IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT JACKSON

AUTOMOTIVE FINANCIAL SERVICES, INC., a Tennessee Corporation, JOHN C. KIMBROUGH and VALERIE B. KIMBROUGH,	)	Shelby County Circuit Court No. 48766 T.D.
Plaintiffs/Appellants.	)	
VS.	)	C. A. NO. 02A01-9510-CV-00231
AZALEA TERRACE PARTNERS, LTD., a Tennessee limited partnership,	)	
Defendant/Appellee,	)	
And	)	
PHILLIP BAUM,	)	
Defendant.	)	

FILED

October 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

From the Circuit Court of Shelby County at Memphis.
Honorable D'Army Bailey, Judge

Roger A. Stone, Memphis, Tennessee
Attorney for Plaintiffs/Appellants.

Paul J. Posey, Jr.,
GLANKLER BROWN, Memphis, Tennessee
Attorney for Defendant/Appellee Azalea Terrace Partners, Ltd.

OPINION FILED:

AFFIRMED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)
LILLARD, J. : (Concurs)

This is an action seeking to recover for the defective construction of a residence. On September 22, 1988, Appellant, Automotive Financial Services, Inc. (Automotive), contracted to purchase the residence located at 650 Azalea Terrace Circle from Appellee, Azalea Terrace Partners, Ltd. (Azalea). John and Valerie Kimbrough, the remaining appellants in this action, were to reside in the home. The contract included a punch list of items for completion or repair.[1] At closing, on September 30, 1988, Automotive received a one year warranty of construction from the contractor of the home, Phillip Baum.[2] Thereafter, the Kimbroughs made several requests of Baum and Azalea to make certain repairs to the premises.

On September 18, 1992, Appellants filed the present action against Azalea and Baum,[3] alleging gross negligence, breach of contract, breach of warranty, fraud and a violation of the Tennessee Consumer Protection Act as a result of the improper installation of the home's roof, flooring and foundation. It was further alleged that Appellee had improperly repaired the reported damage to the home and had assured Appellants that the problems were minor and had been corrected when, in reality, there were "major structural defects."[4] Azalea moved for summary judgment, asserting Appellants' causes of action were barred by the applicable statute of limitations. The trial courts granting of the motion is appealed.

We perceive the issue on appeal as whether the appellees were properly granted a summary judgment. We review this matter in the same manner as a motion for directed verdict made at the close of plaintiff's proof, i.e., all evidence must be viewed in a light most favorable to the motion's opponent and all legitimate conclusions of fact must be drawn in that party's favor. It is only when there is no disputed issue of material fact that summary judgment should be granted. ***White v. Methodist Hosp. South***, 844 S.W.2d 642, 645 (Tenn. App. 1992).

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[1]The agreement was amended to allow Automotive a credit for the costs of certain repairs.

[2]The deed was actually conveyed to Kimbrough Properties, Inc. which is now known as Automotive Financial Services, Inc.

[3]Appellants subsequently took a nonsuit as to Baum. Consequently, Azalea is the only appellee for purposes of this appeal.

[4]Appellants argue in their brief that their discovery that the roof was faulty was on April 30, 1992.

The statute of limitations applicable in this case is found at T.C.A. § 28-3-202, which provides:

> **Limitation of actions.** -- All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

T.C.A. § 28-3-201(2) defines "substantial completion" as:

> [T]hat degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change order agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended; the date of substantial completion may be established by written agreement between the contractor and the owner.

Additionally, T.C.A. § 28-3-205(b) states:

> The limitation hereby provided shall not be available as a defense to any person who shall have been guilty of fraud in performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying, in connection with such an improvement, or to any person who shall wrongfully conceal any such cause of action.

In discussing the foregoing statutes, the supreme court in ***Watts v. Putnam County***, 525 S.W.2d 488 (Tenn. 1975), held:

> These statutes (Sec. 28-314 et seq.)[5] are entirely unrelated to the accrual of any cause of action, since they begin to run on the date of substantial completion as opposed to the date of injury or damage.
>
> . . . .

[5]These are now codified as T.C.A. § 28-3-202 et. seq.

