

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVELYN FELICIANO; MARK AND
BECKY LILLEY; GEORGE AND ELISE
HASSE; THEODORE AND ILENE
MANAHAN;
Appellants,
vs.
AMERICAN WEST HOMES, INC., A
NEVADA CORPORATION,
Respondent.

No. 56012

FILED

JUL 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment, certified as final under NRCP 54(b), in a construction defect action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Appellant Evelyn Feliciano filed suit against respondent American West Homes, Inc., seeking to recover damages resulting from alleged defects in her home.¹ American West moved for summary judgment on the ground that Feliciano's complaint was time-barred by NRS 11.203, Nevada's ten-year statute of repose governing construction-defect claims. The district court granted the motion.

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition. Our analysis of Feliciano's arguments applies with equal effect to the remaining appellants.

On appeal, Feliciano acknowledges that her complaint was initiated after the ten-year repose period elapsed.² However, she contends that summary judgment was improper because questions of fact existed regarding: (1) whether she suffered an “injury” in the repose period’s tenth year so as to afford her two additional years within which to file suit, and (2) whether American West engaged in “willful misconduct” so as to afford her an open-ended timeframe within which to file suit. We affirm.

Standard of review

We review an appeal from an order granting summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate “when the pleadings and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.’” Id. (alteration in original) (quoting NRCPC 56(c)). When deciding a motion for summary judgment, “the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” Id.

²Namely, Feliciano acknowledges that her home’s “substantial completion” date was February 14, 1997, and that she sent her Chapter 40 Notice to American West on March 26, 2007. See NRS 11.203(1) (“[N]o action may be commenced . . . more than 10 years after the substantial completion” (emphasis added)); NRS 40.695(1) (“[S]tatutes of limitation or repose applicable to a claim based on a constructional defect . . . are tolled from the time notice of the claim is given . . .”).

Although Feliciano argued in district court that American West needed to provide evidence of all three substantial-completion dates, she does not pursue this argument on appeal. See NRS 11.2055(1) (indicating that “substantial completion” occurs on the latest of three dates, one of which is the date when a notice of completion is issued). Thus, American West’s February 14, 1997, notice of completion sufficiently establishes the “substantial completion” date for Feliciano’s home.

“[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the [summary judgment standard] by . . . ‘pointing out . . . that there is an absence of evidence to support the nonmoving party’s case.’”³ Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (second alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

Feliciano failed to present evidence that she suffered an injury in the repose period’s tenth year

The district court granted summary judgment on the ground that Feliciano’s claims were time-barred by NRS 11.203. In relevant part, NRS 11.203 provides:

1. Except as otherwise provided in NRS 11.202 and 11.206, no action may be commenced against . . . any person performing . . . the construction of an improvement to real property more than 10 years after the substantial completion of such an improvement
2. Notwithstanding . . . subsection 1 of this section, if an injury occurs in the 10th year after the substantial completion of such an improvement, an action for damages for injury to property or person . . . may be commenced within 2 years after the date of such injury

(Emphases added.)

³Of note, Feliciano would bear the burden of persuasion on both disputed issues: (1) whether she suffered an injury in the tenth year, and (2) whether American West engaged in willful misconduct. Her argument that “it is a defendant’s burden to negate a plaintiff’s claim of willful misconduct” is misplaced and stems from an overly narrow reading of G and H Associates v. Ernest W. Hahn, Inc., 113 Nev. 265, 934 P.2d 229 (1997).

On appeal, Feliciano contends that she presented evidence sufficient to raise a question of fact with regard to whether she suffered an injury in the repose period's tenth year. We disagree.

