

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 04, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP301

Cir. Ct. No. 2002CV4183

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

LINDA T. PETERSON,

PLAINTIFF-APPELLANT,

v.

CORNERSTONE PROPERTY DEVELOPMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Linda T. Peterson appeals from an order granting Cornerstone Property Development's motion for summary judgment and dismissing her action. Because we determine that Peterson has: (1) failed to identify any latent defects in her Commerce Bluff One Condominium unit;

(2) failed to show that any alleged defects were a violation of any specific building code provisions; and as a consequence, (3) failed to demonstrate that Cornerstone's failure to correct any alleged defects breached the Limited Warranty provision of her contract to purchase her condominium unit (Contract), we conclude that summary judgment was proper and affirm.

BACKGROUND

¶2 This case returns to us after an earlier remand to the trial court. In our decision in Peterson's first appeal, *Peterson v. Cornerstone Property Development, LLC*, 2006 WI App 132, 294 Wis. 2d 800, 720 N.W.2d 716 (*Peterson I*), we remanded to the trial court for a determination of whether Cornerstone had breached the Limited Warranty provision included in the Contract and, if so, what consequential damages Peterson would be entitled to receive as a remedy for Cornerstone's breach.

¶3 Upon remand, Cornerstone filed a motion for summary judgment, moving the trial court for a dismissal of all remaining issues on the grounds that Peterson had failed to identify any additional "consequential" damages to which she was entitled, other than the undelivered materials identified in Revised Exhibit A, as identified in *Peterson I*, which Cornerstone and Peterson had already stipulated to be \$3,388.50. *Id.*, ¶¶8, 22. Peterson filed a responsive memorandum and affidavit. The affidavit attached a copy of Peterson's expert's report and a copy of a complaint filed by Commerce Bluff One Condominium Association and others against Cornerstone and others, alleging workmanship defects in the condominium project as a whole. In its reply, Cornerstone argued that Peterson

had failed to raise any “specific facts showing that there is a genuine issue for trial,” citing WIS. STAT. § 802.08(3) (2005-06).¹ Cornerstone also argued that the allegations in the new complaint were hearsay and, further, that Peterson had no standing to sue or recover damages for common area defects on behalf of her fellow condominium owners, citing *Bence v. City of Milwaukee*, 107 Wis. 2d 469, 478, 320 N.W.2d 199 (1982).

¶4 A hearing on Cornerstone’s motion for summary judgment was held on October 12, 2006. At the hearing, the trial court first noted that our decision in *Peterson I* left only the issue of whether the Limited Warranty provision of the Contract was breached and, if so, what damages resulted from that breach. The trial court then examined the provision,² concluding that any latent defects

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The Limited Warranty provision states, in pertinent part:

THIS LIMITED WARRANTY is extended to Buyer only and not to a future owner of the unit or to a tenant thereof. This Limited Warranty is non-transferable and all of Warrantor’s obligations under it terminate if the unit is resold or ceases to be occupied by Buyer.

I. BASIC ITEMS

1. **COVERAGE.** For one (1) year, beginning on the Warranty Date (date of closing and/or date of completion of Warrantor’s work, whichever is later), Warrantor warrants that the unit will be free from latent defects due to faulty materials or workmanship, subject to the exclusions, limitations and provisions of this Limited Warranty. No representative of Warrantor has the authority to expand the scope of, or extend the duration of, this Limited Warranty or make agreements with respect thereto.

“Faulty materials or workmanship” are materials or workmanship which are not in compliance with the applicable building codes regulating construction in the Commerce Bluff

(continued)

resulting from faulty materials and workmanship were defined as “materials and workmanship which [we]re not in compliance with the applicable building codes.” The trial court went on to discuss the evidence in light of the Limited Warranty provision:

One Condominiums as of the date of issuance of the applicable building permits. Inspection by the governmental authority with jurisdiction will provide evidence of compliance. For purposes of this Limited Warranty, “latent defects” are only those defects which are not apparent at the time of the closing and/or completion of the Warrantor’s work, but will become apparent and of which Warrantor is notified, in writing, before the expiration of the warranty.

2. WARRANTOR’S PERFORMANCE. If a latent defect occurs in an item, which is covered by this Limited Warranty, Warrantor will repair, replace, or pay Buyer the reasonable cost of repairing or replacing the defective item. The choice among repair, replacement or payment is Warrantor’s. Steps taken by Warrantor to correct defects shall not act to extend the term or duration of this Limited Warranty. Warrantor shall not be obligated to remedy any defects which are covered by this Limited Warranty unless Buyer notifies Warrantor, in writing, of the defect before the expiration of the warranty period. Warrantor’s obligations under this Limited Warranty are limited to repair or replacement (or paying Buyer the reasonable cost of repairing or replacing) defective items.

....

II. EXCLUSIONS

The following are not covered by this Limited Warranty:

....

5. Any damage to the extent it is caused or made worse by:

....

