IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 7, 2007 Session

WILLIAM H. LIGGETT, JR. ET AL. v. BRENTWOOD BUILDERS, LLC

Appeal from the Chancery Court for Williamson County
No. 30405 R.E. Lee Davies, Chancellor

No. M2007-00444-COA-R3-CV - Filed March 27, 2008

Home buyers brought suit against home builder alleging fraud, breach of contract, consumer protection violations, negligent misrepresentation, and negligence. The trial court granted the builder's motion for summary judgment based upon the statute of limitations and statute of repose. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and ROSS H. HICKS, SP.J., joined.

Samuel P. Funk and Lisa K. Helton, Nashville, Tennessee, for the appellants, William H. Liggett, Jr., and Cynthia Liggett.

Kent E. Krause and Jason A. Lee, Nashville, Tennessee, for the appellee, Brentwood Builders, LLC.

OPINION

The plaintiffs, William H. Liggett, Jr. and his wife Cynthia Liggett, purchased a newly-constructed house from the defendant, Brentwood Builders, L.L.C., in March 2000. The house received a final certificate of occupancy in August 1999, and the Liggetts moved in on March 4, 2000. Almost immediately after moving into their new home, the Liggetts began experiencing problems with the house.[1] It is undisputed that, in April or May 2000, "the Liggetts experienced water leaks from the windows and French door in the great room as well as leaks in the ceiling at the intersection of the great room and the kitchen." They "also experienced large amounts of water coming in under the kitchen door." For the rest of 2000, the Liggetts "continued to experience serious water intrusion problems throughout the house." As of February 2001, "leaks continued unabated throughout the Liggetts' home." Prior to the summer of 2000, the Liggetts found puddles

[1] As this case is before this Court on summary judgment, we will summarize the undisputed facts based mainly upon the defendant's statement of undisputed material facts and the plaintiffs' response to the defendant's statement.

of water in the great room in the corner between the great room and the kitchen. Mr. Liggett first noticed problems with the mortar along one of the windows sometime in 2000. He also knew that the back windows and French doors leaked during 2000 and 2001. When the Liggetts contacted Brentwood Builders about the water leaks, the builder allegedly assured them that these problems were not out of the ordinary and were associated with heavy rains. Brentwood Builders applied additional silicone caulk and secured the lock on the double hung window.

On February 14, 2001, the Liggetts sent Brentwood Builders a punch list that included the following alleged defects: roof leaks, a kitchen drywall water leak, cracks in the kitchen tile, large brick cracks, nail pops in several locations, and drywall cracks in several locations. The builder allegedly advised the Liggetts that the cracked tiles were the result of settling.

In July 2001, the Liggetts sent a letter to Brentwood Builders about continuing problems with cracked tiles. Brentwood Builders responded by applying silicone caulk. In January 2002, they sent another letter regarding continuing "problems with water intrusion throughout the home and the concomitant water damage to the dry wall." According to the Liggetts' deposition testimony, this letter suggested that Brentwood Builders consult an expert regarding the leaking problem. Brentwood Builders applied silicone to the flashing at the roof and windows. Mr. Liggett first noticed paint peeling and moisture problems in the kitchen window in 2002. In March or April of 2003, he noticed water intrusion and leaking above and below the master bathroom window. In July 2003, the Liggetts hired a contractor to inspect the roof; the contractor opined that the problem was structural in nature. Brentwood Builders undertook some repairs, but the Liggetts hired another contractor to perform the drywall repair in November 2003.

Subsequent to November 18, 2003 (after an inspection by an engineer), the Liggetts discovered several piers under the home were not supporting the beam beneath the kitchen and sent a letter to Brentwood Builders notifying them of this problem. Subsequent to December 18, 2003, the Liggetts discovered multiple "serious defects which compromise the integrity of the home." As described in the amended complaint, the defects discovered after December 18, 2003, include the following: inadequate attachment of rafters to ridges, inadequate attachment of draft rafters, and bracing that fails to support the framing in the attic; inadequately supported wood floor framing; lack of flashing between the deck and the house; lack of weep holes or through wall flashing in the brick veneer; lack of appropriate brick ties; lack of adequate air space between the brick veneer and the sheathing; inadequate pitch in the exterior window sills; a missing lintel above a glass block window; shoddy workmanship in the brick veneer; poorly installed windows and a defective seal in the front door; poorly-installed side wall flashings around the roof; and improperly-installed plumbing in a bathroom.

