IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROY FARMS, INC.,	)	**No. 28048-9-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
F&M CONSTRUCTION COMPANY and CONTINUOUS GUTTER COMPANY, INC.,	)	**UNPUBLISHED OPINION**
	)	
Respondents.	)	

Brown, J. — Roy Farms, Inc. appeals the trial court's summary dismissal of its breach of contract and negligent construction claims against F&M Construction Co. (F&M) and Continuous Gutter Co., Inc. (Continuous Gutter). We agree with the Yakima County Superior Court that Roy Farms' claims are barred as untimely by the statute of repose, RCW 4.16.310. Accordingly, we affirm.

FACTS

The material facts are undisputed. In 1997, Roy Farms hired F&M as general contractor to rebuild two cold storage warehouses at its place of business in Moxee. F&M performed some work itself; that work was completed by October 18, 1997.

F&M subcontracted with Continuous Gutter to install metal roofing on the buildings. Continuous Gutter completed its work on October 13, 1997, and submitted its "final billing" to F&M by invoice dated October 16, 1997.

F&M subcontracted with Central Washington Refrigeration (CWR) to furnish and install refrigeration equipment in the warehouses. CWR's final purchase order was dated October 15, 1997. The purchase order directed CWR's subcontractor, Sage Brush, to perform concrete core drilling on site. The drilling work was completed within one week of the date of the purchase order, by October 22, 1997. CWR's final invoice to F&M was dated October 31, 1997. According to CWR's owner, Terry Campbell, it takes at least one week to process the time cards and billings for a project before a final bill is generated. Therefore, CWR finished its work on the project no later than one week before October 31, 1997, that is, by October 24, 1997. F&M paid CWR on November 14, 1997.

Roy Farms hired another contractor, Zero-O-Loc, Inc., to install insulated panels in the warehouses. There was no contract between F&M and Zero-O-Loc, but F&M agreed with Roy Farms to bill Zero-O-Loc's invoice through F&M so that Roy Farms would not have to issue separate checks to Zero-O-Loc. Zero-O-Loc finished its work sometime before October 23, 1997, and sent its final invoice to F&M on that date.

On October 29, 2003, a windstorm damaged the warehouse roofs that Continuous Gutter had installed. In January 2005, Roy Farms sued for damages, alleging breach of contract by F&M and negligent installation of the roofing by

Continuous Gutter.

F&M and Continuous Gutter each filed motions for summary judgment, contending that all work on the Roy Farms project was completed no later than October 24, 1997, and therefore, the statute of repose for improvements to real property, RCW 4.16.310, barred Roy Farms' claims because they accrued on October 29, 2003—more than six years after substantial completion of the project.

In response to the summary judgment motions, Roy Farms' vice president, Jerry Roy, stated in a declaration that Zero-O-Loc and CWR were the last two contractors to work on the warehouse buildings. In his deposition, Mr. Roy was unable to indicate on what dates those contractors provided services and materials or completed their work.

Mr. Roy stated in his declaration that November 13, 1997 was the first date that any product was stored in the reconstructed buildings. He presented a bill of lading showing delivery of fruit product on that date. In 2005, F&M had served requests for production on Roy Farms, but the bill of lading was not produced until July 9, 2008. Mr. Roy testified that such documents often got "lost in the shuffle" at Roy Farms. Clerk's Papers at 54. He could not explain why he believed that the bill of lading established the date the buildings were first used.

F&M's project manager on the Roy Farms' job, Manuel Torrez, declared that Mr. Roy had products moved into the freezer buildings before F&M completed its work and before a final inspection could be conducted.

The court granted F&M's and Continuous Gutter's motions for summary

judgment and dismissed Roy Farms' case as barred by the statute of repose. Roy Farms appealed directly to the Supreme Court, which transferred the case here.

ANALYSIS

The issue is whether the court erred in dismissing Roy Farms' suit as barred by the six-year statute of repose, RCW 4.16.310.

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 93. Interpretation of a statute is a matter of law. *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110-11, 676 P.2d 466 (1984).

Roy Farms' case falls within the ambit of RCW 4.16.300-.310 because it involves claims or causes of action arising from the construction of an improvement upon real property. RCW 4.16.300. RCW 4.16.310 partly provides:

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred.

This statute of repose differs from a statute of limitation. A statute of limitation

bars a plaintiff from bringing a claim that has already accrued after a certain specified period of time, while a statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred. *See Rice v. Dow Chem. Co.*, 124 Wn. 2d 205, 211-12, 875 P.2d 1213 (1994).

Our initial focus is the meaning of the phrase "substantial completion of construction," which RCW 4.16.310 defines as "the state of completion reached when an improvement upon real property *may be used* or occupied for its intended use." (Emphasis added.) Under this standard, substantial completion of construction occurs when the entire improvement, not merely a component part may be used for its intended purpose. *Smith v. Showalter*, 47 Wn. App. 245, 250, 734 P.2d 928 (1987); *Glacier Springs Prop. Owners Assoc. v. Glacier Springs Enters.*, 41 Wn. App. 829, 832, 706 P.2d 652 (1985). In *1519-1525 Lakeview Blvd. Condominium Association*, the court held that "the Legislature's use of the phrase 'may be used' instead of 'is used' plainly means that actual use or occupancy is not required for construction to be [considered] substantially complete." *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 931, 6 P.3d 74 (2000).

