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REAL ESTATE

Out of Time: Applying the SOL in Condo Construction Defect Cases

Why it is so tricky in the condominium context

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The purchase of a home is one of the biggest investments in a person's life. Condominium living is an especially attractive form of home ownership, where maintenance and repair of common property, including roofs, exterior walls, exterior cladding, lawns and streets, are routinely performed by an association. Most buyers who purchase condominium units at a premium are attracted to the allure of "new construction" but may not realize the costly problems hidden behind the walls.

Homeowners have no way of discovering the nature and extent of latent defects in construction until an association hires a professional engineering firm to conduct a preliminary investigation of the property. Prior to transition (the point in time when the developer transfers control of the board of trustees to the unit owners), the association is run by the developer, who has no intention or incentive to perform the duties of homeowner-controlled boards (i.e., hire forensic engineers, discover construction defects, bring suit, etc.).

However, the Condominium Act requires the developer to retain control of the association until it sells 75 percent of the units. Depending on the market conditions, the number of units and the developer's sales efforts, this can take a few months to several years. During that period of time, the developer retains majority control of the association, which is the only entity with exclusive right to test, repair or otherwise disturb the common elements.

The unique dynamic of condominium development and control has therefore made navigating the legal waters of the statute of limitations in construction defect cases tricky and unreliable. The statute of limitations, unlike the statute of repose, is mobile and not tethered to any one event. Its starting marker is determined on a case-by-case basis, turning on the plaintiff's actual or constructive knowledge of injury and fault.

Accrual marks the beginning of the limitations period. N.J.S.A. 2A:14-1. In the negligence setting, accrual has always been understood to occur not when the wrongdoing occurs, but rather when the resulting injury or damage occurs. In the context of hidden, latent and not readily apparent injuries, the accrual of a plaintiff's cause of action is delayed (not tolled) until

the injured party discovers, or through the exercise of reasonable diligence and intelligence should have discovered, his or her injury.

Defendants in construction defect cases have always argued that the timeliness of an association's complaint under the statute of limitations should be measured from the date of substantial completion. Defendants can latch on to language from noncondominium cases decided in the context of contractual privity between a plaintiff property owner and a defendant contractor, submitting that an injured association has six years from substantial completion to bring suit. So long as there remains a "reasonable amount of time" within that six-year period to file suit after the injury is discovered, it makes no difference when the association discovers its injury during that initial six-year period.

While completely inimical to common sense and established law, this argument nevertheless finds traction in certain cases, such as that of the Palisades in Fort Lee, a 40-story, 538-unit condominium tower that started out as an abandoned parking garage in 1977. After it was acquired in 2000, the owner hired a general contractor to finish building the 16-story parking deck and construct a 30-story residential tower on top. Construction of the tower was substantially completed in May 2002, and it was used as an apartment building over the next two years. In June 2004, the building was sold to a sponsor who converted the apartment building into condominiums and put the individual units on the market.

The following year, the Palisades Condominium was formally registered with the Department of Community Affairs, and the sponsor completely controlled the Palisades board until it sold 75 percent of the condominium units almost two years later. A year later, in 2006, the sponsor transitioned control of the board to the unit owners, giving them, for the first time, the right to control and investigate the common elements. The new board wasted no time in hiring an engineering firm to perform site inspections and evaluate the property for deficiencies. After an engineering report was prepared and forwarded in 2007, and settlement talks and negotiations proved fruitless, the board filed a lawsuit against the sponsor in March 2009.

During the pendency of the litigation, several defendants filed motions for summary judgment aimed at dismissing the association's claims as being time-barred by the six-year statute of limitations. They argued that since the statute of limitations commenced running upon substantial completion (2002), and the association discovered its injury within that statutory period (2006) with enough time to file suit (two years until 2008), but did not do so until after the limitations period expired (complaint filed in 2009), its claims were time-barred.

Their argument, however, was based on the premise that the statute of limitations ran against the association for four years while the association neither existed nor was controlled by the unit owners. By the time the owners gained the opportunity to investigate and discover their injury, their six-year statute of limitations had been truncated to two years. That nuance did not stop the trial court from agreeing with the defense and dismissing the association's claims.

