NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0225-10T3

FAIRVIEW HEIGHTS CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff-Appellant/
Cross-Respondent,

v.

R.L. INVESTORS, 440 ASSOCIATES,
INC., VINCENT LUPPINO, RUSSELL
LUPPINO and ROSARIO LUPPINO,

Defendants-Respondents/
Cross-Appellants,

and

R.L. INVESTORS, 440 ASSOCIATES,
INC., VINCENT LUPPINO, RUSSELL
LUPPINO and ROSARIO LUPPINO,

Defendants/Third-Party
Plaintiffs-Respondents,

v.

LOUIS GELFAND, INC. and
H.Y. YOUNG ASSOCIATES,

Third-Party Defendants.

Argued April 12, 2011 - Decided May 23, 2011

Before Judges Payne, Baxter and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-519-08.

John Randy Sawyer argued the cause for appellant/cross-respondent (Stark & Stark, attorneys; Mr. Sawyer, on the brief).

John M. Bowens argued the cause for respondents/cross-appellants (Schenck, Price, Smith & King, L.L.P., attorneys; Mr. Bowens on the brief).

PER CURIAM

This appeal concerns a condominium that was completed in 1988, and litigation that was not instituted against the builders, and the builder-owned management company, until twenty years later concerning water seepage in the building.

Plaintiff Fairview Heights Condominium Association, Inc. ("the Association" or "the Board") appeals from orders granting summary judgment to defendant R.L. Investors (RLI), the builders of the condominium, based upon the ten-year statute of repose, N.J.S.A. 2A:14-1.1; and to the builder-owned management company, 440 Associates, and to defendants, Vincent, Russell and Rosario Luppino, based upon lack of duty and lack of proximate cause. Defendants have cross-appealed, arguing that the judge erred by denying their motion for leave to file an amended third-party complaint.

We reverse the dismissal of plaintiff's complaint against RLI, because the judge neglected to address the statute of repose requirement that the alleged construction defect rendered the building "unsafe," and therefore remand for further findings on that issue. If, on remand, the judge determines that the statute of repose is inapplicable, he shall proceed to consider whether RLI is entitled to summary judgment on any other ground.

As to 440 Associates and the Luppino defendants, we affirm the judge's determination that plaintiff failed to raise a genuine issue of material fact on the question of whether any breach of duty by defendants was a proximate cause of plaintiff's damages.

On the cross-appeal, we affirm, finding no abuse of discretion in the judge's refusal to grant such a late amendment to defendant's third-party complaint.

I.

In 1987, RLI broke ground on a twenty-one unit condominium project in Fairview Heights (the building), which was completed a year later. RLI served as the sponsor of the condominium in accordance with the Public Offering Statement, which specified that RLI would retain control over the condominium association until sixty days after seventy-five percent of the units had

been sold. At that point, the sponsors' control of the condominium association would terminate. Initially, the condominium Board consisted of the three principals of RLI, defendants Vincent, Russell and Rosario Luppino (the Luppinos).

In 1992, unit owner Susan Miller was elected to the Board, followed in 2001 by Diana Babat. In 2001, after RLI had sold seventy-five percent of the condominium units, Miller became president of the Association and Babat, Vice-President. Defendant Rosario Luppino remained on the Board until 2006. Miller resigned as president of the condominium Board in 2004, at which time Babat replaced her.

440 Associates, which was owned by the three Luppinos, managed the building from 1988 until resigning at the end of 2001. At that time, the Board hired Gelfand, Inc. to manage the building. Gelfand was replaced on August 1, 2002 by H.W. Young Associates. The Association ultimately was dissatisfied with Young, as well, largely for reasons concerning the cleanliness of the building. On August 1, 2004, the Board again contracted with 440 Associates to manage the building, although 440 Associates resigned again in 2006. At the time plaintiff filed the complaint that is the subject of this appeal, the building was self-managed.

