NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3128-11T3

FAIRVIEW HEIGHTS CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

R.L. INVESTORS,

Defendant-Respondent,

and

440 ASSOCIATES, INC., VINCENT LUPPINO, RUSSELL LUPPINO, and ROSARIO LUPPINO,

Defendants.

VINCENT LUPPINO, RUSSELL LUPPINO, and ROSARIO LUPPINO,

Third-Party Plaintiffs,

v.

LOUIS GELFAND, INC. and H.Y. YOUNG ASSOCIATES,

Third-Party Defendants.

Argued November 28, 2012 – Decided July 1, 2013

Before Judges Axelrad, Sapp-Peterson and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-519-08.

John Randy Sawyer argued the cause for appellant (Stark and Stark, attorneys; Mr. Sawyer and Gene Markin, of counsel and on the brief).

John M. Bowens argued the cause for respondent (Schenck, Price, Smith & King, L.L.P., attorneys; Mr. Bowens, on the brief).

PER CURIAM

Plaintiff Fairview Heights Condominium Association, Inc. ("the Association") appeals from the trial court order entered, following a remand proceeding conducted at the direction of this court, dismissing all of the remaining counts of its first amended complaint filed against defendant R.L. Investors ("RLI"), the condominium developer. We affirm.

The facts underlying the lawsuit were previously outlined in our earlier unpublished opinion. Fairview Heights Condo. Ass'n v. R.L. Investors (Fairview Heights I) No. A-0225-10 (App. Div. May 23, 2011) (slip op.), certif. denied, 208 N.J. 370 (2011). We therefore discuss, in this opinion, those facts and circumstances germane to our opinion.

Construction of the twenty-one-unit Fairview Heights condominium building ("building") was completed in 1988. Pursuant to the Offering Statement, defendant retained control

over the building's condominium association until sixty days after seventy-five percent of the units had been sold. Seventy-five percent of the units were sold in 2001.

440 Associates, Inc. ("440"), a property management company owned by defendants Vincent Luppino, Russell Luppino and Rosario Luppino ("the Luppinos"), managed the building from 1988 until resigning at the end of 2001. At that time, the Association retained another management company, which was replaced one year later by yet another management company. On August 1, 2004, the Association once again contracted with 440 to manage the building. It did so until 2006 when the building became self-managed.

In January 2008, plaintiff filed a complaint against RLI, 440, and the developer's principals, the Luppinos, who served as members of the Association's board of trustees from approximately 1989 to 2004. Plaintiff's complaint alleged breach of implied and express warranties, negligence, breach of contract, products liability, negligent misrepresentation, breach of fiduciary responsibility, violations of the New Jersey Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 to -42, and the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -195.

Upon completion of discovery, all defendants moved for summary judgment. The court granted RLI's motion, agreeing that plaintiff's claims against it were barred by the statute of repose. The court denied the motion as to the negligence claims asserted against 440 and the breach of fiduciary duty claims against the Luppinos. The court later denied plaintiff's motion for reconsideration but granted the remaining defendants' motions for reconsideration, thereby dismissing the negligence claims against 440 and the breach of fiduciary duty claims against the Luppinos.

On appeal, we affirmed the grant of summary judgment to 440 and the Luppinos, but reversed the grant of summary judgment to RLI. In doing so, we did not disagree with the trial court's conclusion that the statute of repose bars any action whether grounded in contract or tort arising out of the defective design or construction of an improvement to real property or arising out of the defective and unsafe condition of an improvement to real property. Fairview Heights I, supra, No. A-0225-10 (slip op. at 15-16). Rather, our remand was limited to a determination of whether the improvement to the building here resulted in an unsafe and defective condition that would implicate the statute of repose. Id. (slip op. at 2). We stated:

> Here, the judge made no findings on whether the water seepage, or the property damage caused by such seepage, in any way rendered the building, or any of the units, unsafe. Although the statute must be broadly construed, Rosenberg [v. North Bergen], 61 N.J. [190,] 198 [(1972)], "the Legislature has limited the statute of repose so that only improvements to real property 'that result in unsafe and defective conditions implicate the statute[.]'" Port Imperial Condo, Ass'n Inc. v. U.S. Wick Drain, Inc., 419 N.J. Super. 459, 470 (App. Div. 2011) . . . (quoting Newark Beth Israel Med. Ctr. v. Gruzen & Partners, 124 N.J. 357, 364 (1991)).