On March 2, 2004, the Liggetts filed suit against Brentwood Builders for fraud, breach of contract, consumer protection violations, negligent misrepresentation, and negligence. After discovery was complete, Brentwood Builders moved for summary judgment based upon the statute of limitations and the statute of repose. In support of its motion, Brentwood Builders submitted an affidavit from Jerry Johnson (the owner of Brentwood Builders) and excerpts from the deposition of Mr. Liggett. The Liggetts responded and submitted an affidavit of Robert Warren, a structural engineer. Mr. Warren described "significant structural defects" in the house, "including lack of

flashing, weepholes, improper brick ties, extensive improper roof framing, missing lintel over the glass block window, and improper support of the floor framing system under the kitchen area." He opined that "[t]hese defects are latent defects which would not be ordinarily discoverable in the course of typical home ownership." In an order entered on December 8, 2006, the trial court granted the defendant's motion for summary judgment "subject to a showing by the plaintiffs of any injury occurring between March 2, 2003, and August 2003."

The Liggetts submitted a supplemental brief along with an affidavit from Ms. Liggett and a second affidavit from Mr. Warren, the structural engineer. In her affidavit, Ms. Liggett described a number of defects discovered from April 2003 through August 2003. These included the sloping of the property under the deck toward the house, cracks in the ceiling and drywall of the foyer, cracks in the bead board in the kitchen, a water stain in the master bathroom window, peeling paint on various windows, door rot on the French doors, baseboard pulling away from the wall in two locations, cracks in the drywall in the master bedroom and living room, twisted bead board along the ceiling in the great room entry, a poorly installed roof, missing insulation, a mismatched coil on the HVAC unit, and mismatched flashing on the roof. On February 22, 2007, the trial court granted the defendant's motion for summary judgment in its entirety. The court specifically cited the applicability of *Mulhern v. Pulte*, No. W2004-01488-COA-R3-CV, 2004 WL 3021109 (Tenn. Ct. App. Dec. 28, 2004).

On appeal, the Liggetts assert that the trial court erred in granting summary judgment as there exist genuine issues of material fact. The case presents two main issues: (1) whether the statute of limitations of Tenn. Code Ann. § 28-3-105 applies to all of the plaintiffs' claims in this case; and (2) whether the trial court erred in granting summary judgment based upon the applicable statute of limitations and statute of repose.

ANALYSIS

This case was resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Pub. Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 10, 104 (Tenn. Ct. App. 1998).

(1)

The threshold question for determination is what statute of limitations applies to each of the Liggetts' claims in this case.

The Liggetts argue that there is a distinction between (1) their claims for fraud, negligent misrepresentation, negligence, Tennessee Consumer Protection Act violations, and breach of contract "relating to defects in the design and construction of a new home" and (2) their claims for breach of contract and fraud "relating to Defendant's unfulfilled contractual obligations and fraudulent inducement to contract." With respect to the latter category of claims, the Liggetts assert, the statute of limitations set forth at Tenn. Code Ann. § 28-3-109(a)[2] for contract actions (six years from accrual of cause of action) should apply, not the statute of limitations set forth at Tenn. Code Ann. § 28-3-105[3] (three years from accrual of cause of action). We have concluded that this argument must fail.

It is well-settled law in this state that "the gravamen of an action, rather than its designation as an action for tort or contract, determines the applicable statute of limitations." *Pera v. Kroger Co.*, 674 S.W.2d 715, 719 (Tenn. 1984); *see also Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006). In *Kirby Farms Homeowners Ass'n v. Citicorp, Citibank, N.A.*, 773 S.W.2d 249 (Tenn. Ct. App. 1989), the court applied this principle in a case involving alleged defects in and damages to a condominium project. The complaint included claims for breach of express warranty, breach of implied warranty, and breach of fiduciary duty as well as claims for negligence, negligent misrepresentation, strict liability, and fraudulent concealment. *Id.* at 250. After citing the gravamen of the action rule, the court stated:

> The word "actions" in T.C.A. §28-3-105 refers to the subject matter of the controversy and not to the remedial procedure. Whether an action for the recovery of damages to personal or real property results from a breach of contract or from a tort, independent of contract, is immaterial.

