

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-37

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

CAPE FEAR MEDICAL CENTER, L.L.C.,
and MED CARE OF NORTH CAROLINA,
P.L.L.C., a/k/a KASTNER URGENT
CARE FACILITY,
Plaintiffs,

v.

New Hanover County
No. 04 CVS 0813

S.K. ANDERSON CONSTRUCTION CO.,
INC.,
Defendant and Third-Party
Plaintiff,

v.

BARKER-GUIDRY ARCHITECTS, INC.,
MOORE'S GLASS SERVICE, INC.,
LARRY & DEENA, INC., d/b/a
HINNANT MASONRY CO., INC.,
MELVIN STUCCO COMPANY, INC.,
CAROLINA COMMERCIAL FLOORCOVERING,
INC., f/d/b/a CAROLINA COMMERCIAL
FLOORCOVERING, LLC, and MATTHEWS
& SONS FLOORS, INC., d/b/a
MATTHEWS & SONS FLOOR MAINTENANCE,
Third-Party Defendants.

Appeal by Third-Party Plaintiff from order entered 4 October 2005 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 17 August 2006.

Maupin Taylor, P.A., by H. Mark Hamlet, for Third-Party Plaintiff-Appellant.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by Kimberly Connor Benton, for Third-Party Defendant-Appellee Moore's Glass Service, Inc.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for Third-Party Defendant-Appellee Larry & Deena, Inc., d/b/a Hinnant Masonry Co., Inc.

STEPHENS, Judge.

Third-Party Plaintiff-Appellant S.K. Anderson Construction Co., Inc. ("Anderson") was the general contractor for the construction of Plaintiffs' urgent care facility. As general contractor, Anderson orally contracted with Third-Party Defendant-Appellee Larry & Deena, Inc., d/b/a Hinnant Masonry Co., Inc. ("Hinnant Masonry" or "Hinnant") for the provision and installation of all masonry material required for the facility's exterior. Similarly, Anderson orally contracted with Third-Party Defendant-Appellee Moore's Glass Service, Inc. ("Moore's Glass") for the provision and installation of the facility's windows. During the facility's construction, and before the windows had been installed, a large amount of water entered the building during a heavy rainstorm. Though Anderson completed all construction on the facility in March 2001, Moore's Glass completed its work not later than 31 January 2001, and Hinnant Masonry completed its work not later than 4 February 2001. Plaintiffs moved into the facility on 12 March 2001.

Within a year of moving into the facility, Plaintiffs experienced moisture-related problems in the building. In March 2003, Plaintiffs noticed that mold was growing on the exterior of the building and that the mold was coming through the sheetrock into the interior of the building. In August 2003, Plaintiffs

notified Anderson that there was moisture intrusion in the building. On 5 March 2004, Plaintiffs filed a complaint against Anderson alleging negligence and breach of contract in Anderson's construction of the facility relating to the moisture problems. Anderson filed its Answer on 10 May 2004 denying Plaintiffs' claims.

On 7 June 2004, Anderson amended its Answer to include a third-party complaint against six subcontractors it had employed in its construction of Plaintiffs' facility, including Hinnant Masonry and Moore's Glass. Though Anderson continued to deny Plaintiffs' claims, Anderson sought relief in the form of contribution and indemnification from the subcontractors in the event Anderson was found liable to Plaintiffs. Anderson advanced three claims for relief against Hinnant Masonry: breach of contract, breach of warranty, and negligence. Anderson advanced two claims for relief against Moore's Glass: breach of warranty and negligence. On 24 June 2004, Anderson again amended its Answer to indicate that the relief sought included damages "in an amount greater than \$10,000" under all of its claims against Hinnant Masonry and Moore's Glass.

Upon Anderson's motion for summary judgment as to Plaintiffs' claims, and upon Hinnant's and Moore's Glass's motions for summary judgment as to Anderson's claims, the trial court granted summary judgment in favor of Hinnant and Moore's Glass on 4 October 2005, concluding there existed "no genuine issue[s] of material fact[.]" The court denied Anderson's motion for summary judgment against Plaintiffs. On appeal, though Anderson abandons its negligence

claims against both Hinnant Masonry and Moore's Glass, Anderson argues that the trial court erred in dismissing its breach of contract claim against Hinnant Masonry and its breach of warranty claims against both Hinnant Masonry and Moore's Glass.¹ For the reasons set forth below, we affirm the court's grant of summary judgment.

I. SUMMARY JUDGMENT STANDARD

A trial court's grant of summary judgment receives *de novo* review on appeal, and all evidence is viewed in the light most favorable to the non-moving party. *Stafford v. County of Bladen*, 163 N.C. App. 149, 592 S.E.2d 711, *appeal dismissed and disc. review denied*, 358 N.C. 545, 599 S.E.2d 409 (2004). Summary judgment is proper when "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). "Where a claim is barred by the running of the applicable statute of limitations, summary judgment is appropriate." *Webb v. Hardy*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Mar. 20, 2007) (COA06-907) (citing *Brantley v. Dunstan*, 10 N.C. App. 706, 707-08, 179 S.E.2d 878, 879 (1971)).

