NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4292-13T3

THE PALISADES AT FORT LEE
CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

100 OLD PALISADE, LLC., CRESCENT
HEIGHTS OF AMERICA, INC., CRESCENT
HEIGHTS ACQUISITIONS, LLC, 100 OLD
PALISADE HOLDINGS, LLC, 100 OLD
PALISADE HOLDINGS II, LLC, 100
OLD PALISADE HOLDINGS III, LLC.,
EREZ BASHARI, PEIRU WEN, LENNY
WARSHAW, NISSIM LANCIANO, SHARON
CHRISTENBURY, JOSEPH ZDON, PABLO
DE ALMAGRO, EPHRAIM BASHARI,
SONNY KAHN, individually and as
Trustee of the SK Business Trust,
SK BUSINESS TRUST, RUSSELL
W. GALBUT, individually and as
Trustee of the RF Business Trust,
RF BUSINESS TRUST, BRUCE A. MENIN,
individually and as Trustee of the
MENIN 1998 FAMILY TRUST, MENIN 1998
FAMILY TRUST, F&G MECHANICAL CORP.,
MANNIX EXTERIOR WALL SYSTEMS, INC.,
SOUTH SHORE CONTRACTING, INC.,
PATWOOD CONTRACTING CO., INC.,
d/b/a PATWOOD ROOFING, MTA CORP.,
MAARV WATERPROOFING, B&B IRON
WORKS, INC., RAY ENGINEERING, INC.,
STEVEN W. RAY, P.E., METRO GLASS,
INC., and ROMITCH CO.,

Defendants,

and

AJD CONSRUCTION CO., INC., LUXURY

FLOORS, INC., BENFATTO MASONRY, INC., and FORSA CONSTRUCTION, INC.,

Defendants-Respondents.

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100 OLD PALISADE, LLC., CRESCENT HEIGHTS OF AMERICA, INC., CRESCENT HEIGHTS ACQUISITIONS, LLC, 100 OLD PALISADE HOLDINGS, LLC, 100 OLD PALISADE HOLDINGS II, LLC, 100 OLD PALISADE HOLDINGS III, LLC., EREZ BASHARI, PEIRU WEN, LENNY WARSHAW, NISSIM LANCIANO, SHARON CHRISTENBURY, JOSEPH ZDON, PABLO DE ALMAGRO, EPHRAIM BASHARI, SONNY KAHN, individually and as Trustee of the SK Business Trust, SK BUSINESS TRUST, RUSSELL W. GALBUT, individually and as Trustee of the RF Business Trust, RF BUSINESS TRUST, BRUCE A. MENIN, individually and as Trustee of the MENIN 1998 FAMILY TRUST, MENIN 1998 FAMILY TRUST,

Defendants/Third-Party Plaintiffs,

v.

APPLIED PROPERTY MANAGEMENT CO., INC., a/k/a APPLIED DEVELOPMENT COMPANY, IRONSTATE DEVELOPMENT COMPANY, a/k/a IRONSTATE DEVELOPMENT, LLC, IRONSTATE HOLDINGS, LLC., COSTAS KONDYLIS & ASSOCIATES, P.C., COSTAS KONDYLIS & PARTNERS, LLP., CONSTANTINE A. KONDYLIS, a/k/a COSTAS KONDYLIS, GOLDSTEIN ASSOCIATES CONSULTING ENGINEERS, P.C.,

Defendants/Third-Party Defendants.

AJD CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

v.

PATWOOD CONTRACTING CO., INC.,
d/b/a PATWOOD ROOFING, MTA
CORP., MAARV WATERPROOFING, INC.,
BENFATTO CONSTRUCTION CORP.,
B&B IRON WORKS, INC.,

Third-Party Defendants.

SOUTHSHORE CONTRACTING, INC.,

Third-Party Plaintiff,

v.

ARQ PAINTING & CONTRACTING, INC.,

Third-Party Defendant.

