NO. COA01-720

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

JOHN D. MILEY and wife,
JOANNE G. MILEY,
Plaintiffs,

v. Iredell County
No. 99 CVS 2316

H.C. BARRETT & ASSOCIATES, INC., DRYVIT SYSTEMS, INC., COLORMATCH EXTERIORS, INC., HIGH TECH STUCCO CO., and LINCOLN WOOD PRODUCTS, INC.
Defendants.

and

H.C. BARRETT & ASSOCIATES, INC.,
Third-Party Plaintiff,

v.

WYLIE DUNLAP and JAMES DEAN d/b/a DEAN'S ROOFING,
Third-Party Defendants.

Appeal by plaintiffs from order entered 5 October 2000 by Judge Michael E. Beale in Iredell County Civil Superior Court.

Heard in the Court of Appeals 17 April 2002.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for plaintiff appellants.

Johnston, Allison & Hord, P.A., by Gary J. Welch and Alicia Almeida Bowers for H.C. Barrett & Associates, Inc., defendant appellee.

McCULLOUGH, Judge.

Plaintiffs John and Joanne Miley appeal the grant of summary judgment in favor of defendant H.C. Barrett & Associates, Inc. (HCB). The pertinent facts are as follows: In 1993, plaintiffs contacted HCB and discussed hiring HCB as the general contractor to construct a new 6000-square-foot residence in Iredell County, North Carolina. The contract price was $622,000.00. Plaintiffs rejected the standard prime contract arrangement proposed by HCB because they wanted to take advantage of subcontractor discounts and maintain a high level of control throughout the construction process. As a result, plaintiffs and HCB entered into a Construction Management Agreement (the Agreement) on 24 September 1993. The Agreement allowed plaintiffs to benefit from subcontractor discounts and savings, to enter into the contracts with subcontractors and pay the subcontractors themselves, and to change or modify the construction plans at their discretion. However, plaintiffs also undertook the risks of errors or omissions in the construction of their residence.

Pursuant to the Agreement, HCB agreed to schedule and coordinate the construction of plaintiffs' house for a fee of $70,000.00. On the subject of HCB's fee, the Agreement stated that "in the determination of the fee paid to [HCB], the parties have not built in a cost for errors in construction, costs for correction of errors, and warranty costs after completion of the construction." The Agreement defined plaintiffs as the "owners" and designated HCB as a subcontractor, whose job it was "to obtain other contractors to do the work, to obtain the best price for

labor and materials possible, and to supervise and co-ordinate for the Owners the construction of the dwelling house." Plaintiffs agreed to

> be responsible for all costs of construction of the dwelling, including but not limited to all costs of materials, labor, Builders Risk Insurance thru HCB's policy, Workman's Compensation Insurance as required, all losses by theft, fire or other causes and all errors or omissions during the construction of the dwelling. In the event of errors or omissions, HCB will exercise its best efforts to correct the situation through the Owner's subcontractor or vendor causing said error or omission.

HCB hired Mr. Jerry Thorne to monitor and coordinate construction of the residence. Mr. Thorne served in this capacity until plaintiffs became dissatisfied with his performance. Thereafter, plaintiffs cancelled the Agreement with HCB and proposed an amendment to the original agreement in which plaintiffs would assume Mr. Thorne's duties or hire a replacement supervisor who would have a contract directly with them. Plaintiffs and HCB executed the Amended Agreement on 12 April 1994. Under the Amended Agreement, HCB's supervisory duties were diminished and HCB's fee was reduced from $70,000.00 to $56,000.00 due to Mr. Thorne's removal from the arrangement. Plaintiffs subsequently hired Mr. Wiley Dunlap to supervise the construction of their residence.

As construction progressed, plaintiffs contracted directly with High Tech Stucco Company (High Tech) to apply the exterior insulation finish system (EIFS) for the residence. The EIFS was a form of synthetic stucco which consisted of multi-layered exterior

wall systems with a finish coat, a base coat and insulation board that was secured to plywood or another substrate. High Tech began applying the synthetic stucco on 31 May 1994. Upon completion, plaintiffs paid High Tech directly.

