New Jersey Law Journal

VOL. CXCI– NO.12 – INDEX 1010 MARCH 24, 2008 ESTABLISHED 1878

Real Estate
Title Insurance &
Construction Law

Repose Re-examined: When Does the Period Begin To Run?

Time frame defined for claims related to the improvement of real property

By Daniel J. Cogan and Richard W. Gaeckle

The Statute of Repose, *N.J.S.A. 2A:14-1.1*, was enacted in 1967 in an attempt to limit the liability of designers and contractors. In nearly as many years since its enactment, judicial interpretations have examined and re-examined the statute addressing issues ranging from its constitutionality to what constitutes an unsafe condition. One issue, however, which has often presented much debate is when the period of repose begins to run. While several opinions have attempted to answer this basic question, it was not until recently, with the decision *Daidone v. Buterick Bulkheading,* 191 N.J. 557 (2007), that our Supreme Court had spoken definitively on this subject.

Cogan is a partner and Gaeckle is a senior associate in the construction law practice group at Hoagland, Longo, Moran, Dunst & Doukas of New Brunswick. Mr. Cogan was counsel of record for the architect in the Daidone case, discussed in the article.

In response to the ever expanding liability of designers and contractors, the Legislature enacted the Statute of Repose, which established a 10-year time limitation within which an action must be brought for claims relating to the improvement of real property. The broad purpose of the statue was to immunize those involved in the design and construction after the lapse of 10 years from when the services were performed or furnished. In relevant part, the statute provides that:

> No action…to recover damages for any deficiency in the design, planning, surveying, supervision 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 person performing or furnishing the design, planning, surveying, supervision of construction or construction... more than 10 years after the performance or furnishing of such services and construction.

This legislative response is credited with two important legal developments finding favor around the time of the statute's enactment. The first development had gained momentum in the realm of limitation and accrual of actions with the employment of the now commonly known "discovery rule." The second development focused around the ever increasing trend to reject the application of the "completed and accepted" rule.

Thus, with the immunity previously afforded by the completed and accepted rule quickly vanishing and the discovery rule moving toward universal acceptance, architects and contractors found themselves with a greater exposure to liability. While certainly embraced as an enlightened advance in the field of tort liability, these developments may well have created "liability for life," which the Statute of Repose was aimed at preventing.

The statute presented an interesting feature unlike the typical statute of limitations. While the typical statute of limitations measures the time within which an action must be brought from when the cause of action accrues, the time within which an action must be brought under the Statute of Repose is wholly unrelated to the accrual date of the action. To the contrary, the Statute of Repose does not simply bar an action; rather it prevents an action from ever arising.

As often characterized by our courts, once the repose period has expired "[t]he

injured party literally has no cause of action. The harm that has been done is damnum absque injuria — a wrong for which the law affords no redress." See *Rosenberg v. North Bergen*, 61 N.J. 190 (1972).

Given this unique feature of the statute, the important question then is when the services undertaken are deemed completed. This very basic question, however, was not, to any real extent, examined until the Appellate Division's decision in *Welch v. Engineers, Inc*., 202 N.J. Super. 387, 397 (App. Div. 1985). There, the plaintiff filed a complaint alleging personal injuries relating to a pedestrian sidewalk designed and constructed by defendant. While the complaint was filed within 10 years from project completion, it was filed more than 10 years from when the design was completed. Since the plaintiff conceded she could only prove a design defect, versus a defect in the construction, the defendant, a design build contractor, argued that the claim was barred by the Statute of Repose, since all design work was completed more than 10 years from the filing of the complaint.

The Appellate Division, however, refused to endorse a piecemeal concept of repose and break the project down into stages. Rather, the Appellate Division recognized that defendant had agreed to undertake services which required its performance throughout the entire project. In discussing its reasoning, the *Welch* Court read the legislative intent of the statute to mean 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 ten years and one day "after the performance or furnishing of such services and construction," N.J.S.A. 2A:14-1.1, and know there was repose from liability. We do not think that the Legislature intended 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.

Thus, in reading the statute specific to the party claiming repose, versus when specific stages were completed, the Appellate Division concluded that "[t]he ten-year time-bar matures under N.J.S.A. 2A:14-1.1 and the period of repose begins must be measured from 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 [emphasis added]."

This ruling, however, left unsettling results. Subsequent to the *Welch* decision, it had been urged that the commencement date of repose was not when individual stages were completed, albeit by separate parties, but when the project itself was completed. As similarly recognized by the *Welsh* Court, the Appellate Division in *Hopkins v. Fox & Lazo Realtors*, 242 N.J. Super. 320 (App. Div. 1990), noted:

> [t]he words of N.J.S.A. 2A:14-1.1 do not provide a clear solution to the problem of determining when the ten-year period begins to run. The statute's language could reasonably be interpreted to support either the view that the ten-year period begins to run when a party completes its own work with respect to a project or, alternatively, when the project which incorporates that person's work is itself completed.

