O/A 5-2-89

IN THE SUPREME COURT OF FLORIDA

NO. 73,124

FIRST DCA DOCKET NO.: 87-01571

ALMAND CONSTRUCTION CO., INC., a Florida corporation, and A. F. ALMAND, JR., and DORIS J. ALMAND, his wife, individually,

Petitioners,

vs.

JOHN A. EVANS and IRMA L. EVANS,

Respondents.

APPEAL FROM THE DISTRICT COURT
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS ALMAND CONSTRUCTION CO., INC., a Florida corporation, and A. F. ALMAND, JR., and DORIS J. ALMAND, his wife, individually

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CITATION OF AUTHORITIES

Other Authorities:

INTRODUCTION

This brief is submitted on behalf of the Petitioner, defendants below, Almand Construction Co., Inc., a Florida corporation, and A. F. Almand, Jr., and Doris J. Almand, his wife, individually. The parties will be referred to by proper name as follows:

Petitioners shall be referred to as "Almand"

Respondents shall be referred to as "Evans"

Reference to the record on Appeal will be by the symbol "R" followed by the page number. Reference to pleadings and opinions contained in the Appendix following this brief shall be by the symbol "A" followed by the page number. Reference to the Opinion of the First District Court of Appeal rendered September 1, 1988 shall be referred to as "D.Ct." followed by the page number of the opinion.

STATEMENT OF THE CASE AND FACTS

The Evans' filed their cause of action on August 7, 1985, thirteen and one-half years after they occupied the residence and seven years after Evans became aware of alleged improper preparation of the lot to hold the weight of the house. Counts I, II and V of the Fifth Amended Complaint allege claims of breach of contract, negligence and breach of implied warranty against the individual Almands and the corporate Almand arising out of the construction of the residence, pursuant to a Construction Agreement of September 29, 1971 attached to the Fifth Amended Complaint. In each of the three counts, Evans allege that they notified Almand in 1978 of structural problems with the residence (R 39-44; A 1-6). Importantly, in paragraphs 25 and 26, they allege that upon taking possession of the premises they knew the lot was not properly prepared to hold and sustain the weight of the single family structure and notified Almand of the defects and the structural problems caused (A 5). Almand answered the Fifth Amended Complaint and alleged as their defenses that the claims were barred by the statute of limitations in that the claims thereunder were not brought within four years of the notice of Evans of the structural problems with the residence, Section 95.11(3)(c), Florida Statutes (R 48-50). Evans responded to these Affirmative Defenses with a denial of each and every Affirmative Defense (R 51).

After propounding discovery to plaintiffs, Almand moved for summary judgment (R 60-61; A 10-11). A hearing was held on September 16, 1987 which Almand caused to be transcribed by the court reporter for the purposes of any appeal which ensued and, at that time, the

Trial Court determined summary judgment was warranted as to each count of the Fifth Amended Complaint, based on the statute of limitations (R 86).

The District Court of Appeal reversed the summary judgment as to Counts I, II and V based on the statute of limitations. The opinion stated that Evans alleged that the settling and resultant damage to the house was the result of a latent defect (the defective, unstable and unsuitable fill) of which Evans had no actual or constructive knowledge prior to 1982 rather than 1978 (D.Ct. 1-5;A 10-14).* The District Court of Appeal relied upon its opinion in **The Board of Trustees of Santa Fe Community College v. Caudill-Rowlett Scott, Inc.**, 461 So.2d. 239 (Fla. 1st DCA 1984), review denied 472 So.2d. 1180 (Fla. 1985), as support for its opinion that Evans' lack of knowledge of the actual cause of the structural problems with the house met the latent defect exception to the statute of limitations contained in Section 95.11(3)(c), Florida Statutes.

Almand files this appeal of the District Court's opinion reversing the summary judgment of the Trial Court.

*The District Court affirmed summary judgment as to Counts III and IV which are not involved in this appeal.

SUMMARY OF ARGUMENT

The District Court of Appeal incorrectly reversed the summary judgment in favor of Almand based on:

1. Evans' Fifth Amended Complaint established that they were aware in 1978 that the alleged unsuitability of the lot and its preparation were defects causing the structural problems with the house. The District Court overlooked these allegations in finding that Evans was not aware of the cause of the structural problems until they received an engineer's report in 1982 advising them that the condition of the lot was causing the house to settle.

2. The District Court relied on a hearsay engineer's report which was not in evidence nor even provided the Trial Court as the District Court's basis for establishing Evans lack of knowledge of the cause of the structural problems until 1982.

3. Counts I, II and V alleging either negligent construction of the residence or a breach of warranty of which Evans was aware of in 1978 are barred by the four year statute of limitation in that Evans had notice of defects or structural problems alleged caused by the lot not being properly prepared to hold and sustain the weight of the single family structure in 1978 but did not file their cause of action within four years of that notice. The District Court erroneously found the notice of the defects or structural problems did not commence running of the statute of limitations.

