

## Construction Law Alert

### “Substantial Completion” and Allocating Fault Under New Jersey’s Statute of Repose

August 5, 2013

Many New Jersey contractors and design professionals are familiar with New Jersey’s Statute of Repose, which imposes a ten-year limit on the legal responsibility of contractors, architects, engineers, and others involved in construction, supervision, design or planning of improvements to real property. In relevant part, the Statute of Repose, Title Two-A, Chapter Fourteen, Section One of New Jersey Statutes Annotated provides in relevant part:

No action whether in contract, in tort, or otherwise to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any 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, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions both governmental and private but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

[N.J.S.A. 2A:14-1.1(a)]

The Legislature adopted the Statute in 1967 as a response to the then-expanding liability concepts concerning the legal responsibility of contractors, architects, engineers, and others involved in creating improvements to real estate. Brown v. Jersey Central Power & Light, Co., 163 N.J. Super. 179, 193 (App. Div. 1978). The Statute was intended “to provide a measure of repose and prevent ‘liability for life’ against contractors and architects.” Russo Farms, Inc. v. Vineland Board of Educ., 144 N.J. 84, 117 (1996) (quoting Hudson County v. Terminal Constr. Corp., 154 N.J. Super. 264, 268

(App. Div. 1977), certif. denied, 75 N.J. 605 (1978)). It “prevents what might otherwise be a cause of action from ever arising” when an injury occurred “more than ten years after the performance of the negligent act[.]” Rosenberg v. Town of N. Bergen, 61 N.J. 190, 201 (1972). “There comes a time when [the defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when ‘evidence has been lost, memories have faded, and witnesses have disappeared.’” Ibid. (quoting Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950)).

Recently, in the matter of Town of Kearny v. Louis F. Brandt, AIA, (A-60/61-11) (068992) (Decided June 20, 2013), the New Jersey Supreme Court revisited the Statute of Repose to decide two issues: (1) when a building should be considered “substantially complete” for purposes of triggering the statute’s time limitation; and (2) whether an allocation of fault can be made at trial, pursuant to New Jersey’s Comparative Negligence Act, N.J.S.A. 2A:15-5.2, and Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-2, against defendants who have obtained a dismissal under the statute. The latter issue was one of first impression for the Court.

The complex factual and procedural history of the Brandt matter involves structural failures at the Town of Kearny’s public safety facility (the “Building”). On learning of these failures, the Town sued the project’s architectural firm, Brandt-Kuybida Architects (“B-K”), and three of B-K’s architects. Kearny also filed claims against the project’s soil and structural engineers, Soils Engineering Services, Inc. (SESI) and Harrison-Hamnett, P.C. (“H-H”), along with persons from those firms.

In the trial court, SESI and H-H were successful on motions for summary judgment based on the Statute of Repose and Statute of Limitations because the claims were filed more than ten years after the engineers’ work was completed. Alternatively, the Court denied a similar motion that B-K filed reasoning that the ten-year period was triggered when the first Temporary Certificate of Occupancy was issued for the building. B-K subsequently filed a motion for leave to appeal the trial court’s decision. Despite the Appellate Division granting the motion and remanding the case for reconsideration, the trial court again denied the motion for summary judgment. The trial court further ruled that the jury could not allocate liability against the dismissed defendants.

The matter proceeded to trial, during which the Town obtained an \$800,000 jury verdict. B-K filed an appeal, which resulted in a reversal of the trial court’s decision on the allocation issue. The Appellate Division agreed with the trial court’s determination on the substantial completion issue. Thus, the Appellate Court remanded the matter for a new trial on the issue of liability only because the Town’s lawsuit was found to have been filed in a timely manner.

The Supreme Court granted the Town’s and B-K’s Petition for Certification. In its opinion, the Supreme Court revisited the issue of when the Statute of Repose begins to run for various contractors and design professionals. “For professionals [like B-K], whose responsibilities for the Kearny public safety facility continued throughout its design and construction, the ten-year period ... commences on the date of the project’s substantial completion.” This is distinguishable from a contractor or design professional

whose project-related services do not continue through the lifespan of the project, but are hired to perform limited services or discrete tasks. The Court further explained:

[A]s the Appellate Division noted in Port Imperial Condominium Association, Inc. v. K. Hovnanian Port Imperial Urban Renewal, Inc., 419 N.J. Super. 459, 470 (App. Div. 2011), “unlike a claim against a general contractor whose work continued throughout the project up until the time of occupancy, a claim against a subcontractor who performed limited services with no further involvement with the construction is barred after ten years following the completion of that subcontractor’s discrete task.”

