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LAW360, "EFFORTS TO REPAIR FLA. CONSTRUCTION DEFECT LAW ARE LIMITED"

March 9, 2020

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Law360

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Efforts are again underway to renovate Florida's construction defect law. Originally enacted in 2003, Chapter 558 of the Florida Statutes, put in place a pre-suit notice and opportunity to repair process for construction defect claims , which the Florida Legislature described as an alternative dispute resolution mechanism, involving a claimant providing a written notice of claim to the responsible contractor and allowing it to resolve the defect as a precondition for any lawsuit against the contractor.

Since 2003, Chapter 558 has been amended six times because the 558 process was often expensive and never achieved the legislature's stated intent of reducing the need for litigation. Two bills are now making their way through the legislature which contain significant modifications to the existing law, and seek to promote faster resolution of construction defect cases. HB 295 , sponsored by Representative David Santiago of Deltona, and its comparable Senate version, SB 1488 , sponsored by Senator Joe Gruters of Sarasota, contain significant changes to Chapter 558.

Notice of Claim

Under the legislation, a claimant is prohibited from filing a notice of claim unless the claimant has first submitted a claim for the alleged defect under any applicable warranty and the warranty provider has denied the claim or failed to offer a satisfactory remedy. In addition to the information required under current law, a notice of claim is also required to: (a) describe the nature of the alleged defect and its location in specific detail; (b) include any repair estimates or expert reports the claimant obtained relating to the alleged defect (and, if the alleged defect is visible, at least one photograph of such defect); (c) affirm the claimant has personal knowledge of the alleged defect; (d) acknowledge the claimant is aware of real estate disclosure obligations and perjury penalties; and (e) be signed by the claimant under penalty of perjury.

Claimants, such as owners and associations, may view the new proposed requirements as simply imposing an additional burden on them in an already time-consuming and ineffective Chapter 558 process. For example, what happens if a claimant first submits a claim for the alleged defect under a warranty and the warranty provider does not respond to the warranty claim? The proposed amendment is silent on this point potentially leaving the claimant in Chapter 558 purgatory. Under the legislation, the claimant is prohibited from serving a notice of claim, and therefore cannot file a construction defect lawsuit. Proponents of the notice of claim requirements, however, will point to the potential to reduce fraudulent construction defect claims and reduce litigation expenses if legitimate claims are resolved through the warranty process or settled.

Inspection and Testing

The legislation expressly requires a party responding to a notice of claim to reasonably coordinate the timing of

any property inspections with the claimant and any secondary respondents to minimize the number of inspections. In addition, a claimant must give a secondary respondent reasonable access to the property for defect inspections.

Inspections are often costly because each party may have one or more professional present, such as engineers, architects, contractors, subcontractors, suppliers, representatives for the product manufacturer, attorneys, and insurance representatives. Requiring the parties to reasonably coordinate the timing of any property inspections with the claimant and any secondary respondents, if actually carried, will avoid multiple inspections, which will reduce costs and minimize delays.

Special Verdicts

The legislation also requires that a jury verdict and a final judgment issued in a construction defect case describe the nature of the defect and the monetary amount awarded against each party separately and the monetary amount of the judgment attributable to: (a) repairing or replacing the party's defective work; (b) repairing or replacing other non-defective property damaged by the defective work; and (c) other damages awarded against the party.

This proposed requirement for specificity in jury verdicts and final judgments will ensure responsibility for construction defects is placed on the correct party and a defendant's liability is accurately identified. This, however, presumes the special verdict forms and final judgments are drafted correctly and are based on the supporting evidence.

Real Estate Disclosures

The legislation also contains new real estate disclosures for Chapter 558 claims. Under Florida law, where the seller of a home knows of facts materially affecting the property's value not readily observable to and are not known by the buyer, which may include latent construction defects, the seller must disclose such facts to the buyer. A real estate agent and a broker must also disclose such facts when known to the agent.

The legislation requires a seller of real property to disclose to a buyer in a written disclosure statement in the sale contract, or a separate writing: (a) whether the seller, or an association acting on the seller's behalf, made a construction defect claim relating to the real property subject to the sale contract; (b) the specific nature of the defect alleged; (c) the claim's outcome; and (d) whether the defect was repaired, and if so, a repair description. The legislation also requires real estate agents or brokers to disclose, if known, whether the seller or an association acting on the seller's behalf made a construction defect claim relating to the property subject to the sale contract, the outcome of the claim, and what repairs were made.

Although these provisions seek to ensure the buyer has notice of any unrepaired construction defects prior to purchasing a property, the proposed disclosures could lead to a new wave of "failure to disclose" lawsuits. Sellers, real estate agents and even third parties who provide information for these disclosures could be targets of lawsuits and be face monetary liability if the real estate disclosures are insufficient, incomplete or untruthful.

Notice to Mortgagee or Assignee

Finally, the legislation gives additional protection to mortgagees and assignees. Currently, if a claimant succeeds on a construction defect claim related to a property in which a mortgagee or its assignee has a security interest, Florida law does not require the claimant to notify the mortgagee or assignee of the defect. The legislation provides if a construction defect claim results in a monetary settlement or judgment in the claimant's favor, and a mortgagee or assignee has a security interest in the real property related to the claim, the claimant must, within 90 days of the claim's resolution, send written notice to the mortgagee or assignee of: (a) the specific nature of the defect; (b) the claim's outcome, including the amount of any monetary settlement reached or judgment awarded; and (c) whether the defect was repaired and a repair description or, if repairs have not begun, the anticipated repair start date. If defect repairs are completed after the claimant sends such notice, the claimant must supplement the notice within 30 days of repair completion to ensure the mortgagee or assignee has knowledge of property defects which may decrease the value of property in which it has a security interest.

Claimants will likely view these requirements as imposing an unnecessary, additional burden on them. Mortgagees and assignees will obviously favor these provisions but the legislation lacks any enforcement mechanism if a claimant fails to comply. Mortgagees and assignees may therefore be better served by including the substance of the legislative requirements in their mortgages and loan documents.

Conclusion

Since its creation in 2003, Florida's construction defect law – commonly referred to as Chapter 558 – has undergone many revisions and been subject to significant criticism. The Florida Legislature continues to wrestle with legislation "to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners." . HB 295 and SB 1488 are laudable as they seek to improve the construction defect law but they fail to address the exploding costs of construction defect litigation, lawsuits involving minor defects, and legitimate construction defects not being repaired. Appropriate and effective legislation will require avenues for builders to avoid litigation without creating overwhelming obstacles and impractical hurdles for owners with genuine defect claims. Even if the legislation becomes law on July 1, 2020, Chapter 558 will remain a work in progress.

A "construction defect" is a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from: (a) defective material, products, or components used in the construction or remodeling; (b) a violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to Fla. Stat. § 553.84; (c) a failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or (d) a failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Fla. Stat. § 558.002(5).

A "claimant" is a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. Fla. Stat. § 558.002(3).

A "contractor" is a contractor, subcontractor, supplier, or design professional that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.

Fla. Stat. § 558.002(6).
Fla. Stat. § 558.001-§ 558.005.
Fla. Stat. § 558.001.
HB 295, Reg. Leg. Sess. (Fla. 2020).
SB 1488, Reg. Leg. Sess. (Fla. 2020).
Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). Id.
Fla. Stat. § 558.001.

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