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Narrow Amendment to Statute of Limitations May Have Wide Implications for Some Developers

New Jersey Law Journal

In January 2022, Governor Phil Murphy signed into law Senate Bill 396, which extends the time for claims by planned real estate development associations against real estate developers, under certain circumstances. There may be some unintended consequences.

By **Donald E. Taylor** and **Daniel J. Kluska** | April 22, 2022

For decades, the New Jersey Legislature has enacted and amended statutes of limitations applying to a wide variety of civil claims to balance competing noble protections of plaintiffs and defendants alike. On the one hand, the Legislature has sought to provide claimants adequate time to discover and explore potential claims, consider the weighty decision of filing a lawsuit and promote the resolution of claims on their merits. On the other hand, the Legislature has striven to discourage the untimely filing of claims to ensure that parties need not fear and account for the possibility of lawsuits long after certain conduct has occurred, and to further ensure that defendants are not prejudiced by the loss or unavailability of critical evidence, witnesses and recollections over time. In carefully establishing the time periods during which certain claims can be brought, the Legislature has consistently applied the statutes without regard to the identity of the plaintiff seeking to assert a claim. That is, whether the plaintiff is a Fortune 500 company, single-member LLC or lone individual, the statutes of limitation remain the same.

However, on Jan. 18, 2022, Governor Phil Murphy signed into law Senate Bill 396, which amends the New Jersey Statute of Limitations, N.J.S.A. 2A:14-1 et seq. (the "Amendment"), to extend the time for claims by planned real estate development associations, including condominium and cooperative associations (the "Associations"), against real estate developers under certain circumstances. The Amendment was a legislative reaction to the New Jersey Supreme Court's decision in *Palisades at Fort Lee Condominium Association v. 100 Old Palisade, LLC*, 230 N.J. 427 (2017), wherein the court held that the statute of limitations started to run when the Association learned of a defect, not when a change in control of the allegedly injured party occurred. In adopting the Amendment, the Legislature has now afforded preferential treatment for these types of organizations, and consequently has also likely created new, unintended questions that the courts will undoubtedly be called upon to untangle.

The two most cited statutes of limitations in New Jersey are the general statutes applicable to injuries to persons (N.J.S.A. 2A:14-2) and to property (N.J.S.A. 2A:14-1). Prior to 2022, the statute of limitations applicable to injuries to property simply provided that such actions "shall be commenced within six years next after the cause of any such action shall have accrued." The Legislature has now amended that straightforward and universally applicable statute to add a subsection providing that claims brought by Associations against a developer and any person "acting on behalf of or at the behest of" a developer "shall be tolled until an election is held and the owners comprise a majority of the board." The Amendment further states that it applies to any cause of action "that has not been subject to a final judgment dismissing the claim as of the effective date." The Legislature has

thereby added a single subsection to one of the most universally applicable statutes of limitations to add a tolling element only to claims by Associations against developers and those acting at its behest.

Countless claims involving multitudes of injuries, and varying classes of claimants and defendants, have navigated this straightforward statute utilizing time-tested and tried and true analyses of such familiar concepts as "accrual date" and the "discovery rule." Indeed, as recently as June 2020, in *Riva Pointe at Lincoln Harbor Condo. Ass'n* v. *Tishman Constr. Corp.*, Docket No. A-3568-18T2 (June 15, 2020), the New Jersey Appellate Division applied these familiar principles to define when, and under what circumstances, the statute of limitations accrues, and expires, on construction defect claims.

In *Riva Pointe*, the Appellate Division applied the legal precedent established by the New Jersey Supreme Court in *Palisades at Fort Lee Condo. Ass'n* v. *100 Old Palisade, LLC*, and held that the statute of limitations begins to run on a construction defect claim when the plaintiff knows or reasonably should know of the claims against an identifiable party. The court further held that the statute of limitations can begin to run before control of the condominium association is transitioned to the unit owners. The Appellate Division recognized in *Riva Pointe* that the post-transition condominium association would not be prejudiced by a typical application of the statute of limitations because the association could pursue claims for fraudulent concealment or breach of other duties against the developer if the developer did not timely address alleged defects before transition occurred. In so ruling, the court ensured that a post-transition condominium association would not be foreclosed from bringing viable claims that it could not earlier bring through no fault of its own, while continuing to maintain the balance of interests of parties in the timely and fair adjudication of claims.

The Amendment now provides that the time period for Associations to file a claim against "a developer or any person acting through, on behalf of or at the behest of the developer" shall be tolled until the date of transition of control of the Association from the developer to the unit owners. The Amendment applies to any cause of action involving an Association "that has not been subject to a final judgment dismissing the claim" as of the effective date of the Amendment. The official statement that accompanies the bill states that the intent was "to allow the owner-controlled board more time to file a construction defect claim by requiring the statute of limitations to begin running upon transition of developer control" rather than upon substantial completion of the project. In singling out Associations from any other party seeking recourse for injuries to property, the Amendment creates a number of significant concerns for developers, and design professionals and contractors retained directly by developers.

First, the Amendment arguably tolls the statute of limitations for an Association's direct claims against the direct contractors of a developer, those "acting through, on behalf of or at the behest of the developer," but not against subcontractors of those contractors; that is, those acting "through, on behalf of, or at the behest of" not the developer but the developer's contractors. Although a claim for contribution or indemnification may not accrue until after the Association sues and obtains a judgment against the developer and its direct contractees, the statute of limitations for ordinary negligence and breach of contract claims by a developer or contractor against the contractor's subcontractors could expire before the Association's claims against the developer and contractor even accrue under the Amendment.

Second, the Amendment only tolls the statute of limitations for claims brought by an Association. The Amendment does not also toll the statute of limitations on a developer's contractual and/or tort claims against its own contractors related to the Association's claims if the Association chooses not to sue them directly. This could leave the developer with limited recourse in certain circumstances against the parties that actually performed the allegedly defective work, thereby essentially gutting protections that the developer built into provisions of its contracts with its contractors. By way of example, if substantial completion of a building occurs on Jan. 1, 2020, an inspection report is served on Jan. 1, 2021 that raises alleged construction defects,

and transition occurs on Jan. 1, 2022, under the Amendment, the Association's action against the developer is tolled until transition. The Association can then file a timely lawsuit against the developer on Jan. 1, 2028. If the Association chooses to not also sue the developer's contractors, the developer's contract and negligence claims against the contractors that actually performed the allegedly defective work will not be so tolled, and the statute of limitations on the developer's claims (likely other than contribution and indemnification) will have expired a year earlier.

Third, the Amendment applies to causes of action that have not been subject to "final judgment" by the effective date of the bill. The Amendment, therefore, appears to invite the reopening of cases that were previously resolved by way of settlement agreement, voluntary dismissal or other order that does not rise to the level of a "final judgment."

The pre-Amendment six-year statute of limitations, with the application of the "discovery rule" tolling the statute in appropriate cases for unknown, latent defects, provided adequate protection to Associations for alleged construction defects. If the pre-transition board did not address known defects in a timely manner, the post-transition board already had adequate means to hold the prior board accountable for any breaches of their duties. The transition of control in a common interest community is already a costly and sometimes contentious process. By going beyond its history of enacting and amending statutes of limitations applying to all parties alike, the Amendment unfortunately creates a number of circumstances, which we suspect are unintended, that could increase legal and insurance costs, and contribute to an overall lack of housing affordability in New Jersey.

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