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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,

v.

SQI, INC., Washington Corporation; BORDAK
BROTHERS, INC., an Oregon Corporation, et.al

Respondents.

ADMIRAL WAY LLC'S JOINDER OF LEDCOR INDUSTRIES
(USA), INC.'S BRIEF

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APPEALS

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I. INTRODUCTION

Pursuant to RAP 10.1(g), Admiral Way LLC (hereinafter "Admiral Way") joins the Petitioner's Brief submitted by Ledcor Industries (USA), Inc. (hereinafter "Ledcor"). In addition to adopting by reference Ledcor's entire Brief, Admiral Way respectfully supplements several facts and arguments.

The ultimate issue is whether issuance of a certificate of occupancy by a governmental entity alone, means the project is substantially complete as contemplated by the construction statute of repose (i.e. RCW 4.16.310). If an unequivocal, absolutely no other possible scenario answer is "yes", the statute of repose bars the indemnity claims of Ledcor and Admiral Way and such a summary judgment is proper. If "no", or there is any question/dispute, summary judgment is not appropriate.

II. ASSIGNMENT OF ERROR

Admiral Way joins in the "Assignment of Error" and "Issues Relating to Assignment of Error" as set forth in Ledcor's Brief.

III. STATEMENT OF THE CASE

A. The Evidence Submitted On Summary Judgment Establishes That A Certificate of Occupancy Does Not Mean Substantial Completion

On reconsideration of a prior summary judgment ruling, the Superior Court entered an Order providing that the six year statute of repose bars the indemnity claims of both Ledcor and Admiral Way. CP 1550-52. The Court believed that as a matter of law, the issuance of a certificate of occupancy means that regardless of any other evidence, the project is substantially complete. CP 1550-52. The Certificate of Occupancy was issued on March 14, 2003. CP 1820. The underlying construction defect case was settled on July 28, 2009 (i.e. six years and four

months after issuance of the certificate of occupancy). CP 664-65.

On summary judgment, only one expert provided a declaration to discuss substantial completion in relation to a certificate of occupancy. CP 546. In his Declaration, the project architect provides his extensive qualifications as follows:

I am an architect and the principal of CDA + Pirscher Architects, Inc. ... **I have extensive experience designing multi-use buildings like the Admiral. I have been involved in hundreds of projects from the 1980s to the present. ... I was intimately involved in both the design and construction phases of the project.** Thus I am familiar with issues that arose during construction and the progress of the project.

(Emphasis Added) CP 546 at Par. 2 and 4.

With the above described experience, the project architect submitted a detailed declaration to clearly, unequivocally and without question, set forth that issuance of a certificate of occupancy does not mean a project

is substantially complete. CP 546 at Par. 15. In fact, he testifies that "certificates of occupancy are regularly issued when work remains to be completed on a project." CP 546 at Par. 15. There were no other declarations submitted on summary judgment from any other architects, building officials, certificate of occupancy specialists or anyone else to state or hint at anything different.

At the time the certificate of occupancy was issued, the architect and Ledcor staff were having numerous discussions regarding incomplete work. CP 546 at Par. 5. Specifically, through the spring and summer of 2003, the architect submitted extensive weekly lists detailing hundreds of pages of items needing completion. CP 546 at Par. 6. The architect testifies:

The Punch Lists were more extensive than any such lists I had ever prepared on a project of this kind. Indeed, while typically a punch list contains minor items, the Punch Lists I provided

to Leducor identified several fundamental issues with the Admiral's construction. In fact, to call my lists a "punch list" is actually a misnomer as they are more accurately described as Field Directives given the substantial amount of items needing work and repair by Leducor.

(Emphasis Added) CP 546 at Par. 7.

On April 1, 2003 and two weeks after the certificate of occupancy was issued, the architect sent Admiral Way and Leducor a letter stating the project was not substantially complete and provided additional work items. CP 546 at Par. 8. For example, the April 1 punch list was over 8 pages long and noted issues with the elevator, water leakage and chemical drippings in the garage, insufficient drain slope at the commercial unit, re-coating and re-sloping of the condo units and the disabled ramp needing to be installed per design drawings. CP 546 at Par. 9-10.

Again on April 14, 2003 in a 23-page fax identifying only problems with units on the fourth floor, substantial issues were noted with numerous windows, construction debris and unfinished painting and texturing of all walls and ceilings. CP 546 at Par. 11. By September of 2003, the architect had still not issued a certificate of substantial completion (i.e. meaning that the settlement date for the underlying lawsuit of July 28, 2009 is within the six year statute of repose). CP 546 at Par. 14.

B. The Project Was Not Substantially Complete While Admiral Way Marketed Condominium Units

Admiral Way began marketing condominium units for sale in March of 2003 about the same time as issuance of the certificate of occupancy. CP 546 at Par. 12. As set forth above, however, there was still significant work needing completing on the entire project including each individual condominium unit. Thus, the architect crafted the punch list work to correspond to each

condominium unit number. CP 546 at Par. 12. In this way, when a buyer entered into a contract to purchase a particular unit, Ledcor could give top priority to complete the work in that unit prior to it being turned over to the buyer. CP 546 at Par. 12.

Thus, Ledcor would perform the painting, deck re-sloping work and anything else needed to complete the unit after it was sold but before it was transferred to the buyer. In other words, when each condominium unit was transferred to the buyer, it was "turnkey" meaning that the buyer could move into and take possession of it. While the particular unit would thus be complete and ready for occupancy, there remained other units awaiting completion until they were "under contract" with a new buyer. The fact that individual condominium units were marketed for sale is not indicative that the project was substantially complete. CP 546 at Par. 12.