In *Hopkins*, the Court addressed the situation in which an architect was retained only to develop plans for a particular project but not to perform any further responsibilities during construction. The complaint was filed within 10 years of when the project itself was completed, but more than 10 years from the completion of the design. In that scenario, the *Hopkins* Court held that the 10-year statutory period contemplated by N.J.S.A. 2A:14-1.1 commences "[w]hen the architect or contractor completes its task with respect to the property involved in the claim." Similar to the reasoning in *Welch*, the *Hopkins* Court explained "[w]hen an architect, such as [defendant] here, completes the work for which he was commissioned; he should be able to look back ten years and one day after the completed performance of his work and know there is repose from liability."

Following *Hopkins*, a new dilemma arose: in situations where an architect or contractor must perform functions throughout the entire project, at what point is the project, and thus, the services undertaken, deemed completed? Recognizing that the final punch-list stages may extend the life of the project long after beneficial occupancy, the Supreme Court, in *Russo Farms, Inc. v. Vineland Board of Education*, 144 N.J. 84 (1996), attempted to establish a finishing line consistent with the statutory protection afforded architects and contractors. The Supreme Court recognized that "[i]f liability were to be measured from the date the last retainage is released and all disputed and punch list items are completed, a contractor's exposure to suit might be prolonged unreasonably. Disputes over workmanship and compensation for services can continue for years." This, according to the Supreme Court, could result in "liability for life," which is contrary to the very purpose of the statute.

In an effort to ensure that the measure of project completion was consonant with the intent of the statute, the Supreme Court held that architects and contractors would be free from liability after 10 years from the date of substantial completion. Substantial completion, as explained by the Court is a term specific to the construction industry. It occurs "[w]hen the architect certifies such to the owner and a certificate of occupancy is issued attesting to the building's fitness. At that point, the building is inhabitable, and only touch-up items and disputed items, the 'punch list,' remain."

With the outermost limits of when the repose period could commence set by *Hopkins* and *Russo Farms*, the remaining question addressed the situation in which services are completed after the initial design stages, but prior to substantial completion. *Daidone v. Buterick*

Bulkheading finally resolved this issue.

In *Daidone*, the plaintiff, acting as his own general contractor, retained an architect and subcontractor for the purposes of constructing his residence. The defendant architect was retained solely to prepare design plans, which were completed by June 23, 1993. The architect had no further responsibilities on the project following the completion of the plans. The residence was then constructed by the defendant contractor on foundation pilings as designed by the architect. The contractor completed its services and was paid in full on May 24, 1994. A certificate of occupancy was issued on June 14, 1994.

Beginning in 1999, plaintiffs began experiencing a number of problems resulting from the residence settling on the foundation. Plaintiffs attributed the settlement to improper installation of the pilings and improper design of the ground-level slab. Suit was filed on June 2, 2004, within 10 years from the date of the certificate of occupancy, but more than 10 years from when the architect and the contractor completed their respective services. The issue before the Supreme Court was whether the period of repose should be delayed until the issuance of the certificate of occupancy, despite the fact that the architect and contractor had completed their services at an earlier date.

In affirming the dismissal of the architect and the contractor, the Supreme Court focused on the plain language of the statute itself. The Court emphasized that no action may be brought "[m]ore than 10 years after the performance or furnishing of such services and construction." See N.J.S.A. 2A:14-1.*1*. In definitively interpreting this specific language, the *Daidone* Court brought the Statute of Repose debate around in full circle:

> The Legislature's words are clear and therefore deserving of enforcement as written: a cause of action for construction or design defects ceases to exist ten years and one day after the designer or contractor has performed or furnished his or her design or construction services. Thus, if a designer's or contractor's services continue up to and including the date the certificate of occupancy is issued for the improvements made, then the start date for Statute of Repose purposes is the date of the certificate of occupancy.
>
> If, however, the design or construction services are completed before a certificate of occupancy is issued and the designer or contractor has no further functions to perform in respect of that construction project, then the start date for Statute of Repose purposes is the date on which the designer or contractor has completed his or her portion of the work.

See *Daidone* at 566.

While the date at which the services are actually completed will certainly continue to be an issue of debate between litigants, at least the framework has been set and the issue of when the period of repose commences has been settled. Ironically, after 40 years and the lapse of several repose periods, we finally have a place to start. ■