At some point, the exact date not being clear from the record, condominium owners began to notice serious water seepage. Defendants claimed they knew nothing of any leaks during 440 Associates' first tenure managing the building from 1988 through 2001. Plaintiff disputes that contention, contending that defendants were made aware of problems with the Exterior Insulation and Finish System (EIFS)[1] much earlier, both from a 1989 report prepared by an employee of the EIFS manufacturer, and from a unit owner, who stated that in 1999 she notified defendants of a leak in her unit. According to defendant Rosario Luppino, he did not learn of the leaks in the building until some time between 2001 and 2004, and he noted that the management company, either Gelfand or Young, had hired a contractor to re-caulk the windows, but that leakage around the windows had continued nonetheless.

Miller stated in her deposition that "the only issue[] with the building itself up through 2001" was "nothing [other] than the normal wear and tear," which she described as the building needing painting because it was "dirty." When asked whether she "recall[ed] any issues up to 2001 involving any water intrusion," Miller answered "no." Babat explained that at no

[1] EIFS is a synthetic stucco product used to clad the exterior of buildings. It has been the subject of numerous lawsuits. See, e.g., Dean v. Barrett Homes, Inc., 204 N.J. 286, 290-91 (2010).

time during her rental of a unit between 1994 and 2001 was she aware of any leaks or problems with water, and when she and her husband purchased their unit in 2001, "there were minor things" they wanted repaired, such as new carpeting, but there were no structural problems with the unit. Babat also reported that at the June 2002 Board meeting, although there were some minor cosmetic repairs discussed, there "were no other problems with the building" at that time.

Although one resident, Janice Lohwin, complained to Babat while Babat was a Board member that her unit "had a really bad water intrusion," Lohwin's complaint could not have been made prior to 2001, as Babat did not become a member of the Board until then. The record does not specify what was done to remedy the problem; Lohwin eventually moved out.

As for general repairs, when asked at his deposition whether he had been required to arrange for "repairs to the outside of the building" during 440 Associates's first tenure managing the building, from 1988 to 2001, Rosario Luppino said there was no need to do so "because there was nothing wrong with the building and nothing was done." Nor did it engage anyone to inspect the building at that time because, according to him, there was no cause to do so. It was only between 2001 and 2004, when 440 Associates was not managing the building, that he first

became aware of leaks in the building, although the leaks appeared to result from poor caulking around the windows, and not from problems with the EIFS. He noted that in response to the leaks, either Young or Gelfand had hired a company to re-caulk the windows.

In his deposition, Russell Luppino confirmed the statements of his father, Rosario Luppino, that there were no problems with the building until after 2001. Russell stated that RLI never hired anyone to perform repairs on the outside of the building. He also stated that during the period of 1988-2001, 440 Associates was not aware of any leaks in the building, was unaware that EIFS had been installed improperly, had not contacted anyone at a company known as Sto Seal of New Jersey concerning the EIFS, and did not know whether anyone had met with a Sto Seal representative on site.

As some point in 2004, numerous unit owners began to experience leaks. By late 2005, 440 Associates called a meeting of all unit owners after a period of heavy rain revealed "many different leaks throughout the building." After soliciting bids to repair the problem, 440 Associates convened another meeting with unit owners in May 2006 to discuss the repair options, all of which were very expensive. None of the proposals was accepted because the unit owners could not agree that any would

be effective. As of November 10, 2006, at least four of the units, including one still owned by defendant Rosario Luppino, still had a water leakage problem.

Prior to filing its complaint, plaintiff hired R.V. Buric, a "construction/management consulting firm specializing in building diagnostics," to conduct a study of the building. The study revealed that the building's leaks were attributable to the "Developer, the Project Architect, the EIFS and sealant installation contractor, the EIFS manufacturer, the window manufacturer, the window installation contractor, and the roofing and flashing contractors." The report continued by indicating that "[i]nadequate and improper construction details and design, improper or incomplete installation, and substandard quality and underperformance of the finished components of the cladding system have caused the current water intrusion problems and the deterioration of the building components." In short, the building was flawed in its construction.

On January 18, 2008, plaintiff filed its complaint against RLI and 440 Associates, Inc., asserting breach of implied and express warranties, negligence, breach of contract, products liability, negligent misrepresentation, breach of fiduciary responsibility, violations of the New Jersey Planned Real Estate

Development Full Disclosure Act and violations of the Consumer Fraud Act.