B. Failure to give notice to Warrantor of any defect within a reasonable time

I do believe strongly that summary judgment is the put up or shut up moment in a case. It's not quite fair to say that this issue of the building code has been put up at this point. I was the one who introduced that here. [Cornerstone]'s motion doesn't really put that four square before the court. But I think it's a valid concern, because as I look at [Peterson's expert]'s letter I don't see any building code violations.

....

Furthermore, if you look at the text of the [L]imited [W]arranty, it suggests that if the building inspector comes and looks and finds the place in compliance and signs off, then the builder is off the hook. Now, I don't mean to say I'm ruling on that point, but these are some considerable issues. As I look at that long list which has about 20 things on it, and [Peterson's expert]'s letter, most of these things, are not latent. He talks about illegal riser heights and unconcealed sprinklers. Anybody could see that. Likewise, if there are holes in the roof you can see those.

But even if they're not latent, then you've got another hurdle, which is, they have to relate to her unit. Then you have another hurdle, which is, they have to relate to the building code.

It seems to me that rather than schedule this matter for trial we should figure out if there's really anything for a jury to decide. So, what I would propose is that I give the plaintiff a deadline to show me facts that show that there really is an issue on the breach of the Limited Warranty, give the defense, which started this whole ball rolling, a chance to reply, and then have another brief hearing.

The trial court then set a briefing schedule and a new hearing date.

¶5 Peterson filed a supplemental affidavit. In the affidavit, Peterson averred that she had provided timely notice to Cornerstone—i.e., within the Limited Warranty period—of defects within her unit, “including wall and window construction, poor heating and air conditioning design and execution.” Peterson averred that “[a]ll the defects were not apparent at the time of the closing but were found only after [Peterson] commenced completion of her unit.” Peterson further

averred that despite her notice and demands, Cornerstone “failed to repair or replace the defects in [her unit] or pay to [her] the reasonable cost of replacing or repairing the numerous defective items.” Peterson noted that the expert witness that she retained in this lawsuit, Church Home Inspection Service, “determined that there existed construction deficiencies in [her] unit that were far below the allowable ‘Construction Industry Quality Standards’ as per ‘The Metropolitan Builders Association of Greater Milwaukee,’” referring the court and the parties to a copy of the expert’s report attached to her attorney’s affidavit filed in opposition to Cornerstone’s motion for summary judgment.

¶6 Peterson also attached, as exhibits to her affidavit: (1) the report of Roofing Consultants Ltd., which discusses defects to her unit, including roof and wall defects which would not have been “apparent at the time of closing and could only have been found either upon failure or extensive inspection”; and (2) the report of Computerized Structural Design, S.C., which confirmed the defects discussed in the previous two reports. Finally, Peterson avers that “[w]hether city code violations occurred cannot be determined given the actual construction and the apparent failure of the City of Milwaukee to properly inspect.” Cornerstone filed a letter response to Peterson’s supplemental submissions, arguing that nothing contained in the submissions established that any latent defects existed in Peterson’s condominium during the one-year warranty period.

¶7 Peterson’s counsel also filed a supplemental affidavit. Attached to this affidavit were: (1) a February 18, 2003 letter from Scott A. Kubicki, a project manager for FJA Christiansen Roofing Co., Inc., specifically addressing problems of third floor units, such as Peterson’s, associated with roofing concerns; (2) a May 14, 2002 letter from Cornerstone project manager Jim Read to Tim Dixon, owner of Cornerstone, relating to a site visit he made to determine the source of

unwanted moisture in two condominium units, including Peterson's; and (3) City of Milwaukee Department of Neighborhood Services building inspection records for the condominium project which included Peterson's unit. None of these documents set forth a violation of any specific building code.

¶8 At the hearing on December 18, 2006, the trial court immediately inquired of Peterson whether she had any evidence of specific City of Milwaukee building code violations. Peterson's counsel admitted that he was unable to contact Peterson's expert witness, John V. Wantz (of Church Home Inspection Service, Inc.), or the witnesses from FJA Christiansen Roofing Co., Inc. (individual had left company) or Computerized Structural Design (individual was out of town). Peterson's counsel admitted that none of the reports or letters provided by Peterson's witnesses cited any specific City of Milwaukee building code violations associated with Peterson's condominium. Peterson's counsel conceded that when he realized that he could not reach and obtain the information from her expert witnesses in time for the hearing, he could have requested an extension, and that he did not do so. Based upon Peterson's failure to provide specific building code violations, the trial court found that Peterson had failed to establish a genuine issue of material fact as to the existence of latent defects in her condominium. The trial court then granted Cornerstone's motion for summary judgment and dismissed the case. Before concluding the hearing, the trial court invited Peterson to file a motion for reconsideration should she obtain the necessary expert or other evidence indicating specific City of Milwaukee building code violations relating to her condominium unit that would support a claim that latent defects existed and that Cornerstone failed to remedy same, thereby creating a breach of the Limited Warranty. There is no motion for reconsideration in the record. Peterson appealed.

