



Developers Sur. & Indem. Co. v. Italian Cast Stone, Inc.

United States District Court for the Middle District of Florida, Tampa Division

May 5, 2017, Decided; May 5, 2017, Filed

Case No.: 8:16-cv-3491 T-24 TGW

Reporter

2017 U.S. Dist. LEXIS 118931 *

DEVELOPERS SURETY AND INDEMNITY
COMPANY, Plaintiff, v. ITALIAN CAST
STONE, INC. TURLOCK CONSTRUCTION,
INC. and ROSY CONTO, Defendants.

Prior History: [*Developers Sur. & Indem. Co. v. Italian Cast Stone, Inc.*](#), 2017 U.S. Dist. LEXIS 118928 (M.D. Fla., May 5, 2017)

Counsel: [*1] For Developers Surety and Indemnity Company, a Foreign Corporation, Plaintiff: Edward Etcheverry, Jeffrey S. Geller, LEAD ATTORNEYS, Etcheverry Harrison, LLP, Ft Lauderdale, FL.

For Italian Cast Stone, Inc., a Florida Corporation, Turlock Construction, Inc., a Florida Corporation, Rosy Conto, individually, Defendants: Andrew Ernest Peluso, Erik Raines, LEAD ATTORNEYS, Hill Ward Henderson, PA, Tampa, FL.

Judges: SUSAN C. BUCKLEW, United States

District Judge.

Opinion by: SUSAN C. BUCKLEW

Opinion

ORDER

This cause comes before the Court on Defendants' Motion to Dismiss Counts II and III of Plaintiff Developers Surety and Indemnity Company's ("Developers") complaint (Doc. 20). Developers has filed a response in opposition (Doc. 27), and Defendants—Italian Cast Stone, Inc. ("ICS"), Turlock Construction, Inc. ("Turlock"), and Rosy Conto (collectively, "Defendants")—have filed a reply (Doc. 30). As explained below, the motion is GRANTED IN PART and DENIED IN PART.

I. Background¹

On or about November 16, 2004, Developers agreed to issue various bonds in favor of ICS, and Defendants executed an indemnity agreement related to those bonds ("Indemnity Agreement"). (Docs. 1 ¶12; 1-1 at 1-10). In July 2007, ICS, acting as a subcontractor, [*2] executed contracts with South Capital Construction, Inc. ("South Capital") to perform construction work on the Trinity Town Center project. (Doc. 1 ¶9). Developers issued a performance bond and a payment bond covering ICS' work on that project ("Bonds"). (Doc. 1 ¶10). Eventually, South Capital took issue with ICS' performance on the project, asserted claims against Developers under the Bonds, and sued Developers and ICS in state court ("State Court Action").² (Doc. 1 ¶11).

In turn, Developers sued ICS and Conto in the Middle District of Florida in 2009, raising a number of claims, including indemnification ("Federal Court Action").³ (Doc. 1 ¶15). Developers, ICS, and Conto executed a stipulation

for settlement on January 31, 2011, which obligated ICS and Conto to pay Developers \$150,000 ("Stipulation for Settlement"). (Docs. 1 ¶¶16-17; 1-1 at 11-21). Then, in May 2012, Developers and ICS entered into a separate settlement agreement that addressed the claims asserted in the State Court Action, under which Developers was to pay South Capital \$215,000 under the Bonds ("Settlement Agreement"). [*3] (Docs. 1 ¶29; 1-1 at 49-59). Through this process, Developers reserved its claims against ICS and its individual indemnitors for the amount it paid South Capital in settlement of the State Court Action. (Docs. 1 ¶30; 1-1 at 53).

Through March 2014, ICS and Conto paid \$74,200 of the \$150,000 they owed Developers under the Stipulation for Settlement, but their payments stopped at that point. (Doc. 1 ¶18). In September 2015, Developers issued cure notices to Defendants that demanded, first, that ICS and Conto remit payment in satisfaction of their outstanding obligations under the Stipulation for Settlement and, second, that all Defendants remit \$215,000 in satisfaction of their obligations under the Indemnity Agreement. (Docs. 1 ¶¶20, 31, 42; 1-1 at 27-31). ICS and Conto responded in October 2015 stating they were unable to comply with their settlement terms and threatening bankruptcy. (Doc. 1 ¶¶21, 32).

¹ Allegations regarding the nature of the case and Developers' claims, drawn from Developers' complaint, are accepted as true for purposes of Defendants' motion to dismiss.

² *South Capital Construction, Inc. v. Italian Cast Stone, Inc. and Developers Surety and Indemnity Company*, Pinellas County Circuit Court case no. 09-2306-CI-02. (Doc. 1 ¶11).

³ Case No. 8:09-cv-1762-T23-TBM. (Doc. 1 ¶15).