Here, the evidence is undisputed that the last two contractors to work on the Roy Farms project were CWR and Zero-O-Loc; both finished their work no later than October 24, 1997. F&M previously completed its work by October 18, 1997, and Continuous Gutter was done by October 13, 1997. No evidence shows any contractor did any work (nor that any additional work was required) after October 24, 1997,

irrespective of when Roy Farms actually first used the buildings. Accordingly, under the facts of this case, the "may be used" standard was met on or before October 24, 1997, and Roy Farms' claim accrued more than six years after the construction was substantially complete.

Roy Farms contends *Showalter* compels a different result based upon that court's reference to RCW 4.16.310's legislative history. There, the Showalters personally performed construction on their home while also living in it from 1975 to 1981, when they sold it to the Smiths. Fire destroyed the home in 1984. The Smiths sued the Showalters, alleging that substandard wiring in a utility room caused the fire. *Id*. at 246-47. The trial court dismissed the Smiths' action as barred by the statute of repose based on the view that the six years began when the utility room was occupied and wired in 1977. *Id.* at 247. This court reversed, holding that neither termination of construction services nor substantial completion occurred until 1981, and thus, the Smiths' claims began accruing at that time and were not barred by the statute of repose. *Id*. at 247, 251.

The *Showalter* court first reasoned that "termination of services" would refer to all construction activities engaged in by the Showalters, who, by their own admission, did not end those activities until shortly before they sold the home in 1981. *Id.* at 249. The court then considered the legislative comments of Senator Uhlman pertaining to amendment of the phrase "whichever is earlier" to "whichever is later" in RCW 4.16.310:

> "[I]t is conceivable that the following facts would be applicable under the previous wording: You are an architect. You design a building. You then do not supervise the construction of that building. The building is the I.B.M. building in the city of Seattle which may take eight or nine years to build. You would be out of the picture. You would have rendered your services long before the six-year period which is the subject matter of this proposed legislation, and this would then cut off your liability as an architect after six years, and then even though the building went up in nine years and your errors or omissions would not be discovered until some nine years later when the building was actually built. It was felt by the Senate Judiciary Committee that we should wait until a substantial completion and tenants had moved in and had a chance to find out any errors or omissions on your part. Thus we should then have an opportunity to sue you as the architect if you had any errors or omissions through that longer period of time. We felt then as of the time of substantial completion *or as of the time the tenant moved in,* they had an opportunity to observe the building and were able to find out whether or not there were any errors or omissions on your part, from satisfactory completion of construction."

Showalter, 47 Wn. App. at 250 (quoting Senate Journal, at 995, 40th Leg. Reg. Sess. (Wash. 1967)). Thus, based upon the express language of the statute and the legislative history, the court first concluded that the later 1981 date marked the beginning of the 6-year period of the statute of repose in RCW 4.16.310. *Id.* at 250.

The court then addressed the concept of substantial completion, explaining the entire house (not just the utility room and its wiring) was the improvement and "substantial completion of construction" occurs "when the *entire improvement*, not merely a component part, may be used for its intended purpose." *Showalter*, 47 Wn. App. at 251 (citing *Glacier Springs Prop. Owners Ass'n,* 41 Wn. App. at 832). Next recognizing the house was being lived in by the builder, the court stated, "the Legislature did not intend liability to be cut off before 'the tenant moved in, [and] they

had an opportunity to observe the building.'" *Id.* at 251 (quoting Senate Journal at 995).

The *Showalter* court finally held the house was the entire improvement, construction services were not terminated until sometime in 1981, *and* "substantial completion of construction" did not occur until 1981 as well. Thus, whether "substantial completion" or "termination of services" was the date used, the Smiths' cause of action accrued within six years of that date. *Showalter*, 47 Wn. App. at 251.

Conversely, here, applying the plain meaning of RCW 4.16.310, whether "substantial completion" or "termination of services" is used, the latest cutoff is October 24, 1997—more than six years prior to the October 29, 2003 roof damage. Significantly, Mr. Roy could not identify any later date on which any contractor performed. Moreover, while the *Showalter* court found the legislative history regarding tenant move-in to be instructive under the particular facts of that case, it is of no moment here. Unlike the Smiths, Roy Farms was already the owner/occupant of the real property while construction was performed and completed. Roy Farms thus stood in the same position for statute of repose purposes on October 24, 1997 that the Smiths assumed in 1981 when they purchased the house from the Showalters. As in *1519-1525 Lakeview Blvd. Condominium Association*, 101 Wn. App. at 931, no resort to legislative history is warranted here.

Roy Farms' alternative argument that "termination of services" for purposes of RCW 4.16.310 did not occur until the date of final payment for construction services on

November 14, 1997 is without merit. Assuming Roy Farms adequately preserved the argument for appeal, its cited cases are not persuasive. Contrary to Roy Farms' argument, *Showalter* did not refer to final payment as establishing the date for termination of services. *Showalter*, 47 Wn. App. at 249. In *Glacier Springs Property Owners Association*, the court referred to the date of final billing as the date of substantial completion only because the record was unclear as to the actual date of completion. The court thus assumed the work was completed before final billing. *Glacier Springs Prop. Owners Ass'n*, 41 Wn. App. at 832, n.3. Moreover, here, as argued by Continuous Gutter, the date of final payment is irrelevant when there is specific evidence of not only substantial completion but total completion of the warehouse project. No Washington case is cited or found that supports Roy Farms' position.

Under the plain provisions of RCW 4.16.310 that the statute of repose accrual period begins on the later of substantial completion of construction or termination of services, the pertinent date here is October 24, 1997. Since the windstorm occurred more than six years later on October 29, 2003, Roy Farms' claims against both defendants are barred by the 6-year statute of repose. Because our reasoning to this point is dispositive of this appeal, it is unnecessary to address alternative arguments posed to reach the same result.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Sweeney, J.

Korsmo, J.