After pretrial discovery, all defendants moved for summary judgment. At the conclusion of oral argument on August 9, 2010, the judge granted RLI's motion, determining that the ten-year statute of repose, N.J.S.A. 2A:14-1.1, barred all of plaintiff's claims against the developer of the property. The judge, however, denied defendants' motions to dismiss plaintiff's negligence claims against 440 Associates and breach of fiduciary duty claims against Rosario, Russell and Vincent Luppino. The judge issued a confirming order on August 20, 2010.

In the interim, on August 12, 2010, plaintiff moved for reconsideration. Defendants cross-moved for reconsideration of the judge's denial of summary judgment on the claims remaining against 440 Associates and the fiduciary duty claim against the Luppinos. After oral argument on September 2, 2010, the judge denied plaintiff's motion for reconsideration, again concluding that plaintiff's claim against RLI was time-barred under the statute of repose because such claim was "founded upon the construction of the building."

At the same time, the judge granted defendants' motion to bar the 2010 certification from a unit owner, Damarys Gonzalez,

because plaintiff had failed to amend its answers to interrogatories in a timely manner to include the Gonzalez certification.[2] The judge also barred a 1989 job site report on the grounds that the report included hearsay that satisfied none of the exceptions in the Rules of Evidence.[3]

Finally, the judge granted the motion by 440 Associates and the Luppinos to reconsider the portion of the August 20, 2010 order that had permitted the remaining claims to proceed to trial. As to 440 Associates, the judge noted that although defendants had a duty to inspect, maintain, and repair the common elements of the building, which included its exterior, plaintiff failed to raise a genuine issue of material fact on the question of causation and damages. In particular, the judge found that plaintiff was unable to prove damages because "had [d]efendants inspected, maintained, and repaired the [EIFS],

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[2] In her certification, Gonzalez maintained that when she moved into her unit in January 1999, ten years after the building was completed, she noticed a leak located in the wall of her kitchen, adjacent to an exterior wall of the building. She notified defendant Rosario Luppino, who sent a handyman to repair the damage to the kitchen wall. Later in 1999, Gonzalez's father notified Luppino of the leaks around the unit's windows, to which Luppino allegedly replied, "You live here, you fix it."

[3] The May 23, 1989 job site report prepared by Raymond Brzuchalski stated that the "owner of the building," RLI, "is concerned with water penetration at the northeast elevation" where "stains are apparent on the ceiling below the 1st floor at the northeast corner." He described the measures taken by RLI to address the leaks.

would that have corrected the problem? And the only evidence before the [c]ourt appears to be the -- to the contrary." Indeed, "[p]laintiff's own expert testified in depositions that it didn't matter, because the [EIFS] was essentially inherently defective . . . in his expert report, he said the same thing."

The judge observed that even if the 1989 job site report and the Gonzalez testimony were to be considered, "[p]laintiffs lack the required evidence, expert or otherwise, by which a reasonable . . . fact finder could resolve the alleged dispute in its favor" because plaintiff produced "no expert testimony that informs the trier of fact as to the standard of care for the [EIFS], for the manner, nature, and number of inspections," nor expert testimony "relat[ing] the alleged failure to repair to [p]laintiff's damages." On September 20, 2010, the judge issued an order dismissing plaintiff's remaining claims.

On appeal, plaintiff argues that the judge erred by: 1) dismissing plaintiff's claims against RLI based upon the statute of repose; 2) dismissing the breach of fiduciary duty claims against the Luppinos based upon a lack of expert opinion; 3) barring the testimony of Gonzalez; and 4) barring the May 23, 1989 job site report.

II.

In point one, plaintiff contends that the judge erred when he dismissed plaintiff's claim against the condominium builder RLI as time-barred under N.J.S.A. 2A:14-1.1.

When reviewing a grant of summary judgment, we apply the same standard as that governing the trial judge. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). As the statute of repose presents a question of law, our review is de novo. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (noting that "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference").

