

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

FILED
2018 APR 20 PM 3:49
CATHY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

SOARING EAGLE LODGE MASTER ASSOCIATION, INC.,
a West Virginia non-profit Corporation; and
SOARING EAGLE LODGE ASSOCIATION, INC.,
a West Virginia non-profit Corporation,
Plaintiff,

vs.)

Civil Action No. 15-C-2202
Presiding Judge: Tabit
Resolution Judge: Matish

SOARING EAGLE DEVELOPMENT COMPANY, LLC,
a West Virginia Limited Liability Company;
GBBN ARCHITECTS, INC.,
an Ohio Corporation; and
BRANCH & ASSOCIATES, INC.,
a Virginia Corporation,
Defendants

and

BRANCH & ASSOCIATES, INC.,
a Virginia Corporation
Third Party Plaintiffs

vs.)

APPLIED MECHANICAL SYSTEMS, INC.,
a West Virginia Corporation;
EASTCOAST SIDING, INC.,
a Maryland Corporation;
RICHARDSON AND MARCH CARPENTRY, LLC,
A West Virginia Limited Liability Company;
TRI-STATE ROOFING & SHEET METAL COMPANY OF WEST VIRGINIA,
a West Virginia Corporation; and
Third Party Defendants

and

SOARING EAGLE DEVELOPMENT COMPANY, LLC,
a West Virginia Limited Liability Company;
Third Party Plaintiff

vs.)

**TRI-STATE ROOFING & SHEET METAL COMPANY OF
WEST VIRGINIA, a/k/a, TRI-STATE ROOFING & SHEET
METAL CO.,**

a West Virginia Corporation;

APPLIED MECHANICAL SYSTEMS, INC.,

an Ohio Corporation;

RICHARDSON AND MARCH CARPENTRY, LLC,

a West Virginia Limited Liability Company;

RICHARDSON CARPENTRY, LLC,

a West Virginia Limited Company; and

EASTCOAST SIDING, INC.,

a Maryland Corporation,

THE TRAVELERS INDEMNITY COMPANY OF

AMERICA, a Connecticut corporation; and TRAVELERS

PROPERTY AND CASUALTY COMPANY OF AMERICA,

Third Party Defendants,

vs.)

O.C. CLUSS LUMBER COMPANY,

a Pennsylvania Corporation,

Third Party Defendant,

and

BRANCH & ASSOCIATES, INC.,

a Virginia Corporation

Third Party Plaintiff,

vs.)

O.C. CLUSS LUMBER COMPANY,

a Pennsylvania Corporation; GAF

MATERIALS CORPORATION, a New

Jersey corporation; QUALITY STONE

VENEER, INC.; MODERN LIGHTING

PROTECTION, INC.; JAMES HARDIE

BUILDING PRODUCTS, INC.; and FIBERON,

LLC, a North Carolina Limited Liability Company,

Third Party Defendant,

and

RICHARDSON AND MARCH CARPENTRY, LLC,

A West Virginia Limited Liability Company;

Third Party Plaintiff,

vs.)

JAMES HARDIE BUILDING PRODUCTS, INC.
Third Party Defendant.

and

O.C. CLUSS LUMBER COMPANY,
a Pennsylvania Corporation,
Fourth Party Plaintiff,

vs.)

GAF MATERIALS CORPORATION,
a New Jersey Corporation; and
FIBERON, LLC,
a North Carolina Limited Liability Company,
Fourth Party Defendants,

and

FIBERON, LLC,
a North Carolina Limited Liability Company,
Fourth Party Plaintiff,

vs.)

JAMES HARDIE BUILDING PRODUCTS, INC.
Fourth Party Defendant.

**ORDER DENYING
QUALITY STONE VENEER INC.'S MOTION TO DISMISS AND
MODERN LIGHTING PROTECTION CO. INC.'S MOTION TO DISMISS**

Third-Party Defendant Quality Stone Veneer, Inc. (“Quality Stone”), has requested that this Court dismiss the Third-Party Complaint brought against it by Branch & Associates, Inc. (“Branch”) arguing that the same is barred by the statute of repose for construction defect claims. Modern Lighting Protection Co. Inc. (“Modern Lighting”) makes the same argument in support

of its Motion to Dismiss the Third-Party Plaintiff, Branch & Associates, Inc.'s Third-Party Complaint Against Modern Lighting Protection Co. Inc.

