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VELA TOWNHOMES CONDOMINIUM ASSOCIATION, INC., a New Jersey non-profit corporation,

Plaintiff,

v.

ROSEN PARTNERS, LLC, a New Jersey limited liability company; ROSEN PARTNERS I, LLC, a New Jersey limited liability company; ROSEN GLOBAL PARTNERS, LLC, a New Jersey limited liability company; JACK ROSEN; DANIEL ROSEN; JORDAN ROSEN; BRIAN ROSEN; JOHN DOES (1-20) (individuals or as companies); ABC CORP. (1-10) fictitiously named entities; JOHN DOES (21-30) (representing unknown members of Rosen Partners, LLC, Rosen Partners I, LLC, or Rosen Global Partners, LLC); ABC CORP. (11-20) (representing unknown members of Rosen Partners, LLC, Rosen Partners I, LLC, or Rosen Global Partners, LLC),

Defendants.

ROSEN PARTNERS, LLC; ROSEN PARTNERS I, LLC; ROSEN GLOBAL PARTNERS, LLC; JACK ROSEN; DANIEL ROSEN; JORDAN ROSEN and BRIAN ROSEN,

Third-Party Plaintiffs,

v.

DCM PARTNERS a/k/a DECORA CONSTRUCTION and DECORA GROUP, LLC; EASTERN CONTRACTING GROUP, LLC; JOHN FEHER, INC.; FJES, LLC; PAINO ROOF CO. INC.; FM HOME IMPROVEMENT, INC.; CONCRETE SYSTEMS, INC.; NALINI PARIKH; SID LAKHANI;

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. **BER L-4477-18**

Civil Action

OPINION

NELSON CHEN; RAYE DUBE; LEO LAI; SHYAM PARIKH; SELECTIVE INSURANCE COMPANY OF AMERICA;SCOTTSDALE INSURANCE COMPANY; HARLEYSVILLE INSURANCE COMPANY OF NEW JERSEY; and ESSEX INSURANCE COMPANY, INC.,

Third-Party Defendants.

Argued: January 11, 2019
Decided: January 23, 2019

Honorable Robert C. Wilson, J.S.C.

Samuel J. McNulty, Esq., appearing for the Plaintiff, Vela Townhome Condominium Association, Inc., and Third-Party Defendants, Nelson Chen, Raye Dube, Leo Lai, Shyam Parikh, Nalini Parikh, and Sid Lakhani (from Hueston McNulty, P.C.).

John Randy Sawyer, Esq., Brian J. McIntyre, Esq., and Anthony J. Chirles, Jr., Esq., appearing for Defendant/Third-Party Plaintiffs, Rosen Partners, LLC, Rosen Partners I, LLC, Rosen Global Partners, LLC, Jack Rosen, Daniel Rosen, Jordan Rosen, and Brian Rosen (from Stark & Stark, P.C.).

PROCEDURAL HISTORY

THIS MATTER arises from a dispute regarding alleged construction defects in a condominium complex. On or about December 1, 2014, Vela Townhome Condominium Association (the "Association") filed suit against Rosen Global Partners, LLC ("Rosen Global"), the sponsor/developer of Vela Townhomes community in Edgewater, New Jersey ("Vela Townhomes"), and other contractors who worked on the development, for damages relating to several alleged construction defects. This matter, the "2014 Vela Matter," is a pending matter which is separate and distinct with its own docket number, BER-L-19989-14. However, it is relevant to this instant matter, in that several claims overlap, and discovery responses in the 2014 Vela Matter are relevant to this Motion for Summary Judgment.

As of date, the 2014 Vela Matter has been ongoing for four years. Fact discovery is completed, expert discovery is ongoing, and a trial date is set for March 11, 2018. The Association filed Second, Third, and Fourth Amended Complaints in that matter to include additional defendants who were allegedly responsible for the construction defects and deficiencies at Vela Townhomes. The construction defects alleged include: (1) defective brick cladding; (2) defective roofing material; (3) defective flashing and sealant work; (4) defectively built decks and balconies; (5) defective wing walls and stoops; and (6) alleged structural deficiencies.

