IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

HOWARD LISTON,

Plaintiff,

vs.

Civil Action No.: 16-C-279
Presiding Judge: Shawn D. Nines
Resolution Judge: Michael D. Lorensen

FRONTIER WEST VIRGINIA, INC., a Connecticut corporation, and T.A. CHAPMAN, INC., a West Virginia corporation,

Defendants.

ORDER GRANTING DEFENDANT T.A. CHAPMAN, INC.'S MOTION FOR SUMMARY JUDGMENT AND ORDER GRANTING DEFENDANT FRONTIER WEST VIRGINIA, INC.'S RENEWED MOTION FOR SUMMARY JUDGMENT AND JOINDER IN T.A. CHAPMAN, INC.'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court this 7th day of ~~February~~ March 2022, upon Defendant T.A. Chapman, Inc.'s Motion for Summary Judgment and Defendant Frontier West Virginia, Inc.'s Renewed Motion for Summary Judgment and Joinder in T.A. Chapman, Inc.'s Motion for Summary Judgment. The Plaintiff, Howard Liston (hereinafter "Plaintiff" or "Liston"), by counsel, Kevin T. Tipton, Esq., and Defendants, T.A. Chapman, Inc. (hereinafter "Defendant" or "T.A. Chapman"), by counsel, Heather M. Noel, Esq. and Jonathan J. Jacks, Esq., and Frontier West Virginia, Inc. (hereinafter "Defendant" or "Frontier"), by counsel, Charles C. Wise, III, Esq., have fully briefed the issues necessary. The Court held a hearing giving each party the opportunity to present oral argument on February 18, 2022, via Microsoft Teams. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. The Complaint in this matter was filed May 5, 2016, and the claims surround alleged damages resulting from the removal and replacement of a utility pole adjacent to Plaintiff's property. *See* Am. Compl., ¶¶5-11. Plaintiff has admitted this removal and replacement occurred in 1990-1993[1]. *See* Def. Frontier's Mot., p. 3. On May 17, 2019, the Plaintiff filed a Second Amended Complaint adding Defendant T.A. Chapman as a Defendant, alleging that in the alternative, Frontier contracted T.A. Chapman to remove the utility pole. *See* Second Am. Compl., ¶7.

2. On or about July 3, 2019, Frontier filed a Cross-Claim against T.A. Chapman for Common Law Indemnification (Count I), Common Law Contribution (Count II), and Contractual Indemnification/Contribution Against T.A. Chapman (Count III). *See* Crossclaim, ¶¶1-17.

3. On or about November 5, 2021, Defendant T.A. Chapman filed Defendant T.A. Chapman, Inc.'s Motion for Summary Judgment, arguing no genuine issue of material fact exists and it is entitled to judgment as a matter of law because Plaintiff's claims fail as they are time-barred by the statute of limitations and statute of repose. *See* Def. T.A. Chapman's Mot., p. 1.

4. A Briefing Order was entered.

5. On or about December 30, 2021, Plaintiff filed his Response to Defendant T.A. Chapman, Inc.'s Motion for Summary Judgment, arguing it wasn't until September 2014 that he discovered any negative impact or damages from water infiltration, making his 2016 original Complaint in this civil action timely under the statute of limitations. *See* Pl's Resp., p. 2, 5. Additionally, Plaintiff argues the statute of repose does not apply because the replacement and removal of the utility pole does not constitute an improvement to real property necessary for the application of the statute of repose and is instead a mere/ordinary replacement or repair. *Id.* at 2-4.

[1] The Court notes Plaintiff's Response to T.A. Chapman's motion indicates Plaintiff admits that the removal and replacement occurred in the years 1990-1991. *See* Pl's Resp., p. 2. At any rate, for the purposes of time calculation, the Court may find from the record that the pole replacement and removal occurred at the very latest into 1993.

6. On or about January 10, 2022, T.A. Chapman filed Defendant T.A. Chapman's Reply in Support of Its Motion for Summary Judgment, reiterating its contention that no genuine issue of material fact remains and it is entitled to summary judgment as a matter of law. *See* Reply, p. 1. Further, the Reply argues that Plaintiff's Response did not suggest or allege there is any genuine issue of material fact. *Id.* Also, T.A. Chapman argues Plaintiff's argument regarding the discovery rule tolling in September 2014 ignores the reasonable diligence requirement for application of the discovery rule, citing the examples from the record it argues support the argument that a reasonable prudent person knew or should have known of the elements of a possible cause of action, specifically the potential damages, prior to 2014. *Id.* at 6-8.

