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NO. 70635-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EASTLAKE LOFTS CONDOMINIUM ASSOCIATION, as assignee of
Defendant/Third-Party Plaintiff Eastlake & Lynn, LLC,

Appellant,

v.

LORIG ASSOCIATES, LLC, a Washington Limited Liability Company,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Eastlake & Lynn, LLC (“E&L”) was created to develop property at the corner of Eastlake Avenue and Lynn Street in Seattle, Washington. E&L hired Val Thomas, Inc. to act as the Developer for this project.

E&L hired Express Construction to be the general contractor for the Project. E&L and Express Construction agreed to be part of a Wrap-Up insurance program and waive any claims they may have against each other. Joe Borden worked for Val Thomas, Inc. for more than ten years, including when he was the designated Owner’s Representative in the E&L – Express Construction agreement.

Near the middle of 2006, while the Eastlake Lofts Project was well under way, Val Thomas, Inc. began to downsize. Val Thomas, Inc. began subleasing office space from Lorig Associates, LLC (“Lorig”).

On July 1, 2006, Mr. Borden became an employee of Lorig. Val Thomas, Inc.’s other employee, Dawn Frivold, stayed on at Val Thomas, Inc. for several months. Eventually, Ms. Frivold joined Mr. Borden at Lorig. Mr. Borden and Ms. Frivold continued working on the Eastlake Lofts Project as they had with E&L and Val Thomas, Inc.

Years later, the Eastlake Lofts Homeowners Association (“HOA”) filed a construction defect lawsuit against E&L and Mr. Val Thomas.

Because the general contract precluded Mr. Thomas or E&L from suing Express Construction or any other members of the Wrap-Up program, E&L looked for other entities it could bring into the lawsuit. Lorig was one such entity.

Lorig brought a motion for summary judgment dismissal. Lorig sought dismissal of the claims against it because: (1) they were barred by the statute of limitations; (2) E&L could not prove the required connection between any alleged breach and their alleged damages; and (3) the agreement, if any, was with Val Thomas, Inc., not E&L.

The trial court first found that the statute of limitations would prevent E&L from pursuing any claims whatsoever against Lorig having to do with construction defects that they were on notice of as early as July of 2008. The court also found, as to the post-substantial completion warranty work, that E&L failed to present evidence showing what the alleged breach was in coordinating the warranty work and also what damage allegedly flowed from that breach. The trial court also denied E&L's motion for reconsideration.

II. STATEMENT OF ISSUES

1. Did the trial court properly determine the three-year statute of limitation for oral contracts applied?

2. Did the trial court properly conclude that E&L failed to make the required connection between any specific services provided within the three-year statute of limitations and E&L's damages?

3. Did E&L present admissible evidence establishing all elements of a prima facie negligence claim against Lorig?

4. Did the trial court properly conclude that E&L's claims against Lorig arise from the supervising or observation of construction, or the administration of construction contracts?

5. Did the trial court properly determine the agreement to assist in the development of the Eastlake Lofts condominium was not a "continuous services contract"?

III. STATEMENT OF THE CASE

E&L contracted with Val Thomas, Inc. to be the Developer for the Eastlake Lofts condominium project ("Project"). (CP 156-67) Mr. Val Thomas was a shareholder in Developer. (CP 166)

E&L also entered into a contract with Express Construction. (CP 86-120). E&L and Express Construction agreed to be part of a Wrap-Up insurance program and waive claims against each other. (CP 118-20)

Joseph Borden began working for Val Thomas, Inc. in 1996. (CP 81) Mr. Borden began working on the Eastlake Lofts Project in 2004, and was the Project Manager while working for Val Thomas, Inc. (CP 81) He

was the Owners Representative in the January 12, 2006 construction contract between E&L and Express Construction. (CP 95)

After the Project was well underway, Val Thomas, Inc. began downsizing and, in July 2006, Mr. Borden began working for Lorig. (CP 81, at ¶¶ 2, 3)

The Project was substantially complete by July 7, 2007. (CP 82, at ¶ 7) The initial sale of all 17 residential units and both commercial units closed and the owners took possession by December 6, 2007. (CP 82 at ¶ 8)

Reports of construction defects from Tatley Grund, Inc. were provided to E&L in 2008. (CP 82, ¶ 9)

In August 2011, the Association sued E&L and Mr. Val Thomas. (CP 1-11) The Association did not sue Val Thomas, Inc. (CP 1) The E&L – Express Construction agreement barred E&L from suing Express. (CP 118-20)

In February 2012 E&L brought a third-party complaint against Lorig and two entities that provided glass and door products for the project. (CP 31-47)

On September 14, 2012 the Court granted Lorig's motion for summary judgment, finding no evidence establishing a link between Lorig's alleged breach of contract or negligence, and E&L's damages.

