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

REPLY 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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INTRODUCTION

This brief is submitted on behalf of the Petitioners, 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 Evans Brief will be by "Evans Br" 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. Reference to the appendix following this reply brief shall be referred to as "A" followed by the page number.

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, in their brief, argue that the First District Court of Appeal found that the record to establish the latent defect exception to the statute of limitations applicable to this building construction case. However, Almand takes issue with the remainder of the discussion under subpart A of Evans's Brief (Evans Br 6). Evans argues the complete reverse of the normal situation required for consideration of a summary judgment under Rule 1.510, Florida Rules of Civil Procedure. The party opposing the summary judgment, if there is not other evidence of record, must support its defense by affidavit. Evans argues that the Trial Court, by granting summary judgment, foreclosed Evans from presenting before the Court a material fact, that is, the engineer's report which demonstrated to the Court that the latent defect alleged in the Complaint would not have been known to the parties in 1978 and, thus, could not have tolled the statute of limitations.

This argument does an injustice to both the Trial Court and to Almand. The engineer's report, which the Trial Court foreclosed Evans from offering, was never placed before the Trial Court in any way, shape or form except in oral argument to which Almand objected (R 97). Evans was required to support the existence of the report by either the affidavit of the engineer or his deposition. Evans did neither of these and, in fact, did not even offer a written copy

of the engineer's report to the Trial Judge at argument and it is still not of record anywhere in this case.

Evans's abuse of Rule 1.510 is flagrant compared to the situation in **DeMesme v. Stephenson**, 498 So.2d 673 (Fla. 1st DCA 1986). DeMesme sued Stephenson for malpractice and the doctor moved for summary judgment. The Trial Court granted summary judgment and declined to consider at the hearing on summary judgment the proofs offered by the patient since they were not in compliance with the rule. The First District Court of Appeal affirmed and so doing stated at page 675:

> "[3] Moreover, DeMesme failed to demonstrate the existence of an issue by coming forward with countervailing facts. The trial court was not required to look at the documents submitted by DeMesme because (1) they were not timely filed in accordance with Fla.R.Civ.P. 1.510(c). Von Zamft v. South Florida Water Management District, 489 So.2d 779 (Fla.2d DCa 1986); (2) they were not in the form of affidavits in violation of Rule 1.510(e); and (3) the documents did not specifically allege they were based on personal knowledge and in no way established that the persons speaking therein were competent to testify to the matters stated. Rule 1.510(e); Landers v. Milton, 370 So.2d 368 (Fla.1979). Accordingly, the trial court had no choice but to enter a summary judgment in favor of Dr. Stephenson."

In the present case, Evans did not offer to the Trial Court the mysterious and hearsay engineer's report, but simply argued its existence to create a genuine issue of material fact. The Trial Court had no choice but to enter summary judgment.

This Court, in affirming summary judgment in a statute of limitations case such as this case, pointed out the party opposing the summary judgment failed to come forward with counter-evidence sufficient to reveal a genuine issue of fact precluding summary

judgment. This is exactly what Evans failed to do. This Court stated in **Landers v. Milton**, 370 So.2d 368 (Fla. 1979), 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."

This Court need go no further than this part of the argument in reversing the opinion of the First District Court since is was based totally by reliance on the hearsay engineer's report which was not properly brought before the Trial Court for its consideration 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.

Evans, in their Answer Brief to this portion of the argument, relies upon the opinion of the First District Court of Appeal at page 4 to support Evans's arguments that the latent defect exception to the statute of limitations applied in this case and that the statute did not begin to run until 1982 when Evans first was able to discover the cause of the structural problems of the house (Evans Br 7).

As Almand did, in its Initial Brief, they take issue with the statement of the First District Court, ". . . 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." (D.Ct. 4) Where in the Fifth Amended Complaint did this allegation appear to support the opinion of the First District Court of Appeal? (A 1-9)

The First District Court of Appeal then compounded its error by going on to state, ". . . 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. . . ." (D.Ct. 4, Evans Br 7) Where, by affidavit or deposition in the record before the First District Court of Appeal, is there support for this gratuitous commentary on why Almand's alleged repair efforts in 1979 were unsuccessful? The only evidence of record dealing with the nature of the repairs was the affidavit of A. F. Almand, Jr. wherein he states that he went out and rebricked a corner of the house upon the

request of the Evans but did no further work nor made no further conclusions as to the reason for the cracking in the corner of the house (R 57-59).

Once again, Almand takes issue with that portion of the opinion of the First District Court relied upon by Evans wherein the Court stated, ". . . 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) Where in the Fifth Amended Complaint did Evans make this allegation? Where in the record on appeal before the District Court was there support for the statement that Evans had no actual or constructive knowledge prior to 1982 of the cause of the defect?

Turning to the allegations of the Fifth Amended Complaint, it is apparent that Evans was aware that the condition of the lot, and not the construction of the house, was their basis for seeking damages against Almand. Reading through the various portions of the Fifth Amended Complaint which discuss the condition of the lot, the Court will see as to the following paragraphs:

> "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."
> [Emphasis added.]