An appeal ensued. Faced with these facts, the Appellate Division must now decide whether the limitations commenced at substantial completion, the time of transition, the time the defects were discovered or discoverable by the association, or some other time.

While the trigger for the statute of limitations is accrual, N.J.S.A. 2A:14-1, it is undefined in the statute, and can vary case by case. *Fernandi v. Strully*, 35 N.J. 434, 449 (1961). In order to avoid the "mechanical application" of the statute of limitations and the unfair results caused by it, our courts devised the "discovery rule." *Viviano v. CBS*, 101 N.J. 538, 546-47 (1986).

Contrary to a persistent misconception held by defense counsel, the application of the discovery rule is *not* contingent on discovering the injury outside the limitations period; rather the application of the discovery rule determines the *starting point* of the limitations period: "Under [the discovery rule], a cause of action does not *accrue* until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." *Lopez v. Swyer*, 62 N.J. 267, 272 (1973).

It follows, therefore, that in complex construction defect cases, the trigger for the statute of limitations is the moment in time when the defects become reasonably apparent or ascertainable to the association. *Terrace Condominium Association v. Midlantic National Bank*, 268 N.J. Super. 488, 502 (Law Div. 1993).

Defendants may rely on a series of cases that were decided in the context of an owner who hired a contractor and had the opportunity to discover his injury (i.e., deficiencies) at the time of substantial completion, and these defendants always argue that the statute of limitations begins to run against a condominium association at substantial completion. See *Mahony-Troast Constr. Co. v. Supermarkets General Corp.*, 189 N.J. Super. 325 (App. Div. 1983), and *Trinity Church v. Lawson-Bell*, 394 N.J. Super. 159 (App. Div. 2007). However, unlike in a condominium construction defect setting, those aforementioned cases involved substantial completion and discovery, or the ability to discover the injury, occurring on the same date, triggering the statute of limitations.

At substantial completion, the developer delivers the condominium common elements to itself vis-à-vis the developer-staffed board of trustees. Only when it sells 75 percent of the units in the condominium does control of the association shift from the developer to the unit owners, in turn making the association capable of ascertaining its injury and seeking legal redress. When the construction defects are discovered or discoverable to the homeowners, the legislatively granted six-year statute should begin to run.

Defendants, however, subscribe to the idea that if an injured plaintiff discovers his injury with time left to file suit within the limitations period as measured from substantial completion, then the plaintiff must rush to take legal action before the statute runs out. That concept was squarely addressed by our Supreme Court, who saw "no reason why it should be required of the plaintiff that he bring his action with any degree of 'expedition' after discovery of his cause of action." *Fox v. Passaic General Hosp.*, 71 N.J. 122, 126 (1976).

The New Jersey Supreme Court acknowledged that, in principle, an injured plaintiff should ordinarily have the benefit of the full statutory limitations period after accrual, "just as he does when discovery is contemporaneous with the actionable conduct." *Ibid.*

After acknowledging the general consensus that a "cause of action does not 'accrue' until discovery," the *Fox* court set out to address the "inherent capacity for prejudice to a defendant" when an injured plaintiff institutes an action "beyond the statutory period after the defendant's actionable conduct." *Id.* at 127-28. In no uncertain terms, the Supreme Court devised a threshold test for barring a complaint filed after the expiration of the limitations period (as measured from the date of the actionable event) when discovery of the injury occurred during the limitations period:

If a defendant can establish

(a) that the lapse of time between the expiration of the limitations period after the actionable

event and the date of institution of the suit "*peculiarly or unusually prejudiced the defendant*"; and

(b) that there was a reasonable time for plaintiff to institute his action between discovery of the cause of action and expiration of the limitations period after the actionable event,

then the cause of action *may* be dismissed on limitations grounds.

Id. at 128.

Whether the Appellate Division follows *Fox*, affirms the trial court's decision or takes a unique approach, condominium practitioners in New Jersey can rest assured that the decision will provide much needed guidance on evaluating the statute of limitations in construction defect cases. •

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