NO. COA13-333
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

BILL WAHL, and wife SUSAN WAHL,
Plaintiffs

v. Avery County
No. 11 CVS 307

ANDREW PORTER, Individually, and
PYRAMID BUILDERS, INC.,
Defendants

Appeal by plaintiffs from order entered 21 December 2012 by Judge Gary E. Trawick in Avery County Superior Court. Heard in the Court of Appeals 11 September 2013.

Nancy Schleifer, Attorney-at-Law, PLLC, by Nancy Schleifer, for plaintiff-appellants.

Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper and Timothy D. Swanson, for defendant-appellees.

Marc J. Meister, for defendant-appellee Pyramid Builders, Inc.

CALABRIA, Judge.

Bill Wahl and his wife, Susan Wahl ("plaintiffs") appeal from the trial court's order granting summary judgment in favor of Andrew Porter and his company Pyramid Builders, Inc. (collectively "defendants"). We affirm.

I. Background

On 10 September 2000, plaintiffs entered into a "Construction Agreement" with defendants whereby defendants would build a house on property owned by plaintiffs on Beech Mountain in Avery County, North Carolina ("the home"). During construction, plaintiffs noticed water entering into the home from underneath the doors and from the walls on multiple occasions. Nevertheless, on 22 January 2002, a certificate of occupancy ("CO") was issued and plaintiffs took possession of the home.

In the ensuing months and years, plaintiffs continued to experience problems with water intrusion in the home. Specifically, they observed moisture on their roof, ceiling, walls, and doorways, as well as condensation and ice forming on the interior of the home's windows. Defendants performed a variety of minor work on the home several times in an attempt to correct the water intrusion problems. For instance, between 2004 and 2006, defendants replaced thirty-three windows in the home.

In addition to the window replacement, defendants also performed significant repairs on the home in 2006. These repairs focused on the southern side of the home and included,

inter alia, replacement of the cedar siding with Hardiplank, a synthetic siding material, replacement of the studs and plywood underneath the new siding with pressure-treated material, replacement of the exterior house wrap, and installation of an ice and water shield product. When defendants removed the original cedar siding from the home, they discovered water and moisture intrusion under the siding. However, defendants did not inform plaintiffs of the water damage and did not inspect the remaining sides of the home to determine if similar damage was occurring there. Instead, plaintiffs received an invoice which included replacement of the siding but did not include any repair work that defendants completed on the interior framing of the walls and joists and did not mention the installation of the ice and water shield. After defendants' 2006 repairs, plaintiffs continued to experience water intrusion in the home.

On 1 July 2008, plaintiffs replaced the original roof of the home after it sustained hail damage. Plaintiffs then paid defendants to reattach the gutter and roof caulking in another attempt to try and remedy the water intrusion. However, the problems continued, and in September 2009, plaintiffs hired Kenner & Sons Roofing ("Kenner") to install a third roof on the home. When the water intrusion problems still persisted after

this roof was installed, plaintiffs had Kenner return to inspect the roof. Kenner drilled holes in the roof decking, and hot, wet air escaped. As a result of its inspection, Kenner believed that the water intrusion problems were caused by a lack of proper roof ventilation.

Plaintiffs next hired Quality Builders, a building expert, to inspect the home. Quality Builders removed the Hardiplank siding that defendants had installed on the southern exterior wall and found mold, mildew, and rotting framing material underneath the siding. Plaintiffs then sought an opinion from Patrick A. Beville, an engineer, who determined that these problems resulted from defendants' mistakes during the initial construction of and subsequent repairs to the home.

On 1 November 2011, plaintiffs filed a complaint against defendants in Avery County Superior Court. The complaint alleged breach of contract, breach of duty of workmanlike performance, unfair and deceptive practices, breach of implied warranty of good workmanship, and negligence. Defendants answered plaintiffs' complaint and asserted the affirmative defenses of the statutes of limitations and repose. On 21 September 2012, defendants moved for summary judgment on their affirmative defenses. After a hearing, the trial court granted

defendants' motion on 21 December 2012. Plaintiffs appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Statute of Repose

Plaintiffs argue that the trial court erred in granting summary judgment in favor of defendants based upon the statute of repose. We disagree.

"[A] statute of repose bars an action a specified number of years after a defendant has completed an act, even if the plaintiff has not yet suffered injury." *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240, 515 S.E.2d 445, 449 (1999). Pursuant to N.C. Gen. Stat. § 1-50(a)(5)(a) (2011),

> [n]o 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.

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(a)(5)(c) (2011).

"Whether a statute of repose has run is a question of law." *Mitchell v. Mitchell's Formal Wear, Inc.*, 168 N.C. App. 212, 215, 606 S.E.2d 704, 706 (2005). "Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001).

In the instant case, defendants substantially completed the original construction of the home on 22 January 2002, when the CO was issued. *See Moore v. F. Douglas Biddy Constr., Inc.*, 161 N.C. App. 87, 90, 587 S.E.2d 479, 482 (2003) ("A house is substantially completed when it can be used for its intended purposes as a residence."). However, plaintiffs contend that 22 January 2002 should not be the date by which the running of the statute of repose should be measured. Instead, plaintiffs argue that the replacement of siding and other construction defendants performed in 2006 constituted defendants' last acts or omissions

which gave rise to the cause of action and thus, should have restarted the running of the statute of repose. Plaintiffs are mistaken.

