Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12891

LIZ D'ALLESSANDRO, ET AL.,
Plaintiffs/Appellees,

v.

LENNAR HINGHAM HOLDINGS, LLC, ET AL.,
Defendants/Appellants.

On Appeal As A Certified Question
From The Order Of The United States District Court –
District Of Massachusetts,
Case #1:17-cv-12567-IT

AMICUS BRIEF OF THE NEW ENGLAND CHAPTER OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PLAINTIFF/APPELLEE

Date: 04/13/2020

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other

INTRODUCTION AND STATEMENT OF INTEREST

The Amicus Curiae, the New England Chapter of the Community Associations Institute ("CAI"), is an international non-profit research and education organization formed in 1973 by the Urban Land Institute, the National Association of Home Builders and the United States Counsel of Mayors to provide the most effective guidance for the creation and operation of condominiums, co-operatives and homeowner associations. CAI has 42,000 members including homeowners, community associations, condominium and homeowner association board members, community managers and affiliated professionals and service providers in 57 local chapters. CAI's industry data estimates that as of 2020, there are approximately 73.5 million Americans living in 347,000 community associations in the United States. This number constituted roughly 25% of the population of the United States.

Community associations are property developments in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. The regimes include, among others, condominiums, homeowner associations and

co-operatives. The community association presents a unique form of ownership where responsibility for the submitted property is shared, on some level, between the individual owner or member, on the one hand, and an association, trust or corporation, on the other. The properties governed by community associations may be commercial or residential in nature. Community associations are usually governed by not-for-profit organizations comprised initially of the Declarant/Developer and eventually by a group of owners elected by their fellow homeowners. Most condominium organizations of owners take the form of a condominium trust.

CAI submits this amicus brief on behalf of its members who recognize that the sustained health of the condominium form of ownership in Massachusetts depends in part upon condominium trustees being able to seek legal redress for construction and design defects and building code violations against a condominium declarant-developer (hereinafter, "Declarant") in continuous phased condominium projects without running afoul of Massachusetts six-year statute of repose. There is a significant public policy in ensuring the habitability of homes and compliance with building

codes which are designed to protect the health, safety and welfare of homeowners and the public at large.

CAI submits that the public policy of ensuring the habitability and proper construction of condominiums in Massachusetts will be furthered and advanced by a judicial determination providing that the statute of repose in a continuous phased condominium project does not begin to run until completion of the entire condominium project.

Conversely, if this Court were to determine that a continuous phased condominium project is a discrete series of separate improvements and therefore subject to different statutes of repose within a condominium project, it will enable condominium developers in continuous phased projects to effectively shield themselves from liability for construction defect claims. Condominium developers will be able to appropriately space out the phasing of their project, while at the same time retaining control of the organization of owners which is the only entity that can legally sue for common area construction defect claims. A decision construing the statute of repose to commence on a building-by-building basis will

enable condominium developers to run out the clock and bar otherwise valid common area defect claims.

The District Court's decision (Talwani, J.) recognizes the hybrid nature of condominium ownership and its peculiarities while at the same time appropriately balances the competing interests of condominium developers and homeowners. The Decision recognizes the need for a period of developer control during construction and phasing and at the same time preserves the rights of homeowners to seek redress in the Courts for construction claims at the conclusion of a continuous project. The Decision prevents the manipulation and evisceration of legal rights that would otherwise be afforded to homeowners. It also prevents multiple lawsuits (phase-by-phase to comply with the statute of repose). To be clear, interpreting the statute of repose to allow for its commencement at the completion of a continuous phased project merely provides condominium homeowners with access to the court system for common area construction defect claims and it does so only in factually appropriate and distinctive cases where the project is deemed continuous.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI urges this Court to answer the certified question to provide that under appropriate factual circumstances, a court should be able to determine or declare that a phased condominium project is continuous, such that the entire condominium project constitutes a single improvement, hence dictating that the statute of repose will begin to run upon completion of the entire condominium project.

DECLARATION OF AMICUS

Pursuant to Mass. R. App. P. 17(c)(5), CAI makes the following declarations:

1. This brief was not authored in whole or in part by counsel for any of the parties to this case.

2. Neither of the parties to this case nor their counsel contributed money that was intended to fund preparing or submitting this brief.

3. The amicus curiae and its counsel has not represented the parties to this appeal in another proceeding involving similar issues. Counsel for the amicus curiae represents Toll

Brothers, Inc. and its affiliates in a case pending in the Essex County Superior Court entitled Douglas Souza v. Toll MA Land, LP, C.A. No. 2017-01924 where the Massachusetts Superior Court Denied a partial Motion to Dismiss presented on statute of repose grounds, based in part upon the Trial Court's finding that the phased condominium project constitutes one continuous construction project, and is a single improvement for purposes of the running of the statute of repose. That decision is cited in support of the Decision of the United States District Court (Talwani, J.) Denying the Appellant's Motion for Summary Judgment, which ultimately led to the certification of the question to this Court.

THE CERTIFIED QUESTION

The following question of Massachusetts Law has been certified to the Massachusetts Supreme Judicial Court by the United States District Court (Talwani, J.):

> Where the factual record supports the conclusion that a builder or developer was engaged in the continuous construction of a single condominium development comprising multiple buildings or phase, when does the six-year period for an

action of tort relating to the construction of the condominium's common elements or limited common elements start running?

STATEMENT OF THE CASE

CAI relies upon, and incorporates herein by reference, the Statement of the Case contained in the briefs of the parties.

STATEMENT OF FACTS

CAI relies upon, and incorporates herein by reference, the Statement of Facts contained in the briefs of the parties.

SUMMARY OF ARGUMENT

The Legislative intent behind the statute of repose was to limit the liability of contractors and others to possible liability throughout their professional lives and into retirement. (pp. 27-29). In the condominium context, this Court has raised additional concerns regarding the application of the statute of repose in condominiums where the developer/declarant has the ability to maintain control of a condominium until after the repose period has expired. (pp. 22-27).

The District Court's decision finding that in a multi-phased, continuously constructed single

condominium, substantial completion of the improvement occurs only when there is substantial completion of the entire condominium is consistent with the Legislative intent behind the statute of repose as there is no delay in bringing suit and it dispels of this Court's concern regarding the declarant's control of the condominium within the repose period and is supported by case law in Massachusetts and elsewhere. (pp. 30-34). In factually appropriate cases where there is continuous construction of a phased condominium there is no concern regarding litigating stale claims where memories have faded and evidence has been lost which is what the Legislature was concerned with in adopting the statute of repose and in those instances the statute of repose should run upon the substantial completion of the entire condominium. (pp. 38-41).

ARGUMENT

I. THIS COURT'S PRIOR DECISIONS RELATIVE TO CONDOMINIUMS WITH RESPECT TO CONDOMINIUM CONSTRUCTION DEFECT CLAIMS AND PUBLIC POLICY MILITATE IN FAVOR OF THIS COURT EMBRACING THE CONCEPT THAT CONTINUOUS PHASED CONDOMINIUM PROJECTS CONSTITUTE A SINGLE IMPROVEMENT FOR STATUTE OF REPOSE PURPOSES.

A. Construction Defects in Condominium Common Areas Require Unique Consideration Due to the Hybrid Nature of Condominium Ownership.

Condominium ownership is a unique dual form of interest in real estate, established by statute, G.L. c. 183A, et seq., entitling the owner both to exclusive ownership and possession of his unit and to an undivided interest together with other unit owners in the common areas. Noble v. Murphy, 34 Mass.App.Ct. 452, 455-456 (1993); McEneaney v. Chestnut Hill Realty Corp., 38 Mass.App.Ct. 573 (1995); G.L. c. 183A, §§ 4 & 5. The deed to a purchaser of a condominium unit conveys not only the individual unit but also an undivided percentage interest in the common areas and facilities. Typically, the common areas of a condominium encompass anything and everything beyond the "four walls of the unit," including the roof, lawn and recreation areas and depending on the constituent condominium documents may include decks and patios,

roadways, septic systems and other major infrastructure.[1]

Subject to the provisions in the master deed and the by-laws of the association of unit owners, the unit owner has exclusive control over his unit. G.L. c. 183A, § 4. However, the Condominium Act, requires that the formation of an organization of unit owners in whom management and control of the condominium common areas is exclusively vested. G.L. c. 183A, § 10. Furthermore, the organization of unit owners is statutorily responsible for conducting all litigation and is subject (as the proper party in interest) to

[1] *See* G.L. c. 183A § 1 defining common areas and facilities to include, except as otherwise provided, foundations, columns, girders, beams, supports, party walls, common walls, main walls, roofs, halls, corridors, lobbies, public stairs and stairways, fire escapes and entrances and exists of buildings, installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incineration, elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use, the land on which the building is located, or the lessee's interests in any lease of such land submitted pursuant to the Condominium Act, basements, yards, lawns, gardens, recreational facilities, parking areas and storage spaces, premises for lodging of the custodian, community and commercial facilities provided for in the master deed and all other parts of the condominium necessary or convenient to its existence, maintenance or safety, or normally in common use. G.L. c. 183A, § 1(1-8).

suit as to any cause of action concerning the common areas. G.L. c. 183A, § 10(b)(4). In fact, "individual condominium unit owners are without basis or right to conduct litigation concerning the common areas and facilities." Strauss v. Oyster River Condominium Trust, 417 Mass. 442 (1994).

Thus, when addressing construction or design defects in the common areas of a condominium, the inter-relationship between the parties is necessarily different than it would be in addressing construction defects in a single-family home. Specifically, there is no privity of contract between the association of unit owners, which is legislatively charged with control and management of the common area, and the developer. In the condominium setting, the developer negotiates with builders and contractors for the design and construction of the buildings, structures and other improvements at the complex. Thereafter, the developer creates the units and common areas by submission of the condominium form of ownership through the recording of the Master Deed and at the same time establishes the organization of unit owners.

Although the organization of unit owners is responsible for management and control of the common

areas it does not and cannot participate in the construction and design of the common areas. Accordingly, if defects arise in the common areas of the condominium, unlike in the construction of a new home, the remedy lies in tort and not in contract, which therefore implicates the statute of repose.

Also distinct from single-family home construction and sale, in the condominium context the condominium homeowners may not immediately have the ability to sue for defects, even latent defects. In condominiums, the developer/declarant will traditionally reserve the right to control the organization of unit owners for a period of time following creation of the condominium. The declarant/ developer control period has been recognized as "an important balancing act between the developer and the owners in order to protect the developer and its mortgagee's large investment and risk in undertaking a condominium development." *See*, Barclay v. Deveau, 384 Mass. 676, 683 (1981). It hardly bears explication that condominium boards under developer control, whether phased projects or not, typically do not sue the developer and its contractors/subcontractors and/or design professionals. Indeed, it is the rare

developer that is going to sue himself, regardless of what hat he is wearing or the extent of his fiduciary duties while wearing that hat.

Unfortunately, the Massachusetts Condominium Act places no limit on the time period for developer control of a condominium, which in practice has resulted in most developers maintaining control of the organization of unit owners until the sale of the final unit to be built at a condominium, which in a phased project can take many years.[2] That practice places condominium associations and the unit owners they represent at a distinct disadvantage when it comes to exercising their legal right of recourse for construction defect claims. This is especially the case in phased condominiums, if the statute of repose is interpreted to run upon the completion of each and every building or phase.

[2] By contrast the Uniform Condominium Act requires transition of control of the organization of unit owners from the developer to the unit owners at the earlier of: (1) the conveyance of 75% of the units that may be created at the condominium, (ii) 2 years after the developer has ceased to offer units for sale in the ordinary course of business, or (iii) 2 years after any development right to add new units was last exercised. Uniform Condominium Act (1980), 7 Uniform Laws Annot., § 3-103(d).

By way of example, if a construction defect exists in a condominium consisting of 6 equal phases (each containing one building) built over a 12 year period with phasing dates two years apart and the developer retains control of the condominium's organization of unit owners until the conveyance of the final unit, the transitioned condominium board would have to bring suit almost immediately just to preserve a potential remedy relating to **only half** of the buildings if the Statute of Repose were interpreted to apply to the substantial completion or opening of occupancy for each building in the condominium.[3] Of course, that is only if the newly elected board of condominium homeowners had immediate awareness of the defects, which is not likely. The District Court's interpretation of the statute of repose balances and addresses that concern.[4]

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[3] Even if a developer transitioned the organization of owners to the homeowners prior to sale of the final unit, which is increasingly unlikely, it would still require multiple lawsuits on a phase-by-phase basis and tracking of multiple phasing deadlines.

[4] The Commissioners, as drafters of the Uniform Condominium Act have recognized and addressed the problem of pervasive developer control and as Judge Talwani did in her decision, they have appropriately balanced the competing interests. As noted above, the Uniform Act provides for transition of control prior

Developers should not be heard to complain about an interpretation of the statute of repose that starts the clock at substantial completion of the last building or improvement in a continuous phased project, as it was the Developer for its own financial and other reasons that chose to submit his land and buildings to condominium status.[5] Developers should

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to the sale of the last unit. However, Section 3-111(a) and (b) of the Uniform Condominium Act also provides that a declarant will be liable for any wrongs (including attorney fees) committed by the Declarant during the period of Declarant control. More importantly, Section 3-111(c) **of the Uniform Condominium Act specially tolls any statute of limited affecting the association's right of action against a declarant until the period of declarant control terminates**. *See*, Uniform Condominium Act § 3-111 (1980)(emphasis supplied). While Massachusetts has not adopted the Uniform Condominium Act, Massachusetts Courts have looked to it for "useful guidelines" in the past. *See*, Barclay v. Deveau, 384 Mass. 676 (1981); Drummer Boy Homes Assn., Inc. v. Britton, 86 Mass.App.Ct. 624 (2014) *reversed* 474 Mass. 17 (2016); Podell v. Lahn, 38 Mass.App.Ct. 688 (1995); Noble v. Murphy, 34 Mass.App.Ct. 452 (1993); Woodvale Condominium Trust v. Scheff, 27 Mass.App.Ct. 530 (1989); Sewall Marshal Condominium Ass'n v. 131 Sewall Ave. Condominium Ass'n, 89 Mass.App.Ct. 130 (2016). In any event, the fact that developer mischief, tolling of statutes of limitations and concern about condominium associations loss of legal rights has addressed in a uniform act, provides support as to why the certified question in this case should be interpreted in a manner that preserves legal rights and access to the courts to address habitability issues and code violations.

[5] Here the Developer contemplated a 15-year continuous project, yet expects the single phases to be subject to singular six-year statutes of repose in

not be able to use the condominium form of ownership and the idiosyncrasies of phasing and control of organization of unit owners to run the clock out on construction defect claims and leave condominium unit owners without a remedy for all or even a portion of their complex. It places condominium homeowners at a distinct legal disadvantage to single family homeowners, whose remedies for defective construction are immediate upon transfer of the deed.