(CP 320-323; Report of Proceedings, page 23-24) On October 1, 2012 the Court denied E&L's motion for reconsideration. (CP 360-361)

IV. ARGUMENT

A. Applicable Standards.

1. Standard Of Review.

The standard of review of an order on summary judgment is de novo, with the appellate court engaging in the same inquiry as the trial court. *Brower v. State*, 137 Wn.2d 44, 52, 969 P.2d 42, *cert. denied*, 526 U.S. 1088 (1999).

2. Summary Judgment Standard.

The object and function of the summary judgment procedure is to avoid a useless trial. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

A defendant may move for summary judgment by simply pointing out to the Court that there is an absence of evidence to support the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986). Then the inquiry shifts to the party with the burden of proof at trial, the plaintiff, to establish all elements essential to that party's case. *Id.* In order to make this showing, the party opposing summary judgment must submit "competent testimony setting forth specific facts, as

opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). If a non-moving party fails to make a showing sufficient to establish the existence of an element of that party’s case, and on which that party bears the burden of proof at trial, then summary judgment should be granted. *Young*, 112 Wn.2d at 225. In such situations, there can be “no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of a non-moving party’s case necessarily renders all other facts immaterial.” *Id.*, citing *Celotex*, 477 U.S. at 322-23.

The non-moving party may not rest upon the mere allegations or denials of its pleadings. In order for the non-moving party to prevail on a motion for summary judgment, the party must either, by affidavits or as otherwise provided in the civil rules, set forth specific facts showing that there is a genuine issue for trial. CR 56(e). The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain, but instead “must set forth specific facts that sufficiently rebut the moving party’s contentions.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. Applicable Statute Of Limitations.

1. The Three-Year Statute Of Limitations Applies.

For purposes of the six-year Statute of Limitations, a written agreement must contain all essential elements of the contract, including: the subject matter; parties; terms and conditions; and price or consideration. *Browning v. Howerton*, 92 Wn. App. 644, 649, 966 P.2d 367 (1998), citing *Barnes v. McLendon*, 128 Wn.2d 563, 570, 910 P.2d 469 (1996); *Kloss v. Honewell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995) (citing *Family Med. Bldg. v. DSHS*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985)); *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42 (1983).

A party asserting a written agreement for purposes of applying the six-year Statute of Limitations must prove that each essential element of the alleged contract exists in the writing. *Browning*, 92 Wn. App. at 647-48. If parol evidence is necessary to establish any material element, the contract is partly oral and the three-year Statute of Limitations applies. *Barnes*, 128 Wn.2d at 570; *Cahn*, 33 Wn. App. at 841.

Because E&L's third-party complaint alleged a written contract, Lorig was forced to address whether a three-year or six-year statute of limitations applied. (CP 32 at ¶ 3; CP 70 – 73) In responding to Lorig's Motion, E&L conceded there was no written agreement. (CP 295 at ¶ 4)

Moreover, on appeal, E&L admits the three-year statute of limitations under RCW 4.16.080(3) applies. (Appellant's Brief, page 9) Thus, the trial court properly determined that the three-year statute of limitations under RCW 4.16.080 applied to E&L's claims.

2. Claim Accrued And Statute Of Limitations Began To Run On Pre-Substantial Completion Claims In 2008.

Statutes concerning improvements upon real property and case law interpreting those statutes are well developed in Washington. RCW 4.16.300 – 4.16.320 apply to all claims or causes of action of any kind arising from, among other things, administration of construction contracts for any construction, furnishing construction services, or supervision or observation of construction. RCW 4.16.300. E&L alleged that Lorig agreed to provide development management services for the construction of the Eastlake Lofts condominium. (CP 32, ¶3) For statutory time limitation purposes, claims covered by RCW 4.16.300 may still accrue prior to the beginning of the period of repose created by RCW 4.16.310. *Harmony at Madrona Park v. Madison Harmony*, 143 Wn. App. 345, 352-53, 177 P.3d 755 (2008). RCW 4.16.326 provides certain affirmative defenses to those engaged in furnishing, supervising or observing construction services. This may include the application of the “discovery

rule” to claims for breach of an oral contract. *1,000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 582, 146 P.3d 423 (2006).

