

**H**NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Appeals of North Carolina.

Richard Scott JONES, Plaintiff,

v.

SUMMIT HOMES GROUP, INC., J.D. Beam Residential, Inc. and Dryvit Systems, Inc., Defendants.

No. COA01-723.

May 7, 2002.

\*1 Appeal by plaintiff from judgment entered 23 February 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 March 2002.

Lewis & Roberts, P.L.L.C., by Daniel K. Bryson and Kurt F. Hausler, for plaintiff-appellant.

Alexander H. Barnes for defendant-appellees.

HUNTER, Judge.

Richard Scott Jones ("plaintiff") appeals the trial court's grant of summary judgment in favor of Summit Homes Group, Inc. ("Summit Homes") and J.D. Beam Residential, Inc. ("J. D. Beam Residential"). We reverse and remand for further proceedings.

On 23 August 1999, plaintiff filed a complaint seeking damages related to alleged defects in a house he had purchased, and related to the allegedly defective Exterior Insulation Finish System ("EIFS") applied to the house. The complaint names three defendants: Summit Homes, J.D. Beam Residential, and Dryvit Systems, Inc. ("Dryvit"). The complaint alleges that at some point prior to August of 1993, Summit Homes and J.D. Beam Residential contracted with plaintiff to construct the house in question and to sell to plaintiff the house and real property in question. The complaint also alleges that Dryvit was the manufacturer of the EIFS used in the construction of the house. The complaint alleges that the closing on the sale of the

house and real property occurred "in or about August, 1993," and that "[t]hereafter, plaintiff moved into and occupied the house."

Summit Homes and J.D. Beam Residential filed an answer to the complaint. The answer admits that Summit Homes had owned and developed the real property in question, and that J.D. Beam Residential had contracted to sell the house and real property to plaintiff. Summit Homes and J.D. Beam Residential moved for summary judgment. The record indicates that, in addition to the pleadings, the trial court considered the following in ruling on the motion: the deposition testimony of Joseph David Beam, III ("Mr. Beam") and two letters identified as exhibits during the deposition; an affidavit from plaintiff; and two affidavits from Mr. Beam. The trial court granted the motion for summary judgment in favor of Summit Homes and J.D. Beam Residential (referred to herein as "defendants"), and plaintiff appeals.

Pursuant to N.C. Gen.Stat. § 1A-1, Rule 56 (1999), a motion for summary judgment is properly granted if, considering the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Moore v. Coachmen Industries, Inc., 129 N.C.App. 389, 393-94, 499 S.E.2d 772, 775 (1998). The moving party bears the burden of showing that there are no genuine issues of material fact. Id. at 394, 499 S.E.2d at 775. "The evidence is to be viewed in the light most favorable to the nonmoving party." Id.

Defendants first argue that summary judgment was properly granted because the record establishes that neither Summit Homes nor J.D. Beam Residential actually constructed the house in question. In his affidavit, Mr. Beam avers that J.D. Beam Residential was formerly named Summit Homes; that Summit Homes had owned the house and real property in question and had sold them to plaintiff; and that neither Summit Homes nor J.D. Beam Residential constructed the house. Further, in his deposition, Mr. Beam testified that the company that acted as the general contractor in the construction of the house was a company titled "J.D. Beam, Inc." (to be distinguished from "J. D. Beam Residential, Inc."), and

that J.D. Beam, Inc. contracted with Summit Homes to construct the house which plaintiff subsequently purchased from Summit Homes. In other words, defendants contend that the complaint incorrectly alleges that the house was constructed by defendants rather than a separate company called J.D. Beam, Inc.

\*2 However, as noted above, the answer to the complaint filed by defendants specifically admits that Summit Homes “at one time was a developer and a prior owner of the real property at issue,” and that J.D. Beam Residential “contracted to sell said real property and improvements thereon to Plaintiff.” Thus, Mr. Beam’s statement in his affidavit that Summit Homes sold the property in question to plaintiff directly conflicts with the admission in defendants’ answer that J.D. Beam Residential sold the house and real property to plaintiff. Moreover, plaintiff specifically avers in his affidavit that he contracted with Summit Homes “for the purchase of a house to be constructed by Summit Homes.” We also note that defendants, who bear the burden of establishing the lack of any genuine issue of material fact as the parties moving for summary judgment, have failed to produce the contract for the construction and sale of the property and the house.