B. This Court Has Often Recognized and Applied Legal Distinctions in Condominium Construction Defect Cases.

In 2002, in the case of Berish v. Borenstein, 437 Mass. 252 (2002), this Court emphasized the hybrid nature of condominium ownership as distinct from ownership in a single-family home in holding that a

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the face of pervasive defects. Section 19 of the Hewitt's Landing Condominium Master Deed provides in part that the:

> "Declarant **contemplates** the expansion of the Condominium by the addition of certain buildings..."; "Declarant **shall have no obligation** to expand the Condominium..."; nor shall Declarant ... have **any obligation to** add all of the Additional Phases..."; "Declarant shall be under no obligation to proceed beyond those Units contained in Phase I;" and "Declarant's reserved rights to amend this Master Deed to add new Units to the Condominium as part of the Additional Phases **shall expire fifteen (15) years after the date of the recording of this Master Deed**..." (emphasis added).

condominium association could bring claims for latent defects in common areas that implicated habitability of individual units. In so holding, the Court noted that:

> When there are defects or other problems in the common areas, the organization of unit owners has the exclusive right to seek a remedy. G.L. c. 183A, § 10 (*b*) (4). See Strauss v. Oyster River Condominium Trust, *supra.* This exclusive right, combined with a unit owner's virtually nonexistent control over the common areas, may result in an incomplete remedy for unit owners against a builder whose improper design, material, or workmanship is responsible for a defect in a common area that causes units to be unhabitable or unsafe. To ensure that there is a complete remedy for a breach of habitability in the sale of condominium units, we conclude that an organization of unit owners may bring a claim for breach of the implied warranty of habitability when there are latent defects in the common areas that implicate the habitability of individual units. Id.

Similarly, the District Court's decision interpreting the start date of the statute of repose in continuous phased condominium projects affords unit owners a complete remedy, which would otherwise be unavailable if the Statute of Repose were to run on a building-to-building or phase-to-phase basis.

In 2014, in Wyman v. Ayer Properties, 469 Mass. 64 (2014) the Massachusetts Supreme Judicial Court again recognized the unique nature of condominiums in holding that the economic loss rule does not apply to

construction defect claims brought by a condominium association against a developer because the "nature of condominium unit ownership supports our conclusion that claims such as those raised here do not fit into the rubric of claims intended to be covered by the rule." The Wyman Court went to explain:

> The problem arises where the party exclusively responsible for bringing litigation on behalf of the unit owners for the negligent construction of the common areas (here, the trustees) has no contract with the builder under which it can recover its costs of repair and replacement, that is, its economic losses caused by defective construction. We agree with the Appeals Court that "the rule does not require a court to leave a wronged claimant with no remedy," and that "[t]he fundamental purpose of the rule is to confine the indeterminacy of damages, not to nullify a right and remedy for a demonstrated wrong and its harm." Wyman v. Ayer Properties, LLC, 469 Mass. 64, 71 (2014).

Like Wyman, the District Court's interpretation of the statute of repose in this case avoids the nullification of a legal right and remedy and access to the court system.

More recently, in 2018, the Supreme Judicial Court in the case of Trustees of Cambridge Point Condominium Trust v. Cambridge Point, LLC, 478 Mass. 697 (2018), invalidated on public policy grounds a condominium by-law provision inserted by the developer that made it impossible for a condominium association

to sue a developer for construction defects. In doing so, this Court once again recognized the hybrid nature of condominium ownership and that the public policy of Massachusetts strongly favors the habitability of homes and the rights of individuals to obtain legal redress when their homes fail to meet these minimum standards. This Court stated:

> Massachusetts has a well-established public policy in favor of the safety and habitability of homes, as reflected in our implied warranty of habitability under common law and in the legislative enactment of building codes. In Albrecht v. Clifford, 436 Mass. 706, 710–711, (2002), we expanded our implied warranty of habitability under common law, holding that it attaches not only to residential leases but also to "the sale of new homes by builder-vendors in the Commonwealth." The purpose of this implied warranty is "to protect a purchaser of a new home from latent defects that create substantial questions of safety and habitability." Id. at 705.

The Cambridge Point Court further stated:

> A developer of a condominium not only is subject to the implied warranty of habitability but also must comply with the minimum standards prescribed by the building code. See 780 Code Mass. Regs. § 114.1 (2017) ("It shall be unlawful for any person, firm[,] or corporation to erect [or] construct ... any building, structure[,] or equipment regulated by [the building code] ... in violation of any of [its] provisions..."). The purpose of the building code "is to establish the minimum requirements to safeguard the public health, safety[,] and general welfare ...." 780 Code Mass. Regs. § 101.3 (2017). The importance of adherence to the building code is evident from the fact that, in certain circumstances, a

> building code violation may also result in liability under G. L. c. 93A, pursuant to the Attorney General's regulation, 940 Code Mass. Regs. § 3.16(3) (1993), which provides, among other things, that an act or practice may constitute unfair or deceptive conduct within the scope of G. L. c. 93A if it "fails to comply with existing statutes, rules, regulations[,] or laws, meant for the protection of the public's health, safety, or welfare." Id. at 707.

That important public policy identified by the Cambridge Point Court is furthered by the District Court's interpretation of the statute of repose for a continuous phased project in this case.

Perhaps most significantly, the Cambridge Point Court alluded to the very problem confronted by and addressed by the District Court in its Decision involving the statute of repose. Specially, the Cambridge Point Court opined:

> Moreover, if the developers or their affiliates were to retain at least a twenty per cent ownership interest in the units for more than six years, **they could effectively prevent any suit from being brought against them for design or construction defects in the common areas or facilities because the statute of repose would bar any subsequent suit**. See G. L. c. 260, § 2B (six-year statute of repose for tort actions for damages arising out of deficiency or neglect in design, planning, construction, or general administration of improvement to real property). Id. at 704 (emphasis supplied).

The District Court's Decision interpreting the start date for the statute of repose at the completion

of a continuous phased project, recognizes and addresses the precise concern with respect to the statute of repose articulated by this Court in Cambridge Point. Collectively, this Court's prior decisions in Berish, Wyman and Cambridge Point are instructive in terms of: (1) recognizing the hybrid nature of condominium ownership and that its statutory and practice peculiarities require distinctive application in the construction defect context, (2) identifying specific public policy in protecting the habitability and code compliant condominium units on par with those rights afforded to purchasers of single family homes, and (3) recognizing the need to prevent developer manipulation to use the statute of repose as a possible bar to claims for common area defects. In light of the same, interpreting the statute of repose to run at the completion of an entire continuous phased condominium project is in accord with this Court's prior and evolving precedent in the condominium construction defect arena.

II. COMMENCMENT OF THE STATUTE OF REPOSE UPON COMPLETION OF A CONTINUOUS PHASED CONDOMINIUM IS CONSISTENT WITH LEGISLATIVE INTENT.

G.L. c. 260, § 2B places an outer limit on when a builder can be subject to suit following substantial

completion of the work. Courts in the Commonwealth have consistently held that the legislative purpose of the repose statute was to protect builders and design professionals from liability long after the completion of their work. Finding that the repose period does not begin until the completion of the final phase of a continuously constructed multi-phased condominium is consistent with this Legislative intent.

The repose statute "was enacted in response to case law abolishing the rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, there was no liability as a matter of law." Klein v. Catalano, 386 Mass. 701, 708 (1982). "The statute, thus protects contractors from claims arising long after the completion of their work." Bridgwood v. A.J. Wood Construction, Inc., 480 Mass. 349, 353 (2018). "G.L. c. 260 § 2B, was enacted to shield contractors from the burden of liability throughout their careers and into retirement for work that had long since been completed." Id. at 357. "There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be

called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared.'" Klein, 386 Mass. at 709, *quoting* Rosenberg v. Town of North Bergen, 61 N.J. 190, 201 (1972). The "Legislature's primary objective in enacting [G.L. c. 260 § 2B] was to limit the liability of architects, engineers, contractors, and others involved in the design, planning, construction, or general administration of an improvement to real property ... to possible liability throughout their professional lives and into retirement." Stearns v. Metropolitan Life Company, 481 Mass. 529, 533, 534 (2019).

This case concerns the construction of the Hewitt's Landing Condominium ("the Condominium") consisting of twenty-four (24) continuously constructed phases, which included a total of twenty-eight buildings and took place from 2008 through 2015. The Defendant/Appellant Lennar Hingham Holdings, LLC ("Lennar") was the sole developer and builder of the Condominium throughout this time period and suit was initiated against Lennar approximately two and a half years after the completion of their work at the Condominium. The District Court's finding that the

repose period did not begin until the final phase of the condominium was substantially complete is squarely within the intent of the Legislature when enacting G.L. c. 260, § 2B. When a condominium project is being continuously constructed, memories and documentation will not have faded. In fact, the builder and design professionals were still physically on the property until very recently. Adoption of a single improvement doctrine in continuous phased condominium projects is consistent with the overall intent and purpose of the statute of repose.

III. MASSACHUSETTS CASES SUPPORT THE ADOPTION OF A SINGLE IMPROVEMENT RULE IN CONTINUOUS PHASED CONDOMINIUMS.

Case law from Massachusetts supports the adoption of a single improvement rule when interpreting the statute of repose in continuous phased condominium projects.[6] In Fine v. Huygens, DiMella, Shaffer & Associates, 55 Mass.App.Ct. 1114 (2002)[dec after

[6] "Phasing of a condominium permits a developer to expand the size and scope of a condominium project in response to market conditions. In a phased condominium development, groups or stages of units are completed over a period of several years and become part of the condominium by successive amendments to the master deed. 'Phasing' is not a statutory term, but is a usage that had grown out of the general enabling provisions of G.L. c. 183A." Queler v. Skowron, 438 Mass. 304, 312 n.15 (2002) *quoting* Podell v. Lahn, 38 Mass.App.Ct. 688, 689 n.3 (1995).

rehearing], 57 Mass.App.Ct. 397, 401 (2003), the St. George Seaside Condominium and Beach Club Condominium Association sued the developer, contractors and the architect for common area defects in a phased condominium. The condominium was constructed in several phases beginning in January 1988 and continuing through September, 1988. In analyzing the date for purposes of the statute of repose, the Fine Court used the date for the "project's substantial completion". While the issue was not squarely addressed in Fine, and the Court ultimately dismissed most of the claims as untimely using the later date, using the "project completion date" made sense for two reasons. Obviously, the construction was continuous as it was completed within a single year. Secondly, it is apparent from the Fine case that the same issues were prevalent in each of the phases as it was an integrated project, which bears mentioning. Certain common elements and facilities in condominium projects are integrated and used by all condominium residents regardless of the phase. For example, septic systems, HVAC systems, waste water plants, fire protection systems, sidewalks and roads might be operational in one phase but are continuous to other phases and are

added to and built upon. This is a critical distinction from single family homes. It is unfair to treat half of an integrated common element as barred by the statute of repose and the other half as timely, when it is a single system.

More recently, in 2019, the Essex County Superior Court had an opportunity to address the exact issue before this Court in Douglas Souza v. Toll MA Land LP, C.A. No. 2017-01924 (Mass.Super.Ct. Jan. 28, 2019) (Feeley, J.)(unpublished). In Souza, the Superior Court examined the application of the running of the statute of repose in a continuously constructed sixty-six (66) phase condominium. In Souza, the developer/builder defendants contended that sixty (60) of the two hundred and forty (240) Units were phased into the condominium outside of the repose period and should be dismissed from suit. Souza, p. 6. In finding that all phases were within the repose period the Superior Court stated that:

> [if] there were two distinct phases of the development, either by distinct geographical locations or perhaps type of unit, such that construction was completed on one distinct phase prior to commencement of a second construction phase, the [] defendants' argument would have more force. But here, **there was one continuous construction project with no large phases ... The sixty units for which the [] defendants seek the**

> **protection of the statute of repose are distinguishable from the remaining 180 units only by their completion date...** the law should not impose a duty on the plaintiffs to commence separate law suits[7] arising out of a large series of small construction phases one at a time to prevent the statute of repose from running on numerous small indistinct portions of one comprehensive and continuous condominium development."[8] Souza, pp. 6-7.

While there were only twenty-four phases in this case as compared to the sixty-six (66) in Souza the remainder of the factors are nearly identical. Here, there was a continuous construction project with no large breaks in construction; there were no distinct geographical locations or types of unit; and the only distinguishable feature in the units was building and phasing completion dates. By contrast, if the project were a residential subdivision there would be one

[7] The Court's reasoning in Souza provides an additional reason why the repose period should not begin until the completion of the entire project. While less common, developers occasionally transition condominium's early and if this were to occur and there are multiple trigger dates for the statute of repose in a continuous project the result would be multiple suits with multiple deadlines, with the same parties and factual basis, a process which is contrary to judicial economy and has long been disfavored by the Courts.

[8] One of the defect issues in Souza were alleged defects in interrelated detention basins, which arguably were a single system and alleged defects in common areas sidewalks. In that case, the Court seemingly recognized the unfairness of determining that a portion of an interrelated system was barred by the statute of repose and the rest of it was not.

substantial completion date for an integrated stormwater or detention system and one substantial completion date for sidewalks and roads. Condominiums should not be treated differently because of the nature of ownership.

These Massachusetts cases provide support and basis that continuously constructed phased condominium projects should be considered a single improvement and have a completion date at the end of the project for the purposes of the accrual of the statute of repose.

IV. OTHER JURISDICTIONS HAVE RECOGNIZED A CONTINUOUS PHASED PROJECT IS A SINGLE IMPROVEMENT AND NOT COMPLETE UNTIL SUBSTANTIAL COMPLETION OF THE ENTIRE PROJECT.

Other states have concluded that an entire project must be substantially completed before the statute of repose begins to run. Notably in State v. Perini Corp., 221 N.J. 412 (2015), the Supreme Court of New Jersey analyzed the continuous construction of a multi-phased 26 building prison construction project. In Perini, phases of the installation of a high temperature hot water system were designed to allow New Jersey to begin housing prisoners "in orderly and expeditious waves," meaning as each phase was completed prisoners began to house completed

portions of the prison. Id. at 418. When construction and design claims were made relative to the same and the statute of repose was raised as a defense, the New Jersey Supreme Court held that the improvement was complete and the statute of repose "period commenced to run on the day after the final certificates of substantial completion issued for the final buildings served by the hot water system," and not on the earlier dates when prisoners began to occupy buildings. Id. at 433.

Perini is instructive in the condominium context as often times in condominium projects, whether phased or not, owners will occupy buildings either under temporary certificates of occupancy and construction of integrated or other systems for the owners to serve as those earlier phases continue. It provides basis for concept that a phased condominium project is a single project and improvement, constructed in phases due mainly for the economic benefit, economic constraints and convenience of the developer and its lender. Unit owners do not buy into an isolated condominium phase, they buy into a condominium development or project in its entirety and they are typically permitted for building and zoning purposes

as a single project. Homeowners legal remedies should not be constrained because the developer for its own purposes decided to break up the project into phases and the owners were unlucky enough to buy into one of the earlier phases. Just as the hot water pipes, sidewalks, and roads are a single improvement, the same should hold true for an entire condominium development.

