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C

United States District Court, E.D. North Carolina.
NATIONAL PROPERTY INVESTORS, VIII,
Plaintiff,
v.
SHELL OIL COMPANY, et al., Defendants.
No. 5:95-CV-1035-BO.

Dec. 9, 1996.

Owner of apartment complex which had allegedly defective polybutylene plumbing system brought action asserting claims of strict liability, negligence, breach of implied and express warranties, and fraud against raw material suppliers who had provided resin to other companies which had manufactured components of system. Suppliers moved for summary judgment based on North Carolina statute of repose, and the District Court, Terrence William Boyle, J., held that suppliers were remote manufacturers rather than materialmen, so that claims were governed by six-year products liability statute of repose.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ↪2468

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to Judgment
170Ak2468 k. Bar of Statute of Limitations. Most Cited Cases
Summary judgment may be appropriate where there is issue of time limitation, and when statute of limitations or statute of repose is legally sufficient defense to claim summary judgment should be granted to defending party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Limitation of Actions 241 ↪165

241 Limitation of Actions
241IV Operation and Effect of Bar by Limitation
241k165 k. Operation as to Rights or Remedies in General. Most Cited Cases
Under North Carolina law, "statute of repose" serves as unyielding and absolute barrier that prevents plaintiff's right of action even before his cause of action may accrue, and is condition precedent to action itself, whereas "statute of limitation" acts as procedural bar to action which has already accrued.

[3] Products Liability 313A ↪305

313A Products Liability
313AIV Actions
313AIV(A) In General
313Ak305 k. Time to Sue and Limitations. Most Cited Cases
(Formerly 313Ak71.5, 241k30)
Under North Carolina law, all products liability claims, regardless of their nature, are subject to six-year statute of repose. N.C.G.S. § 1-50(6).

[4] Products Liability 313A ↪305

313A Products Liability
313AIV Actions
313AIV(A) In General
313Ak305 k. Time to Sue and Limitations. Most Cited Cases
(Formerly 313Ak71.5, 241k30)
North Carolina's six-year statute of repose for products liability action is intended to be substantive definition of rights which sets fixed limit after time of product's manufacture beyond which defendant will not be held liable, and in essence gives defendant vested right not to be sued if plaintiff fails to file within six-year period. N.C.G.S. § 1-50(6).

[5] Limitation of Actions 241 ↪18

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241 Limitation of Actions
241I Statutes of Limitation
241I(B) Limitations Applicable to Particular Actions
241k18 k. Particular Forms of Action.
Most Cited Cases
(Formerly 241k30)

Products Liability 313A ⚡305

313A Products Liability
313AIV Actions
313AIV(A) In General
313Ak305 k. Time to Sue and Limitations. Most Cited Cases
(Formerly 313Ak71.5, 241k30)
Six-year statutes of repose applicable under North Carolina law to products liability claims and to claims involving real property improvements are similar in scope except for fact that real property improvement statute expressly exempts claims for fraud or willful and wanton misconduct from scope of statute. N.C.G.S. § 1-50(5).

[6] Products Liability 313A ⚡214

313A Products Liability
313AIII Particular Products
313Ak214 k. Buildings and Building Components and Materials. Most Cited Cases
(Formerly 313Ak71.5, 241k32(1))

Products Liability 313A ⚡305

313A Products Liability
313AIV Actions
313AIV(A) In General
313Ak305 k. Time to Sue and Limitations. Most Cited Cases
(Formerly 313Ak71.5, 241k32(1))
Under North Carolina law, suppliers of resin to manufacturers of components of polybutylene plumbing system which was installed in apartment complex were remote manufacturers rather than materialmen, and thus, apartment owner's action against suppliers based on alleged defects in plumb-

ing system was governed by six-year statute of repose governing products liability actions, rather than statute of repose governing claims based on improvements to real property. N.C.G.S. § 1-50(5).

