September 19, 2017

NJ Supreme Court Clarifies When Causes of Action for Construction Defects Accrue

The New Jersey Supreme Court recently held that the statute of limitations for construction defects begins to run when any owner in the chain of title knew or should have known of the defects. The case centered on The Palisades at Fort Lee, a condominium project originally developed as a rental property.

Palisades A/V Acquisitions Co. LLC (A/V) developed the condominium project in question. Work was substantially completed on May 1, 2002, and A/V operated the project as a rental property for approximately two years. In 2004, the property was sold and the new owner began the process of converting the property to condominiums, acting as the sponsor of the conversion.

In connection with the conversion process, an engineering report dated October 1, 2004, (the 2004 Report) was prepared that determined the structure to be in generally good condition. The conversion process also included the establishment of The Palisades at Fort Lee Condominium Association (the Association), which was responsible for the administration, operation and management of the condominium, common elements and its facilities. The Association acted through its board of directors initially, and the sponsor had control of membership of the board.

Pursuant to the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to 38, as the units are conveyed, the board members selected by the sponsor are gradually replaced by members selected by the unit owners, with full control of the board being transferred to the unit owners once 75 percent of the units are sold. This occurred in 2006. The Association then retained its own engineering firm to perform an engineering evaluation of the property. The new report (the 2007 Report) was presented to the Association's board on June 13, 2007, and it identified a number of construction defects. In 2009, the Association filed a complaint, which was subsequently amended a number of times, against a number of parties, including contractors who performed construction work on the property.

Certain subcontractor defendants filed a motion for summary judgment, arguing that the complaint was not filed within the time required by N.J.S.A. 2A:14-1. The statute requires that an action to recover on a contract claim must be commenced within six years after the cause of action has accrued. The Association argued that the discovery rule, which provides that a cause of action does not accrue until an injured party discovers or reasonably should have discovered that it has a basis for a claim, applied and that the Association had timely filed within six years of discovery of a basis for its claim. The threshold issue to be decided, then, is when did the Association's claim accrue?

The Law Division judge held that in a construction case, the cause of action accrues at the time of substantial completion of the work and that as long as a reasonable amount of time remains in the limitations period to commence an action, the limitations period will not be extended by the discovery rule. The trial court held that since the results of both the 2004 Report and the 2007 Report were known to the Association within the six-year limitations period and known within a reasonable time to commence an action before the expiration of the limitations period, the discovery rule did not apply and the cause of action accrued at substantial completion of the building on May 1, 2007. Therefore, the Association's claim was time-barred.

The Appellate Division, in reversing the trial court, held that the discovery rule did apply. The Appellate Division held that the cause of action did not accrue until the owners took full control of the board and "the Board had sufficient facts upon which to assert actionable claims against defendant contractors." *Palisades at Fort Lee Condo. Ass'n v. 100 Palisade, LLC*, 2016 N.J. Super. Unpub. LEXIS 193, *14 (N.J. Super. Ct. App. Div. 2016). The Appellate Division held that it was not until the 2007

Report was received that the Association had the facts necessary to support an actionable claim and that the cause of action accrued at that time.

The Supreme Court, however, held that neither the trial court nor the Appellate Division applied the correct legal standard. The Supreme Court held that a "construction-defect lawsuit must be filed within six years from the time that the building's original or subsequent owners first knew or, through the exercise of reasonable diligence, should have known of the basis for a cause of action." *Palisades at Fort Lee Condo Ass'n v. 100 Palisade, LLC*, 2017 N.J. LEXIS 845, *11-12 (N.J. 2017). The court went on to note that a "subsequent owner stands in no better position than a prior owner in calculating the limitations period. If a prior owner knew or should have known of a basis for a construction-defect action, the limitations period began at that point." *Id*. at 12. By way of example, the court posited "if the building's original owner does not file a construction-defect lawsuit within the six-year limitations period from the accrual of an actionable claim, the purchaser taking title has no right to revive a lapsed claim." *Id*. The court noted that although generally a cause of action in a construction-defect claim accrues upon substantial completion of the building, there may be circumstances where the discovery rule will result in a cause of action accruing at a different time. The application of the discovery rule, however, is not impacted by either (1) a change in ownership, since a subsequent owner takes only the interest held by the prior owner, or (2) the amount of time left in the limitations period as the trial court had held.

The court also took the opportunity to emphasize that the corollary 10-year statute of repose, N.J.S.A. 2A:14-1.1(a), begins at the date of the project's substantial completion and sets the outer limit for the filing of a construction-defect claim. In that regard, the court concluded that because the date of substantial completion of the project was May 1, 2002, the construction defect claims filed in 2009 were within the 10-year statute of repose and therefore those claims were not time-barred.

Pursuant to the court's decision in *Lopez v. Swyer*, 62 N.J. 267 (1973), the court remanded the case to the trial court for a so-called *Lopez* hearing to determine when the accrual clock actually commenced for the construction-defect claims.

The upshot of the Supreme Court's decision is that a construction-defect lawsuit may be time-barred even if based on actual knowledge obtained by the owner as early as possible and brought within six years of obtaining such knowledge if a prior owner either knew or should have known of the defect and no action was brought within the statute of limitations period. While this will require developers to diligently pursue claims, it will also protect builders from a new limitations period being triggered with each change in ownership or control of a property.

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