Other courts around the country have arrived at similar conclusions. In Pennsylvania, the Courts have held that the repose period begins to run when the entire improvement, and not merely a component part, is so far completed that it may be used for its intended purposes by the general public. In Patraka v. Armco Steel Co., 459 F.Supp. 1013, 1019 (1980), the Court determined that the "commencement of the limitations period as that point when third-parties would be exposed to any defect in design or construction. This would be when the **entire improvement**, and not merely a component part, is so far completed that it may be used for its intended purposes by the general public." Id. at 1019 (emphasis added). *See also* Fetterhoff v. Fetterhoff, 354 Pa.Super 438, 440-441 (1986)(Statute of repose

runs when entire construction project is so far completed that it can be used by the entire public)[citing] Catanzaro v. Wasco Products, Inc., 339 Pa.Super. 418, 489 (1985).

In Shaw Const., LLC v. United Builder Services, Inc., 296 P.3d 145 (2012 CO), the Colorado Court of Appeals was asked to determine when the statute of repose began to run for subcontractors working on a phased condominium. Id. at 149. In dicta the Shaw, Court noted that the last building constituted an improvement, substantial completion of which would trigger the statute of repose. Id. at 155. (Reversed on other grounds).

The Supreme Court of Wyoming has additionally explored the issue of when the statute of repose begins to run in a phased condominium. In Horning v. Penrose Plumbing & Heating, Inc., 336 P.3d 151 (2014 WY 133), the developer/declarant defendants argued that the owners' claims were barred because the Wyoming statute of repose had expired based on the date in which the improvement was completed to the point the owner could live in it. Id. at 152-153. The Horning Court determined that the repose period

begins to run when the **entire improvement could be utilized for its intended purpose**. Id. at 155.

These cases from other jurisdictions provide substantial persuasive authority for concept that a phased project is a single improvement. Moreover, they provide support for the concept that a phased condominium project is in fact a single improvement and that it is not complete until the entire project can be utilized for its intended purpose. While that concept is broader than the certified question that the Court has been asked to answer, it certainly provides support for the determination that a continuous phased condominium project in Massachusetts constitutes a single improvement for purposes of the accrual of the statute of repose.

V. UNDER FACTUALLY APPROPRIATE CICRUMSTANCES A COURT SHOULD BE PERMITTED TO DETERMINE THAT A PHASED CONDOMINIUM PROJECT IS CONTINUOUS AND THEREFORE CONSTITUTES A SINGLE IMPROVEMENT FOR PURPOSES OF ACCRUAL OF THE STATUTE OF REPOSE.

When there are factually appropriate circumstances that a phased condominium project is continuously constructed, a Court should be able to determine or declare that entire project constitutes a single improvement so that the statute of repose should only begin to accrue when the entire

condominium is substantially completed. As the District Court determined in this case, factors that should be considered when determining whether construction is "continuous" for repose purposes should include, but are not limited to, the similarity of construction of each phase; the length of time in between construction of each phase; the geographic location of each unit/phase; the use of the same contractors/subcontractors throughout the phases, a single developer, and the interrelation of common area components in the project to the various phases. Conversely, where there are large gaps in between phases with varying design styles of homes and different entities being involved during the different phases and the phases are distinct or lack integrated common element components, multiple repose periods could be employed. The factual determination and employment of the factors should be left to the discretion of the courts on a case-by-case basis.

Case law around the county has examined "continuous activity" and what would cause something to no lose continuity. *See* State ex rel. Quelette v. Civil Service Com'n of Columbus, 1993 WL 212842 P. 2 (1993 Ohio Court of Appeals)(Employee's length of

services considered continuous unless there is an absence of three hundred sixty (365) days or more); *See* Delia v. Riley Stoker Corp., 20 Pa. D.& C.3d 173, 177 (1980)(Continuous employment services ends after first eighteen months of an involuntary layoff); *see also* United Steel Workers of America, AFL-CIO, CLC v. ASARCO, Inc., 2005 WL 8167027 P. 3 (2005 U.S. District Court D. Ariz.)(Continuous service is broken if greater than a four (4) year break in service occurs). This concept of continuous is additionally seen in Perini, Shaw Const., Patraka, Fetterhoff and the cases discussed *supra*. In each of those cases, different state courts have made the determination that when there is ongoing and continuous integrated construction substantial completion for purpose of accrual of the statute of repose does occur until the **entire project** is completed. The Courts held in this fashion because the nature of the construction in those cases was that it was continuous and ongoing, just like this case.

On the other hand, CAI concedes that continuity would end when enough time has passed after a phase that the statute of repose has expired. Clearly, in instances where there is a six (6) year gap between

two phases, that project should not be deemed continuous so as to breathe life into a claim that had already expired under the statute. Quite possibly, there could be a time frame that is less than six (6) years or a convergence of other factors referenced above that would end a project's continuity, but CAI respectfully submits that those factors should be left to the discretion of the trial judge and not subjected to a simple black building-by-building or phase-by-phase improvement concept.

The facts of this particular case seemingly fall within the penumbra of continuous construction as determined by the District Court. While constructing and developing the twenty-four (24) phases of the Condominium not even a year went by between the recording of each of the phases. The development, construction and creation of the Condominium was the continuous work of one single contractor (Lennar) on a single project, to create one single condominium project. As stated in detail above, bringing suit two and a half years from the date of completion of a project is squarely within the Legislature's intent in adopting G.L. c. 260, § 2B and this Court should answer the certified question that this particular

project was continuous and constituted a single integrated improvement for purposes of accrual of the statute of repose.

VI. VILLAGE LOFTS AT ST. ANTHONY'S FALLS ASSOCIATION IS DISTINGUISHABLE FROM THIS CASE.

In support of their position Lennar cities to Village Lofts at St. Anthony Falls Association v. Housing Parters III-Lofts, LLC, 937 N.W.2d 430 (Minn. 2020), which found that the running of the statute of repose begins after the substantial completion of each phase of a two (2) phase condominium. Id. at 434. Village Lofts, however is distinguishable from the matter.

One critical difference between Massachusetts and Minnesota law is Minnesota's adoption of the Uniform Condominium Act which sets a maximum period of time in which a developer/declarant may control a condominium, whereas Massachusetts law has no such maximum time period. Specifically, the Minnesota statute provides in part as follows:

> Any period of declarant control extends from the date of the first conveyance of a unit to a unit owner other than a declarant **for a period not exceeding five years in the case of a flexible condominium or three years in the case of any other condominium**. Regardless of the period provided in the declaration, a period of declarant control **terminates upon the surrender**

> **of control by the declarant or not later than 60 days after the conveyance of 75 percent of the units to unit owners other than a declarant**.
> Minn. Stat. § 515A.3-103. (Emphasis added).

This limit on declarant control is a significant difference from Massachusetts' condominium law. As noted previously this Court has raised concerns with developers retaining control of a condominium board, which is the only party that can sue for construction defects, until after the statute of repose has run. Cambridge Point, at 704. In Minnesota, the policy concern raised by this Court in Cambridge Point, does not exist because the Uniform Condominium Act used in Minnesota requires that a declarant give up control of a condominium prior to sale of all of the units.

In Massachusetts there is nothing to prevent a declarant from maintaining control of a condominium and therefore manipulating or eviscerating homeowners' rights to bring defect claims until the repose period ends like there is in Minnesota.

A second distinguishing factor is that Minnesota has a 10 year statute of repose, which is actually extended to 12 years if the action accrues in the ninth or tenth year. Id. at n.8 [citing Minn. Stat §541.051, subd. 2]. The fact that the period at issue

is twice as long as the Massachusetts statute of repose (and has an extension device) seemingly makes it less likely for the Minnesota Court to consider the concept of a single improvement in a phased condominium project given the lengthy protection and extension period already afforded under the Minnesota Condominium Act. In fact, the Minnesota Supreme Court noted that the intent of its longer statute of repose was to prevent stale claims. Id. at 439, 440.

A third distinguishing factor is that the Minnesota Condominium Act is a version of the Uniform Condominium Act and has numerous express and implied warranties built into the act, which were excluded from application of its statute of repose and for which the Minnesota Supreme Court noted that Village Lofts failed to assert, instead relying on common law claims. Id. at 445. It is no surprise that the Minnesota Supreme Court failed to consider Village Loft's single improvement argument when it had other remedies. The Massachusetts Condominium Act contains no statutory express or implied warranties of construction.

Finally, Village Lofts did not make a continuous construction argument of the type that is presented

here. Village Lofts is distinguishable and while persuasive should not be controlling in this case for all of the above factors.

VII. STEARNS AND BRIDGWOOD ARE DISTINGUISHABLE.

Recently the Supreme Judicial Court has had the opportunity to take a close look at G.L. c. 260, § 2B in Bridgwood v. A.J. Wood Construction, Inc., 480 Mass. 349 (2018) and Stearns v. Metropolitan Life Insurance Company, 481 Mass. 529 (2019). The facts in Bridgewood and Stearns demonstrate a consistency with the District Court's decision and support this Court answering the certified question consistent with the District Court's decision.

Bridgwood concerned an improvement to real property which was completed in January of 2001 and suit was not filed until 2016. Bridgewood, at 350. In dismissing the claims the Court stated that "[h]ad the Legislature intended to remove this shield and expose contractors to **indefinite liability** for claims **arising long after** the completion of their work, it would have said so explicitly." Bridgwood, at 357-388 (emphasis added). The Stearns Court was not looking at construction defects but rather was related to a personal injury caused by asbestos exposure. Stearns,

at 530-531. The suit in Stearns, took place even longer after the improvement than that of Bridgwood, and was an approximate forty (40) year delay. Stearns, at 530-531. In finding that these claims were barred by the statute of repose the Court noted that the Legislature's primary objective in enacting the statute of repose was to limit liability from claims which took place a long time ago. Id. at 533-534.

The issues in Bridgwood and Stearns involved straightforward application of the statute of repose and did not involve or require analysis of issues such as continuous construction or single improvement present in this case and are therefore inapposite.

CONCLUSION

For all of the above reasons, CAI respectfully requests that this Court answer the certified question that: under appropriate factual circumstances, a court may determine or declare that a phased condominium project is continuous, such that the entire condominium project constitutes a single improvement and that the statute of repose will begin to accrue upon completion of the entire condominium project.

Respectfully submitted,

Amicus Curiae,
THE NEW ENGLAND CHAPTER OF
COMMUNITY ASSOCIATIONS INSTITUTE

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ADDENDUM

ADDENDUM
TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2017-01924-D

DOUGLAS SOUZA, ET AL., As They are Trustees of the Regency at Methuen Condominium Trust,
Plaintiff

vs.

TOLL MA LAND LIMITED PARTNERSHIP, TOLL BROS., INC., DAVID BAUER, MATTHEW DENNIS, SHAWN NUCKOLLS, TOLL ARCHITECTURE, MICHAEL LEBLANC, and KP BUILDING PRODUCTS,
Defendants

MEMORANDUM AND DECISION ON TOLL DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Now before the court is plaintiffs' first amended complaint. [D. 4]. Plaintiffs are the trustees (the "trustees") of the Regency at Methuen Condominium (the "condominium"). The Toll defendants are the three entities bearing the name Toll, plus the four named individual defendants that have or had employment relationships with one or more of the named Toll entities. The Toll entities and the named individual defendants with connections to the Toll entities will be collectively referred to as the "Toll defendants" and individually referred to by portions of their full names. The claims in this case arise out of the construction of the condominium

by the Toll defendants. Defendant KP Building Products, Inc. ("KP") is alleged to have provided defective siding as part of the construction of the condominium. Toll MA Land Limited Partnership was the developer of the condominium and the declarant on the trust documentation that created the condominium. Toll Bros., Inc. is alleged to have participated in the development of the condominium and/or to have had pervasive control of the development such that it should be liable for any proven damages.

The first amended complaint [D. 4] asserts the following causes of action:

1. Negligence against Toll MA and Toll Bros.
2. Breach of fiduciary duties against Toll MA and Toll Bros.
3. Breach of implied warranty against Toll MA and Toll Bros.
4. Breach of fiduciary duties against Bauer, Dennis, Nuckolls and Toll Bros.
5. Piercing corporate veil of Toll MA against Toll Bros.
6. Negligence against LeBlanc and Toll Architecture
7. Negligent misrepresentation against LeBlanc and Toll Architecture
8. Breach of contract - third party beneficiary against LeBlanc and Toll Architecture
9. Negligence against KP

10. Breach of implied warranty against KP

11. Breach of express warranty against KP

12. Breach of warranty for a particular purpose against KP

13. Negligence against John Doe(s)

John Doe(s) are alleged, upon information and belief, to have provided subcontracting services with regard to the construction of the condominium pursuant to agreements with Toll MA and/or Toll Bros. Negligence by John Doe(s) is alleged upon information and belief. The court dismisses Count XIII for failure to state a claim against a named individual at this time. Service of process is impossible to effect, and no one is available to respond to the claim. Subcontractors may well be brought into the case by the Toll defendants and/or KP. Discovery may well provide plaintiffs with specific facts to name one or more identified subcontractors as defendants. Those possibilities will be addressed by the court upon appropriate motions filed in a timely fashion.

Now before the court is the motion to dismiss filed on behalf of all Toll defendants. [D. 15]. KP has filed an answer to the first amended complaint [D. 18] and is not a party to the motion to dismiss now before the court.[1] A non-evidentiary

[1]Also before the court is plaintiffs' subsequently filed motion for leave to file second amended complaint. [D. 16]. Plaintiffs will be given leave to file a second amended complaint consistent with the court's rulings on the Toll defendants' motion to dismiss.

hearing was held on January 22, 2019. For reasons discussed below, the Toll defendants' motion to dismiss is **ALLOWED IN PART** and **DENIED IN PART**.

DISCUSSION

In considering a motion to dismiss, "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." *Nader* v. *Citron*, 372 Mass. 96, 98 (1977). The Supreme Judicial Court has restated the motion to dismiss standard by adopting the reformulated standard adopted by the United States Supreme Court. In *Iannacchino* v. *Ford Motor Company*, 451 Mass. 623, 636 (2008), quoting liberally from *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007), the Supreme Judicial Court stated:

> "While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to "reflect[] the threshold requirement of [Fed. R. Civ. P.] 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"

See also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). "Threadbare

recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action." *Id.* It is worth noting that *Iannacchino* "retired" the previous standard used in Massachusetts to determine the legal sufficiency of claims challenged under Mass. R. Civ. P. 12(b)(6), which was the same federal standard overruled in *Twombly*. The earlier standard was: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Nader*, 372 Mass. at 98. The current *Iannacchino* standard is more stringent than the earlier, now retired, *Nader/Conley* standard. There are two commands that this court takes from *Iannacchino*. First, specific factual allegations must plausibly suggest an entitlement to relief. Second, labels and conclusions are not sufficient to make such a plausible suggestion.

In considering a motion to dismiss, the court is bound by the four corners of the complaint, but a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Mass. R. Civ. P. 10(c). Here, no exhibits are attached to the plaintiffs' first amended complaint. However, the court will accept as properly before it the copies of the trust documentation recorded with the registry, attached to the Toll Bros. supporting memorandum, and referenced in plaintiffs' first

amended complaint. The court does not view its consideration of recorded trust documentation as converting this motion to dismiss into a Rule 56 motion, and so rules. Mass. R. Civ. P 12(b).

