OA 5-2.89

SUPREME COURT OF FLORIDA

NO. 73,124

FIRST DISTRICT COURT OF APPEAL 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 RESPONDENTS JOHN A. EVANS and IRMA L. EVANS

DAVID B. LEE, JR.
DAVID B. LEE, JR., CHARTERED
P. O. Box 400
Orange Park, FL 32067-0400
(904) 269-1400
Florida Bar No. 0115376

Attorney for Respondents

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the Respondents, defendants below, JOHN A. EVANS and IRMA L. EVANS. For the purpose of this brief, the Petitioners shall be referred to herein as "Almand", and the Respondents shall be referred to herein as "Evans". References to the testimony at trial shall be referred to by "T" followed by the page and record by "R" followed by the page number. Reference to pleadings and opinions contained in the Appendix following this brief shall be by the symbol "App." 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, in regards to a residence they had purchased from Almand some thirteen and one-half years previously. The Complaint in Counts I, II and V of the Fifth Amended Complaint alleged a breach of contract, negligence and breach of implied warranty against the individual Almands and the corporate Almand arising out of the construction of a single-family residence pursuant to a Deposit Receipt and Purchase and Sale Agreement with the corporate Almand to construct a single-family residence on a lot that was owned by Evans. The Compliant among other things alleges that Evans notified Almand in 1978 of certain structural problems with the home (R 37-44; App. 1-6) and that Almand attempted to correct the structural problems in 1979. Almand answered the Fifth Amended Complaint and in their defense alleged that all of the claims were barred by the statute of limitations thereunder which were not brought within the four-year period of the notice to Almand of the structural problems citing Section 95.11(3)(c), Florida Statutes (R 48-50). Evans responded to these Affirmative Defenses with a denial of each and every allegation (R 51).

Almand moved for a summary judgment (R 60-61). A hearing was held before The Honorable Henry L. Adams, Jr. on September 16, 1987, at which time the trial court entered a summary final judgment based upon the fact that each count as alleged in the Fifth Amended Complaint was barred by the statute of limitations (R 86).

Evans appealed to the First District Court of Appeal and stated in its brief that the cause of action should not be barred by the statute of limitations because the actual cause of the problem Evans had with the structure was a latent defect (unstable and unsuitable fill) of which the Evans had no knowledge prior to 1982 rather than 1978. 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), in support of its opinion that the 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 takes its appeal from the District Court's opinion reversing the summary judgment of the trial court.

SUMMARY OF ARGUMENT

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

1. Although Evans' Fifth Amended Complaint establishes that there were certain problems Evans was having with structural defects in the home, it is quite apparent from the evidence that the actual cause of the problem was not determined until 1982 when they received the engineer's report advising them the condition of the lot was causing the house to settle.

2. The District Court the engineer's report, although not introduced into evidence, would provide the trial court with a basis for establishing that the Evans did not have any actual knowledge of the cause of the problem until 1982.

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.

The District Court of Appeals in its opinion correctly found that a summary judgment did not properly lie on page 5 of their opinion where the Court stated:

> "If the appellants are able to prove their allegations, i.e., if they can prove to the satisfaction of a trier of fact that the damager to their house was caused by a latent defect of which they neither knew or should have known prior to 1982, the four year statute of limitations will not constitute a bar to their action. Board of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc., 461 So.2d 239 (Fla. 1st DCA), review denied 472 So.2d 1180 (Fla. 1985). Summary judgment was therefore improperly entered as to Counts I, II and V."

It should be clear to the Court that the First District Court of Appeal opinion took into consideration that in the entry of the Final Summary Judgment, the court failed to consider that in granting summary judgments that:

> "Summary judgments should be sparingly granted and must be denied if there exists any controverted issue of material fact or if the proof supporting the motion fail to overcome every theory upon which, under the pleadings, the adversary's position might be sustained." Campbell v. Anheuser-Busch, Inc., 265 So.2d 557 (Fla. 1st DCA 1972) at 557." (Emphasis added.)

Therefore, Evans should be given every opportunity to present to the trier of fact an evidentiary determination as to whether or not the latent defect could or should have been determined prior to 1982. Although the issue of the latent defect could not possibly have been known without the engineer's report of 1982, the trial court must allow Evans to place the evidence before the court to make the determination of whether or not the statute of limitations properly runs starting in 1978 when Evans first notified Almand that they were having structural problems with the home. By granting the summary judgment, the trier of fact has foreclosed Evans from presenting before the court a material fact, i.e., the engineer's report, which can graphically demonstrate to the court whether the latent defect alleged in the complaint would have been known to the parties in 1978 thus starting the tolling of the statutes of limitations.

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.