APPLIED PROPERTY MANAGEMENT CO., INC.,
THE PALISADES A/V COMPANY, LLC,
APPLIED PALISADES, LLC, APPLIED
DEVELOPMENT COMPANY, INC., improperly
pleaded as d/b/a APPLIED DEVELOPMENT
COMPANY, IRONSTATE DEVELOPMENT, LLC,
IRONSTATE HOLDINGS, LLC,

Fourth-Party Plaintiffs,

v.

WENTWORTH PROPERTY MANAGEMENT
CORPORATION, WORTHMORE CONSTRUCTION
& MAINTENANCE CO., INC.,

Fourth-Party Defendants.

Argued November 10, 2015 - Decided February 1, 2016

Before Judges Yannotti, Guadagno and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2306-09.

Raymond A. Garcia (Garcia & Milas, P.C.) of the Connecticut bar, admitted pro hac vice, argued the cause for appellant (Lum, Drasco & Positan, LLC, and Mr. Garcia, attorneys; Paul A. Sandars, III, of counsel; Mr. Garcia, Mr. Sandars and Nicole Liguori Micklich (Garcia & Milas, P.C.) of the Connecticut and Rhode Island bar, on the brief).

John H. Osorio argued the cause for respondent AJD Construction, Co., Inc. (Marshall Dennehey Warner Coleman & Goggin, attorneys; Pauline F. Tutelo, on the brief).

Stephen C. Cahir argued the cause for respondent Luxury Floors, Inc. (Law Offices of William E. Staehle, attorneys; Mr. Cahir, on the brief).

Mark D. Shifton argued the cause for respondent Benfatto Construction Corp. (Seiger Gfeller Laurie, L.L.P., attorneys; Mr. Shifton, of counsel; Mr. Shifton and Chester R. Ostrowski, on the brief).

Eric S. Schlesinger argued the cause for respondent Forsa Construction (Golden, Rothschild, Spagnola, Lundell, Boylan & Garubo, P.C., attorneys; Mr. Schlesinger and Russ M. Patane, of counsel; Mr. Schlesinger, Mr. Patane and Daniel C. Seger, on the brief).

Gene Markin argued the cause for amicus curiae Community Association Institute (Stark & Stark, P.C., attorneys; Mr. Markin and John Randy Sawyer, on the brief).

PER CURIAM

The Palisades at Fort Lee Condominium Association, Inc. (plaintiff or Association) appeals from orders entered by the trial court on March 28, 2014, which granted summary judgment in favor of defendants AJD Construction Co., Inc. (AJD), Forsa Construction LLC (Forsa), Benfatto Construction Corp. (Benfatto), and Luxury Floors, Inc. (Luxury). Plaintiff also appeals from an order entered by the trial court on May 9, 2014, which denied its motion for reconsideration. We reverse.

I.

The Palisades is a condominium located in the Borough of Fort Lee, which contains an eleven-story parking structure, a thirty-story residential tower, an open plaza and other facilities. The Palisades has 538 residential dwellings and units for commercial use. It appears that in the late 1970s, a six-story parking garage had been built on the site but it remained unfinished and unused.

In 1998, Palisades A/V Acquisitions Co., LLC (A/V) purchased the parking garage and adjacent property and contracted with AJD to construct five additional floors on the garage, the plaza, the residential tower and other facilities. AJD hired various subcontractors to perform the work, including Forsa, Benfatto and Luxury.

Forsa built the addition to the garage and the building structure. Benfatto constructed the exterior masonry walls, and

Luxury installed the finished floors in the common areas. In May 2002, construction was substantially completed, although plaintiff claims some work continued to be performed until October 2002.

A/V thereafter operated The Palisades as a rental property for about two years. On June 28, 2004, A/V sold the property to 100 Old Palisade, LLC (Old Palisade), which began the process of converting it to the condominium form of ownership, pursuant to the New Jersey Condominium Act (NJCA), N.J.S.A. 46:8B-1 to -38, and filed an application for registration of the condominium with the New Jersey Department of Community Affairs, as required by the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56.