1. Statute of Repose Issue

An action of tort for damages arising "out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues" and in no event "more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." G. L. c. 260, § 2B. The Toll defendants contend that the six-year statute of repose bars tort claims for those parts of the condominium that were opened or occupied more than six years before the complaint in this case was filed on December 22, 2017. The Toll defendants contend that sixty of the 240 units planned and ultimately built were opened/ substantially competed before December 22, 2011. Plaintiffs contend that the statute of repose did not start to run until the last of the 240 planned units were opened/ occupied, well within the six years prior to December 22, 2107. The court agrees with the plaintiffs.

If this was a different case, and there were two distinct phases of the

development, either by distinct geographical locations or perhaps by type of unit, such that construction was completed on one distinct phase prior to commencement of construction of a second distinct phase, the Toll defendants' argument would have more force. But here, there was one continuous construction project with no large distinct phases, and units merely came on line for occupancy as the particular unit, and not a large distinct phase was completed. In other words, there were not two distinct phases, there were sixty-six phases, each comprised of a small number of units, that were ready for occupancy as each small phase was completed. The sixty units for which the Toll defendants seek the protection of the statute of repose are distinguishable from the remaining 180 units only by their completion date. As plaintiffs argue, the law should not impose a duty on plaintiffs to commence separate law suits arising out of a large series of small construction phases one at a time to prevent the statute of repose from running on numerous small indistinct portions of one comprehensive and continuous condominium development.

In any event, as to certain of the Toll defendants, they executed a written tolling agreement with plaintiffs, apparently before six years had passed from the occupancy of the first completed units. The court agrees with the Toll defendants that equitable tolling is unavailable to defeat the statute of repose, but rejects their unsupported contention that parties cannot contractually toll the statute of repose. No

case cited by the Toll defendants supports that unfathomable contention that potential defendants can lull potential plaintiffs into delaying the commencement of suit by execution of a written tolling agreement, and then sandbag them by disavowing the legal effect of the written agreement. So much of the motion to dismiss that relies on the statute of repose will be denied.

2. ADR/Mediation Issue – Former Trustees

Bauer, Dennis and Nuckolls ("former trustees") are alleged to have been trustees of the condominium appointed by the developer to hold their offices until replaced by trustees elected by unit owners, which plaintiffs allege occurred in or about the fall of 2015. Plaintiffs alleged that the former trustees breached their fiduciary duties to the trust by failing and refusing to address and remediate certain construction defects despite having actual and/or constructive knowledge of the existence of the significant design and/or construction deficiencies. Plaintiffs also allege that the former trustees failed to pursue the trust's claims concerning construction defects against the developer or take other proper action concerning the construction deficiencies. The former trustees seek dismissal of the breach of fiduciary duty claim against them for failure by plaintiffs to pursue required alternative dispute resolution ("ADR") provided for in Paragraphs 23 and 24 of the Master Deed. The pertinent portion of Paragraph 23, as it now reads, provides as

follows:

> B. The Board of Trustees, its trustees, officer, directors and committee members, unit owners and all parties subject to this Master Deed, agree that it is in the best interest of all concerned to encourage the amicable resolution of disputes involving the Condominium without the emotional and financial cost of litigation. Accordingly each Bound Party agrees not to file suit in any court with respect to a Claim described below, unless and until it has first submitted such Claim to the alternative dispute resolution procedures set forth herein in a good faith effort to resolve such Claim.

Such claims referenced above include: "The rights obligation, and duties of any Bound Party under the Master Deed, Declaration of Trust, the By-Laws, and Rules and Regulations adopted by the Board of Trustees." There is no dispute, and the court finds, that the fiduciary duty claim asserted against the former trustees is a described claim under Paragraph 23 of the Master Deed. The dispute between the parties is whether the former trustees are included within the reference to "its trustees" and thus entitled to the protections of the ADR provision of the Master Deed. The court agrees with the former trustees and finds that they are entitled to the ADR protection of the Master Deed and cannot be sued without plaintiffs having first complied with its provisions.[2]

First, the claims asserted against the former trustees in the first amended

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[2]Plaintiffs concede that they did not pursue the dispute resolution procedures of Paragraph 24 of the Master Deed with respect to any defendants, including the former trustees.

complaint arose while they were trustees of the condominium. Second, Paragraph 23 does not limit its protections to current trustees. Third, plaintiffs recently amended Paragraph 23 to remove the developer of the condominium from its protections. Plaintiffs could have further limited Paragraph 23 to current, or current and future trustees, or eliminated developer appointed trustees from its coverage, but did not. Fourth, the amended provision maintained protection for "all parties subject to this Master Deed." The Master Deed has numerous provisions regarding the rights and responsibilities of the condominium's trustees, that at one time included the former trustees. Just by way of example, the first Paragraph 23 of the Master Deed (at page 32) provides in part: "The Board of Trustees shall have the power to adopt, amend and enforce compliance with such reasonable Rules and Regulations relative to the operation, use and occupancy of the Units and the Common Elements consistent with the provisions of this Master Deed . . ." So much of the motion to dismiss that seeks dismissal of the former trustees from Count IV (breach of fiduciary duty) will be allowed. The dismissal shall include defendant Toll Bros., as the court is also finding below no fiduciary duty on the part of the developer/declarant Toll MA, and it follows that the same claim against Toll Bros. cannot survive.

3. Fiduciary Duties of Developer/Declarant

Plaintiffs have asserted a breach of fiduciary duty claim against Toll MA and

Toll Bros. as the developer of the condominium and declarant on the Master Deed. [See Count II]. Toll MA has not moved to dismiss the negligent design/construction claim against Toll MA in Count I of the first amended complaint, as it concedes that Massachusetts law has long recognized suits against condominium developers for defective or negligent construction. Toll MA has moved to dismiss the breach of fiduciary duty claim in Count II, contending that Massachusetts law has not established a fiduciary relationship between a condominium developer and unit purchasers/owners. Plaintiffs do not dispute that no appellate court in Massachusetts has ever found such a fiduciary relationship, but rely on trial court decisions and decisions in other jurisdictions. Plaintiffs also analogize to established law finding a fiduciary duty between corporate promoters and investors. On the other hand, Toll MA relies on former Superior Court Judge Paul Chernoff's decision in *Wyman* v. *Ayer Properties, LLC*, Middlesex Superior Court Civil Action 2005-04230 (September 30, 2010), a negligent/defective condominium construction case charged similarly to this case. Judge Chernoff found that any statutorily based fiduciary duty placed upon a condominium developer was not breached by the allegations in the case, and that no general fiduciary duty exists upon a developer/declarant to submit the common areas and facilities to condominium status free from defects, fit for their intended purpose, and in accordance with all laws, codes and industry standards.

[Pages 23-27 of memorandum decision]. This court agrees with the analysis and rulings in the *Wyman* case and will dismiss so much of the first amended complaint (Count II) that asserts a breach of fiduciary duty claim against Toll MA and vicariously against Toll Bros.

4. Third-Party Beneficiary Claim

Count VIII of the first amended complaint asserts a breach of contract claim against the architects for the construction of the condominium on a third-party beneficiary theory of liability. This claim is in addition to the negligence and negligent misrepresentation claims brought against the same defendants, and which are not the subject of the Toll defendants' motion to dismiss. For reasons advanced by the architect defendants, the third-party defendant claim asserted against them in Count VIII will be dismissed.

5. Claims Against Toll Bros.

Plaintiffs added Toll Bros. as a named defendant in each of their claims against Toll MA as a direct participant in the alleged misconduct. Plaintiff also separately asserted a piercing the corporate veil claim against Toll Bros. based on alleged pervasive control of Toll MA by Toll Bros. Toll Bros. seeks dismissal of those claims where it is alleged it was a direct participant, and dismissal of the piercing claim as failing to state a cause of action recognized in Massachusetts. The court

agrees with Toll Bros. that Count V does not state a cause of action in this Commonwealth. The doctrine of corporate disregard is an equitable tool available to courts, but not a stand-alone cause of action. Count V will be dismissed. Although a close call, the court will not dismiss Toll Bros. from Counts I and III without further factual development and a properly submitted summary judgment record, if one develops through the course of discovery. Much will depend on whether employees of Toll Bros. who were not employees of Toll MA participated meaningfully in the design and construction of the condominium. The court is also not sure, given use of one counsel to represent all Toll defendants, whether Toll Bros.'s inclusion in this case is of any significant concern to the Toll defendants. If is it, the court will given Toll Bros. the option of splitting discovery in this case, staying general discovery, and permitting expedited discovery on the role of Toll Bros. in the development of the condominium, in order to determine whether plaintiffs have a reasonable expectation of establishing direct participation by Toll Bros. or the doctrine of corporate disregard. The court will not at this time dismiss Toll Bros. from Count I and III.

ORDER

The Toll defendants' motion to dismiss [D. 15] is **ALLOWED** as to the following counts, and otherwise **DENIED**:

1. Count II in its entirety against Toll MA and Toll Bros.

2. Count IV in its entirety against Bauer, Dennis, Nuckolls, and Toll Bros.

3. Count V in its entirety against Toll Bros.

4. Count VIII in its entirety against LeBlanc and Toll Architecture

5. Count XIII in its entirety against John Doe(s)

Plaintiffs' motion for leave to file second amended complaint [D. 16] is **ALLOWED**, but the proposed second amended complaint submitted to the court will not be docketed. Plaintiffs shall have thirty days from this date to file a second amended complaint that is not inconsistent with the court's rulings on the Toll defendants' motion to dismiss. After answers are filed to the second amended complaint, Toll Bros., if it wishes, may file (under Rule 9A) a motion for leave to limit initial discovery to the issue of its liability, with a proposed schedule of such discovery. If the Toll defendants do not exercise their right to file a third-party complaint without leave of court within 20 days of serving their original answers, they shall have leave to file any such third-party complaint within sixty days after the expiration of the original twenty days to so file as a matter of right. Any further leave shall be by motion only, supported by good cause for any delay.

Timothy Q. Feeley
Associate Justice of the Superior Court

January 28, 2019

55 Mass.App.Ct. 1114
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Albert FINE & others, [1]

v.

HUYGENS, DIMELLA, SHAFFER & ASSOCIATES & others. [2]

No. 99–P–2007.
|
Aug. 29, 2002.

Synopsis

Condominium board of managers sued various contractors alleging negligence, breach of contract, breach of express and implied warranties, and unfair trade practices related to design and construction of condominium building. Contractors moved for summary judgment on statute of limitations grounds. The trial court entered judgment in favor of nine of twelve contractors. Managers appealed. The Appeals Court held that: (1) managers failed to file negligence claims within three-year limitations period; (2) tort three-year limitations period applied to breach of contract claims; (3) unfair trade practices claims were filed within four-year limitations period; and (4) prior settlement did not preclude claims against contractors who were not parties to settlement.

Affirmed in part, reversed in part, and remanded.

West Headnotes (5)

[1] **Limitation of Actions** Injuries to property

Irregularities in building exterior, observed and reported by waterproofing firm to condominium managers in periodic invoices, put managers on notice of injury from water leakage due to faulty construction, and thus, managers failed to file negligence action against contractors within three-year limitations period for tort actions against design professionals, even though waterproofing firm's final report, which detailed faulty exterior panels and failed sealants, was submitted to managers less than three years prior to commencement of suit, where defects were discovered by customary observation in course of repairs and were not hidden from discovery until repairs were finished. G.L. c. 260, § 2B.

1 Cases that cite this headnote

[2] **Limitation of Actions** Injuries to property

Condominium managers defective design claims against heating contractor accrued when managers received consultant's report that design might be deficient if building exterior was faulty, and thus, three-year statute of limitations for tort actions against design professionals expired prior to managers filing suit, where managers knew of problems with exterior, which caused water leakage in building, at the time of consultant's report. G.L. c. 260, § 2B.

1 Cases that cite this headnote

[3] **Common Interest Communities** Limitations and laches

"Gist" of condominium managers' claims was that contractors failed to perform their contractual duties to requisite standard of care, and thus, three-year statute of limitations applied to managers' breach of contract claims against contractors, even though managers alleged that contractors breached their contract to inspect, review documents, and repair defects, where there was no evidence that contractors failed to perform these tasks, only that they failed to perform them properly. G.L. c. 260, § 2B.

[4] **Antitrust and Trade Regulation** Time to Sue; Limitations

Limitation of Actions Consumers' remedies

Four-year statute of limitations applied to condominium managers' claims that certain contractors committed unfair and deceptive trade practices in design and construction of building, and thus, managers' suit, filed just more than three years after managers had notice of design and construction defects in building exterior, was within limitations period. G.L. c. 93A.

1 Cases that cite this headnote

[5] **Judgment** Operation and effect

Settlement in prior litigation between condominium unit owners and architect, engineers, and general contractor of building, which resulted in federal court consent decree, related to damages for water leakage in building and was intended only to release those defendants who were parties in the suit, and thus, condominium managers were not precluded from bringing similar claims against contractors who were not parties to prior settlement, where settlement specifically named parties and did not provide release for any others connected with project.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** This is a suit by the board of managers of the St. George Seaside Condominiums and Beach Club Association, individually and as board managers, against twelve entities [3] that were involved in the planning and construction of the condominium building, predicated upon various construction defects and leaks that spawned litigation in both the Federal and State courts. The issues on appeal, resolved on motions for summary judgment in favor of nine of the twelve defendants, [4] concern the applicability of various statutory limitation periods and the statute of repose, G.L. c. 260, § 2B. The plaintiffs appeal from the entry of judgments against them, principally arguing that they did not discover they were injured, nor who the likely tortfeasor was, until, at the earliest, January, 1991, just under three years prior to commencement of the instant action on December 31, 1993. [5]

1. *Background.* We summarize the proceedings and certain uncontested facts to provide background, relying on familiar principles of law pertaining to summary judgment. See *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716, 575 N.E.2d 734 (1991); *Ng Bros. Constr., Inc. v. Cranney,* 436 Mass. 638, 647–648, 766 N.E.2d 864 (2002). In 1985 and 1986, the developer, Parencorp, contracted with the defendant architectural firm, Huygens, DiMella, Shaffer & Associates (Huygens), to design the St. George, a 240–unit, multi-story residential condominium building located on Revere Beach Boulevard in Revere. Huygens

and a design team elected to use glass fiber reinforced concrete (GFRC) panels for the exterior envelope, or "skin," of the building. HJP Construction Corporation (HJP) agreed to act as general contractor and construction manager of the project. Subcontractors were hired to design, fabricate and erect the GFRC panels, as well as to manufacture and install windows and to seal the installed windows and the GFRC panel joints to ensure against moisture penetration.

In 1986, Parencorp hired Thompson & Lichtner Company, Inc. (T & L) to review architectural drawings of the building's facade and to provide, among other things, on-site weatherproofing inspections and testing services during construction of the GFRC panels, sealant joints between panels, and welding of panel connections to the building frame. After the panels were installed, but before the joints were sealed, Huygens, HJP and T & L inspected the panels and joints and reported imperfections to Parencorp. HJP was responsible for insuring that "punch list" items concerning the GFRC panel erection were completed. The punch list items were completed in February, 1988. Huygens issued certificates of substantial completion with respect to certain units and common areas in February and March, 1988, and certified substantial completion of the building as a whole on September 1, 1988. A.590–613

Because construction was completed in phases, the first unit owners began occupying the building in April, 1988, while other units remained under construction. A few of the initial unit owners complained to Parencorp and its managing agent as early as July, 1988, of construction defects, including water leaks in the parking garage, function room, lobby and in dwelling units, that focused attention on the balcony decks, roof and garage traffic deck as the sources of the leaks. A.209–216, 776, 1051–1054, 2309, 2691

***2** During 1989, an informal group of unit owners banded together to finance an investigation by consultants, Simpson, Gumpertz & Hager (SGH), into the cause or causes of their concerns.[6] SGH submitted several reports to the group that ultimately pointed the finger to defects in the GFRC panels and window unit and joint sealants as likely leak sources.[7] However, before SGH conducted its investigation and submitted its report, Alpha Waterproofing (Alpha) was engaged by the unit owners to address numerous leaks occurring within individual units beginning in April, 1990; Alpha submitted invoices to unit owners on an ongoing basis. Alpha's invoices dating from May, 1990, through November, 1990, reflected weatherproofing work that involved the repair or removal of defective sealants around various windows and expansion joints, the new sealant to be "properly dry tooled to insure a watertight joint" A. 808–820; repair of "splits in the perimeter caulking" and "any horizontal cracks in the precast" A.810; inspection for "minor splits" in the "facade" A.814; and application of "waterproofing solution[ ] to the concrete panels above the leaking area." A.819 By letter dated January 29, 1991—the date on which the plaintiffs claim they were first on notice of the defects—Alpha summarized the conditions they had observed during leak repairs, including split and separated sealant on the expansion joints and "noticeable fractures on the panels, around the entire facade." A.829 The fractures, "more prevalent at the top," included "many at ground level, which can be seen as you walk around the building." *Ibid.*

On June 19, 1990, unit owners, including some who subsequently were named to the board of directors and are plaintiffs in this action,[8] brought an action in the Superior Court against Parencorp and the original developers[9] of the St. George that was removed to the United States District Court for the District of Massachusetts (St. George I). A.2310 When it was initially filed in Federal court, the St. George I complaint did not specifically mention defects to the exterior skin of the building,[10] but did recite that "the [p]laintiffs retained consultants to examine the structural integrity of the building," who had "confirmed that there are several substantial defects and deficiencies in the building," and that the plaintiffs had paid fees for these studies and continued to incur expenses as a result of defects including, among others, roof leaks. The initial complaint further alleged that the roof of the St. George "permits the leaking of water into condominium units and the common areas," and that "[t]he cost of full investigation and correction will be substantial." A.2560–2561, 2563 The Federal court action ultimately was settled, and we shall return to this procedural wrinkle later in this memorandum and order.

The present litigation was, as we have observed, filed by the board and individual board members on December 31, 1993. In the defendants' summary judgment motions, the primary claim is that this date falls outside of the three year statute of limitations applicable to tort actions against design professionals. G.L. c. 260, § 2B. The defendants assert, and the motion judge agreed,

that the time began to run when owners first reported observations of water leakage into their dwelling units in July, 1988, some five and one half years preceding the filing of the instant action, whereas the plaintiffs pinpoint January 29, 1991, as the date they were first on notice of the injury and its cause.

***3** 2. *Statute of limitations.* The burden is on the plaintiffs to establish that the claim was timely filed. "Where summary judgment is sought on the basis of a statute of limitations, once the defendant establishes that the time period between the plaintiff's injury and the plaintiff's complaint exceeds the limitations period set forth in the applicable statute, the plaintiff bears the burden of alleging facts which would take his or her claim outside the statute." *McGuinness v. Cotter,* 412 Mass. 617, 620, 591 N.E.2d 659 (1992), citing *Riley v. Presnell,* 409 Mass. 239, 243–244, 565 N.E.2d 780 (1991).

To defeat the motions for summary judgment, the plaintiffs seek to avail themselves of the discovery rule, which has been applied to latent construction or design defects. See *Albrecht v. Clifford,* 436 Mass. 706, 767 N.E.2d 42 (2002). "The rule, which operates to toll a limitations period until a prospective plaintiff learns or should have learned that he has been injured, may arise in three circumstances: where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party, where a wrongdoer breached some duty of disclosure, or where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive." *Id.* at 714, 767 N.E.2d 42, quoting from *Patsos v. First Albany Corp.,* 433 Mass. 323, 328, 741 N.E.2d 841 (2001).

[1] (a) *Negligence claims—discovery rule.* Relying principally upon *Bowen v. Eli Lilly & Co.,* 408 Mass. 204, 207, 557 N.E.2d 739 (1990), and *Cambridge Plating Co. v. Napco, Inc.,* 991 F.2d 21 (1st Cir.1993), the plaintiffs argue that the discovery rule tolled the statute of limitations during the period that investigation was undertaken by an expert to determine whether there was injury and, if so, to identify the likely tortfeasor. Br. at 15, 29 Under this view of the discovery rule, the plaintiffs argue, the statute was tolled until January 29, 1991, when Alpha (the company that had been engaged by the unit owners to waterproof the common areas as well as various individual units, see discussion *supra*), wrote to the plaintiffs informing them that Alpha workers had observed fractures on panels and split and separated sealants on expansion joints. Although Alpha's letter states that it was "not sure, at this point, that the fractures [on the panels] are causing any water penetration," Alpha was concerned that "serious problems could occur," and also that "failed expansions are causing leaks into the units." A.2050

We agree that the discovery of certain latent defects may not be evidence absent investigation by an expert, but disagree that the defects alleged to exist in this case were not observable, nor observed, earlier, and conclude that the observed defects also put the plaintiffs on notice as to the likely cause of their injury. "Latent defects are conditions that are hidden or concealed, and are not discoverable by reasonable and customary observation or inspection." *Albrecht v. Clifford,* 436 Mass. at 713, 767 N.E.2d 42. Cf. *Cambridge Plating Co. v. Napco, Inc., supra.* [11] The undisputed evidence, consisting of Alpha's invoices for weatherproofing services, indicates that the irregularities in the GFRC panels, and in the joint and window sealants, were not concealed but were discovered by customary observation beginning in May, 1990.

***4** As did the plaintiffs in *White v. Peabody Constr. Co.,* 386 Mass. 121, 129–130, 434 N.E.2d 1015 (1982), the plaintiffs here "argue that their causes of action did not accrue until [January, 1991], when 'the cause of (and) cure for' the leaks had been 'finally determined.' ... This contention reflects a misunderstanding of the relationship between statutes of limitation, the 'delayed discovery' doctrine, and the 'discovery' devices authorized by our rules of civil procedure. In all cases the statute of limitations begins to run when the injured person has notice of the claim. The 'notice' required is not notice of every fact which must eventually be proved in support of the claim. These details are properly the subject of requests for discovery once an action is filed. See Mass.R.Civ.P. 26–37. Rather, 'notice' is simply knowledge that an injury has occurred." See also *Bowen v. Eli Lilly & Co.,* 408 Mass. at 207, 557 N.E.2d 739 (" 'If cause were defined in its strictest sense, a cause of action would never accrue for purposes of the statute until cause, when at issue, had been resolved at trial" '); *Malapanis v. Shirazi,* 21 Mass.App.Ct. 378, 382–383, 487 N.E.2d 533 (1986).

Although there were early observations by a few owners of water damage to individual units, attributable at that time to roof leaks and defects in deck installation, we agree that these would not have been sufficient to put the plaintiffs reasonably on notice

of possible defects in the design and installation of the GFRC panels and window and joint sealants. [12] The surface irregularities observed by Alpha and reported to the plaintiffs in invoices submitted in May, 1990, and after, constituted manifestations of design or construction defects relating to the GFRC panels, joints and window installation that are alleged to have resulted in the plaintiffs' harm. This information, coupled with the plaintiffs' prior knowledge that water leaks into their units were not remedied by weatherproofing efforts directed at the roof and decking, was sufficient to put them on notice of injury and the "likely cause" of harm. Cf. *White v. Peabody Constr. Co.,* 386 Mass. at 123, 130, 434 N.E.2d 1015 (plaintiffs should reasonably have known that widespread water leaks in a newly constructed building almost certainly were the result of design or construction defects; "[t]here was ... nothing inherently unknowable about these causes of action"). See also *Kingston Housing Authy. v. Sandonato & Bogue, Inc.,* 31 Mass.App.Ct. 270, 273 n. 2, 577 N.E.2d 1 (1991) (plaintiff's position was not improved by application of the discovery rule where the leakage difficulty dramatically was apparent from day one; "through the application of diligence, the [plaintiff] was in a position to discover what was wrong"). More was not required to begin the running of the statute of limitations. [13] Therefore, the plaintiff's claims for negligence against each of the defendants except Peregrine (which we discuss below) are time barred; as to these claims the judgment of dismissal should be affirmed.

***5 [2]** (b) *Claim against Peregrine.* We also decide that the plaintiffs' single negligence count against Peregrine—in connection with alleged defects in the heating, ventilating and air conditioning system—is barred by the three year statute of limitations. The plaintiffs allege that Perergine failed to exercise due care "in the design, specification, inspection and construction of the HVAC system." A.59

The plaintiffs argue in their brief that the boilers installed by Peregrine were inadequate to heat the building, and that this inadequacy was not discoverable until the severe winter of 1994–1995. This argument is not supported by the record. The only relevant evidence in the record is a report dated March 6, 1990, from an outside consultant retained to "investigate apparent heating and domestic hot water deficiencies at the St. George," and "to assess the design, construction and operation of the building with respect to the issues." A.679 According to the report, the HVAC deficiencies were related to "balancing, control, and calibration problems," and notes that the "heating system in general was properly designed." A.679–680 The report also notes that "[u]nless there were gross deficiencies in the construction of the building envelope, there should be adequate capacity to heat the building." A.688

The plaintiffs were aware, at least by the date of the report, that the heating system may be inadequate if there were deficiencies in the building envelope, and the plaintiffs cite nothing in the record to support the conclusion that the heating system was inadequate notwithstanding any problems with the building exterior. We conclude that the statute of limitations was tolled by at least the date of the March, 1990, report, and that this claim is therefore also time-barred.

[3] (c) *Breach of contract claims.* The plaintiffs contend that the motion judge should not have relied on *Kingston Housing Authy. v. Sandonato & Bogue, Inc., supra,* in applying the three-year statute of limitations in G.L. c. 260, § 2B, to their breach of contract claims against Huygens (architect), HJP (general contractor and construction manager), and T & L (on-site inspector). In that case, which also involved a claimed breach of an express warranty, we held that, where the basis of the claim was the negligence of the defendant general contractor in deviating from contract specifications resulting in the construction of a leaky building, the claim was barred by application of the three year statute of limitations under § 2B. 31 Mass.App.Ct. at 271–274, 577 N.E.2d 1. The plaintiffs argue that the instant case is, instead, governed by *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engrs., Inc.,* 396 Mass. 818, 819–823, 489 N.E.2d 172 (1986), in which the Supreme Judicial Court held that time limits set forth in § 2B did not bar suit by a plaintiff alleging breach of an express warranty where the defendant, who designed and constructed a ship cradle and mooring system that failed during a storm and led to the destruction of the plaintiff's ship, expressly promised that the system would withstand wind and tidal forces. We agree that where "the standard of performance is set by the defendants' promises, rather than imposed by law, an express warranty claim is and generally has been understood to be an action of contract, rather than of tort." *Id.* at 822, 489 N.E.2d 172 "[A]n express warranty promises that a specific result will be achieved—in contrast to a promise implied by law—namely, that the work of the professional conforms to the standards of his or her profession." *Coca–Cola Bottling Co. of Cape Cod v. Weston & Sampson Engrs., Inc. .,* 45 Mass.App.Ct. 120, 128, 695 N.E.2d 688 (1998). The plaintiffs point to no contractual provisions that guarantee a specific result.

***6** "A plaintiff may not ... escape the consequences of a ... statute of limitations on tort actions merely by labeling the claim as contractual. The court must look to the 'gist of the action." ' *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engrs., Inc.,* 396 Mass. at 823, 489 N.E.2d 172. Although the complaint makes allegations that, broadly construed, could be said to assert claims of breaches of contract based on the defendants' failures to inspect work, review documents, correct defects and manage the construction as required by the terms of the various agreements, [14] we find nothing in the summary judgment materials before us, and the plaintiffs do not direct us to any, that would support claims that the defendants failed to undertake these activities. [15] We therefore are left to conclude that "the gist" of the plaintiffs' argument is that if the defendants had performed their contractual duties according to the requisite standard of care, the defects in the building would have been uncovered, a claim that sounds in tort. *Klein v. Catalano,* 386 Mass. 701, 719, 437 N.E.2d 514 (1982). The claims against Huygens, HJP and T & L were barred by the three year statute of limitations. [16]

[4] (d) *Chapter 93A claims.* Claims were made against Coastal, ACS and Howard for unfair and deceptive trade practices in violation of G.L. c. 93A. We apply a four year statute of limitations to such claims, with an accrual date that "is determined by the same principles dispositive of the accrual dates of general tort actions." *International Mobiles Corp. v. Corroon & Black/ Fairfield & Ellis, Inc.,* 29 Mass.App.Ct. 215, 221, 560 N.E.2d 122 (1990). Cf. *Albrecht v. Clifford,* 436 Mass. at 714 n. 15, 767 N.E.2d 42. Because the action commenced on December 31, 1993, less than four years after Alpha's May through November, 1990, invoices reflect the plaintiff's awareness of the defects at issue, these claims are not time-barred. We therefore reverse the judgment dismissing the c. 93A claims against Coastal, ACS and Howard. [17]

(e) *The statute of repose.* Because we conclude that the the plaintiffs' negligence claims accrued more than three years before the filing of their complaint and are thus time barred, we need not address Howard and Coastal's contentions that the negligence claims against them are likewise barred by the six-year period of repose provided by G.L. c. 260, § 2B.

[5] 3. *Claim preclusion.* The defendants assert that the doctrine of res judicata bars the plaintiffs' suit because the plaintiffs' claims against the defendants should have been raised in St. George I, which was settled. "In the jargon of res judicata and collateral estoppel law, the question is whether a form of 'nonmutual claim preclusion' is appropriate, i.e. whether a party not involved in the earlier action may deflect this lawsuit because he should have been, but was not, included in the earlier suit." *In re El San Juan Hotel Corp.,* 841 F.2d 6, 10 (1st Cir.1988). [18]

"Generally, a court-approved settlement receives the same res judicata effect as a litigated judgment." *In re Medomak Canning,* 922 F.2d 895, 900 (1st Cir.1990) (italics omitted). However, "[t]he basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4443, at 384 (1981) (footnote omitted). "The preclusive effect of the Consent Order is determined by the intent of the parties which is, in turn, determined by application of contract interpretation principles." *Young–Henderson v. Spartanburg Area Mental Health Center,* 945 F.2d 770, 774 (4th Cir.1991). "The straightforward rule is that a party releases only those other parties whom he intends to release." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 347, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). See *Boguslavsky v. South Richmond Sec., Inc.,* 225 F.3d 127, 130 (2nd Cir.2000) (issue is contractual privity, not preclusion privity.) [19]

***7** The defendants, who were not parties in St. George I, contend that the consent judgment in that action released them of all liability. We disagree, and conclude that the consent judgment in this case is applicable only to the parties in St. George I. [20] Reading the consent judgment in conjunction with the settlement agreement [21] it is further evident—from the fact that the settlement agreement provides for an assignment of claims by the federal defendants to the plaintiffs here—that the plaintiffs intended to preserve their present claims. We therefore conclude that the parties did not intend to preclude any future suit against the current defendants.