Feliciano's only evidence of an "injury" in the tenth year is a list of dates on which rain fell in Las Vegas. Indeed, rain may cause damage to Feliciano's home, but even if it were reasonable to infer that the listed rain actually fell on her home, Feliciano has provided no evidence of damage to her home caused by this rain. Thus, it would be purely speculative to conclude that Feliciano suffered a discrete and compensable "injury" in the repose period's tenth year.⁴

Because Feliciano failed to provide evidence that she suffered an injury in the tenth year, summary judgment was proper on the issue of NRS 11.203(2)'s potential applicability. Cuzze, 123 Nev. at 602-03, 172 P.3d at 134.

Feliciano failed to present evidence of American West's willful misconduct

NRS 11.202 is an exception to NRS 11.203 that permits a plaintiff to bring a construction-defect claim "at any time" when the defect is a result of the defendant's "willful misconduct." NRS 11.202(1).

⁴Assuming without deciding that NRS 11.203(2) permits a plaintiff to recover damages for a tenth-year exacerbation of a preexisting injury, we note that Feliciano has provided no such evidence. To be sure, her expert did opine that "[d]amage occurred . . . during the 10th year," but no factual basis for this opinion exists in the record. Cf. Wood, 121 Nev. at 732, 121 P.3d at 1031 (indicating that the nonmoving party must "'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment" (quoting Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986))).

The district court determined that Feliciano failed to provide evidence of American West's willful misconduct. As such, it found NRS 11.202 to be inapplicable and concluded that Feliciano's complaint was time-barred as a matter of law under NRS 11.203. On appeal, Feliciano argues that she presented evidence that was sufficient to raise an inference of willful misconduct. We disagree.

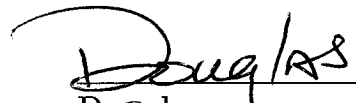
In Tahoe Village Homeowners v. Douglas County, 106 Nev. 660, 799 P.2d 556 (1990), we held that "willful misconduct," as the term is used in NRS 11.202, "requires some degree of intent to do harm." 106 Nev. at 663, 799 P.2d at 558. Here, Feliciano's only evidence in support of her willful-misconduct allegation was a list of building-code violations from which her home suffered. This list, even when viewed in the light most favorable to her, was not sufficient to raise an inference that American West intended to harm Feliciano when it constructed her home.⁵


With no evidence of American West's willful misconduct, Feliciano's complaint was subject to NRS 11.203's ten-year repose period. Because Feliciano's complaint was undisputedly initiated after the ten-

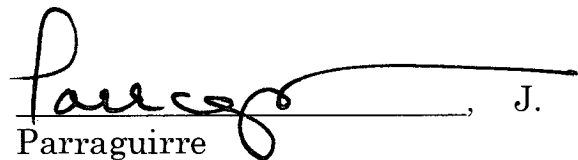
⁵Nor did the district court err in denying Feliciano's NRCP 56(f) motion for a continuance. Choy v. Ameristar Casinos, 127 Nev. ___, ___, 265 P.3d 698, 700 (2011) (reviewing a district court's decision regarding an NRCP 56(f) motion for an abuse of discretion). Namely, Feliciano requested the continuance so that she could depose American West's principals in an effort to uncover evidence supporting her willful-misconduct allegation. Given the unlikelihood that these depositions would have produced evidence of American West's intent to harm Feliciano, the district court was within its discretion in determining that a continuance would have been futile.

year period elapsed, her complaint was time-barred as a matter of law.⁶
We therefore

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Susan Johnson, District Judge
Ara H. Shirinian, Settlement Judge
Fuller Jenkins
Fuller Jenkins/San Diego
Springel & Fink
Lee, Hernandez, Landrum, Garofalo & Blake, APC
Greenberg Traurig, LLP/Las Vegas
Canepa Riedy & Rubino
Eighth District Court Clerk

⁶The record demonstrates that the Manahans' complaint was also time-barred by NRS 11.203. Thus, we need not consider whether summary judgment was proper against the Manahans on the ground that they lacked standing. See *J.D. Construction v. IBEX Int'l Group*, 126 Nev. ___, ___, 240 P.3d 1033, 1043 (2010) (affirming when the district court reached the right result, albeit for the wrong reason).