

Busch v. Lennar Homes

Circuit Court of the Fifth Judicial Circuit of Florida, Lake County

April 13, 2016, Decided; April 14, 2016, Filed

Case No.: 2015-CA-001726-AXXX-XX

Reporter

2016 Fla. Cir. LEXIS 11412 *

TIMOTHY BUSCH, Plaintiff, v. LENNAR
HOMES, LLC, Defendant.

Judges: [*1] Honorable Mark J. Hill, Circuit
Judge.

Opinion by: Mark J. Hill

Opinion

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS WITH PREJUDICE**

THIS MATTER came before the Court on April 5, 2016, at 2:30 p.m., upon the Motion to Dismiss with Prejudice ("Motion") filed by the defendant, Lennar Homes, LLC ("Lennar"). The Court has reviewed the Motion and all related memoranda, has heard argument of counsel, and is otherwise fully advised in the premises. Based upon the foregoing, the Court finds and orders that the Motion should be, and hereby is, GRANTED.

More specifically, the Court finds as follows:

1. The plaintiff, Timothy Busch ("Mr. Busch"), filed his Complaint on September 17, 2015, alleging claims for breach of contract, building code violations, negligence, and deceptive and unfair trade practices. All of those claims are based upon alleged construction defects at Mr. Busch's home, located at 3930 Derby Glen Drive, Clermont, Florida 34711.

2. Lennar contends that Mr. Busch's claims are barred by the statute of repose in [*Florida Statutes § 95.11\(3\)\(c\)*](#) ("the Statute of Repose"), and should be dismissed, because: (a) the applicable repose period commenced on or before August 31, 2005, and expired on or before August 31, 2015; and (b) Mr. Busch [*2] did not file his Complaint until September 17, 2015.

3. Mr. Busch disagrees for three reasons. First, Mr. Busch contends that the Court may not resolve this

issue upon a motion to dismiss. The Court disagrees. Lennar's position is based solely on the allegations of, and exhibits to, Mr. Busch's Complaint. And, the Court finds that those allegations and exhibits establish that the Statute of Repose commenced on or before August 31, 2005, and expired on or before August 31, 2015.

4. Second, Mr. Busch contends that (a) on or before July 17, 2015, he served Lennar with a notice of claim pursuant to [Florida Statutes § 558.004](#) ("the 558 Notice"); and (b) this action "commenced" when Mr. Busch served that notice. The Court disagrees. This action "commenced" when Mr. Busch filed his Complaint not when he served the 558 Notice., See [Fla. R. Civ. P. 1.050](#); see also *Altman Contrs., Inc. v. Crum & Forster Specialty Inc. Co.*, No. 13-80831-[CIV-MARRA](#), [2015 U.S. Dist. LEXIS 72466](#) (S.D. Fla. June 4, 2015).

5. Third, Mr. Busch contends that, pursuant to [Florida Statutes § 558.004\(10\)](#), the 558 Notice tolled the expiration of the Statute of Repose until a date after September 17, 2015. Mr. Busch acknowledges that [§ 558.004\(10\)](#) only references the applicable statute of limitations, but argues that it should be construed to apply to the Statute of Repose as [*3] well. In support of this argument, Mr. Busch relies on [Musculoskeletal Inst. v.](#)

[Parham](#), [745 So. 2d 946](#) (Fla. 1999).

6. In *Parham*, the court held that certain tolling provisions of *Florida Statutes* Chapter 766 tolled the statute of repose applicable to medical malpractice claims. *Parham*, however, is distinguishable, and does not control in this case, because:

- a. Medical malpractice claims are subject to a four-year statute of repose, whereas Mr. Busch's claims are subject to a much longer ten-year repose period;
- b. The pre-suit procedures of *Florida Statutes* Chapter 766 are unique, and more complex than those contained in *Florida Statutes* Chapter 558; and
- c. A party's failure to comply with *Florida Statutes* Chapter 766 may result in a dismissal and other sanctions, whereas a party's failure to comply with *Florida Statutes* Chapter 558 merely acts to stay an action without prejudice. Compare [Fla. Stat. §§ 766.104](#), [766.106](#), [766.205](#), and [766.206](#), with [Fla. Stat. § 558.003](#).

7. Accordingly, Mr. Busch's service of the 558 Notice did not toll the Statute of Repose, and Mr. Busch was required to file his Complaint on or

before August 31, 2015. Because he did not do so,
his claims are time barred.

Given the foregoing, the Court hereby ORDERS
and ADJUDGES as follows:

1. Lennar's Motion is hereby GRANTED.
2. Mr. Busch's claims are DISMISSED WITH
PREJUDICE.
3. The Court reserves jurisdiction over this action
to consider motions regarding Lennar's attorneys'
fees [*4] and costs.

DONE and ORDERED in Chambers at Tavares,
Lake County, Florida on April 13, 2016.

/s/ Mark J. Hill

The Honorable Mark J. Hill

Circuit Judge

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