4. *Other issues.* Although raised below, the plaintiffs make no argument on appeal that the defendants' control of the board of managers tolled the statute of limitations. The argument is therefore waived. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

5. *Conclusion.* The judgment of dismissal is affirmed as to all claims asserted against defendants Huygens, DiMella, Shaffer & Associates; Wrenn Construction Corp.; Chapman Waterproofing Co.; HJP Construction Co.; Peregrine Mechanical, Inc.; and Thompson & Lichtner Co., Inc. The judgment of dismissal is affirmed as to Counts III, VI, IX, and XXIV asserted against defendants Coastal G.F . R.C., Inc., Architectural Cladding Systems, and Howard Industries, Inc.; it is reversed and the case is remanded as to Counts IV, V, VII, VIII, X, XI, XXV, and XXVI.

So ordered.

APPENDIX

"Counsel for the parties have reported to the Court a settlement of all claims raised in this action, pursuant to a Settlement Agreement signed by the parties. The parties have further reported that said Settlement Agreement calls for a dismissal with prejudice of all claims raised by plaintiffs against *defendants in this action,* and all cross-claims and counterclaims asserted herein.

...

"3. This Court hereby dismisses on the merits, with prejudice and without costs, with each party to bear its own attorneys' fees and other costs, all claims raised in this action and all amended complaints filed in this action and any and all claims, cross-claims, demands, rights, of whatever nature, character or description, actions and causes of action, whether direct, derivative, representative or individual in nature, known or unknown, foreseen or unforeseen, concealed or hidden, accrued or unaccrued, which might have been, could have been or might in the future be asserted by any of the plaintiffs arising out of or in any way related to, directly or indirectly ... (b) the development, construction or repair of the St. George Seaside Condominiums and Beach Club (the 'Condominium'), *any work performed by the contractor or any subcontractor on the Condominium,* and any choice or approval of any design of or materials used in construction or repair of the Condominium....

"4. The individual plaintiffs and the Board of Managers of the Condominium Association are hereby forever barred and enjoined from instituting or prosecuting, either directly or indirectly, *against any of the defendants,* any and all claims, demands, rights, actions or causes of action whether direct, derivative, representative or individual in nature, known or unknown, foreseen or unforeseen, concealed or hidden, accrued or unaccrued, which might have been, could have been or might in the future be asserted by any of the plaintiffs arising out of or in any way related to, directly or indirectly ... (b) the development, construction or repair of the St. George Seaside Condominiums and Beach Club (the 'Condominium'), any work performed by the contractor or any subcontractor on the Condominium, and any choice or approval of any design of or materials used in construction or repair of the Condominium." (R. 1886–1888) (Emphasis added.)

All Citations

55 Mass.App.Ct. 1114, 774 N.E.2d 685 (Table), 2002 WL 31002133

Footnotes

1 Josephine Colarusso, Bertram Lipman, Barbara McDonald, and Darrell Mook, individually, and as they constitute the Board of Managers of the St. George Seaside Condominiums and Beach Club Association.

2 Architectural Cladding Systems, Wrenn Construction Corporation, Chapman Waterproofing Company, HJP Construction Co., Peregrine Mechanical, Inc., Panitas/Zade Associates, Inc. [also referred to in the complaint as Panitsas/Zade Associates, Inc.], PDM Mechanical Contractors, Inc., Thompson & Lichtner Co., Inc., Three Rivers Aluminum Company, doing business as Traco, Coastal G.F.R.C., Inc., and Howard Industries, Inc.

3 The complaint alleges negligence in the design and construction of the building on the part of each of the named defendants. In addition, the complaint asserts breach of contract claims against Huygens, DiMella, Shaffer & Associates (Huygens), HJP Construction Co. (HJP) and Thompson & Lichtner Co., Inc. (T & L), and breach of implied warranty claims against Coastal G.F.R.C., Inc. (Coastal); Architectural Cladding Systems (ACS, alleged to be the successor to Coastal); HJP; Three Rivers Aluminum Company, doing business as Traco, (Traco), and Howard Industries, Inc. (Howard). The complaint alleges, with respect to Coastal, ACS, Traco and Howard, that the breaches of implied warranties also constituted unfair trade practices under G.L. c. 93A.

4 All defendants except Panitas/Zade Associates, Inc. (Panitas), PDM Mechanical Contractors, Inc. (PDM), and Traco filed motions for summary judgment. According to the briefs, Traco was voluntarily dismissed from the action, whereas neither Panitas nor PDM appeared to defend.

5 In light of the motion judge's dismissal of all claims on the basis that none were timely filed, he did not address the merits of any claims. Some defendants now argue that we should determine issues that were not addressed by the motion judge (such as whether there was insufficient evidence set forth by the plaintiffs to make out a claim of negligence, entitling a defendant to summary judgment). The record before us is insufficient to enable us to address these issues; we decline to do so. Cf. *Christo v. Edward G. Boyle Ins. Agency, Inc.,* 402 Mass. 815, 819, 525 N.E.2d 643 (1988) (declining to resolve equitable tolling issue with respect to administrative appeal where motion judge did not reach question).

6 From mid–1989 through early 1990 the developer, Parencorp, suffered financial reversals culminating, on March 12, 1990, in the transfer of title to the unsold portion of the project from Parencorp to an entity created by the project lenders. Board members who had been appointed by Parencorp resigned, and the lender-created entity appointed new board members. The newly appointed members soon declined appointment. A.461

7 The first, dated February 28, 1990, focused on leakage in the garage areas. A.776 In its August 12, 1991, report of a June 24, 1991, field inspection SGH noted that “GFRC panels show surface crazing” and some cracking, and water stains running vertically down the interior drywall of an inspected unit. A. 1578–1586 By the time of its September 17, 1991, letter to unit owners, the scope of SGH's involvement had increased to include preliminary inspection “of the waterproofing work recently completed by Alpha.” A.1576 A further site visit was conducted by SGH on September 27, 1991, and reported in a December 30, 1991, letter summarizing SGH's preliminary investigation. The report focused specifically on the GFRC panels as a possible source of the leakage problems, noting among other things that “[f]ine cracking is visible on the face of many of the panels,” and that “[s]ealant is debonded from the edge of the panels in several areas.” A.1102–1103 The report concludes: “These preliminary observations indicate that some water is penetrating the GFRC panels. Probable areas of penetration include the window units, panel-to-panel joints, coping details, and or cracks and defects in the panels. The large incidence of cracking also indicates that some of the panels may be improperly designed, fabricated, or installed.” A.1103 A detailed investigation of the building envelope was proposed to assess the cause and extent of the problem and arrive at recommendations for remedial action.

8 Josephine Colarusso, Bertram Lipman and Barbara McDonald.

9 Named defendants in St. George I included the St. George Limited Partnership, alleged to have been “the original developer and marketer of the St. George;” other limited partnerships, general partners, co-general partners, and those substituting as general and co-general partners; as well as lenders who had initiated foreclosure proceedings against the property. None of the defendants in the instant action was a named defendant in St. George I.

10 After the action was removed to Federal court, an amended complaint dated January 6, 1992, was filed that added the condominium board as a plaintiff and further alleged that “the plaintiffs have been advised that the ... [GFRC] panel sections ... were improperly designed, constructed and/or installed, and such defects and deficiencies have permitted water to penetrate the building skin. In addition, many of the building panels show signs of premature cracking.” A.2615

11 *Cambridge Plating* involved a wastewater treatment system designed and installed by the defendant. Once the system became operative, the plaintiff experienced test results indicating contaminant levels in its wastewater discharges that exceeded regulatory limits. This was attributed either to errors in operation or sampling. It transpired that test results were not accurate because the defendant's failure to install an important component, a static mixer, meant that only 80% of the wastewater was being tested. The defendant's diagrams wrongly reflected that the static mixer was placed in the system. This defect was not unearthed until February, 1989, through an expert's comparison of the defendant's diagrams with the actual system. The Court of Appeals, in contrast to *White v. Peabody Constr. Co.,* 386 Mass. 121, 130, 434 N.E.2d 1015 (1982), concluded that Cambridge Plating “had no reason to suspect serious flaws” because omission of the static mixer could only have been discovered by a wastewater treatment expert, and because the defendant's diagrams reflected that the necessary device had been installed when in fact it had not. 991 F.2d at 29.

12 The January, 1995, report of the plaintiff's expert states, in summary, that the cracks in the panels and sealant joints and window assemblies allowed water penetration through the exterior wall; water then traveled down the wall cavity, was absorbed by fire safing insulation and then drained to wet steel beams and interior ceilings, making the source difficult to pinpoint. A.2084–2085

13 *Solomon v. Birger,* 19 Mass.App.Ct. 634, 638, 477 N.E.2d 137 (1985), is not to the contrary. There, the plaintiffs did not file suit until four years after the date of an expert's report that informed them that cracks in the foundation slab and walls of a house were caused by a serious foundation defect. Because a three year statute of limitations applied, it was not necessary to determine the precise point in time when, prior to the date of the report, the plaintiffs first observed the cracks that alerted them to the problem.

14 The plaintiffs' expand upon these allegations in their brief, claiming that (1) HJP expressly contracted to perform all work required by the contract, warranted that the work would be free from defects, and promised, after notice, to correct work found to be defective; (2) Huygens promised to provide enhanced field services, guard against defects, certify the work quality to be in accordance with the contract, and visit the project and observe any conditions requiring corrective action; and (3) T & L expressly promised to review plans relating to weatherproofing the facade, review and comment on window system drawings, inspect weatherproofing related installation, advise on use of weatherproofing materials, and test windows and curtain walls.

15 The sole basis provided by the plaintiffs to support their assertion that there are genuine issues of material fact surrounding the failure of Huygens, HJP and T & L to perform their contractual duties consists of a record reference to an expert opinion provided under Mass.R.Civ.P. 26(b), 365 Mass. 772 (1974). A.1297 The expert opinion asserts the existence of a number of deficiencies in the design and construction of the project, and concludes that based these deficiencies the defendants failed to "perform the work in accordance with the project documents." *Ibid.* These conclusory assertions are insufficient to transform this from a tort claim to one based on contract.

16 We note that HJP's contract contains a one year limitation period during which written notice of defects must be given. A.1449 There is nothing in the record to indicate that this was done.

We also note that a "cause of action for breach of contract accrues at the time of the breach." *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.,* 29 Mass.App.Ct. 215, 221, 560 N.E.2d 122 (1990). The plaintiffs make no assertions, nor direct us to summary judgment materials, regarding the dates on which failures to perform under the contract allegedly occurred.

17 We also reverse the dismissal of breach of warranty claims against ACS, Coastal, and Howard. These claims, premised on the supply of GFRC panels and window products to the project by these defendants, were dismissed by the motion judge on the basis of the incorrect June, 1988, tolling date. The Uniform Commercial Code contains both a three year statute of limitations applicable to tort-based claims, G.L. c. 106 § 2–318, and a four year statute of limitations applicable to contract-based actions, G.L. c. 106, § 2–725. "The appropriate statute of limitations to apply to a breach of warranty claim under art. 2 of the Uniform Commercial Code is found by determining the nature of that particular breach of warranty claim." *Bay State–Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.,* 404 Mass. 103, 110, 533 N.E.2d 1350 (1989). Because the judge's ruling that the Code barred these claims was based on his assumption that the statute was tolled as of June, 1988, he made no determination whether the three or four year limitations period applied, concluding that the claims were barred under either period. Because the parties do not address this issue on appeal, and there is little in the record from which to determine whether these claims are tort- or contract-based and timely under the Uniform Commercial Code, we do not decide the issue.

18 Because the Federal litigation terminated pursuant to a consent decree, we apply federal law. "When a State court is faced with the issue of determining the preclusive effect of a Federal court's judgment, it is the Federal law of res judicata which must be examined." *Anderson v. Phoenix Inv. Counsel of Boston, Inc.,* 387 Mass. 444, 449, 440 N.E.2d 1164 (1982). See also *Amalgamated Sugar Co. v. NL Indus., Inc.,* 825 F.2d 634, 639 (2d Cir.1987) ("The general rule is that a final consent decree is entitled to res judicata effect ... because the entry of a consent judgment is an exercise of judicial power ... entitled to appropriate respect and because of the policy favoring finality of judgments").

19 "Under the federal law of res judicata, a final judgment on the merits of an action precludes the parties *or their privies* from relitigating claims that were raised or could have been raised in that action." *Apparel Art Intl., Inc. v. Amertex Enterprises Ltd.,* 48 F.3d 576, 583 (1st Cir.1995) (emphasis added, footnote omitted). "For a claim to be precluded, the following elements must be present: 1) a final judgment on the merits in an earlier suit; 2) sufficient identicality between the causes of action asserted in the earlier and later suits; and 3) sufficient identicality between the parties in the two suits." *Ibid.*

20 Relevant portions of the consent decree, entitled "Stipulated to Entry of Final Judgment and Order of Dismissal," are set forth in the attached appendix to this opinion. We disagree with the defendants' contention that the language emphasized in paragraph three of that document releases them from liability because it does not specifically use the word "defendants" in reference to those released from liability, and therefore that the plaintiffs are barred from bringing suit against any entity connected with the project. Construing the document as a whole, we find no intent on the part of the settling parties to preclude the plaintiffs from bringing suit against the defendants here. Cf. *Massachusetts Mun. Wholesale Elec. Co. v. Danvers,* 411 Mass. 39, 45–46, 577 N.E.2d 283 (1991) ("To ascertain intent a court considers the words used by the parties, the agreement taken as a whole, and surrounding facts and circumstances").

21 The settlement agreement provides in relevant part:

"[T]he Settling Defendants hereby assign any and all rights with respect to such claims or causes of action that they may have against the Architect, Engineers and General Contractor to the Board of Managers for the purpose of allowing the Board of Managers the

authority to undertake such claims, causes of action, lawsuits, arbitrations, and any and all other such litigation as may be necessary and appropriate against the aforesaid Architect, Engineers and Contractor for the benefit of the Condominium and further assign and transfer to the Board of Managers all right, title and interest of the Settling Defendants and release any claim in and to any and all damage awards, settlements, judgments and the like arising therefrom." A. 127–128

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title I. Title to Real Property (Ch. 183-189)
Chapter 183A. Condominiums (Refs & Annos)

M.G.L.A. 183A § 1

§ 1. Definitions

Currentness

As used in this chapter, the following words shall, unless the context otherwise requires, have the following meanings:--

“Building”, any building containing one or more units comprising a part of the condominium.

