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The Impact on Building Defect Litigation from the Supreme Court Decision in *The Palisades*

by Andrew J. Carlowicz Jr. and Peter K. Oliver

In Sept. 2017, the New Jersey Supreme Court issued its decision in *The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisades, LLC,* which specifically dealt with the discovery rule exception to the six-year statute of limitations in a building defect claim brought by a condominium association. The timeline in *The Palisades* case was as follows: The original developer, A/V Acquisitions, LLC, substantially completed the project in May 2002, at which time it began renting units until June 2004, when it sold the complex to an entity referred to as "Old" Palisades. Old Palisades converted the apartments into condominiums. As part of that process, they obtained a report in Oct. 2004, from Ray Engineering, which referenced some problems with the buildings, but not nearly to the extent as was alleged later.

After 75 percent conversion to condominium ownership occurred in 2006, and, thus, Old Palisades relinquished control of the association, the plaintiff/condominium association (*i.e.*, The Palisades) retained the Falcon Group to inspect the common elements of the building complex. Eleven months later, in June 2007, the plaintiff/condominium association obtained the report from the Falcon Group. In the litigation that ensued, the plaintiff asserted that it did not "discover" its cause of action until it received Falcon's report in June 2007. Suit was filed against one defendant in March 2009, a second in April 2009, and a third in Sept. 2010.

In *The Palisades* case, the New Jersey Supreme Court wrote in a definitive manner that the commencement of the six-year timeframe within which a potential plaintiff must file suit for a building defect case ordinarily begins to run at the time the project is substantially completed. Of course this is distinguishable from final completion.

As the New Jersey Supreme Court previously held in the *Russo Farms v. Vineland Bd. of Ed.*[1] decision, substantial completion has a definitive meaning within the construction industry. It occurs upon beneficial occupancy of the project and before the punch list phase. Whether final payment has been made is not a material fact in this determination. In *The Palisades* case, the Supreme Court recognized that in "many" instances actual or constructive knowledge of a potential cause of action may not reasonably be known by a building owner at or around the time of substantial completion, which ordinarily will give rise to potential tolling of the statute of limitations under the discovery rule.

Of significance was the holding in *The Palisades* case that when the form of ownership or the actual owners of a building or building complex change, the six-year statute of limitations (applicable to breach of contract or negligence claims arising out of defects in the design or construction of the building) does not start over. To the contrary, the new ownership literally steps into the shoes of prior ownership and assumes all of their rights and obligations. Lawyers who represent condominium associations may question the equity of this holding in instances where the prior owner was the developer/sponsor who 'knew' of building defects while in control of a condominium association, but transition was not effectuated for more than six years.

Ultimately, the Supreme Court determined that factual disputes existed based upon the record with which it was presented. As a result, the matter was remanded back to the trial court to conduct a *Lopez*[2] hearing, during which the trial court will have to determine whether or not the plaintiff meets its burden of proving it did not know or have reason to know, through the exercise of reasonable diligence, that it had a cause of action against identifiable defendants until issuance of the Falcon report in June 2007, which, if proven to be the case, would permit suit to be filed as late as June 2013.

At the trial level up through the Supreme Court, the defendants argued that even if the plaintiff did not 'discover' its cause of action until receipt of the report from Falcon in June

2007, it still had ample time per the original six-year timeframe within which to file suit by May 2008, since substantial completion occurred in May 2002. The defendants relied upon the oft-cited *Torcon v. Alexian Brothers Hospital*.[3] However, when that and other similar decisions[4] are scrutinized, it is clear that this particular rule of law applies to equitable estoppel cases and not discovery rule cases.

Although such a line of demarcation was not specifically written into the wording of the Supreme Court's decision in *The Palisades* case, such a distinction has now expressly been made by the New Jersey Supreme Court. Succinctly stated, in an equitable estoppel case, if the reason for tolling the statute ends and the plaintiff still has a reasonable amount of time to file suit under the original statutory timeframe, the plaintiff does not get another six years to commence the action. Contrast that with a discovery rule case.

