

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

FILED

January 31, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JAMES & CAROLYN CHRISMAN,)

Plaintiffs/Appellants)

v.)

HILL HOME DEVELOPMENT, INC.,)

JIM HILL, ROBERT G. CAMPBELL,)

ROBERT G. CAMPBELL & ASSOC.,)

INC., SOUTHLAND COMMUNITIES,)

INC., BATSON, HIMES & NORVELL,)

GARY F. NORVELL and)

WHANIS ALI RGHEBI,)

Defendants/Appellees)

and)

LAURA BAILEY and SOUTHLAND)

REALTORS, BETTER HOMES &)

GARDENS,)

Defendants)

KNOX CIRCUIT

NO. 03A01-9607-CV-00218

AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Donald E. Overton and Glenna W. Overton, Knoxville For the Appellants.

Terrill L. Adkins, Knoxville, For Appellees, Hill Home Development, Inc. and Jim Hill.
Robert H. Green, Knoxville, For Appellees, Robert G. Campbell and Robert G.
Campbell & Assoc., Inc.

James M. Cornelius, Jr., Knoxville, For Appellee, Southland Communities, Inc.
R. Loy Waldrop, Jr., Knoxville, For Appellees, Batson, Himes & Norvell, Gary F.
Norvell and Wanis Ali Rghebi.

OPINION

INMAN, Senior Judge

This is an action for the abatement of a continuing nuisance and for accrued damages to the residence of the plaintiffs caused by rechannelled and reinforced surface waters from nearby property.

The plaintiffs alleged that they purchased their residence at 4909 Tazewell Pike, Knoxville in December 1988 from Hill Home. It was located in a subdivision known as Fountain Gate I developed by Hill Home Development, Inc., which was

opened adjacent to their residence in early 1988. The defendants Campbell and Associates contracted with Hill Home to perform the necessary surveying, site development, design and drainage. According to the complaint the development of this subdivision drastically increased the volume of surface water which geologically drained onto the plaintiff's property, thereby creating a nuisance and, on one occasion in June 1992, flooded a portion of their residence.

In 1992, the defendant Southland Communities, Inc. began construction of another subdivision known as Fountain Gate II, adjacent to the first subdivision, which allegedly increased the volume of surface water draining onto the plaintiffs' property. The engineering firm of Batson, Himes & Norvell performed the requisite surveying, site development and drainage design of Fountain Gate II.

Hill Home Development is alleged to be liable because it initially created the drainage nuisance which has damaged the plaintiffs' residence.

Jim Hill is accused of fraud and negligence in allegedly concealing his knowledge that the plaintiff's residence was located in a flood plane.

Campbell is alleged to be liable because it negligently designed the drainage design of Fountain Gate I.

Southland Communities, Inc. is alleged to be liable because it created the drainage nuisance on Fountain Gate II which worsened the runoff onto plaintiffs' property.

Batson is alleged to be liable because it negligently designed the drainage scheme on Fountain Gate II.

The plaintiffs alleged that Hill and Southland fraudulently concealed their knowledge of the flooding problem.

The respective role of each defendant was essentially admitted, although each denied liability or negligence and each relied upon comparative fault and the statutes of repose and limitations.

All defendants filed motions for summary judgment, and each motion was granted. The plaintiffs appeal and present for review the following five (5) issues, as formed by the plaintiffs:

- I. Whether or not the trial court erred in dismissing Hill Home Development, Inc. under the theory of temporary continuing nuisance.
- II. Whether or not the trial court erred in dismissing Jim Hill under the theory of fraud perpetrated on the plaintiffs by way of concealment of a material fact and negligence.
- III. Whether or not the trial court erred in dismissing Robert G. Campbell and Robert G. Campbell & Assoc., Inc. under the theory of negligence in the design of the drainage plans of Fountain Gate I, in accordance with Tennessee Code Annotated 28-3-202, Limitations of Actions.
- IV. Whether or not the trial court erred in granting Southland Communities, Inc.'s motion for summary judgment regarding plaintiffs' claim that Southland Communities, Inc. had created a temporary continuing nuisance.
- V. Whether or not the trial court erred in dismissing Batson, Himes & Norvell, Gary F. Norvell and Wanis Ali Rghebi's motion for judgment regarding plaintiffs' claim under engineering negligence.

THE EVIDENCE

The plaintiffs purchased a residence from builder-defendant Hill Home Development Corporation ("Hill Home") on December 8, 1988, located in the Fountain Gate I subdivision. No revelations were made by the seller with respect to whether or not this property was located in a natural flood plain. The plaintiffs negotiated with defendant Jim Hill ("Hill") for the purchase of the property. Hill was the owner and agent of Hill Home.

After the plaintiffs purchased the property, they observed water flowing and standing behind their residence in an area designated as an easement. The problem worsened, a severe storm occurred on June 18, 1992 and flood waters caused significant damage to their residence.

Plaintiffs' investigation of the flood revealed that the defendant Robert Campbell ("Campbell") had been employed by Hill Home to perform a site development with respect to fountain Gate I. Campbell prepared a design for Fountain Gate I which allegedly did not consider the acreage that naturally drained onto Fountain Gate I subdivision and onto the property purchased by the plaintiffs. This was not denied by Campbell or Hill. Neither did Campbell nor Hill Home deny that the drainage design of Fountain Gate I caused or contributed to the flood problems of the plaintiffs.

Later, the defendant Southland Communities, Inc. ("Southland") planned and developed a subdivision on property higher than and contiguous to Fountain Gate I, which was called Fountain Gate II. The site development for Fountain Gate II was engineered by defendant Batson, Himes & Norvell ("Batson"), a partnership. Defendant Gary Norvell ("Norvell") is a partner in Batson. Defendant Wanis Ali Rghebi ("Rghebi") is an employee of that partnership. He made the computations for the design of a detention basin on Fountain Gate II subdivision. Both Norvell and Rghebi affixed their engineering stamps on these drainage plans.