“By-laws”, the by-laws of the organization of unit owners.

“Common areas and facilities” shall, except as otherwise provided or stipulated in the master deed, mean and include:--

(1) The foundations, columns, girders, beams, supports, party walls, common walls, main walls, roofs, halls, corridors, lobbies, public stairs and stairways, fire escapes and entrances and exits of the building;

(2) Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating;

(3) The elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use;

(4) The land on which the building is located, or the lessee's interest in any lease of such land which is submitted to the provisions of this chapter;

(5) The basements, yards, lawns, gardens, recreational facilities, parking areas and storage spaces;

(6) The premises for the lodging of custodian or persons in charge of the condominium;

(7) Such community and commercial facilities as may be provided for in the master deed as being owned in common.

(8) All other parts of the condominium necessary or convenient to its existence, maintenance and safety, or normally in common use.

“Common expenses”, the expenses of administration, maintenance, repair or replacement of the common areas and facilities, and expenses declared common expenses by this chapter.

“Common funds”, all funds held by the organization of unit owners.

“Common profits”, the balance of all income, rents, profits and revenues from the common areas and facilities remaining after the deduction of the common expenses.

“Condominium”, the land or the lessee's interest in any lease of such land which is submitted to the provisions of this chapter, the building or buildings, all other improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, which have been submitted to the provisions of this chapter.

“Declarant”, the person or any other entity and its successors or assigns who submits land or the lessee's interest in any lease in land to this chapter pursuant to section two hereof.

“Leasehold condominium”, a condominium created by the submission of a lessee's interest in a lease pursuant to this chapter.

“Limited common areas and facilities”, a portion of the common areas and facilities either (i) described in the master deed or (ii) granted or assigned in accordance with the provisions of this chapter by the governing body of the organization of unit owners, for the exclusive use of one or more but fewer than all of the units.

“Manager”, the managing agent, the trustees in a self-managed condominium, or any other person or entity who performs or renders management or administrative services to the organization of unit owners, including but not limited to preparation of budgets and other financial documents; the collecting, controlling, disbursing, accounting or custody of common funds; obtaining insurance; conducting meetings of the organization of unit owners; arranging for and coordinating maintenance and repair; or otherwise overseeing the day to day operations of the condominium for the organization of unit owners.

“Master deed”, the instrument by which the condominium is submitted to the provisions of this chapter, as hereinafter provided, and any amendment to said instrument.

“Organization of unit owners”, the corporation, trust or association owned by the unit owners and used by them to manage and regulate the condominium.

“Replacement reserve fund”, a separate and segregated portion of the common funds of the organization of unit owners which shall be used to replace, restore, or rebuild common areas and facilities.

Any given “percentage of unit owners” means the owners of that percentage in the aggregate in interest of the undivided ownership of the common areas and facilities.

“Unit”, a part of the condominium including one or more rooms, with appurtenant areas such as balconies, terraces and storage lockers if any are stipulated in the master deed as being owned by the unit owner, occupying one or more floors or a part or parts thereof, including the enclosed space therein, intended for any type of use, and with a direct exit to a street or way or to a common area leading to a street or way.

“Unit designation”, the number, letter or combination thereof designating the unit in the master deed.

“Unit owner”, the person or other entity owning a unit, including the declarant.

Credits

Added by St.1963, c. 493, § 1. Amended by St.1967, c. 868; St.1969, c. 564; St.1970, c. 139, § 1; St.1972, c. 595; St.1972, c. 709, §§ 1, 2; St.1985, c. 788, §§ 1, 2; St.1992, c. 400, §§ 2 to 4; St.1994, c. 365, § 1; St.1998, c. 242, § 3.

Notes of Decisions (15)

M.G.L.A. 183A § 1, MA ST 183A § 1
Current through Chapter 44 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title I. Title to Real Property (Ch. 183-189)
Chapter 183A. Condominiums (Refs & Annos)

M.G.L.A. 183A § 4

§ 4. Exclusive ownership and possession; restrictions

Currentness

Each unit owner shall be entitled to the exclusive ownership and possession of his unit, subject to the provisions of this section and of sections seventeen, eighteen and nineteen; provided, however, that:--

(1) No unit shall be devoted to a use prohibited in the master deed or any lease which is submitted to the provisions of this chapter;

(2) The organization of unit owners, its agent or agents shall have access to each unit from time to time during reasonable hours for the maintenance, repair or replacement of any of the common areas and facilities therein or accessible therefrom or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another unit or units; and

(3) Each unit owner shall comply with the by-laws and with any administrative rules and regulations adopted pursuant thereto, as either of the same may be amended from time to time, and with the lawful covenants, conditions and restrictions set forth in the master deed or in the deed to his unit and with each lease which is submitted to the provisions of this chapter.

(4) Each unit owner shall provide to the organization of unit owners and to each mortgagee holding a recorded mortgage upon the unit, within sixty days of the effective date of this subsection or at the time of acquisition of title to the unit, whichever comes later, written notice of the unit owner's name and mailing address. Thereafter, the unit owner shall provide written notice to the organization and said mortgagees of any changes in the name or mailing address previously provided by the unit owner. The organization and mortgagees may rely in good faith upon the most recent notice of name and address for the purpose of providing notices to the unit owner under this chapter or under provisions of the loan documents or condominium documents, and such notices sent in writing to the address listed in the most recent notice of name and address, if relied upon in good faith, shall be deemed sufficiently given, provided that the organization or mortgagee, as the case may be, has complied with other requirements, if any, of this chapter and the loan or condominium documents.

(5) The organization of unit owners shall provide to each mortgagee holding a recorded mortgage upon a unit, written notice of the organization's name and mailing address. The organization shall provide written notice to each such mortgagee of any changes in the name or mailing address previously provided by the organization. Each mortgagee holding a recorded mortgage upon a unit shall give written notice of the mortgagee's name and mailing address to the organization of unit owners. Thereafter, each mortgagee shall provide written notice to the organization of any changes in said name and address for the purpose of providing notices to the mortgagee under this chapter or under the provisions of the loan documents or condominium documents. The organization and mortgagees may rely in good faith upon the most recent notice of name and address for the purpose of providing notices to the organization and mortgagees, as the case may be, under this chapter or under the provisions of the loan documents or condominium documents. In addition, any first mortgagee may at any time give notice to both the unit owner

and the organization of unit owners of its desire to receive notice regarding the granting of an easement or other interest or the granting or designation of a limited common area, or the taking of other action by the organization of unit owners all as provided for in paragraph (2) of subsection (b) of section 5. Notice to the governing body of the organization of unit owners shall be deemed notice to the organization of unit owners. Any notices sent in writing to a mortgagee or to the governing body of the organization of unit owners, as listed in the most recent notice of name and address, if relied upon in good faith, shall be deemed sufficiently given, provided that the organization or mortgagee, as the case may be, has given notice as required by this chapter.

(6) Each unit owner shall provide in writing to the organization of unit owners the name or names of any tenants or occupants of the unit, other than visitors for less than thirty days.

Credits

Added by St.1963, c. 493, § 1. Amended by St.1985, c. 788, §§ 5, 6; St.1992, c. 400, § 6; St.1998, c. 242, § 4.

Notes of Decisions (14)

M.G.L.A. 183A § 4, MA ST 183A § 4
Current through Chapter 44 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title I. Title to Real Property (Ch. 183-189)
Chapter 183A. Condominiums (Refs & Annos)

M.G.L.A. 183A § 5

§ 5. Interest in common areas or facilities; percentage; division

Effective: April 7, 2015
Currentness

(a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentage set forth in the master deed. Such percentage shall be in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all the units and may include determinations of whether and how to weigh a restriction relating to value imposed on 1 or more, but fewer than all, units by covenant, agreement or otherwise.

(b)(1) The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is materially affected, expressed in an amendment to the master deed duly recorded; provided, however, that the acceptance and recording of the unit deed shall constitute consent by the grantee to the addition of subsequent units or land or both to the condominium and consent to the reduction of the undivided interest of the unit owner if the master deed at the time of the recording of the unit deed provided for the addition of units or land and made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom; and provided, further, that readjustment of 1 or more unit's percentage interest solely to reflect release or termination of a restriction previously imposed on the unit by covenant, agreement or otherwise that was a factor for reduction of that percentage interest, with proportionate adjustment only to each other unit's percentage interest, if not otherwise provided for in the master deed, may be made by vote of 75 per cent or such other percentage of unit owners as is required to amend the master deed generally, whichever is less, and the consent of 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified as provided in clause (5) of section 4 is obtained; provided further, that any such re-adjustment shall be effective on the date the amendment is recorded in the appropriate registry of deeds or land registration office or such later date as may be stated in the amendment; and provided further, that in the case of readjustment following expiration of a term of years stated in the restriction, that readjustment shall be effective on the date as aforesaid or 1 year after termination of the restriction, whichever is later. The percentage of the undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument. The granting of an easement by the organization of unit owners, or the designation or allocation by the organization of unit owners of limited common areas and facilities, or the withdrawal of a portion of the common areas and facilities, all as provided for in this subsection, shall not be deemed to affect or alter the undivided interest of any unit owner.

(2) The organization of unit owners, acting by and through its governing body, shall have the power and authority, as attorney in fact on behalf of all unit owners from time to time owning units in the condominium, except as provided in this subsection, to:

(i) Grant, modify and amend easements through, over and under the common areas and facilities, and to accept easements benefiting the condominium, and portions thereof, and its unit owners, including, without limitation, easements for public or private utility purposes, as the governing body of the organization shall deem appropriate; provided, however, that the consent

of at least 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have requested to be notified thereof, as provided in subsection (5) of section 4 is first obtained; and provided, further, that at the time of creation of such easement and at the time of modification or amendment of any such easement, such easement and any such modification or amendment shall not be inconsistent with the peaceful and lawful use and enjoyment of the common condominium property by the owners thereof. Such grant, modification, amendment, or acceptance shall be effective on the thirtieth day following the recording, within the chain of title of the master deed, of an instrument duly executed by the governing body of the organization of unit owners setting forth the grant, modification, amendment or acceptance with specificity, and reciting compliance with the requirements of this subsection.

(ii) Grant to or designate for any unit owner the right to use, whether exclusively or in common with other unit owners, any limited common area and facility, whether or not provided for in the master deed, upon such terms as deemed appropriate by the governing body of the organization of unit owners; provided, however, that consent has been obtained from (a) all owners and first mortgagees of units shown on the recorded condominium plans as immediately adjoining the limited common area or facility so designated and (b) 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified thereof as provided in subsection (5) of section 4. In such case as the limited common area or facility shall directly and substantially impede access to any unit, the consent of the unit owner of such unit and its first mortgagee, if such mortgagee has requested notice as aforesaid, shall also be required. Such grant or designation, and the acceptance thereof, shall be effective 30 days following the recording, within the chain of title of the master deed or of the declaration of trust or by-laws, of an instrument duly executed by the governing body of the organization of unit owners and the grantee or designee and his mortgagees, which instrument shall accurately designate, depict and describe the area affected and the rights granted and designated, and shall recite compliance with the requirements of this subsection. Such grant or designation shall be considered an appurtenance to the subject unit and shall be deemed to be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

(iii) Extend, revive or grant rights to develop the condominium, including the right to add additional units or land to the condominium; provided, however, that the rights to add additional units are set forth in or specifically authorized by the master deed, and, notwithstanding any provision in section 19 to the contrary, withdraw any portion of the common area of the condominium upon which, at the time of said withdrawal, no unit has been added to the condominium in accordance with the master deed; and provided further, that said withdrawal is not specifically prohibited by the master deed. Any action taken pursuant to this subparagraph shall be taken upon such terms and conditions as the organization of unit owners may deem appropriate, including the method or formula by which the percentage interest of each unit is to be set in accordance with subsection (a) of section 5, or in accordance with another method which the organization of unit owners reasonably determines is fair and equitable under the circumstances, following such extension, revival, grant, addition or withdrawal if not specified in the master deed; provided further, that the consent thereto, including the terms and conditions thereof, of not less than 75 per cent of owners of units within the condominium, or such lower percentage, if any, as the master deed may provide, and 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified thereof as provided in subsection (5) of section 4 is obtained for such extension, revival, grant, addition or withdrawal. Any action taken pursuant to this subparagraph may be taken even if the time period for adding land, units or common facilities, or for withdrawal has expired. The withdrawal of common areas pursuant to this subparagraph shall not be deemed to affect the percentage interest of each unit. Such extension, revival, grant, addition or withdrawal shall be effective 30 days after the recording, within the chain of title of the master deed or of the declaration of trust or by-laws, of an instrument duly executed by the organization of unit owners setting forth accurately the extension, revival, grant, addition or withdrawal, and reciting compliance with the requirements of this subsection; and

(iv) Sell, convey, lease or mortgage any rights or interest created as a result of exercise of rights established under subparagraph (iii); provided, however, that any proceeds obtained by the organization of unit owners as a result of such sale, conveyance, lease, or mortgage may be paid by the organization of unit owners for common expenses of the condominium, and otherwise

shall be distributed in accordance with subparagraph (iii) of subsection (a) of section (6), or in accordance with another method which the organization of unit owners reasonably determines is fair and equitable under the circumstances. The provisions of paragraph (2) shall not affect the rights reserved by the declarant in the master deed except to the extent such rights have expired.

Any consent required by this subsection shall be deemed to be given if, upon written notice by certified and first class mail, provided by the governing body of the organization of unit owners of a proposed action hereunder, to the unit owner or mortgagee whose consent is required, such unit owner or mortgagee fails to object within 60 days of the date of mailing of such notice. The consent of each mortgagee, to the extent required hereunder, shall be counted separately as to each unit upon which such mortgagee holds a mortgage, based upon one vote for each unit. In no event may a consent required of a mortgagee under this subsection be withheld unless the interests of the mortgagee would be materially impaired by the action proposed. In the event of any conflict between the provisions of this subsection and of the master deed, trust or by-laws or other governing documents of the condominium, this subsection shall control. Any third party interested in title to said condominium or condominium unit or units may conclusively rely upon the recitation of compliance contained within any instrument recorded pursuant to this subsection.

<[Subsection (c) applicable as provided by 2014, 483, Sec. 3.]>

(c) The common areas and facilities shall remain undivided and no unit owner or any other person shall bring an action for partition or division of any part thereof, except as provided in section 17, 18 or 19. The grant, modification, amendment or designation of any easements or any limited common area and facility pursuant to clause (i) or (ii) of paragraph (2) of subsection (b) shall not require an amendment to the master deed or an amendment to the site plan or floor plan recorded with the master deed. The organization of unit owners, acting by and through its governing body, may assess the reasonable costs of the preparation, execution and recordation of such grant of an easement, designation or allocation of limited common areas and facilities to the unit owner to whom such easement, designation or allocation is being granted. This section shall not be construed to require the consent of 100 per cent of the beneficial interest and the mortgagees prior to the granting of an easement by the organization of unit owners, or the designation or allocation of limited common areas and facilities. Except as expressly provided, this section shall not be varied by agreement and rights conferred thereby shall not be waived. If there is a conflict between this section and the master deed, declaration of trust or bylaws of any condominium submitted under this chapter, then the language of this section shall control. Any covenant or provision to the contrary shall be null and void.