HCB completed its services for plaintiffs in September 1994. By that time, plaintiffs had almost fully paid HCB its $56,000.00 fee. In July 1996, plaintiffs hired Mr. Peter Verna to inspect their residence for potential moisture problems. Mr. Verna tested the residence on 29 July 1996 and sent plaintiffs a report (the Verna Report) on 30 July 1996. Mr. Verna's inspection detected over thirty areas throughout the residence with above normal moisture content readings (greater than 19%) in the framing wood. The Verna Report explained that high moisture readings subjected the residence to structural damage. Mr. Verna detected trim rot and defects in the metal windows at plaintiffs' residence which allowed water seepage and would cause further rotting and expensive repair costs in the future unless measures were taken immediately. The Verna Report recommended that plaintiffs recaulk portions of the exterior of their residence, contact the window manufacturer for re-evaluation, and make repairs.

On 12 August 1996, plaintiffs contacted Mr. Phil Hernandez, the President of High Tech, to inform him of the Verna Report's findings and to express concern about the high moisture readings. Mr. Hernandez later signed an affidavit stating he did not hear from plaintiffs again and High Tech did not perform any further work on the Miley residence. Mr. Miley, however, asserted that

High Tech inspected the home between June and August 1997 and found no damage. On 15 October 1996, plaintiffs hired Golsch Builders to perform the repairs recommended by the Verna Report. In October 1999, plaintiffs hired Mr. R.D. McClure to retest the home for moisture damage. On 27 October 1999, Mr. McClure prepared a report (the McClure Report) which indicated damage to the residence.

On 1 November 1999, plaintiffs filed suit against HCB, High Tech (the EIFS installer), Dryvit Systems, Inc., Colormatch Exteriors, Inc. (the manufacturers and sellers of EIFS), and Lincoln Wood Products, Inc. (the window manufacturer and installer). This was the first communication between plaintiffs and HCB since HCB completed its work on the residence in September 1994. Plaintiffs' complaint alleged sixteen claims against defendants arising out of the construction of their residence. These claims included negligence, breach of contract, breach of express warranty, breach of implied warranty of habitability, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligent failure to warn, negligent misrepresentation, unfair and deceptive trade practices, and fraud.

HCB filed an answer on 7 January 2000, asserting nineteen defenses. Thereafter, on 13 September 2000, HCB moved for summary judgment and attached supporting affidavits from Charlie Barrett (the owner of HCB), and Phil Hernandez, answers to interrogatories, a transcript of Charlie Barrett's deposition, and other admissions for the trial court's consideration. The trial court granted

summary judgment in favor of HCB on 5 October 2000. On 1 February 2001, plaintiffs gave notice of voluntary dismissal of their lawsuit with prejudice against High Tech and Colormatch Exteriors, Inc. Plaintiffs also voluntarily dismissed their lawsuit without prejudice as to Lincoln Wood Products, Inc. As a result of the dismissals, the remaining issues among the remaining parties were resolved, and plaintiffs' appeal of the summary judgment order was no longer interlocutory. Plaintiffs appealed the trial court's order granting summary judgment for HCB on 22 February 2001.

On appeal, plaintiffs argue the trial court committed reversible error by granting summary judgment for HCB because (I) an issue of fact existed as to whether HCB was the builder of plaintiffs' home; and (II) plaintiffs' claim was not barred by the statute of limitations. For the reasons set forth herein, we disagree with plaintiffs' arguments and affirm the order of the trial court.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999) states that

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

"The purpose of Rule 56 is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists, and if not, whether the moving party is entitled to judgment as a matter of law." *Schoolfield v. Collins*, 12 N.C. App. 106, 108-09, 182 S.E.2d 648, 650 (1971), *rev'd on other*

grounds, 281 N.C. 604, 189 S.E.2d 208 (1972). "On appeal from an order granting summary judgment, we must review the pleadings, affidavits and all other materials produced by the parties at the summary judgment hearing to determine whether there existed any genuine issue of fact and whether one party was entitled to judgment as a matter of law." *Bradley v. Wachovia Bank & Trust Co.*, 90 N.C. App. 581, 582, 369 S.E.2d 86, 87 (1988). We note that

> [a]n issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action."

