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Another Reversal for Subcontractors: Court of Appeal Rules That The Exemption From The 10 Year Statute of Limitations For Construction Defects For "Actions Based On Willful Misconduct" Applies To Cross-Complaints For Indemnity So Long As The Indemnity Cross-Complaint Incorporates The Complaint (Alleging Willful Misconduct) By Reference

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As many are aware, 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 "absolute 10 year period" applies regardless of when the defect is discovered. See, Lantzy v. Centex Homes (2003) 31 Cal.4th 363. However, there are three important exceptions, one of which has been expanded by the Court of Appeal decision, issued January 12, 2009, in Pine Terrace Apartments, L.P. v. Windscape, LLC (2008) Westlaw 68877 ("Pine Terrace case" or "Pine Terrace") as discussed herein.

The most important exceptions to the "10 year absolute" limit are:

- (1) where the defendant has induced plaintiffs to delay in filing suit, i.e. equitable estoppel, Lantzy v. Centex Homes (2003) 31 Cal.4th 363;
- (2) where the suit against the developer or general contractor has been brought timely, then a cross-complaint for indemnity may be brought later on against a subcontractor even though a direct suit against the subcontractor would be time barred at the time the cross-complaint for indemnity was filed, Valley Circle Estates v. VTN Consolidated, Inc. (1983) 33 Cal.3d 604; and
- (3) actions based on willful misconduct or fraudulent concealment, Code of Civil Procedure, section 337.15(f).

The Court in Pine Terrace, 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 facts of the Pine Terrace case are relatively routine: a 256 apartment unit complex was developed in Fresno in or about 1989 and was completed in the early 1990s (there were factual disputes involving notices of completion which were recorded in 1990 or 1991). The complex was held by the developer or related entities until 2003 when it was sold to the plaintiff buyer. In 2004, the plaintiff buyer filed suit against the developer (and seller) and alleged that the complex was so defectively built that the defendants' conduct amounted to willful misconduct. The signature claim involving defects concerned a claim that windows were installed without any flashing.

The developer defendant then filed suit in 2006 against the architect and two subcontractors for indemnity. The developer defendant's cross-complaint did not allege willful misconduct but did incorporate the complaint by reference. A series of dispositive motions followed. As pertinent here, the trial court ruled that triable issues of material fact existed regarding the willful misconduct exemption against the developer defendant but further ruled that the indemnity cross-defendants were entitled to summary judgment as the 10 year statute of limitations period had run as to them.

On appeal, the Court of Appeal ruled that, while the developer defendant had not plead or provided evidence of willful misconduct on the part of the subcontractors, the developer defendant's incorporation by reference of the complaint in the indemnity cross-complaint was sufficient by itself to trigger the exemption under Code of Civil Procedure section 337.15(f) as against the subcontractors. The Court of Appeal further ruled, consistent with the decision in Valley Circle Estates v. VTN Consolidated, Inc. (1983) 33 Cal.3d 604, that cross-complaints for indemnity are not barred by the ten year period so long as the plaintiff has timely filed suit against the defendant seeking indemnity.

The Pine Terrace decision will certainly have its impacts. In cases where there has been willful misconduct on the part of the developer, indemnity cross-complaints may be asserted against subcontractors by merely incorporating the complaint by reference and without any evidence of willful misconduct against them.

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