IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SPRING ISLE COMMUNITY ASSOCIATION, INC.,

Appellant,

v.

Case No. 5D20-1420
LT Case No. 2017-CA-1953

HERME ENTERPRISES, INC. AND SEMOCOR ENTERPRISES, INC., MOLAMARK CONSTRUCTION, INC., APOLLO MARBLE PRODUCTS COMPANY, INC., HIGH & LOW ELECTRIC, INC., ET AL.,

Appellees.

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Opinion filed October 22, 2021

Appeal from the Circuit Court
for Orange County,
Chad K. Alvaro, Judge.

Robyn Marie Severs, Patrick C. Howell, and Scott P. Kiernan, of Becker & Poliakoff, P.A., Orlando, for Appellant.

Kellie A. Caggiano, Hannah M. Tyson, and Randell H. Rowe, of Moyer Law Group, St. Petersburg, for Appellees, Hermes Enterprises, Inc. and Semocor Enterprises, Inc.

No Appearance for Other Appellees.

Jeffrey V. Mansell, of Burlington & Rockenbach, P.A., West Palm Beach, Amicus Curiae, for Florida Justice Association.

Curtis L. Brown and J. Michael Moorhead, of Wright, Fulford, Moorhead & Brown, P.A., Altamonte Springs, Amicus Curiae, for American Council of Engineering Companies of Florida.

Reed W. Grimm of Taylor, Day, Grimm & Boyd, Jacksonville, and Paulo R. Lima, of Russo Appellate Law Firm, P.A., Miami, Amicus Curiae, for Main Street America Group, Inc.

J. Michael Huey, D. Ty Jackson, George T. Levesque, and Patrick M. Hagen, of Gray Robinson, P.A., Tallahassee, Amicus Curiae, for AIA Florida.

EVANDER, J.

In this construction defect case, Spring Isle Community Association, Inc. ("the Association") appeals a partial final summary judgment entered in favor of third-party defendant, Herme Enterprises, Inc. ("Herme"), a stucco subcontractor. In entering the partial final summary judgment, the trial court found that the claims brought against Herme were barred by the ten-year

statute of repose set forth in section 95.11(3), Florida Statutes (2016). Because a genuine issue of material fact remains as to the date the repose period commenced, we reverse.

On March 2, 2017, the Association sued Pulte Home Corporation, n/k/a Pulte Home Company, LLC ("Pulte"), which developed the 71 building/390 townhome unit project in Spring Isle, for alleged defects related to the buildings' exteriors and roofs. On March 10, 2017, Pulte sent notices of claims, pursuant to section 558.004, Florida Statutes (2016), to its subcontractors on the Spring Isle project, including Herme and its successor, Semocor Enterprises, Inc. ("Semocor"). Two weeks later, Pulte filed a third-party complaint against several contractors, including Herme and Semocor. Herme and Semocor both raised the statute of repose as an affirmative defense to Pulte's third-party complaint.

Ultimately, Herme and Semocor filed an amended motion for partial summary judgment, arguing that the ten-year repose period as to each Spring Isle townhome unit commenced when the certificate of occupancy was issued for such unit. The trial court agreed and found that the statute of repose barred claims on the 324 townhome units completed before March

10, 2017.[1] Because the judgment disposed of all claims against Herme, it is appealable under Florida Rule of Appellate Procedure 9.110(k).

Pulte filed a timely notice of appeal, and the Association was later substituted as the appellant in this case. (Pursuant to a settlement agreement between Pulte and the Association, Pulte assigned its third-party claims to the Association.)

In this case, both parties agree that the applicable language from section 95.11(3)(c), Florida Statutes, provides as follows:

> [T]he action [founded on the design, planning, or construction of an improvement to real property] must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered

[1] Neither party challenges the trial court's determination that the service of the Chapter 558 notices of claims constituted an "action" for statute of repose purposes. *See Gindel v. Centex Homes,* 267 So. 3d 403, 406 (Fla. 4th DCA 2018) (holding that homeowners' action against contractor and subcontractor for damages arising from alleged construction claim commenced, for statutory repose purposes, when notice of claim was provided to contractor and subcontractor). In 2019, the Legislature amended section 558.004 to expressly provide that a notice of claim served pursuant to Chapter 558 would not toll any statute of repose under Chapter 95. Ch. 2019-75, § 8, Laws of Fla. (2019).

We further observe, as the trial court did, that although the Legislature amended section 95.11(2)(c) on July 1, 2018, to give third-party plaintiffs an extra year to file a third-party claim after being sued by an initial plaintiff, that amendment was not retroactive and, thus, does not apply in this case.

> architect, or licensed contractor and his or her employer, *whichever date is latest.*

§ 95.11(3)(c), Fla. Stat. (2016) (emphasis added). However, the parties disagree as to what event triggered the commencement of the statute of repose under the facts in this case.