DISCUSSION

¶9 We review *de novo* the grant or denial of a summary judgment, applying the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984).

¶10 Our summary judgment methodology is well-known. We first must determine whether the pleadings set forth a claim for relief. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. After we have determined that a claim has been stated, we next examine the moving party's affidavits and other proof to determine whether a *prima facie* case for summary judgment has been established. *Id.* A *prima facie* case is one in which the moving party shows that it has a defense which would defeat the nonmoving, opposing party. *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). If the moving party established a *prima facie* case, we must then determine whether the opposing party has demonstrated that there are disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn, which entitle the party opposing summary judgment to a trial. *Id.*

¶11 The simple existence of a factual dispute between the parties shall not defeat a proper summary judgment motion; rather, the factual issue must be genuine. *Id.*, ¶11. "A factual issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A 'material fact' is one that impacts the resolution of the controversy." *Strasser v. Transtech*

Mobile Fleet Serv., Inc., 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142. “A party opposing a summary judgment motion must set forth ‘specific facts,’ evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based on personal knowledge.” *Helland v. Kurtis A. Froedtert Mem’l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999); *see also Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (“[O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial ‘to make a showing sufficient to establish the existence of an element essential to that party’s case.’” (citation omitted.)). Additionally, WIS. STAT. § 802.08(3) provides, in pertinent part:

When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

¶12 In *Peterson I*, we remanded this case to give Peterson the opportunity to pursue her claim for consequential damages under her breach of contract claim. *Peterson*, 294 Wis. 2d 800, ¶52. We noted in our decision that these consequential damages could arise from any breach of the Limited Warranty as to latent defects within Peterson’s individual unit, as well as by any special assessments charged to Peterson by the condominium association that arose out of the need to repair latent defects to the common elements. *Id.* Peterson conceded that there are currently no outstanding condominium assessments relating to latent defects. Accordingly, the sole remaining issue is whether Cornerstone breached

the Limited Warranty as to latent defects to Peterson's unit only, and, if so, what damages, if any, Peterson suffered as a result of such breach. To determine whether a breach occurred, we must construe the terms of the Limited Warranty.

¶13 First, as set forth in its section I.1., the Limited Warranty is valid only for a period of one year, which Peterson avers begins on the closing date (the earliest date possible under the language of the Limited Warranty). The Limited Warranty warrants only "that the unit will be free from latent defects due to faulty materials or workmanship," and that this warranty is "subject to the exclusions, limitations and provisions of this Limited Warranty." The term "faulty materials or workmanship" is defined as "materials or workmanship which are not in compliance with the applicable building codes regulating construction in the Commerce Bluff One Condominiums as of the date of issuance of the applicable building permits. Inspection by the governmental authority with jurisdiction will provide evidence of compliance." The term "latent defects" is defined as "only those defects which are not apparent at the time of the closing and/or completion of the Warrantor's work, but will become apparent and of which Warrantor is notified, in writing, before the expiration of the warranty."

¶14 The Limited Warranty is triggered only upon written notice to the Warrantor (Cornerstone) of the latent defects, which notice must be effected during the one-year Limited Warranty period. Peterson avers in her affidavit that she provided written notice of all of the defects about which she complains relating to items covered by the Limited Warranty. Cornerstone does not contest that Peterson provided notice of items about which she was unhappy; however, Cornerstone argues that because Peterson has not shown how any of these items complained of were building code violations, none of the items meet the definition of "latent defects" and, therefore, are not covered by the Limited Warranty.

¶15 At the second hearing on Cornerstone’s motion for summary judgment, after the trial court had provided Peterson with over sixty days to bring forth proof, in the form of expert testimony or otherwise, that the defects of which she complains were violations of the applicable building code, Peterson was unable to provide any evidence demonstrating that the defects Peterson was seeking to show were covered by the Limited Warranty and, therefore, that Cornerstone’s failure to “repair, replace, or pay [Peterson] the reasonable cost of repairing or replacing” any of the defects was a breach of the Limited Warranty. The definition of latent defect specifically included that the defect must be a violation of the applicable building code. Based upon our review of the record, Peterson has not shown, by way of expert testimony or other evidence, that any of the alleged defects in her unit were the result of violations of the City of Milwaukee building code. Because Peterson has failed to establish that any additional latent defects exist, we determine that, as a matter of law, Peterson has failed to satisfy her burden to show that a genuine issue exists for trial. *See Strasser*, 236 Wis. 2d 435, ¶32. Accordingly, we determine that summary judgment was proper. *See Jensen v. School Dist. of Rhineland*, 2002 WI App 78, ¶12, 251 Wis. 2d 676, 642 N.W.2d 638; *Hunzinger Constr. Co.*, 179 Wis. 2d at 291-92.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

