

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-264

ROBERT MARSHALL AND KARRI
MARSHALL

APPELLANTS

V.

TURMAN CONSTRUCTION
CORPORATION

APPELLEE

Opinion Delivered December 5, 2012

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
WESTERN DISTRICT
[NO. CV 2010-0857]

HONORABLE JOHN N. FOGLEMAN,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Robert Marshall and Karri Marshall appeal the circuit court's order of summary judgment in favor of appellee, Turman Construction Corporation, in which the court found that the statute of limitations barred appellants' claim for negligent construction of the foundation for a house. Appellants argue that the court erred by applying the three-year limitations period of Ark. Code Ann. § 16-56-105 (Repl. 2005) rather than the five-year limitations period of Ark. Code Ann. § 16-56-112(a) (Repl. 2005) and that there remained questions of material fact about tolling. We reject this argument, and we affirm the order of summary judgment.

Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Harvest Rice, Inc. v. Fritz & Mertice Lehman Elevator & Dryer, Inc.*, 365 Ark. 573, 231

S.W.3d 720 (2006). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense; once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Reed v. Guard*, 374 Ark. 1, 285 S.W.3d 662 (2008).

In considering a motion for summary judgment, the circuit court is not confined to considering affidavits filed with the motion but may search and review “the entire record, including all pleadings and exhibits filed in the case.” *Purser v. Corpus Christi State Nat’l Bank*, 258 Ark. 54, 59, 522 S.W.2d 187, 190 (1975). The appellate court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered. *Harvest Rice*, 365 Ark. at 576, 231 S.W.3d at 723. The evidence is reviewed in the light most favorable to the party against whom the motion was filed, with all doubts and inferences resolved against the moving party. *Id.* Appellate review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

Appellants in the present case contracted with appellee to pour concrete footings, a foundation, and slab for a “spec” house to be built by appellants in Jonesboro, Arkansas. Appellee began the work in January 2005 and completed it on or about January 15, 2006. Appellants finished the construction by late 2006 and began marketing the house for sale. In

November 2007, appellants became aware of cracks in the home, which they attributed to settling of the foundation caused by appellee's allegedly negligent acts in constructing it. On July 23, 2008, the foundation-repair company Hydro-Guard, Inc., was hired to remedy the alleged defects. Hydro-Guard completed the work on August 9, 2008. In May 2009, appellants discovered additional damage to the home and concluded that the attempted repairs had failed.

Appellants filed suit against appellee on November 10, 2010, alleging that it had negligently constructed the foundation through actions of "defective soil compaction, improper pouring, handling and curing the concrete and improperly laying the concrete blocks and failure to adequately prepare the soil for the footing." According to the complaint, appellants had notified appellee of the damage and had made demand on or before January 3, 2009.

Appellee filed a motion for summary judgment asserting that the alleged negligent act occurred on or before January 15, 2006, the date on which construction of the foundation was completed, and that appellants had not filed their action within the three years allowed by the "applicable" statute of limitations, Ark. Code Ann. § 16-56-105. Attached to the summary-judgment motion were various pages of the September 20, 2011 deposition testimony of appellant Karri Marshall. These excerpts included her statements that she hired appellee as the subcontractor on the foundation work; that an invoice from appellee and a check written to it on January 12, 2006, indicated that the work was completed; and that construction of the home was completed by June 12, 2006.

Appellants contended in their response to the summary-judgment motion that the statute of limitations had been tolled by appellee's attempted repairs—as shown by additional excerpts from Karri Marshall's deposition that were attached to the response. Appellants argued in part:

6. If this cause of action was deemed to be purely a negligence action or oral breach of contract, the statute of limitation[s] was still met because the statute of limitations begins to run at the time the damage occurs.
7. The time of occurrence is a question of fact, which is disputed.
8. The damage to the property occurred when the foundation shifted or moved resulting in cracks, slopping and other structural damage.
9. This cause of action is limited only by A.C.A. § 16- 56-112, which provides that the action shall not be brought after five (5) years from improvement to the property.
10. Further, the statute of limitations is tolled by the Defendant's actions in making attempted repairs to the damaged property.

Karri Marshall stated in the attached deposition testimony that she became aware of problems in November 2007 when a real-estate agent phoned her to report them, whereupon she went to the house and observed that the floor was not level and that the baseboard no longer touched it. Additionally, she stated that she observed Hydro-Guard's work in late July 2008.

On December 2, 2011, the circuit court conducted a hearing on appellee's motion for summary judgment. The court orally granted summary judgment at the conclusion of the hearing on the following basis:

I find that the statute of limitations began no later than January 15th, 2006, and that if there was any tolling, then it would have only been during the time when repairs were attempted. But on this record, I can't say that the defendants had anything to do with the repairs.

In its subsequent written order, the court found that there were no genuine issues of fact remaining for trial. The court found that appellants' cause of action had accrued on or

before January 15, 2006—the date on which appellee completed construction of the foundation—and that the three-year statute of limitations of Ark. Code Ann. § 16-56-105 required appellants to file suit on or before January 15, 2009. Regarding appellants’ assertion that appellee’s attempts to repair the foundation had tolled the running of the statute, the court found that the record contained “no proof” that appellee performed any repair work after January 25, 2006—specifically, that the record did not demonstrate that Hydro-Guard’s repair work was on behalf of appellee; that even if the repair work was performed on appellee’s behalf, it would toll the statute of limitations only during the period of repairs, which was not of sufficient length to render appellants’ claim timely; and that the statute of repose, codified at Ark. Code Ann. § 16-56-112, did not extend the three-year statute of limitations codified at Ark. Code Ann. § 16-56-105.