ARGUMENT: THE DISTRICT COURT'S REVERSAL OF SUMMARY JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE AS TO THE EXISTENCE OF A LATENT DEFECT AND IS CONTRARY TO THE LAW AS TO WHAT NOTICE OF A BREACH OF CONTRACT STARTS THE RUNNING OF THE STATUTE OF LIMITATIONS.

A. THE EVIDENCE DID NOT SUPPORT THE OPINION OF THE DISTRICT COURT AS TO THE EXISTENCE OF A LATENT DEFECT.

Evans did not offer the Trial Court evidence of any latent defect exception to the running of the statute of limitations, either by affidavit or otherwise, at the hearing on motion for summary judgment.

The District Court of Appeal, in its opinion of September 1, 1988, relied upon an engineer's report which Evans allegedly received in 1982 as the first evidence that Evans had knowledge of the cause of the latent defect, i.e., the unsuitable soil, which was causing the structural problems. The pertinent portions of the District Court's opinion appear at page 4 where the Court stated:

> ". . . However, he argued that the appellants did not have actual knowledge of the substantial cause of the problems until 1982, when they received the engineer's report showing that the settling and resulting damage to their house was a result of its construction on defective and unsuitable fill . . ."
>
> and
>
> ". . . The appellees attempted repairs to correct the structural problems, but were unsuccessful, apparently because the settling was not a result of negligent construction of the house but was caused by the use of unsuitable fill beneath the house, which condition could not be corrected. Because the appellants alleged that the settling and resultant damage to the house was the result of a latent defect (the defective, unstable and unsuitable fill) of which they had no actual or constructive knowledge prior to 1982, the entry of summary judgment on the statute of limitations grounds was erroneous."

(D.Ct. 4;A 13)

This hearsay was not in the record before the Trial Court and Almand objected to the Evans' attorney arguing this hearsay as the basis for establishing the existence of a latent defect unknown to the Evans (R 97). Almand was prejudiced by the District Court's reliance on the "engineer's report" since its contents were not anymore known to the Trial Court or District Court than it is to the Court. Whether it established that the cause of structural problems with the residence were not known or should have been discovered by the Evans until 1982 was sheer speculation on the part of the District Court of Appeal.

In **Landers v. Milton**, 370 So.2d. 368 (Fla. 1979), this Court stated at page 370:

> "[1,2] A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist. Harvey Building, Inc. v. Haley, 175 So.2d. 780 (Fla. 1965); Farrey v. Bettendorf, 96 So.2d. 889 (Fla. 1957); See Fla.R.Civ.P. 1.510. Concomitantly, the party seeking to escape the statute of limitations must bear the burden of proving circumstances that would toll the statute."

In the present appeal, the District Court of Appeal incorrectly disturbed the summary judgment of the Trial Court which was based on the evidence of record at the hearing of September 16, 1987.

B. THE PLEADINGS ESTABLISHED RESPONDENTS' KNOWLEDGE OF THE UNSUITABLE SOIL AS A DEFECT OR STRUCTURAL PROBLEM IN 1978 CONTRARY TO THE FINDINGS OF THE DISTRICT COURT

The District Court of Appeal failed to consider all the allegations of the Fifth Amended Complaint and found that Evans was not aware of the cause of the structural problems until 1982 and

based its reversal of summary judgment on this misreading of the pleadings. At page 4 of its opinion, the District Court stated:

> ". . . Although the appellants admittedly knew as early as 1978 that there were structural problems with the house, they allege they did not know the cause of the settling and cracking. The appellees attempted repairs to correct the structural problems, but were unsuccessful, apparently because the settling was not a result of negligent construction of the house but was caused by the use of unsuitable fill beneath the house, which condition could not be corrected. Because the appellants alleged that the settling and resultant damage to the house was the result of a latent defect (the defective, unstable and unsuitable fill) of which they had no actual or constructive knowledge prior to 1982, the entry of summary judgment on statute of limitations grounds was erroneous."

(D.Ct. 4;A 9)

The Fifth Amended Complaint does not support the finding of the District Court that ". . . Although the appellants admittedly knew as early as 1978 that there were structural problems with the house, they allege they did not know the cause of the settling and cracking . . .". This knowledge attributed to the Evans by the District Court does not appear anywhere in the Fifth Amended Complaint or the other evidence of record before the Trial Court.