Judge Wilson touched upon this statute in ***Agus v. Future Chattanooga Development Corporation***, 358 F.Supp. 246 (E.D. Tenn. 1973). He takes the position that:

> (T)he intent of the Tennessee [L]egislature in passing T.C.A. § 28-314 was to insulate contractors, architects, engineers and the like from liability for their defective construction or design of improvements to realty where either the occurrence giving rise to the cause of action or the injury happens more than four years after the substantial completion of the improvement. ***Id***. at 251.

We take note that Judge Wilson holds in ***Agus*** that where the occurrence or injury giving rise to the cause of action comes more than four years after substantial completion, suit is barred. This conclusion is harsh, but it is demanded under the statutory scheme.

Watts, 525 S.W.2d at 491-92.

The record before us includes the affidavit of Phillip Baum which states, as pertinent here:

> I am employed by Baum & Company and am involved in real estate development and construction.
>
> On March 27, 1986, I entered into a contract with [Azalea] to construct twelve (12) two-story luxury planned unit development residences together with all interior streets, city utilities, landscaping and driveways, for a project known as Azalea Terrace Phase I in Memphis, Tennessee.
>
> Construction began initially on the three (3) residences which face White Station Road. The first three (3) residences constructed included Unit No. 10 known as 650 Azalea Terrace Circle, . . .
>
> The hardwood floors, which were one of the last elements of construction for the Property, were installed on or before November 11, 1986 . . . .
>
> The Property was completed on or about the end of November 1986, but no later than December of that year.
>
> Following completion the Property was furnished as a "model" until it was sold to [Automotive] in September of 1988.

Also before us is the affidavit of John Kimbrough, stating as here relevant:

> 1. That prior to purchase of the property, I had numerous contacts and communications with representatives of the Seller and

contractor.

2. That I was never advised by them this was not a new house.

3. That I was led to believe this was a new house of high quality.

4. That I did not consider the house to be substantially complete until closing due to the numerous remaining work items listed in the contract.

5. That after purchase of the property, I was led to believe by defendants that necessary repairs would be done.

6. That subsequently defendants caused repairs to be made to the property with assurances that repairs were satisfactory.

Based on the above, it would appear that we have two potential dates for the substantial completion of this residence: December 1986 or September 30, 1988 (the date of closing). According to Kimbrough, the date of substantial completion could not have occurred prior to the date of closing, "due to the many remaining work items listed in the contract." In ***Meyer v. Bryson***, 891 S.W.2d 223 (Tenn. App. 1994), the court of appeals expressly rejected the argument that substantial completion cannot occur until defects in the dwelling have been repaired. The court held that to accept such a position would, in essence, defeat the purpose of the statute of limitations. The court concluded that "[s]ubstantial completion occurs when the owner can use the building for its intended use. If the owner can use the building for its intended use, then ***any defects in the construction are usually held not to be material***." ***Meyer***, 891 S.W.2d at 225 (quoting ***Howard G. Lewis Constr. Co.***, 830 S.W.2d 60 (Tenn. App. 1991)). Consequently, in our case, the fact that there were repairs to be made to the property prior to closing would not affect the date of substantial completion provided the property ***could*** be used for its intended purpose. According to Baum, the residence was complete and, thus, could be used for its intended purpose no later than December 1986.

Appellants assert that the statute of limitations could not begin running until the sale to Automotive, the "ultimate purchaser" and "occupant," because Azalea, the developer, could not use the property for which it was intended as neither it nor its representatives intended to reside there. The plain language of T.C.A. § 28-3-201(2) makes clear that substantial completion occurs when the owner of the improvement "can" use it for the purpose for which it was intended. It

matters not whether it is actually being used for such purpose. This argument must also fail because it is uncontradicted that when Azalea owned the property, its intended use was that of a "model" home. There is nothing in the record to indicate that the home was not used for such purpose after December 1986 until its purchase by Automotive. Moreover, we note that the statute fails to place any significance on the date of purchase of such improvement.