Carolina Place Joint Venture v. Flamers Charburgers, Inc., 145 N.C. App. 696, 698, 551 S.E.2d 569, 571 (2001) (citations omitted).

"The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. [The materials offered to support his motion] are meticulously scrutinized and all inferences are resolved against him." *Boyce v. Meade*, 71 N.C. App. 592, 593, 322 S.E.2d 605, 607 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 390 (1985). "The movant may meet its summary judgment burden by showing either (1) an essential element of the non-movant's claim is nonexistent, or (2) the non-movant cannot produce evidence to support an essential element of his claim." *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 714, 440 S.E.2d 585, 590 (1994). With these principles in mind, we turn to the case at hand.

HCB's Role

Plaintiffs first argue an issue of fact existed as to whether HCB was the builder of plaintiffs' home. After careful examination of the record and the dealings between the parties, we disagree.

The parties executed a contract, the Amended Agreement, which designated plaintiffs as the owners and HCB as the subcontractor of the construction project. Pertinent aspects of the Amended Agreement are as follows:

> 1. HCB agrees to supervise and co-ordinate the construction of a dwelling house for the Owners at the address referred to in this agreement pursuant to the plans and specifications attached to this agreement with the understanding that the Owner may make any and all changes to the plans and specifications as the Owners deem appropriate from time to time.
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> * * * *
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> 4. The relationship between Owners and HCB shall be that of Owners and subcontractor.
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> 5. It is anticipated that HCB will negotiate in its own name contracts for labor and materials for the construction of the dwelling house. However, it is strictly understood that HCB is acting as agent for the Owners and that all contracts for labor, materials and supplies are entered into for and on behalf of the Owners, and it is further understood that where practical Owners may be involved in contract negotiations and that where possible, Owners will co-sign contracts along with HCB.
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> 6. It is agreed that Owners will be responsible for all costs of construction of the dwelling, including but not limited to all costs of materials, labor, Builders Risk Insurance thru HCB's policy, Workman's Compensation Insurance as required, all losses by theft, fire or other causes and all errors or omissions during the construction of the dwelling. In the event of errors or

> omissions, HCB will exercise its best efforts to correct the situation through the Owner's subcontractor or vendor causing said error or omission.
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> * * * *
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> 8. All invoices or work, labor and materials due to all contractors shall be paid by Owners when due. HCB will inspect and provide approved invoices to Owners after receipt by HCB. By the 1st day of each month following the date any invoice is due, Owners will provide to HCB in writing their certification by specific reference thereto that all due invoices have been paid. . . .
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> * * * *
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> e) In no event shall HCB be responsible for or obligated to pay for any errors or omissions in the construction of the dwelling house and in no event shall the Owners be entitled to setoff for such errors or omissions against the fees due to HCB pursuant to the agreement.

"If the contract is clearly expressed, it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981). *See also Lagies v. Myers*, 142 N.C. App. 239, 542 S.E.2d 336, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001). Moreover, "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citation omitted). *See also Williamson v. Bullington*, 139 N.C. App. 571, 574, 534 S.E.2d 254, 256 (2000), *aff'd*, 353 N.C. 363, 544 S.E.2d 221 (2001). Where a

contract is plain and unambiguous, "the legal effect of the contract is a matter of law for the court." *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679.

After considering the contractual provisions in the Amended Agreement, we conclude that HCB served as a construction manager under a pure construction management arrangement; HCB was neither a general contractor nor a builder of plaintiffs' home. Our conclusion is reinforced by the fact that HCB acted solely as plaintiffs' agent, had no control over the manner in which the construction project was actually performed, and assumed no responsibility for costs, timeliness, or quality of the project. The $56,000.00 fee paid to HCB by plaintiffs contained no incentives and was merely compensation for services rendered. The Amended Agreement, signed by the parties on 12 April 1994, relieved HCB of its supervisory duties before High Tech began installing the EIFS on 31 May 1994. Plaintiffs contracted directly with High Tech and paid High Tech themselves after the installation procedure. HCB was dispossessed of its supervisory role upon execution of the Amended Agreement on 12 April 1994. Thus, HCB was not liable for the problems which ensued after the EIFS system caused structural damage to plaintiffs' home.

