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Out of Time: Have Recent Rulings Revived the Statute of Repose Defense in Florida?

I. Florida's Statute of Repose: Purpose and Implementation

A. The Statute – Florida Statutes § 95.11(3)(c)

1. Current Version of Statute

The statute currently contains both a limitation and a repose provision, and reads as follows:

An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed or the date of completion of the contractor or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. However, counterclaims, crossclaims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred. With respect to actions founded on the design, planning, or construction of an improvement to real property, if such construction is performed pursuant to a duly issued building permit and if a local enforcement agency, state enforcement agency, or special inspector, as those terms are defined in s. 553.71, has issued a final certificate of occupancy or certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction of defects to completed work or the repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced. Completion of the contract means the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made.

2. Purpose of the Statute and Legislative Preamble

With its 2006 amendment shortening the repose period from 15 to 10 years, the Legislature included a preamble explaining its intent for enacting a repose period. The Legislature cited the following reasons (among others) that construction defect claims should be limited by repose:

- Construction entities sued many years after a project is completed may be unable to fairly defend themselves due to the passage of time.
- Construction entities cannot control a property owner's potential lack of maintenance or alterations to a project.
- Liability insurance is more difficult to obtain and/or more costly for construction work if claims can be brought indefinitely.
- The increased insurance costs translate to increased costs of construction and higher sale prices, hurting consumers.

Thus, while the repose period may be detrimental to plaintiffs, the ultimate goal is to benefit consumers because the statute will theoretically result in more widely available and cheaper construction projects. This is because the repose period is meant to give contractors and insurers certainty when building or insuring a project. Additionally, the longer the passage of time between construction and suit, the less likely it is that at the time of suit the contractors will still maintain the documentation and employees present at the time of the construction, meaning that there will be a scarcity of evidence upon which the contractor may rely. Indeed, many contractors may be entirely out of business by the time suit is brought. This uneven playing field disincentivizes construction work and insurance for such. The repose period represents an effort to remedy this problem.

B. Which Version of the Statute Applies to Your Case?

1. 2006 Version, 2017 Version, 2018 Version – Differences

Florida Statutes § 95.11(3)(c) was amended in 2006 to shorten the repose period from 15 years to 10 years. The statute was then amended again in 2017 to add the language defining "completion of the contract" – specifically, that contractual completion means "the later of the date of final performance of all the contracted services or the date that final payment for such services ***becomes due*** without regard to the date final payment is made." This is important because, if the payor issues payment belatedly, that will not toll the repose period. Finally, the Legislature amended the statute in 2018 to include the explanation that warranty work and other corrective actions do not toll the repose date, and to include an additional year to bring pass-through claims, benefitting developers, general contractors, and subcontractors with potential claims against sub-subcontractors.

2. Legislature's Explanation of Which Version Applies

The basic rule for determining what version of a statute applies to your case is that the version which was in place when the cause of action accrued is the operative version. However, with Florida Statutes § 95.11(3)(c), the Legislature has actually given specific directions for when each version applies. The Legislature explained that the 2006 amendment ". . .shall apply to any action commenced on or after July 1, 2006, regardless of when the cause of action accrued. . .." The 2017 amendment was accompanied by directions that that "[t]his act applies to causes of action that accrue on or after July 1, 2017." Finally, the Legislature set forth that the 2018 amendments ". . .shall apply to any action commenced on or after July 1, 2018, regardless of when the cause of action accrued . . ."

Accordingly, before making a repose argument, make sure you check these rules and make sure you cite to the right version. Old case law which may have been abrogated by the statute may still be valid if the prior version of the statute applies to your case.

II. Case Law Interpretations and Legislative Response

At common law, Florida has always had a policy of claims proceeding on their merits, and therefore, "limitations defenses" are disfavored. Although some courts have held that statutes of limitations and repose are distinct, others have applied the "disfavor" rule to repose defenses under the same public policy considerations. For those reasons, many appellate courts over the years have interpreted Florida Statutes § 95.11(3)(c) in a very liberal manner that still permits claims. Because of this, until recently, the statute of repose has not been seen as a realistic defense for contractors due to its near insurmountable obstacles. However, because of the practical goals which the statute serves, in many instances the Legislature has sought to clarify its intent via statutory amendment shortly after anti-repose court opinions are published.