In *Monson*, this Court held that "[a] duty to complete performance may occur after the date of substantial completion, however, a 'repair' does not qualify as a 'last act' under N.C. Gen. Stat. § 1-50[a](5) unless it is required under the improvement contract by agreement of the parties." 133 N.C. App. at 241, 515 S.E.2d at 450. The Court explained that "[t]o allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50[a](5)." *Id.* at 240, 515 S.E.2d at 449. Accordingly, the Court held that the replacement of windows in a residence did not reset the running of the statute of repose. *Id.* at 242, 515 S.E.2d at 450. Since *Monson*, this Court has consistently rejected similar arguments regarding whether various repairs constituted the last act by which the running of the statute of repose should be measured. *See, e.g., Bryant*, 147 N.C. App. at 660, 556 S.E.2d at 601-02 (repair of water intrusion to foyer); *Whitehurst v. Hurst Built, Inc.*, 156 N.C. App. 650, 654-55, 577

S.E.2d 168, 171-72 (2003)(repair of moisture intrusion problems due to defectively applied exterior stucco); and *Moore*, 161 N.C. App. at 90, 587 S.E.2d at 482 (repairs to wall and windows). The replacement of windows and siding by defendants in the instant case cannot be materially distinguished from the repairs in these previous cases. Thus, as in *Monson*, *Bryant*, *Whitehurst*, and *Moore*, the repairs undertaken by defendants in 2006 did not qualify as a last act under N.C. Gen. Stat. § 1-50(a)(5)(c) and did not reset the running of the statute of repose.

However, plaintiffs contend that the statute of repose is still inapplicable in this case based upon N.C. Gen. Stat. § 1-50(a)(5)(e), which states:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

N.C. Gen. Stat. § 1-50(a)(5)(e) (2011). Under this statutory provision, defendants cannot rely upon a statute of repose affirmative defense if they have engaged in fraud or willful and wanton negligence or if they have wrongfully concealed fraud or willful and wanton negligence.

> Wilful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct. Negligence . . . connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. . . . Conduct is wanton when [done] in conscious and intentional disregard of and indifference to the rights and safety of others.

Cacha v. Montaco, Inc., 147 N.C. App. 21, 30-31, 554 S.E.2d 388, 394 (2001).

On appeal, plaintiffs argue that defendants' failure to inform them of the deterioration observed by defendants when they replaced the siding on the south side of the home in 2006 and defendants' failure to inspect the remainder of the home's exterior for similar problems constituted willful and wanton negligence sufficient to preclude the application of the statute of repose. However, there is nothing in the record that reflects that plaintiffs raised this specific argument before the trial court; instead, plaintiffs consistently referred to defendants' work as ordinary negligence.

Plaintiffs' complaint did not include any allegations of willful and wanton negligence. Moreover, in its brief opposing defendants' motion for summary judgment, plaintiffs argued that N.C. Gen. Stat. § 1-50(a)(5)(e) should apply because "Defendants used negligent construction methods, negligent use of faulty design plans, negligent construction of an improvement to the Plaintiffs' real property and repairs to the Plaintiffs [sic] real property, and then wrongfully concealed these facts and the damage resulting from the Defendants' construction and design from the Plaintiffs." Finally, in the actual hearing on defendants' summary judgment motion, plaintiffs relied almost exclusively upon an equitable estoppel argument to oppose the application of the statute of repose. Therefore, the record reveals that plaintiffs never argued to the trial court that the statute of repose defense could not be utilized by defendants due to their willful and wanton negligence.

It is well established that an appellant "is not entitled to swap horses between courts in order to get a better mount in the appellate courts." *Grier v. Guy*, ___ N.C. App. ___, ___, 741 S.E.2d 338, 342 (2012)(internal quotations and citation omitted). Since plaintiffs' arguments to the trial court uniformly refer to defendants' actions as ordinary negligence,

the question regarding whether defendants' actions constituted willful and wanton negligence is not properly before us. As a result, N.C. Gen. Stat. § 1-50(a)(5)(e), which only precludes the use of the defense of the statute of repose for acts (or the concealment of acts) of willful and wanton negligence, cannot be applicable to this case. Accordingly, the trial court properly concluded that the statute of repose barred plaintiffs' claims. This argument is overruled.

IV. Conclusion

Defendants' replacement of plaintiffs' windows and repairs to the southern side of plaintiffs' home in 2006 did not constitute a last act or omission sufficient to reset the running of the six-year statute of repose in N.C. Gen. Stat. § 1-50(a)(5)(a). Plaintiffs did not argue to the trial court that defendants' actions constituted willful and wanton negligence, and so N.C. Gen. Stat. § 1-50(a)(5)(e) did not bar defendants from relying upon the affirmative defense of the statute of repose. Consequently, the trial court properly granted summary judgment in favor of defendants because there was no genuine issue of material fact as to whether the statute of repose had expired. Since we have decided this case based upon the statute of repose, it is unnecessary to consider plaintiffs' arguments

regarding the statute of limitations. *See Wood v. BD&A Constr., L.L.C.*, 166 N.C. App. 216, 222, 601 S.E.2d 311, 315-16 (2004). The trial court's order is affirmed.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).