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NO. COA06-1091

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

AUBREY LONG AND  
PAMELA LONG,  
Plaintiffs,

v.

Person County  
No. 05 CVS 853

RANDY MOORE, T/A RANDY  
MOORE BUILDING CONTRACTORS,  
J.T. BRADSHER CO., INC. and  
PERSON COUNTY, NORTH  
CAROLINA,  
Defendants.

Appeal by plaintiffs from order entered 21 June 2006 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 16 April 2007.

*King Law Group, PLLC, by Ronnie P. King, for plaintiff appellants.*

*Alan S. Hicks, P.A., by Alan S. Hicks, for Randy Moore, t/a Randy Moore Building Contractors, defendant appellee.*

McCULLOUGH, Judge.

Aubrey Long and Pamela Long ("plaintiffs") appeal from an order granting summary judgment in favor of defendant Randy Moore, t/a Randy Moore Building Contractors ("defendant").

Plaintiffs filed a complaint on 15 December 2005, alleging defendant, as a building contractor, constructed a house for plaintiffs and negligently failed to assure the washing machine

drain line was connected to the wastewater drain system. They alleged that defendant J.T. Bradsher Company, Inc., the plumbing subcontractor, negligently failed to connect the washing machine drain line to the wastewater discharge system, and that defendant Person County negligently failed to inspect and discover the defect. As a result, mold has appeared in the house and the flooring and support system of the house "have been compromised."

Defendant filed an answer and moved for summary judgment. The trial court granted defendant's motion on 21 June 2006. Plaintiffs appeal.

Summary judgment is proper "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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979). The burden of showing the absence of a triable issue of fact is upon the party seeking summary judgment. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974).

In support of his motion for summary judgment, defendant asserted N.C. Gen. Stat. § 1-50(a)(5)(a) (2005), which provides in

pertinent part:

- (5) a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5)(a). The statute further provides that an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
2. Actions to recover damages for the negligent construction or repair of an improvement to real property;
3. Actions to recover damages for personal injury, death or damage to property[.]

N.C. Gen. Stat. § 1-50(a)(5)(b)(1)-(3). "Substantial completion" is defined as "that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended." N.C. Gen. Stat. § 1-50(c).

This statute is a statute of repose and as such is "a substantive definition of, rather than a procedural limitation on, rights." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 426, 302 S.E.2d 868, 872 (1983). "Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event

occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (citations omitted). A statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue[.] " *Id.* at 633, 325 S.E.2d at 475. Because a statute of repose creates a substantive right, it is "not subject to tolling." *Stallings v. Gunter*, 99 N.C. App. 710, 716, 394 S.E.2d 212, 216, *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990).

Plaintiffs admitted, in response to requests for admissions, that construction of the house was completed and that they were living in it prior to 1 December 1998. They also admitted that they never contacted the subcontractor about the water problem until the year 2005, and that they had noticed the problem within the first year of occupancy. Defendant also swore in his affidavit in support of the motion that he substantially completed construction of the home on 13 August 1998 and that the first time plaintiffs complained about the washing machine drain line not being properly connected was in September 2005. Plaintiffs did complain about a leak around a roof dormer less than two years after completion of the house. Defendant repaired that leak promptly.

Plaintiffs argue that the statute of repose should not apply because they notified defendant of the problem within the first year and defendant came to the residence several times in an effort

to locate the source of the moisture problem. Plaintiffs' argument is unavailing. "Our courts have made it clear that a statute of repose may operate to cut off a defendant's liability even before an injury occurs." *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 77, 518 S.E.2d 789, 792 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). Repair or other attempted remedial action subsequent to substantial completion does not toll the statute of repose or start it running anew. *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 242, 515 S.E.2d 445, 450 (1999).

The undisputed facts disclose an absolute bar to plaintiffs' recovery.

The order is affirmed.

Affirmed.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).