A. Cases Potentially Abrogated by Legislature, But Still Relied Upon by Plaintiffs

The Legislature has issued a number of amendments which appear to be aimed at the specific issues addressed by the cases in which the repose defense did not succeed. However, we still see many plaintiffs citing to these cases in response to repose arguments. These cases may still be valid in lawsuits which are governed by the prior versions of the statute, which is why it is important to know which version of the statute applies before proceeding with this defense.

1. Cypress Fairway Condominium v. Bergeron Construction Company., Inc., 164 So. 3d 706 (Fla. 5th DCA 2015)

In this case, the Court held that the statutory repose trigger of "completion of the contract" meant completion "of performance by both sides of the contract, and not merely performance by the contractor." The Court determined that this meant that "completion of the contract" could only be denominated by the date on which final payment was **made**.

The Legislature subsequently amended the statute in 2017 to explain that completion of the contract is represented by the later of the final performance of all contracted services or the date that final payment ***becomes due, without regard to when payment was made.***

2. *Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 5th DCA 2017)

In *Busch*, a homeowner contracted with a builder for the construction and sale of a home. The contract provided that potentially defective work could be corrected after closing. Although the home appears to have been essentially completed at closing (with some punch list work remaining), the Court held that this post-closing work tolled the statute of repose because the contract was not "complete" while any of this work remained outstanding.

The Legislature subsequently issued the 2018 amendment stating that "the correction of defects to completed work or the repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced." This is seen by many as a direct response to *Busch*.

However, we still see many plaintiffs arguing that *Busch* prohibits the "completion of the contract" trigger from occurring if the contract contains a warranty provision – especially in cases in which the pre-July 2018 versions of the statute apply. Interestingly, a close analysis of *Busch* reveals that the provision at issue in *Busch* was ***not*** a warranty provision. Instead, it was a provision allowing an inspection by the purchaser to identify punch list work. In fact, when we examined the trial court's docket in *Busch*, we located the applicable contract, which actually contained a ***separate*** warranty provision which the *Busch* Court did not discuss. So, although many plaintiffs may rely on *Busch* for warranty arguments, this position is not altogether correct.

3. *Gindel v. Centex Homes*, 267 So. 3d 403 (Fla. 4th DCA 2018)

The *Gindel* case actually addresses two statutes – Florida Statutes § 95.11(3)(c) and Florida Statutes § 558. As background, all construction defect actions in Florida are governed by Chapter 558, which requires that claimants send a pre-suit notice to any and all contractors which they plan to sue for defective work. This notice must advise of defects and give an opportunity for inspection and repair. Suit may not be filed for a certain number of days after the notice is issued (the timelines vary depending on the number of units at the project).

In *Gindel*, the Court held that the issuance of the notice under 558 constitutes an "action" for repose purposes under § 95.11(3)(c). In other words, the Court determined that only this notice needed to be sent within the 10-year period, as opposed to an actual suit being filed.

In response, the Legislature amended § 558.004 in 2019 to dictate that "[a] notice of claim served pursuant to this chapter shall not toll any statute of repose period under chapter 95." It further dictated that "this act shall take effect July 1, 2019."

Thus, *Gindel* is no longer good law for notices sent on or after July 1, 2019. However, *Gindel* may very well still apply to cases in which the 558 notice was served before July 1, 2019 – even if suit was not filed until after.

B. Problematic Cases for Defense Not Addressed by the Legislature

1. *Allan and Conrad, Inc. v. University of Central Florida*, 961 So. 2d 1083 (Fla. 5th DCA 2007)

This case involved a single-building construction project for which no certificate of occupancy was ever issued (as none was required). The Court interpreted the trigger relating to "completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest" and held that the modifier "whichever date is latest" meant that the repose clock could not start until the ***last*** contract on a project was completed by any entity.

While this may make sense in theory under a plain reading of the statute, it creates a problem when applied to multi-unit projects. This problem was examined in the *Spring Isle* case, discussed below.