IV. ARGUMENT

A. No Case Or Statute Equates A Certificate Of Occupancy To Substantial Completion Without Additional Inquiry

The statute of repose defines "substantial completion" as "the state of completion reached when an improvement upon real property may be used or occupied for its intended purpose." See RCW 4.16.310. Thus, the real question is how or whom determines if the "property may be used or occupied for its intended purpose?" The statute provides no additional guidance.

The Washington Court of Appeals previously addressed the issue when the lower court in that case determined that "substantial completion" occurred upon issuance of the certificate of occupancy. See 1519-1521 Lakeview Blvd. Condominium Assoc. v. Apartment Sales Corp., 101 Wn.App. 923, 6 P.3d 74, affirmed 144 Wn.2d 570, 29 P.3d 1249 (2001). In Lakeview, the lower court believed that two "events" established

substantial completion as follows:

In this case, substantial completion, I believe, did occur when the condos were being marketed and a certificate of occupancy had been issued.

(Emphasis Added) See Lakeview at 79. The Lakeview appellant attempted to argue that the lower court erred by holding that issuance of the certificate of occupancy established the date of substantial completion. See Lakeview at 79.

The Court of Appeals affirmed the above lower court holding as follows:

We agree that **in this case**, at the point both events had occurred in August of 1990, the project was substantially completed. Only "punch list" items remained, and **the record does not indicate** that work yet unfinished rendered the project not substantially complete...

(Emphasis Added) See Lakeview at 79. In other words, issuance of a certificate of occupancy and marketing of units were sufficient to establish substantial completion because there was no contrary evidence. With absolutely no evidence

to establish otherwise, the Lakeview Court could only rule one way; there was substantial completion. See Lakeview at 79. By expressly limiting its ruling to "in this case" and "the record does not indicate" otherwise, the Lakeview Court implicitly held that a substantial completion finding is fact specific to each particular and unique case. See Lakeview at 79

Clearly, issuance of an occupancy permit and marketing of units can be "events" to consider when determining whether there is substantial completion. However, the Lakeview Court made it clear that in other factual scenarios, additional factors may give rise to a different ruling.

Unlike Lakeview, there are facts in this case to establish that an occupancy permit does not equate to substantial completion. Again, the project architect unequivocally states that substantial completion did not occur until September of 2003. CP 546 at Par. 14. Further,

there were numerous items that needed completion after issuance of the certificate of occupancy before the project was substantially complete. CP 546 at Par. 7. Even more compelling, while the units were being marketed, the architect testifies that each unit was not actually completed until a buyer executed a purchase agreement and the unit was sold. CP 546 at Par. 12.

In addition to all the above, the Prime Contract between Admiral Way and Ledcor provided that only the architect had authority to certify the project as substantially complete. CP 429, 469. In other words, the parties agreed as between them that only the architect had authority to certify the project and thus implicate the contractual indemnity provisions.

Unlike Lakeview, there are significant facts to establish that substantial completion did not occur upon issuance of the certificate of

occupancy. Frankly, Admiral Way is not aware of one case that stands for the proposition that substantial completion means exactly the same as a certificate of occupancy with no additional inquiry. Ultimately, the statute of repose requires the Court to examine and consider all facts.

B. Legitimate Factual Disputes Should Not Be Decided On Summary Judgment

When considering a summary judgment motion, the Court should consider all reasonable inferences in favor of the non-moving party. See Brown v. Courtesy Ford, 108 Wn. App 683 at 687, 32 P.3d 307 (2001). In this case, as the non-moving parties, all the facts should have been construed in favor of Admiral Way and Ledcor. Since all the facts are at best conflicting as to when substantial completion occurred, summary judgment was not proper.

C. Admiral Way Requests An Award of Fees

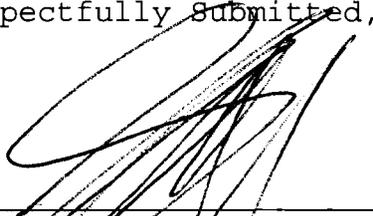
Should Admiral Way be successful with this appeal, it requests that it be awarded its attorney's fees and costs under RAP 18.1 (a) and (b).

V. CONCLUSION

The Superior Court ruled on summary judgment that there were no factual disputes and the certificate of occupancy alone as a matter of law establishes substantial completion. Since there is no statute or case that stands for the proposition and in fact, the Washington Court of Appeals already determined that the situation demands a factual inquiry, summary judgment is not proper in this case. Again, there are significant and legitimate factual disputes. Admiral Way respectfully requests that the summary judgment order be vacated.

DATED this 31st day of May, 2011.

Respectfully Submitted,



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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LEDCOR INDUSTRIES (USA), INC.,)
a Washington Corporation,)
) NO. 65833-6-I
)
) Petitioner,)
)
) DECLARATION OF
) vs.) SERVICE
)
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) SQUI, INC., a Washington)
) Corporation; BORDAK BROTHERS,)
) INC., an Oregon Corporation,)
) et al,)
)
) Respondents.)
)

I, Leslie Kay Peppard, hereby certify under penalty of perjury under the laws of the State of Washington that on May 31, 2011, I caused to be filed with the Court, via ABC Legal Messengers Incorporated, the originals of the following documents:

- 1. Admiral Way LLC's Joinder of Ledcor Industries (USA), Inc.'s Brief; and
- 2. Declaration of Service.

and served copies of the above-named documents upon:

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SIGNED in Seattle, Washington, this 31st day
of May, 2011.


Leslie Kay Peppard