IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BORDAK BROTHERS, INC., a Washington corporation,

Plaintiff,

v.

PACIFIC COAST STUCCO, LLC,

Defendant.

LEDCOR INDUSTRIES (USA), INC., a Washington corporation; and ADMIRAL WAY, LLC, a Washington limited liability company,

Appellants,

v.

SQI, INC., a Washington corporation; SCAPES & CO., INC., a Washington corporation; BORDAK BROTHERS, INC., a Washington corporation; UNITED SYSTEMS, INC., a Washington corporation; THE PAINTERS, INC., a Washington corporation; COATING UNLIMITED, INC., a Washington corporation; EXTERIOR METALS, INC., a Washington corporation; SKYLINE SHEET METAL, INC., an Oregon corporation; ROESTEL'S MECHANICAL, INC., a Washington corporation; and STARLINE WINDOWS, INC., a Washington corporation,

Respondents.

)	No. 65833-6-I
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)	DIVISION ONE
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)	UNPUBLISHED
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)	FILED: July 2, 2012

Cox, J. — The statute of repose bars all causes of action that arise from construction, alteration, or repair of any improvement to real property where the

action does not accrue within six years after the later of two dates.[1] One date is the date of "substantial completion" of construction. The other is the date of "termination of services" that is enumerated by statute.

In this case, it is undisputed that the causes of action that Ledcor Industries (USA), Inc. (Ledcor) and Admiral Way LLC (Admiral) assert against subcontractors to Ledcor accrued on July 28, 2009. The trial court properly determined on summary judgment that substantial completion of construction of the project was in April 2003. That is more than six years before the accrual of the causes of action in this case. Moreover, there is no nexus between work that subcontractor SQI, Inc. performed in 2005 and its prior work that ended before substantial completion of the project in April 2003. Accordingly, the work that SQI performed in 2005 does not constitute the "termination of services." Therefore, we affirm summary dismissal of the claims because they are barred by the statute of repose.

Admiral, an owner developer, and Ledcor, a general contractor, entered into a prime contract to build a mixed-use project in West Seattle. Ledcor hired subcontractors to work on the project. Among these subcontractors who performed work were Bordak Brothers, Inc. (Bordak), SQI, Inc., Exterior Metals, Inc., Skyline Sheet Metal, Inc. (Skyline), Starline Windows, Inc. (Starline), and Scapes & Co., Inc. (Scapes). Each subcontractor agreed to indemnify Ledcor from all claims arising out of its own liability.

[1] RCW 4.16.310.

On March 14, 2003, the City of Seattle issued a certificate of occupancy for the residential portion of the project. The commercial portion of the project, which consisted of a Bartell Drugstore, was not included in this certificate.

Also in March 2003, Admiral began marketing the project's condominiums. The first sale closed in April 2003, and owners began moving in that month.

The prime contract designated the project's lead architect, Carl Pirscher, to issue a certificate of substantial completion when he believed the project was substantially complete. In April 2003, Pirscher refused to issue a certificate of substantial completion. He believed that there was still fundamental work that had to be performed before the project would be substantially complete. Admiral removed Pirscher from the project in September 2003 to save money. In February 2004, Ledcor and Admiral executed a Construction Agreement Addendum in which they contractually agreed that the project was substantially complete. None of the subcontractors on the project were parties to this agreement.

In June 2007, Trinity ERD, a construction consultant, conducted an investigation of the project and concluded that there were multiple deficiencies with the project's construction. The Admiral Condominium Owners' Association ("HOA") sued Admiral for defective construction. Admiral impleaded Ledcor for alleged defective construction performed by it and its subcontractors. In 2008, Ledcor commenced this action against the subcontractors. The essence of

these claims is that Ledcor seeks indemnification for allegedly faulty work by the subcontractors. On July 28, 2009, the HOA, Admiral, and Ledcor settled the HOA's lawsuit.

Shortly thereafter, Bordak moved for summary judgment on Ledcor's indemnity claims based on the substantial completion prong of the statute of repose. SQI joined Bordak's motion in part. Admiral and Ledcor opposed the motions, claiming that genuine issues of material fact existed. The trial court denied the motions.

Bordak moved for reconsideration. In its response to this motion, Ledcor first advanced the argument that SQI's termination of services on the project in 2005 also fell within the six year period specified by the statute of repose. Ledcor advanced this argument as an alternative basis for the court to deny the motion for reconsideration for denial of summary judgment. The trial court granted the motion and summarily dismissed Ledcor's indemnity claims against Bordak and SQI.