In paragraph 6 Evans states that they were aware the structure was sinking into the lot. Paragraph 6 states:

> "6. Defendants A. F. ALMAND, JR. and DORIS J. ALMAND represented that the lot was fit for the construction of a single family residence. Defendants, A. F. ALMAND, JR. and DORIS J. ALMAND knew or should have known that the lot was not suitable to have placed on said lot a single family home by defendant ALMAND CONSTRUCTION CO., INC., portions of the single family residential structure erected on said lot showed severe structural defects and structural problems which were caused by the single family residential structure sinking into the lot."

(R 40;A 2)

In paragraph 7, Evans states:

> "7. Defendants were notified by Plaintiffs in 1978 and 1982 of the structural problems with the home as a result of the lot which was sold to them by Defendants A. F. Almand, Jr. and Doris J. Almand."

(R 40;A 2)

Contrary to the opinion of the District Court, Evans' knowledge that the unsuitability of the lot was the cause of the settling is clearly shown in paragraph 25 which states:

> "25. Upon taking possession of the premises, the Plaintiffs discovered that the single family dwelling constructed thereon was constructed in an unworkmanlike manner in that the lot which the structure was placed on was not properly prepared to hold and sustain the weight of the single family structure and therefore the structure was in need of extensive repairs to correct the defects and make it suitable for habitation."

(R 43;A 5)

In paragraph 26, Evans then allege, ". . . Upon the first notification of the defects, Plaintiffs advised Defendants in 1978 and 1982 <u>of said defects and the structural problems</u> caused by the Defendants' breach". (R 43-44;A 5-6), (Emphasis added).

Quite clearly, Evans considered the unsuitable lot a "defect" separate and distinct from "the structural problems" of which they had actual or constructive knowledge in 1978.

The District Court of Appeal overlooked these admissions by Evans and substituted a totally gratuitous finding that a latent defect existed, ". . ., apparently because the settling was not a result of negligent construction of the house but was caused by the use of unsuitable fill beneath the house, which condition could not

be corrected . . .". (D.Ct. 4;A 13).

This finding is not based on the pleadings, nor by any evidence which Evans provided the Trial Court, and is derived solely from the District Court's own supplementation of the record.

C. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD AS TO WHEN EVANS HAD KNOWLEDGE OF A DEFECT REQUIRING THEM TO FILE SUIT WITHIN FOUR YEARS

Section 95.11(3)(c), Florida Statutes (1977), reads in part:

> "(3) Within four years.-
> (c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer; except that when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. . . ."

The First District Court of Appeal relied upon its opinion in **The Board of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc.**, 461 So.2d. 239 (Fla. 1st DCA 1984), review denied 472 So.2d. 1180 (Fla. 1985), wherein summary judgment based upon the statute of limitations was reversed on the basis that material facts existed as to whether or not the leaks in the pipes were such that the community college had, or should have, discovered the existence of corrosion in the pipes more than four years before suit was filed (thereby bringing into issue that portion of the statute tolling the time in which suit must be filed when the action involves a latent defect).

The District Court distinguished its opinion from the leading

opinion of this Court, **Kelley v. School Board of Seminole County**, 435 So.2d. 804 (Fla. 1983) at page 244 of **The Board of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc.**, supra, where it said:

> "Appellees contend that it is the discovery of the leaks, and not discovery of the corrosion which caused the leaks, which commences the statutory limitations period, citing Kelley v. School Board of Seminole County, 435 So.2d. 804 (Fla.1983), which overrules School Board of Seminole County v. GAF Corporation, 413 So.2d. 1208 (Fla. 5th DCA 1982), upon which appellant had relied in the trial court. Appellees also cite Havatampa Corporation v. McElvy, Jennewein, Stefany and Howard, Architects/Planners, Inc., 417 So.2d. 703 (Fla. 2d. DCA 1982), pet. for rev. den., 430 So.2d. 451 (Fla.1983) and K/F Development & Investment Corporation v. Williamson Crane & Dozer Corporation, 367 So.2d. 1078 (Fla. 3d DCA), cert. den. 378 So.2d. 350 (Fla. 1979). However, as the Kelley court noted (in footnote 3), that case did not present the question of whether a cause of action actually existed or whether the school board had, or should have, discovered the existence of a problem. The Supreme Court's holding in Kelley was a rejection of the 'continuous treatment' doctrine which the majority had adopted in the DCA opinion."

It is apparent from the District Court's opinion in this appeal that it interprets the statute to require that the owner must have or should be able to determine the actual cause of the defect before having a duty to bring suit within four years. The District Court's opinion at page 4 states:

> ". . . Although the appellants admittedly knew as early as 1978 that there were structural problems with the house, they allege they did not know the cause of the settling and cracking. The appellees attempted repairs to correct the structural problems, but were unsuccessful, apparently because the settling was not a result of negligent construction of the house but was caused by the use of unsuitable fill beneath the house, which condition could not be corrected.
>
> Because the appellants alleged that the settling

> and resultant damage to the house was the result of a latent defect (the defective, unstable and unsuitable fill) of which they had no actual or constructive knowledge prior to 1982, the entry of summary judgment on statute of limitations grounds was erroneous."