(d) Each unit owner may use the common areas and facilities in accordance with their intended purposes without being deemed thereby to be hindering or encroaching upon the lawful rights of the other unit owners.

(e) The necessary work of maintenance, repair and replacement of the common areas and facilities shall be carried out as provided in the by-laws.

(f) Unless the by-laws otherwise provide, whenever the common areas and facilities shall require emergency works of repair, replacement or maintenance, any unit owner may undertake the same at his expense and recover his reasonable costs as a common expense.

(g) No work which would jeopardize the soundness or safety of the building shall be done in a unit or in the common areas and facilities unless in every such case the unanimous consent of all unit owners is first obtained.

Credits

Added by St.1963, c. 493, § 1. Amended by St.1987, c. 87; St.1994, c. 365, §§ 2, 3; St.1998, c. 242, § 5; St.2010, c. 183, §§ 1, 2, eff. Oct. 24, 2010; St.2014, c. 483, § 1, eff. April 7, 2015.

Notes of Decisions (56)

M.G.L.A. 183A § 5, MA ST 183A § 5
Current through Chapter 44 of the 2020 2nd Annual Session

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title I. Title to Real Property (Ch. 183-189)
Chapter 183A. Condominiums (Refs & Annos)

M.G.L.A. 183A § 10

§ 10. Corporation, trust or unincorporated association; owner's interest; powers and duties; management

Effective: November 3, 2017
Currentness

(a) Each unit owner shall have the same percentage interest in the corporation, trust or unincorporated association provided for in the master deed for the management and regulation of the condominium as his proportionate interest in the common areas and facilities. Such interest shall not be separated from ownership in the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

(b) Such corporation, trust or association shall have, among its other powers, the following rights and powers:--

(1) To lease, manage, and otherwise deal with such community and commercial facilities as may be provided for in the master deed as being common areas and facilities.

(2) To own, convey, encumber, lease and otherwise deal with units conveyed to it or purchased by it as the result of enforcement of the lien for common expenses, any right of first refusal, or otherwise.

(3) To obtain insurance on the common areas and facilities. Such insurance coverage shall be written in its name, and the provisions thereof shall be without prejudice to the right of each unit owner to insure his own unit for his own benefit.

(4) To conduct litigation and to be subject to suit as to any course of action involving the common areas and facilities or arising out of the enforcement of the by-laws, administrative rules or restrictions in the master deed.

(5) To impose charges or to charge interest for the late payment of common expense assessments or other charges, and to levy reasonable fines for violations of the master deed, trust, by-laws, restrictions, rules or regulations of the organization of unit owners.

(6) To require or cause the installation of energy saving devices in all units, not already separately metered for water and utilities, and common areas in the condominium. Such devices shall include, but not be limited to, separate meters for each unit that will monitor the use of water and other utilities for the unit to which it is attached, low-flow toilets and showerheads, faucet aerators, windows and storm windows; provided, however, that such devices shall not be considered to be an improvement for

purposes of section eighteen; and provided further, that the board of trustees of the organization of unit owners or if there is no board of trustees, the entity performing its duties receives the approval of the majority of unit owners in attendance at a meeting, for which notice was duly given and which was held for the purposes of voting on the installation of such energy conservation devices. The cost of installation of such energy conservation devices shall be an expense of the organization of unit owners, which may be assessed to the individual unit owners as a special assessment, the amount of which, in an instance where such energy conservation device has been installed in each individual unit, or in substantially all of the units in the condominium, may be attributable to each unit owner in the amount of the cost of the item installed. The organization of unit owners may assess to each unit owner his proportionate share of the costs for water and other utilities, as measured by the meter attached to the unit. In the event of a conflict between this clause and the master deed, trust, or bylaws, and any amendment thereto, of any condominium submitted to the provisions of this chapter, the provisions of this clause shall control. Notwithstanding the aforesaid, nothing contained herein shall be construed to conflict with the provisions of the state sanitary code.

The expenses incurred in and proceeds accruing from the exercise of the aforesaid rights and powers shall be common expenses and common profits.

(c) The organization of unit owners may appoint a manager or managing agent or be self-managed by their elected trustees or managing board. The organization of unit owners shall keep a complete copy of the following items, except when the organization shall appoint a manager or managing agent who has responsibility for the collection of assessments, payment of common expenses, or the accounting or custody of common funds, in which case the manager or managing agent shall be responsible, without limitation, for keeping the records in item (4) below:

(1) a true and accurate copy of the master deed as recorded and amended;

(2) the by-laws, including amendments thereto, as recorded;

(3) the minute book, as maintained by the organization of unit owners, to the extent such minutes are kept which shall be made available to unit owners through electronic mail upon request; and

(4) financial records, including the following:

(i) records of all receipts and expenditures, invoices and vouchers authorizing payments, receivables, and bank statements relating thereto;

(ii) records regarding the replacement reserve fund or any other funds of the organization of unit owners and bank statements relating thereto;

(iii) audits, reviews, accounting statements, and financial reports relating to the finances of the organization of unit owners;

(iv) contracts for work to be performed for or services to be provided to the organization of unit owners; and

(v) all current insurance policies of the organization of unit owners, or policies which name the organization as insured or obligee.

Such records shall be kept in an up-to-date manner within the commonwealth and shall be available for reasonable inspection by any unit owner or by any mortgagee holding a recorded first mortgage on a unit during regular business hours and at such other times as may be provided in the agreement between the manager or managing agent and the organization of unit owners. Access to said records shall include the right to photocopy said records at the expense of the person or entity making the request.

Such records, and all other records to be maintained by the manager or managing agent in accordance with any agreement between the organization of unit owners and said manager or managing agent, shall be the property of the organization of unit owners. The organization shall be entitled, during regular business hours, to receive and review such records, upon request, at any time during the term of the agreement. The manager or managing agent shall give to the organization of unit owners all books, records, funds, and accounts in the possession of the manager or managing agent upon termination of the agreement. All records shall be retained for a period of at least seven years.

(d) The party responsible for keeping the records in clause (4) of subsection (c) shall be responsible for preparing a financial report to be completed within one hundred and twenty days of the end of the fiscal year, including without limitation a balance sheet, income and expense statement, and a statement of funds available in the various funds of the organization. A copy of such financial report shall be made available to all unit owners within thirty days of its completion, and shall be made available upon request to any mortgagee holding a recorded mortgage on a unit in the condominium.

An independent certified public accountant shall conduct according to the standards of the American Institute of Certified Public Accountants, a review of the financial report for any condominium comprising 50 or more units. Such review shall be conducted annually, or less frequently in accordance with subsection (m), but in no case less frequently than every two years. In any action brought to enforce the provisions of this paragraph, the prevailing party shall be entitled to reasonable attorneys' fees incurred in such action.

In the case of condominiums comprising fewer than fifty units, an independent certified public accountant shall conduct, according to the standards of the American Institute of Certified Public Accountants, a review of the financial report, if so voted by a majority in beneficial interest of the unit owners at a meeting duly convened in accordance with the by-laws of the condominium, and the cost of said review shall be paid as a common expense of the organization.

A unit owner or mortgagee holding a recorded mortgage on a unit in the condominium shall be allowed to have a review or audit prepared at its own expense, such expense to include, but not be limited to, reasonable expenses incurred by the manager directly related to the preparation of the review or audit. The organization of unit owners and the manager or managing agent shall fully cooperate in providing the information needed to perform the review or audit.

A not-for-profit community development corporation, housing partnership, or other not-for-profit entity established for the purpose of creating or establishing affordable housing may request a copy of the financial report described earlier in this subsection by making such request in writing to the owner of a unit with whom said community development corporation, housing partnership, or other entity entered into a legally enforceable, good faith and bona fide offer to purchase said unit, which offer grants said community development corporation, housing partnership, or other entity the right to inspect said documentation as a condition to the purchase of said unit. In such case, said unit owner may obtain said documentation from the organization of unit owners, the manager, or managing agent of the condominium, and may transmit the documents to said community development corporation, housing partnership, or other entity.

(e) In any contract between a manager or managing agent and an organization of unit owners, the organization shall have a right to terminate the contract for cause with ten days' notice, during which time the manager or managing agent shall have an opportunity to cure. The organization shall in no case be required to provide more than ninety days' notice if the contract is terminated without cause.

(f) If the organization of unit owners appoints a manager or managing agent who has responsibility for the collection of assessments, payment of common expenses, or the accounting or custody of common funds, then the manager or managing agent shall be responsible for keeping the records listed in clause (4) of subsection (c), and shall:

(1) render at least monthly, or less frequently in accordance with subsection (m), but in no case less frequently than quarterly, a written report to the trustees or the managing board of the organization of unit owners detailing all receipts and expenditures on behalf of the organization, including beginning and ending balances and copies of all relevant bank statements and reconciliations for the replacement reserve fund and any other funds of the organization for which the manager or managing agent has responsibility; and

(2) maintain a separate and distinct account or accounts for each of the following: the replacement reserve fund and any other fund of the organization for which the manager or managing agent has responsibility. These funds shall not be commingled with the assets of the manager or managing agent or with the assets of any other person or any other entity. These funds shall not be subject to the claims of any creditor of the manager or managing agent or its successor in interest including a secured creditor or trustee in bankruptcy, and shall not be subject to the claims of any creditor of any other person or any other entity.

(g) Any reserve account of the organization of unit owners shall require all checks to be signed by one member of the governing board or the organization in addition to the managing agent, if one exists, unless there is a written agreement to the contrary between the organization of unit owners and the managing agent. The governing board shall designate a member or members to be the approved signatories on such checks. The requirements of this subsection may be modified pursuant to subsection (m).

(h) The organization of unit owners in condominiums of more than ten units must secure and maintain, at its own cost and expense, blanket fidelity insurance coverage insuring against the dishonest acts of any person, trustee, manager, managing agent or employee, or the organization of unit owners who is responsible for handling organizational funds, in an amount equal to at least one-fourth of the annual assessments, excluding special assessments. Such fidelity insurance policy per its definition of employee must specifically include the manager or managing agent or provide for same by an endorsement to the fidelity policy. Such fidelity insurance must name the organization of unit owners as the insured and include a provision requiring ten days' written notice to the organization or manager, in the event of cancellation or substantial modification.

The manager or managing agent shall be the designated agent on the fidelity insurance policy, and the fidelity insurance policy shall be the property and for the sole benefit of the organization of unit owners.

The manager or managing agent must maintain, at its sole cost and expense, its own fidelity insurance with substantially the same form of coverage.

The requirements of this subsection may be modified pursuant to subsection (m) of this section.

(i) All condominiums shall be required to maintain an adequate replacement reserve fund, collected as part of the common expenses and deposited in an account or accounts separate and segregated from operating funds. The requirements of this subsection may be modified pursuant to subsection (m) of this section.

(j) The declarant shall not use any funds of the organization to fund expenses relating to the initial construction, development, and marketing of the project, to pay the declarant's share of common expenses, or to pay for any costs that are not directly related to the operation of the condominium.

(k) The organization of unit owners shall designate a person or entity who shall oversee the maintenance and repair of the common areas of the condominium. The organization of unit owners shall notify all unit owners in writing of the name and phone number of the person or entity designated to oversee maintenance and repair of the common areas, and shall notify all unit owners whenever there is a change in said person or entity.

In cases where a unit owner rents a unit to a tenant, the owner of said unit shall designate a person or entity who shall oversee the maintenance and repair of said unit. At the commencement of any tenancy, the unit owner shall notify the tenant and the organization of unit owners in writing of the name and phone number of said person or entity, and shall notify the tenant in writing of the name and phone number of the person or entity designated to oversee maintenance and repair of the common areas. The unit owner shall notify the tenant and the organization of unit owners in writing whenever there is a change in the person or entity designated to oversee maintenance and repair of the unit, and shall notify the tenant in writing whenever the unit owner is notified of a change in the person or entity designated to oversee maintenance and repair of the common areas.

(*l*) The manager or managing agent, the president, the chairperson, or a majority of the governing board of the condominium may, when so empowered, act for the organization of unit owners and references herein to the organization of unit owners shall include such person or persons when so empowered.

(m) After control of the condominium has been transferred from the declarant to the organization of unit owners, the organization may by an annual vote of sixty-seven percent in beneficial interest or more of the unit owners modify any or all of the following provisions: the requirement regarding the review of financial records for condominiums comprising fifty or more units in the second paragraph of subsection (d), but such review shall be performed not less frequently than every two years as provided in said subsection (d); the frequency with which written reports must be prepared by the manager or management agent pursuant to clause (1) of subsection (f); the signature requirements in subsection (g); the requirement for fidelity insurance coverage in subsection (h); and the reserve fund requirement of subsection (i); provided, however, that any such modification may be rescinded at any time by the vote of a majority in beneficial interest of the unit owners.

(n) If the organization of unit owners is a trust or unincorporated association, an instrument signed by a majority of the trustees or of the managing board named in the master deed and duly attested as the act of such trust or association may be relied on as conclusively establishing that such instrument was the free act of the trust or association, and shall be binding upon such trust or association when recorded. No purchaser, mortgagee, lender, or other person dealing with the trustees or managing board of the association, as they appear of record, shall be bound to ascertain or inquire further as to the persons who are then trustees or members of the managing board nor be affected by any notice, implied or actual, relative thereto, other than a recorded certificate thereof, and such recorded certificate shall be conclusive evidence of the personnel of said trustees or members of the managing board and of any changes therein.

Credits

Added by St.1963, c. 493, § 1. Amended by St.1992, c. 400, §§ 13, 14; St.1994, c. 319, § 2; St.1996, c. 450, § 227; St.2000, c. 203, §§ 1, 2; St.2017, c. 110, § 22, eff. Nov. 3, 2017.

Notes of Decisions (49)

M.G.L.A. 183A § 10, MA ST 183A § 10
Current through Chapter 44 of the 2020 2nd Annual Session

End of Document

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Proposed Legislation

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 2B

§ 2B. Tort actions arising from improvements to real property

Currentness

Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency, as defined in said section thirty-nine A shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

Credits
Added by St.1968, c. 612. Amended by St.1973, c. 777, § 2; St.1984, c. 484, § 53.

Notes of Decisions (170)

M.G.L.A. 260 § 2B, MA ST 260 § 2B
Current through Chapter 44 of the 2020 2nd Annual Session

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Edmund A. Allcock, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 point, ten and one-half (10½) characters per inch, and contains 34 total non-excluded pages prepared with Word 2013.

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CERTIFICATE OF SERVICE

I, Edmund A. Allcock, hereby certify, under the penalties of perjury, that on April 13, 2020, I filed this Brief through eFileMA on behalf of the Amicus Curiae, Community Associations Institute and made service upon counsel of record of all parties who are registered for eFileMA and by email to those recipients who are not registered for eFileMA:

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