

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
James Nivens and Carolyn Nivens,)
)
Plaintiffs,)
)
v.)
)
JB&E Heating & Cooling, Inc., a)
South Carolina Corporation,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-46-02339

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGEMENT

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SC Court of Appeals

This matter came before the court on February 7, 2019, by way of Defendant's Motion for Summary Judgement. Defendant was represented by James W. Boyd, Esquire, and Plaintiffs were represented by John Martin Foster, Esquire. Having considered exhibits submitted by both parties, written motions and oral argument; the Court enters this Order.

PROCEDURAL HISTORY

On or about October 4, 2010, Plaintiff contracted with the Defendant for the purchase and installation of a geothermal HVAC unit. On or about March 28, 2012, Plaintiff filed a complaint with the South Carolina Department of Labor and Licensing Regulation before the Residential Builders Commission alleging improper installation of the unit. On February 13, 2013, Panther Heating and Cooling, Inc. prepared an inspection report for Plaintiff, identifying alleged defects in the installation of the HVAC system. (Defendant's Exhibit B). On July 23, 2014, the Hearing Officer of the Commission issued a recommendation that the Complaint be dismissed. (Defendant's Exhibit C). The Hearing Officer's recommendation was adopted as a final Order, dated January 27, 2015. (Defendant's Exhibit D). The Plaintiff filed his civil complaint on August 10, 2017, alleging the following seven (7) causes of action:

- 1. Violation of the Magnuson-Moss Warranty Act;

2. Violation of the Unfair and Deceptive Trade Practices;
3. Breach of express warranties;
4. Breach of implied warranty of fitness;
5. Negligence;
6. Nuisance; and
7. Negligent misrepresentation.

Defendant filed a Motion to Dismiss within their answer on April 4, 2018. Defendant then filed their Motion for Summary Judgement on January 24, 2019.

STANDARD OF REVIEW

Rule 56 of the SCRCP provides that a trial judge may grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Charleston Lumber Co. v. Miller Hous. Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 436 (Ct. App. 1995). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. Cafe Assoc., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991).

ANALYSIS

Defendant argues it is entitled to summary judgement based on two separate grounds: (1) the action is barred by the South Carolina Statute of Limitations; and (2) the action is barred by the doctrines of res judicata and collateral estoppel.

1. The Statute of Limitations is Three Years on All of Plaintiffs' Claims

South Carolina Code § 15-3-530 provides for a three (3) year statute of limitations, “on an action upon a contract, obligation, liability, expressed or implied,” “an action for assault, battery, or any injury to the person or rights of another,” and “an action for trespass upon or damage to real property.” All of Plaintiffs’ state law claims are therefore subject to a three years statute of limitations. See e.g., Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 371, 725 S.E.2d 112, 125 (Ct. App. 2012) (state law breach of warranty and

negligence); Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) (nuisance); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 392, 503 S.E.2d 184, 188 (Ct. App. 1998) (SCUFTPA).

Plaintiffs argue that their contract falls within the Uniform Commercial Code ("UCC") definition of a sale of goods, entitling them to a six (6) year statute of limitation as provided by S.C. Code § 36-2-725, which states:

- (1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.
- (2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.
- ...
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

In order for this contract to fall under the South Carolina UCC, the contract must be for goods rather than services. When a contract provides for both goods and services, courts have used the "predominant purpose test" to determine if the UCC applies. Ranger Constr. Co. v. Dixie Floor Co., 433 F.Supp. 442 (D.S.C. 1977). Under this test, if the predominant purpose of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. Id. at 445. In determining the predominant purpose of the contract, the court should consider factors such as the language of the contract, the structure of the compensation, and the ratio of material supplied to labor expended. Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co., 980 F. Supp. 187, 189 (W.D. Va. 1997).

According to the exhibits submitted by the Plaintiff, this contract consists of a proposal and three invoices detailing the labor to be performed, the materials supplied, and their respective costs. The proposal provides that the total value of the contract is \$15,280; \$750 of which is for "15 KW heat strips". The remaining \$14,530 was for the removal of an old oil furnace and ductwork; installation of a new duct system, Climate master unit and plumbing; installation of "closed loop[s]"; and "start-up and check out of the system". While the proposal itself is vague as to the cost of the actual Climate Master unit, the accompanying invoices provide clarification. Invoice #80206 states the cost of the parts, "the unit and piping", is \$5,000. The total contract value also includes \$350 in sales tax. The court finds the costs associated with the materials, including sales tax, is only \$6,100; which is less than 40% of the total value of the \$15,280 contract. Additionally, Defendants did not design, fabricate, or manufacture the Climate Master unit; they merely acquired it as a necessary material to this removal/installation service contract. Accordingly, the court finds that this contract is predominately for the delivery of services with goods only incidentally involved. Therefore, the UCC does not apply.

The Magnuson-Moss warranty act borrows the appropriate state law statute of limitations, here three years because the UCC is not implicated. See, e.g., Dilly v. Corp., No. 2:14-CV-03307-DCN, 2016 WL 53828, at *11 (D.S.C. Jan. 4, 2016).

2. This Action is Untimely

The statute of limitations runs from the date the injury is discoverable by the exercise of reasonable diligence. Republic Contract Corporation v. SCDHPT, 332 S.C. 197, 503 SE2nd 761 (SC App. 1998). An injured party must act promptly when the facts and circumstances of the injury place a reasonable person on notice that a claim against another party might exist. *Id.* Here, Panther Heating and Cooling (a competitor company hired to inspect the system) issued its

inspection report on February 13, 2013 and identified problems in the system. This, therefore, is the very latest date the statute of limitations clock began running. Any action filed after February 13, 2016 is therefore untimely, and this action was not filed until August 10, 2017.

3. Remaining Arguments

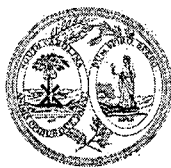
Since all causes of action are barred by the South Carolina Statute of Limitations, the court declines to address the remaining grounds for dismissal.

CONCLUSION

Accordingly, the court grants the Defendant's motion for summary judgement because even viewing the evidence in the light most favorable to the Plaintiff, this action was commenced more than three years after a written report identifying problems with the system. It is therefore untimely. For the forgoing reasons, Defendant's motion for summary judgement is GRANTED. IT IS SO ORDERED.

WILLIAM A. MCKINNON
Presiding Judge
Sixteenth Judicial Circuit

_____, South Carolina



York Common Pleas

Case Caption: James Stephen Nivens , plaintiff, et al VS JB&E Heating & Cooling
Inc
Case Number: 2017CP4602339
Type: Order/Summary Judgment

So Ordered

/s William A. McKinnon, #2761, Circuit Judge