On or about March 28, 2018, the Association filed a motion for leave to file a Fifth Amended Complaint in the 2014 Vela Matter. The Association sought to add a claim to pierce the corporate veil of Rosen Global Partners, LLC to reach newly-proposed defendants Rosen Partners, LLC, Rosen Partners I, LLC, Jack Rosen, Daniel Rosen, Jordan Rosen, and Brian Rosen (collectively, the "Rosen Defendants") in their individual capacity. The Association sought to hold these entities and individuals responsible for Rosen Global's debts to the Association.

Judge Robert L. Polifroni, P.J.Cv. heard oral argument on the motion, and thereafter entered an order on April 27, 2018 denying, in part, the Association's motion for leave to file a Fifth Amended Complaint. Specifically, Judge Polifroni denied the Association's motion to add a claim for piercing the corporate veil of Rosen Global to reach the Rosen Defendants and hold them liable for debts to the Association.

On June 18, 2018, the Association filed a new complaint creating the instant matter (the "2018 Vela Matter"). The Complaint in the 2018 Vela Matter contains all the claims

that were in the proposed Fifth Amended Complaint that Judge Polifroni would not permit the association to file.

FACTUAL BACKGROUND

Rosen Global was the sponsor/developer of Vela Townhomes. Rosen Global issued a public offering for sale of units in Vela Townhomes on March 28, 2005. The community was to consist of five buildings with a total of twenty-five units. Pursuant to New Jersey state law, Rosen Global incorporated the Vela Townhomes Condominium Association on December 12, 2006, and staffed its board of trustees with Rosen Global appointees. Rosen Global filed the Master Deed for Vela Townhomes on January 3, 2007.

Construction on Vela Townhomes began in early 2006. Temporary Certificates of Occupancy ("TCO") were issued for all units between January 17, 2007 and March 7, 2008. As of July 14, 2009, seventy-five percent of the units at Vela Townhomes were sold. This triggered the process of transition of majority control of the Vela Townhomes board of trustees (the "Association Board") from Rosen Global appointees to independent unit owners in the community, as required by N.J.S.A. 46:8B-12-1. At a meeting held on November 2, 2009, the independent unit owners of Vela Townhomes elected the majority of trustees to the Association Board, and took majority control over the board and full responsibility over the common elements of the community.

At that same November 2, 2009 meeting, the members of the community were notified that the Association Board would be soliciting proposals for a "Transition Engineering Study," which was intended to determine builder adherence to construction specifications, to determine any construction defects, an investigate any known construction problems. On November 30, 2009, the Association retained Altura

Construction Company ("Altura Construction") to investigate a leak in one of the condo units. Thereafter, between December 2009 and March 2011, several unit owners complained of various water leaks in their units or water pooling on the roof.

In April 2011, the Association conducted a survey of the units at Vela Townhomes. In their responses, the unit owners complained of the following: interior water damage; mold on decks; water infiltration at windows and doors; leaks from roof areas; inadequate caulking; cracking, missing, and deteriorated brick work and mortar joints; warping deck boards; leaks from deck and balcony areas; and inadequate drainage around buildings. Unit owners continued to complain of leaks and water intrusions through April of 2012.

On April 18, 2012, the Association's transition expert, Kipcon, Inc., issued final transition study report to the Association Board (the "Report"). The Report identifies alleged defects in Vela Townhomes' roadways and driveways, Belgium block curbing, concrete stoops, site grading and drainage, roof parapets, window flashing, brick weep holes, brick shifting and cracking, and water intrusion into the buildings, etc.

The Rosen Defendants now move for summary judgment, alleging that the duplicative claims in the 2018 Vela Matter are subject to New Jersey's six-year statute of limitations and ten-year statute of repose, based on the filing date of June 18, 2018. The Association argues that summary judgment is inappropriate, because: (1) the statute of limitations should be equitably tolled given the circumstances; (2) equitable estoppel should bar the Rosen Defendants from invoking the statute of limitations; (3) discovery remains outstanding; (4) the statute of repose does not apply to the Association's consumer fraud claims; (5) it is unclear when the "clock began to run" for the statute of repose; (6) the statute of repose does not lie against the Rosen Defendants, and (7) in the alternative,

if the statute of repose does apply and the requisite elements are shown, the time for the statute of repose should not begin to run upon the issuance of the TCO.

For the reasons set forth below, the Rosen Defendants' motion for summary judgment is hereby **GRANTED.**

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." R. 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 R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 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 R. 4:46-2." Id. at 540.

RULES OF LAW AND DECISIONS

I. The Statute of Limitations Bars the Association's Claims Against the Rosen Defendants Requiring Dismissal of this Action in its Entirety

A. *The Causes of Actions at Issue in this Matter Accrued in 2009, Well Outside the Time Allotted in the Six-Year Statute of Limitations*

In New Jersey, claims based upon alleged damage to real property are subject to a limitations period contained in N.J.S.A. § 2A:14-1, which requires the commencement of an action within six years after the cause of action has accrued. The "discovery rule" states that a cause of action under N.J.S.A § 2A:14-1 does not accrue until an injured party discovers, learns, or reasonably should learn, the existence of facts that may equate in law with an actionable claim. Burd v. NJ Tel. Co., 76 N.J. 284, 292 (1978); O'Keefe v. Snyder, 83 N.J. 478, 491 (1980).

In complex construction cases, such as this one, the statute of limitations is triggered at the moment in time when the construction defects become reasonably apparent or ascertainable to the plaintiff. Diamond v. N.J. Bell Telephone Co., 51 N.J. 594 (1968). "[I]n a construction-defect case, the date on which an architect certifies to the owner that the structure is substantially complete typically will start the running of the six-year property-tort statute of limitations, N.J.S.A. 2A:14-1, unless, despite the exercise of reasonable diligence, the plaintiff is unaware of an actionable claim." The Palisades at Ft. Lee Condominium Assoc., Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 448 (2017) (citing Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 115 (1996)).

However, "the statute-of-limitations clock is not reset every time property changes hands." The Palidades at Ft. Lee Condominium Assoc., Inc., 230 N.J. at 450. "[I]f the original owner was unaware of an actionable claim, despite the exercise of reasonable

diligence, then the accrual clock begins when a subsequent owner knew or reasonable should have known of the existence of the claim. A cause of action, for the purposes of N.J.S.A. 2A:14-1, accrues when someone in the chain of ownership first knows or reasonably should know of an actionable claim against an identifiable party." Id.

Here, the record of the 2014 Vela Matter establishes that the Association either knew of or should have known about the alleged construction defects at Vela Townhomes sometime in 2009 – nine years before the 2018 Vela Matter was filed. Specifically, the fact that the unit owner-controlled Board discussed retaining an engineer to investigate "known construction problems" upon taking control of the Board on November 2, 2009 supports such a conclusion. Furthermore, there are documents dating from December 2009 referring to the Board's discussion of "a leak report" and "roof/balcony deck material problems."

Evidence of the Association's knowledge of the alleged construction defects at a time outside the statute of limitations period, is that the Association conducted a survey of its unit owners asking them to report construction problems with their units in April of 2011. Even assuming that the Association's causes of actions did not accrue until this point, the latest the Association could have filed an action within the statute of limitations would be April of 2017. Therefore, even giving the Association the benefit of the doubt, that they were unaware of the alleged construction defects until April of 2011, the 2018 Vela Matter would still be filed too late and outside the time required by the statute of limitations. As such, the Association's claims against the Rosen Defendants are dismissed.

B. ***The Circumstances in this Matter Do Not Support Equitable Tolling of the Statute of Limitations***

Plaintiff argues in his opposition papers that the applicable six year statute of limitations should be equitably tolled to March 2018. New Jersey courts have recognized that a defendant may be equitably estopped from invoking the statute of limitations where it has caused the plaintiff to withhold filing a complaint until after the statute has run. Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 171 (App. Div. 2007). The judiciary has defined "equitable estoppel" as the effect of the voluntary conduct of a party whereby he is absolutely precluded from asserting rights as against another person who has in good faith relied upon such conduct and has been led to change his position for the worse. Id.

Furthermore, "[i]n contract actions, equitable estoppel has been used to prevent a defendant from asserting the statute of limitations when the defendant engages in conduct that is calculated to mislead the plaintiff into believing that it is unnecessary to seek civil redress." Id. Estoppel may also arise if a defendant wrongfully conceals or withholds information which it has a duty to provide to the plaintiff, causing the plaintiff to miss a filing deadline. Id.