Ultimately, after a fact-specific analysis, the Supreme Court found that the issuance of the Temporary Certificate of Occupancy for the building triggered the running of the ten-year period for the purposes of the Statute of Repose.

Turning to the issue of first impression, the Court began with a thorough analysis of the New Jersey Comparative Negligence Act and the Joint Tortfeasors Contribution Law. The statutes permit the factfinder to evaluate the fault of all potentially responsible parties. Under the New Jersey Comparative Negligence Act, a plaintiff’s claims will be reduced by the percentage of its own negligence. N.J.S.A. 2A:15-5.2(a). If a plaintiff’s own negligence exceeds fifty percent, the right to recover damages will be barred; any lesser percentage simply reduces the percentage of damages that a plaintiff will be entitled to collect. New Jersey’s Joint Tortfeasor Contribution Law permits one tortfeasor to seek contribution from another tortfeasor where any person suffers damage or injury as the result of the neglect or default of both of them. N.J.S.A. 2A:53A-3. A “joint tortfeasor” is two or more persons liable in tort to the same person, arising from the same injury to person or property. N.J.S.A. 2A:53A-1. If a settlement is reached before trial, non-settling defendants may obtain an allocation of fault for the settling defendant that operates as a credit to the benefit of the non-settling defendants at the time of trial. Young v. Latta, 123 N.J. 584, 595-97 (1991).

In light of the foregoing, the Court held that “[t]he jury’s assessment of the SESI and [H-H’s] fault promotes fair allocation of responsibility and avoids creating an incentive for a plaintiff to strategically target only one of a range of culpable defendants.” This holding is consistent with when a jury allocates liability between settled and non-settled defendants. Id. at 596-97. Part of the rationale is that “in a case in which a plaintiff fails to meet a statutory requirement to file a claim against a particular defendant, our comparative fault statutes do not require that the remaining defendants be penalized when the factfinder allocates fault.” Furthermore, the Court reasoned that it would not frustrate the Statute of Repose’s purpose to give construction defendants “the right not to have to defend ancient claims or obligations. Cyktor v. Aspen Manor Condo. Ass’n, 359 N.J. Super. 459, 470 (App. Div. 2003). Thus, the Court concluded that a jury should allocate liability amongst existing defendants, settled defendants, and those defendants that have obtained a dismissal under the Statute of Repose.

The impact of the Brandt decision is significant for trade defendants, general contractors, and developers. Counsel for trade defendants whose clients performed limited services or discrete tasks at construction projects must be mindful of when the relative trade defendant completed its work. The last day the trade defendant performed

its limited services or discrete task, whereupon the trade defendant had no further involvement in the construction project, is the date on which the Statute begins to run. Alternatively, counsel for general contractors and developers must be mindful of when substantial completion is achieved. Determining substantial completion is fact-sensitive. While it may be achieved upon issuance of a Temporary Certificate of Occupancy, it may also be achieved upon issuance of a Permanent Certificate of Occupancy or based on a date agreed upon by the parties in contract. Finally, counsel for all construction defendants must be sure to assert negligence claims not only against existing defendants, but also settled defendants, and those dismissed under the Statute of Repose, thereby protecting them from penalties when the factfinder allocates fault pursuant to the New Jersey Comparative Negligence Act and the Joint Tortfeasors Contribution.

\* \* \*

*Jessica M. Carroll Esq. is an associate in the Insurance Services Department at McElroy, Deutsch, Mulvaney & Carpenter, LLP. Her practice includes a variety of civil litigation and coverage areas including construction defect, medical malpractice, along with general civil defense and coverage litigation. She devotes a large portion of her practice to complex construction litigation where she has represented contractors in defending against claims involving construction defects. She can be reached directly at (973) 425-8720 or via email at jcarroll@mdmc-law.com*

*Louis A. Uccello, Esq. is an associate at McElroy, Deutsch, Mulvaney & Carpenter, LLP. He has extensive experience in complex litigation, including construction litigation involving the representation of owners, design professionals, and contractors against claims involving construction defects, architectural and engineering errors and omissions, worksite accidents, and environmental and contamination issues. He can be reached at (973) 425-8732 or via email at luccello@mdmc-law.com.*

*The material in this publication should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, an attorney/client relationship.*