Generally, a motion to dismiss should be granted only where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996). The Supreme Court of Appeals of West Virginia has advised that motions to dismiss are viewed with disfavor and that lower courts should rarely grant such motions. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008); citing *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605-06, 245 S.E.2d 157, 159 (1978). For the purpose of evaluating a motion to dismiss, a complaint must be "construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978); *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). However, where it "appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" the courts should grant a motion to dismiss to weed out unfounded suits. Syl. pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977); *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003).

Here, the movants assert that the complaints were filed more than ten (10) years after the contract completion date. West Virginia Code §55-2-6a sets a ten (10) year statute of repose for bringing a claim for the planning or actual construction of improvements to real property. The statutory period begins to run once the improvement has been occupied or accepted by the owner. *Id.* Barring renewed work on the property, the discovery rule and equitable tolling of the statute does not apply to the statute of repose as it would to a statute of limitation. *Gibson v. W. Va. Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).

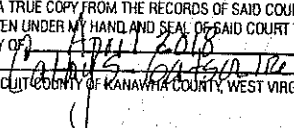
A statute of limitations ordinarily begins to run on the date of the injury; whereas, under a statute of repose, a cause of action is foreclosed after a stated time period regardless of when the injury occurred. . . . Recently, in *Shirkey v. Mackey*, 184 W.Va. 157, 399 S.E.2d 868 (1990), we discussed whether the time period in W.Va.Code, 55-2-6a, was tolled until the construction defect was discovered. There, the plaintiffs' home sustained severe damage to its foundation because improper fill material had been used. The Shirkeys did not discover the construction defect until twelve years after the house was built. We determined that the discovery rule did not toll the statutory time period because the provision had a substantive quality in that it applied "regardless of the date of injury."

Id., holding modified by *Neal v. Marion*, 222 W. Va. 380, 664 S.E.2d 721 (2008) (statute of repose for deficiencies in improvements was inapplicable to claims based on builder's alleged misrepresentations to second purchasers). In this case, movants cite the Master Label Certificate, executed on November 10, 2006, and the Certificate of Completion, executed on November 27, 2016, as owner's acceptance of the work done by the defendants. Quality Stone points to Branch's own 30(b)(7) witness's deposition to support its allegation that the Certificate of Completion constituted acceptance. A review of the Amended Complaint shows that Plaintiffs alleged that the Certificate of Completion was issued by GBBN, the project architect retained by owner/developer Defendant SEDC. It is unclear from the *pleadings* whether the Certificate of Completion was given to contractors on behalf of the owner to demonstrate acceptance or if GBBN gave the owners the Certificate to show their own work was completed. Similarly, it is unclear from the *pleadings* what the Master Label Certificate signified. Accordingly, it is inappropriate to dismiss the claims under §55-2-6a at this stage of the proceedings. While the arguments advanced by Quality Stone and Modern Lighting may very well succeed at the summary judgment stage, the Court cannot dismiss the claims if it is to construe the same "in the light most favorable to plaintiff, and its allegations are to be taken as true."

THEREFORE, the Court hereby DENIES Quality Stone Veneer Inc.'s Motion to Dismiss and Modern Lighting Protection Co. Inc.'s Motion to Dismiss. The Clerk of the Circuit Court of Kanawha County, West Virginia, is directed to forward an attested copy of this Order to the Business Court Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia, 25401; the Resolution Judge, the Honorable James Matish at the Harrison County Courthouse, 301 West Main Street Clarksburg, WV 26301-2967; all counsel of record; and any *pro se* parties.

ENTER this 20th day of April, 2018.


HONORABLE JOANNA I. TABIT

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 23rd
DAY OF April 2018.

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA