

No. 74023-7-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 APR 20 AM 10:41

MERCER PLACE II CONDOMINIUM OWNER'S ASSOCIATION,

Plaintiff/Appellant,

v.

MCGLYNN PLASTERING, INC.,

Defendants/Respondents.

APPELLANT'S BRIEF IN REPLY

Christopher I. Brain, WSBA #5054
Email: cbrain@tousley.com
Chase C. Alvord, WSBA #26080
Email: calvord@tousley.com
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: (206) 682-5600
Fax: (206) 682-2992
Attorneys for Appellant

ORIGINAL

Table of Contents

A.	SUMMARY OF ARGUMENT	1
B.	ARGUMENT IN REPLY	3
1.	Contrary to McGlynn’s Assertion, Mercer Place’s Claims are Not Time-Barred Because (a) the Allegations in Mercer Place’s Complaint Required McGlynn to Assert the Statutory Affirmative Defense, Which It Failed to Do and (b) Even if McGlynn Asserted That Defense and a Nexus is Required, that Nexus Both Exists and Creates a Factual Issue Precluding Summary Judgment	3
a.	The allegations in Mercer Place’s Complaint stating the nature of the specific defects in McGlynn’s work put McGlynn on notice that the defects alleged were latent, requiring McGlynn to assert the affirmative defense in RCW 4.16.326(1)(g)	3
b.	Even if McGlynn could rely on RCW 4.16.326(1)(g), Mercer Place’s claim was timely under that statute because the statute and case law contain no nexus requirement applicable to this case, and, even if they did, such a nexus exists because the Final Report was part of the contract between the parties	6
2.	Courts Do Not Require the “Formal Compliance” with CR 56(f) that McGlynn Claims, Mercer Place Still Complied with the Rule, and the Court Erred in Denying Mercer Place’s CR 56(f) Motion.....	10
C.	CONCLUSION	11

Table of Authorities

Cases

<i>1000 Virginia Ltd. P'ship v. Vertecs Corp.</i> 158 Wn.2d 566, 582, 146 P.3d 423 (2006)	6
<i>1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corporation</i> 101 Wn. App. 923, 6 P.3d 74 (2000)	7
<i>Bichl v. Poinier</i> 71 Wn.2d 492, 496, 429 P.2d 228 (1967)	4
<i>Coggle v. Snow</i> 56 Wn. App. 499, 507-08, 784 P.2d 554 (1990).....	10
<i>Dania, Inc. v. Skanska USA Bld., Inc.</i> 185 Wn. App. 359, 340 P.3d 984 (2014)	7
<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.</i> 143 Wn. App. 345, 177 P.3d 755 (2008)	5
<i>Janda v. Brier Realty</i> 97 Wn. App. 45, 55, 984 P.2d 412 (1999)	10
<i>MRC Receivables Corp. v. Zion</i> 152 Wn. App. 625, 629, 218 P.3d 621 (2009)	10
<i>Turner v. Kohler</i> 54 Wn. App. 688, 693, 775 P.2d 474 (1989)	10

Statutes

RCW 4.16.310	2
RCW 4.16.326	1, 3, 6, 7

Rules

CR 56.....	2, 10, 11
CR 8.....	3, 6

A. SUMMARY OF ARGUMENT

In its Response, Respondent McGlynn Plastering, Inc. (“McGlynn”) argues that its failure to assert a mandatory affirmative defense was simply the result of a mistake and that Appellant Mercer Place II Condominium Owner’s Association (“Mercer Place”) and the trial court should have known what it meant. However, the fact that the order the trial court signed dismissing this case also contained that “mistake” belies McGlynn’s claim: it simply failed to assert an affirmative defense under RCW 4.16.326(1)(g) and cannot now rely on it in seeking to preserve the trial court’s erroneous ruling.

McGlynn also claims that it was not required to assert the affirmative defense because Mercer Place did not use the word “latent” in its Complaint when describing the defects in McGlynn’s work. However, courts do not require that parties use the word “latent,” only that they describe the defects sufficiently that their latent nature is apparent. Here, Mercer Place described the hidden nature of the defects and stated how a reasonable inspection would not reveal the true extent of those defects. Such a description was sufficient for McGlynn to be on notice of their latency and to require it to raise the affirmative defense.

However, even if McGlynn had properly raised that affirmative defense, the trial court still erred in dismissing this case. Although McGlynn claims that a nexus must exist between its Final Report and Mercer Place’s cause of action, case law and common sense show that requirement only exists in cases in which multiple contractors performed work. Moreover,

even if such a nexus requirement existed, the trial court still erred: the Final Report was expressly part of the work that Mercer Place contracted and paid for and thus the warranties within it were supported by consideration. As Mercer Place specifically sued, in part, based on McGlynn's breach of those warranties, any required nexus exists.

Finally, McGlynn attempts to read requirements into CR 56(f) that simply do not exist. Courts do not require the "formal compliance" with that rule that McGlynn claims and, even if they did, Mercer Place met the requirements of the rule. First, the reason for delay in obtaining the evidence was clear to all parties and the trial court: Mercer Place had 47 days between receiving McGlynn's first responsive pleading—its Motion for Summary Judgment—and the deadline for filing its opposition, which was not enough time to conduct the required document discovery and take depositions. Second, at the time it made its motion, Mercer Place stated the evidence it would establish with discovery: documentation from McGlynn regarding whether the Final Report was part of the work for which Mercer Place contracted. Third, that such evidence would raise a genuine issue of material fact was clear: if the Final Report was part of the contracted-for work, McGlynn's final service occurred when it sent that report, thus extending the timeframe in which to file suit.

As a result, by denying Mercer Place's CR 56(f) motion and dismissing this case expressly based on the statute of repose, RCW 4.16.310, the trial court erred and Mercer Place respectfully requests that this Court reverse and remand this case for further proceedings.

B. ARGUMENT IN REPLY

1. Contrary to McGlynn’s Assertion, Mercer Place’s Claims are Not Time-Barred Because (a) the Allegations in Mercer Place’s Complaint Required McGlynn to Assert the Statutory Affirmative Defense, Which It Failed to Do and (b) Even if McGlynn Asserted That Defense and a Nexus is Required, that Nexus Both Exists and Creates a Factual Issue Precluding Summary Judgment

a. The allegations in Mercer Place’s Complaint stating the nature of the specific defects in McGlynn’s work put McGlynn on notice that the defects alleged were latent, requiring McGlynn to assert the affirmative defense in RCW 4.16.326(1)(g)

In its Complaint, Mercer Place alleged that the defects in McGlynn’s work included items that were hidden once installed and that only completely removing the stucco would reveal the extent of the defects. CP 3:24 – 4:22. These allegations, and the specificity with which Mercer Place set forth the defects discovered to date, put McGlynn on notice that the defects were latent in nature. McGlynn was thus required to assert RCW 4.16.326(1)(g) as an affirmative defense in its pleading responding the Complaint. The court rules require that “[i]n pleading to a preceding pleading, a party shall set forth affirmatively... any other matter constituting an avoidance or affirmative defense.” CR 8(c). Here, McGlynn did not file an answer to Mercer Place’s Complaint and its Motion for Summary Judgment was thus its “pleading to a preceding pleading” under the rule.

Specifically, Mercer Place alleged that McGlynn’s work included, among other things, “framing” and installing “sealants... sheathing, water resistant barriers,” all of which were invisible once installed. CP 2:23 – 3:2.

For instance, Mercer Place alleged the sheathing installed by McGlynn was “located beneath the stucco” and suffered from “significant deficiencies and damage...” CP 4:9-11. Significantly, Mercer Place’s investigator stated, and Mercer Place’s Complaint alleged, that the “extent of the construction deficiencies and damage cannot be ascertained at this time without complete removal of the overburden [stucco] cladding...” CP 4:15-16.

These allegations sufficiently put McGlynn on notice that Mercer Place was alleging latent defects in McGlynn’s work, even if Mercer Place did not use the word “latent.”¹ Indeed, a “latent defect” is simply a defect of which the owner “in the exercise of reasonable care... should have no knowledge.” *Bichl v. Poinier*, 71 Wn.2d 492, 496, 429 P.2d 228 (1967). Black’s Law Dictionary similarly defines a latent defect as a “hidden defect... a product imperfection that is not discoverable by reasonable inspection...” DEFECT, Black’s Law Dictionary (10th ed. 2014). By alleging that the defects in McGlynn’s work were, *inter alia*, ones in the water resistant barriers and sheathing, “located beneath the stucco,” CP 4:9-11, Mercer Place alleged hidden defects.

However, Mercer Place did not only allege hidden defects in products installed by McGlynn. Mercer Place also alleged that it could not ascertain the full extent of the defects in McGlynn’s work with a reasonable inspection: to fully determine the extent of those defects, Mercer Place

¹ Mercer Place further reinforced this allegation in its opposition to McGlynn’s Motion for Summary Judgment, in which it specifically stated that the defects it alleged in its complaint were “latent.” *See, e.g.*, CP 36.

stated it would need to *completely remove* the stucco that covers almost the entire exterior of its building. CP 4:15-16. As the result of these allegations, McGlynn was on notice that the defects detailed in Mercer Place's Complaint could not be discovered via a reasonable inspection or with reasonable care.

Although McGlynn notes that the *Harmony* court required parties "to plead latency," Resp't Br. at 16, it fails to note that the *Harmony* court did not expressly require parties to use the word "latent" in their pleadings. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 177 P.3d 755 (2008) ("*Harmony*"). And, significantly, the allegations in the *Harmony* case did not relate to work that was hidden from reasonable inspection: the work at issue in that case related to "exterior trim," which "included belly bands [a type of exterior trim] and vertical trim between the windows." *Harmony*, 143 Wn. App. at 351. In other words, the defendant in *Harmony* could not have been on notice that the alleged defects were latent unless the plaintiff used that word because of the nature of the work itself. Defects in exterior trim work would be discoverable by a reasonable inspection because they are visible to the naked eye and do not require dismantling a building to discover them.

Here, by contrast, the inherently hidden nature of the defects in McGlynn's work, as alleged by Mercer Place, put McGlynn on notice that the defects were latent. The extremely destructive investigation that would be required to discover the full extent of those latent defects also put McGlynn on notice that a reasonable inspection would be insufficient to

discover all of the defects. Mercer Place therefore “pled latency,” even if it did not use the word “latent” in doing so.

As a result, McGlynn was required under CR 8(c) to state its affirmative defense under RCW 4.16.326(1)(g) in an answer or in its Motion for Summary Judgment. It did neither and thus waived the defense. Without that defense, the traditional two-step analysis applies. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 582, 146 P.3d 423 (2006) (if the defendant fails to plead RCW 4.16.326(1)(g) as an affirmative defense, then the discovery rule of accrual can apply). And, as set forth in the Appellant’s Opening Brief, under the traditional two-step analysis, the statute of repose is no bar to Mercer Place’s claim and the trial court thus erred in granting McGlynn’s Motion for Summary Judgment under that statute. Appellant Br. at 10-11.

b. Even if McGlynn could rely on RCW 4.16.326(1)(g), Mercer Place’s claim was timely under that statute because the statute and case law contain no nexus requirement applicable to this case, and, even if they did, such a nexus exists because the Final Report was part of the contract between the parties

As Mercer Place set forth in its Opening Brief, no nexus is required between the last service McGlynn provided and Mercer Place’s cause of action because McGlynn did not assert the affirmative defense under RCW 4.16.326(1)(g). Appellant Br. at 12-19. As also set forth in Mercer Place’s Opening Brief, application of the nexus rule is unnecessary here: the purpose of the nexus rule is to differentiate the work of different contractors on a project, so that the work of a later contractor does not extend the liability of a contractor that completed its work earlier. Appellant Br. at 22-

23 (citing *Dania, Inc. v. Skanska USA Bld., Inc.*, 185 Wn. App. 359, 340 P.3d 984 (2014), which in turn relied upon *1519-1525 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corporation*, 101 Wn. App. 923, 6 P.3d 74 (2000)). Although McGlynn disputes the purpose of the rule, when only one contractor works on a project, the rule becomes superfluous because that contractor's work will *always* have some nexus to claims in a subsequent lawsuit arising from that work. McGlynn claims in its brief that other contractors were hired, but the record does not support that assertion. Moreover, the existence of other contractors would not change the application of the rule here: Mercer Place is not attempting to use the work of another contractor to extend the statute of limitations for its claim against McGlynn: McGlynn performed all of the work at issue, including the Final Report.

However, even if the Court does read a nexus requirement into RCW 4.16.326(1)(g), such a nexus both exists and creates a factual issue precluding summary judgment.

The Final Report that McGlynn provided to Mercer Place contained additional warranties about McGlynn's work, CP 41:1-2, and Mercer Place expressly alleged in its Complaint that the warranted work was defective. *Compare, e.g.*, CP 49 (Final Report warranting that urethane coating would last for eight or nine years) *with* CP 3:8-20; 5:6 (citing Final Report's warranties and alleging their breach). In other words, a direct connection exists between the Final Report and Mercer Place's claims.

Although McGlynn claims that the Final Report was “a free piece of work” and that “any warranty contained in the Final Report is not supported by consideration,” Resp’t Br. at 22, that assertion is both incorrect and highlights the genuine issue of material fact inherent to this issue.

Steve Adams, Mercer Place’s then-president, stated in a declaration at summary judgment that “[a]s part of McGlynn’s work on the Mercer Place II Condominium building, *we agreed that McGlynn would provide Mercer Place with a Final Report containing assurances about its work...* when we did not receive McGlynn’s promised Final Report after we paid the final bill, I made repeated telephone calls and sent emails to McGlynn regarding providing us with the Final Report... *[w]e did not consider the project completed until we had the Final Report.*” CP 43:19 – 44:8 (emphasis supplied).

As “part of McGlynn’s work,” the Final Report *was* supported by consideration because Mercer Place paid for the Final Report when it paid McGlynn’s bill. CP 43:18. Simply because McGlynn delayed providing the Final Report to Mercer Place—despite Mercer Place’s repeated attempts over the course of a year to get McGlynn to send it—does not mean that Mercer Place did not pay for it.

Moreover, to even consider the nexus issue requires a factual inquiry into whether McGlynn’s issuance of the Final Report was actually part of the services for which Mercer Place contracted or, as McGlynn claims, a completely separate project that McGlynn did as a favor. McGlynn also claims, without reference to any evidence in the record, that the “alleged

defects and McGlynn's ensuing breach, if any, necessarily took place during construction, before the Final Report was sent." Resp't Br. at 22. However, leaving aside that McGlynn is asking to be rewarded for doing a better job of hiding the defects in its work than stuccoing Mercer Place's building, that is not the issue.

Instead, the issue is whether the Final Report was part of the services for which Mercer Place contracted with McGlynn. Mr. Adams stated in his declaration opposing summary judgment that the Final Report was part of those services and that McGlynn simply delayed providing the Final Report to Mercer Place: "part of McGlynn's work... [and the parties] agreed that McGlynn would provide Mercer Place with a Final Report..." CP 43:19-21. By contrast, McGlynn stated in a declaration supporting its Motion for Summary Judgment that it "was not paid for this letter [the Final Report]" and that it "prepared [the Final Report] as a courtesy to the [Mercer Place] homeowners." CP 24:12-13.

As the result of this opposing evidence, the trial court should have taken the inferences from Mercer Place's evidence in the light most favorable to Mercer Place: that is, it should have found that the Final Report was the final service that McGlynn provided on its contract and that it contained enforceable warranties. At a minimum, whether the Final Report was part of the contract between Mercer Place and McGlynn is a genuine issue of material fact that should have precluded summary judgment. Thus, by granting summary judgment, the trial court erred.

2. Courts Do Not Require the “Formal Compliance” with CR 56(f) that McGlynn Claims, Mercer Place Still Complied with the Rule, and the Court Erred in Denying Mercer Place’s CR 56(f) Motion

Although McGlynn claims that “[f]ormal compliance with CR 56(f) is required,” Resp’t Br. at 24, courts do not require overly strict adherence to the rule. Indeed, the primary consideration on a “motion for a continuance should have been justice.” *Coggle v. Snow*, 56 Wn. App. 499, 507-08, 784 P.2d 554 (1990) (citation omitted). “[T]he trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case.” *Coggle*, 56 Wn. App. at 507.

Courts properly denying CR 56(f) motions often do so when a lawyer’s affidavit does not even mention CR 56(f) or request a continuance, *see, e.g., Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989); *see also MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 629, 218 P.3d 621 (2009), or when the lawyer offers “no good reason for the delay in obtaining evidence...” *Janda v. Brier Realty*, 97 Wn. App. 45, 55, 984 P.2d 412 (1999). Although McGlynn claims that Mercer Place did not meet the requirements of CR 56(f) in requesting a continuance, Resp’t Br. at 25, an examination of the facts demonstrates otherwise.

First, requiring an affidavit from Mercer Place in support of its motion for a CR 56(f) continuance, as McGlynn contends, would have been futile. The reason Mercer Place could not present “by affidavit facts essential to justify” its opposition was obvious: McGlynn had not answered the complaint and Mercer Place thus did not know the issues that discovery,

which would have needed to occur in the space of a month and a half before the summary judgment hearing, would need to address.

Mercer Place filed its lawsuit against McGlynn in May 2015. CP 7. However, Mercer Place could not effect service on McGlynn until mid-June 2015, and even then it was required to serve by publication. CP 31-32. McGlynn served its Motion for Summary Judgment via U.S. Mail on July 1, 2015, CP 22, and the trial court set the summary hearing for August 28, 2015, CP 16-17, only three months after Mercer Place had filed its Complaint. As McGlynn did not file an answer prior to filing its Motion for Summary Judgment, Mercer Place did not know the issues McGlynn would raise until receiving the Motion.

Second, Mercer Place also clearly stated the evidence it would establish through discovery: "...documentation from Mr. McGlynn that may bear on that issue [raised by the trial court regarding whether the September 2009 letter extended the date of termination of services]." RP 21:15-18. Third, the genuine issue of material fact such documentation would create was also clear in the context of the hearing: it would show whether the Final Report was part of the services McGlynn had agreed to provide, which would make the Final Report the final service McGlynn provided, thus extending the timeline in which to file suit. RP 11:15-23.

The trial court thus erred when it denied Mercer Place CR 56(f) motion.

C. CONCLUSION

For the foregoing reasons, Mercer Place respectfully requests that the Court reverse the order dismissing Mercer Place's complaint and remand this case for further proceedings.

DATED this 18th day of April, 2016.



Christopher I. Brain, WSBA #5054
Email: cbrain@tousley.com
Chase C. Alvord, WSBA #26080
Email: calvord@tousley.com
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: (206) 682-5600
Fax: (206) 682-2992
Attorneys for Plaintiff/Appellant

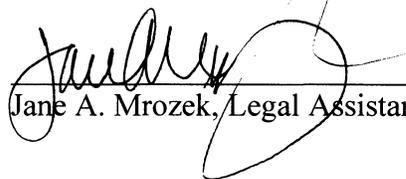
CERTIFICATE OF SERVICE

I, Jane A. Mrozek, hereby certify that on the 18th day of April, 2016, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Gordon Klug, WSBA #21449 Smith Freed & Eberhard 705 2 nd Avenue, Suite 1700 Seattle WA 98104	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
Chin See Ming, <i>pro hac vice</i> Smith Freed & Eberhard 111 SW 5 th Avenue, Ste. 4300 Portland OR 97204 <i>Attorneys for Plaintiff/Appellant</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 18th day of April, 2016, at Seattle, Washington.



Jane A. Mrozek, Legal Assistant

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2016 APR 20 11:10:39