We reasoned, citing Port Imperial, supra, 419 N.J. Super. at 470, that "[w]ithout a specific finding on the question of whether the defects had rendered the building 'unsafe,' defendants were not entitled to the benefit of the ten-year statute of repose." We concluded by stating that "if after considering his original opinion the judge concludes that defendants are not entitled to summary judgment based upon the statute of repose, the judge shall then proceed to analyze whether plaintiff's claims are barred for any other reason." Fairview Heights I, supra, No. A-0225-10 (slip op. at 22).

Upon remand, the court considered all of the evidence before it, which included the allegations in the pleadings, plaintiff's answers to interrogatories, the deposition testimony of its expert, the deposition of the Association's president, and the architectural survey report from R. V. Buric. From its

consideration of this evidence, the court disagreed that there was a need for an evidentiary hearing as plaintiff had urged. Rather, the court was satisfied from its review of the evidence that "an unsafe condition was created with -- by the alleged defective construction of the building by the defendants and the situation was one which is hazardous to the well[-]being and safety of the persons or property coming into contact with the building." Based upon this finding, the court once again granted summary judgment to RLI "based on the application of the statute of repose." The present appeal ensued.

On appeal, plaintiff contends the judge erred in dismissing its claims against RLI based upon the statute of repose. Rather than addressing the sole issue upon which our remand was based, namely, "whether the defects [as alleged] had rendered the building 'unsafe,'" Fairview Heights I, supra, No. 0225-10 (slip op. at 21), plaintiff revisits its equitable tolling argument, which we earlier rejected:

> Plaintiff argues that rigid application of the statute of repose in the present circumstance is unreasonable, as the statute of repose should not, according to plaintiff, begin to run until after RLI sold seventy-five percent of the units and thereby relinquished its control of the Board in 2001. Plaintiff urges us to construe N.J.S.A. 2A:14—1.1 such that causes of action of condominium associations against developers arise after unit owners take control of the condominium association.

> That is, the cause of action for individual owners would begin at the moment of "substantial completion" of the building or complex, but an association's right would arise only after members took formal control of the condominium association. We do not accept such an equitable tolling argument.
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> We long ago concluded there is no equitable tolling of the statute of repose. Cnty. of Hudson v. Terminal Constr. Corp., 154 N.J. Super. 264, 268–69 (App. Div. 1977), certif. denied, 75 N.J. 605 (1978).
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> Id. (slip op. at 15-16).

Admittedly, we did not address the two opinions plaintiff relied upon, one published, Terrace Condo. Ass'n v. Midatlantic Nat'l Bank, 268 N.J. Super. 488, 503 (Law Div. 1993), and one unpublished, Skyline Condo. Ass'n v. Falkin, Nos. A-3913-98, A-3860-98, A-3792-98 (App. Div. Sept. 10, 2001), certif. denied, 172 N.J. 177 and 179 (2002), to advance its theory that the statute of repose was equitably tolled until RLI relinquished its control of the Association in 2001. We determined that there was no need to address these cases because the motion "judge's findings on the statute of repose failed to address one of the statute's key elements, namely, whether the alleged construction defects rendered the building 'unsafe.'" Fairview Heights I, supra, No. A-0225-10 (slip op. at 18). Our consideration of those cases now does not alter the outcome.

Although both cases involve the tolling of the statute of limitations and not the statute of repose, we do not deem this distinction dispositive because our Court has "equated statutes of repose with substantive statutes of limitations and suggested that equitable principles would apply if consonant with the legislative intent and purpose." R.A.C. v. P.J.S., Jr., 192 N.J. 81, 100 (2007) (citing Greczyn v. Colgate-Palmolive, 183 N.J. 5, 18 (2005)). However, the Court cautioned that "in light of the purpose of a repose statute, which is to set a fixed end to the limitations period regardless of when the cause of action accrues, we expect that equitable tolling will arise only in extraordinary circumstances consistent with legislative intent. Id. at 100-01.

We are, therefore, guided by this cautionary approach in our analysis. We are convinced that when the facts are viewed in the light most favorable to plaintiff, there are no genuinely disputed issues of fact as to whether extraordinary circumstances exist implicating equitable tolling considerations here. Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540.

Our analysis looks first to N.J.S.A. 2A:14-1.1(a) ("the Act"). R.A.C., supra, 192 N.J. at 101 (looking first to the plain language of the Parentage Act, N.J.S.A. 9:17-45b, "to

determine whether the Legislature intended equitable tolling of the repose statute in the circumstances of [that] case and whether such tolling would effectuate the statutory scheme"). The Act provides:

> No action whether in contract, in tort, or otherwise to recover damages for any deficiency in the . . . construction of an improvement to real property, or for any injury to property, real or personal . . . arising out of the defective and unsafe condition of an improvement to real property . . . 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.
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> [N.J.S.A. 2A:14-1.1(a).]