Id. at 251 (citing *Williams v. Thompson*, 443 S.W.2d 447, 449 (Tenn. 1969)). In affirming the trial court's grant of summary judgment, the court found that the gravamen of the plaintiffs' complaint was injury to real property and that, therefore, the three-year statute of limitations in Tenn. Code Ann. § 28-3-105 applied.

Pursuant to these authorities, we must conclude that, with respect to all but the consumer protection claims, the Liggetts' claims are governed by the three-year statute of limitations set forth

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[2]Tenn. Code Ann. § 28-3-109(a) provides in pertinent part that, "The following actions shall be commenced within six (6) years after the cause of action accrued: . . . (3) Actions on contracts not otherwise expressly provided for."

[3]Tenn. Code Ann. § 28-3-105 provides in pertinent part that, "The following actions shall be commenced within three (3) years from the accruing of the cause of action: (1) Actions for injuries to personal or real property; . . ."

at Tenn. Code Ann. § 28-3-105. The claim for violations of the Consumer Protection Act is governed by the special one-year statute of limitations set forth at Tenn. Code Ann. § 47-18-110.[4]

(2)

We must now proceed to address the thornier questions surrounding the application of the statute of limitations, codified at Tenn. Code Ann. § 28-3-105, and the statute of repose, codified at Tenn. Code Ann. § 28-3-202, to the facts of this case. In *Watts v. Putnam County*, 525 S.W.2d 488 (Tenn. 1975), the court examined the relationship between these two statutes:

> A simple approach to the application of Sec. 28-314 [now Tenn. Code Ann. § 28-3-202] et seq., to personal injury and property damage actions would be to first determine whether the appropriate statute (28-304 or 28-305) [now Tenn. Code Ann. §§ 28-3-104 and 28-3-105] has run. If either has expired, the lawsuit may not be brought. If the appropriate period has not expired, plaintiff should look to Sec. 28-314 [now Tenn. Code Ann. § 28-3-202] et seq. If four years since the date of substantial completion has expired, absent fraud or wrongful concealment, the lawsuit may not be brought unless the cause of action arose during the fourth year after completion.[5]

Id. at 493-94. We will, therefore, start our analysis with the statute of limitations.

Statute of limitations

In interpreting the provisions of Tenn. Code Ann. § 28-3-105, the courts have held that, in a suit for property damages, "the cause of action accrues at the time the injury occurs, or when it is discovered, or when in the exercise of reasonable care and diligence the injury should have been discovered." *Prescott v. Adams*, 627 S.W.2d 134, 138 (Tenn. Ct. App. 1981). The key question in this case is whether there are genuine issues of material fact concerning the time when the Liggetts' causes of action accrued.

The Liggetts rely heavily on the *Prescott* case for their position that summary judgment was not proper in this case. We have concluded, however, that *Prescott* is distinguishable from this case. In *Prescott*, the Prescotts purchased a home in September 1976 and were informed by a neighbor in December 1976 that there had previously been a mud slide on the hill behind their new house.

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[4]Tenn. Code Ann. § 47-18-110 states: "Any action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person's discovery of the unlawful act or practice, but in no event shall an action under § 47-18-109 be brought more than five (5) years after the date of the consumer transaction giving rise to the claim for relief."

[5]The latter scenario is addressed in Tenn. Code Ann. § 28-3-203(a), which provides that, "Notwithstanding the provisions of § 28-3-202, in the case of such an injury to property or person or such injury causing wrongful death, which injury occurred during the fourth year after such substantial completion, an action in court to recover damages for such injury or wrongful death shall be brought within one (1) year after the date on which such injury occurred, without respect to the date of death of such injured person."

Id. at 136. In the spring of 1977, Mr. Prescott noticed a crack in the hill behind the house. An inspector advised Mr. Prescott that this crack was probably caused by a water drainage problem and recommended the installation of French drains. Builder Adams told Mr. Prescott that French drains had been installed. *Id.* It was not until May 1979 that "the hillside behind the house broke loose and became a major landslide." *Id.* at 136. Another major mudslide occurred in September 1979. *Id.* The Prescotts filed suit against Mr. Adams on July 11, 1980. The chancellor granted Mr. Adams's motion for summary judgment pursuant to Tenn. Code Ann. §§ 28-3-105 and 28-3-202. *Id.*

After finding summary judgment inappropriate on the issue of fraud under Tenn. Code Ann. § 28-3-202, the appellate court in *Prescott* concluded that a jury question existed on the issue of when the cause of action accrued, which it interpreted to mean "when should the plaintiffs have reasonably known that their cause of action existed." *Id.* at 139. In reaching this conclusion, the court made the following statement, cited by the Liggetts in support of their case: "The time of the accrual of the cause of action, as affecting limitations, is frequently a question of fact to be determined by the jury or trier of fact, as where the evidence is conflicting or subject to different inferences." *Id.* While this statement provides a helpful summary of the applicable legal principles, we do not agree with the Liggetts' application of those principles to the facts of this case. In *Prescott*, the home owners had very little information about the potential for damage to their house due to mud washes prior to July 11, 1977, the accrual date before which their claims would be barred by the statute of limitations. Thus, the court concluded:

> We cannot say as a matter of law that a greatly reduced purchase price, notice of 'mud washes' and the installation of drains, reports of mud slides by neighbors and cracks in the ground in the year following the purchase were an indication of drainage problems such that *in the absence of visible damage to the real property* a reasonable man should have known that he had a cause of action.

Id. at 139 (emphasis added). Thus, as of the accrual date required for the chancellor to find their claims barred by the statute of limitations, the home owners in *Prescott* had not yet sustained significant damage to their property. Under those circumstanes, the appellate court determined that a jury question existed as to when their cause of action actually accrued.

The circumstances in the present case differ significantly from those in *Prescott*. The Liggetts filed their complaint on March 2, 2004. Under the statute of limitations of Tenn. Code Ann. 28-3-105, any cause of action that accrued prior to March 2, 2001 would be barred because the complaint would not be filed within three years of the accrual of the cause of action. The undisputed evidence establishes that the Liggetts had actual knowledge of significant problems and damage prior to March 2001. The uncontroverted facts show that, as of February 2001, the Liggetts had noticed and reported to the builder leakage problems affecting the French doors, kitchen door, and windows; roof leaks; cracks in the kitchen tile; large brick cracks; kitchen dry wall damage; nail pops in several locations; and drywall cracks in several locations. In deposition testimony, the Liggetts further detailed problems that were discovered during their first year in the house, from March 2000 through March 2001: cracking in the edges and discoloration in the kitchen and hearth room windows; a window askew in a child's bedroom; problems with windows in the master

bedroom and study (which they thought were merely cosmetic); and irregular mortar by a south window.

Based upon all of the damage known to the Liggetts prior to March 2, 2001, we have concluded that the trial court could properly have found, as a matter of law, that their claims were time-barred by the three-year statute of limitations set out in Tenn. Code Ann. § 28-3-105. Prior to March 2001, the Liggetts knew of problems related to, among other things, the windows and doors, the roof, the drywall, and the kitchen floor. The Liggetts assert that the failure of several piers under the house to support the main beam under the kitchen, a defect not discovered until December 2003, and other "latent defects" should be not be deemed, as a matter or law, to be problems that they, with the exercise of reasonable care and diligence, should have discovered based upon the information they had prior to March 2001. In light of the overall picture of the information known to the Liggetts prior to March 2001, however, this Court has reached the conclusion that they were on notice that there were significant and pervasive problems with the construction of their home. With respect to the alleged "latent" defects, the Liggetts had either discovered the injury or had knowledge from which, "in the exercise of reasonable care and diligence[,] the injury should have been discovered." *Prescott*, 627 S.W.2d at 138.

The same reasoning applies with respect to the Liggetts' causes of action for fraud and negligent misrepresentation. They allege that they were induced to purchase the home by Brentwood Builders' false and fraudulent representations that "the home was solidly constructed, was in good and sound condition, that the home was built to conform to the code, that the home was built using high quality materials, that the home had been built by skilled professionals, that the home would meet the Builder's exacting standards, that the Builder was committed to providing the highest quality product and that any defects would be covered by the warranty." In the alternative, the Liggetts allege that the same representations were negligently made and that they relied on those representations to their detriment. Under the rule stated in *Prescott*, a cause of action for fraud (or intentional misrepresentation) accrues within the meaning of Tenn. Code Ann. § 28-3-105 "at the time the injury occurs, or when it is discovered, or when in the exercise of reasonable care and diligence the injury should have been discovered." *Prescott*, 627 S.W.2d at 138. Viewing the evidence in the light most favorable to the Liggetts, we must conclude that they knew of significant defects prior to March 2001 and either knew or should have known that they had a cause of action against Brentwood Builders for fraud and/or negligent misrepresentation. Given their knowledge of persistent leakage through the windows, doors, and roof, cracks in the kitchen floor tile, drywall cracks, and other problems, the Liggetts had reason to know that at least some of the representations upon which they had relied in purchasing the house were not true.

