STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2015-CP-10-0020
	)	
Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and All Others Similarly Situated,	)	
	)	
Plaintiffs,	)	**ORDER**
	)	
v.	)	
	)	
3 Chisolm Street Homeowners Association, Inc.,	)	
	)	
Defendant.	)	

This matter came before the Court on Defendant 3 Chisolm Street Homeowners Association, Inc.'s (hereinafter the "HOA") Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. A hearing was held on October 22, 2018. Dawes Cooke and Jeff Bogdan were present and argued on behalf of the HOA. Mike Ellis was present and argued on behalf of the Plaintiffs. The Court also considered the briefs submitted by both parties, including the HOA's Motion for Summary Judgment, Plaintiffs' Return, and the HOA's Reply. For the reasons set forth below, the Court GRANTS the HOA's motion and dismisses Plaintiffs' case in its entirety.

BACKGROUND

The HOA is a South Carolina Nonprofit Corporation that is made up of the owners of the condominium units located at 3 Chisolm Street in Charleston, South Carolina (hereinafter the "Condos"). The Condos are located on the site of the old Andrew B. Murray Vocational School, which was built sometime in the beginning of the 20th century. From about 2000 through 2002, the three buildings of the Vocational School (the Main Building, the Gymnasium, and the

Cottage) were renovated and converted to the Condos. The Certificate of Occupancy was issued on June 28, 2002. In March 2003, the developer turned over control of the HOA to the unit owners.

Plaintiffs Steven and Deborah Bernard are members of the HOA, who purchased their unit in 2012. The Plaintiffs' class has been certified as "all persons who were owners of condominium units at 3 Chisolm Street between January 1, 2015 and the present including those that were subject to the 2015 lump sum payment to make necessary repairs and those subject to the increased regime fees to make necessary repairs."

Beginning in late 2002 and/or 2003, homeowners, including members of the Plaintiffs' class, began experiencing and complaining of condensation and moisture intrusion at the windows of their units. The HOA retained a forensic architect, Myles Glick, to investigate the complaints. In April 2003, Glick issued a report to the HOA (hereinafter the "Glick Report") which summarized his visual inspection (without any destructive testing) of the Main Building only. The Glick Report summarized Glick's observations regarding the complained-of water intrusion and concluded by noting that the problems he found were "significant and were persuasive [sic] throughout the entire" Main Building and included his recommendation "that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. . . ." Glick also recommended that the HOA pursue "a forensic report documenting and recording the above issues." The HOA sent a copy of the Glick Report to the developer, who responded by sending the general contractor to the Condos to repair certain elements that were causing the water intrusion. Years later, the water intrusion issues reappeared and the HOA again demanded that the developer remediate the problems. The developer responded via letter dated January 30, 2008, stating that any negligence claim that the

HOA would have against the developer was without merit and barred by the statute of limitations. The developer further advised the HOA to notify its own insurance carrier of a potential suit by the HOA members (the Plaintiffs' class here) against the HOA for negligence in management, including failure to timely file suit. At that time, the HOA's board was made up of Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, and Bill Maneri. Each of these individuals is a member of the Plaintiffs' class.[1]

In January 2009, the HOA filed a construction defects lawsuit against the developer, the general contractor, and certain subcontractors styled 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a R Masonry Brickwork, Carolina Roofing Systems, Inc., and Lacy Painting 2009-CP-10-267, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Water Intrusion Lawsuit"). The defendants therein moved for summary judgment, arguing that the Water Intrusion Lawsuit was time-barred by the three-year statute of limitations. On June 9, 2011, the Honorable Roger Young issued several orders granting in whole or in part some of the defendants' motions. Judge Young found that the three-year statute of limitations on the HOA's claims regarding defective original construction work, as opposed to defective repair work done in response to the Glick Report, had expired. In another order, Judge Young explained that the three-year statute of limitations on construction work done as part of the conversion project began to run in 2003, when the HOA received a copy of the Glick Report. The Court of Appeals agreed via unpublished opinion issued March 26, 2014, finding that the statute of limitations on defects in the original renovation construction began to run in April 2003 when the HOA received a copy

[1] All but one of these class members had rotated off the HOA's board by 2011.

of the Glick Report and, thus, the statute expired in April 2006, making the Water Intrusion Lawsuit time-barred.