The Act limits the "'potential liability to which architects and building contractors, among others,'" were increasingly subject. Cyktor v. Aspen Manor Condo. Ass'n, 359 N.J. Super. 459, 470 (App. Div. 2003) (quoting Rosenberg v. Town of North Bergen, 61 N.J. 190, 194 (1972)). "The primary consideration underlying a statute of repose is fairness to a

defendant, the belief that 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[.]" R.A.C., supra, 192 N.J. at 96-97 (internal citations and quotation omitted).

Additionally, a statute of repose serves a distinct purpose. Its basic feature is that it has a "fixed beginning and end to the time period a party has to file a complaint" and "bears no relationship to when the injury occurs or the cause of action accrues." Id. at 96. To that end, it is

> distinguishable from a statute of limitations because it manifests the doctrine of "damnum absque injuria" ("a wrong for which the law affords no redress") conceptually translated to mean that upon the expiration of the statutory period, a cause of action literally ceases to exist no matter when the harm arose.

[Cyktor, supra, 359 N.J. Super. at 473 (citing Rosenberg, supra, 61 N.J. at 199).]

As our Court has previously observed in Rosenberg, supra, 61 N.J. at 194, the legislative history of the Act is "meager and unrevealing." See also O'Connor v. Altus, 67 N.J. 106, 121 (1975) (stating that legislative history is "of little assistance"). However, the Court has suggested that the development of the discovery rule and its repudiation of the "completed and accepted rule" may have motivated the Legislature's adoption of the Act:

> The completed and accepted rule provided that an architect's or a builder's liability for negligent design or construction of a structure terminated upon the completion of the professional's work and its acceptance by the property owner. We repudiated the completed and accepted rule outright in Totten v. Gruzen, 52 N.J. 202, 245 (1968), a year after the enactment of N.J.S.A. 2A:14-1.1. As we have pointed out, the tendency away from the completed and accepted rule was so clearly established as to make it reasonable to assume that the Legislature took that trend into account in enacting the statute. The demise of the completed and accepted rule left those involved in the design and construction of improvements to real property vulnerable indefinitely to liability for injuries arising from a structure's defect. N.J.S.A. 2A:14-1.1 was a legislative response seeking to delimit th[at] greatly increased exposure, and to prevent liability for life against contractors and architects.
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> [Greczyn, supra, 183 N.J. at 10-11 (alteration in original) (internal citations and quotation marks omitted).]

Thus, "'[t]he function of the statute is . . . to define substantive rights [rather] than to alter or modify a remedy[,]'" [and] "the substantive right created by the statute is the right not to have to defend ancient claims or obligations." Cyktor, supra, 359 N.J. Super. at 470 (quoting Rosenberg, supra, 61 N.J. at 199). See also Terminal Constr. Corp., supra, 154 N.J. Super. at 270.

In its 1996 decision in Russo Farms v. Vineland Board of Education, 144 N.J. 84 (1996), the Court adopted and agreed with

approximately thirty other jurisdictions that the triggering point for when the statute of repose commences is "substantial completion" of the project. "'[S]ubstantial completion is a term of art in the construction industry and it has a well-recognized meaning.'" State v. Perini Corp., 425 N.J. Super. 62, 72 (App. Div. 2012) (alteration in original) (quoting Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 175 (App. Div. 2007)), certif. granted, 210 N.J. 476 (2012). Moreover, it has been broadly construed to effectuate the legislative purpose of the statute. To that end, we have held that "substantial completion" does not mean completion of every last task of the contractor. Daidone v. Butenck Bulkheading, 191 N.J. 557, 567 (2007) (rejecting plaintiff's contention that the ten-year period of repose should commence after a certificate of occupancy has been issued); see also Perini Corp., supra, 452 N.J. Super. at 75 (holding that the statute of repose commenced to run against contractors on the date each of the contractors substantially completed its work on the project).

What is significant is that the triggering point is tied to substantial completion of the construction project itself, rather than other factors such as obtaining a certificate of occupancy or, as plaintiffs would urge here, relinquishment of control of the Association by defendants. The condominium was

substantially completed in 1988. To permit the Association's claims against RLI, filed twenty years later, runs afoul of the policy considerations underlying N.J.S.A. 2A:14-1.1(a), fairness to defendant and the expectation of RLI that it "ought to be secure in [its] reasonable expectation that the slate has been wiped clean of ancient obligations." Rosenberg, supra, 61 N.J. at 201 (internal citation and quotation omitted). Construction of the Act, as plaintiff urges, would also run counter to the clearly worded language of the statute which evinces no legislative intent that application of the doctrine would be subject to equitable tolling under the circumstances of this case.

Affirmed.