

Real Estate Title Insurance & Construction Law

Enforcing the Statute of Repose

How strict is too strict?

By Clint B. Allen

A recent decision by the Appellate Division serves as a reminder of both the importance of identifying all defendants in complex construction litigation cases, and the resulting loss of a cause of action by not naming such defendants in a complaint until more than 10 years after the completion of their construction activities.

On May 2, in the case of *Port Imperial Condo. Ass'n, Inc. v. K. Hovnanian Port Imperial Urban Renewal, Inc.*, the court affirmed summary judgment for the defendant subcontractors under the New Jersey statute of repose (N.J.S.A. 2A:14-1.1). The law precludes construction defect claims against subcontractors that completed work on a project more than 10 years before complaints were filed against them. The court

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held that, due to the plaintiff's failure to include the defendant subcontractors in the complaint within the 10-year period, summary judgment was appropriate.

Statutes of repose are designed to prevent causes of action from arising after a specified period of time has run. They are often enforced more strictly than statutes of limitations (which may be tolled by a number of equitable factors). However, the serious nature of the defects alleged in *Port Imperial* — homes collapsing — and the sympathetic plight of the homeowners, make the court's strict application of the statute of repose remarkable.

The case involves damage to dwelling units within a 445-unit residential condominium community called Port Imperial, located along the banks of the Hudson River in Guttenberg and West New York. The community was constructed by K. Hovnanian from 1996 until completion in 2002. Port Imperial is split into three communities known as Jacobs Ferry, Harbour Place and Bulls Ferry. The Avenue at Port Imperial runs through the length of Port Imperial along the Hudson River dividing the communities in half. All the units within Port Imperial were constructed upon slab

foundations and without basements. The essence of the litigation involves settling soil under the condominium units resulting in cracked foundations, window and roof problems, and building separations.

During development of Port Imperial, K. Hovnanian enlisted the aid of engineering experts to conduct ground compaction and soil borings to evaluate site soil conditions in preparation for site construction. Moreover, in connection with the site development, K. Hovnanian contracted with U.S. Wick Drain Inc. (US Wick), Drainage and Ground Improvement Inc. (DGI) and New Jersey Drilling Co. (NJ Drilling) to drill holes for wick drains and install wick drains to facilitate groundwater removal and prevent soil settling underneath the condominium units. US Wick completed its work in February 1998. NJ Drilling and DGI completed their work in May 1998.

Upon completion of the project, K. Hovnanian transferred maintenance and control of the Port Imperial development to the plaintiff, Port Imperial Condominium Association (PICA). During the transition, PICA, with the aid of an engineering firm, evaluated the development for construction defects requiring correction and/or repair prior to transition from K. Hovnanian to PICA. During its evaluation, PICA determined that there were construction defects involving cracked foundations, along with

roof and window issues. On April 22, 2008, PICA filed a complaint against K. Hovnanian and its design professionals, alleging numerous claims all involving defective construction.

During discovery following PICA's complaint, PICA's geo-technical expert produced reports indicating that soils underneath the Port Imperial condominium units could not support the structural load of the homes. Moreover, PICA's expert stated that the wick drains were improperly installed, resulting in settlement-related damage to the condominium buildings. PICA's expert recommended that units within the Jacobs Ferry and Bulls Ferry portion of Port Imperial be demolished and reconstructed, but only after installation of new pile foundations. Moreover, PICA's experts opined that rotting wood within a bulkhead used to support the Avenue at Port Imperial created significant and largely unpredictable settling beneath the dwelling units.

On Feb. 10, 2009, PICA amended its complaint to name additional defendants, including US Wick, DGI and NJ Drilling, alleging that the Port Imperial construction defects were due, at least in part, to the installation of the wick drains.