By statute, architects and builders are protected from liability claims presented against them more than ten years after completion of the services rendered, or more than ten years after the completion of the building. The ten-year statute of repose provides:

> 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, or for any injury to property, real or personal or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and 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. This limitation shall serve as a bar to all such actions both governmental and private but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.
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> [N.J.S.A. 2A:14-1.1(a) (emphasis added).]

In construing this statute, the Supreme Court has observed that "[t]he legislative history of the act is singularly unhelpful," describing it as "meager and unrevealing." Greczyn v. Colgate-Palmolive, 183 N.J. 5, 9 (2005) (quoting O'Connor v. Altus, 67 N.J. 106, 121 (1975)). However, the Court noted that the adoption of the "discovery rule" may well have been one of the factors that "provided the motivation" for the enactment of N.J.S.A. 2A:14-1.1. Id. at 9-10 (quoting Rosenberg v. N. Bergen, 61 N.J. 190, 194 (1972)). "The discovery rule provides that the statute of limitations does not start to run until [the plaintiff] discovers or should have discovered that a wrong has been inflicted." Id. at 10. The discovery rule exposed builders and architects to "potential liability for

injuries caused by defective workmanship [that] would last indefinitely, inasmuch as many defects would often not be discovered or give rise to a claim for damages until an injury had in fact occurred." Ibid. (quoting E.A. Williams, Inc. v. Russo Dev. Corp., 82 N.J. 160, 165 (1980)). The statute of repose therefore seeks to "'prevent "liability for life" against contractors and architects.'" Id. at 11 (quoting Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 117 (1996)).

The Court has characterized the statute of repose as "prevent[ing] what might otherwise be a cause of action from ever arising. Injury occurring more than ten years after the performance of the negligent act simply forms no basis for recovery. The injured party literally has no cause of action." E.A. Williams, supra, 82 N.J. at 167. "Plainly, the Legislature intended to limit the time within which a cause of action may arise against an architect or builder to ten years from the date construction is substantially completed. Thus, injuries sustained or suits filed after the ten-year period are barred." Greczyn, supra, 183 N.J. at 18.

Plaintiff argues that rigid application of the statute of repose in the present circumstance is unreasonable, as the statute of repose should not, according to plaintiff, begin to run until after RLI sold seventy-five percent of the units and

thereby relinquished its control of the Board in 2001. Plaintiff urges us to construe N.J.S.A. 2A:14-1.1 such that causes of action of condominium associations against developers arise after unit owners take control of the condominium association. That is, the cause of action for individual owners would begin at the moment of "substantial completion" of the building or complex, but an association's right would arise only after members took formal control of the condominium association. We do not accept such an equitable tolling argument.

We long ago concluded there is no equitable tolling of the statute of repose. Cnty. of Hudson v. Terminal Constr. Corp., 154 N.J. Super. 264, 268-69 (App. Div. 1977), certif. denied, 75 N.J. 605 (1978). In County of Hudson, the plaintiff discovered, fifteen years after a building was complete, that the contractor had improperly installed ceramic tile work, id. at 267-68, and the plaintiff alleged that the contractor had purposefully concealed his faulty work by "bending back . . . the metal ties and cutting off the back of tiles so that they would take up less space and conceal the fact that the cinder block wall was built too far into the stairwell," id. at 269.

We observed that "[s]ince the discovery rule is an instrument of equity, it might seem proper, at first, to allow

the rule to be applied in those cases where it is alleged that there was a purposeful concealment of a defect." Id. at 268-69. We ultimately held the statute of repose was not tolled because "virtually all latent defects in construction could probably be subject to the allegation that they were purposefully concealed. . . . Such an exception would quickly engulf the statute [N.J.S.A. 2A:14-1.1] and render it worthless." Id. at 269.