Appellants filed a motion for reconsideration, asserting that they had argued in their response to the motion for summary judgment that repairs were made; that appellee replied three days prior to the summary-judgment hearing that appellants did not specify that appellee made the repairs; and that appellants had been without adequate time “to appreciate this new argument and to put evidence into the record” but that “the evidence did exist.” Attached to appellants’ motion for reconsideration was an excerpt of Karri Marshall’s deposition in which she stated that appellee was owned and operated by Rick Turman, her stepfather, whom she had phoned after receiving the real-estate agent’s call. Karri Marshall also stated in this portion of her deposition that Rick Turman came to the house, helped her call “foundation people,” and talked to them; that a \$26,400 balance to Hydro-Guard “was paid

from mine and Robert’s account though the money came from Rick and Sherry Turman”; and that she did not recall if the money the Turmans gave her to pay the bill came “from a personal check [or] out of a Turman Construction account.” Appellants reproduced in their motion appellee’s argument—made in its reply to appellants’ response to the motion for summary judgment—that appellants had placed no proof in the record that appellee ever attempted to repair the home, and that appellants’ proof showed only that the attempted repair was completed by Hydro-Guard at appellants’ request rather than at appellee’s.

Appellee responded to the motion for reconsideration, characterizing appellants’ claim that the circuit court failed to consider portions of Karri Marshall’s testimony as “a second bite at the apple” trying to establish that appellee had attempted to repair alleged defects in the home. Appellee argued that the particular testimony had not been introduced into the record during the summary-judgment proceedings and that a motion for reconsideration was not the proper avenue for an “evidentiary redo.” Appellee asserted that appellants could not withhold evidence, wait for an advisory opinion as to what evidence was deemed most important, then supplement the record with evidence being presented for the first time in an attempt to change the ultimate outcome of the case. By written order of February 2012, the circuit court denied appellants’ motion for reconsideration.

Appellants argue on appeal that they filed their lawsuit within five years of the date on which appellee completed its work, thus satisfying the statute of repose; that appellee paid for the repair work performed by Hydro-Guard, thus tolling the three-year statute of limitations; and that the trial court erred in granting summary judgment because genuine issues of material

fact remain. Appellants assert that the deposition testimony upon which they rely is properly a part of the record in this case and was properly before the circuit court. We find no merit in these arguments.

Arkansas Code Annotated section 16-56-112(a) (Repl. 2005) provides:

No action in contract . . . to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury . . . caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement.

The statute, more accurately described as a “statute of repose” than a “statute of limitations,” reflects our legislature’s purpose to “enact a comprehensive statute of limitations protecting persons engaged in the construction industry from being subject to litigation arising from work performed many years prior to the initiation of the lawsuit.” *Curry v. Thomsberry*, 354 Ark. 631, 638, 128 S.W.3d 438, 441 (2003) (citing *Rogers v. Mallory*, 328 Ark. 116, 120, 941 S.W.2d 421, 423 (1997)). The statute’s effect is to entirely cut off a cause of action after the statutory period has elapsed. *Curry, supra; Rogers, supra*. If the breach or injury occurs immediately after completion of the improvement, representations and attempts to repair may toll section 16-56-105(3)’s three-year statute of limitations but for no longer than the five-year period provided in section 16-56-112(a). *Carlson v. Kelso Drafting & Design, Inc.*, 2010 Ark. App. 205, 374 S.W.3d 726.

It is undisputed in the present case that appellee completed construction of the foundation on or before January 12, 2006, but that appellants did not file suit against appellee until November 10, 2010, nearly twenty-two months after the three-year period had run.

The trial court properly found, first, that appellants presented no evidence at the summary-judgment hearing that appellee had performed any repairs after January 25, 2006, or that Hydro-Guard's repair work was done on behalf of appellee; and that even if the repair work had been performed on appellee's behalf, it would have tolled the statute of limitations only during the period of repairs, which was not of sufficient length to render appellants' claim timely.

Rule 56(c) of the Arkansas Rules of Civil Procedure provides definite time periods within which proof must be presented in summary-judgment proceedings, and it prohibits any party from submitting supplemental supporting materials after the time for serving a reply unless the court orders otherwise. *See Miller v. Centerpoint Energy Res. Corp.*, 98 Ark. App. 102, 250 S.W.3d 574 (2007). Here, after presenting their evidence in the summary-judgment hearing, appellants never requested the court to allow them to introduce additional excerpts of Karri Marshall's deposition. Without proof that appellee had attempted repairs or that Hydro-Guard had attempted repairs on appellee's behalf, the statute of repose did not come into play and there was no tolling of the three-year statute of limitations. The trial court appropriately granted appellee's motion for summary judgment.

Affirmed.

ROBBINS and BROWN, JJ., agree.

Arlon L. Woodruff, for appellant.

Waddell, Cole & Jones, P.A., by: *Kevin W. Cole* and *M. Scott Jackson*, for appellee.