On December 27, 2016, Developers filed the instant action, which alleged claims for Breach of the Stipulation for Settlement against ICS and Conto (Count I), Breach of the Indemnity Agreement against ICS and Conto (Count II), and Breach of the Indemnity Agreement against Turlock (Count [*4] III). (Doc. 1).

Defendants moved to dismiss Counts II and III of the complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) based on the running of the statute of limitations. However, by separate order, the Court has quashed service of process as to Turlock (Doc. 33). Having quashed service, the Court lacks jurisdiction over Turlock and may not consider the merits of Defendants' motion to dismiss as it pertains to Count III, which is brought solely against Turlock.⁴ Consequently, the Court will address Defendants' motion to dismiss Count II, but the motion is DENIED AS MOOT as to Count III.

II. Standard of Review

Because the statute of limitations operates as an affirmative defense, and the plaintiff is not required

to negate affirmative defenses in its complaint, dismissal under [Rule 12\(b\)\(6\)](#) on statute of limitations grounds is appropriate "only if it is apparent from the face of the complaint that the claim is time-barred." [Lindley v. City of Birmingham, Ala., 515 F. App'x 813, 815 \(11th Cir. 2013\)](#) (per curiam) (quoting [La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 \(11th Cir. 2004\)](#)) (quotation marks omitted). Stated differently, a court may dismiss a complaint under [Rule 12\(b\)\(6\)](#) on the basis of a statute-of-limitations defense only if it is clear beyond a doubt that the plaintiff can prove no set of facts that toll the statute. *Id.* (quoting [Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 n.13 \(11th Cir. 2005\)](#)). Furthermore, a court may not dismiss [*5] on statute of limitations grounds where doing so would "depend either on facts not yet in evidence or on construing factual ambiguities in the complaint" in favor of the defendant. [Omar ex rel. Cannon v. Lindsey, 334 F.3d 1246, 1252 \(11th Cir. 2003\)](#) (per curiam).

III. Discussion

In Count II, Developers seeks to enforce the parties' Indemnity Agreement, which Defendants argue is subject to the four-year limitation period

⁴Nevertheless, given the similarities between Counts II and III, the Court's conclusions regarding dismissal would almost certainly apply to Count III as well as Count II.

established in [Florida Statute § 95.11\(3\)\(c\)](#) because the Indemnity Agreement is "founded on the design, planning, or construction of an improvement to real property." Specifically, Defendants argue [§ 95.11\(3\)\(c\)](#)'s four-year limitation period applies to Count II because that claim seeks indemnification from ICS and Conto for losses Developers incurred and settlement payments Developers made based on its having bonded ICS' work on the Trinity Town Center project. Citing allegations in Developers' complaint, they contend Developers incurred these losses and made these settlement payments to resolve the State Court Action, which settled in May 2012; at that time, Defendants argue, Developers' indemnity claim accrued.

Developers responds that Defendants are attempting to apply the wrong statute of limitations, and the correct statute of limitations—[Florida Statute § 95.11\(2\)\(b\)](#)—has not yet run. Specifically, Developers [*6] argues that because Count II is founded on the breach of a written contract, the five-year limitation period for written contracts established under [§ 95.11\(2\)\(b\)](#) applies. Next, Developers argues that Defendants have waived their rights to assert a statute-of-limitations defense and, therefore, their motion to dismiss must be denied.

Defendants reply, first, that because [§ 95.11\(3\)\(c\)](#) is a specific statute that relates to real property improvements, it must take precedence over [§ 95.11\(2\)\(b\)](#), which applies generally to breach-of-contract claims. Second, Defendants dispute Developers' contention that Defendants contractually waived all limitations defenses by executing the Indemnity Agreement. They argue that, given the public policy interests supporting Florida's statute-of-limitations scheme, the Florida Supreme Court would likely deem perpetual limitations waivers to be void and unenforceable.

[Section 95.11\(2\)\(b\)](#) establishes a five-year limitation period for an action "on a contract, obligation, or liability founded on a written instrument." A shorter, four-year limitation period is established under [§ 95.11\(3\)\(c\)](#) for "[a]n action founded on the design, planning, or construction of an improvement to real property" ⁵ [Section](#)

⁵ [Section 95.11\(3\)\(c\)](#) reads, in full, as follows:

An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the [*8] owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or

95.11(3)(c) "clearly applies to *all* actions [*7] 'founded on the design, planning, or construction of an improvement to real property.'" See State of Fla., Dep't of Transp. v. Echeverri, 736 So. 2d 791, 792 (Fla. 3d DCA 1999) (emphasis in original) (rejecting the argument that § 95.11(3)(c) would apply to an initial claim for damages but not to actions for indemnity or contribution);⁶ see also Castle Constr. Co. v. Huttig Sash & Door Co., 425 So. 2d 573, 574-75 (Fla. 2d DCA 1982) (applying § 95.11(3)(c) to an indemnity claim related to improvements to real property). Cf. Competitor Liaison Bureau, Inc. v. Cessna Aircraft Co., 2011 U.S. Dist. LEXIS 38656, 2011 WL 1344455, at *8 (M.D. Fla. Apr. 8, 2011) (citing *Echeverri* with approval and applying its statute-of-limitations analysis to a different Florida limitation provision).