E&L admits it was aware of complaints of water intrusion into units and common areas in July, 2008. (CP 295 at ¶ 9; CP 215) E&L cannot ignore a notice of possible defects, and is deemed to have notice of all facts that reasonable inquiry would disclose. *1,000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d at 581; *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998). This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the cause of action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action. *Id.*

Assuming, arguendo, the discovery rule applied to delay the running of the statute of limitations even though the Third-Party Complaint does not allege latent defects, the statute of limitations for alleged construction defects began to run in July, 2008. E&L failed to commence its claims against Lorig until February 2012, more than three years later. (CP 31-47) Thus, the trial Court properly dismissed claims against Lorig having to do with construction defects that E&L was on notice of as early as July 2008. (Report of Proceedings, page 23, lines 12-18)

**C. E&L Failed To Present Admissible Evidence
Establishing A Nexus Between Warranty Supervision Work Within
The Statute Of Limitations, And E&L's Damages.**

To survive summary judgment on a claim for breach of contract, the third-party plaintiffs must prove both a breach and damages sustained as a direct and proximate result of the alleged breach. *Lee v. Bergesen*, 58 Wn.2d 462, 364 P.2d 18 (1961); *Hodges v. Gronvold*, 54 Wn.2d 478, 341 P.2d 857 (1959). There must be a nexus between services performed and the cause of action. *Parkridge Assoc. Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 599, 54 P.3d 225 (2002). The plain language of RCW 4.16.300 describing actions or claims “arising from” various services, shows that the services considered in this assessment must be those that gave rise to the cause of action. *Parkridge*, 113 Wn. App. at 599.

In its claims against E&L, the HOA alleged numerous defects and deficiencies in the original construction of the project. (CP 12-23) Because claims involving defects in the original construction of the building were barred by the statute of limitations, E&L argued its claims involved work Lorig did after substantial completion. After the units were completed and occupied, if a unit owner had a warranty request, Lorig would forward it to E&L's general contractor, Express Construction, who would respond and perform and work required. (CP 304)

In attempting to oppose Lorig's motion for summary judgment, E&L failed to present admissible evidence establishing a causal link between anything Lorig did within the three-year statute of limitations and E&L's cause of action. There is no expert opinion that Lorig's forwarding warranty requests to Express Construction fell below some unspecified standard of care, and that E&L was damaged thereby. The declaration of Mr. Val Thomas describes the involvement of various entities. (CP 294-296) Mr. Thomas does not identify specific actions by Lorig that gave rise to E&L's cause of action.

Lorig never denied performing services after the project was substantially complete. Lorig denied that E&L could come forth with evidence establishing a nexus between services performed after February 16, 2009 and E&L's claims. (CP 67 at #2; CP 68, lines 4-9; CP 76, lines 19-21)

Stating that Lorig provided services within the applicable statute of limitations is insufficient to defeat summary judgment on the merits. E&L failed to present admissible evidence of any nexus or proximate cause between work coordinated by Lorig and E&L's alleged damages, and the trial court properly dismissed its claims.

D. The Trial Court Properly Rejected E&L's Continuous Services Contract Argument.

E&L's attempt to turn the development agreement into a continuous services contract is unsupported by admissible evidence, and contrary to Washington law. (*See, i.e.,* Section IV.B.2., *supra*) Moreover, unlike the cases cited by E&L, this is not a "claim for amounts due" based upon services provided by E&L to Lorig.

Both draft Development Services Agreements which were contemplated by Val Thomas, Inc. but never executed, contained Duration and Termination clauses, evidence that it was not a continuous services contract. (CP 129; CP 146) The only signed Development Agreement (between E&L and Val Thomas Inc.) included a Term of Agreement provision. (CP 159) The warranties provided by E&L to new purchasers were limited by their terms and by the four year statute of limitations in the Washington Condominium Act. RCW 64.34.445; RCW 64.34.452. Thus, the agreement to provide warranty coordination services ended when E&L's warranties to the HOA and unit owners ended.

