

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1091



STEPHEN W. BINNING AND KRISTEN BINNING

VERSUS

JERRY BOUDINOT CONSTRUCTION, L.L.C., ALL STATE
PLASTERING, INC., PENN AMERICA INSURANCE COMPANY
AND XYZ INSURANCE COMPANY

DATE OF JUDGMENT: DEC 21 2011

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 593,235, SEC. 23, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT, JUDGE

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: **AFFIRMED.**

Tandy R. Conner

KUHN, J.

Plaintiffs-appellants, Stephen W. and Kristen Binning, appeal the trial court's judgment, which sustained a peremptory exception raising the objection of peremption asserted by defendant-appellee, Jerry Boudinot Construction, LLC. (Boudinot Construction), and dismissed the Binnings' claims against the home builder under the New Home Warranty Act (NHWA). We affirm.

Nearly five years after Boudinot Construction built the Binnings' home in the Wayside Subdivision in East Baton Rouge Parish, they discovered several soft, rotten sections in the exterior walls of their home apparently caused by moisture trapped under the stucco that allegedly had not been sealed properly. An estimate of repair to the stucco was over \$65,000. The Binnings aver that after further investigation, the home showed systematic stucco failure. On August 4, 2010, the Binnings filed this lawsuit naming Boudinot Construction, among others, as a defendant. Boudinot Construction filed an exception of peremption that the trial court sustained. The Binnings appeal the judgment that the trial court subsequently signed, which dismissed their claims against Boudinot Construction.

The NHWA provides the exclusive remedies, warranties, and preemptive periods as between a builder and an owner relative to home construction and no other provisions of the law relative to warranties and redhibitory vices and defects apply. La. R.S. 9:3150. Thus, Louisiana courts have consistently recognized the NHWA's exclusive application to claims between a builder and an owner relative to construction defects in a new residence. *Carter v. Duhe*, 2005-0390 (La. 1/19/06), 921 So.2d 963, 970.

Every builder warrants to the owner that one year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards; and five years following the warranty commencement date, the home will be free from major structural defects due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards. La. R.S. 9:3144A(1) & (3). An action to enforce any warranty provided under the NHWA is subject to a preemptive period of thirty days after the expiration of the appropriate time period provided in R.S. 9:3144. La. R.S. 9:3146. Under the NHWA, an owner's remedy for construction defects in a new residence comes into existence on the "warranty commencement date," which is defined as "the date that legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, whichever occurs first." See La. R.S. 9:3143(7).

The parties stipulated that the Binnings moved into their new home in October 2004. Thus, to the extent that moisture trapped under the improperly sealed stucco constitutes a defect in materials or workmanship, the Binnings' claims against Boudinot Construction are clearly preempted under the NHWA as more than thirty days and one year has elapsed since the warranty commencement date. See La. R.S. 9:3146, 3144A(1) & 3143(7).

The record does not bear out whether the defects in the stucco, alleged to have been "systematic," were major structural defects sufficient to fall within the

ambit of the five-year warranty provided under La. R.S. 9:3144A(3).¹ But assuming *arguendo* that they were, as the trial court did, we likewise conclude that under the plain language of the NHTWA, the Binnings' claims against Boudinot Construction are preempted having been asserted more than thirty days and five years after the warranty commencement date. See La. R.S. 9:3146, 3144A(3) and 3143(7); see also *Barnett v. Watkins*, 2006-2442 (La. App. 1st Cir. 9/19/07), 970 So.2d 1028, 1034 n.3, writ denied, 2007-2066 (La. 12/14/07), 970 So.2d 537 (the "warranty commencement date" is the operative date for determining which version of the NHTWA applies).

DECREE

For these reasons, the trial court's judgment sustaining the builder's exception of preemption and dismissing the Binnings' claims against Jerry Boudinot

¹ Under La. R.S. 9:3143(5), "major structural defects" are defined as:

[A]ny actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable:

- (a) Foundation systems and footings.
- (b) Beams.
- (c) Girders.
- (d) Lintels.
- (e) Columns.
- (f) Walls and partitions.
- (g) Floor systems.
- (h) Roof framing systems.

Construction is affirmed.² Appeal costs are assessed against Stephen W. and Kristen Binning.

AFFIRMED.

² Although in their appellate brief, the Binnings make assertions about the constitutionality of the time limitation of La. R.S. 9:3144A(3), which by La. Acts 2004, No. 45, § 1, reduced the warranty period from seven to five years, they neither pleaded with particularity nor asserted the issue before the trial court. Thus, it is not properly before this court on appeal. See *Istre v. Meche*, 2000-1316 (La. 10/17/00), 770 So.2d 776, 779.