

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7410

(Summary Calendar)

PEOPLES BANK,

Plaintiff-Appellant,

versus

MOSLER, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA 91-573-G-R)

(December 21, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Peoples Bank ("Peoples") appeals summary judgment of its claims against Mosler, Inc. ("Mosler") for actual and punitive damages arising from the burglary of a night depository at the West Biloxi branch of Peoples. Finding no genuine issue of material fact, we affirm.

Peoples acquired an abandoned gas station and converted the building into its Biloxi branch. Mosler manufactured and sold the

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Mosler American Dual Depository System ("MADDS"). Mosler sold the system to Peoples on September 26, 1978 and installed the system on May 5, 1979. The night depository system included several integral parts, including a safe which resided inside the bank and received the deposits, a chute to transport the deposits from the entryway to the safe, and a "head" with a face plate. The head was located within the exterior wall of the bank and allowed a customer to place a deposit into the system. Peoples occupied the building for use as a bank on July 25, 1979.

Sometime between December 8 and December 10, 1990, unknown persons forced open the face plate of the night depository and removed the deposits which were inside the safe. Peoples filed suit against Mosler, claiming that the burglary was caused by (a) a defective and unreasonably dangerous design; (b) Mosler's negligence, including its failure to warn Peoples of latent defects;¹ and (c) the breach of an implied warranty.²

¹ A pattern of break-ins of night depository systems (including a number of Mosler systems) began in 1987, with twenty-three break-ins occurring in the southeastern section of the United States. Mosler was allegedly aware of this criminal activity, yet failed to inform Peoples.

² When Mosler and Peoples contracted for the installation of the night depository system, Mosler allegedly made express warranties that the system offered maximum security and had no points of vulnerability.

Mosler moved for summary judgment on the basis of the Mississippi statute of repose,³ see Miss. Code Ann. § 15-1-41 (West Supp. 1991), which provides:

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property . . . against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, which occurs first, of such improvement by the owner thereof.

Finding that the night depository system was an improvement to property and that more than six years had passed since Peoples first occupied the building with the system installed, the district court concluded that § 15-1-41 barred Peoples' claims. The district court therefore granted summary judgment for Mosler, from which Peoples filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes

³ We apply Mississippi substantive law to this diversity suit as Mississippi is the forum state. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71-80, 58 S. Ct. 817, 818-23, 82 L. Ed. 1188 (1938).

demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

Peoples raises several challenges to the district court's summary judgment. Peoples first contends that the night depository system which Mosler manufactured and installed was not an improvement to real property. We have defined the term "improvement" to "refer to a permanent addition that increases the value of the property and makes it more useful." *Trust Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1152 (5th Cir. 1992) (attribution omitted) (applying Mississippi law). There is little doubt that the night depository system increased the value of the bank building and made it more useful by allowing customers fuller access to the bank's services. The only evidence which Peoples submitted on this point were the conclusory statements contained in the affidavit of its president, Chevis Swetman. Because conclusory statements are insufficient to defeat a motion for summary

judgment, see *Anderson*, 477 U.S. at 256-57, 106 S.Ct. at 2514, we reject Peoples' first contention on appeal.

Peoples also contends that § 15-1-41 does not apply since it falls within the class of entities protected under the statute. Peoples' argument misconceives the exclusion language of § 15-1-41, which states that the limitation applicable to actions arising from deficiencies in improvements to real property "shall not apply to any person, firm or corporation in actual possession and control as owner . . . of the improvement at the time the defective and unsafe condition of such improvement cause[d] injury." The intent behind this language is to prevent owners such as Peoples from invoking the statute of repose as a defense in a personal injury premises liability case. The exclusion language does not prohibit contractors such as Mosler from invoking the statute in an action brought against them by an owner who is in possession of the premises. See *Trust*, 950 F.2d at 1150-52 (applying Mississippi statute of repose in an action against a contractor brought by a bank in possession of the premises); *Reich v. Jesco, Inc.*, 526 So. 2d 550, 553 (Miss. 1988) (recognizing that § 15-1-41 exempts architects and contractors but excludes similarly situated persons such as owners and suppliers). We therefore reject his second contention on appeal.

Peoples further contends that § 15-1-41 does not apply to its cause of action based upon Mosler's failure to warn of alleged latent defects. Section 15-1-41 states that "no action may be brought to recover damages for injury to property . . . arising out

of any deficiency in the design . . . or construction of an improvement to real property." Peoples cites no authority for its proposition that a failure-to-warn cause of action is not barred by § 15-1-41's all-encompassing language. In fact, we previously rejected the "contention that section 15-1-41 applies to some claims, but not others." *Trust*, 950 F.2d at 1151 n.13. We therefore reject his third contention on appeal.⁴

Lastly, Peoples contends that § 15-1-41 does not apply because Mosler fraudulently concealed the alleged latent defects in its night depository system. "To establish fraudulent concealment in [Mississippi], there must be shown some act or conduct of an *affirmative* nature designed to prevent and which does prevent discovery of the claim." *Reich*, 526 So. 2d at 552 (emphasis added). The only evidence submitted by Peoples on this point were documents (e.g., Mosler's correspondence and an FBI report) which showed that Mosler knew of alleged defects in MADDs and failed to apprise Peoples. This evidence, however, neither shows nor creates a genuine issue of fact regarding whether Mosler took an *affirmative* act designed to prevent discovery of the alleged defects. We therefore reject his final contention on appeal.

For the foregoing reasons, we AFFIRM.

⁴ To the extent that Peoples argues that the six-year limitations period should not begin to run until the discovery of latent defects, we note that "[t]he limitations period applies in the case of deficiencies patent or latent and the clock starts ticking on date of occupancy." *Reich*, 526 So. 2d at 552.