Indeed, the rule in County of Hudson has never been modified. No published opinion has ever authorized the equitable tolling of N.J.S.A. 2A:14-1.1 for contractors or architects. Indeed, in Stix v. Greenway Development Co., Inc., 185 N.J. Super. 86, 90 (App. Div. 1982), we were again urged to relax the ten-year statute of repose where the building contractor may have engaged in fraudulent practices. The plaintiffs alleged negligence in the construction of a house, which resulted in the "buckling and collapse" that ultimately "undermin[ed] the entire structure," id. at 87, and also alleged that the contractor made false and fraudulent representations "for the purpose of lulling [them] into a false sense of security," id. at 87-88, 90. Even in the face of the plaintiffs' fraud claims, we affirmed the trial court's dismissal of the complaint as time-barred because the "language

of the statute [of repose] is plain [and] unambiguous." Id. at 90.

Plaintiff relies on two opinions of this court to support its argument that the judge erred by refusing to equitably toll the running of the ten-year statute of repose, one published and one unpublished. We need not consider either of these opinions as we conclude that the judge's findings on the statute of repose failed to address one of the statute's key elements, namely, whether the alleged construction defects rendered the building "unsafe." In particular, N.J.S.A. 2A:14-1.1(a) insulates an architect or owner from liability once ten years has elapsed, but only in instances where the personal injury or property damage alleged by the plaintiff "arise[s] out of the defective and unsafe condition of an improvement to real property[.]" N.J.S.A. 2A:14-1.1(a) (emphasis added).

Here, the judge made no findings on whether the water seepage, or the property damage caused by such seepage, in any way rendered the building, or any of the units, unsafe. Although the statute must be broadly construed, Rosenberg, supra, 61 N.J. at 198, "the Legislature has limited the statute of repose so that only improvements to real property 'that result in unsafe and defective conditions implicate the statute[.]'" Port Imperial Condo. Ass'n, Inc. v. U.S. Wick

Drain, Inc., ___ N.J. Super. ___, ___ (App. Div. 2011) (slip op. at 14-15) (quoting Newark Beth Israel Med. Ctr. v. Gruzen & Partners, 124 N.J. 357, 364 (1991)).

Moreover, a condition will only be deemed "unsafe and defective" within the meaning of N.J.S.A. 2A:14-1.1 when the "'work created a situation hazardous to the well-being and safety of persons or property coming into contact with the improvement or structure.'" Id. at 15 (quoting E.A. Williams, supra, 82 N.J. at 171). In Port Imperial, we provided examples of conditions that were "unsafe" or hazardous, thereby entitling the architect or builder to the protection of the statute of repose. Id. at 15. We pointed to a negligently paved road, Rosenberg, supra, 61 N.J. at 193, 197-98; negligently installed ceramic tiles that began to crumble and fall, Cnty. of Hudson, supra, 154 N.J. Super. at 267; and leakage of water that caused the building's support structure to become unstable, Salesian Soc'y v. Formigli Corp., 120 N.J. Super. 493, 496 (Law Div. 1972), aff'd o.b., 124 N.J. Super. 270 (App. Div. 1973). Unlike expenditures by an owner or a condominium association that are necessary to ensure the safety of the building's occupants, in which event the protections of N.J.S.A. 2A:14-1.1, will apply because the building is "unsafe," "negligent improvements to real property that create merely expensive and inconvenient

repairs" are insufficient to trigger the statute of repose. Port Imperial, supra, ___ N.J. Super. at ___ (slip op. at 15).

In Port Imperial, we affirmed the trial judge's conclusion that the statute of repose precluded the plaintiff's belated claim for damages due to defective and unsafe conditions of the various buildings in the condominium project. Id. at 19. The "unsafe" conditions included "cracks in the masonry, cracked footings, separation developing between floor slabs and walls, separations between view units and adjacent units, and floors sloping downward to the east." Id. at 18. We noted that because of improper installation of the underground drainage system, the buildings had settled after their construction, "the magnitude of which could be very significant, largely unpredictable, and remediable only by first demolish[ing] the existing buildings, then drill[ing] in new foundation piles through the fill and organic deposits, terminating within the underlying glacial soil or bedrock." Ibid.

Ultimately, we held that the summary judgment record supported the judge's conclusion that "without appropriate ground improvements," which "may require total demolition and rebuilding of certain units, the sinking units could not fulfill their intended function of residential occupation." Ibid.

Thus, "the nature of the allegations" entitled the defendants to the protection of the statute of repose. Id. at 20.

Here, as we have noted, the judge concluded that RLI was entitled to summary judgment under N.J.S.A. 2A:14-1.1, yet the judge made no findings on one of the principal requirements of the statute, namely, whether the construction defects had caused an "unsafe condition" to occur. We note that plaintiff's amended complaint alleged that the

> defects and irregularities in the barrier-EIFS, the windows, the roof and the other components of the Condominium's Common Elements, plus multiple additional design and/or construction deficiencies in the Condominium, have resulted in an unacceptable high moisture content in the underlying substructure of the Condominium and have caused extensive damage to the Common Elements and to the units themselves.
>
> [(Emphasis added).]

Plaintiff also alleged that the defects and related conditions at issue had "adversely affected the habitability" of the condominium common elements and the units. Moreover, plaintiff's expert, R.V. Buric, opined that the water intrusion had caused "structural deterioration" and the possibility that mold was present in "unacceptable levels" causing a health hazard.

The judge made no findings on whether the building's structural elements had been weakened by the moisture,

comparable to the situation in Salesian, supra, 120 N.J. Super. at 496, or whether the mold, or any other factor, had created an unsafe condition. Without a specific finding on the question of whether the defects had rendered the building "unsafe," defendants were not entitled to the benefit of the ten-year statute of repose. Port Imperial, supra, ___ N.J. Super. at ___ (slip op. at 15). We therefore reverse the grant of summary judgment to RLI based upon that statute and remand for reconsideration during which the judge must make findings on whether the alleged construction defects rendered the building "unsafe," as required by N.J.S.A. 2A:14-1.1.

On remand, if after considering his original opinion the judge concludes that defendants are not entitled to summary judgment based upon the statute of repose, the judge shall then proceed to analyze whether plaintiff's claims are barred for any other reason.

III.

In point two, plaintiff maintains that the judge erred in dismissing the breach of fiduciary duty claims against Rosario, Vincent and Russell Luppino arising from their service on the Association's Board of Directors from 1988 to 2001. Plaintiff contends that the trial court erred in requiring them to produce expert opinion, and also in failing to find that the report it

produced from R.V. Buric Company, written by Mark Berman, was adequate.

Both sides agree that as members of the Board of Directors from 1988 to 2001, the Luppinos "ha[d] a fiduciary obligation to its members similar to that of a corporate board to its shareholders." See Kim v. Flagship Condo. Owners Ass'n, 327 N.J. Super. 544, 550 (App. Div.), certif. denied, 164 N.J. 190 (2000). "That relationship requires that [members of the Board] act consistently with the Condominium Act and its own governing documents and that [their] actions be free of fraud, self-dealing, or unconscionability." Billig v. Buckingham Towers Condo. Ass'n I, Inc., 287 N.J. Super. 551, 563 (App. Div. 1996) (citing Siller v. Hartz Mountain Assoc., 93 N.J. 370, 382-83 (1983)). "Moreover, that fiduciary relationship requires that in dealing with unit owners, the association must act reasonably and in good faith." Kim, supra, 327 N.J. Super. at 554 (quoting Billig, supra, 287 N.J. Super. at 563). "If a contested act of the association meets each of these tests the judiciary will not interfere." Billig, supra, 287 N.J. Super. at 563.

We agree with the judge's conclusion that expert opinion was needed on the question of causation and damages, without which the claims against the Luppinos could not proceed. Even if we were to assume that the Luppinos' obligations as

fiduciaries included a duty to periodically inspect the EIFS, plaintiff could not establish without expert testimony how such an inspection would have been conducted; how often such inspections should have occurred; what repairs should have been made; when they should been made; and the consequences of failing to make the repairs. As the judge correctly observed, even if the Luppinos had inspected, maintained and repaired the EIFS, "would [that] have corrected the problem?"