"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."
[Emphasis added.]

"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."
[Emphasis added.]

(A 1-6)

The most damaging evidence of record which supports Almand's argument that the First District Court of Appeal was incorrect in saying that Evans was not aware of the cause of the settling house can be seen in re-reading Paragraph 25 of the Fifth Amended Complaint. The pertinent portion reading, ". . . 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. . ." What is different about this allegation as to negligent preparation of the lot and the conclusion reached by the First District Court of Appeal that the latent defect consisted of defective, unstable and unsuitable fill?

Returning to Evans's Answer Brief, Almand next takes issue with the statement ". . . The work in 1979 which attempted to correct the problem wasn't successful because the problem as later indicated in 1982 was the result of settling of unsuitable fill. . . ." (Evans

Br 7) Here, Evans is once again relying upon the mysterious 1982 engineering report which no one has seen to date and which is not the subject of any affidavit or deposition, but which, nevertheless, is the entire basis of Evans's arguments that the statute of limitations did not begin to run in 1978 because the cause of the problem was latent, i.e., was not made known to Evans until 1982. As earlier argued, neither the Trial Court nor Almand had the ability to consider or refute this engineer's report at hearing on summary judgment because the engineer's report was never before the Court (and is still not before this Court).

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.

Evans, at page 10 of their Answer Brief, support the opinion of the First District Court of Appeal in its reliance on its decision in **The Board of Trustees of Santa Fe Community College v. Caudill Rowlett Scott, Inc.**, 461 So.2d 239 (Fla. 1st DCA 1984), rev. den. 472 So.2d 1180 (Fla. 1985), by once again relying upon the hearsay engineer's report which was allegedly not available to Evans until 1982 to advise Evans of the actual cause of the hidden defect (the unstable and unsuitable fill) which was causing the structural problems of the house (Evans Br 10). Almand takes issue with this portion of this First District Court opinion in that a reading of Paragraphs 25 and 26 of the Fifth Amended Complaint clearly indicate that Evans pled knowledge of the defects as alleged in Paragraph 25 and then advised the defendant in 1978 and 1982 of said defects and the structural problems caused by defendants' breach. Reviewing the allegations of Paragraphs 6, 7, and 25, it is apparent that the defects which Evans referred to was the sale of the unsuitable lot and that the lot upon which the structure was placed was not properly prepared to hold and sustain the weight of the single family structure (A 5-6).

Evans then argues that the evidence of the engineer's report which supports Evans's argument of the existence of the latent defect could not properly be introduced to the Trial Court without a trying of the facts (Evans Br 10). If Evans had complied with Rule 1.510 in providing these missing facts by either affidavit or

deposition to the Trial Court, Almand could better understand this argument. Otherwise, it simply does not make sense.

In its Initial Brief, Almand relied upon this Court's decision in **Kelley v. School Board of Seminole County**, 435 So.2d 804 (Fla. 1983). This Court, in **Kelley** at page 806 of its opinion, favorably discussed **Havatampa Corporation v. McElvy, Jennewein, Stefany and Howard, Architects/Planners, Inc.**, 417 So.2d 703 (Fla. 2nd DCA 1982). **Havatampa** knew that the roof on its new building leaked, its architect tried to repair the leaks, and then several years later an independent consultant determined the specific nature of the leaks. The Second District Court in that situation held that Havatampa could not rely on lack of knowledge of the specific cause of the roof leaks to protect it from the running of the statute of limitations under Section 95.11(3)(c), Florida Statutes. This is exactly the situation which confronts us in this case on appeal. As earlier argued, the Evans's pled in paragraph 25 that the preparation of the lot was the cause of the structural problems. (A 5) The Evans were saying that they were on notice that the lot they purchased was the cause of the defects and resulting structural problems. This quite clearly comes within the statute and not the exception to the statute for latent defects.

This Honorable Court then went on to say at page 807 of **Kelley**:

> "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."

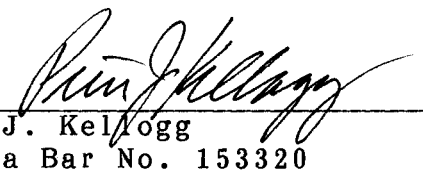
Evans, in Paragraphs 6, 7, and 25 of their Fifth Amended Complaint, makes specific reference to the structural problems in the house as being caused by the sale of an unfit lot and because the lot was not properly prepared to hold and sustain the weight of the single family structure (A 1-6). This is identical to the situation in **Kelley** where the school board attempted to repair the roofs and while the school board did not know the specific reason why the roofs leaked, it did know that the roofs leaked. This Court held that this did not constitute a latent defect and that the statute of limitations had commenced to run at the time the school board became aware that there was something wrong with the roofs. In the present appeal, the statute of limitations began to run in 1978 when Evans became aware that the sale of or the preparation of the lot was the cause of the structural problems which subsequently developed in the house.

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,

HUMPHRIES, KELLOGG & OBERDIER, P.A.

BY: 

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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, Post Office Box 400, Orange Park, Florida 32067-0400, by U.S. Mail, this March 23, 1989.

Peter J. Kellogg