7. Meanwhile, on or about December 29, 2021, Defendant Frontier filed Defendant Frontier West Virginia, Inc.'s Renewed Motion for Summary Judgment and Joinder in T.A. Chapman, Inc.'s Motion for Summary Judgment, also arguing Plaintiff's claims are time-barred by the statute of limitations and statute of repose. *See* Def. Frontier's Mot., p. 2-4. Specifically, Frontier acknowledges it had made a motion for summary judgment before the court in 2018 (the Court notes this was before T.A. Chapman had been added as a party to this suit) and this renewed motion for summary judgment is based on discovery that has been taken since that time. *See* Def. Frontier's Mot., p. 1-3. Specifically, Frontier argues evidence from the record in the form of the second deposition of Plaintiff Howard Liston from August 2021 supports its renewed motion. *See* Def. Frontier's Mot., p. 1-3.

8. On or about January 19, 2022, the Court entered a Briefing Order and Order Setting Hearing and set both motions for summary judgment for hearing February 18, 2022. *See* Ord., 1/19/22.

9. On February 18, 2022, a hearing was held, and counsel was given the opportunity to present oral argument.

10. The Court also considered a transcript of the June 2018 hearing on a previous motion for summary judgment filed before Judge Tucker, which was referenced during the hearing and submitted to the undersigned, with a copy to all counsel, by counsel for Frontier after the hearing concluded.

11. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for summary judgment filed by Frontier and a motion for summary judgment filed by T.A. Chapman. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with

affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

In deciding both Defendant Frontier West Virginia, Inc.'s Renewed Motion for Summary Judgment and Joinder in T.A. Chapman, Inc.'s Motion for Summary Judgment and Defendant T.A. Chapman, Inc.'s Motion for Summary Judgment, the Court must determine whether the statute of limitations or the statute of repose bars Plaintiff's claims as untimely.

It is undisputed that the replacement and removal of the utility pole in question occurred between years 1990-1993. *See* Findings of Fact, *supra*, ¶1.

West Virginia has a two-year statute of limitations for damages to property and for personal injuries. West Virginia Code § 55-2-12(b); *Knotts v. White*, 2021 WL 982653 (March 16, 2021); *Courtney v. Courtney*, 190 W.Va. 126, 437 S.E.2d 436 (1993) (*citing Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W.Va. 588, 244 S.E.2d 321 (1978)).

According to West Virginia Code § 55-2-12,

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

W. Va. Code Ann. § 55-2-12 (West).

Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by

reasonable diligence should know of his claim." *McCoy v. Miller*, 213 W. Va. 161, 162, 578 S.E.2d 355, 356 (2003).

In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. Syl. Pt. 4, *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 708, 487 S.E.2d 901, 903 (1997).

Here, the record shows that by at least 2005, Plaintiff knew (or by exercise of reasonable care should have discovered) of both water around his foundation and actually invading into his crawlspace and suspected the same was from the subject pole butt.

Specifically, at the hearing on February 18, counsel argued that testimony in this case shows that Plaintiff testified he observed the work being done to the pole in the early nineties from the porch across the street from his property; and at that time complained for the pole butt to be taken care of, as it was not taken care of correctly. *See* Def. Frontier's Mot., p. 2. The record shows he testified that within two weeks of the installation of the new pole, Plaintiff started calling the power company, stating concerns of the pole butt "filling up with water". *See* Def. Frontier's Mot., p. 1-2. Plaintiff however did not file his complaint until 2016. While Plaintiff contends he was not aware of the injury to him until September 2014 when mold was discovered, he admits that in 1999, he was called to the building by his tenant, who said she heard running water along the outside of the foundation. *Id.* at 2. When he investigated the next day, he said he "knew it was running down the gap between the sidewalk and the building and around that pole, but where it was going, I had no idea at that time." *Id.*

He also admits that in 2005, he went into the crawlspace of the building and noticed dampness when he put his knee and hand against the wall. *Id.* at 2. Plaintiff testified that after this occurred in 2005, he was prompted "to call the power company again and say, hey, you know, somebody's got to come and fix this pole out here". *Id.*

Therefore, the limitations period was already running because he was aware of the basic facts underlying his claims such that a reasonable inquiry would reveal additional facts. The Court finds that by 2005, Plaintiff learned something went wrong, as evidenced by the fact that he called the power company repeatedly over the years, starting within two weeks of the work on the utility pole in the early 1990's, and asked for the pole to be fixed.

In sum, the Court finds that Plaintiff, as he personally confirmed; (1) observed the replacement of the pole in the early 1990's, (2) was concerned enough to call the power company within two weeks about fixing the sidewalk around the pole butt, (3) was made aware of and personally observed a potential water problem in 1999, which he believed was flowing around or down in the pole, (4) personally felt moisture in the crawlspace with his knee and hand in 2005, which caused him to call the power company again to fix the pole butt/sidewalk, Plaintiff knew or should have known no later than 2005 that he believed the pole butt was the source and cause of his moisture and water infiltration issues in his rental home.

