

TEN YEAR STATUTE OF REPOSE FOR CONSTRUCTION DEFECTS NOT TOLLED DURING DEVELOPER OWNERSHIP OF PROPERTY

Gundogdu v. King Mai, Inc. (2009) 171 Cal.App.4th 310

This recent California Court of Appeals decision held that though the statute of limitations generally begins at the date of completion, developers may have a safe haven by completing construction projects but maintaining possession of properties until the market improves. The court rejected the plaintiff homeowner's argument that because the developer continued to own the home for a 16-month period before sale, the 10-year statute was tolled. The court found that argument to be contrary to the plain language of the statute, and reiterated the purpose behind the statute is, "to protect contractors and other professionals and tradespeople in the construction industry from perpetual exposure to liability for their work."

HOLDING

A developer's ownership of a property for sixteen months after its completion did not preclude the developer from asserting the 10-year statute of repose as a defense for a suit by homeowners because the statute serves as a complete bar to a plaintiff's action brought more than 10 years after the substantial date of completion of construction, regardless of the date of discovery of the defect. The limitations period was not tolled during the developer's passive ownership of the property because the plain language of the statute provides that the 10-year period begins upon the substantial completion of the construction. Moreover, the developer was not equitably estopped from asserting the limitations period because the homeowner was aware of all the alleged defects before the limitations period expired, but did not file their complaint until after the limitations period had run.

SIGNIFICANCE

Consider this case a shelter for developers who are electing to weather the current economic climate by maintaining possession of properties or renting them out for periods of time rather than selling units in the stormy market. Many developers employing this strategy may have significant concerns about the effect of California's 10-year statute of repose for latent construction de-

fects: does the 10-year clock begin running upon substantial completion of the project or from the date of sale of the unit?

While this case has been touted by some as the last word on developer liability for latent construction defects, it is important to bear in mind that the 10-year statute of repose will not be available as a defense where the court finds there has been willful misconduct, fraud or a failure to disclose known defects on the part of the developer. In cases where a developer has contracted to perform an act without intention to perform as promised, or conceals a known defect, courts have tolled the 10-year statute of repose and held developers liable. The plaintiff's bar may seek to circumvent this decision by arguing fraud.

BACKGROUND FACTS

In November of 1995, King Mai (defendant developer) filed a notice of completion for a home it constructed in San Carlos, California. King Mai then continued to own the property prior to selling it to plaintiff homeowners in March of 1997. The purchase contract identified 26 categories of repairs that King Mai agreed to complete. Between March of 1997, and February 2004, King Mai attempted, but failed to complete the repairs to plaintiff homeowners' satisfaction. On April 13, 2006, plaintiff homeowners filed their complaint against defendant developer for negligence

and breach of implied warranty. The complaint alleged that King Mai had breached its duty to build the residence within the applicable standards of the building industry and in a workmanlike manner, free of patent and latent defects.

King Mai contended that plaintiff homeowners' action was barred by the 10-year statute of limitations set forth in Code of Civil Procedure §337.15, which is intended to protect contractors and other construction professionals from perpetual exposure to liability for their work. The plaintiff homeowners argued that the defects which caused their damages occurred during construction of the building, and that King Mai's ownership of the property prior to its sale but after the completion precludes the defendant developer from asserting the 10-year limitation defense. Additionally, the plaintiff homeowners argued that the 10-year limitations period was tolled for the approximate 16-month period between the filing of the notice of completion and the sale of the property.

The trial court granted summary judgment in favor of the defendant developers, based on the ground that the complaint was barred by the expiration of the 10-year statute of limitations set forth in Code of Civil Procedure §337.15.

ANALYSIS

The heart of the plaintiff homeowner's appeal is that the 10-year statute of limitations is unavailable as a defense to the developer because he owned the subject property for almost a year and a half after the recording of the notice of completion, before selling it to the plaintiffs. They also argued that where a developer completes a projected but retains ownership and control, the 10-year period brings to run upon the sale of the project, and any suit filed within 10 years of that date should not be barred.

The court found that here the plaintiff's complaint for the construction defects was premised on King Mai's conduct as the developer of the property, and not on liability incurred as a landowner. The court found that absent any allegation that King Mai's conduct following completion of the home caused plaintiff's damages, there is no rea-

son why the developer should be denied the protections section 337.15 extends to developers.

Moreover, the court emphasized that the purpose of section 337.15 is to protect contractors from perpetual exposure to liability for their work. Accepting plaintiff's argument that the statute is unavailable to the defendant developer because he owned the property prior to its sale robs the statute of its purpose. The court stated:

" Plaintiff's do not allege that King Mai's work after completion of the home caused their damages. The defects they allege caused their damages occurred during the construction of the building. Thus, the question is whether King Mai's passive ownership of the property prior to its sale precludes King Mai from asserting the limitation defense. We conclude that such an interpretation of section 337.15 subdivision (e) would be contrary to the purpose of the statute."

The plaintiff homeowner's statement of undisputed fact established that they were aware of all the alleged defects at the latest by February of 2004, and that the limitations period did not expire until November of 2005. Plaintiff homeowners did not file their complaint until April of 2006. Thus, as the court observed, "King Mai's representation that it would make all necessary repairs did not 'prove false after the limitations period ha[d] expired' nor did plaintiffs proceed diligently once the truth was discovered.

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