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Well, Ten Years Is Ten Years ... Court Of Appeal Rules That Ten Year Statute Of Limitations Period Does Apply And Will Bar A Lawsuit For Construction Defects Where Suit Was Brought More Than Ten Years After The Filing Of The Notice Of Completion Even Though (i) The Developer Retained Possession Of The Residence For More Than A Year After Substantial Completion And (ii) Suit Was Filed Within Ten Years Of The Plaintiffs' Purchase

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As we have reported many times, the California legislature enacted in 1971 an outside 10 year limit in which to bring property damage claims arising from latent construction defects. See, Code of Civil Procedure section 337.15.

The ten year rule has been the subject of significant case decisions including Pine Terrace Apartments, L.P. v. Windscape, LLC (2008) Westlaw 68877 ("Pine Terrace case" or "Pine Terrace"), which we reported on just last month in the January 2009 edition of *The Morrison Law Journal*¹.

In what appears to be a relatively rare win for developers and contractors, the Court of Appeal, First District, has ruled that the ten year limitation period does run from the date of filing the Notice of Completion and not the date of purchase, at least where the defects complained of resulted from pre Notice of Completion work. That decision was issued in Gundogdu v. King Mai, Inc. (2009) Westlaw 330921 ("Gundogdu Case" or "Gundogdu").

The facts of the Gundogdu case are relatively routine: on November 2, 1995, King Mai, Inc. ("King Mai"), a developer, caused a Notice of Completion to be recorded for a single family residence located at 199 Kings Court in San Carlos, California. On March 13, 1997, plaintiffs Mehmet Gundogdu and Aynar Gundogdu (the "Gundogdus") closed on the purchase of the residence. The Gundogdus acquired the residence from the developer, which retained possession and control of the property through the date of sale.

¹ In Pine Terrace, Court of Appeal, in a case of first impression, ruled that the exemption from the 10 year statute of limitations for "actions based on willful misconduct" applies to cross-complaints for indemnity and that an indemnity claim involving willful misconduct may be asserted against a subcontractor merely by incorporating by reference allegations contained in a complaint which alleges willful misconduct against the developer.

The March 1997 purchase contract identified 26 repairs that were required. Between March 1997 and August 1997, King Mai attempted to effect the repairs to the Gundogdus' satisfaction, but was unsuccessful. In October 1997, the Gundogdus had an independent inspection performed which identified numerous defects but no repairs were performed in response by King Mai. In December 2002, the Gundogdus contacted King Mai in regard to water leakage following a winter storm, which elicited a response from King Mai that there may be potential responsibility on the part of King Mai. However, following further correspondence from the Gundogdus in January 2003, King Mai responded that it would not effect any further repairs. In February 2004, the Gundogdus obtained a second home inspection report which revealed other problems including excess dirt in the crawl space around the foundation of the residence. King Mai, again, refused to effect any repairs.

Suit was then filed by the Gundogdus in April 2006, more than ten years after the recording of the Notice of Completion but less than ten years from the date of the Gundogdus' purchase of the residence. King Mai filed a Motion for Summary Judgment under Code of Civil Procedure section 337.15 claiming that the defects complained of existed prior to the recording of the Notice of Completion, that the ten year period ran from the recordation of the Notice of Completion and not the date of purchase, and, by inference, that there was no basis to claim concealment, equitable estoppel or willful misconduct.

The Trial Court granted Summary Judgment. The Court of Appeal affirmed.

Significant in the Court of Appeal decision was that the Court affirmed prior case law decisions which held that the ten year period runs from the date of substantial completion under Code of Civil Procedure section 337.15(g) and not the date of the plaintiffs' purchase. See, Schwetz v. Minnerly (1990) 220 Cal.App.3d 296. In that regard, the Court noted that the ten year period should run from the date of recordation of the Notice of Completion in November 1995, and not the date of purchase in March 1997, even though the developer retained control. This is significant in that Code of Civil Procedure section 337.15(e) provides that the:

"limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or ... control ... of such improvement...at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action".

As to that issue, the Court of Appeal noted Code of Civil Procedure section 337.15(e) but held that the time the developer retained possession following the recordation of the Notice of Completion should not be computed for purposes of the ten year statute of limitations because the defects complained of involved pre recordation work.

Second, the Court of Appeal ruled that principles of equitable estoppel can apply but they must fit within the four part standard set forth in Lantzy v. Centex Homes (2003) 31 Cal.4th 363 which provides that (i) the developer's representations as to repair must have been made while the statute of limitations had not yet run, (ii) the plaintiff reasonably relied on the representations, (iii) the representations proved false and (iv) the plaintiff proceeded diligently once the true facts were discovered. In Gundogdu, the Court of Appeal noted that King Mai refused to make repairs following the February 2004 home inspection report and the limitations period did not expire until November 2005, some twenty months later.

The Gundogdu case may have limited application as it is a fact driven case. However, the decision is important in that it affirms prior case law which provides that the ten year limitation period commences upon substantial completion of the improvement, that the developer's post completion possession will not delay the commencement of the limitations period (at least where the defects being complained of relate to pre substantial completion construction) and there will be no equitable estoppel claim where the developer declines to effect repairs and there is a period of at least a year from the developer's refusal to make repairs and the deadline to file suit.

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