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NO. COA01-261

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

DAVID H. LOW, JR. and  
MALINDA LOW,  
Plaintiffs

v.

WOLFE CONSTRUCTION, INC., f/k/a  
J.B. WOLFE CONSTRUCTION, INC.;  
CAMELOT CONSTRUCTION COMPANY,  
INC.; and STO CORP.  
Defendants

and

Guilford County  
No. 99 CVS 10199

WOLFE CONSTRUCTION, INC., f/k/a  
J.B. WOLFE CONSTRUCTION, INC.,  
Third-Party Plaintiff

v.

WINDSOR WINDOW COMPANY -  
HERITAGE PLN; and A.L. CORMAN  
ROOFING, INC.,  
Third-Party Defendants

Appeal by plaintiffs from an order entered 31 October 2000 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 29 January 2002.

*Lewis & Roberts, P.L.L.C., by Paul R. Dickinson, Jr., Gary W. Jackson and Kurt F. Hausler, for plaintiff-appellants.*

*Dean & Gibson, L.L.P., by Christopher J. Culp; Dinsmore & Shohl, L.L.P., by Allen Grimes, III, for defendant-appellee Wolfe Construction, Inc. f/k/a J.B. Wolfe Construction, Inc.*

*Wells & Daisley, P.A., by Michel C. Daisley, for defendant-appellee Camelot Construction Company, Inc.*

HUNTER, Judge.

David H. Low, Jr. and Malinda Low ("plaintiffs") appeal the trial court's grant of summary judgment in favor of Wolfe Construction, Inc. ("Wolfe"), and Camelot Construction Company, Inc. ("Camelot," together "defendants"). The trial court granted summary judgment on the grounds that plaintiffs' claims are barred by the applicable statute of limitations. We affirm.

The complaint alleges the following undisputed facts. Pursuant to an "Offer to Purchase and Contract," entered into on or about 24 January 1996, plaintiffs contracted to purchase a house from Wolfe. Wolfe acted as the general contractor for the construction of the house, which was clad with an Exterior Insulation and Finish System ("EIFS"). The EIFS was applied by Camelot, and manufactured by Sto Corp. (the third defendant named in the complaint, no longer a party to this litigation). Construction of the house was completed on or about 15 January 1996, and the closing occurred on or about 26 February 1996.

Approximately five months after the closing, Kimley-Horn and Associates, Inc. ("Kimley-Horn") performed an EIFS investigation on the house at Wolfe's request. Kimley-Horn produced a report dated 31 July 1996, and plaintiffs allege that they received this report in late September 1996. The EIFS report first explains: (1) that moisture readings in the twenty to thirty percent range indicate that the level of moisture is "above what would be normal for wood sheathing, but less than total saturation," and also indicate that "moisture could be entering from an outside source and damage to

the sheathing may be occurring"; and (2) that moisture readings at or above thirty percent indicate that the wood has reached moisture "saturation," and that "moisture is entering from an outside source and damage to sheathing may be occurring." The EIFS report then states: that moisture readings in the twenty to thirty percent range were found at fourteen separate locations; that moisture readings above thirty percent were found at seven separate locations; and that structural damage, including gaps, holes, flashing issues, sealant failures, absence of sealant, and surface cracks, was, in fact, discovered at numerous locations.

Plaintiffs filed the complaint in this action on 5 October 1999. The complaint set forth fourteen causes of action. Three of these were claims against Sto Corp. only, which claims are not before us as Sto Corp. is no longer a party to this litigation. The trial court granted summary judgment on eight of the claims in favor of Wolfe and Camelot. Plaintiffs then voluntarily dismissed without prejudice the three remaining claims, and filed a notice of appeal. On appeal, plaintiffs argue that the trial court erred in granting summary judgment because there are genuine issues of material fact as to whether plaintiffs' claims are barred by the applicable statute of limitations. We disagree.

An action "[u]pon a contract, obligation or liability arising out of a contract," or an action "[f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract," which alleges "personal injury or physical damage to claimant's property," must be brought within three years

from the point in time at which "bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(1), (5) and (16) (1999); see also N.C. Gen. Stat. § 1-50(a)(5)(f) (1999) ("[f]or purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant"). Where the undisputed facts show that a cause of action is barred by the applicable statute of limitations, summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (1999) is appropriate. See *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Thus, the issue here is whether the evidentiary forecast disclosed the existence of any genuine issue of material fact as to whether plaintiffs knew or should reasonably have known of the defective condition more than three years prior to the filing of this action so as to preclude summary judgment in favor of defendants based on the applicable statute of limitations.

Plaintiffs acknowledge that they received the EIFS report from Kimley-Horn in September of 1996, and there is no dispute that this action was filed on 5 October 1999. We believe that even a cursory review of the information disclosed in the EIFS report compels the conclusion that plaintiffs knew, or should reasonably have known, that their EIFS cladding was defective, and that damage to their

house had already occurred, at least as early as September of 1996, the time at which they acknowledge that they received the report. Therefore, this action, filed more than three years later, is barred by the statute of limitations. Summary judgment was properly granted.

Affirmed.

Judges GREENE and TYSON concur.

Report per Rule 30(e).