Estoppel

We must also address the Liggetts' argument that their causes of action for breach of contract, fraud, and negligent misrepresentation accrued "not when the defects in the house [were] discovered, but rather when the homeowner realizes that the builder will no longer fulfill its obligations to cure the defects, for breach of contract, and when the homeowner realizes that the statements the builder made were false, for fraud and negligent misrepresentation."

The Liggetts rely on the case of *Molin v. Perryman Constr. Co.*, No. 01-A-019705CV00232, 1998 WL 83737 at *5 (Tenn. Ct. App. Feb. 27, 1998), for the proposition that a cause of action for injury to property that results from a breach of contract does not accrue until the homeowner learns that the builder will no longer make repairs. This interpretation is overly broad. In *Molin,* a case involving renovation of part of an existing structure and the construction of an addition, the court determined that, under the facts in that case, accrual of the cause of action occurred when the homeowners learned that the builder "would no longer repair the defects." *Id.* at *15. Tennessee cases have not, however, adopted a general rule that "any effort by a wrongdoer to remedy the effect of wrongdoing would effectively bar the defense of the statute of limitations." *Bernard*, 968 S.W.2d at 862; *see also Conley v. Jim Wright Const. Co.*, No. 01-A-019012CH00440, 1991 WL 107871 (Tenn. Ct. App. June 21, 1991). Rather, our courts have recognized that a party may by his conduct be estopped from invoking the statute of limitations:

> "Where by promises and appearances one party is induced to believe that the other party is going to pay or otherwise satisfy the claim of the first party, and in reliance on that representation the first party delays filing suit, the party making the representation may be estopped to raise the statute of limitations as a defense."

Id. (quoting *Sparks v. Metro. Gov't of Nashville and Davidson Co.*, 771 S.W.2d 430, 433 (Tenn. Ct. App. 1989); *see also Fairway Village Condo. Ass'n, Inc. v. Connecticut Mut. Life Ins. Co.*, 934 S.W.2d 342, 346 (Tenn. Ct. App. 1996). We view the decision in *Molin* as being limited to its facts. The pertinent inquiry is whether the defendant's actions lulled the plaintiffs into delaying suit. As discussed above, with respect to many of their claims, the Liggetts knew that there were problems before March 2, 2001. The Liggetts have not pointed to any evidence that Brentwood Builders somehow induced them to delay filing suit by assuring them that it would take care of the alleged defects.[6]

Statutes of limitations exist "to ensure fairness to the defendant by preventing undue delay in bringing suits on claims, and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness." *Quality Auto Parts Co. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 820 (Tenn. 1994). They attempt to strike a balance between giving the plaintiff time to understand that recovery for the injuries sustained due to the defendant's actions requires a lawsuit and ensuring that the defendant is not prejudiced by undue delay in bringing that suit. Statutes of limitations do not attempt to distinguish between legitimate and illegitimate claims, so they can operate to bar a deserving claimant from having the merits of his claims adjudicated if the claimant waits too long to file suit. This is an obvious, if unfortunate, result of having statutes of limitations. Nevertheless, the courts must enforce them.

The trial court did not err in granting summary judgment to Brentwood Builders on the basis that the Liggetts' claims were barred by the statute of limitations.

Statute of repose

[6] *Fahrner v. SW Mfg.,* Inc., 48 S.W.3d 141, 145-147 (Tenn. 2001), includes a discussion of the distinctions between estoppel and fraudulent concealment, the latter of which is relevant under the statute of repose.

We need not address the applicability of the statute of repose[7] in light of our holding above that all of the Liggetts' claims were barred by the statute of limitations.

Costs of appeal are assessed against the appellants, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

[7]The applicable four-year statute of repose is set forth at Tenn. Code Ann. § 28-3-202:

> All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveyed in connection with, such an improvement within four (4) years after substantial completion of such an improvement.