Viewing the evidence in the light most favorable to plaintiff as the non-moving party, we hold that there are genuine issues of material fact as to whether defendants owned the property in question, constructed the house in question, entered into a contract with plaintiff, and ultimately sold the house and real property to plaintiff. Therefore, summary judgment was not warranted on the grounds that the complaint names Summit Homes and J.D. Beam Residential as defendants rather than J.D. Beam, Inc.<sup>FNI</sup>

*FNI. We also note that the complaint alleges numerous causes of action against defendants, including negligence, gross negligence, breach of express and implied warranties, breach of contract, negligent misrepresentation, and unfair and deceptive practices. Even assuming arguendo that defendants entered a contract to sell to plaintiff the property and the house, but did not actually construct the house, defendants have not explained why they would be entitled to summary judgment on all of plaintiff’s claims.*

Defendants also argue that summary judgment was properly granted because the record establishes that this action is barred by the applicable statute of repose. “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, ---, 556 S.E.2d 597, 600 (2001). “The moving party has the burden of producing evidence sufficient to show that summary judgment is justified.” *Id.* “The burden then shifts to the non-moving party to ‘set forth specific facts showing that there is a genuine issue for trial.’ ‘*Id.* (citations omitted).

Here, the applicable statute of repose is the North Carolina real property improvement statute, which states in pertinent part:

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 (1999). The statute defines “substantial completion” 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. Although the statute does not define “last act or omission,” this Court has stated that “[i]n order to constitute a last act or omission, that act or omission must give rise to the cause of action.” *Nolan v. Paramount Homes, Inc.*, 135 N.C.App. 73, 79, 518 S.E.2d 789, 793 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). Defendants contend that both (1) the “specific last act or omission of the defendant giving rise to the cause of action,” and (2) the date of “substantial completion of the improvement” occurred more than six years before this action was commenced, and that the action is therefore barred. Plaintiff appears to concede that the date of “substantial completion” was either 3 August 1993, on which date the Certificate of Occu-

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pancy for the house was issued, or 4 August 1993, on which date plaintiff purchased and took possession of the house, and that the date of “substantial completion” was therefore more than six years before the action was commenced on 23 August 1999. However, plaintiff argues that there are genuine issues of material fact as to whether the action was filed within six years of the “specific last act or omission of the defendant giving rise to the cause of action.”

\*3 The defects in the house alleged by plaintiff in the complaint include: (1) “Missing or inadequate sealant at penetrations and junctures of dissimilar materials”; (2) “Cracks in the EIFS”; (3) “Exposed EIFS mesh, where base and finish coats have not been applied”; (4) “EIFS improperly applied to horizontal surfaces”; and (5) “Lack of expansion joints.” In his affidavit, plaintiff specifically avers that “[t]he EIFS band which is applied at the juncture of the brick foundation and the framed structure of the house” was “not completed prior to September 1, 1993.” When asked about this specific factual allegation during his deposition, Mr. Beam stated: “I have no personal knowledge of the things in Mr. Jones' affidavit that would allow me to dispute whether or not he is reflecting them accurately or not.” Furthermore, the record includes a letter dated 4 August 1993 from Summit Homes to plaintiff acknowledging the existence of unspecified “uncompleted work at [the] time of closing” and stating that such work would be completed by 30 September 1993.

This evidence reveals the existence of genuine issues of material fact as to whether the “last act or omission of the defendant giving rise to the cause of action” occurred more than six years before this action was commenced on 23 August 1999. Thus, we hold that defendants have not satisfied their burden of establishing that the pleadings and evidence “show without contradiction that the statute of repose has expired.” *Bryant*, 147 N.C.App. at ----, 556 S.E.2d at 600. We reverse the trial court's grant of summary judgment in favor of defendants and remand for further proceedings.

Reversed and remanded.

Judges GREENE and TIMMONS GOODSON, concur.

Report per Rule 30(e).

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