Because Developers' indemnity claim derives from ICS' obligations to South Capital to act as a subcontractor and to perform construction work on the Trinity Town Center project, that claim is "founded on the design, planning, or construction

of an improvement to real property" and is, therefore, subject to the four-year limitation period set forth in § 95.11(3)(c).

This conclusion comports with the principle of statutory construction that dictates a more specific statute controls over a more general statute when those two statutes are in conflict. See, e.g., Suntrust Banks v. Don Wood, Inc., 693 So. 2d 99, 101 (Fla. 5th DCA 1997); see also MSR GL Resort, LP v. Hunt Constr. Group, Inc., 2012 U.S. Dist. LEXIS 96502, 2012 WL 2873117, at *1 (M.D. Fla. July 12, 2012) (citing *Suntrust Banks* with approval and applying the more specific § 95.11(3)(c)—rather than the more general limitation provision governing oral contracts—to a claim for breach of an oral contract related to real property improvements).

Developers and ICS executed the Settlement Agreement in May 2012, under which Developers paid South Capital [*9] \$215,000 on the Bonds. (Doc. 1-1 at 49-50). At that point, the statute of limitations on Developers' indemnity claim began to run. See Am. Home Assurance v. Weaver Aggregate Transp., Inc., 990 F. Supp. 2d 1254, 1278 (M.D. Fla. 2013) (citing Scott & Jobalia Constr. Co., Inc. v. Halifax Paving, Inc., 538 So. 2d 76, 79 (Fla. 5th DCA 1989)) ("[I]t is well

the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

⁶"[A]bsent a decision from the state supreme court on an issue of state law, [federal courts] are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently." McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002).

established that the statute of limitations does not begin to run in indemnity cases until the indemnitee has paid a judgment, or has made a voluntary payment of its legal liability to an injured party.").

Because Developers filed the instant action in December 2016—more than four years after its May 2012 settlement with, and payment to, South Capital—the four-year limitation period on this claim established by [§ 95.11\(3\)\(c\)](#) has run.

Nevertheless, Developers next argues that Defendants have waived their rights to assert a statute-of-limitations defense by virtue of a provision in the Indemnity Agreement, which reads as follows:

WAIVERS. The Principal and Indemnitor hereby waive and agree not to assert:

...

8.4 The defense of the Statute of Limitations in any action hereunder or for the collection of any claim or the performance of any obligation indemnified hereby.

(Doc. 1-1 at 4). Based on this language, Developers contends, Defendants have waived their right to assert the statute-of-limitations defense here, and therefore, their motion to dismiss [*10] must be denied.

In reply, Defendants draw a distinction between a

tolling agreement that extends the applicable limitations period for claims that have already accrued and the one at issue here, which was "entered into at the inception of the parties' agreement, before any claim under the agreement could possibly accrue." (Doc. 30 at 4). Although Defendants do not cite Florida case law directly on point, they cite case law from other jurisdictions in which courts have concluded that stipulations like the one at issue here are void and unenforceable as contrary to public policy. (Doc. 30 at 5).

Given the public policy underpinning Florida's statutory limitations scheme, *see* [Major League Baseball v. Morsani](#), 790 So. 2d 1071, 1074-75 (Fla. 2001)⁷, the Court concludes the Indemnity Agreement's waiver provision—executed at the inception of the parties' relationship (more than two and a half years before ICS contracted with South Capital, more than seven years before Developers paid South Capital under the Settlement Agreement, and more than twelve years before Developers filed this lawsuit)—does not prevent the parties from asserting statute-of-limitations defenses in perpetuity or, more immediately, in this

⁷ "[F]ixed limitations on actions are predicated on public policy and are a product of modern legislative, rather than judicial, processes. A prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims." [Morsani](#), 790 So. 2d at 1074-75 (footnote omitted).

case.

IV. Conclusion

Given the foregoing, the Court [*11] concludes that, because Count II of Developers' complaint is "founded on the design, planning, or construction of an improvement to real property," [*Florida Statute § 95.11\(3\)\(c\)*](#) provides a four-year limitation period for that count. Because more than four years have elapsed since that indemnity claim accrued, Counts II is dismissed.

Accordingly, it is ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is **GRANTED** with respect to Count II, but the motion is **DENIED AS MOOT** with respect to Count III.

DONE AND ORDERED at Tampa, Florida, this 5th day of May, 2017.

/s/ Susan C. Bucklew

SUSAN C. BUCKLEW

United States District Judge

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