We likewise conclude that plaintiffs have failed to show facts (supported by substantial evidence) that HCB was a general contractor. It would be unreasonable to treat HCB as a general contractor and expect it to build plaintiffs' $622,000.00 home for a fee of $56,000.00, and at the same time, assume all risks of

errors or omissions in the construction.

N.C. Gen. Stat. § 87-1 (1999) states:

> For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, ... shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

"The principal characteristic of a general contractor, as opposed to a subcontractor or mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project." *Harrell v. Clarke*, 72 N.C. App. 516, 517, 325 S.E.2d 33, 35 (1985). Even though HCB was a licensed general contractor, was paid over $30,000.00, and secured the building permit for plaintiffs' home, we do not conclude that HCB operated as a general contractor in this case. Rather, we look for control over the entire project, which HCB lacked in this case. *See Harrell*, 72 N.C. App. at 518, 325 S.E.2d at 35 (classifying plaintiff as a general contractor where he "was free to hire any persons he deemed suitable; [used] his credit to purchase the materials; [purchased] the materials at places of his choice; and [installed] the requisite materials as he saw best or as the persons he hired saw best").

We have considered plaintiffs' other arguments and find them

to be without merit. Plaintiffs' first assignment of error is overruled.

Statute of Limitations

By their second assignment of error, plaintiffs contend the trial court erred in concluding their complaint was barred under the three-year statute of limitations. We disagree.

> Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate.

Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citations omitted). Because plaintiffs alleged property damage, their lawsuit is governed by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(16) (1999):

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of action referred to in G.S. § 1-15(c), shall not accrue until 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.

Id.

> For 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.

N.C. Gen. Stat. § 1-50(5)(f) (1999).

HCB argues plaintiffs were first on notice of the problems with the EIFS system when they received the Verna Report on 30 July 1996. We agree. The Verna Report detected over thirty areas throughout the residence with above normal moisture content readings, as well as areas of trim rot and defects in the metal windows which allowed water seepage and would cause further rotting and expensive repair costs in the future unless measures were taken immediately. The Verna Report recommended recaulking portions of the exterior of the residence, contacting the window manufacturer for re-evaluation, and making repairs. Plaintiffs discussed the Verna Report with High Tech's President, Phil Hernandez, on 12 August 1996. Mr. Hernandez's affidavit stated he did not hear from plaintiffs after the August discussion and High Tech did not perform any further work on the Miley residence. In October 1996, plaintiffs hired Golsch Builders to perform the repairs recommended by the Verna Report.

Three years later, in October 1999, Mr. R.D. McClure retested the home for moisture related problems and found damage. Based on this sequence of events, it appears plaintiffs became aware of the moisture problems upon receipt of the Verna Report in July 1996. Their cause of action accrued at that time, and they were required to file suit by July 1999. Because plaintiffs' lawsuit was not filed until 1 November 1999, they did not act within the applicable three-year statute of limitations and summary judgment was properly

entered for HCB on this ground.

We also note that HCB is not estopped from asserting the statute of limitations.

> In order to constitute an equitable estoppel, there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or, having the means of knowledge of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice.

Boddie v. Bond, 154 N.C. 359, 365-66, 70 S.E. 824, 826-27 (1911). *See also Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 358-59, 301 S.E.2d 459, 463-64, *disc. review denied*, 309 N.C. 319, 306 S.E.2d 791 (1983); and *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967). Furthermore, "[i]t does not matter that further damage could occur; such further damage is only aggravation of the original injury." *Pembee*, 313 N.C. at 493, 329 S.E.2d at 354. Thus, the discovery of additional defects after July 1996 did not extend the statute of limitations.

Upon careful review of the record and the arguments of the parties, we conclude summary judgment for HCB was proper because it was a construction manager rather than a general contractor. Summary judgment was also appropriate because plaintiffs' lawsuit was barred by the applicable statute of limitations.

The trial court's order granting summary judgment in favor of defendant H.C. Barrett & Associates, Inc. is hereby

Affirmed.

Judges WYNN and BIGGS concur.

Report per Rule 30(e).