PREPARED BY THE COURT

THE PALISADES AT FORT LEE CONDOMINIUM ASSOCIATION, INC., Plaintiff, v. 100 OLD PALISADE, ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. L-2306-09 Civil Action

THIS MATTER comes before the Court pursuant to four Motions for Summary Judgment filed by Defendants AJD Construction, Co. Inc., Luxury Floors Inc., Benfatto Construction Corp. and Forsa Construction, LLC. Opposition to these motions was filed on behalf of the Plaintiff, Palisades at Fort Lee Condominium Association, Inc.. Oral argument was heard before this Court on February 28, 2014.

FACTUAL BACKGROUND

This case concerns the residential condominium known as The Palisades at Fort Lee Condominium (hereafter "the Palisades") in Fort Lee, New Jersey. The Palisades consists of 538 condominium apartments situated within a 40-story residential tower constructed above and adjacent to what, at the time of construction of the buildings, was a twenty-five year old abandoned eleven story parking structure. There are six stories of just parking, five stories of parking with apartments and one story of amenity spaces. There also is an open plaza with mid-rise apartments and townhomes built on its perimeter, with a first floor lobby and 28 residential floors of apartments in the tower.

The complex began its existence as an incomplete eleven story parking facility in 1977. The parking deck was subsequently abandoned by its owners. Sometime in the year 1998[1], the Palisades A/V Acquisitions Co., LLC (hereafter "A/V") purchased the property. A/V was a joint venture comprised of Applied Property Management (hereafter "Applied") and Vornado Realty Trust (hereafter "Vornado"). On or about July 19, 2000, A/V contracted with AJD Construction Co., Inc. (hereafter "AJD") to construct five additional floors on the parking deck and a thirty story residential tower atop the parking facility. Additionally, along the perimeter of the plaza, mid-rise apartments and townhomes were constructed as well as a swimming pool. AJD then hired various subcontractors to perform various aspects of the construction including the co-Defendants on these Motions.

Forsa Construction, LLC (hereafter "Forsa") entered into a contract with AJD on February 7, 2000 to do concrete construction work. On June 27, 2000 Benfatto Construction Corp. (hereafter "Benfatto") contracted with AJD to perform the masonry work at Palisades. By agreement dated August 31, 2000 Luxury Floors, Inc. (hereafter "Luxury") contracted with AJD to furnish finish flooring.

The construction on the Palisades was deemed substantially complete on May 1, 2002. At this point in time the Palisades was a pure rental apartment building owned and operated by A/V. Plaintiff contends that AJD was continuing to "work" on the Palisades as of October 11, 2002. Some two years later, on or about June 28, 2004 A/V sold the Palisades to the Sponsor, Crescent Heights of America, Inc. (hereafter "Crescent Heights"). Crescent Heights, a former Defendant in this action, who previously settled, only then undertook to convert the rental apartment complex into condominium units. Crescent Heights filed an application to sell the

[1] Plaintiff certified that A/V bought the property in 1998, however, the Court notes that the Complaints state that the property was bought in 2000.

units and that application was registered with the State of New Jersey, Department of Community Affairs, Division of Housing and Development on or about January 27, 2005. Crescent Heights then began selling units in the Palisades as condominiums in January of 2005. Crescent Heights controlled the new "Condominium Association" until July 2006 when control was assumed by the unit owners.

The Association then engaged the Falcon Group to perform inspections at the Palisades numerous times beginning in November 2006. The Falcon Group performed the inspection and issued a written report that detailed various construction and design defects. The report was issued on or about July 13, 2007.

The Plaintiff, Palisades at Fort Lee Condominium Association, Inc., (hereafter "the Association") belatedly filed its first Complaint on March 12, 2009 asserting claims related to the alleged defects in the original construction of the Condominium, including the parking garage, plaza deck waterproofing, roofs, parapets, windows and exterior walls, pool, concrete floor slabs, and plumbing.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show 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." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case

of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of N.J.S.A. § 4:46-2." Id. at 540.

DECISION

The Court has determined, based upon the written submissions and oral arguments of the parties, that the Defendants Motions for Summary Judgment are granted because the Plaintiff's Complaint is barred by the statute of limitations.

