UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHELLE IRIZARRY; VALERIE WILLIAMS; JOANNE NIXON; JOANN ROBINSON; and BRANDON LITT,

Plaintiffs,

v. Case No. 6:19-cv-268-Orl-37EJK

ORLANDO UTILITIES COMMISSION; LENNAR CORPORATION; U.S. HOME CORPORATION; AVALON PARK GROUP MANAGEMENT, INC.; BEAT KAHLI; and BORAL RESOURCES, LLC,

Defendants.

ORDER

Defendants U.S. Home Corporation and Lennar Corporation (collectively, "**Lennar**") move for summary judgment.[1] (Doc. 88 ("**Motion**").) Plaintiffs responded (Doc. 90), and Lennar replied (Doc. 92). On review, the Motion is denied.

I. BACKGROUND[2]

Plaintiffs are homeowners in suburban residential communities of homes built by Lennar. (Doc. 43, ¶¶ 21–25, 29, 32.) Plaintiffs allege these homes were constructed with

[1] Lennar Homes, LLC was named in the Motion but has been dismissed from the case. (Docs. 79, 88.)

[2] The facts recited here may not be the "actual" facts of the case. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). Rather, they reflect Plaintiffs' "best case"—the Court must consider the facts in the light most favorable to Plaintiffs as the nonmoving party. *See Robinson v. Arrugueta*, 415 F.3d 1252, 1257 (11th Cir. 2005); *see also Walker v. City of Riviera Beach*, 212 F. App'x 835, 837 (11th Cir. 2006).

contaminated building materials, on contaminated soil, the source of which is the nearby Curtis H. Stanton Energy Center. (*Id.* ¶¶ 1, 314–316.) Their homes were built at various times between 1997 and 2001. (Doc. 88, pp. 2–3.) They say this pollution has caused harm by reducing their property values, diminishing the enjoyment of their homes, and raising the incidence of cancer in the area. (Doc. 43, ¶¶ 5, 6, 156.) For this, Plaintiffs allege Lennar is strictly liable under Florida Statute § 376.313, the Water Quality Assurance Act ("**WQAA**"). (*Id.* ¶¶ 312–19, 328–35.) The Florida Legislature enacted the WQAA in 1983, finding:

> the preservation of the quality of surface and ground waters is of prime public interest and concern to the state in promoting its general welfare, preventing disease, promoting health, and providing for the public safety and that the interest of the state in such preservation outweighs any burdens of liability imposed by the Legislature upon those persons engaged in storing pollutants and hazardous substances and related activities.

Fla. Stat. § 376.30(4). The WQAA creates a strict-liability cause of action, allowing private parties to sue for damages caused by pollution. Fla. Stat. § 376.313. Plaintiffs seek damages and injunctive relief including the removal of all contaminants from their homes. (Doc. 43, p. 76.)

Lennar moves for summary judgment, arguing Florida's ten-year statute of repose under § 95.11(3)(c) precludes Plaintiffs' suit. (Doc. 88.) Florida applies a default statute of limitations, Florida Statute § 95.11, to all causes of action other than for the recovery of real property. *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994). Section 95.11(3)(c) has a ten-year statute of repose for "[a]n action founded on the design, planning, or construction of an improvement to real property." Fla. Stat. § 95.11(3)(c). Plaintiffs argue statutes of repose

or limitations are not available as defenses by the express terms of the WQAA and that, even if they were, the proper limitations period is found in Florida Statute § 95.11(3)(f). (Doc. 90). This provision applies to "[a]n action founded on a statutory liability" and applies a four-year statute of limitations without a statute of repose. Fla. Stat. § 95.11(3)(f). Briefing complete (Docs. 88, 90, 92), the matter is ripe.

II. ANALYSIS

The parties devote the majority of their briefing to whether the WQAA permits any defense to be asserted to a pollution claim beyond those specifically enumerated in the statute.[3] (*See* Doc. 88, pp. 8–18; Doc. 90, pp. 11–19.) This question, interesting as it is, impacts the disposition of the Motion only if the defenses in § 95.11 are available, notwithstanding the limiting language of the WQAA, *and* the relevant limitations period is § 95.11(3)(c) and not § 95.11(3)(f) because only § 95.11(3)(c) contains a statute of repose. *See* Fla. Stat. § 95.11. Because the proper statute of limitations here is § 95.11(3)(f), the availability of defenses to the WQAA is best left for the Florida state courts to determine. For our purpose, we will assume defenses are available.

"Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts." *CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014). Statutes of limitations ordinarily create a deadline to sue based on when a cause of action accrues. *Id.* But statutes of repose run "from the date of the last culpable

[3] The section creating a private cause of action under the WQAA states the "only defenses to such cause of action shall be those specified in § 376.308." Fla. Stat. § 376.313. Section 376.308 does not have a statute of limitations. *See* Fla. Stat. § 376.308.

act or omission of the defendant." *Id.* at 8. Statutes of limitations are subject to equitable tolling. *Id.* at 9. Statutes of repose are not. *Id.*

Lennar argues § 95.11(3)(c)'s ten-year statute of repose applies because this is "[a]n action founded on the design, planning, or construction of an improvement to real property." Fla. Stat. § 95.11(3)(c); (Doc. 88, pp. 5–8). And because Plaintiffs did not sue within ten years, their claims are barred.[4] (Doc. 88, pp. 7–8.) Plaintiffs counter that § 95.11(3)(f) applies because this case is "[a]n action founded on a statutory liability." Fla. Stat. § 95.11(3)(f); (Doc. 90, pp. 3–8). Section 95.11(3)(f) has a four-year statute of limitations, but no statute of repose. Fla. Stat. § 95.11(3)(f). And Plaintiffs say § 95.11(3)(f)'s four-year statute of limitations hasn't run, so their claims can proceed. (Doc. 90, p. 6.)

Because a statute, rather than common law, creates Plaintiffs' cause of action, § 95.11(3)(f) applies. Fla. Stat. § 95.11(3)(f); *see Scott v. Otis Elevator Co.*, 524 So. 2d 642, 643 (Fla. 1988) (finding § 95.11(3)(f) applied where a statute, rather than common law, created the cause of action); *Hullinger v. Ryder Truck Rental, Inc.*, 548 So.2d 231, 233 (Fla. 1989) (same). The WQAA created a new cause of action that did not exist at common law. *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20, 24 (Fla. 2004) ("[S]ection 376.313(3) departs from the common law by creating a damages remedy for the non-negligent discharge of pollution without proof that the defendant caused it."). Plaintiffs

[4] Lennar says Plaintiffs did not sue within ten years of four possible triggering dates: the date of possession; the date of issuance of a certificate of occupancy; the date of abandonment of construction; or the date of completion of the contract. (Doc. 88, p. 7.) Plaintiffs do not address this argument or dispute these dates. (*See* Doc. 90.)

allege Lennar is strictly liable under the WQAA, not common law. (*See* Doc. 43, ¶¶ 312–19, 328–335.) So § 95.11(3)(f) applies to Plaintiffs' WQAA claims. *See Clark v. Ashland, Inc.*, No. 2:13-cv-794-FtM-29DNF, 2015 WL 1470657, at *4 (M.D. Fla. Mar. 31, 2015) (applying § 95.11(3)(f) to a WQAA claim).

Lennar, arguing § 95.11(3)(c) should apply, contends Plaintiffs' claims are founded on Lennar's construction and development of their properties. (Doc. 88, pp. 5–8.) Not all cases that address improvement to property are treated equally under § 95.11. Some are founded on construction. *See, e.g.*, *Dubin v. Dow Corning Corp.*, 478 So.2d 71, 72 (Fla. 2d DCA 1985) (applying § 95.11(3)(c) to a suit over a leaky roof). And others are founded on statutory liability. *See, e.g.*, *Clark*, 2015 WL 1470657, at *1, 4 (applying § 95.11(3)(f) to a WQAA suit involving "dredge and fill activities" on a commercial farm). Plaintiffs' only cause of action against Lennar is under the WQAA. (*See* Doc. 43, ¶¶ 312–19, 328–35.) Lennar seizes on the focus of the harm—real property—rather than the cause of the injury—pollution. True enough this suit involves construction,[5] but the source of the claim has its foundation in statute. Plaintiffs seek to impose statutory liability on Lennar under the WQAA. (*See* Doc. 43, ¶¶ 312–19, 328–35); *see also, e.g.*, *State of Fla. Dep't of Envtl. Prot. v. Fleet Credit Corp.*, 691 So. 2d 512, 514 (Fla. 4th DCA 1997) (addressing a different Florida environmental statute and explaining in the environmental context "the crux of

[5] Lennar quotes this Court's motion to dismiss order (Doc. 80) to argue Plaintiffs have already said their claims are founded on construction. (Doc. 88, p. 6.) The Court said Lennar's "development and construction-related activities" are what Plaintiffs contend created the pollution. (*Id.*) This does not mean construction founded Plaintiffs' claims, as explained above.

the . . . claim is to abate the current hazard, not [the defendant's] action on the property"). As this case is founded on statutory liability, § 95.11(3)(c) is inapplicable.

Applying § 95.11(3)(f), it's undisputed that the limitations period for pollution does not run until the harm is abated. (*See* Doc. 92, pp. 5–6); *see also State of Fla. Dep't of Envtl. Reg. v. CTL Distribution, Inc.*, 715 So. 2d 262, 264 (Fla. 3d DCA 1998); *Fleet Credit*, 691 So.2d at 514. Plaintiffs allege ongoing pollution, so the statute of limitations in § 95.11(3)(f) has not run. (*See* Doc. 43, ¶ 156.) As no limitations period bars Plaintiffs' claims, summary judgment is inappropriate.

III. CONCLUSION

It is **ORDERED AND ADJUDGED** that Defendants, U.S. Home Corporation, Lennar Corporation, and Lennar Homes, LLC's Dispositive Motion for Summary Judgment (Doc. 88) is **DENIED**.

DONE AND ORDERED in Chambers in Orlando, Florida, on April 3, 2020.

ROY B. DALTON JR.
United States District Judge

Copies to:
Counsel of Record