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No. 65833-6-I

(King County Superior Court No. 08-2-29583-4 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA), INC.,
a Washington Corporation,

Petitioner,

vs.

EXTERIOR METALS, INC., a Washington corporation, *et al.*

Respondents.

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BRIEF OF RESPONDENT EXTERIOR METALS, INC.

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I. INTRODUCTION

RESPONDENT Exterior Metals, Inc. ("Exterior Metals"), a defendant below, responds to and opposes Ledcor Industries (USA) Inc.'s ("Ledcor's") and Admiral Way LLC's appeal of the trial court's dismissal of Ledcor's and Admiral Way LLC's indemnity claims against Exterior Metals and other subcontractors as untimely under the construction statute of repose.

Under the construction statute of repose, RCW 4.16.310, a claim must accrue within six years of "substantial completion" of construction or "termination of services," whichever is later. "Substantial completion" is defined as the "state of completion reached when an improvement upon real property **may be used or occupied for its intended use.**" *Id.* It is undisputed that as of April, 2003, units of the Admiral Way condominium were sold for immediate occupancy. The trial court properly determined the building was "substantially complete" by **April, 2003**, because the building was **in fact** being "used or occupied for its intended use." The Certificate of Occupancy and the Architect's punch list were irrelevant to the trial court's decision.

There is no dispute that Exterior Metals completed its work at the Admiral project no later than May 31, 2003. Ledcor's indemnity

claim accrued on **July 28, 2009**, more than six years after the building was substantially complete and Exterior Metals' work was terminated. The trial court correctly ruled that the claim was time barred as a matter of law.¹

II. ASSIGNMENTS OF ERROR

Exterior Metals does not assign error to the trial court's dismissal of Ledcor's and Admiral Way LLC's indemnity claims against the subcontractor defendants as untimely under the construction statute of repose, RCW 4.16.310.

III. COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the definition of "substantial completion" for purposes of the construction statute of repose, RCW 4.16.310, established by statute or by agreement?
2. Did the trial court err in dismissing Ledcor's and Admiral Way LLC's indemnity claims against the subcontractor defendants as untimely under the "substantial completion" prong of the construction statute of repose when it is undisputed that units of the condominium building at issue were sold for immediate

¹ Exterior Metals also joins the Briefs of Respondents filed by Bordak Brothers, Inc. ("Bordak"), Skyline Sheet Metal, Inc. ("Skyline"), and SQI, Inc. ("SQI"). The facts, authority and argument in the Briefs of Respondents are adopted and incorporated as if fully stated herein.

occupancy by **April, 2003**, and when Ledcor's and Admiral Way LLC's indemnity claims accrued more than six years later?

IV. STATEMENT OF THE CASE

A. Factual History

1. Exterior Metals' work at the Admiral Way project was complete no later than May 13, 2003.

This case arises out of the construction of the Admiral Way Condominiums located in Seattle, Washington. *CP 169; 183*. The project includes 69 residential units and commercial space. *Id.* Admiral Way LLC was the owner/developer of the project. *Id.* Ledcor was the general contractor. *Id.*

Exterior Metals entered into a subcontract with Ledcor on January 27, 2003, to install certain sheetmetal siding elements at the Admiral Way project. *CP 2111-2155*. Appendix F to that subcontract includes an indemnification agreement. *CP 2139*.

Appendix B lists Exterior Metal's scope of work:

1. Remove and replace metal siding as per directed by Ledcor Industries (USA) Inc.
2. All materials supplied by Ledcor.
3. Work to be completed by March 7, 2003.

CP 2140. Exterior Metals commenced work in early 2003 and

invoiced Ledcor as it completed its work. *CP 2108-2109; 2157-2165*. Invoices were sent on 2/13/2003, 2/21/2003, 2/28/2003, 3/24/2003, and 4/25/2003. *Id.* Records indicate that Exterior Metals returned to the site on May 31, 2003, to install certain air deflectors. That is the last date Exterior Metals performed any work at the Admiral Way project. *CP 2109*. Ledcor's last payment to Exterior Metals was issued on May 12, 2003. *CP 2157*.

2. The Admiral Way Project was "substantially complete" by April, 2003.

The Certificate of Occupancy for the Admiral project was issued on March 14, 2003. *CP 1018; 1820*. Units were marketed in March, 2003, and sold in April, 2003. *CP 1027-1028; 1060-1061*. At his deposition in the underlying claim, Admiral Way LLC proprietor Marc Gartin testified:

Q. So according to my records, you sold the first unit in approximately April of 2003, that's what the unit closed?

A. Correct.

Q. So does that help you with respect to your recollection of when you began marketing the units for sale?

A. I think we started marketing them in March of 2003.

...