In January 2005, Old Palisade issued a public offering statement, which included an engineering report prepared by Ray Engineering, Inc. (Ray Engineering). Old Palisade also filed a master deed which established The Palisades as a condominium. In the public offering statement and master deed, Old Palisade is identified as the sponsor of the conversion to condominium ownership.

Among other things, the master deed provides that upon its filing, the sponsor shall be the owner of every unit, the applicable related percentages of the property's common elements, and certain limited common elements, which include the

parking spaces, terraces accessible from a unit, and storage areas. The master deed states that the Association had been established and would have responsibility for the administration, operation and management of the condominium, the common elements and its facilities.

According to the master deed, the Association acts through its Board of Directors (Board), pursuant to applicable law and its by-laws. Initially, the sponsor has control of membership of the Board. However, pursuant to NJCA, as units are conveyed, membership of the Board expands, and Board members selected by the sponsor are gradually replaced by members chosen by the unit owners. Upon the sale of 75% of the units, full control of the Board is transferred to the unit owners.

The master deed further provides that the unit owners are responsible for the maintenance and repair of their individual units. The Association has responsibility for the maintenance and repair of the common elements of the property, as defined in the master deed. The Association is authorized to impose annual common expense assessments upon the unit owners to maintain the exterior of the building and the common elements. In addition, the Association is responsible for maintenance and repairs required in the limited common elements, although the Association may pass those costs along to individual unit owners who derive a benefit from those elements.

In July 2006, following the sale of the required number of units, the unit owners gained full control of the Association's Board. The Association then retained The Falcon Engineering Group (Falcon) to undertake an engineering evaluation of the property. In May 2007, Falcon produced a report, which identified various construction defects in the property, including defects to the exterior walls, parking garage, roofs and plaza terraces, and the landscaping. Falcon provided the report to the Association's Board on June 13, 2007.

On March 12, 2009, plaintiff filed a complaint in the Law Division asserting claims against various parties, including persons and entities involved in the conversion of the property to condominium ownership. Plaintiff also asserted claims against AJD, Luxury Floors and other parties that performed construction work on the property.

Plaintiff alleged that the construction defendants had performed their work in a negligent, reckless and careless manner; and also breached expressed and implied warranties pertaining to the work. The claims against the construction defendants were based on the findings in the Falcon Report.

Thereafter, plaintiff amended its complaint eight times. Plaintiff asserted claims against Benfatto in the Second Amended Complaint, which was filed on December 3, 2009. It asserted claims against Forsa in the Fifth Amended Complaint, which was

filed on April 21, 2011. Plaintiff alleged that Benfatto and Forsa, like the other defendant contractors, were negligent, reckless and careless in the performance of their work on the project, and breached expressed and implied warranties related thereto. In addition, various third and fourth-party claims were asserted during the course of the trial court proceedings.

II.

The claims against all parties eventually were resolved, except for plaintiff's claims against AJD, Forsa, Benfatto and Luxury. After discovery was complete, these defendants filed motions for summary judgment, arguing that plaintiff had not asserted its claims against them within the time required by N.J.S.A. 2A:14-1. Plaintiff opposed the motions. The judge heard oral argument and thereafter filed a written opinion, in which he concluded that the motions should be granted.

In his opinion, the judge noted that, under N.J.S.A. 2A:14-1, a cause of action for any tortious injury to property or for recovery on a contract claim must be commenced within six years after the cause of action has accrued. The judge stated that in construction cases, the cause of action accrues at the time of substantial completion of a party's work. The judge observed, however, that in certain circumstances, the discovery rule may apply, and the cause of action will not accrue until the injured

party discovers, or should reasonably have discovered, that it has a basis for an actionable claim.

The judge wrote that, in this case, the six-year statute of limitations began to run on May 1, 2002, which was the date upon which the building was deemed substantially complete. The judge noted that the unit owners assumed control of the Association's Board in July 2006, and Falcon produced its engineering report in May 2007. The judge observed that some construction defects previously had been identified in Ray Engineering's report, which was included in the sponsor's public offering statement.