Exterior Metals, Skyline, Starline, and Scapes also moved for summary judgment on Ledcor's indemnity claims. The trial court granted their motions. The court designated all the orders granting summary judgment for immediate review under Civil Rule 54(b) and certified the orders for review pursuant to RAP 2.3(b)(4). We accepted certification under RAP 2.3(b)(4) and granted discretionary review.

STATUTE OF REPOSE

Ledcor and Admiral argue that the trial court erred in dismissing the indemnity claims because there were genuine issues of material fact when "substantial completion" of construction occurred. Specifically, they claim that the architect's opinion of "substantial completion" creates a genuine issue of material fact. They also claim that the certificate of occupancy cannot alone establish "substantial completion." Finally, they claim that the Construction Agreement Addendum, in which they agreed between themselves that "substantial completion" did not occur until February 2004, also creates a material factual issue. We disagree with all of these arguments.

A moving defendant meets its initial burden on summary judgment by showing that there is an absence of evidence to support the plaintiff's case.[2] Then, the inquiry shifts to the plaintiff to set forth specific facts demonstrating a genuine issue for trial.[3] An order granting summary judgment should be affirmed if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law.[4] "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.'"[5]

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[2] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

[3] Id.

[4] CR 56(c).

[5] Owen v. Burlington Northern and Santa Fe R.R. Co., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (quoting Hartley v. State, 103 Wn.2d 768, 775, 698

Summary judgment orders are reviewed de novo, taking the evidence and all reasonable inferences from it in the light most favorable to the nonmoving party.[6] We review a motion for reconsideration for an abuse of discretion.[7]

The primary issue in this case is whether the statute of repose, RCW 4.16.310, bars Ledcor's claims against the subcontractors. The statute states two ways in which claims are barred based on either the date of "substantial completion" of construction or the date of "termination of services." The later of these two possible dates controls whether a cause of action is barred:

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after ***substantial completion of construction***, or during the period within six years after the ***termination of the services enumerated in RCW 4.16.300***, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred . . . .[8]

Whether there are genuine issues of material fact with respect to either or both dates is at issue in this case. We address each prong, in turn, below.

Substantial Completion

P.2d 77 (1985)).

[6] Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

[7] Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

[8] RCW 4.16.310 (emphasis added).

The trial court initially denied the summary judgment motions of Bordak and SQI. But on Bordak's motion for reconsideration, the trial court determined that summary judgment was appropriate. In doing so, it specifically noted that it concurred with SQI's analysis of 1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corporation[9] in its supplemental reply brief.

Under the statute of repose, 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."[10] Significantly, this definition does not require that a project be completely finished, only that it be substantially complete. Also, the definition does not require actual use of the project, only that it "***may*** be used or occupied for its intended use."[11]

In Lakeview this court considered whether the defendant contractors were entitled to summary judgment under the statute of repose.[12] There, the contractors were hired to design and provide engineering and construction services for several single family residences built on a steep hill in Seattle.[13]

In June 1990, the condominiums were featured in the local papers as the "Home of the Month."[14] An open house was held on June 24, 1990, during which

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[9] 101 Wn. App. 923, 6 P.3d 74 (2000).

[10] RCW 4.16.310.

[11] Id. (emphasis added).

[12] Lakeview, 101 Wn. App. at 928-29.

[13] Id. at 926-27.

[14] Id. at 927.

hundreds of visitors viewed the condominiums.[15] On August 27, 1990, the City of Seattle issued a certificate of occupancy for the properties.[16]

On January 3, 1997, the land beneath the condominiums began to slide down the hill and they were substantially damaged as a result.[17] They remained vacant after that date.[18]

The condominium association sued the contractors under various legal theories.[19] The contractors moved for summary judgment based on the statute of repose.[20]

The trial court granted the contractors' motion, deciding that the building was substantially complete in August 1990 and, therefore, the condominium association's claims did not accrue within six years.[21] In deciding when substantial completion occurred, the trial court explained that by August the condominiums had been marketed, a certificate of occupancy had been issued, and there was no evidence that the property was not substantially complete.[22]

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[15] Id.

[16] Id.

[17] Id. at 928.

[18] Id.

[19] Id.

[20] Id.

[21] Id. at 932.

[22] Id.

Furthermore, the "punch list" items that remained to be completed did not alter the fact that substantial completion had occurred.[23] This court affirmed.[24]

Here, a certificate of occupancy for the residential portion of the project was issued on March 14, 2003. The record is silent on whether or when the commercial portion of the project may have been used or occupied for its intended purpose. In any event, Ledcor does not appear to have specified whether any of its claims in this action relate to the commercial space.

The subcontractors presented evidence that Marc Gartin, a principal of Admiral, began marketing the condominiums in March 2003 as "turnkey" units, meaning "[s]upplied, installed, or purchased in a condition ready for immediate use, occupation, or operation . . . ."[25] He explained that he did so because he "felt [the project] was complete at that point, except for some pickup items."[26] The first unit closed in April 2003. Additionally, this record shows that in Ledcor's summary judgment motion in its litigation with the HOA, it stated that "new homeowners proceeded to move into (and to inhabit) their new homes" during that same time period.[27] Thus, by April 2003, the city had issued a certificate of occupancy and the units were occupied by purchasers.

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[23] Id.

[24] Id. at 933.

[25] American Heritage Dictionary 1929 (3d ed. 1992).

[26] Clerk's Papers at 1330-31.

[27] Id. at 1057.

Based on this record, the trial court granted Bordak's motion for reconsideration, entering summary judgment dismissing Ledcor's claims against both Bordak and SQI. The trial court then granted summary judgment for the remaining subcontractors based on a similar analysis.

In its CR 54(b) order, the trial court explained why summary judgment was proper:

> [T]his Court determined that the date of substantial completion, which is normally a fact-based inquiry, could be determined under the facts of this case as a matter of law because a Certificate of Occupancy was issued in March 2003 and certain units at the project were sold in April 2003 and that any remaining defects in the project did not prevent its use for its intended purpose. Based on that evidence, this Court held that substantial completion of the Admiral project occurred, as a matter of law, no later than April 2003.[28]

The analysis is correct. As in Lakeview, the City of Seattle issued a certificate of occupancy for the residential portion of the project in March 2003. That same month, Admiral began marketing condominium units as turnkey sales. Furthermore, according to the record, homeowners were moving into the condominiums units in April 2003.

The combination of these factors supports the conclusion that construction on the project was "substantially complete" by April 2003. That is because the condominium units were actually being used and occupied for their intended use at that time. This was more than six years before July 28, 2009, the date of the settlement of the HOA litigation that triggered the accrual of the

[28] Id. at 4040-41.

causes of action in this case. Therefore, these actions are time barred. Summary judgment in favor of the subcontractors based on this prong of the statute was proper.

Ledcor and Admiral argue that the subcontractors agreed to a provision in the prime contract that specified that Pirscher, the project architect, would determine the date of "substantial completion." According to them, his declaration creates a genuine issue of material fact whether that date ever occurred. We disagree.

We first clarify that Ledcor and Admiral conceded at oral argument that they do not contend that the subcontractors waived their right to assert the statute of repose as a defense to the claims in this case. Thus, the main issue is whether the architect's declaration creates a genuine issue of material fact.

In his declaration, Pirscher relies on an April 1, 2003, punch list to show that there were fundamental construction issues with the elevator, garage, decks, and certain ramps. These items do not appear to be issues that would preclude the project from being used or occupied for its intended use. And, information as of April 1 does not tell us what was completed during April 2003, the date the trial court held substantial completion occurred as a matter of law. Furthermore, the punch list includes a number of items that are crossed out, the meaning of which is unclear. But, most importantly, nowhere in Pirscher's declaration does he affirmatively state that the project could not be used for its intended purpose as of the end of April 2003. Therefore, this declaration does

not create a genuine issue of material fact whether any defects remained as of April 2003 that prevented the use of the project for its intended purpose.

Ledcor also argues that the 2004 addendum creates a genuine issue of material fact regarding substantial completion. But the addendum is simply an acknowledgment by Admiral and Ledcor that the project was "complete with the exception of the items in the Punch List" in February 2004. Nothing in the addendum states that the project was ***not*** used or occupied for its intended purpose in April 2003. We also note that none of the subcontractors were parties to this addendum. Therefore, this addendum between Admiral and Ledcor does not raise a genuine issue of material fact as to their claims against the subcontractors.

Ledcor also argues that, under Washington law, the statute of limitations may be tolled or modified by a contractual agreement. Statutes of limitations are of a different nature than statutes of repose and the general rule is that they are not treated the same.[29] As such, Ledcor's reliance on cases involving the statute of limitations is not persuasive.

Ledcor also relies on two cases from other jurisdictions, which hold that parties to a contract may toll or modify a statute of repose: McRaith v. BDO Seidman, LLP,[30] and First Interstate Bank of Denver v. Central Bank & Trust Co. of Denver.[31] In both cases, the parties' contracts included specific provisions

[29] Rice v. Dow Chemical Co., 124 Wn.2d 205, 212, 875 P.2d 1213 (1994).

[30] 391 Ill. App.3d 565, 909 N.E.2d 310 (Ill. App. Ct. 2009).

[31] 937 P.2d 855 (Colo. App. Ct. 1996).

related to the tolling of any time-related defenses.[32] Here, there is no such provision explicitly tolling or modifying the statute of repose or any other time-related defense. Therefore, these cases are not persuasive.

Ledcor unsuccessfully attempts to distinguish Lakeview in other ways. First, it argues that this project was larger and more complex than the condominium project in that case. But the plain language of the statute of repose does not require any distinction based on size or complexity of a project. And Ledcor cites no authority explaining why either size or complexity of a project should impact substantial completion of construction. Accordingly, we need not consider this argument any further.[33]

Second, Ledcor argues that Lakeview is distinguishable because there is evidence here of ongoing damage and uncompleted work when the certificate of occupancy was issued and there was no such evidence in Lakeview. But, the only evidence cited by Ledcor is Pirscher's declaration and punch list. As discussed above, Pirscher's opinion as to the date of substantial completion

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[32] McRaith, 391 Ill. App.3d at 570 ("BDO hereby agrees that the period (hereinafter referred to as the 'Tolling Period') commencing on July 26, 1997, and ending on June 30, 1998, shall be excluded from the calculation of any limitations or other time-related periods for purposes of any statute of limitations, doctrine of laches, or any other time-related defenses applicable . . . ."); First Interstate Bank, 937 P.2d at 860 ("As to any statute of limitations, doctrine of laches, or other similar time limit applicable to any claim that [plaintiff] may have against [defendant] relating to the Bonds, [defendant] agrees to toll the running of such time period . . . .") (alterations in original).

[33] See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

does not raise a genuine issue of material fact here. There is nothing in the record to show that the project was not ready for occupancy for its intended use. Therefore, this is not a basis for distinguishing Lakeview.

Third, Ledcor argues that the trial court erred to the extent that it held a certificate of occupancy is conclusive and unrebuttable evidence of substantial completion. The trial court made no such holding. Rather, as the trial court's order plainly states, it determined that the project was substantially complete because a certificate of occupancy was issued, units were being marketed and sold, and no remaining defects prevented the project from being used for its intended purpose.

Ledcor also argues that substantial completion only occurs when the entire project may be used for its intended purpose and that there is a genuine issue of material fact whether this standard was met. Ledcor argues that the project was not substantially complete because the certificate of occupancy did not include the retail portion of the mixed use project. But it cites nothing in the record to show that the retail portion was not ready for use or occupancy for its intended purpose in April 2003. And Ledcor fails to specify what, if any, claim relates to the retail portion of the project. Furthermore, the plain language of the statute of repose includes no such mandate.[34] Therefore, Ledcor has not met its burden to present a genuine issue of material fact.

[34] RCW 4.16.310 ("The phrase 'substantial completion of construction' shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use.").

Ledcor relies upon Smith v. Showalter[35] and North American Capacity Insurance Co. v. Claremont Liability Insurance Co.[36] for the proposition that the entire project must be complete for substantial completion to occur. Neither case supports this argument.

In Smith, Division Three considered whether substantial completion occurred when a home builder completed electrical wiring in a single room or, instead, after he finished wiring the entire house. The court held that the term "improvement" in the statute of repose cannot refer to a single room in a home, but must refer to the entire home.[37]

Ledcor seeks to draw an analogy between a single room and the entire house in that case and the residential portion of this project and the entire project. There is no analogy. In the case of a house, completion of a single room does not allow an owner to use the house for its intended purpose. In contrast, completion of a condominium unit, particularly on a turnkey basis, will allow the owner such use. That is true regardless of the status of the entire project. In short, Smith is not helpful.

Ledcor also relies on North American Capacity, a California Court of Appeals case. That reliance is misplaced.

There, the court addressed whether construction of a home was

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[35] 47 Wn. App. 245, 734 P.2d 928 (1987).

[36] 177 Cal. App. 4th 272, 99 Cal. Rptr. 3d 225 (2009).

[37] Smith, 47 Wn. App. at 250-51.

completed under the terms of an insurance policy.[38] The policy defined completion as "[w]hen that part of the work done at a job site ***has been put to its intended use*** . . . ."[39] The court held that, under the terms of the policy, the trial court did not err in finding that the date of completion was the date when all of the construction was complete, not when the family moved into the home.[40]

Here, we are concerned with the Washington statute of repose, not the terms of an insurance policy whose definitions are different from the wording of our statute. Therefore, North American Capacity does not require reversal.

We note that, on appeal, Ledcor and Admiral do not argue that the trial court erred in dismissing the indemnity claims against Starline. Therefore, any argument that summary judgment was not proper for Starline is waived.

To summarize, there are no genuine issues of material fact as to the date of substantial completion of construction: April 2003. The trial court properly granted summary judgment on this basis.

Termination of Services

Ledcor argues, in the alternative, that the trial court erred in summarily dismissing the claim against subcontractor SQI based on the termination of services prong of the statute of repose. We hold that there are no genuine issues of material fact that the termination of services of prong applies to SQI in

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[38] North American Capacity, 177 Cal. App. 4th at 285-86.

[39] Id. at 286.

[40] Id. at 286-87.

this case.

For contractors who perform final services on a project, the statute of repose begins to run from the date their last service was provided.[41] For all other contractors, it begins to run from the date of substantial completion.[42] "The plain language of RCW 4.16.300, describing actions or claims 'arising from' various services, shows that the services considered in [the termination of services prong] must be those that gave rise to the cause of action."[43] In other words, there must be a nexus between the services performed after the date of substantial completion and the cause of action in order for the termination of services prong to extend the statute of repose.

Here, Ledcor argues that summary judgment was improper because SQI's services were not terminated until May 2005. Ledcor submitted evidence below showing that SQI performed roofing services in May 2005 in order to bring existing roofing back into warranty compliance. But none of the evidence shows that there was a nexus between the work performed by SQI in May 2005 and the original work performed by SQI in 2002, which gave rise to this cause of action. Therefore, Ledcor failed to raise a genuine issue of material fact whether SQI's termination of services occurred after April 2003.

Ledcor appears to argue that summary judgment was improper because

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[41] Lakeview, 101 Wn. App. 930.

[42] Id.

[43] Parkridge Assocs., Ltd. v. Ledcor Indus., Inc., 113 Wn. App. 592, 599, 54 P.3d 225 (2002).

there was evidence that SQI's 2005 roofing work was defective. Because the indemnity claims at issue here are based only on the 2002 work, we express no opinion on whether Ledcor has any surviving claim based solely on indemnification for work performed in 2005.

In its reply brief, Ledcor argues that SQI is not entitled to relief under the termination of services prong because it did not request such relief in its joinder of Bordak's motion for summary judgment. But we need not consider arguments raised for the first time in a reply.[44]

Finally, Ledcor claims that Bordak and Scapes also terminated their services after July 2003, extending their liability under the statute of repose. But nothing in the evidence cited by Ledcor states the date on which Bordak or Scapes last provided services on the project. Therefore, Ledcor does not raise a genuine issue of material fact that SQI's services terminated after the date of substantial completion.

ATTORNEY FEES

All parties on appeal, except Starline, argue that they are entitled to attorney fees as the prevailing parties under their contracts. We hold that an award of fees is premature at this juncture of the case.

The contractual provisions for fees in this case entitle the prevailing party to an award of reasonable attorney fees. That will depend upon the final

[44] See Cowiche Canyon Conservancy, 118 Wn.2d at 809 ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

determination of all claims before the trial court. The award of attorney fees for appellate representation shall abide the final disposition of the cause.[45] Accordingly, we decline to award fees now. Our holding is without prejudice to the trial court awarding fees, for trial and appeal, on proper application to it.[46]

We affirm and remand for further proceedings.

Cox, J.

WE CONCUR:

Spearman, A.C.J.

Appelwick, J.

[45] Perry v. Moran, 111 Wn.2d 885, 888, 766 P.2d 1096 (1989).

[46] See RAP 18.1(i).