[7] Limitation of Actions 241 ⚡18

241 Limitation of Actions
241I Statutes of Limitation
241I(B) Limitations Applicable to Particular Actions
241k18 k. Particular Forms of Action.
Most Cited Cases
(Formerly 241k30)

Products Liability 313A ⚡305

313A Products Liability
313AIV Actions
313AIV(A) In General
313Ak305 k. Time to Sue and Limitations. Most Cited Cases
(Formerly 313Ak71.5, 241k30)
Term "materialman," for purposes of provision of North Carolina's six-year statute of repose for claims arising from improvements to real property which includes actions against persons furnishing materials, refers to one who furnishes materials to jobsite either directly to owner of premises or to contractor or subcontractor on job, and who furnishes materials directly to ultimate consumer, while "remote manufacturer," who would come within products liability statute is one who places product directly into stream of commerce and has no intent to sell or deliver directly to end user. N.C.G.S. § 1-50(5).
*711 Charles T. Francis, Wood & Francis, Raleigh, NC, for plaintiff.

Bradford A. De Vore, Womble, Carlyle, Sandridge & Rice, Charlotte, NC, for Shell Oil Company.

Mark S. Brennan, Sr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA, for Hoechst Celanese Corporation.

*712 James K. Dorsett, III, Smith, Anderson,

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Blount, Dorsett, Mitchell & Jernigan, Raleigh, NC,
for E.I. Dupont de Nemours & Company, Inc.

Discussion

ORDER

TERRENCE WILLIAM BOYLE, District Judge.

This matter is before the Court on Defendants' Motion for Summary Judgment on the grounds that Plaintiff's cause of action is barred by North Carolina's six-year products liability statute of repose, N.C.Gen.Stat. § 1-50(6) (1995). The parties do not contest the fact that North Carolina substantive law controls in this case. For the reasons stated below, Defendants' motion is GRANTED.

Background

Plaintiff is a California limited partnership which owns a 212 unit apartment complex, called Huntington Apartments, in Morrisville, North Carolina. Plaintiff's claims stem from an allegedly defective polybutylene plumbing system installed in the Huntington Apartment complex. Plaintiff alleges claims for strict liability, negligence, breach of implied warranty of fitness for a particular purpose, breach of express warranties, intentional and negligent misrepresentation, and consumer fraud.

Defendants, Shell, Celanese, and DuPont, are raw material suppliers who sold resin to other companies that manufactured the components of the polybutylene plumbing system.

The Huntington Apartment complex was built between 1985 and 1987. The latest certificate of occupancy for a building in the complex was issued on October 13, 1987. Therefore, the plumbing system at issue was fully installed by October 13, 1987.

Plaintiff filed this action on January 9, 1995, more than seven years after the purchase and installation of the polybutylene plumbing system at the Huntington Apartment complex.

[1] In granting summary judgment, Rule 56 of the Federal Rules of Civil Procedure directs the Court to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment has the initial burden of showing that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the moving party has met his burden, the non-moving party only needs to put forth evidence from which a jury might return a verdict in order to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-57, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). Summary judgment is also appropriate when there is an issue of time limitation. When a statute of limitations or statute of repose is a legally sufficient defense to a claim, summary judgment should be granted to the defending party. See *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir.1974); *Lindsay v. Public Service Co. of North Carolina*, 725 F.Supp. 278 (W.D.N.C.1989).

This Motion for Summary Judgment hinges on whether Plaintiff's claims are barred by North Carolina's Product Liability Statute of Repose. This statute provides that "[n]o action for the recovery of damages for personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of the initial purchase for use or consumption." N.C.Gen.Stat. § 1-50(6) (1995). Section 1-50(6) is incorporated into North Carolina's products liability statute at N.C.Gen.Stat. § 99B-1(3), and describes those actions to which § 1-50(6) applies.^{FN1}

FN1. Products liability action includes any action brought for or on account of person-

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al injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product. See N.C.Gen.Stat. § 99B-1(3).