2. *Clearwater Housing Authority. v. Future Capital Holding Corp.*, 126 So. 3d 410 (Fla. 2d DCA 2013)

Clearwater Housing Authority provides a similar ruling to the *Allan and Conrad* case. The Court in this case held that the submission of a final plat by the engineers three years after the property's certificate of occupancy was issued tolled the statute of repose because the engineers' contract was not "completed" until that plat was submitted.

III. Developments Strengthening or Clarifying the Statute of Repose

A. Legislative Change Regarding Third-Party Claims

As discussed, the Legislature amended the statute in 2018 to read "counterclaims, cross-claims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred." Developers and general contractors sued in Florida for construction defects typically file third-party claims against the subcontractors as a way to transfer risk. Prior to this amendment, a plaintiff could hypothetically bring a suit against a developer or general contractor one day prior to the repose clock's expiration, preventing that defendant from subsequently bringing pass-through claims against the subcontractors. This amendment gives those defendants an extra year to bring their pass-through claims in the interest of fairness.

B. Actual Possession by Developer

1. *Brooks v. Palm Bay Condominium Association, Inc.*, 375 So. 2d 348 (Fla. 3d DCA 1979).

The repose factor of "actual possession by the owner" is often contentious because it is unclear whether this means that the initial developer's ownership and possession triggers this factor or if it is triggered by a subsequent purchaser's ownership and possession. From a defense perspective, it would make no sense to trigger the repose clock by a subsequent

purchaser's ownership, because the property may potentially remain unsold for a long time, or it may have multiple subsequent purchasers down the road. Starting the repose clock from a subsequent purchase could potentially allow suit to be brought many years after a project's completion, which is not contemplated by the Legislature. For this reason, the defense side argues that "actual possession by the owner" is achieved through the initial developer's ownership and possession of the project.

This position is supported by *Brooks*. Although *Brooks* is not a case dealing with the statute of repose, the Court unequivocally held that "the developer is clearly the unit owner" for statutory interpretation purposes. Although *Brooks*' ultimate holding is no longer good law due to a statutory revision, the revision did not have anything to do with this statement, meaning that *Brooks* is at least still a strong persuasive authority.

2. *Sabal Chase Homeowners Association, Inc. v. Walt Disney World Company*, 726 So. 2d 796 (Fla. 3d DCA 1999)

The *Sabal Chase* Court held that under the facts of that case, the commencement period for the statute of repose was established as of the date of issuance of the certificates of occupancy, which it determined "were not issued until after the original owner had actual possession of the property." The Court stated elsewhere that "Appellee Arvida Corporation [] was the ***owner and developer*** of the Sabal Chase community . . .." This gives rise to the inference that the developer's ownership is sufficient to meet the "actual possession by owner" trigger.

C. Turnover Does Not Affect Repose

1. *Sabal Chase Homeowners Association, Inc. v. Walt Disney World Company*, 726 So. 2d 796 (Fla. 3d DCA 1999)

Sabal Chase is also an extremely important case because the Court affirmatively held that Florida Statutes § 718.124, which tolls § 95.11(3)(c)'s limitations period for condominiums until turnover by the developer to the association, does not apply to § 95.11(3)(c)'s repose component. Accordingly, turnover has no impact on the repose clock.

D. Recent Decisions – Removing Part or All of a Construction Defect Claim

1. *Swingholm v. KB Home Fort Myers, LLC*, Consolidated Case Nos. 2017-CA-000994, 2017-CA-001065 (Fla. 12th Cir. May 23, 2019)

In *Swingholm*, the Court cited *Brooks* and *Sabal Chase* to hold that a homeowner's suit against a builder as to a single-family home was barred because the builder was the "owner in actual possession" of the single-family home at the time of issuance of the certificate of occupancy. This further supports the rationale of *Sabal Chase* that actual possession by a subsequent purchaser does not toll the repose clock, even if the subsequent purchaser is the entity bringing suit.

2. *Spring Isle Community Association, Inc. v. Pulte Home Corporation n/k/a Pulte Home Company, LLC*, Case No. 2017-CA-1953-O (Fla. 9th Cir. June 10, 2020) (on appeal)

We consider *Spring Isle* to be a critical case in the development of repose defenses in Florida. Notably, this case is currently on appeal, so its impact may be significantly strengthened or weakened depending on the appellate court's ruling.

