

CONSTRUCTION DEFECTS
A STATUTE OF LIMITATIONS REVIEW

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The combination of the booming economy and Mother Nature have lead to a tremendous flood of new construction and remodeling. As anyone who has ever tried to pin down a roofing or remodeling contractor can tell you, this is a busy time for construction contractors. But with all the construction and remodeling, there are bound to be problems. The problems can range from poor roof work to improper footing and masonry work. While everyone wants to believe that the contractor they hired did not cut any corners, used only the best materials and most qualified subcontractors, and supervised every inch of the construction or remodeling, reality has a funny way of invading our “dreamland.” Construction will bring problems. This article is intended to address a major issue in the field of construction defect claims – the statute of limitations.

A. THE STATUTES.

The statute that has the most implications to those homeowners (or common interest communities) contemplating a construction defect claim is Minn. Stat. § 541.051. That statute states, in pertinent part:

- (a) Except where fraud is involved, no action by any person in contract, tort or otherwise to recover damages for any injury to property . . . 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, supervision, materials, or observation of construction or construction of the improvement to real property . . . more than two years after the discovery of the injury.
- (b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury.

Minn. Stat. § 541.01, Subd. 1(a) and (b). The statute is clear, actions arising out of improvements made to real property are barred if: (1) they are premised upon theories of “contract (i.e., the breach thereof), tort (usually negligence), or otherwise” (an incredibly broad concept limited by Subdivision 4); and (2) they are brought more than two years after the date on which the “injury” is discovered. And, while the statute appears to apply only to a specific type of claim (i.e., those “arising out of the defective and unsafe condition of an improvement”), in reality the courts have broadened the statute’s application far beyond its plain meaning. This and other common issues concerning the application of limitations statutes will be more fully addressed below.

As alluded to above, Minn. Stat. § 541.01, Subd. 4 limits the application of Subdivision 1. Subdivision 4 provides as follows:

For the purposes of actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written

warranty, such actions shall be brought within two years of the discovery of the breach.

Minn. Stat. § 541.01, Subd. 4.

Perhaps the distinction between Subdivisions 1 and 4 is not apparent to the untrained eye, but the difference boils down to the “trigger” that commences the two-year limitations period: either the “injury” (for contract and tort claims under Subdivision 1); or the “discovery of the breach” (for breach of warranties provided by Chapter 327A or by express agreement).

In addition to the limitations periods established by Minn. Stat. § 541.051, certain other claims applicable to these cases are governed by different statutory limitations periods. Obviously, the different layers of statutory limitations periods requires some review of their application by the courts to form an understanding of what this all means to homeowners concerned about preserving their claims against contractors.

B. FUNDAMENTAL CONCEPTS AND JUDICIAL APPLICATION.

1. Improvements to real property.

The limitations statute applies to “improvements to real property,” which the courts have defined as “a permanent addition to or betterment of real property that enhances its capital value.” *State Farm Fire and Cas. v. Aquila Inc.*, 697 N.W.2d 636, 640 (Minn. Ct. App. 2005)(quoting *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977)) The Association should assume that almost all contractor work in construction or remodeling will meet the definition, and certainly claims against a builder/developer relating to new construction fall under the ambit of this statute.

2. Defective and unsafe conditions.

A problem area in the statute’s application is the apparent, though illusory, limitation to only “defective and unsafe” conditions. Most would probably agree that a leaky roof is clearly “defective,” but the droplets of water are not really “unsafe.” However, the Minnesota Supreme Court has used some fairly interesting semantics and defined “unsafe” in a manner not consistent with its common usage. In *Griebel v. Anderson Corp.*, 489 N.W.2d 521, 523 (Minn. 1992), the court found that patio doors that did not keep out flies were defective and unsafe. The court stated:

A window or door which fails to provide the expected barrier against unwanted elements such as rain or snow or living creatures such as flies or mosquitoes is insecure or unsafe whether or not the invader is hazardous to life and limb.

Id. This interpretation may stand for the general proposition that if the construction material fails in its intended purpose, whether by negligent installation or poor manufacture,

it is “unsafe.” Given this interpretation, when the Association is confronted with an apparent defect, it should immediately seek an attorney’s assessment of the problems and its relation to the statute.

3. Persons performing or furnishing construction-related services

The statute also applies to almost any individual or entity providing construction services to the Association. The statute applies to a claim made against “any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to the real property or against the owner of the real property . . .” Minn. Stat. § 541.051, subd. 1(a). This statute of limitations does not, however, apply regarding damages that result from an owner’s negligent operation or inspection of a “real property improvement.” Minn. Stat. § 541.051, subd. 1(c).