N.J.S.A. 2A:14-1 sets forth, in pertinent part, the following:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:12-2 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

Generally, in construction cases a cause of action accrues for statute of limitations purposes at the time of substantial completion of a party's work. See Russo Farms, Inc. v. Vineland Bd. Of Ed., 144 N.J. 84, 92-93 (1996). In Russo Farms, the issue was whether the statutory period ran from the date a school building was occupied and in use or from the date months later when the punch list for corrective work was completed. The Supreme Court held that the statutory period is triggered at the date of "substantial completion," a term of art in the construction industry. Id. at 117, 675 A.2d 1077; *see* Trinity Church v. Lawson-Bell, 394 N.J.

Super. 159, 175, 925 A.2d 720 (App.Div.2007) ("[S]ubstantial completion is a term of art in the construction industry and it has a well-recognized meaning.").

The Court in Russo Farms held that the architect and the general contractor had substantially completed their work at the time the certificate of occupancy was issued, and therefore, the statute of repose was triggered at that time, not when they completed punch list items. Russo Farms, supra, 144 N.J. at 119, 675 A.2d 1077. *See* State v. Perini, 425 N.J. Super. 62, 72 (App. Div. 2012). The Court's reasoning emphasized the legislative goal of avoiding indefinite liability of a contractor for the invariable loose ends of a construction project, such as a punch list of remaining corrective work. Id. (internal citations omitted).

The exception to that general rule is found in cases where the equitable principle of the discovery rule is applicable. Lopez v. Swyer, 62 N.J. 267, 273-74, 300 A.2d 563 (1973) ("The discovery rule is essentially a rule of equity," and therefore, "in each case the equitable claims of opposing parties must be identified, evaluated and weighed."). The court in Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 83 (App. Div. 2013), found that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." (internal citations omitted). In Belmont the Court found that the statute of limitations for the plaintiff's consumer fraud claims tolled until the date that was "the first time plaintiff [condominium association], through its new property manager...had reason to believe that it had suffered an ascertainable loss." Id. However, it has been well established in New Jersey case law that if the plaintiff has sufficient knowledge of its claim and there remains a reasonable time under the applicable limitations period to commence a cause of action, the action

will be time barred if not filed within that remaining time. Torcon, Inc. v. Alexian Brothers Hospital, 205 N. J. Super. 428, 437 (Ch. Div. 1985).

In the instant matter, the six year statute of limitations began to run on May 1, 2002, when the building was deemed substantially complete. The Association assumed control of the Palisades in July 2006 and Falcon Engineering issued its formal report in May 2007. A year later on May 1, 2008 the original six year statute of limitations had run. However, it should be noted that the Public Offering Statement registered by Crescent Heights contained an October 1, 2004 Engineers Report authored by former Defendant, Ray Engineering, Inc., which outlined a number of deficiencies. At that point nearly two years remained on the statute of limitations. Even assuming that the Association was not reasonably aware of the defects until May 2007, there was still an entire year left in the statute of limitations for the Association to bring a claim.

Furthermore, the original Complaint that was filed seven years after the substantial completion date, and failed to name co-defendants Forsa and Benfatto as defendants.[2] In fact, defendant Forsa, the concrete subcontractor, and defendant Benfatto, the masonry subcontractor, were not named parties until the Plaintiff filed numerous amended complaints. The Plaintiff Association did not timely file its Complaint within the statutory time frame and therefore they are barred from further relief. Plaintiff's contention that the discovery rule is applicable is unpersuasive to this Court. As previously mentioned, the Plaintiff was reasonably aware of an injury within the statutory time frame and had ample amount of time to seek recourse.

This Court also finds that the Association's reliance on case law concerning condominium associations may be misguided given the undisputed facts of this particular action. The Belmont case concerned a condominium association bringing claims against the contractor.

[2] Both Defendant Forsa and Defendant Benfatto raised these additional arguments in their motion for summary judgment based on the statute of limitations. Defendants Forsa and Benfatto enjoy the additional time that lapsed between the statute of limitations and when they were mentioned in the amended complaints.