When discovery occurs, the cause of action accrues and thus, the plaintiff does get six years from that date within which to file suit. This logically follows the wording of the statute, which dictates that the six-year timeframe commences upon accrual, and the courts have deemed accrual to occur upon discovery. As a result, even though both the discovery rule and the doctrine of equitable estoppel are 'equitable' doctrines in nature, how much more time a potential plaintiff gets within which to file suit varies based on which doctrine is applicable.

The Supreme Court's decision in *Fox v. Passaic Gen. Hosp.*[5] allowed for a defendant to argue that a plaintiff relying upon the discovery rule should not be afforded an additional six years within which to file suit if it can be shown, among other things, the defendant has been prejudiced. In *The Palisades* decision, however, the Supreme Court certainly appeared to abandon or abrogate this exception. Specifically, the Court wrote that "the *Fox'* qualifying language fell into disuse by 1980 and has not been employed again in an opinion of our Court."

At the conclusion of its decision, the Supreme Court in *The Palisades* case set forth a curious observation. In opposition to the motions for dismissal, the plaintiffs had argued before the trial court, the Appellate Division and the Supreme Court that the defendants were not being harmed because the 10-year statute of repose was available as a defense as well. The decision references the defendants' "critique" of that argument, and the Supreme Court expressly wrote that, "Because the statute *appears* to bar only claims involving defective and unsafe conditions arising from construction, defendants posit that the statute will not apply to a defective condition that does not raise safety concerns." (Emphasis added). The Court next observed that, "*If* the wording in the statute, *as defendants believe*, has the effect they suggest and does not represent good public policy, defendants' appeal on this issue must be to the legislature." (Emphasis added).

The reason these are surprising observations is because it was the New Jersey Supreme Court in its *E.A. Williams, Inc. v. Russo Development Corp.*[6] decision that explicitly interpreted the statute to the effect that in order for the statute of repose to apply, an element of the case *must* entail a claim involving an unsafe condition. Thus, while the Legislature assuredly wrote the statute that the *E.A. Williams* Court interpreted, the Supreme Court's rationale literally turned on where a comma was placed. While the authors are not suggesting that the *E.A. Williams* decision was an erroneous interpretation, it seemed surprising that the New Jersey Supreme Court express any doubt that a defendant relying upon the statute of repose must demonstrate that the allegations in the case must also entail an unsafe condition, since the same Court spoke on that issue. ⚖

Andrew J. Carlowicz Jr. *is the co-chair of the construction law department at Hoagland, Longo, Moran, Dunst & Doukas, LLP, and concentrates his practice exclusively in the representation of clients involved in construction project claims, disputes and other related issues, such as contract formulation and negotiation, and risk management advice. He also serves as a construction mediator for both the New Jersey Superior Court program and the American Arbitration Association, for whom he also serves as a construction arbitrator.* ***Peter K. Oliver*** *is an associate with Hoagland, Longo, Moran, Dunst & Doukas, LLP, in the firm's construction law department. He concentrates his practice in insurance defense, construction defect, design defect, professional liability, and products liability.*

ENDNOTES

1. 144 N.J. 84 (1996).
2. *See Lopez v. Swyer*, 62 N.J. 267, 275 (1973), where New Jersey's Supreme Court decided that the determination whether to use the discovery rule should ordinarily be made by a judge at a preliminary hearing and out of the presence of the jury.
3. 205 N.J. Super. 428 (Ch. Div. 1985) (*aff'd* for reasons stated in the Law Division decision), 209 N.J. Super. 239 (App. Div. 1986), *cert. den*. 104 N.J. 440 (1986).
4. *See e.g. Evernham v. Selected Risks Ins. Co*., 163 N.J. Super. 132, 137 (App. Div. 1976); *Ochs v. Federal Ins. Co*., 90 N.J. 108, 116-117 (1982); *Mosier v. Ins. Co. of North America*, 193 N.J. Super. 190, 197 (App. Div. 1984); *Kaprow v. Bd. of Ed. of Berkeley Township*, 131 N.J. 572, 589-590 (1993).
5. 71 N.J. 122 (1976).
6. 82 N.J. 160 (1980).