Q. Do you know if the first sale was an advance sale or if it was turnkey?

A. It was turnkey.

Id. In other words, units were sold for **immediate occupancy** by April, 2003. Neither Ledcor nor Admiral Way LLC submitted evidence establishing that only *some* of the units were being marketed or sold because others were not ready. There is no dispute that as of April, 2003, the building was **in fact** being “used or occupied for its intended use.”

Ledcor and Admiral Way LLC argue that the trial court should not have applied the **statutory** definition of “substantial completion.” Rather, they propose that the date of “substantial completion” should have been **determined by the architect**, Carl Pirscher, under Section 9.8 of the General Conditions of the Prime Contract. *CP 469*. After the Certificate of Occupancy was issued by the City of Seattle, Mr. Pirscher submitted “more than one hundred pages of punch lists and Field Directives” to be completed before he would decree that the project was “substantially complete.” *CP 1094-1159; CP 452-463*. To this day Mr. Pirscher has not issued a “certificate of substantial completion” for the Admiral Way project, as he claims he “is not aware whether Ledcor ultimately completed all the work identified in the Punch Lists.” *CP 545-46*. It is Ledcor’s position

instead that the date of “substantial completion” was established in a Construction Agreement Addendum dated February 10, 2004, in which Ledcor and Admiral LLC decided to agree that “the Project is complete with the exception of the items listed in the Punch List....” *CP 526-529.*

B. Procedural History

1. The Admiral HOA Litigation

In June, 2007, the Admiral Way Homeowners Association (Admiral “HOA”) hired construction consultant Trinity/ERD (“Trinity”) to conduct an investigation of the Admiral Way building envelope. *CP 566-597.* In July, 2007, the Admiral HOA filed a construction defect lawsuit against Admiral Way LLC. *CP 599-606.* Admiral Way LLC subsequently brought a third party claim against general contractor Ledcor. *CP 615-630.*

Ledcor filed a separate lawsuit alleging various claims against its subcontractors on August 29, 2008, including Exterior Metals. *CP 1969-1980.* An Amended Complaint asserting breach of contract, indemnity and warranty claims was filed on September 23, 2009. *CP 1685; 1703-1705.* Admiral Way LLC and Ledcor settled the Admiral HOA’s lawsuit on July 28, 2009. *CP 664-665.* The trial court granted Admiral Way LLC’s motion to intervene in the

subcontractor action, and Admiral Way LLC filed its Complaint on January 14, 2010. *CP 1869-1896*.

2. Bordak's Motion for Summary Judgment and SQI's Joinder

On August 14, 2009, Bordak filed a Motion for Summary Judgment to dismiss Ledcor's claims for breach of contract, breach of warranty, and indemnity as untimely under the statute of limitations and the statute of repose. *CP 168-180*. SQI filed a partial joinder in Bordak's motion with regard to Ledcor's indemnity and breach of warranty claims only. *CP 420-422*. The motion was continued to January 29, 2010, and additional briefing was allowed. SQI pointed out in a supplemental brief that Ledcor had previously filed a motion in the underlying HOA litigation in which it took the position that the date of substantial completion of the project was March 14, 2003, the date the Certificate of Occupancy was issued. *CP 693; 187; 1005-1006; 1011-1012*.

At the January 29, 2010 hearing, the trial court dismissed Ledcor's breach of warranty claim. On February 1, 2010, the court denied the balance of Bordak's Motion for Summary Judgment and SQI's partial joinder. *CP 1034-1038*. SQI submitted additional briefing in response to the trial court's inquiry at oral argument, establishing that Admiral Way condominium units were **marketed** in

March, 2003, and **sold for occupancy** in April, 2003. *CP 1004-1033*. On February 10, 2010, Bordak filed a Motion for Reconsideration of the trial court's ruling on Ledcor's indemnity claim. *CP 1039-1047*. The trial court ultimately ruled that Ledcor's indemnity claims against SQI and Bordak Brothers were untimely and barred under the statute of repose. *CP 1550-1552*.

Ledcor then filed a "Motion for Reconsideration," or, in the alternative, for Certification under CR 54(b) of the Order granting *Bordak's* Motion for Reconsideration, and for stay of the proceedings in the trial court pending appeal. *CP 1553-1569*. On June 22, 2010, the Court denied Ledcor's "Motion for Reconsideration," stayed the action, and certified the Order dismissing Ledcor's indemnity claims against Bordak and SQI for immediate appeal under CR 54(b). *CP 2089-2092*.

On July 16, 2010, the trial court replaced its June 22, 2010, Order with a subsequent Order in which it concluded that Ledcor's and Admiral Way LLC's indemnification claims against the remaining subcontractors were also untimely under the substantial completion prong of the construction statute of repose. *CP 2096-2098*. The court again certified the dismissal of the indemnity claims for immediate appeal but invited the remaining subcontractor

defendants to file summary judgment motions to dismiss Ledcor's and Admiral Way LLC's indemnity claims against them as untimely. *Id.*

Exterior Metals filed its motion on July 20, 2010. *CP 2099-2107*. On October 25, 2011, the court entered an order granting Exterior Metals' Motion for Partial Summary Judgment. *CP 3734-3736*. The trial court subsequently entered a consolidated order certifying the various orders dismissing Ledcor's and Admiral Way LLC's indemnity claims for immediate review. *CP 4038-4046*.