Finally, Washington law concerning claims involving the construction or administration of construction contracts is well developed and sets forth when claims accrue and the statute of limitations begins to run. *See, i.e.,* Section IV.B.2., and RCW 4.16.300-.326; *1000 Virginia v.*

Vertecs, 158 Wn.2d 566 (2006); *Harmony at Madrona Park v. Madison Harmony*, 143 Wn. App. 345 (2008). E&L's request to adopt a "continuous services contract" theory would obliterate the statute of repose, and would render the contract statute of limitations affirmative defense provided in RCW 4.16.326(1)(g) meaningless.

E. Labelling A Claim "Negligent Construction Management" Instead Of "Negligent Construction" Is A Distinction That Does Not Make A Difference.

E&L assumes that because it found no authority stating that Washington does not recognize a cause of action for negligent construction management, it must be a valid cause of action. E&L is mistaken. In repeatedly rejecting a cause of action for negligent construction, Washington courts make no distinction between general contractors who are physically building the home and those who hire subcontractors to perform all of the work. Those who hire others are not liable for claims of negligent construction management. Our courts have also held that an action for implied warranty of workmanlike performance in construction contracts would be strikingly similar to a cause of action for negligent construction, which is not recognized in Washington. *Warner v. Design and Build Homes*, 128 Wn. App. 34, 42, 114 P.3d 664

(2005), citing *Urban Devel. Inc. v. Evergreen Bld. Prods.*, 114 Wn. App. 639, 59 P.3d 112, *aff'd sub nom.*, 151 Wn.2d 534 (2004).

E&L admits it had a contract with Lorig to perform development management services for the project. (CP 295) Courts hold parties to their contracts to avoid allowing tort and contract remedies to overlap. *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994). E&L cannot maintain a tort claim separate from the parties' contract.

E&L's attempt to rely upon *Michaels v. CH2M Hill*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011), and *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010), is misplaced. For example, in *Michaels*, the question was whether an professional engineering firm is potentially liable when it gives engineering advice, people follow its advice, and that advice is a contributing cause of a collapse of the structure. *Id.* *Affiliated FM* also concerned the scope of a professional engineer's duty.

Unlike these independent duty doctrine cases, Lorig and E&L had a contract. Additionally, Lorig is not a professional engineering firm, and it did not give professional engineering advice.

Moreover, even if E&L's negligence claim was not barred because E&L had a contract with Lorig, and even if a "negligent construction

management” claim was not barred because it was strikingly similar to a claim for “negligent construction”, and even if a negligence claim was not barred by the three-year statute of limitations, dismissal on summary judgment was still proper because E&L failed to present admissible evidence establishing duty, breach, and proximate cause. The trial court properly dismissed E&L’s tort claim.

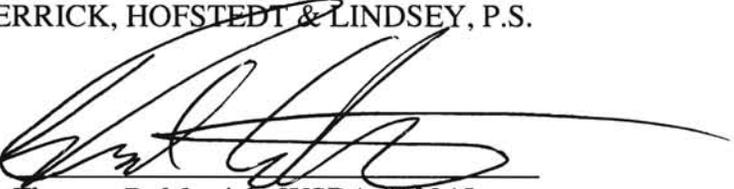
V. CONCLUSION

Faced with condominium construction defect claims, and unable to sue its general contractor, E&L’s prior counsel sued Lorig. The trial court correctly determined that any construction defect claims that E&L knew or should have known about by 2008 were time barred. The trial court also correctly found that E&L failed to present admissible evidence creating a genuine issue of material fact establishing a nexus or proximate cause between work Lorig performed within the statute of limitations, and E&L’s claim.

The trial court properly granted summary judgment dismissal of E&L’s claims, and that decision should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of January, 2014.

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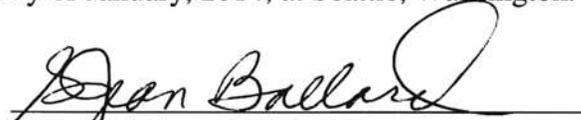
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the **Brief of Respondent**
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED this 3rd day of January, 2014, at Seattle, Washington.


S. Jean Ballard, Assistant to
David S. Cottnair, WSBA #28206