In February 2014, almost three years after Judge Young's initial summary judgment orders in the Water Intrusion Lawsuit, a home inspection conducted in relation to the sale of one of the units revealed structural deficiencies in the crawlspace under the Main Building, and these defects were later confirmed by a structural engineer. In response, the HOA filed a lawsuit on November 4, 2014, styled 3 Chisolm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc., Chisolm Street Partners, LLC, Murray School Partners, LLC, David L. Perdue, A. Rhodes Perdue, John W. Wilcox, III, Austin Dillon Cook Engineering, Inc., and John Doe #1, 2014-CP-10-6805, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Foundation Defects Lawsuit"). The defendants moved for summary judgment, arguing that the Foundation Defects Lawsuit was barred by the statute of limitations because, in accordance with Judge Young's and the Court of Appeals' holdings in the Water Intrusion Lawsuit, the HOA's receipt of the Glick Report in 2003 started the running of the statute of limitations on all defects related to the original conversion construction, which would include the defects being claimed in the Foundation Defects Lawsuit. In response, the HOA argued that it did not have notice (constructive or actual) of the foundation defects until February 2014, making its November 2014 filing of the Foundation Defects Lawsuit timely. The HOA submitted the affidavit of Myles Glick, which stated that his 2003 inspection and report were related to above-grade water intrusion issues only, not to any structural issues or potential problems in the crawlspace. Glick swore that he did not advise the HOA to undertake a structural analysis of any of the buildings and that neither he nor the HOA were on notice of any structural defects in the foundations or crawlspaces in 2003. Glick said that, even if the HOA

had commissioned the forensic examination that his 2003 report recommended, that forensic examination would not have included an examination of the crawlspaces and would not have uncovered any defects therein. While the summary judgment motions were pending in the Foundation Defects Lawsuit, the HOA (including members of the Plaintiffs' class) voluntarily agreed to a settlement. There was never an adjudication of whether the statute of limitations had expired on the Foundations Defect Lawsuit.

Now, in a third lawsuit filed January 2, 2015, the Plaintiffs here allege one claim against the HOA: that it was negligent in failing to follow the Glick Report's advice to pursue additional forensic testing, which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired.

STANDARD

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). SCRCP 56(e). "[I]n 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." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

While the HOA asserts that it timely filed the Foundation Defects Lawsuit (and thus was not negligent), it does not ask the Court to decide that issue here. Instead, the HOA argues that if Plaintiffs are correct that the Glick Report triggered the statute of limitations to begin to run on both the Water Intrusion Lawsuit and the Foundation Defects Lawsuit, then Plaintiffs must have failed to file *this case* within the statute of limitations because everyone knew, more than three years before this suit was filed, that the HOA might have filed the Water Intrusion Lawsuit too late. The HOA argues that Plaintiffs' class members were placed on actual and/or constructive notice that the HOA may have been negligent in failing to timely file suit: (1) in or around January 2008, when one of the Water Intrusion Lawsuit defendants notified the then-HOA board (which was made up entirely of individuals who are now members of the Plaintiffs' class) that the claims against it were barred by the statute of limitations and advised the class members that they may have a negligence case against the HOA for failing to timely file suit; and/or (2) on June 9, 2011, when Judge Young issued his orders finding that the HOA failed to timely file suit. Therefore, the HOA argues that the Plaintiffs' January 2, 2015 filing of this case was untimely. The crux of Plaintiffs' claim of negligence against the HOA is that, even though nobody knew of any problem with the foundations until February 2014, the foundation defects were, should have been, or could have been part of the Water Intrusion claim, so the HOA was too late in filing the Foundation Defects Lawsuit because it was too late in filing the Water Intrusion Lawsuit. The HOA argues that if this is so, then the same principle applies to this suit: The Plaintiffs knew by 2008, or at least by June 9, 2011, that the HOA might have missed the statute of limitations, so this suit had to be filed no later than June 9, 2014.

The Plaintiffs on the other hand argue that the statute of limitations did not begin to run on this case until March 26, 2014 (when the Court of Appeals affirmed Judge Young's ruling) or until January 22, 2015 (when the HOA levied a special assessment on its members to pay for the cost of repairs to the foundations). Therefore, Plaintiffs argue that their January 2, 2015 filing of this case was timely.

The South Carolina Supreme Court has "repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("The statute runs from 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."); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist."). The statute of limitations can be triggered despite the fact that the injured party may not comprehend the full extent of the damage or may not have developed a full-blown theory of recovery. Dean, 321 S.C. at 364, 468 S.E.2d at 647. "The date on which discovery should have been made is an objective, not subjective, question." Stokes–Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016); Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). As Plaintiffs correctly cite, a statute of limitations begins to run at the time the cause of action accrues. King v. James, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). "A cause of action accrues at the

moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." Bergstrom v. Palmetto Health All., 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004), quoting Stephens v. Draffin, 327 S.C. 1, 4–5, 488 S.E.2d 307, 309 (1997); McAlhany v. Carter, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), aff'd, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). A cause of action accrues when the defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989). "The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule)." Doe v. Bishop of Charleston, 407 S.C. 128, 140, 754 S.E.2d 494, 500 (2014), quoting Kreutner, 320 S.C. at 285, 465 S.E.2d at 90.