*713 [2][3] A statute of repose “serves as an unyielding and absolute barrier that prevents a plaintiff’s right of action even before his cause of action may accrue.” *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469 (1985). Thus, a statute of repose is a condition precedent to the action itself whereas a statute of limitation acts as a procedural bar to an action which has already accrued. See *Bolick v. American Barmag Corp.*, 306 N.C. 364, 369-70, 293 S.E.2d 415 (1982). All products liability claims, regardless of their nature, are subject to this statute. See e.g., *Colony Hill Condominium 1 Assoc. v. Colony Co.*, 70 N.C.App. 390, 396, 320 S.E.2d 273 (1984), *review denied*, 312 N.C. 796, 325 S.E.2d 485 (1985) (North Carolina Legislature intended for the products liability statute of repose to cover a multiplicity of claims that can arise out of a defective product); *Bonti v. Ford Motor Co.*, 898 F.Supp. 391, 399 (S.D.Miss.1995) (North Carolina Products Liability Statute of Repose barred plaintiff’s claims for negligence, breach of warranty, misrepresentation, and strict liability).

[4] The statute “is intended to be a substantive definition of rights which sets a fixed limit after the time of the product’s manufacture beyond which the seller will not be held liable.” *Bryant v. Adams*, 116 N.C.App. 448, 456, 448 S.E.2d 832 (1994), *review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995). In essence, this statute gives the defendant a “vested right not to be sued” if the plaintiff fails to file within the six-year period. *Id.* at 456, 448 S.E.2d 832. Since it is an uncontested fact that Plaintiff failed to file suit within the six-year period, if the products liability statute of repose applies to this matter, all of Plaintiff’s claims are barred.

[5][6] Plaintiff, in opposition to Defendants’ argument, contends that the North Carolina Products Liability Statute of Repose is inapplicable. Plaintiff asserts that the proper statute in this matter is the North Carolina Real Property Improvement Statute of Repose. N.C.Gen.Stat. § 1-50(5) ^{FN2}. The two statutes of repose are similar in scope except for the fact that Section 1-50(5) expressly exempts claims for fraud or willful and wanton misconduct from the scope of the statute. N.C.Gen.Stat. § 1-50(5) e. See *Forsyth Memorial Hospital, Inc. v. Armstrong World Indus.*, 336 N.C. 438, 444, 444 S.E.2d 423 (1994) (“*Forsyth I*”) (“The real property improvement statute of repose expressly exempts all claims sounding in fraud or willful and wanton misconduct, whereas the product liability statute of repose contains no such exemption.”). Therefore, even if the real property statute were applicable in this matter, only Plaintiff’s fraud claim would not be barred.

FN2. Section 1-50(5) provides that:

No action to recover damages based upon or arising out of the defective or unsafe condition of any improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

[7] Plaintiff’s argument hinges on two assertions: 1) that the installation of the plumbing system in question is akin to an improvement of real property; and 2) that defendants are “materialmen” within the meaning of the statute. Plaintiff’s argument fails because Defendants are classified as “remote manufacturers” and not as “materialmen”. The distinction between these two terms was recently clarified by the North Carolina Courts. The term “materialman” refers to one “who furnish[s] materials to the jobsite either directly to the owner of the premises or to a contractor or subcontractor on the job.” *Forsyth I*, 336 N.C. at 443, 444 S.E.2d 423. A “materialman” furnishes materials directly to the ultimate consumer, whereas a “remote manufac-

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turer” places “its product into the stream of commerce” and has no intent to sell or deliver directly to an end user. *Forsyth Memorial Hospital, Inc. v. Armstrong World Indus.*, 122 N.C.App. 413, 470 S.E.2d 826, 830-31 (1996) (“*Forsyth II*”).

The Defendants in the case at bar are clearly remote manufacturers. They sold raw materials to manufacturers who, in turn, used the materials to manufacture a plumbing*714 system that was eventually sold through the stream of commerce by distributors and retailers. This plumbing system was bought and installed more than six years before Plaintiff filed this lawsuit. Furthermore, there is no evidence that Defendants have acted in any way to be estopped from invoking the statute of repose. Accordingly, Plaintiff’s action is barred by the statute of repose.

Defendants’ Motion for Summary Judgment is GRANTED.

SO ORDERED.

E.D.N.C., 1996.
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