¹Though Anderson asserts that this appeal is proper pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(b) in that the "judgment is final to all claims and parties," we note that the appeal is clearly interlocutory. This appeal is properly before this Court pursuant to the trial court's Rule 54(b) certification of the order granting summary judgment.

II. BREACH OF CONTRACT / BREACH OF WARRANTY

Anderson argues that neither Hinnant Masonry nor Moore's Glass is entitled to summary judgment on the breach of contract or breach of warranty claims because neither Hinnant Masonry nor Moore's Glass established both that no triable issue exists and that any affirmative defense barred Anderson's claim. In response, Hinnant and Moore's Glass argue that the applicable statutes of limitations operate as complete bars to Anderson's claims. We agree with Hinnant and Moore's Glass.

Generally, the statute of limitations for a breach of contract action is three years. N.C. Gen. Stat. § 1-52(1) (2005). A cause of action for breach of contract accrues on the date of the breach, at which time the three years begin to run. *Miller v. Randolph*, 124 N.C. App. 779, 478 S.E.2d 668 (1996). As Anderson itself points out in its brief, "[t]he statute of limitations for breach of warranty is also three years, accruing at breach." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 44, 587 S.E.2d 470, 477 (2003) (emphasis added) (citation omitted), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004). The result in *Kaleel* mandates the proper outcome in the case *sub judice*.

In *Kaleel*, a couple hired a general contractor to build their house. The general contractor, in turn, hired several subcontractors to complete various aspects of the job. Work on the house was halted in the fall of 1996, and thereafter the couple filed a demand for arbitration against the general contractor for allegedly defective construction of the house, including the work

of the subcontractors. In July 2001, the general contractor filed a complaint against the subcontractors alleging breach of contract, breach of warranty, and negligence. This Court held that under the provisions of N.C. Gen. Stat. § 1-52(1), the applicable statutes of limitations began to run on the breach of contract and breach of warranty claims not later than the fall of 1996, when construction stopped, and that, therefore, the general contractor's claims were time-barred. We reach the same conclusion in the case at bar.

In this case, Anderson alleged that Hinnant Masonry breached the contract in that Hinnant:

- a. failed to take proper precautions to ensure that the construction defects would not occur;
- b. failed to follow general construction and installation principles in the design and/or installation of the masonry and brick that it applied to the Cape Fear Medical Center so as to protect the building from water and moisture intrusion, including but not limited to the installation of sealants;
- c. inadequately supervised the installation of the masonry and brick at the Cape Fear Medical Center;
- d. failed to perform its contract in a workmanlike manner; and
- e. failed in such other ways as will be shown at the trial of this action.

Anderson also alleged that Hinnant Masonry breached its warranties in that Hinnant:

- a. failed to select masonry and bricks that were adequate to prevent moisture from entering through any wood substructure of the construction;
- b. failed to follow general masonry installation principles in the application of the masonry and brick in the construction, including but not limited to the installation of sealants;

c. inadequately supervised the application of the brick and masonry on the building; and

d. breached its warranties in other ways as will be shown at the trial of this action.

As to Moore's Glass, Anderson alleged that Moore's Glass breached its warranties in that Moore's Glass:

a. failed to properly install the windows so as to protect the building from the weather;

b. failed to install or properly install flashing, weather-stripping, glazing and sealant joints around the window openings so as to protect the building from the weather and water intrusion; and

c. failed to manufacture and/or supply aluminum window units that were adequate to prevent moisture from entering the building, thereby causing damage; [and]

d. breached its warranties in such other ways as will be shown at the trial of this action.

If Hinnant Masonry breached its contract or any warranty with Anderson as alleged, such breach must have occurred not later than 4 February 2001, the last date upon which Hinnant performed any work under the contract. If Moore's Glass breached any warranty with Anderson as alleged, the last date on which a breach could have occurred was 31 January 2001. Anderson first filed its claims against Hinnant and Moore's Glass on 7 June 2004, more than three years after the claims arose. The applicable statutes of limitations, therefore, operate as complete bars to Anderson's claims against both Hinnant Masonry and Moore's Glass.

Anderson, however, argues that the statutes of limitations did not accrue until the moisture intrusion became apparent or reasonably should have become apparent to Anderson. In advancing

this argument, Anderson mistakenly relies on the case of *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). *Pembee*, however, involved the application of N.C. Gen. Stat. § 1-52(16), which states, in pertinent part, that "for . . . physical damage to claimant's property, the cause of action . . . shall not accrue until . . . [such damage] becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16) (2005) (emphasis added). We find that N.C. Gen. Stat. § 1-52(1), not N.C. Gen. Stat. § 1-52(16), is the controlling statute under these facts as any damage that may have occurred was to Plaintiffs' facility, not Anderson's.

Because we find that the statutes of limitations operate as complete bars to Anderson's breach of contract and breach of warranty claims, we need not address Anderson's argument that Hinnant Masonry and Moore's Glass failed to establish that no triable issues exist on the claims. Also, we need not address Anderson's assertion that it is entitled to indemnification from both Hinnant and Moore's Glass since such relief arises solely out of its claims for breach of contract and breach of warranty.

The judgment of the trial court is AFFIRMED.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).