Here, Plaintiffs' sole claim against the HOA is one of negligence. Therefore, it accrued at the moment the alleged negligent conduct caused some injury, or when a reasonable person would have been put on notice that they had a claim against the HOA. Doe, 407 S.C. at 140, 754 S.E.2d at 500. Plaintiffs acknowledge in their Return that the HOA's alleged negligent act for which Plaintiffs are seeking damages was "failing to file suit against renovators[2] within the applicable statute of limitations." Therefore, Plaintiffs' action against the HOA accrued when Plaintiffs knew or should have known that the HOA failed to timely file suit. Plaintiffs were damaged then, even though the amount of damage would not be quantified until later. Plaintiffs could have sued as soon as they suffered any damage, which was as soon as they knew or should have known that the HOA

[2] Plaintiffs defined "renovators" as "the general contractor and various sub-contractors that performed the 2002 renovation of the condominiums."

might have failed to timely file suit. Under Plaintiffs' theory that the 2003 Glick Report triggered the statute of limitations for both the Water Intrusion Lawsuit and the Foundation Defects Lawsuit, the statute of limitations on Plaintiffs' case against the HOA for failing to timely file the Foundation Defects Lawsuit began to run with the Plaintiffs' class members receipt of the January 2008 letter informing them that the HOA missed the statute of limitations, or at the latest with Judge Young's June 2011 orders finding that the HOA missed the statute of limitations.

Plaintiffs are incorrect that their claim did not accrue until the Court of Appeals issued its March 26, 2014 opinion affirming Judge Young's rulings. Plaintiffs incorrectly contend that it could not have filed suit against the HOA until then, because it was not until then that the HOA's liability was conclusively established. Plaintiffs suffered damage as soon as the HOA missed the statute of limitations, even though the extent of the damage continued to evolve with subsequent events, including the affirmance by the Court of Appeals.

For the same reason, Plaintiffs are also incorrect that their negligence claim against the HOA did not accrue until January 22, 2015, when Plaintiffs claim they were "first damaged" by the HOA's levying of the special assessment. As an initial matter, Plaintiffs filed this case on January 2, 2015, which is before it even accrued, according to them. Plaintiffs are also incorrect because they did not have to wait until all of their damages were established before filing suit. See Bergstrom, 358 S.C. at 397, 596 S.E.2d at 46 ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose.)". Plaintiffs could have filed suit before all of its damages occurred or were discovered. Grooms, 298 S.C. at 402, 380 S.E.2d at 857. Plaintiffs certainly did not have to wait until all of their damages were established and billed to them before filing suit, as they now claim in

this argument. Plaintiffs reasonably should have known that the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit would have to be repaired or remediated at some point and that the HOA would necessarily have to acquire those funds through its assessment process from the Plaintiffs. In any event, Plaintiffs knew that they had suffered some damage to their claims against the renovators as soon as they were aware that the HOA might have missed the statute of limitations. This undeniably occurred more than three years before Plaintiffs filed this suit.

The HOA argues, in the alternative, that Plaintiffs' claim is governed by the statute of limitations found in the South Carolina Nonprofit Corporations Act of 1994, which provides that Plaintiffs' case must have been commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann. § 33-31-830(f). The South Carolina Court of Appeals has held, in an unpublished opinion, that the Nonprofit Corporations Act applies not only to claims against individual directors of a nonprofit corporation, but also to claims against the corporation. Smith v. Dockside Ass'n, Inc., No. 2005-UP-139, 2005 WL 7083482, at *4-5 (S.C. Ct. App. Feb. 28, 2005). This is because a corporation can only act through its directors, so application of the standards governing a corporation's directors also applies to the corporation itself. Indeed, Steven Bernard, one of the individually-named Plaintiffs and the appointed class representative, testified that this case is against both the HOA and its directors. This Court need not decide which statute applies. Based on the Court's rulings above, the statute of limitations expired before Plaintiffs filed this suit, regardless of whether the Court applies §33-31-820(f)'s statute of limitations of §15-3-505's, with the discovery rule. Even a three-year statute of limitations with the discovery rule would have expired in either January 2011 or June 2014, prior to Plaintiffs filing this case in January 2015.

IT IS HEREBY ORDERED THAT:

Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' case is dismissed in its entirety.

Edward W. Miller
Presiding Judge, Ninth Judicial Circuit

November 30, 2018