> Unambiguous statutes must be construed to mean what they say, ***Montgomery v. Hoskins***, 222 Tenn. 45, 432 S.W.2d 654 (1968). The purpose of statutory interpretation is to ascertain and give effect to legislative intent and all rules of construction are but aids to that end, but where words of a statute are clear and plain and fully express legislative intent, there is no room to resort to auxiliary rules of construction. ***Anderson v. Outland***, 210 Tenn. 526, 360 S.W.2d 44 (1962).

Roberson v. University of Tennessee, 912 S.W.2d 746, 747 (Tenn. App. 1995).

The only relevant date for purposes of determining when the statute of limitations begins to run is that of "substantial completion." As the record, through the unrefuted testimony of Mr. Baum, has established that date to be December 1986, we hold that the statute of limitations, for purposes of § 28-3-202, began running as of that date and that the present action filed on September 18, 1992 is time barred, unless a genuine issue of material fact exists as to Appellants' claim of fraud which, if proven at trial, would render the statute inapplicable. ***See*** T.C.A. § 28-3-205(b).

It is argued that Azalea misrepresented the property to Appellants as "new," thereby defeating any contention that the property was "substantially complete" two years prior. Once again, as we interpret the plain language of the statute, whether an improvement to real property is identified as "new" has no bearing on the date of substantial completion. Moreover, Mrs. Kimbrough states in her deposition that she did not inquire as to the age of the home because she "used to drive by there on [her] way to another destination everyday." She recalled "when [the homes] were being built" and "knew it was . . . a new house." Thus, it appears that Mrs. Kimbrough was aware of the approximate age of the home irrespective of any representations by Azalea. She was further questioned:

> Q. Has [Azalea] or any representative of Azalea . . . made any representation to you with respect to the matters in this lawsuit?
>
> A. No.
>
> Q. Do you have any reason to believe that [Azalea] . . . concealed or attempted to defraud you with respect to the matters in this lawsuit?
>
> A. No, I don't have any reason to believe that.

Mr. Kimbrough likewise states in his deposition that Azalea made no misrepresentations about the condition of the home to him prior to purchase. He further declared that he "[doesn't] know" whether Azalea attempted to conceal the condition of the home's roof and flooring after purchase.

We conclude that there is no evidence in the record to support Appellants' allegations of fraud and that § 28-3-205(b) does not apply to the present controversy. Accordingly, we hold the present action time barred inasmuch as Appellants filed suit outside the four year[6] statute of limitations, which began running in December 1986.[7]

In addressing Appellants' concerns that a decision such as ours is rather harsh, allowing a developer to construct a home, retain ownership for four years, thereafter selling it and escaping any liability for negligent construction, we quote the language of the court in ***Meyer v. Bryson***:

> Any proper understanding and analysis of these statutes [T.C.A. §§ 28-3-201 et seq.] must start with the recognition that they are virtually verbatim the Model Code proposed by the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors.
>
> Similar statutes were adopted between 1964 and 1969 in some thirty jurisdictions as a result of the activities of these interested

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[6]There is an exception if the injury occurs during the fourth year after completion, which extends the statute of limitations an additional year from the date of injury. ***See*** T.C.A. § 28-3-203. This exception does not apply here.

[7]We note that under ***Watts,*** "[t]hese statutes [§ 28-3-201 et. seq.] may not be construed to extend any existing statute of limitation, but they must be construed to curtail and limit all other periods to the four-year period, plus one year of grace, in appropriate cases." ***Watts***, 525 S.W.2d at 491. Thus, Appellants' suit under Tennessee's Consumer Protection Act, which provides for a one-year statute of limitations running from the date of discovery, with a four year ceiling from the date of the consumer transaction, T.C.A. § 47-18-110, is, likewise, barred.

> associations and following major extensions of their potential liability.
>
> We must, therefore, indulge in the realistic recognition that they were designed to mitigate against liability.

Meyer, 891 S.W.2d at 225 (quoting ***Watts***, 525 S.W.2d at 490).

It results that the judgment of the trial court is affirmed. Costs are assessed against Automotive Financial Services, Inc., John C. Kimbrough and Valerie B. Kimbrough, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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LILLARD, J. (Concurs)