

Real Estate Title Insurance & Construction Law

Construction Defect Plaintiffs, Be Aware of the Statute of Repose

By Gene Markin

In New Jersey, in addition to the statute of limitations, litigants need to be conscious of the “statute of repose.” Statute-of-repose issues most often arise in the construction defect setting, where a lawsuit is brought more than 10 years after the construction of the subject building or development.

The statute of repose provides, in relevant part (at N.J.S.A. § 2A:14-1.1.), that:

No action ... to recover damages for any deficiency in the design, ... or construction of an improvement to real property, ... arising out of the defective and unsafe condition of an improvement to real property, ... shall be brought against any

Markin is an associate in Stark & Stark's construction litigation group, where he concentrates his practice in complex construction litigation claims on behalf of community associations, developers and other plaintiffs.

person performing or furnishing the design, ... or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction.

New Jersey courts have explained that in an important respect, a statute of repose is unlike the typical statute of limitations because the time within which suit may be brought under the statute of repose is entirely unrelated to the accrual of any cause of action. Unlike a statute of limitations, the statute of repose does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising. For that reason, injury occurring more than 10 years after the negligent act allegedly responsible for the harm forms no basis for recovery.

The statute requires that a complaint be filed within 10 years after the completion of the work that is complained of. In reviewing the history of the statute and the reasons behind it, New Jersey courts have determined that the legislature most

likely meant that when a person rendered any construction-related services on a particular job, finished them and walked away from the job site with the work accepted, that person could look back 10 years and one day “after the performance or furnishing of such services and construction,” and know there was repose from liability. *Welch v. Engineers, Inc.*, 202 N.J. Super. 387, 396 (App. Div. 1985). The *Welch* court went on to conclude that the legislature did not intend to let repose turn on serial cut-off dates accruing through various stages of the work, turning on fact-sensitive determinations and various analytic approaches to construction staging. The court fashioned a clear and simple rule for determining when the statute of repose starts to run against a contractor who performed work on a project: the statute begins to run on the final date the person claiming repose and immunity from suit furnishes any and all services or construction which it has undertaken at the job site.

Notably, the *Welch* court did not condone a piece-meal concept of repose where the contractor is involved in multiple phases of the undertaking. The importance of prohibiting piece-meal application of the statute of repose cannot be understated. Should it be allowed, contractors would overwhelm courts and plaintiffs with motions seeking to definitively parse their work into those items that were completed

more than 10 years before the date of the complaint and those that were completed after. In many instances, there are conflicting construction documents and lack of evidence to allow for an accurate division. Moreover, that difficulty is compounded in those instances where an item, such as a balcony or lake, is partially constructed at the 10-year relation back date. The door would be opened for contractors to incessantly argue, down to the nail, about what portions of a partially constructed item should be precluded by the statute.

Luckily, that is not the state of the law, and substantial completion is determined by the date upon which a contractor can leave the job site with all of his job responsibilities completed.

Unsafe Condition Requirement

A party seeking to avoid liability by asserting the defense of the statute of repose bears the initial burden of proof that the statute bars the claims asserted. In order for the statute of repose to bar a claim against those protected by the statute, the claim must be that a defective condition exists, *and* that the condition has resulted in an unsafe condition.

New Jersey's statute of repose expressly requires that a claim be barred only if it arises from deficiencies in the design, planning, supervision or construction of an improvement to real property, and relates "to a resulting condition which is itself defective and unsafe." The New Jersey Supreme Court, in *E.A. Williams Inc. v. Russo_Development Corp.*, 82 N.J. 160 (1980), specifically pointed out that the statute of repose "does not provide that *all* claims against planners, and designers, including surveyors, vanish after the passage of ten years from the performance of services." Rather, the Court expressly observed that the statute of repose "very pointedly includes ... as a significant limiting qualification" the requirement that a condition be both defective and unsafe. To illustrate the point of this limitation, the *E.A. Williams* Court cited a North Carolina case involving a leaky roof as an example

of a claimed defective condition that would not be barred by the statute of repose because the claim did not also involve an unsafe condition.

Our Supreme Court has specifically held that the "defective and unsafe" requirement of the statute of repose operates to limit the type of cases that fall under the statute. Thus, in determining which actions fall within the statute, a court must first determine, as a threshold issue, whether the claimed condition is one that can be classified as "defective and unsafe." The Supreme Court's holdings in *E.A. Williams* and *Newark Beth Israel Medical Center v. Gruzen and Partners*, 124 N.J. 357 (1991), illustrate this difference.

In *E.A. Williams*, the New Jersey Supreme Court was confronted with the issue of whether a surveying error, resulting in improper spacing between buildings, rose to the level of a dangerous and unsafe condition. The Court found that it did not, concluding that the surveying mistake created merely a "functional impairment with consequential economic losses entailed in its correction," a defect that may well "cause the owner dismay and economic injury." The Court recognized that the statute's major impetus was to limit liability of contractors and professionals, for damages from injury to persons and property, and consequences that ordinarily flow from unsafe conditions. The surveyor was not protected by the statute because a surveying error did not create a defective and unsafe condition.

In contrast, in the *Newark Beth Israel* case, the defendants (architects) were hired by the plaintiff (a hospital) to design an addition to the hospital. During the design phase, the defendants were aware that the plaintiff was planning to construct an addition to the structure. Twelve years later, when the plaintiff attempted to construct an addition, it learned of structural problems with the defendants' design. The architects asserted the statute of repose as a defense. The Supreme Court determined that the statute of repose did in fact apply to bar the plaintiff's action. The Court found that

even though the statute did not apply in the case of general functional impairments, the functional impairment in this case was directly related to an "unsafe condition" because additional stories made the building "dangerously" vulnerable to wind. The design created an unsafe condition that prevented the property from being used for its intended purposes. The Court distinguished its decision from *E.A. Williams* by finding that safety considerations dominated.

Therefore, plaintiffs have to be very conscious about the allegations they make in construction defect cases because there is a fine line between asserting damages and creating a foundation for the application of the statute of repose.

Subsequent Repairs Triggering a Separate Repose Period

While the statute of repose applies once a contractor substantially completes his scope of work, what happens if that same contractor comes back to do punch-list items or other repairs? The answer depends on the magnitude of work the contractor undertakes when he comes back.

Our Supreme Court has held that when a contractor performs repairs at some date after having fully completed its initial construction work, the statute of repose begins anew and allows the injured party to file an action against that contractor within 10 years of completion of the repair work for "for defects relating *solely* to that repair work". *Horosz v. Alps Estates, Inc.*, 136 N.J. 124, 133 (1994).

The statute of repose applies to improvements to real property; therefore, simple punch-list items completed after substantial completion do not extend the date of substantial completion. However, substantial repairs undertaken after substantial completion serve to create a new statute-of-repose period. The threshold issue will be whether the subsequent repairs constitute improvements to real property, and if so, the plaintiff will have a new statute-of-repose period to bring claims associated strictly with that repair work. ■