4. Discovery of the injury or breach

a. Injury

As noted above, claims for breach of contract or for negligence will be triggered by (and therefore must be brought within two years of) the “discovery of the injury.” This concept is more broad than it appears. A party discovers an injury when the party either actually discovers, or through the exercise of reasonable diligence, should have discovered, the injury. *Greenbrier Village Condominium Two Ass’n, Inc. v. Keller Investment, Inc.*, 409 N.W.2d 519, 524 (Minn. Ct. App. 1987). Thus, the two-year limitations period is triggered by the appearance of the symptoms of the problem, even where the cause or actual scope is not initially comprehended. *See Dakota County v. BWBR*, 645 N.W.2d 487, 492 (Minn. Ct App. 2002)(holding that continuous leaks for several years were sufficient notice of problem even though occasional repairs seemed to temporarily correct the issue); *see also Hyland Hill North Condominium Ass’n, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617, 621 (Minn. 1996), cert. denied (*Hyland Hill Condominium Ass’n, Inc. v. St. Paul Fire and Marine Ins. Co.*, 519 U.S. 1041 (U.S. Minn. Dec. 16, 1996))(holding that board’s knowledge of leakage in 1987 gave rise to the cause of action, rather than realization that the roof actually needed replacement in 1990). While there are legitimate and potentially successful arguments to the contrary, upon which Thomsen & Nybeck has preserved claims beyond summary judgment, the Association must conservatively assume that the first awareness of a problem, by a unit owner or board member, may commence the running of the two-year clock and should proceed diligently under such assumption.

The Minnesota Supreme Court has also held that the statute of limitations applies to all defects of the association began when the first leakage or other problem was discovered. *Hyland Hill*, 549 N.W.2d at 621. In *Hyland Hill*, it was held that the two-year statute of limitations began to run regarding all the association’s defects, whether related to the leaking roof or otherwise, even though the other defects may not have been discovered until later. The Association should not assume that it will have a “fresh” two-year period for every defect or problem discovered.

However, the Court of Appeals in the unpublished case *Fuhr vs. D.A. Smith Builders, Inc.* did state:

But summary judgment should not be granted when the homeowner initially discovers a problem and takes corrective action that is apparently appropriate to fix the defect, and then a new injury appears and there is evidence that the new injury is different in kind, location, cause, and appropriate corrective action. In such a situation, the finder of fact should determine whether the initial and the subsequent problem constitute the same or different injuries and when the homeowners knew or should have know of the injury for which they are claiming damages.

b. Breach

In contrast, a cause of action for for breach of certain warranties under the statute does not accrue until the homeowner discovers, or should have discovered, the breach. *Vlahos v. R & I Construction of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004). In *Vlahos*, the Minnesota Supreme Court held that a breach occurs upon the “builder’s refusal or inability to ensure the home” is in the warranted condition. However, there are qualifications to this rule that may void a claim under such warranties if action is not promptly taken upon discovery of the injury (as discussed in part C.2. below).

C. THE RESULT: LIMITATIONS PERIODS ON VARIOUS CLAIMS

The statute’s limitation period appears to apply to an unending array of claims, because of the legislature’s decision to include in its apparent purview any “action by any person in contract, tort or otherwise.” Generally speaking, however, most homeowners and their homeowners associations are going to be concerned with claims for negligence, breach of contract, breach of possible express warranties, and breach of certain statutory warranties. Fraud or misrepresentation claims are frequently asserted as well, but are limited by a separate statute. These claims, and the applicable limitations considerations for each, are addressed below.

1. Negligence and breach of contract: Minn. Stat. § 541.051, Subd. 1.

Negligence and breach of contract actions must be commenced within two years of the date when the injury is discovered or should have been discovered. Minn. Stat. § 541.051, Subd. 1(a) and (b). This creates a great deal of controversy in claims brought by common interest communities. Contractors will point to the earliest leak observed by any member of the association as sufficient notice of the problem, while associations will argue that the injury is not “discovered” until the entity has formal knowledge or recognition of an injury, i.e., the matter must have come to the attention of the board of directors. Either way, the result is that all leaks or other problems should be investigated promptly and the larger implications considered immediately.

2. Express warranties and warranties under Chapter 327A

There are a number of warranties that may be available to homeowners as well. Minn. Stat. § 327A.02 provides several statutory warranties against “noncompliance with building standards” in connection with any new construction of a “dwelling” or “major structural changes or additions to a residential building.” Those warranties are: (1) a one-year warranty against “defects caused by faulty workmanship and defective materials;” (2) a two-year warranty against “defects caused by faulty installation of plumbing, electrical, heating, and cooling systems;” and (3) a 10-year warranty against “major construction defects.”

