CONSTRUCTION INDUSTRY ALERT

5/27/15

Statute of Repose in Construction Cases Clear as Mud if Owner Does Not Pay

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On May 8, 2015, a Florida appellate court held that § 95.11 (3) (c) Florida Statutes, which establishes the statute of repose in construction cases, clearly and unambiguously provides that the period of repose does not begin to run until an owner timely makes final payment on the construction contract. In doing so, the court drew attention to a possible concern for contractors: whether the statute begins to run when the owner fails to timely make final payment. As explained below, if contractors handle the situation properly, they can probably limit their exposure to the risk of this issue. However, due to an ambiguity, the Florida Legislature should clarify when the statute of repose begins to run in a situation where the contract is terminated because the owner has failed to pay as agreed.

In *Cypress Fairway Condo. v. Bergeron Constr. Co., Inc.*, 2015 WL 2129473 (Fla. 5th DCA, May 8, 2015), the Fifth District Court of Appeal was called upon to determine when the statute of repose began to run in a construction defect case. The dates in question were extremely close in proximity, January 31, 2001 and February 2, 2001, but the three-day difference was critical because Cypress Fairway Condominium Association filed its claim on February 2, 2011. If the 10-year statute of repose began to run on February 2, 2001, the date that the owner timely made final $949,966 payment on the prime construction contract, the Association would be able to maintain its claim, filed exactly ten years later. If the statute began to run on January 31, 2001, when the general contractor submitted its Final Application for Payment to the owner,[1] the Association's claim would be barred by the statute of repose.

Section 95.11 (3) (c), Florida Statutes, provides:

> An action founded on the design, planning, or construction of an improvement to real property, . . . must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

The trial court in *Bergeron* ruled that construction was completed on January 31, 2001, and, therefore, the Association's claims were filed two days too late. The trial court concluded that it was "convinced that the Legislature intended that the date of completion of the contract had to do with the date of completion of the construction that would have been done under the contract, not the date of final payment."

The Association argued that the ruling was erroneous because (1) the clear language of the statute indicates that the repose period commences upon "completion of the contract," not completion of construction; (2) the specific context of the provision indicates that when the Legislature intended to refer to either "construction" or "improvements," it knew how to do so; (3) several other Florida statutes have timelines that run from "completion of construction," meaning that when the Legislature intended to reference "completion of construction," it knew how to do so; and (4) the Legislature specifically deleted completion of construction from the statute and has declined to reinstate the language.

[1] Arguably, this constituted substantial completion of construction.

The subcontractor, who prevailed initially in the trial court, argued that completion of the contract should be determined as the date of completion of construction because the 1980 preamble to Section 95.11 shows that the statute was enacted to protect architects, engineers and contractors from being named in lawsuits many years after construction. The Legislature reasoned that to permit the bringing of such actions, without any limitation as to time, places the defendant in an unreasonable, if not impossible, position with respect to asserting a defense. This is especially true because architects, engineers, and contractors have no control over (1) an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years, (2) an owner who uses an improvement for purposes for which it was not designed, or (3) an owner who makes alterations or changes which, years afterward, may be determined to be unsafe or defective and which may appear to be a part of the original improvement. Additionally, the Legislature recognized that the availability of professional liability insurance for the engineer, architect, and contractor is more difficult to obtain if they are exposed to potential liability for an indefinite period of time after an improvement to real property has been completed and the best interest of the people of the state will be served by limiting the period of time an engineer, architect, or contractor may be exposed to potential liability after an improvement has been completed. The trial court accepted this argument but the court of appeal disagreed.

The court of appeal held that the language of Section 95.11 (3) (c) clearly and unambiguously provides that the statute of repose begins to run at the completion of the contract, not construction, and "completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor." The court reasoned that if the Legislature had intended the statute to run from the time the contractor completed performance, it could have simply said so, and it is not the court's function to alter plain and unambiguous language under the guise of interpreting a statute. As a result, the *Bergeron* court concluded that the statute of repose commenced to run on the date that final payment was made under the terms of the contract. I think this was the correct result but it is not difficult to imagine scenarios where unscrupulous owners will be able to use this opinion as a basis for extending the statute of limitations for construction defect claims by delaying payment of the full contract amount at the completion of construction.

Here's a possible problematic scenario: At the end of construction, an owner disputes the amount owed and fails to make final payment when due under the contract. As all contractors should do to begin the running of the statute of repose, the contractor declares a default for non-payment and terminates the contract. Litigation between the contractor and the owner ensues concerning payment under the contract. The lawsuit continues for several years and is ultimately resolved four years after construction is completed. Nine years after construction is completed, the owner allegedly discovers a latent defect in construction. The owner waits until the four-year statute of limitations is about to run[2] to file its claim against the contractor, i.e., 13 years after construction is completed. The contractor argues the claim is barred by the 10-year statute of repose, which ran 10 years after the owner failed to pay the full contract amount when due (in the year construction was completed). The owner counters that the statute did not begin to run until the contract was fully performed, i.e., not until four years after construction when the contract dispute was resolved, so the statute of repose has not run yet.

The owner's argument is possible due to an ambiguity in the language of the statute. Section 95.11 provides that one of the triggers for the statute of repose is "completion or termination of the contract …, whichever date is latest." Under the above scenario, termination of the contract could occur when

[2] Four years after discovery of the latent defect.

the contractor declares the owner in default for not paying and sues the owner. But, completion of the contract arguably would not occur until the contract dispute is ultimately resolved at a later date. Thus, a strained argument could be made that the terms "whichever date is latest" means that the statute of repose begins to run at the later of termination after default or resolution of the contract claim (the date of resolution would always be later than the default date under the above scenario).

Without getting into a discourse regarding punctuation and statutory construction, the best interpretation seems to be that the "whichever date is latest" language applies to the four possible dates of (1) actual possession by the owner, (2) issuance of a certificate of occupancy, (3) abandonment of construction if not completed, or (4) completion or termination of the contract (whichever occurs first). However, this is hardly clear and unambiguous. Owners will surely use this quandary to make claims that the statute does not begin to run until the conclusion of litigation over non-payment by the owner. The Legislature needs to fix this ambiguity in the statute.

I suggest the Legislature revise Section 95.11 to provide triggers for the running of the statute of repose at the later of the following dates:

(1) actual possession by the owner;

(2) issuance of a certificate of occupancy;

(3) abandonment of construction if not completed; or

(4) completion of the contract, unless it is terminated before completion, in which case the date of termination of the contract.

If the statute is revised in this manner and the owner fails to make timely payment, the contractor will be able to terminate the contract due to the owner's payment default and the statute will clearly begin to run on the date of termination. If the statute is not revised, unnecessary litigation will potentially occur because owners can argue that the payment dispute prolonged the running of the statute of repose.

Please address any questions with regard to the statute of repose and the implications of the *Bergeron* decision to the following Roetzel Construction Law attorneys.

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