Shortly thereafter, the Port Imperial Property Owners Association filed a separate action against PICA and K. Hovnanian alleging deficiencies within the Port Imperial promenade walkway and an adjacent bulkhead. In answering the complaint of the owners' association, K. Hovnanian filed a third-party complaint against various professionals and contractor, including US Wick, DGI and NJ Drilling. In response, US Wick and DGI filed motions for summary judgment, and thereafter, NJ Drilling filed a motion for summary judgment, based on the plaintiff's failure to name them in the complaint within the 10-year time period specified by the New Jersey statute of repose (N.J.S.A. 2A:14-1.1). The trial court granted summary judgment in favor of US Wick, DGI and NJ Drilling. K. Hovnanian's and PICA's motions for reconsideration were denied.

The statute of repose (N.J.S.A. 2A:14-1.1), adopted by the New Jersey Legislature in 1967 to decrease builder or contractor

liability, precludes certain actions from arising in connection with a defective and unsafe condition of an improvement to real property. Specifically, the statute provides that an action to recover damages for any deficiency in design, planning, surveying, supervision or construction of an improvement to real property, or for an injury to property or to a person arising out of the defective and unsafe condition of an improvement to real property, cannot be brought more than 10 years after the performance of such services. The significant distinction between the statute of repose and a conventional statute of limitations is that a statute of repose does not bar a cause of action but, instead, prevents a cause of action from arising. *Rosenberg v. Town of N. Bergen*, 61 N.J. 190, 199 (1972).

Over time, the court has broadly interpreted the Legislature's intent to limit potential builder or contractor liability, applying its protections to general contractors, planners, designers, landscapers and well drillers. *Rosenberg*, 61 N.J. at 194, 198, 201. US Wick, DGI and NJ Drilling, based on their construction of the wick drains, fit within the coverage of the statute of repose.

Moreover, the court has interpreted language from the statute regarding "improvement to real property" to include alterations or modifications of property that enhances its use, requires the expenditure of labor or money, is more than a mere repair, adds value and is permanent in nature. *Ebert v. S. Jersey Gas Co.*, 157 N.J. 135, 139 (1999). Improvements to prevent sinkage of a house built on fill is an "improvement" within the meaning of the statute of repose since without a foundation, the structure could not function as intended. *Horosz v. Alps Estates, Inc.*, 136 N.J. 124, 129-31 (1994). The wick drains were an improvement to the Port Imperial property intended to prevent soil settlement under the condominiums, therefore considered an "improvement" under the statute of repose.

Absent a claim being brought within a 10-year period following the completion of the construction-related activities, a plaintiff's cause of action will not arise. See *Richards v. Union Bldg. & Constr. Corp.*, 130 N. J. Super. 127, 130 (App. Div. 1974). The stat-

ute of repose begins to run once a contractor completes its task and has no further involvement with the construction. Moreover, a claim against a subcontractor that performed limited services on a development project, with no further project involvement, is lost after 10 years following the completion of that subcontractor's work.

The statute's 10-year time period started running for NJ Drilling and DGI, based on the completion of their respective construction activities, in May 1998. The 10-year time period began running for US Wick, based on its completion of construction, in February 1998. The three companies were not named as defendants until PICA's amended complaint was filed on Feb. 10, 2009 — one year too late.

The statute of repose applies to any "defective and unsafe condition of an improvement to real property" that creates a safety hazard to persons or property. *Rosenberg*, 61 N.J. at 197-98. On appeal, the court rejected PICA's and K. Hovnanian's argument that inexpensive and inconvenient repairs were involved, as opposed to unsafe conditions, with regard to the Port Imperial condominiums. The court relied on PICA's amended complaint alleging that DGI and US Wick acted in a manner resulting in potential serious harm due to the negligent construction and erection of the condominiums. Moreover, PICA asserted that due to the defects and deficiency of the condominiums, they were unreasonably dangerous to the unit owners and could result in personal property damage. The court also looked to the opinions issued by PICA's expert that indicate that the magnitude of settlement for these homes could be significant and unpredictable and could only be remedied by demolishing the buildings, installing new foundation piles and then reconstructing the buildings.

Based on the plaintiff's allegations, coupled with the expert's opinion supporting those allegations, the court found that a defective and unsafe condition exists at Port Imperial. However, since the plaintiffs failed to name DGI, US Wick and NJ Drilling in their complaints within a 10-year period following completion of their work, the grant of summary judgment was appropriate. ■