The judge wrote that when plaintiff received Ray Engineering's report "nearly two years remained on the statute of limitations." The judge added that, even if plaintiff was not reasonably aware of the construction defects until Falcon issued its report in May 2007, plaintiff still had one year in which to bring timely claims against defendant contractors.

The judge concluded that plaintiff had not filed its claims against defendants within the time required by N.J.S.A. 2A:14-1. The judge rejected plaintiff's argument that the discovery rule applied, stating that plaintiff "was reasonably aware of an injury within the statutory time frame and had [an] ample amount of time to seek recourse."

The judge also rejected plaintiff's contention that the statute of limitations should not begin to run until it was

established and the unit owners took control of the Board. The judge pointed out that A/V had contracted with AJD to construct a building with rental apartments. Thereafter, A/V sold the property to Old Palisade, which converted the property to the condominium form of ownership, at which point the Association was established.

The judge wrote that defendant contractors could not have reasonably anticipated that the Association would eventually be formed and they would be "forever liable" for alleged construction defects, notwithstanding the six-year statute of limitations in N.J.S.A. 2A:14-1. The judge entered orders dated March 28, 2014, granting defendants' motions.

Plaintiff thereafter filed a motion for reconsideration, which defendants opposed. The judge filed an order dated May 9, 2014, denying the motion. In a statement attached to the order, the judge wrote that plaintiff had not presented any evidence or legal arguments which warranted reconsideration of the orders granting summary judgment to defendants. Plaintiff's appeal followed.

III.

On appeal, plaintiff argues that the motion judge erred by finding that the six-year statute of limitations in N.J.S.A. 2A:14-1 began to run when the construction project was deemed to be substantially complete. Plaintiff contends that its claims

for construction defects accrued in June 2007, which was after the unit owners took control of the Board and it received Falcon's report detailing the alleged deficiencies in defendants' construction work.

When reviewing an order granting a motion for summary judgment, we apply the same standard that governs the trial court's ruling on the motion. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). Rule 4:46-2(c) provides that summary judgment may be granted when the record before the court "show[s] that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

However, when the grant or denial of summary judgment is based on an issue of law, an appellate court owes no deference to the trial court's "interpretation of law that flows from established facts." State v. Perini Corp., 221 N.J. 412, 425 (2015) (citing Kearny, supra, 214 N.J. at 92). Determining the date upon which a statute of limitations begins to run is an issue of law, subject to plenary review. Kearny, supra, 214 N.J. at 92.

We note initially that, in its written submission to the trial court, plaintiff conceded that the construction work on the project was substantially completed on May 1, 2002. At oral argument on defendants' motions, plaintiff's counsel told the

motion judge plaintiff agreed that May 1, 2002, was the date of substantial completion of the work. On appeal, however, plaintiff appears to challenge that fact.

In its brief, plaintiff asserts that the contract between A/V and AJD provides that the date of substantial completion is the date so certified by the project's architect. According to plaintiff, the project's architect never certified to the Borough that the project had been completed in accordance with the specifications and applicable codes.

In addition, plaintiff asserts that in 2004, an architect employed by A/V's parent company sent a letter to the Borough stating that the building was substantially complete on May 1, 2002. Plaintiff states that this letter was not a certificate of substantial completion, and it did not comply with the contract or applicable requirements of the American Institute of Architects. Plaintiff also asserts that a certificate of substantial completion was never issued for the project.

We are convinced that plaintiff is bound by the position it took in the trial court in responding to defendants' motions, and should not be permitted to raise for the first time on appeal an issue of fact regarding the date of substantial completion. Siddons v. Cook, 382 N.J. Super. 1, 12 (App. Div. 2005). Accordingly, we will assume for purposes of our decision

that the construction work on the project was substantially complete on May 1, 2002.

We also note that, in its brief, plaintiff suggests that it asserted claims against AJD, Forsa, Benfatto and Luxury pursuant to the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. However, a review of plaintiff's nine complaints indicates that plaintiff only asserted claims under the CFA against those parties involved with the condominium conversion. Plaintiff never asserted claims under the CFA against the construction defendants.

