Not Reported in F.Supp., 1990 WL 302693 (S.D.Fla.)
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Only the Westlaw citation is currently available.

United States District Court, S.D. Florida.
William R. DANIELL, and Sarah E. Daniell, Plaintiffs,
v.
BAKER-ROOS, INC., a foreign corporation, and Baker (Hugh J.) and Company, a foreign corporation, Defendants.
No. 89-14100-CIV-RYSKAMP.

July 19, 1990.

Clifford M. Miller, Miller & Miller, Vero Beach, Fla., for plaintiffs.

Douglas D. Rozelle, Jr., Stewart, Call, Byrd and Rozelle, Palm Beach, Fla., for defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

RYSKAMP, District Judge.

***1** THIS MATTER is before the court on defendants' motion for summary judgment, filed March 19, 1990, and on plaintiffs' motion to continue discovery pending a ruling on that motion, filed March 30, 1990. Plaintiffs brought this products liability action against the manufacturer of scaffolding equipment, Baker-Roos, Inc. and its successor-in-interest Baker (Hugh J.) and Company, an Indiana corporation. Plaintiffs alleged that defendants manufactured a scaffold with a faulty safety device, which caused an accident on April 1, 1989 that severely injured plaintiff William R. Daniell. Defendants submitted an affidavit to show that Baker-Roos, Inc. manufactured and delivered the scaffolding to the original purchaser sometime before 1972. Plaintiffs offered no contravening evidence.

Defendants move for summary judgment in reliance on Florida's repealed statute of repose, which provided that "actions for products liability ... must be begun within the period prescribed in this chapter ... but in any event within 12 years after the date of delivery of the completed product to its original purchaser ... regardless of the date the defect in the product ... was or should have been discovered." Fla.Stat. section 95.031(2) (repealed 1986). Defendants argue that the repealed statute of repose defeats claims that arose after repeal became effective on July 1, 1986, if the twelve-year limitation expired before repeal. Defendants claim that the statute of repose, although now repealed, created a vested interest to be free from litigation.

The Supreme Court of Florida in *Melendez v. Dreis and Krump Mfg. Co.*, 515 So.2d 735 (Fla.1987), held that the legislative amendment abolishing the statute of repose in products liability actions did not apply retrospectively to an action that arose before the effective date of the amendment. *See also Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1371 (11th Cir.1988), *cert. denied*,109 S.Ct. 68, 102 L.Ed.2d 44 (1988). Notwithstanding, *Melendez* does not stand for the proposition that the repealed statute of repose bars an action that arose *after* the effective date of the amendment. By holding that the repeal does not operate retroactively, the Florida Supreme Court in *Melendez* merely provided a definite date, the effective date of the amendment, to break cleanly with past policy regarding repose in products liability actions. Only this reading gives effect to the plain meaning of the amendment repealing the statute of repose, which provides:

Actions for products liability ... under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), ...

Fla.Stat. section 95.11(3). *See also Regency Wood Condominium, Inc. v. Bessent, Hammack & Ruckman, Inc.*, 405 So.2d 440-443, 444 (Fla. 1 Dist.App.1981) (interpreting legislation extending statute of limitations as retroactive to actions arising after the effective date of the statute, applied to "any action ... which a condominium association ... may have ..."). The Florida legislature could not have intended for products liability actions to be exempt from the amendment for an indefinite, and conceivably endless, time

period.

***2** Defendants imply that even if statutory language and judicial interpretation are not in their favor, the Florida legislature cannot foreclose application of the statute of repose because it created a vested right that could not be divested. Defendants do not allege whether this "vested interest" is protected by state or federal law.

Cases interpreting Florida law indicate that a statute of repose does not create a vested interest. In any event, it is clear that "[t]o be vested a right must be more than a mere expectation based on an anticipation of the continuance of existing law." *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F.Supp. 1144, 1149 (S.D.Fla.1986) (*quoting In re Will of Martell*, 457 So.2d 1064, 1067 (Fla. 2 Dist.Ct.App.1984)), *aff'd*, *Eddings v. Volkswagenwerd, A.G.*, 835 F.2d 1369 (11th Cir.1988). The circumstances of this case when viewed in light of the statute's history render defendants' claim meritless. Significantly, the statute of repose did not exist when the allegedly defective scaffolding was delivered; it was not enacted until 1974. Even after the statute was enacted, its history was volatile and scarcely could have created an expectation that it would continue to protect defendants. The Florida Supreme Court first declared that the statute denied access to the courts in violation of the Florida constitution by terminating a cause of action before it arose. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla.1980). Six years later, the court reversed itself and ruled that the statute of repose did not violate the Florida constitution. *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla.1985). The following year, the Florida legislature amended the statute to repeal the portion applicable to products liability actions. Considering the history of the statute and the facts of this case, defendants lacked even a reasonable expectation that the statute would apply to plaintiffs' claim, much less a vested interest in the statute's protection.

Florida cases involving the extension of statutes of limitations do not mandate a different conclusion, because of the fundamental difference between a statute of limitations and a statute of repose, which can terminate a plaintiff's right to sue before a claim arises. Furthermore, the court has located no Florida cases that involve the extension of a statute of limitations after the statutory period expired. *See Corbett v. General Engineering & Machinery Co.*, 37 So.2d 161, 162 (Fla.1948) (as statutory limitations period had not expired, there was no vested right); *Mazda Motor of America, Inc. v. S.C. Henderson and Sons, Inc.*, 364 So.2d 107, 108 (Fla. 1 Dist.Ct.App.1978) (same).

The Florida Supreme Court in *Melendez* held that the statute of repose applies to an action accruing before the date of repeal. Absent law to the contrary, this court must assume that the court in *Melendez* drew a line between cases barred by the statute of repose and cases not barred, in accordance with Florida law. This court is persuaded that the plain meaning of the statutory amendment and the interpretation of that amendment in *Melendez* require that repeal of the statute of repose apply to all actions arising after the effective date of the amendment to section 95.031(2).

***3** Beyond Florida law, defendants offer no authority that indicates federal law protects a vested right to be free from litigation. This court holds that federal law offers no such protection. *See Wesley Theological Seminary v. U.S. Gypsum*, 876 F.2d 199 (D.C.Cir.1987) (statute of repose held to be like statute of limitations, which does not create a protected interest). Accordingly, after consideration of defendants' motion, and the record in this matter, it is hereby:

ORDERED and ADJUDGED that defendants' motion for summary judgment is DENIED; it is also:

ORDERED and ADJUDGED that plaintiffs' motion for leave to continue discovery before the court's ruling on the motion for summary judgment is DENIED as moot. This case remains set for trial for the two-week period beginning October 1, 1990.

S.D.Fla.,1990.
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