectfully submitted,

Conway, South Carolina

November 18, 2013

THOMPSON & HENRY, P.A.



Linda Weeks Gangi
Post Office Box 1740
Conway, South Carolina 29528-1740
Telephone No: (843) 248-5741
Fax No.: (843) 248-5112
Attorney for Cambridge Lakes, LP and
Stephen R. Heape, Classic Properties of
Charleston, Inc.

Charleston, South Carolina

NEXSEN PRUETT, LLC

David J. Parrish
Post Office Box 486
Charleston, SC 29402
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee
Telephone No: (843) 720-1771
Fax No: (843) 720-1777
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RULE 211 CERTIFICATE OF COMPLIANCE

In preparing the Final Brief of the Respondents, it came to the attention of the undersigned that footnote 3 which simply contains a cite to a case the Appellate was a party to was erroneously omitted in the Initial Brief. It has been added to the Final Brief. The undersigned hereby certify that except as set forth above, the Final Brief of the Respondents is in compliance with Rule 211(b) of the South

Carolina Rules of Appellate Procedure.

Respectfully submitted,

Conway, South Carolina

November 18, 2013

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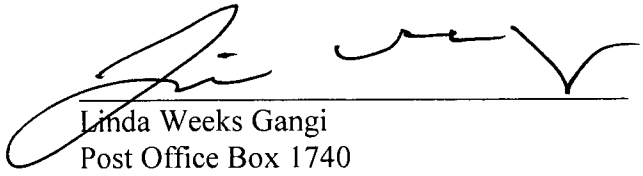

Linda Weeks Gangi
Post Office Box 1740
Conway, South Carolina 29528-1740
Telephone No: (843) 248-5741
Fax No.: (843) 248-5112
Attorney for Cambridge Lakes, LP and Stephen R. Heape, Classic Properties of Charleston, Inc.

Charleston, South Carolina

NEXSEN PRUETT, LLC

David J. Parrish by LWG

David J. Parrish
Post Office Box 486
Charleston, SC 29402
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee
Telephone No: (843) 720-1771
Fax No: (843) 720-1777
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee

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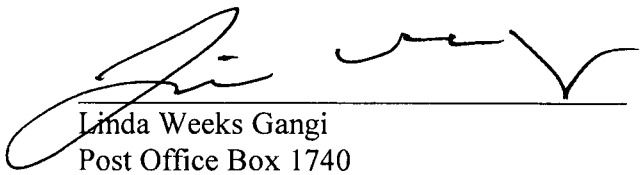

Linda Weeks Gangi
Post Office Box 1740
Conway, South Carolina 29528-1740
Telephone No: (843) 248-5741
Fax No.: (843) 248-5112
Attorney for Cambridge Lakes, LP and Stephen R. Heape, Classic Properties of Charleston, Inc.

Charleston, South Carolina

NEXSEN PRUETT, LLC

David J. Parrish by WG

David J. Parrish
Post Office Box 486
Charleston, SC 29402
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee
Telephone No: (843) 720-1771
Fax No: (843) 720-1777
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee

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CERTIFICATE OF SERVICE

I, Ann Shearin, am an employee for the law firm of Thompson & Henry, P.A., attorney for the Respondents in the above-captioned action, certify that I have this 18th day of November, 2013 mailed a copy of the following documents:

a. Three copies of the Respondents' Final Brief;

b. Certificate of Compliance with Rule 211(b); and
c. Certificate of Service

to the undersigned at their address of record, with sufficient postage attached thereto as follows:

William B. Jung, Esq.
Bowman Center
1156 Bowman Road, Suite 100D
Mount Pleasant, SC 29464
Attorney for the Appellant

David J. Parrish, Esq.
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402
Attorney for Respondents Cambridge Two, LLC and Albert V. Estee

Ann Shearin
Assistant to Linda Weeks Gangi