Plaintiffs allege that since construction of Fountain Gate II began, they have experienced worsened, continuing rainwater runoff problems. There is evidence that the combination of the development of Fountain Gate I and II has caused an increase in surface water from these subdivisions draining onto plaintiffs' property. Plaintiffs allege that the engineers Batson and Campbell negligently designed the detention basin, which contributed to the flood damage.

It is not denied that the plaintiffs have suffered damage from flood waters. It is not denied that the damage is from surface water flowing from properties higher than theirs. Neither is it denied that the drainage from Fountain Gate I and II flows onto the plaintiffs' property in greater quantities and in a manner their property was not accustomed to receiving.

It is not disputed that Campbell and Associates, Inc. was employed by the developer [Hill Home] to perform the requisite engineering respecting Fountain Gate I and that its work was completed on or before September 29, 1987.

Analysis

The complaint was filed December 29, 1994.

The statute of limitations for damages to real property is three (3) years from the accrual of the cause of action. T.C.A. § 28-3-105. Allied with the delimiting period is one of repose, T.C.A. § 28-3-202, which provides that all actions to recover damages for engineering negligence must be brought within four years after the substantial completion of the project.

Fountain Gate I was substantially completed in 1988.

The point need not be labored. Each statute is applicable, because the complaint was filed more than six years after the completion of the engineering services by Campbell and more than six years after the substantial completion of the subdivision. See *Watts v. Putnam County*, 525 S.W.2d 488 (Tenn. 1975).

The cases construing summary judgments make clear that they are intended “to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no genuine dispute regarding material facts.” *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). We find that summary judgment was properly granted as to Campbell.

Hill Home is alleged to have caused a temporary, continuing drainage nuisance by the development of Fountain Gate I, which altered the natural condition of the property to the extent that surface waters in unnatural quantities poured onto the plaintiffs’ property.¹

If the owner of higher lands alters the natural condition of his property so that surface waters collect and pour in concentrated form or in unnatural quantities upon lower lands, he will be responsible for all damages caused thereby to the possessor of the lower lands.

Zollinger v. Carter, 837 S.W.2d 613, 614-15 (Tenn. Ct. App. 1992) and cases cited.

There is evidence of a damaging flood on June 18, 1992, well within any delimiting period. Moreover, there is evidence of ongoing drainage problems adversely affecting the plaintiffs, which began after the first subdivision was completed.

Where the nuisance complained of is a temporary, continuing one, “the very continuation is a new offense.” *Kind v. Johnson City*, 478 S.W.2d 63, 66 (Tenn. Ct. App. 1970). We hold that summary judgment was not proper as to Hill Home Development, Inc. since there are contested issues of material fact. *Byrd v. Hall*, *supra*.

¹The complaint charges this defendant under additional theories, but the brief alleges only that it created a temporary but continuing nuisance. Accordingly, we confine a discussion to the latter theory.

Jim Hill is alleged to have fraudulently and negligently concealed from the plaintiffs the fact that their residence was located on a natural flood plain for which they seek damages.²

He pleads the statute of limitations, T.C.A. § 28-3-105, as a defense, insisting that any cause of action accrued more than three years before this complaint was filed. We disagree. The gravamen of the suit against Jim Hill is for damage to real property, which arguably occurred less than three years before the plaintiff filed this action. So far as this record reveals, the actionable damages to plaintiffs' residence occurred in June 1992. See *Prescott v. Adams*, 627 S.W.2d 134 (Tenn. Ct. App. 1981). Moreover, Hill, albeit not very artfully, is alleged to be the agent with full portfolio of Hill Home Development and, as such, that he created and maintained the continuing nuisance complained of. The motion by Hill for summary judgment was not well-taken since there are contested issues of material fact as to the allegations of fraud and negligence together with the allegation that, as agents for his corporation, he created and maintained the continuing nuisance..

Batson, Norvell and Rghebi are charged with engineering negligence with respect to the design and development of Fountain Gate II.

The plaintiffs' expert, James Bauman, testified that these defendants violated the applicable standard of care by designing a detention basin that was inadequate for the intended purpose. But this testimony was merely conclusory, since he admittedly had no knowledge or evidence that the basin had ever overflowed.

Obviously, if the basin designed to contain the surface water generated by Fountain Gate II and restricted it from flowing onto Fountain Gate I, it was successful in its purpose. It is not controverted that there is no evidence that the basin failed in its purpose. The grant of summary judgment in favor of these defendants was proper.

²Again, the allegations in the complaint are broader than as alleged in the brief. We accordingly limit our discussion to the theory of recovery asserted in the brief.

Southland Communities, Inc. is alleged to have created and maintained a nuisance or contributed thereto, by increasing the flowing of surface water onto Fountain Gate I by the construction of Fountain Gate II.

What we have said with respect to the Batson defendants applies with equal force to Southland. There is no evidence that the detention basin overflowed, a prerequisite to the evidence of a nuisance as alleged. The grant of summary judgment was proper as to these defendants.

In summary, we hold that, as to Jim Hill, the case is remanded for trial on the tort and nuisance theories; as to Hill Home Development, Inc., the case is remanded for trial on the nuisance theory. Otherwise, the judgment is affirmed.

Costs on appeal are assessed 50% to the appellants and 50% to the appellees, the latter to share ratably.

William H. Inman, Senior Judge

CONCUR:

Houston M. Goddard, Presiding Judge

Don T. McMurray, Judge