Contrary to the argument of counsel for Almand in regards to the question of structural problems in 1978, the First District Court of Appeals correctly summarized the position of Evans at page 4 of its opinion:

> " . . . 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."

It is clear from the record and transcript before The Honorable Henry L. Adams that in 1979 the parties attempted to correct the problem in terms of patching walls and doing work in the home to correct structural problems. The work in 1979 which attempted to correct the problem was unsuccessful because the problem as later indicated in 1982 was the result of settling of unsuitable fill. If, in fact, Almand had attempted to correct the problem in 1978 (unsuitable fill), there would be a possibility that the statute of limitations would have run against Evans but it is quite clear that the Almands nor the Evans had any idea

what the actual problem was until 1982 when the engineer's report determined that unsuitable fill was the basic cause of the problem which was not determined until some four (4) years after the original notification to Almand of structural problems with the home.

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.

It would appear that the First District Court of Appeal did apply the correct legal standard regarding the running of the statute of limitations against Evans in that it distinguished its opinion from the leading opinion of this court, Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1982) 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 relief 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 and 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."

The District Court of Appeal interpreted in this case that the statute required that the owner must or should have been able to determine the actual cause of the defect before having a duty to

bring suit within four years. The First District Court of Appeal in the instant case correctly stated in its opinion (App. 2, DC.T 4) 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. 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 was erroneous."

Therefore, the findings of the District Court of Appeal appear to be quite correct that the running of the statute of limitations should not convene until 1982 at which time there was actual notice or possible constructive notice of the hidden defect (the unstable and unsuitable fill) which could not have been known without the engineer's report which was not available to Evans until 1982. By granting the summary judgment, this evidence which was before the court at the summary judgment in the form of an engineer's report which could not properly be introduced without a trying of the facts clearly showed that the problems that Almand attempted to correct in 1979 as mentioned in Almand's affidavit (R 57-59) did not address the actual problem and could not have addressed the problem because there was no knowledge,

real or constructive, as to the actual problem with the house settling and the cracking of the walls as a result of the unstable fill. If we are to believe the argument in Almand's brief that because Evans knew of a problem in 1978 with the home, although not the cause of the problem until the tolling of the statute, i.e., the statute would run in 1978 when Almand was notified by Evans of a problem with the construction of the home, this would preclude any further investigation of the problem by Evans although admittedly neither party knew in 1978 what the problem with the home was, an actual latent defect which was not determinable until 1982. This is distinguishable from this court's decision in Kelley where it stated at 807:

> "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."

Our situation is certainly distinguishable due to the fact that the amount of effort it would take to determine the cause of the structural problems of the Evans home were not ascertainable until 1982 and the cosmetic application of repairs by Almand in 1979 after notification should not start the tolling of the time under the statute in view of the fact that neither party could determine the cause of the settling of the home until 1982 when the engineer's report, which has not been placed into evidence as

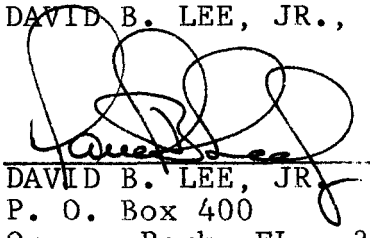
a result of the summary final judgment, could be introduced at the trial level to make the determination that until that professional opinion was rendered, the parties could not ascertain what was the cause of the settling of the home.

CONCLUSION

For the foregoing reasons, the opinion the First District Court of Appeal of 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 affirmed.

Respectfully submitted,

DAVID B. LEE, JR., CHARTERED



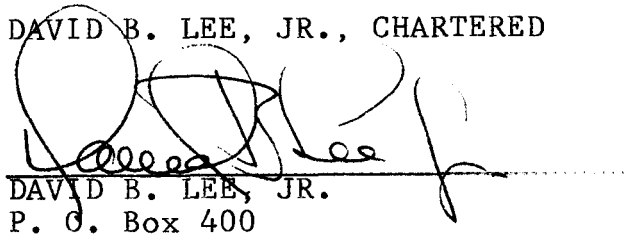
DAVID B. LEE, JR.
P. O. Box 400
Orange Park, FL 32067-0400
(904) 269-1400
Florida Bar No. 0115376

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby CERTIFY that a true and correct copy of the foregoing has been furnished to PETER J. KELLOGG, Attorney for Petitioners, at 801 Blackstone Building, 233 East Bay Street, Jacksonville, FL 32202, by U. S. Mail on this 14 day of March, 1989.

DAVID B. LEE, JR., CHARTERED



DAVID B. LEE, JR.
P. O. Box 400
Orange Park, FL 32067-0400
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Florida Bar No. 0115376

Attorney for Respondents