RECEIVED
May 26 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and
Carolyn Nivens, Appellants,

v.

JB & E Heating & Cooling, Inc.,
a South Carolina corporation, Respondent.

PETITION FOR REHEARING

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Appellants

STATEMENT OF THE CASE

In or about October, 2010, the Appellants NIVENS contracted with the Respondent JB & E HEATING & COOLING, INC. (hereafter also JB&E) for the installation of a geothermal system in their home at the price of $15,280.00. The NIVENS allege that the system was never properly completed. JB&E's e-mail to NIVENS dated March 8, 2011 references the parties' continued dealings as to completion.

Appellant JAMES STEPHEN NIVENS alleges repeated promises of examination and repair, and the failure of those promises. In March, 2012, he initiated a complaint with the South Carolina Department of Labor and Licensing Regulation (hereafter also LLR) in March, 2012 alleging improper installation of the unit.

Appellants filed their civil action on August 10, 2017, alleging 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.[1]

Respondent JB&E filed for Summary Judgment on January 24, 2019, alleging an expired Statute of Limitations and that the claims were barred by *res judicata* and collateral estoppel due to the LLR ruling. The Appellants NIVENS alleged that their action falls under the U.C.C. Statute of Limitation, S.C. Code § 36-2-725, which allows a six-year period when dealing with a sale of goods.

By its Order filed March 18, 2019, the Circuit Court dismissed the action on the basis of an expiration of the applicable Statute of Limitations.

The NIVENS filed their Motion for Rehearing under Rule 59, S.C.R.C.P. on March 28, 2019. By its Order filed May 31, 2019, this Motion was denied. Appeal was filed herein on June 25, 2019.

By its Order of May 11, 2022, this Court dismissed the appeal, holding that "the predominant purpose of the contract between [the parties] was for services with goods incidentally involved." [ORDER OF MAY 11, 2022, Para. 1.] This Court based its decision upon such precedent as *Plantation*

---

1 The cause of nuisance was dropped at the hearing on Summary Judgment.

Shutter Co. v. *Ezell*, 328 S.C. 475, 492 S.E.2d 404 (Ct.App. 1997), applying what it sees as the "predominant factor test."

ARGUMENT

DOES THE SIX-YEAR STATUTE OF LIMITATIONS SET OUT IN S.C. CODE § 36-2-725 APPLY TO THIS ACTION?

The Appellants argue that the U.C.C. Statute of Limitations, S.C. Code § 36-2-725, titled "Statute of limitations in contracts for sale", applies in this action. That Statute states, in relevant part:

> (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 determining whether a particular contract falls within the U.C.C. definition of a "sale of goods", and thus whether § 36-2-725 would apply, the Courts have looked to the predominant purpose of the transaction. Most Courts have determined the predominant purpose by looking to the parties' intent. In the leading case of *Coakley & Williams, Inc*. v. *Shatterproof Glass Corp*., 706 F.2d 456, 460 (4th Cir. 1983), the Fourth Federal Circuit Court, applying Maryland law, looked to the language of the contract, the nature of the supplier's business, and the intrinsic worth of the materials provided in determining that intent.

As stated above, in its Order of May 11, 2022, this Court dismissed this appeal, holding that "the predominant purpose of the contract between [the parties] was for services with goods incidentally involved." [ORDER OF MAY 11, 2022, Para. 1.] The Court's citation of *Plantation Shutter Co. supra*, omits that decision's accurate summary of the rule on predominant purpose as recognized in this State:

> In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC, courts generally employ the predominant factor test. *Ranger Constr. Co*. v. *Dixie Floor Co*., 433 F.Supp. 442 (D.S.C.1977). Under this test, if the

predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. *Id*. at 445. If, however, the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. *Id*. at 444. In most cases in which the contract calls for a [328 S.C. 479] combination of services with the sale of goods, courts have applied the UCC. James J. White & Robert S. Summer, UNIFORM COMMERCIAL CODE § 1-1, at 4 (4th ed. 1995).

[*Plantation Shutter Co.* v. *Ezell*, 328 S.C. 475, 478, 492 S.E.2d 404, 406; emphasis added.]

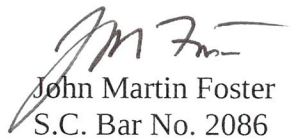
In the case of *Fournier Furniture, Inc.* v. *Waltz-Blow Pipe Co*., 980 F.Supp. 187 (W.D.Va. 1997), (cited by this Court's decision of May 11, 2022) the Federal District Court determined that a contract for design, fabrication and installation of a furnace and which provided for sales taxes, as here, was one for the sale of goods. The intent of the contract of the parties in this case was obviously to secure the Appellants new, properly working geothermal system of equipment in the Appellants' home. Thus, S.C. Code § 36-2-725 applies; since this action was brought within six years of the time to which the parties' actions extended their contract, the relevant Statute of Limitations is satisfied.

CONCLUSION

With respect to the Court, the Appellants can only cite, again, the fact which to their knowledge is undisputed in this action: the Appellants wanted and contracted for a working, adequate geothermal system to heat and cool their house. Installation of that system involved services and equipment. Under the existing and accepted precedent dealing with such a situation, they are entitled to invoke the U.C.C. statute of limitations. They have met that limitation and are entitled to move forward with their action.

May 26, 2022

Respectfully submitted,



John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100
Attorney for Appellants

RECEIVED
May 26 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and Carolyn Nivens, Appellants,

v.

JB & E Heating & Cooling, Inc., a South Carolina corporation, Respondent.

CERTIFICATE OF SERVICE

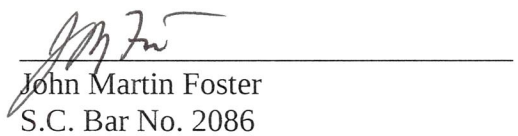
The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Petition for Rehearing; and
this Certificate of Service,

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by service to the opposing lawyer's primary e-mail address listed in the Attorney Information System (AIS), as authorized by Section (b)(2) of the Order of the Supreme Court dealing with Electronic Filing and Service issued May 6, 2022.

James W. Boyd
1544 Ebenezer Road
Rock Hill, S.C. 29732
Attorney for Respondent
803 328-2600



John Martin Foster
S.C. Bar No. 2086
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellants

May 26, 2022