The plaintiffs did not become reasonably aware of the true nature and extend of the water infiltration problem, which was the crux of their complaint, until sometime after 2001 which was well within the six year statute of limitations. On appeal Belmont discussed another unique aspect to condominium construction defect litigation, relying in part on Port Liberte Homeowners Ass'n v. Sordoni Constr. Co., 393 N.J. Super. 492, 924 A.2d 592 (App. Div. 2007), in that the condominium association had standing to sue the contractor for consumer fraud regardless of whether the association formally existed at that particular point in time. In Port Liberte the court found that the "unique relationship between a condominium association and a developer, created by statute, allows an association to step into the developer's shoes when control is passed to the association." Port Liberte, 393 N.J. Super. At 503. Those cases involved a direct transfer from the developer to the association unlike the instant matter.

In holding that a condominium association has standing to sue for defects that arose prior to the association's formation the court relied upon two out of state decisions. In Border Brook Terrace Condo. Assn. v. Sumner Gladston & Assocs., 137 N.H. 11, 622 A.2d 1248 (1993), the plaintiff condominium association had sued the defendant developers for defects in the construction of the condominium caused by the defendants, prior to the association coming into existence. On appeal the court held that because an association is charged with the "maintenance, repair, renovation, restoration, and replacement of the condominium['s] . . . common areas," the association had standing to sue for defects in the construction of those common areas, regardless of whether the association was in existence at the time the defective work was performed. Id. at 1250 (quoting R.S.A. 356-B:41(I)).

Additionally the Port Liberte Court cited the case of Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc., 176 Cal. App. 3d 1217, 222 Cal. Rptr. 523 (1986) as instructive. In

Orange Grove Terrace, the court held that even though the association was not in existence during the conversion of the building from apartments to condominiums, the developer "could reasonable foresee that the Association, which was obligated by the covenants and conditions...to maintain and repair the common areas, and to assess the [unit] owners sums sufficient for that purpose, would be damaged by an injury to the common areas caused by the defendants' negligence during construction." Id. at 504-505. In Orange Grove Terrace, the Association was the successor to the unincorporated owners association that entered into the agreement with the defendant developers to convert the apartment building into condominiums. The defendants were fully aware that the building would be a condominium and that an Association would be formed.

Port Liberte's holding distinguished itself from the court's previous decision in Chattin v. Cape May Greene, 216 N.J. Super. 618 (App. Div.), certif. denied, 107 N.J. 148 (1987), in which the plaintiffs, the initial and subsequent purchasers of homes in a development, brought suit against the developer for representations about windows and doors in a brochure. Port Liberte, 393 N.J. Super. at 506. In Chattin the court held that the subsequent purchasers did not have standing to sue because they had not relied on the representations in the brochure. The court distinguished Chattin from Port Liberte because the plaintiffs in Port Liberte were not subsequent purchasers of the condominium property. Port Liberte, 393 N.J. Super at 506.

It is this Court's holding that the current matter is distinguishable from the previous rulings on condominium associations. The defendant contractors in this case were contracted by the developer A/V to construct aspects of a rental apartment building. Two years after the substantial completion date of construction, the developer A/V then sold the apartment complex to the eventual sponsor Crescent Heights. Crescent Heights only then converted the apartments

to condominiums. Approximately after another two years the condominiums were then sold to individual unit owners and eventually the Association was formed. The instant action is not a situation in which the Defendant construction companies could have reasonably anticipated that a condominium association would eventually be formed for whom they could be forever liable concerning purported construction defects in contradiction to N.J.S.A. 2A:14-1 et seq.. The court in Port Liberte and Belmont grappled with the public policy concerns that condominium associations need direct recourse against developers for construction defects. In this instance the opposite is true. The Defendant contractors could not have reasonably anticipated that they would be liable in perpetuity to fourth-party subsequent buyers for alleged construction defects that were previously known or should have been known to the apartment building owner(s).

The legislative intent behind the statute of repose sheds light on the limiting of liability to unanticipated subsequent buyers. The statute of repose was drafted to "delimit [the] greatly increased exposure" of potential builder or contractor liability and has been broadly interpreted since its inception in 1967. See Rosenberg v. Town of N. Bergen, 61 N.J. 190, 198 (1972). The subsequent changes of ownership from owner, apartment developer, then sponsor, to the Association and the attenuated time frames are compelling facts to enforce the statute of limitations against the Palisades at Fort Lee Condominium Association Inc. which failed to timely institute the instant amended complaint.

Therefore, based on the foregoing the Defendants AJD, Forsa, Luxury Floors and Benfatto's motions for summary judgment are hereby **GRANTED.**

HON. ROBERT C. WILSON