This Court accepted discretionary review on February 10, 2011.

V. ARGUMENT

A. Standard of Review

CR 56(c) provides for judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

A cause of action must be dismissed if the defendant can demonstrate that the plaintiff is unable to establish a critical element

of its claim. *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988). All facts and reasonable inferences are considered most favorably to the nonmoving party. *Craig v. Washington Trust Bank*, 94 Wn.App. 820, 824, 976 P.2d 126 (1999). The motion should be granted only if, from all the evidence, a reasonable person could reach but one conclusion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). The Court must examine the entire record.

An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party... and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Folsom, 135 Wn.2d at 663.

In this case, Plaintiffs' indemnity claims against Exterior Metals fail as a matter of law because they did not accrue within the

six-year statute of repose, RCW 4.16.310. The undisputed evidence establishes that units at the Admiral Way condominiums were sold for immediate occupancy as of April, 2003. The trial court correctly concluded that the building was “substantially complete” at that time. “Substantial completion” is defined by statute, not by Ledcor’s architect or by contract, as the “state of completion reached when an improvement upon real property may be **used or occupied for its intended use.**” RCW 4.16.310. The building was in fact “being used or occupied for its intended use” more than six years before Ledcor’s and Admiral Way LLC’s indemnity claims accrued. The trial court correctly dismissed the claim on summary judgment.

B. For Purposes of the Statute of Repose, “Substantial Completion” is Defined by Statute as “the State of Completion Reached When an Improvement Upon Real Property May be Used or Occupied for Its Intended Use”

Exterior Metals joins in, adopts and incorporates the argument and authority contained in Section V, Subsection B of SQI’s Brief of Respondent as if fully stated herein.

Like Ledcor’s contract with SQI, the contract between Ledcor and Exterior Metals *does not contain* an agreement to toll the statute of repose, and the arguments presented by SQI apply with equal force to Exterior Metals. *CP 2111-2155.*

C. The Trial Court Properly Determined that the Condominium Building was “Substantially Complete” as of April 2003, Because It was In Fact Being Used or Occupied for Its Intended Use

Exterior Metals joins in, adopts and incorporates the argument and authority contained in Section V, Subsection C of SQI’s Brief of Respondent as if fully stated herein.

Any cause of action which has not accrued within six years after “substantial completion” of construction, or within six years after termination of a contractor’s services, whichever is later, shall be barred. *1519-1525 Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp.*, 101 Wn.App. 923, 6 P.3d 74 (2000). In this case the trial court correctly determined that the Admiral Way condominiums were “substantially complete” as of April, 2003, because the uncontroverted evidence established that condominium units were sold as of that date for immediate occupancy. The building was in fact being “used or occupied for its intended use” at that time. RCW 4.16.310. Exterior Metals performed no work on the project after May 31, 2003. *CP 2109*. Because Ledcor’s and Admiral Way LLC’s indemnity claims accrued more than 6 years later, on July 28, 2009, they are untimely and are barred under the statute of repose.

D. Exterior Metals Requests and Award of Attorney's Fees Under RAP 18.1

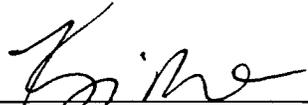
Exterior Metals requests an award of its reasonable attorney's fees and expenses if it prevails on appeal under RAP 18.1(a) and (b), and under Section 7.4 of its subcontract with Ledcor.

VI. CONCLUSION

"RCW 4.16.300 and .310 were adopted to protect architects, contractors, engineers, surveyors and others from extended potential tort and contract liability." *Meneely v. S.R. Smith, Inc.*, 101 Wn.App. 845, 854, 5 P.3d 49 (2000), citing *Hudesman v. Meriwether Leachman Assocs., Inc.*, 35 Wn.App. 318, 321, 666 P.2d 937 (1983). The trial court properly determined on summary judgment that the Admiral Way condominiums were in fact being "used or occupied for their intended use" as of April, 2003. Ledcor's and Admiral Way LLC's indemnity claims accrued more than 6 years later. The indemnity claims are untimely and were properly dismissed as a matter of law.

RESPECTFULLY SUBMITTED this 29th day of July, 2011.

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Sabrina Stevenson hereby certifies that on the 1st day of August, 2011, she caused to be sent the Brief of Respondent Exterior Metals, Inc.; and this Certificate of Service to the below listed parties of record in the above-captioned matter, as follows:

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