

New Jersey Appellate Division Ruling Resolves Disagreement Over Application of “Discovery Rule” to Construction Defect Claims by Condominium Associations

Elyse H. Wolff

Greenbaum, Rowe, Smith & Davis LLP Client Alert

February 2016

The Appellate Division of the Superior Court of New Jersey, on February 1, 2016, determined that the “discovery rule” tolls the six year statute of limitations within which a condominium association must file suit relating to construction defect claims. In *The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC, et al.*, the appellate court reversed and remanded the trial court’s grant of summary judgment in favor of various subcontractor defendants based on the statute of limitations. The appellate panel ruled that the condominium association’s construction defects claims did not begin to accrue until the individual unit owners had full control of the association’s board, regardless of when the project had been substantially completed.

Background

In 1998, Palisades A/V Acquisitions Co., LLC purchased the property, which at the time was occupied solely by a six-story unfinished and unused garage. The construction of additional floors of garage space, a residential tower and other facilities followed and was substantially completed in May 2002, although some work continued through October of that year. The property was operated as a rental for approximately three years.

Following acquisition of the property in 2004 by the sponsor, 100 Old Palisade, LLC, the property was converted to condominium ownership, and has since been known as The Palisades at Fort Lee Condominium. A Public Offering Statement (POS), including the requisite engineering report, was issued in January 2005. In July 2006, the unit owners acquired control of The Palisades Fort Lee Condominium Association, Inc., and the unit owner-controlled board hired an engineering firm to perform an extensive evaluation of the property. Approximately one year later, the engineer issued its report, which identified a variety of construction defects associated with the condominium.

In March 2009, the association filed a multi-count complaint against the sponsor, numerous contractors and others involved in the construction of the property, seeking damages for alleged defects in the design and construction of the condominium.

Published Articles (Cont.)

Following years of discovery and countless depositions, the remaining defendants moved for summary judgment seeking to dismiss the entirety of the association's complaint on the basis that it was time barred by the statute of limitations. The defendants argued that any claims relating to design and construction must have been brought by May 2008, six years from the time that construction was substantially completed.

The trial court agreed and noted that "nearly two years remained" for the association to file suit after the filing of the POS (which contained an engineering report that identified certain defects) and a year remained for the association to file suit after it received its own engineer's report.

Rejecting the association's argument that the "discovery rule" be applied, the trial court stated that if it were to be applied, the contractors could be "forever liable" for alleged construction defects notwithstanding the six year statute of limitations to file suit for tortious injury to property and contract claims. The trial court found that the statute of limitations began in May 2002 when the condominium was substantially completed, prior to the formation of the association and over five years before the unit owners took control of the association. Note that the trial court's decision would not have affected the sponsor, since any statute of limitations against the sponsor would not have commenced before the unit owners took control.

The trial court disregarded both the New Jersey Supreme Court decision in *Siller v. Hartz Mountain Associates*, which held that all claims concerning the common elements are properly and, indeed, are to be brought exclusively by the condominium association, and the Law Division decision of *Terrace Condominium Association v. Midlantic National Bank*, which held that a statute of limitations is tolled while the association is under developer control and while the developer is making repairs that would presumably correct the ongoing problems.

In last week's ruling, the Appellate Division reversed the trial court, finding that the six year statute of limitations did not begin to run until June 2007, when the unit owner-controlled association was provided with its engineer's transition report detailing the alleged construction defects. Noting that the statute of limitations generally begins to run from the date of substantial completion, the Appellate Division found that the "Discovery Rule" resulted in the plaintiff's causes of action not accruing until the unit owners took control of the board and had sufficient facts to assert actionable claims. The Appellate Division found that since the claims did not accrue until June 2007, the association had six years from that date to assert its claims.

Conclusion

Developers and contractors alike should be aware that despite the date of substantial completion of construction, an association's claims will not accrue until unit owners have full control and sufficient facts upon which to base its claims. In addition, as the Appellate Division noted, developers and contractors can rely on the Statute of Repose to limit the "Discovery Rule" and avoid being "forever liable." The Statute of Repose applies to suits "for damages to person and property arising out of the defective and unsafe condition of an improvement to real property" that are filed more than ten years after the issuance of the

Published Articles (Cont.)

certificate of substantial completion.

For additional information, please contact the author of this Alert, **Elyse H. Wolff**, a member of the firm's **Construction Practice Group**.