Herme argues that the trial court correctly determined that the date of the issuance of a certificate of occupancy commenced the repose period for each particular unit. On the other hand, the Association argues that the repose period commenced when the contract between Pulte and Herme was completed and that such completion date occurred less than ten years prior to the filing of Pulte's third-party complaint.[2]

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[2] In *Allan and Conrad, Inc., v. University of Central Florida*, 961 So. 2d 1083, 1087 (Fla. 5th DCA 2007), we held that under the fourth prong of section 95.11(3)(c) the repose period began to run from the latest date that any of the following entities completed or terminated their contract—the professional engineer, registered architect, or licensed contractor. *See also Clearwater Hous. Auth. v. Future Cap. Holding Corp.*, 126 So. 3d 410, 412 (Fla. 2d DCA 2013) ("Under the fourth prong of the repose provision of the statute, the repose period commences on the latest date that any of the listed entities – the professional engineer, registered architect, or licensed contractor – completed or terminated their contract.") Here, the record was not sufficiently developed to allow us to address the potential application of the holdings in *Allan and Conrad* and *Clearwater Housing Authority* to this case.

The summary judgment evidence reflects that in May 2004, Pulte and Herme entered into a written "Master Agreement" whereby Herme agreed to perform stucco work for Pulte. However, the agreement was not specific as to its duration, the payment amount, or the work to be performed. Instead, the agreement applied broadly to "any project" in Pulte's Orlando division. The duration of the agreement was stated to be "unspecified." Furthermore, Pulte was allowed to terminate the agreement at any time. The agreement contained provisions requiring Herme to obtain insurance, to provide materials and workmanship that was "free from defect," and to agree to repair any defects at its own cost and expense for up to eighteen months from the date of installation.[3] The agreement further referenced Pulte's obligation to issue written job orders on a "house-to-house and/or building-to-building basis" and that "[c]ommencement of work by [Herme] on a house or building listed in said work orders constitutes acceptance of terms and conditions contained in this Agreement."

The Master Agreement also referenced the existence of Schedule A's. In the instant case there were two relevant Schedule A's—one for each

[3] We agree with the trial court's determination that any warranty, punch list, or repair work performed by Herme did not extend the period of time in which Pulte's action was required to be commenced.

phase of the Spring Isle project. These Schedule A's identify the community as Spring Isle, the subdivision as The Landing or The Pointe (the names of the two phases), the vendor as Herme, and the price to be paid for stucco application for each particular townhome model in the community. The applicable Schedule A's did not specify the number of townhome buildings, models, or units to which stucco would be applied in each subdivision but did contain an "Effective Date Range" for the Spring Isle project as being from 1/21/05 to 12/31/09.

The trial court found that the Schedule A's combined with the terms set forth in the Master Agreement constituted the contract between Pulte and Herme for statute of repose purposes. However, after finding that the Master Agreement and Schedule A's did not actually require Herme to perform work on any particular townhouse, the trial court determined that there was no genuine issue of material fact and that for statute of repose purposes, it would deem a contract complete when Pulte made the final payment for a particular unit. Because Pulte's payment records reflected that it made a payment for each unit after Herme completed stucco work on that particular unit, and because such payment was made prior to issuance of a certificate of occupancy on that particular unit, the trial court determined that the triggering date for statute of repose purposes for each particular unit was the

date of the issuance of the certificate of occupancy. We respectfully disagree with the trial court's analysis.

We review an order granting summary judgment de novo. *Lopez v. Avatar Prop. & Cas. Ins. Co.,* 313 So. 3d 230, 235 (Fla. 5th DCA 2021). A party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact. *Hollinger v. Hollinger*, 292 So. 3d 537, 541 (Fla. 5th DCA 2020). If a genuine issue of material fact exists, summary judgment is inappropriate. *Id.* Here, Herme had the burden to show conclusively that there was no genuine issue of fact regarding the commencement date of the statute of repose.

It is Herme's contention that each work order issued by Pulte constituted a separate contract and, thus, the trial court properly determined that the contracts for 324 units had been completed prior to March 10, 2017. Because the contract for these units was completed prior to the issuance of certificates of occupancy for such units, Herme contends that the trial court properly determined that the repose period for each particular unit commenced on the date the certificate of occupancy was issued. Given the summary judgment evidence presented below, we cannot accept Herme's argument.

Importantly, the work orders are not in the record. Without the work orders, it cannot be determined whether each work order constituted a separate contract (as argued by Herme) or whether the work orders were issued (consistent with Pulte's obligation under the Master Agreement) as part of a larger contract (as argued by the Association). Additionally, the fact that Pulte may have made payments to Herme after completion of each unit does not establish that the payment constituted "final payment" on one of many separate contracts, as opposed to simply constituting a progress payment on a single contract (or two contracts, if the two phases of the contract are found to constitute separate contracts). Furthermore, Herme's argument is inconsistent with the trial court's finding that for statute of repose purposes, the contract between Pulte and Herme was the Schedule A's together with the terms set forth in the Master Agreement. Quite simply, the summary judgment evidence presented below was insufficient, as a matter of law, to determine the number of contracts that may have existed between Pulte and Herme or to determine the completion date of the contract(s).

In the absence of competent evidence as to the date of occurrence for each of the four triggering events set forth in section 95.11(c)(3), or evidence that one or more statutory events is inapplicable, there is no way to determine which event occurred last. *Lemelin v. M. Arthur Gensler, Jr. &*

Assocs., 570 So. 2d 1131, 1132 (Fla. 3d DCA 1990). Therefore, without sufficient evidence to determine the contract completion date, a genuine issue of material fact remains as to the commencement date of the repose period. Accordingly, we conclude that the trial court erred in granting Herme's motion for partial final summary judgment.

REVERSED and REMANDED.

NARDELLA and WOZNIAK, JJ., concur.