Spring Isle involves a 390-unit townhome subdivision, developed by Pulte Home Corporation from 2005-2008. Each individual unit was issued its own certificate of occupancy. Our clients were two stucco subcontractors who collectively applied stucco to all units at the project. One of the subcontractors had a "master agreement" with Pulte which provided boilerplate terms governing all work for Pulte in the "Orlando division" and was not specific to the subdivision at issue. Pulte then issued a separate "schedule A" document to its subcontractors which provided pricing information for the units at the subdivision, and which was effective from 2005-2009. However, the "schedule A" did not actually **obligate** the subcontractors to perform work; rather, it merely set out pricing terms if the subcontractors were ultimately engaged by Pulte to apply stucco at the units. The "master agreement's" terms and related testimony established that the subcontractors would actually be engaged for work by separate purchase orders.

Although the purchase orders themselves had long gone missing, the testimony established that completion of each purchase order would be reflected by payment to the subcontractor, and that each purchase order would necessarily be complete prior to issuance of a certificate of occupancy. Payment records established that payment did, in fact, occur prior to a certificate of occupancy's issuance.

The plaintiff homeowners' association filed suit against Pulte on March 2, 2017. Pulte then brought its third-party claims against our clients on March 24, 2017. We filed a motion for **partial** summary judgment against Pulte, arguing that claims were barred for 329 of the 390 units, as those units' certificates of occupancy were issued more than 10 years prior to Pulte filing its claims. The Court agreed, barring claims for 324 out of the 390 units and thus substantially reducing the value of the claims against our clients (the Court barred claims for 324 units instead of 329 because Pulte's 558 notice, issued on March 10, 2017, tolled the repose period for five units pursuant to *Gindel*).

This case is important for a number of reasons. First, it demonstrates that "master agreements" applying to multiple projects are not specific enough to be considered the operative contract for the "completion of the contract" trigger under the repose statute. This makes sense, because if the opposite were true, then "completion of the contract" could theoretically never occur.

Second, the case addresses the multi-unit nature of the project at issue. As the Court aptly recognized, it would make no sense to make the "completion of the contract" factor hinge upon completion of the entire project or upon completion of the "schedule A" document, because each separate unit was issued its own certificate of occupancy and could be occupied by subsequent purchasers while other units are still constructed. To toll the repose period until the entire subdivision was complete would create an uneven situation in which earlier-constructed units would be subject to a longer repose period than later-constructed units. Accordingly, *Spring Isle* establishes that it is entirely proper to kick out a ***portion*** of a construction defect claim via the statute of repose if the claim relates to a multi-unit project.

3. *Westpark Preserve Homeowners Association, Inc., et al. v. Pulte Home Corporation d/b/a Pulte Homes*, Case No. 19-CA-001526 (Fla. 13th Cir. May 2021) (written order pending)

Recently, our firm won another summary judgment based on the statute of repose in the *Westpark Preserve* case, disposing of the plaintiff's **entire case**. This case involved a 196-unit townhome subdivision, in which the plaintiff sued the general contractor/developer (again, Pulte) and Pulte then brought pass-through claims against the subcontractors, including our client. However, the plaintiff had not sued within 10 years from the date of issuance of the certificate of occupancy. Accordingly, not only did we bring a motion for summary judgment based on the statute of repose, but this time Pulte also brought its own motion for summary judgment against the plaintiff on that same basis. The Court granted both motions, disposing of the entire case. This ruling adds to the body of case law in which repose defenses have found success and may indicate that courts are finally becoming more willing to seriously consider applying the statute of repose to untimely claims.

E. New Summary Judgment Standard

On May 1, 2021, Florida adopted the Federal summary judgment standard, departing from the original standard to which it has long held over the past few decades. The Federal standard is considered somewhat less difficult to meet than Florida's prior standard. Although this is relatively new and we do not yet know how this will impact construction defect litigation, it may result in courts becoming more willing to grant summary judgment motions based on the statute of repose.