IV.

We turn to plaintiff's contention that the motion judge erred by concluding that plaintiff's causes of action against defendants accrued on May 1, 2002, when the construction work on the project was deemed to be substantially complete.

As the motion judge recognized, N.J.S.A. 2A:14-1 provides in pertinent part that a claim for tortious injury to real property or for recovery on a contract claim "shall be commenced within [six] years after the cause of such action shall have accrued." The statute does not define when a cause of action accrues, and that issue has "been left entirely to judicial interpretation and administration." Russo Farms v. Vineland Bd. of Ed., 144 N.J. 84, 98 (1996) (quoting Rosenau v. City of New Brunswick, 51 N.J. 130, 137 (1968)). The courts have determined

that a cause of action accrues when the right to institute a suit first arises. Ibid. (citations omitted).

Here, the motion judge correctly stated that in construction defect cases, the statute of limitations generally begins to run upon substantial completion of the work. In Mahony-Troast Constr. Co. v. Supermarkets Gen. Corp., 189 N.J. Super. 325, 329 (App. Div. 1983), we observed that "the statute of limitations on an action for deficiencies in design or construction commences to run upon substantial completion of the structure." See also Russo Farms, supra, 144 N.J. at 115-16 (citing Mahony-Troast and noting that the Appellate Division has determined that "the date of substantial completion is to be used for statute of limitations purposes" in construction defect cases).

Our decision in Trinty Church v. Lawson-Bell, 394 N.J. Super. 159 (App. Div. 2007), also supports the conclusion that in general a cause of action accrues on a construction-defect claim at the time of substantial completion. There, the parties had entered into contracts to perform construction work on a church. Id. at 163. The contracts provided that any cause of action arising under the agreements shall be deemed to accrue and the applicable statute of limitations commence to run not later than the date of substantial completion. Ibid. We held that the relevant provisions of the contracts were consistent

with the general principle that the statute of limitations in construction-defect cases begins to run at the time of substantial completion of the work. Id. at 170-71.

V.

As indicated in Trinity Church, although a cause of action in a construction-defect case generally accrues at the time of substantial completion, the date of accrual may be delayed by application of the discovery rule or other equitable considerations. Id. at 171. We are convinced that, under the circumstances presented in this case, plaintiff's causes of action did not accrue until the unit owners took full control of the Association's governing Board, and the Board had sufficient facts upon which to assert actionable claims against defendant contractors.

A condominium association has responsibility for "maintenance, repair, replacement, cleaning and sanitation of the common elements" of the condominium. N.J.S.A. 46:8B-14(a). The association has exclusive authority to prosecute claims regarding the common elements, and the "unit owners may not pursue individual claims for damages to or defects in the common elements predicated upon their tenant in common interest." Siller v. Hartz Mountain Assoc., 93 N.J. 370, 380 (1983). However, if the association refuses to enforce rights that it is

authorized to assert, a unit owner could pursue a derivative claim on behalf of the association. Id. at 381.

Here, the record shows that AJD performed its work pursuant to its contract with A/V, and Forsa, Benfatto and Luxury performed their work as AJD's subcontractors. After the project was substantially complete and certificates of occupancy issued, A/V operated the building as a rental dwelling for two years. The property was not converted to the condominium form of ownership until January 2005, when the sponsor issued the public offering statement and filed the master deed.

The Association was established at that time, but the sponsor controlled the Board as provided by the NJCA, the master deed and the relevant condominium documents. The unit owners did not assume full control of the Board until July 2006, after the requisite number of units had been sold. Notably, while the sponsor had control of the Board, neither the sponsor nor the Association pursued any claims against the contractors for construction defects in the common elements.

Although under Siller, a unit owner could have brought derivative claims on behalf of the Association against the contractor defendants for construction defects in the common elements, the unit owners were not compelled to do so. Indeed, it would be unreasonable for the statute of limitations to run on the claim of a condominium association, unless a unit owner,

or group of unit owners, took on that responsibility. We are convinced that, under the circumstances, the statute of limitations could not begin run on the Association's claims until the unit owners had full control of the governing Board.