The Supreme Court of Appeals of West Virginia has stated that "[w]here a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach." *McCoy v. Miller,* 213 W. Va. 161, 165 (2003). When "an injury or wrong occurs of such a character that a plaintiff cannot reasonably claim ignorance of the existence of a cause of

action," the plaintiff bears the burden of proving that it is entitled to benefit from the discovery rule. *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 712 (1997).

After the above-described incidents in 1999 and 2005, which the Court notes Plaintiff testified he was confident were caused by the pole butt, a reasonably prudent person would have done more investigation at this time. It is common knowledge that water infiltrating a foundation may be indicative of other, hidden, deeper water issues, and an ordinary person would have done some investigation when they felt moisture or heard water running along the foundation of their house, especially if they had a belief that it was stemming from a pole butt in the sidewalk from a utility pole repair and replacement project. The Court notes and also **FINDS** that the water infiltration by itself was actual damage. There is no evidence in the record that the Plaintiff took any steps to fulfill his affirmative duty to "fully investigate the facts surrounding that potential breach." *See McCoy v. Miller*, 213 W. Va. 161, 165 (2003). The Court finds there is no genuine issue of material fact regarding whether a reasonable person would be on notice of the possibility of wrongdoing in light of the discovery and observation of water infiltration issues described above. Additionally, there is no genuine issue of material fact that the Plaintiff failed to present evidence that he affirmatively investigated the incident to determine whether the moisture and water infiltration was the result of a wrongful act, neglect, or default on behalf of Defendants regarding the removal and replacement of the utility pole, as he believed.

Because he did not file his complaint until 11 years later, in 2016, the Court finds that Plaintiff's claim is barred by the two-year statute of limitations. Accordingly, the court **GRANTS** Defendant T.A. Chapman, Inc.'s Motion for Summary Judgment and Defendant Frontier West Virginia, Inc.'s Renewed Motion for Summary Judgment and Joinder in T.A. Chapman, Inc.'s Motion for Summary Judgment on these grounds.

Because the Court has found that the Plaintiff's Complaint is untimely under the two-year statute of limitations, it need not address the parties' arguments about whether the Complaint was timely under the ten-year statute of repose, including the arguments the parties made regarding whether the replacement and removal of the utility pole on the sidewalk adjacent to Plaintiff's property is an improvement upon real property.

Finally, with regard to the argument that Plaintiff brought up at oral argument, wherein he argued this motion was already brought and denied before Judge Tucker before this case was referred to the Business Court Division by the Chief Justice, the Court finds that the undersigned is now Presiding Judge in this civil action, still in the Circuit Court of Monongalia County, but as part of the Business Court Division, similar to a circuit judge sitting by special assignment in another circuit court case. This Court does not serve as an appeal of Judge Tucker's decision in any way. The instant renewed motion for summary judgment on behalf of Frontier is just that – a renewed motion based off of discovery that has occurred since the time of the filing of the first motion for summary judgment in 2018. Throughout its renewed motion, Frontier cited the deposition transcript of Mr. Liston from August 24, 2021. Further, T.A. Chapman was not a party to this litigation at the time of the 2018 motion heard by Judge Tucker. Counsel for T.A. Chapman did not have an opportunity to brief or present argument on the issues at that time and, therefore, it is bringing the timeliness issue to the Court for the first time. The Court also notes T.A. Chapman's motion for summary judgment is also based upon evidence in the record that occurred after the 2018 motions practice before Judge Tucker. Finally, the Court notes at the status hearing held before it on June 10, 2021, the parties indicated there could be renewed motions practice regarding timeliness of claims and statutes of limitations issues based off of discovery that was occurring. For all of these reasons, the Court rejects any argument by Plaintiff that

granting this motion at this time somehow runs afoul of any previous rulings made by Judge Tucker at an earlier point in this litigation.

With the granting of this motion, and summary judgment being found against Plaintiff and for Defendants, the Court finds all three counts in Frontier's Crossclaim against T.A. Chapman for indemnity and contribution are now moot, and the Crossclaim just be dismissed with prejudice as well.

CONCLUSION

Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Defendant T.A. Chapman, Inc.'s Motion for Summary Judgment is hereby **GRANTED**. It is further hereby **ADJUDGED** and **ORDERED** that Defendant Frontier West Virginia, Inc.'s Renewed Motion for Summary Judgment and Joinder in T.A. Chapman, Inc.'s Motion for Summary Judgment is hereby **GRANTED**. Plaintiff's Second Amended Complaint is hereby **DISMISSED WITH PREJUDICE**. Further, Frontier's Crossclaim Against T.A. Chapman, Inc. is hereby **DISMISSED WITH PREJUDICE** as moot.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. This a **FINAL ORDER**. There being nothing further to accomplish in this matter, the Clerk is directed to retire this matter from the active docket.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

03-07-2022

JUDGE SHAWN D. NINES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk

ENTERED: March 7, 2022

DOCKET LINE 198, Jean Friend, Clerk