There are exceptions to these warranty claims which should be examined by a qualified attorney, but they will generally apply to certain defects that would typically arise from construction practices or materials, including water intrusion. See, e.g., *Vlahos*, 676 N.W.2d at 672. The available warranties under Chapter 327A run for as little as one and for as long as 10 years from the “warranty date,” which is defined as the earliest of: (i) the date of initial occupation by the original purchaser (and does not re-start for a subsequent purchaser according to *Vlahos*, 676 N.W.2d at 672); or (ii) the date the original purchaser takes title to the dwelling. Alternatively, if the warranty arises from a renovation rather than new construction, the “warranty date” is the date on which the renovation is complete.

Express warranties will extend for so long as the warranty documents may state. However, in no event may the warranties provided by Chapter 327A be waived. Minn. Stat. § 327A.04, Subd. 1. Therefore, written warranties may operate as supplemental (though often superfluous) protections for a homeowner.

An action for the breach of these warranties must be commenced within two years of its breach. Minn. Stat. § 541.051, Subd. 4. However, there is the additional limitation that the contractor or builder must be notified in writing of the loss or damage within **six months** of the date on which the homeowner discovers, or should have discovered, such loss or damage. Note that once again discovery of the injury rears its ugly head: one need not commence an action for breach of warranty until two years from the date the builder has demonstrated a refusal or inability to perform under the warranty, yet the warranty obligations under Chapter 327A may not be enforceable where an owner has not promptly notified the builder following the date that such homeowner discovered, or should have discovered, the injury. Therefore, extreme vigilance is again required of the injured homeowner (or association) to preserve his, her, or its rights vis-à-vis the builder once a leak or other evidence of a possible defect is discovered.

3. Warranties under Chapter 515B, the Minnesota Common Interest Ownership Act (“MCIOA”).

The limitations provided by Minn. Stat. § 541.051 are sweeping, but there are certain claims that escape the purview of that statute. Chief among them in cases involving common interest communities are those provided by MCIOA, specifically under Minn. Stat. §§ 515B.4-111 and 515B.4-112. Claims for express and implied warranties under those

sections carry a rather unique limitations period: any such claim related to the common area, must be brought within six years of accrual, but for purposes of these sections the cause of action is deemed to accrue as to a claim related to the common elements the latest of these events: (1) completion of common elements (2) sale of the first unit to a bona fide purchaser, or (3) termination of Declarant Control. Therefore, the limitations period is ostensibly longer, but claims for its breach may functionally expire earlier than those arising under Chapter 327A (where a claim may not arise for 10 years and would therefore not necessarily be barred until year 12). Moreover, these warranties may further be restricted by written agreement to expire in only two years (there should be no need to scour your purchase agreements, Minn. Stat. § 515B.4-115(b) requires that any such agreement for the reduction of the limitations period must be separate from the purchase agreement).

It should also be noted that the application of these warranties is limited in terms of its substantive application, in addition to its procedural timing limitations. The express warranty provision applies to claims against the “declarant or an affiliate of declarant.” The implied warranty provision applies only to claims against the declarant. The association should assume, until legal counsel says otherwise, that all other claims are covered by the two-year statute of limitations.

4. Fraud or Misrepresentation

As Minn. Stat. § 541.051, Subd. 1 expressly states, actions based upon fraud or misrepresentation are not controlled by the two-year statute of limitations. Rather, causes of action for misrepresentations of any form (whether intentional or negligent) are barred six years after discovery of the facts constituting the misrepresentation.

D. CONCLUSION.

The defenses to the statute of limitations are limited. The courts have upheld certain defenses, such as the repair doctrine, equitable estoppel, and the inability to discover the injury because of repairs made by the contractor. However, the association should not rely on these defenses to justify delay. The association confronted with a problem related to work performed by a contractor should immediately notify the contractor in writing and seek some written assurance of repair within a reasonable time. The Association should follow up with the contractor to make sure it complies with the assurances and with any applicable warranties. The association should, absent satisfactory assurances from the contractor, receive the opinion of experts in the area to identify the problem and the cost of repair. Perhaps as important as any other step, the Association should contact legal counsel immediately to be advised on the applicable statutes of limitations and the possible need to litigate. The importance of immediate action cannot be overstated.

Associations have a variety of problems facing them and it is easy to disregard a small and apparently meaningless problem. However, with the current status of legislation and the interpretation such legislation has received from the courts, this small, meaningless

problem could be the beginning of the limitations period and possibly the death knell of an otherwise meritorious case. While this letter is intended to briefly highlight certain fundamental considerations, it cannot and should not be the basis of a decision by the board for a specific problem. There may also be alternative causes of action which are necessary or appropriate which have not been addressed herein. There is no substitute for competent legal counsel, and an attorney knowledgeable in these areas should be consulted at the earliest possible time. Vigilance in these matters will allow the association to protect its rights and may stave off the dreaded phrase “the statute of limitations has run.”