However, applying the doctrine of equitable estoppel in this instance is inappropriate. The Association argues that the doctrine should apply because in March 2018, it was advised by an expert in a previous lawsuit that the community needed "almost $1 million in repairs and replacement" and suffered from "significant cracking conditions in the brick work of the buildings." The Association alleges that the Rosen Defendants concealed their knowledge of these issues such that equitable tolling of the statute of limitations is appropriate.

This argument is without merit. The Association was advised of the existence of these defects through discovery in the 2014 Vela Matter. Very early in discovery, the Association was made aware of such defects through files produced to the parties shortly after subpoenas were served. Therefore, it cannot be argued that the Association was unaware of such defects until March 2018, as discovery in September 2015 in the 2014 Vela Matter undoubtable put the Association on notice of the alleged defects at issue. For this reason, equitable tolling of the statute of limitations is inapplicable in the matter at issue.

II. The Fact that Discovery Remains Outstanding is of No Issue Because the Statute of Limitations Precludes this Matter from Being Filed

The Association also argues that summary judgment is not appropriate at this point in the litigation because discovery remains outstanding. However, this argument is also without merit, because the action was filed outside the time proscribed by the six-year statute of limitations. Because dismissal of this action is proper as a matter of law pursuant to the statute of limitations, there are no facts that could come about through discovery that would cut against a finding of summary judgment in favor of the Rosen Defendants. Therefore, summary judgment is appropriate at this time in the litigation and is granted in favor of the Rosen Defendants.

III. The Statute of Repose Applies to All of the Association's Claims, and the Association's Complaint is Properly Dismissed Under the Statute of Repose

New Jersey's Statute of Repose, N.J.S.A. 2A:14-1.1, provides the following:

> No action whether in contract, in tort, or otherwise to recover damages for any deficiency in design, planning, supervision or construction of an improvement to real property, or for an 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, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services.

For claims that arise from any deficiency in the original design, planning, supervision, or construction of an improvement that results in an unsafe condition, the statute will begin to run on the "final date the person claiming repose and immunity from suit furnish[ed] any and all services or construction [that] it ha[d] undertaken at the job site." Welch v. Engineers, Inc., 202 N.J. Super. 387, 397 (App. Div. 1985).

The statute of repose does not operate like a conventional statute of limitations, in that it "does not 'bar' a remedy in the sense of providing an injured person a certain time to institute suit after the 'accrual' of a 'cause of action.'" E.A. Williams v. Russo Dev. Corp., 82 N.J. 160 (1980). Instead, injuries occurring more than ten years after the completion of services simply do not, by legislative edict, form the basis for recovery. In essence, the statute of repose prevents what could have been a cause of action from ever arising.

The purpose of the statute of repose was to limit the expanding liability of contractors, builders, planners, and designers. Id. at 362. Furthermore, New Jersey Courts read and interpret the statute broadly based on interpretation of that legislative purpose. Newark Beth Israel Hosp. v. Gruzen, 214 N.J. 357, 362 (1991).

The most extreme example of such liberal interpretation of the statute of repose is the judiciary's unwillingness to recognize a fraud exception to the statute of repose. Stix v. Greenway Dev. Co., 185 N.J. Super. 86 (App. Div. 1982) (holding that a claim against a builder resulting from the collapse of a home's foundation more than ten years after the

completion of the house was precluded by the statute of repose, despite allegations by the homeowners that they had discovered evidence that the builder had concealed a defect in the foundation); Hudson Cty. v. Terminal Construction Corp., 154 N.J. Super. 264 (App. Div. 1977) (declining to recognize a fraud exception to the discovery rule because "virtually all latent defects could probably be subject to the allegation that they were purposefully concealed").

A. ***The Statute of Repose is Triggered Upon Issuance of Temporary Certificates of Occupancy, and Therefore, There is No Question of Fact as to When the Statute of Repose Begins to Run***

New Jersey case law supports the notion that the issuance of temporary certificates of occupancy ("TCO") will trigger the running of the statute of repose. Town of Kearny v. Brandt, 214 N.J. 76 (2013). In Town of Kearny, the New Jersey Supreme Court held that in a construction case:

> [T]he ten-year period proscribed by the statute of repose commenced . . . when the first Temporary Certificate of Occupancy was issued for the facility [because] this certificate indicated that the building was sufficiently complete so that it could be occupied and used . . . . [W]e hold that the issuance of that certificate triggered the running of the ten-year period for purposes of the statute of repose under N.J.S.A. 2A:14-1.1(a).

