

## **Creekridge Townhome Owners Association v C. Scott Whitten, Inc.**

9/1

### **Construction Defect Litigation; Statute of Limitations; Patent and Latent Defects**

The lawsuit involves the reroofing of 11 buildings, comprising 61 units, in plaintiff's townhome community. The project was completed in 1997, replacing old shake roofs with concrete tile.

In late 1997, one owner wrote a letter to the board that she had a water moisture problem. There is no other evidence of a roof problem until 2003. In that year, numerous leaks were reported. Following an inspection which revealed multiple causes for the leaks, plaintiff sued several defendants for alleged roof defects.

Defendants moved for summary judgment on statute of limitations grounds. Defendants based their summary judgment on answers to interrogatories confirming the 1997 homeowner letter was the first time plaintiff became aware of leaking. The trial court granted the motion, based on Landale-Cameron Court, Inc. v Ahohnen (2007) 155 Cal.App.4<sup>th</sup> 1401. This appeal followed.

CCP section 337.1 provides a four year statute of limitations for a “patent” defect, which [starts running when the construction is substantially completed. The test to determine whether a defect is patent is an objective test that asks “whether the average consumer, during the course of a reasonable inspection, would discover the defect.” The test assumes that an inspection takes place. \(Goertz v Ausonio \(1992\) 4 Cal.App.4<sup>th</sup> 1363\)](#) The test generally presents a question of fact, unless the defect is obvious in the context of common experience, in which case it may be determined as a matter of law. (Preston v Goldman (1986) 42 Cal.3d 108)

Plaintiff opposed the summary judgment with a declaration from its roofing inspector stating the defects “would not be readily apparent to a lay person.” Based on this evidence the Justices stated that it cannot be said a

patent defect was present as a matter of law. In fact the evidence, in the form of the homeowner letter is so thin, the Third DCA could not support grant of the summary judgment for a patent defect.

A latent construction defect is one that is “not apparent by reasonable inspection.” CCP 337.15(b) In the context of negligence, breach of warranty, and breach of contract as plead here, sections 338, 337 and 337.15 are all in play. Actions for a latent defect must be filed within three years for injury to real property (338) or four years for breach of written contract (337), but in any event, must be filed within ten years (337.15) of substantial completion. (*North Coast Business Park v Nielsen Construction Co.* (1993) 17 Cal.App.4<sup>th</sup> 22)

The limitations period starts to run upon discovery, which occurs when the plaintiff suspects, or reasonably should suspect, that someone has done something wrong to the plaintiff, causing injury. (*Norgart v Upjohn Co.* (1999) 21 Cal. 4<sup>th</sup> 383) A plaintiff has reason to suspect when he has notice or information of circumstances to put a reasonable person on inquiry. In other words, sections 337 and 338 begin to run only after the damage is sufficiently appreciable to give a reasonable man notice that he has a duty to pursue his remedies. (*Mills v Forestex Co.* (2003) 108 Cal.App. 4<sup>th</sup> 625)

The Justices distinguished *Landale*. In that case there were multiple leaks made known to the former homeowners’ board president by residents. The HOA had notice or information that should have prompted further inquiry through the exercise of reasonable diligence. At least half of the units were leaking and repairs had been attempted. This stands in contrast to the one reported leak in the present case.

Finally, if the Court were to find in favor of defendants, that would force property owner associations across the state to conduct extensive investigations for possible construction defects based on any report of a small problem. This could prove very expensive and often be futile, and the Justices declined to impose such a burden.

The judgment in favor of defendants is reversed.