(D.Ct. 4;A 13)

Almand does not agree that this Court stated in **Kelley** that the statutory wording triggering the latent defect exception, ". . . the time runs from the time the defect is discovered or should have been discovered . . .", was to be ignored and that knowledge of the cause of the defect was the knowledge required to trigger the exception to the statute of limitations rather than the wording of the statute, Section 95.11(3)(c), Florida Statutes.

This Court, in **Kelley v. School Board of Seminole County**, reviewed a conflict in the decisions of the Fifth District Court in **School Board of Seminole County v. GAF Corp.**, 413 So.2d. 1208 (Fla. 5th DCA 1982) that conflicted with **K/F Development Investment Corp. v. Williamson, Crane and Dozer Corp.**, 367 So.2d. 1078 (Fla. 3d. DCA 1968), cert.den. 378 So.2d. 350 (Fla. 1979) and **Havatampa Corp. v. McElvy, Jennewein, Stefany and Howard, Architects/Planners, Inc.**, 417 So.2d. 703 (Fla. 2d. DCA 1982). The Fifth District Court in **School Board of Seminole County** had applied the continuous treatment doctrine to excuse the school board from filing suit within four years of first becoming aware of roof leaks. This Court, accepting the dissenting opinion of Judge Cowart, declined to follow the continuous treatment doctrine in Florida. At page 806, this Court went on to say that the school board had sufficient knowledge of the defective roofs to put it on notice of its potential cause of action requiring it to file suit within four years.

More importantly, this Court went on to distinguish the Second District case of **Havatampa**, supra and at page 806 of its opinion in **Kelley** said as to **Havatampa**:

> "In Havatampa the second district faced a similar situation. Havatampa knew that the roof of its new manufacturing facility leaked when it took possession of the building. Its architects also tried to repair the leaks, but, as in the instant case, several years passed before Havatampa hired an independent consultant who determined the specific nature of the defects causing the leaks. The district court held that Havatampa could not rely on a lack of knowledge of the specific cause to protect it from the running of the statute of limitations.
>
> The second district acknowledged the fifth district's opinion in the instant case, noted the differences between the cases, and then stated: 'We reject School Board of Seminole County to the extent that it can be construed to require knowledge of the specific nature of the defect causing an obvious problem before the statute of limitations commences to run.' 417 So.2d. at 704. It appears to us that the school board's claim that its reliance on Kelley prevented its discovery of the specific cause of the roofs' problems is central to the fifth district's resolution of this case. On essentially similar facts, however, we find that Havatampa reaches the proper conclusion."

This court then went on to discuss **K/F Development Corp.**, supra, a Third District Court case in conflict with **School Board of Seminole County**, supra, and stated that attempts to remedy defects did not excuse the duty to file suit within four years of the first notice of the defect.

Contrary to the comments of the First District Court in **The Board of Trustees of Santa Fe Community College v. Caudill**, supra, at page 244, as to this Court's intentions in **Kelley**, this Court clearly stated in **Kelley** that it was the knowledge of the defective condition which triggered the four year statute. At page 807 the

opinion states:

> "The evidence shows that, regardless of Kelley's attempts to repair the roofs and regardless of the school board's lack of knowledge of a specific defect, the school board knew more than four years prior to August 1977 that something was wrong with the roofs of these three schools. This knowledge meets the discovery aspect of subsection 95.11(3)(c). We approve Havatampa and K/F Development and quash the instant opinion with orders to reinstate the trial court judgment."

The First District Court of Appeal, in this appeal, incorrectly gave significance to Evans allegedly not knowing the specific cause of the settling of the structure into the lot and, as a result, found that Evans did not have knowledge of the defect which would trigger the running of the four year statute of limitations in 1978. Consistent with this Court's opinion in **Kelley**, supra, Evans, as earlier alleged in paragraphs 6, 7, 25 and 26 of the Fifth Amended Complaint, had knowledge of the defective condition of the lot and of the structural problems of the house. This knowledge of the defect in the construction triggered the obligation of Evans to bring their cause of action within four years of learning of the defects or other structural problems in 1978.

CONCLUSION

For the foregoing reasons, the opinion of the First District Court of Appeal rendered September 1, 1988, which reversed the summary judgment entered by the Trial Court as to Counts I, II and V of the Fifth Amended Complaint should be reversed and the summary judgment of the Trial Court affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided to David B. Lee, Jr., Esquire, P. O. Box 400, Orange Park, Florida, 32067-0400, by U. S. Mail, this February 10, 1989.

Brian J. Kellogg

Attorney