Furthermore, the Association did not have all of the facts necessary to support actionable claims against defendants until the Board received the Falcon report on June 13, 2007. The motion judge noted that the Ray Engineering report, which had been included in the public offering statement issued upon the conversion of property to condominium ownership, had identified some construction defects in the buildings.

However, the Falcon report provided a more detailed analysis of the property and identified construction defects that had not been mentioned in the Ray Engineering report. Indeed, in their complaint, plaintiff asserted a claim of professional negligence against Ray Engineering, alleging that it had been negligent and reckless in failing to disclose the existence of certain major structural and mechanical system defects in the property.

Thus, the unit-owner-controlled Board was not reasonably aware that it had actionable claims regarding the full range of construction defects until it received the Falcon report on June 13, 2007. We conclude that the Association's causes of actions against defendant contractors accrued at that time.

Defendants argue, however, that plaintiff should not be entitled to the benefit of the discovery rule. Defendants contend that by at least May 2007, when Falcon produced its report, plaintiff still had a reasonable time in which to assert claims within six years of the date of substantial completion of the work. Defendants therefore argue that the causes of action accrued at the time of substantial completion.

We do not agree. N.J.S.A. 2A:14-1 states that a claim must be asserted within six years after its accrual. Thus, by its plain terms, the statute indicates that a claimant would have the benefit of the full limitations period to file its complaint after the cause of action has accrued. Here, plaintiff's causes of action against defendant contractors did not accrue until June 13, 2007, when the unit-owner-controlled Board received Falcon's report.

Plaintiff had six years from that date in which to assert its claims. Plaintiff filed its initial complaint in May 2009, naming AJD and Luxury as defendants. It asserted claims against Benfatto in 2009, and against Forsa in 2011. The claims were timely filed. See Caravaggio v. D'Agostini, 166 N.J. 237 (2001) (noting that, although the plaintiff had discovered his claim for malpractice prior to the expiration of the statute of limitations, the plaintiff would "ordinarily" be allowed the full limitations period in which to bring his action); Fox v.

Passaic Gen. Hosp., 71 N.J. 122 (1976) (holding that limitations period does not commence until harm to the plaintiff is reasonably apparent or ascertainable).

In addition, Luxury notes that plaintiff has alleged that the floor slabs in the common areas are not flat and level. Luxury argues that plaintiff and the unit owners should have been aware from the date of construction in 2001 of these alleged deficiencies in the flooring. However, as we have explained, the statute of limitations did not begin to run until the unit owners had full control of the Association's governing Board and it had sufficient facts upon which to assert its claims for construction defects. Even if the unit owners knew or should have known of the defective floors in the common areas sometime before June 13, 2007, the time in which the Association could assert those claims did not begin to run until the unit owners controlled the Board.

The motion judge also observed that it would be unfair to allow the Association to assert its claims against defendant contractors because defendants could not have reasonably anticipated that the property would be converted to a condominium, that the Association would eventually be formed, and that they would be "forever liable" for the alleged construction defects.

However, it is well established that the statute of limitations could be tolled by application of the discovery rule or equitable considerations. Trinity Church, supra, 368 N.J. Super. at 171. Even so, defendants would not be "forever liable" for the alleged construction defects.

The statute of repose in N.J.S.A. 2A:14-1.1(a) provides that:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, . . . arising out of the defective or unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction.

The ten-year limitations period in the statute of repose "generally commences one day after issuance of the certificate of substantial completion for the project." Perini Corp., supra, 221 N.J. at 427 (citing Russo, supra, 144 N.J. at 118). The purpose of the statute was to limit the expanding liability of contractors, including an expansive application of the discovery rule. Horosz v. Alps Estates, Inc., 136 N.J. 124, 128 (1994) (citing Newark Beth Israel Hosp. v. Gruzen, 124 N.J. 357, 362

(1991)). Therefore, the motion judge's statement that defendants would be "forever liable" for the construction defects is unfounded.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION