FOREVER BARRED? DOES SENDING A PRE-SUIT NOTICE OF CONSTRUCTION DEFECTS PREVENT DISMISSAL OF A LAWSUIT BASED ON THE STATUTE OF REPOSE

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The Fifth District Court of Appeal will soon decide whether sending a pre-suit notice of construction defects under Florida's Construction Defect Statute, Section 558, Florida Statutes, commences a construction defect action and simultaneously tolls the 10-year statute of repose.

In *Busch v. Lennar Homes, LLC*, Case No. 5D16-1626 (Fla. 5th DCA), Mr. Busch, a homeowner, appealed the trial court's dismissal of his lawsuit alleging claims for breach of contract, building code violations, negligence, and deceptive and unfair trade practices. The parties executed a Purchase and Sale Agreement under which Lennar served as general contractor to construct Mr. Busch's home. Mr. Busch served Lennar with a pre-suit notice of construction defects on or before July 19, 2015. On September 17, 2015, Mr. Busch filed suit against Lennar based on alleged defects in constructing the Home. The trial court dismissed those claims based on the statute of repose, Florida Statutes § 95.11(3)(c).

Florida Statutes § 95.11(3)(c) provides:

> "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 or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest."

On appeal, Mr. Busch did not dispute that the certificate of occupancy was issued, and actual possession occurred, more than ten years prior to the commencement of the action. Rather, Mr. Busch asserted that his claims were not barred, or should not be dismissed because the date of completion of the Purchase Agreement, the fourth prong in the Statute of Repose, could not be ascertained from the Complaint. Second, Mr. Busch argues that prior to filing his Complaint, he served Lennar with a notice of claim under Florida Statutes Chapter 558 ("the Chapter 558 Notice") and under § 558.004(10), and the decision of the Florida Supreme Court in *Musculoskeletal Inst. v. Parham*, 745 So. 2d 946 (Fla. 1999), the Chapter 558 Notice tolled the expiration of the Statute of Repose. The *Musculoskeletal* Court held that a medical malpractice action is "commenced" for purposes of the statute of repose when the pre-suit notice is provided. *Musculoskeletal Institute,* 745 So. 2d at 954. Further, the tolling provisions in the medical malpractice statutes apply to the statute of limitations and the statute of repose. *Id.* According to Mr. Busch, there is no logical distinction that can be made between the construction defect statutory scheme and the medical malpractice scheme.

In response, Lennar asserts the date of "completion" of the Purchase Agreement may be determined solely by the allegations of, and exhibits to, the Complaint. Lennar further argues the reasoning underlying the

Musculoskeletal Inst. decision applies only to medical malpractice claims, and therefore has no application here.

The Fifth District Court of Appeal will hear oral argument on March 23, 2017.

Notably, Section 558 specifically provides that a proper notice of construction defects tolls the statute of limitations, a legal doctrine which extinguishes the right to prosecute an accrued cause of action after a period of time. However, Section 558 is silent as to the tolling of statute of repose and there is no Florida cases directly addressing whether service of a pre-suit notice of construction defects commences a construction defect action and tolls the statute of repose.

We will follow this case closely.

For more information on this topic, please contact Jeff Wertman on the firm's Dispute Resolution Team.

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