The judge noted that "plaintiff's own expert, [Mark Berman, of Buric], testified in deposition that it didn't matter, because the [EIFS] was essentially inherently defective" and that "in his expert report, he said the same thing." Thus, according to the judge, even if the Gonzalez certification and the Brzuchalski report were admitted, neither of them "would have alerted the Defendants that there was a problem with the [EIFS]." Ultimately, the trial court found "plaintiffs lack the required evidence, expert or otherwise, by which a reasonable . . . fact finder could resolve the alleged dispute in its favor." The judge found "no expert testimony that informs the trier of fact as to the standard of care for the [EIFS,] for the manner, nature, and number of inspections, no expert testimony to [establish that] the water leaks" were such "that the Defendants knew or should have known that the [EIFS]

was defective - - defectively installed and required to be repaired, nor is there any expert testimony [to] relate the alleged failure to repair to Plaintiff's damages."

The report submitted by Berman establishes that the EIFS product was defective in its design and would therefore have failed from the outset. The defects in that product were, according to Berman, not prone to repair or other mitigation. Therefore, even if defendants did not appropriately inspect or repair the EIFS, their failure to do so would have had no impact on the long-term performance of the EIFS exterior cladding. As plaintiff failed to raise a genuine issue of material fact on these questions, the judge properly granted summary judgment to the Luppinos on plaintiff's breach of fiduciary duty claim.

IV.

In points three and four, which we consider jointly, plaintiff maintains that the judge committed reversible error when he excluded the Gonzalez certification and the 1989 job site report prepared by Raymond Brzuchalski. The discovery end date was May 31, 2010. Plaintiff did not identify Gonzalez as a possible witness, or attempt to offer her certification, until plaintiff filed its response to defendants' August 12, 2010 motions. The judge observed that Gonzalez was herself a member of the Board in 2008 when the Board's president, Babat, was

being deposed about leaks in the building. The judge concluded that plaintiff had presented no exceptional circumstances justifying the reopening of discovery to permit the submission of the Gonzalez certification, see Rule 4:17-7, especially in light of the fact that Gonzalez's information was available to plaintiff and could have been submitted before the end of the pretrial discovery period.

A party's answers to interrogatories must be amended no later than twenty days prior to the end of the discovery date. R. 4:17-7. Amendments are permissible thereafter only if the party seeking to amend his or her answers certifies that "the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date." Ibid. Plaintiff made no such showing. Consequently, we perceive no abuse of discretion related to the exclusion of the Gonzalez certification, and reject plaintiff's arguments to the contrary.

Turning to the Brzuchalski job site report, the judge barred it in light of the hearsay contained in that report, which did not satisfy the requirements of the business records exception to the hearsay rule. See N.J.R.E. 803(c)(6). The judge pointed to Brzuchalski's statements about the owner's "concern" with water penetration, and noted that plaintiff was

unable to demonstrate the source of Brzuchalski's information and the circumstances of the preparation of the writing.

In particular, Brzuchalski was employed by Sto, the manufacturer of the EIFS material, and it was his responsibility to travel to all of the job sites in the Mid-Atlantic region. When asked at his deposition whether he could remember who had told him that the owners of the building were concerned about water seepage, he had no recollection of who made such a statement, or whether it had been one of the owners.

The judge concluded the job site report was therefore not sufficiently reliable to justify its admission in evidence. See Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 219 (App. Div. 1996). We perceive no abuse of discretion in the judge's finding that the Brzuchalski 1989 job site report did not satisfy the requirements of N.J.R.E. 803(c)(6). We thus reject the arguments advanced in points three and four.

V.

In their cross-appeal, defendants argue that if we ultimately reverse the dismissal of any claims against them, we should also reverse the trial court's denial of their motion to amend their third-party complaint to assert claims against Sto of New Jersey. The judge justified that refusal by observing that defendants were aware of Sto of New Jersey's involvement

from the very outset of the present litigation, and defendants should therefore not be permitted to file an amended third-party complaint against Sto on the eve of trial. Judges are vested with considerable discretion in permitting, or denying, the filing of an amended complaint. Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997). We perceive no abuse of discretion here where the motion to seek leave to amend the third-party complaint was unreasonably delayed. We therefore reject the claim defendants advance in their cross-appeal.

On the appeal, affirmed in part; reversed and remanded in part. On the cross-appeal, affirmed.