

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Scott & Son v. American Building Co.

93 A.D.2d 987 · Decided April 1, 1983

SUMMARY

The court affirmed summary judgment dismissing plaintiffs’ breach-of-warranty action against a manufacturer of metal buildings. Applying Uniform Commercial Code § 2-725, the court held that the claim accrued when plaintiffs discovered the roof’s rusting and that plaintiffs failed to produce sufficient evidence showing that the action was timely commenced. The court also held that a vague affidavit submitted on renewal did not establish timeliness or create a triable issue of fact.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York
WRITING FOR THE COURT	Dillon, P. J.; Hancock, Jr., J.; Doerr, J.; Denman, J.; Moule, J.
JURISDICTION	New York
DECIDED	April 1, 1983
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed from orders of Supreme Court, Chautauqua County, affirming an earlier order granting defendant summary judgment dismissing the complaint and denying renewal-based relief.
STANDARD OF REVIEW	Summary judgment is proper where the moving party establishes entitlement to judgment as a matter of law and the opposing party fails to present evidentiary proof establishing a triable issue of fact. On a limitations defense, the plaintiff must rebut the defendant's prima facie showing and demonstrate a triable issue concerning timely commencement.
PRECEDENTIAL VALUE	Published intermediate appellate opinion
PARTIES	Scott & Son, Glenn Scott v. American Building Co.

TOPICS

- statute of limitations
- warranty
- summary judgment
- uniform commercial code
- construction law

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the breach-of-warranty action accrued when plaintiffs discovered the roof defect, even if defendant warranted the roof's future performance.
2. Whether plaintiffs presented sufficient evidentiary proof to create a triable issue that the action was commenced within the four-year limitations period.
3. Whether plaintiffs' renewal affidavit, which was vague and purported to contradict prior sworn testimony, established timely commencement or a triable issue of fact.

HOLDINGS

1. Even assuming defendant expressly warranted the future performance of the roof panels, the cause of action accrued when plaintiffs discovered the breach of warranty.
2. The action was subject to a four-year limitations period and plaintiffs failed to show that it was timely commenced.
3. After defendant established prima facie that the action was untimely, plaintiffs were required to rebut that showing with evidentiary proof demonstrating a triable issue of ultimate fact; plaintiffs failed to do so.

KEY QUOTATIONS

“Even assuming that defendant expressly warranted to plaintiffs the future performance of the roof panels, the cause of action accrued upon plaintiffs’ discovery of the breach of warranty (Uniform Commercial Code, § 2-725, subd [2]).” (988)

“It was plaintiffs’ obligation “not only to rebut that prima facie showing but also to demonstrate the existence of a triable issue of ultimate fact by presenting proof in evidentiary form” to show that the action was timely commenced” (988)

FACTUAL BACKGROUND

In 1973, defendant's dealer sold plaintiffs a metal building manufactured by defendant and erected it on plaintiffs' property. Plaintiffs alleged that defendant expressly warranted that the roof would not rust or corrode for 20 years. Glenn Scott testified that he first observed rusting in the spring of 1976, while the action was not commenced until July 24, 1980. Plaintiffs later submitted an affidavit stating only that they first noticed pinholes in the roofing panels in the summer of 1976 and that it may have been in the fall.

PROCEDURAL HISTORY

Plaintiffs sued the manufacturer of a metal building for breach of an express warranty that the roof would not rust or corrode for 20 years. Defendant moved for summary judgment on the ground that the action was barred by the Uniform Commercial Code's four-year statute of limitations. Special Term granted summary judgment on

July 1, 1982. Although plaintiffs' two motions to renew were granted, Special Term reaffirmed its original determination in orders entered November 17, 1982. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Bethlehem Steel Corp. v. Solow, 51 N.Y.2d 870, 872
- Yandel v. Loeb & Troper, 84 A.D.2d 710
- Doyon v. Bascom, 38 A.D.2d 645
- Goldstein v. Edwards, 81 A.D.2d 752

OPINION

PER CURIAM.

— Order unanimously affirmed, without costs. Memorandum: Defendant is a manufacturer of metal buildings. It is undisputed that in 1973 defendant's dealer, a contractor, sold one of defendant's buildings to plaintiff and erected it upon plaintiff's property. This action was commenced on July 24, 1980. Plaintiffs' complaint alleges a breach of express warranty guaranteeing that the roof of the building would not rust or corrode for 20 years.

On examination before trial, plaintiff Glenn Scott testified that he first observed that the roof was rusting "in the spring of 1976." Defendant moved for summary judgment upon the ground, inter alia, that the action was barred by the Statute of Limitations (see Uniform Commercial Code, § 2-725, subds [1], [2]).

In opposition to the motion, plaintiffs offered no proof of the specific date in 1976 when the defect in the roof was first discovered. By order entered July 1, 1982, Special Term granted summary judgment dismissing the complaint.

On two successive motions to renew, the only showing made by plaintiffs bearing upon the limitations issue was contained in an affidavit by plaintiff Glenn Scott in which he stated: "It is submitted that the first notice your deponent had of the pin holes developing in the roofing panels was in the summer of 1976 and may have been in the fall of 1976 as far as I can recall." Although both motions to renew were granted, Special Term, by orders entered November 17, 1982, affirmed its original decision and order.

Plaintiffs appeal, and we affirm. Even assuming that defendant expressly warranted to plaintiffs the future performance of the roof panels, the cause of action accrued upon plaintiffs' discovery of the breach of warranty (Uniform Commercial Code, § 2-725, subd [2]). Plaintiffs were required to

commence their action within four years after the cause of action accrued (Uniform Commercial Code, § 2-725, subd [1]).

On the original motion, *988defendant established prima facie that the action was not timely commenced. It was plaintiffs' obligation "not only to rebut that prima facie showing but also to demonstrate the existence of a triable issue of ultimate fact by presenting proof in evidentiary form" to show that the action was timely commenced (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872; *Yandel v Loeb & Troper*, 84 AD2d 710; *Doyon v Bascom*, 38 AD2d 645).

Plaintiffs failed to do so and summary judgment was properly granted. The affidavit submitted by plaintiff Glenn Scott on the motions to renew was insufficient to meet plaintiffs' burden. While it purports to contradict his previous sworn testimony, it contains only vague and indefinite assertions which do not establish that the action was timely commenced or that there is at least a triable issue of fact as to its timely commencement (see *Goldstein v Edwards*, 81 AD2d 752).

Thus viewed, there is no need to address the other issues raised on appeal. (Appeal from order of Supreme Court, Chautauqua County, Ricotta, J. — motion to renew.) Present — Dillon, P. J., Hancock, Jr., Doerr, Denman and Moule, JJ.