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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-216

VASUNDARA V. VARADAN and VIJAY K. VARADAN APPELLANTS V. TOM PAGNOZZI APPELLEE	Opinion Delivered December 12, 2012 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. CIV-10-1084-4] HONORABLE G. CHADD MASON, JUDGE AFFIRMED

ROBIN F. WYNNE, Judge

Vasundara and Vijay Varadan appeal from the Washington County Circuit Court's order granting summary judgment to appellee Tom Pagnozzi. They contend that the trial court erred in applying the statute of repose for construction defects to their claims regarding the house they purchased from appellee, rather than the statute of limitations for breach of warranty or the statute of limitations under the Arkansas Deceptive Trade Practices Act (DTPA). We affirm.

In November 2004, the Varadans entered into a real-estate contract for the purchase of a house located at 1201 Sumersby Drive in Fayetteville, Arkansas, from Pagnozzi Properties LLC for $724,710.[1] The house was under construction at that time, and it was

[1]The purchase price was later increased to $738,503 when the parties executed an addendum.

to be completed by February 22, 2005. The real-estate contract and the new construction addendum both included a one-year builder's warranty, and Pagnozzi signed a one-year builder's warranty on March 1, 2005, the date of closing. A warranty deed to the property was executed by Pagnozzi Properties LLC and recorded on March 1, 2005, in Washington County.

The Varadans filed a complaint against Pagnozzi on April 2, 2010, alleging violation of the DTPA. In their first amended complaint, they added a claim for "fraud/constructive fraud." In their second amended complaint, appellants expanded their factual allegations and added a claim for breach of contract. Attached to the second amended complaint was a 2008 report by a structural engineer, Jim Gore, of Gore Engineering Associates, Inc., regarding defects in the construction of the house. Recommended repairs included installing a French drain and replacing the brick veneer; the total cost for the engineering and inspection and the remedial construction was approximately $240,000.

Pagnozzi filed a motion for summary judgment on October 14, 2011. In his motion, he challenged appellants' ability to sue him individually, arguing that he could not be sued for actions taken as president of Pagnozzi Properties. He further argued that appellants' claim was not sufficient to state a claim under the DTPA; that fraud could not be predicated on a prediction of a future event (i.e., that repairs would be done in a workmanlike manner); and that the respective statutes of limitation had run on the DTPA and fraud claims. As for the breach-of-contract claim, Pagnozzi argued that the contract was merged into the deed and that the five-year statute of limitations on that claim had also run.

In response, appellants argued that the five-year statute of limitations began to run on June 10, 2005, the date they notified Pagnozzi of the breach of warranty and he assured them that he would remedy the problems. They abandoned their constructive-fraud claim. The court held a motion hearing on November 17, 2011. At the hearing, the arguments focused particularly on the statute of repose. In its written order granting summary judgment, the court declined to address Pagnozzi's argument regarding whether he could be sued individually. Instead, the court granted summary judgment on the grounds that the claims were barred under Arkansas's statute of repose. The trial court addressed and rejected two theories under which appellants contended that the limitations period was tolled—agreement of the parties (repair doctrine) and fraudulent concealment.[2] Appellants filed a timely notice of appeal on December 16, 2011.

Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Harvest Rice, Inc. v. Fritz & Mertice Lehman Elevator & Dryer, Inc.*, 365 Ark. 573, 231 S.W.3d 720 (2006). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* In this case, the material facts are not disputed, and the case was decided as a matter of statutory interpretation. We review issues of statutory interpretation de novo, as it is for this court to decide what a statute means. *Monday v. Canal Ins. Co.*, 348 Ark. 435, 440–41, 73 S.W.3d 594, 597 (2002). Thus, although we are not bound by the trial court's construction, in the absence of a showing that

[2]"The limitations prescribed by this section shall not apply in the event of fraudulent concealment of the deficiency . . . ." Ark. Code Ann. § 16-56-112(d) (Repl. 2005).

the trial court erred, its interpretation will be accepted as correct on appeal. *Id.* The basic rule of statutory construction is to give effect to the intent of the legislature. *Id.* In determining the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.*

In its order granting summary judgment, the circuit court cited the statute of repose at Arkansas Code Annotated section 16-56-112 (Repl. 2005), which provides in part:

> (a) No action in contract, whether oral or written, sealed or unsealed, to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement.
> . . . .
>
> (f) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any cause of action, nor shall the parties to any contract for construction extend the above prescribed limitations by agreement or otherwise.

Our supreme court has recognized that "the effect of § 16-56-112(a) and statutes similar to it 'is to cut off entirely an injured person's right of action before it accrues,' even 'if it does not arise until after the statutory period has elapsed.'"[3] *Rogers v. Mallory*, 328 Ark. 116, 120,

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[3]A statute of limitations, on the other hand, is defined as

> [a] law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). • The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.

Black's Law Dictionary 1450–51 (8th ed. 2004).

941 S.W.2d 421, 423 (1997) (citing *Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 470, 646 S.W.2d 696, 698 (1983)). The General Assembly's purpose in enacting the statute "was to enact a comprehensive statute of limitations protecting persons engaged in the construction industry from being subject to litigation arising from work performed many years prior to the initiation of the lawsuit." *Id.*

There is no dispute that the residence at issue was substantially completed on February 15, 2005, more than five years before appellants filed their complaint on April 2, 2010. Thus, the issue is whether the statute of repose applies to bar their suit. Appellants begin by arguing that the five-year statute of limitations for written obligations applies in this case. Under Arkansas Code Annotated section 16-56-111(a), "[a]ctions to enforce written obligations, duties, or rights . . . shall be commenced within five (5) years after the cause of action shall accrue." Appellants argue that their cause of action did not accrue until at least June 10, 2005, the date that Pagnozzi made verbal assurances to them that he would honor their demands under the one-year builder's warranty. Appellants cite *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996), for their contention that section 16-56-111 applies to claims stemming from written construction contracts. In that case, Dr. Zufari sued the appellee architectural firm for breach of contract due to design defects that prevented him from obtaining certification from the health department. The *Zufari* court held that section 16-56-111(b), the statute of limitations for written contract actions, was the applicable statute of limitations in that case. However, the supreme court has subsequently intimated that the statute of repose does apply to any cause of action to recover damages caused by deficiency in the construction of an improvement to real property. *Ray & Sons Masonry Contractors, Inc.*

v. U.S. Fidelity & Guar. Co., 353 Ark. 201, 114 S.W.3d 189 (2003) (holding that the statute of repose was not applicable because the case was not one based on damages from alleged defective construction but an indemnity agreement).

A review of Arkansas case law reveals a consistent reluctance to carve out exceptions to the statute of repose. *First Electric Co-op. Corp. v. Black, Corley, Owens & Hughes, P.A.*, 2011 Ark. App. 447 (declining to interpret subsection (f) in a manner that would permit the parties to toll, by agreement, section 16-56-112's statute of repose); *Carlson v. Kelso Drafting & Design, Inc.*, 2010 Ark. App. 205, 374 S.W.3d 726 (declining to apply the repair doctrine to toll the time-bar established by the statute of repose).

Appellants next turn to "why the statute of repose cannot apply." They point out, correctly, that the statute of repose creates a shorter period of time to bring a claim than the statute of limitations. Here, appellants attempt to distinguish their claim as being for breach of the written warranty agreement, to which the general statute of limitations for written contracts would apply, rather than for breach of the construction contract, the real-estate contract, or any implied warranty based on the construction or sale of the house. They cite *Ray & Sons Masonry, Inc. v. United States Fidelity & Guaranty Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003), a case involving the alleged breach of an indemnity agreement in which subcontractor Ray agreed to indemnify the general contractor, Crane Construction, from claims and causes of action arising from work performed by Ray on a Wal-Mart store in McKinney, Texas. Ray's masonry work on the McKinney store was completed in 1992, and the construction of the store was completed in June 1993. Ray argued that the statute of repose barred Crane's claim because its complaint was not filed until 2001. The supreme

court held that the statute of repose was not applicable because Crane alleged a breach of the contractual duty to indemnify—not damages from alleged defective construction.

Appellants in the present case argue that the statute of repose does not apply to a warranty claim based on a separate builder's warranty. The present case is distinguishable from *Ray*. There, the supreme court relied on the fact that the statute provides that the damages sought must be "caused by [a] deficiency" in the design or construction of the improvement; they held that the statute of repose does not apply to an action alleging breach of an indemnity provision in a construction contract. The court wrote, "[i]f the legislature wants to expand the protection afforded by the statute of repose to include indemnity actions arising from construction work, it may wish to amend the statute." *Id.*, 353 Ark. at 223, 114 S.W.3d at 202–03. We read *Ray* to apply to contracts for indemnity, which is not the case here. Even though they rely on the written builder's warranty, the crux of the appellants' complaint is that they were damaged by the defective construction of their house. This fits squarely within the statute of repose. Appellants seek to avoid the statute of repose based on the written warranty, but the statute specifically provides that the parties to a contract for construction cannot extend the five-year statute "by agreement or otherwise."

Appellants offer another reason that the statute of repose cannot apply: they asked for the alternative remedy of recission, while the statute of repose applies only to actions to recover damages. They cite the plain language of the statute and a case from North Carolina, *Roemer v. Preferred Roofing, Inc.*, 660 S.E.2d 920 (N.C. Ct. App. 2008). However, appellants failed to obtain a ruling on this argument from the trial court. We will not consider

arguments on appeal when the party has failed to obtain a ruling from the trial court. *Maguire v. Jines*, 2011 Ark. App. 359, at 5, ___ S.W.3d ___, ___.

Affirmed.

PITTMAN and BROWN, JJ., agree.

Cullen & Co., PLLC, by: *Tim J. Cullen*, for appellants.

Kutak Rock, LLP, by: *J.R. Carroll*, for appellee.