The Association argues in its opposition that communications between the Rosen Defendants regarding ongoing repairs or arrangements to make repairs to the units in 2011 support a finding that the TCO do not trigger the running of the statute of repose. However, the Association fails to cite to any case law, binding or persuasive, to support this argument. This argument must fail, as there is no question that the statute of repose in this matter was triggered on January 17, 2007, when the TCO were issued for all the units in Vela Townhomes. It is abundantly clear to the Court that the statute of repose precludes the

filing of any action falling under N.J.S.A. 2A:14-1.1(a) after January 17, 2017. Therefore, the Association's argument must be rejected, and its claims against the Rosen Defendants must be dismissed pursuant to the statute of repose.

B. *The Statute of Repose Applies to the Association's Consumer Fraud Claims, Which Must be Dismissed*

The Association argues that the statute of repose should not bar its claims against the Rosen Defendants, because: (1) the statute of repose does not apply to the Association's consumer fraud claims; and (2) the statute of repose does not apply to the other claims against the Rosen Defendants.

Regarding the consumer fraud claims, the Association argues that a six-year statute of limitations should apply to consumer fraud claims based in real estate transactions, and that this six-year period should start running upon the discovery of the alleged fraud or misrepresentation. However, this theory fails for multiple reasons.

First, the statute of repose *does* apply to consumer fraud claims. The plain language of the statute states that "[n]o action whether in contract, in tort, *or otherwise* to recover damages for any deficiency in the design, planning, supervision or construction of an improvement of real property" will survive after ten years from the date of substantial completion of the improvement. N.J.S.A. 2A:14-1.1(a) (emphasis added). Regardless of how the Association characterizes its claims against the Defendants, the catchall phrase of "or otherwise" in the statute makes it applicable to all claims so long as they are related to the construction defects at Vela Townhomes.

Furthermore, as previously mentioned, the Association's arguments that the statute of repose should be avoided altogether due to alleged fraudulent conduct also fails. New Jersey Courts have been very clear that the statute of repose cannot be tolled or avoided by

arguments that construction defects were fraudulently concealed. Hudson County, 154 N.J. Super. at 264.

C. *The Statute of Repose Applies to the Association's Claims Against the Rosen Defendants*

The Association also claims that the statute of repose does not apply to their claims against the Rosen Defendants. They argue that the Rosen Defendants do not assert that they directly built, designed, or supervised the construction activities, and therefore, the statute of repose cannot be applicable to claims against them. Instead, they allege that the Rosen Defendants, as owners of Rosen Global and as members of the Board of the Association, had independent duties of care to the Association.

In their opposition, the Association relies on State v. Perini Corporation to support their argument that their claims against the Rosen Defendants should not be barred by the statute of repose. The Perini Corporation opinion, states that the statute only applies to the "design, planning, surveying, supervision or construction of an improvement to real property" and does not cover persons or entities who performed work outside of that scope. Id. (citing N.J.S.A. 2A:14-1.1(a)).

However, Perini Corporation is distinguishable from the facts of this matter. In Perini Corporation, the entity at issue was the manufacturer of standardized piping used at a construction site. One of the principal issues in that case was whether a manufacturer of standardized products used in the construction of a building was subject to the statute of repose. Id. The Supreme Court of New Jersey held that "manufacturers of standardized products and sellers of such products are not subject to the statute of repose . . ." and instead, should be subject to the standard "discovery rule" and six-year statute of limitations.

In this matter, a manufacturer of products used in construction is not at issue, but instead, the owners of the entity responsible for construction. The factual circumstances and legal issues discussed and decided in Perini Corporation are entirely distinguishable from those at hand. Therefore, the Court cannot hold that the statute of repose is inapplicable to the owners of an entity overseeing construction of a condominium complex.

CONCLUSION

For the reasons stated above, the Defendants' motion for summary judgment is **GRANTED** in its entirety.