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PAYMENT TRIGGERS STATUTE OF REPOSE IN *CYPRESS FAIRWAY*

Construction Law Section

Chairs: Erik Raines - Hill Ward Henderson; and Edward J. Kuchinski - Sivyler, Barlow & Watson, P.A.



In a case decided last year, the Fifth District Court of Appeal held that the 10-year statute of repose began to run when final payment under the contract occurred, rather than the date on which the contractor completed its work. In *Cypress Fairway Condominium v. Bergeron Construction Co.*, 164 So. 3d 706 (Fla. 5th DCA 2015), the condominium association brought construction defect claims on behalf of the unit owners, as well as claims assigned to it by the general contractor.

The central issue in the case was whether the statute of repose commenced on the date the contractor completed its work and made its final application for payment or the date final payment was tendered to the contractor. In *Cypress Fairway*, the viability of the claims hinged on the answer to this question because work was completed on January 31, 2001, final payment was made on February 2, 2001, and the claims against the contractor were not filed until February 2, 2011. Thus, if the

contractor's completion of work triggered the statute of repose, the claims would be barred.

The trial court dismissed the claims as time barred and explained "the Legislature intended that the date of completion of the contract had to do with the date of completion of the construction that would have been done under the contract, *not the date of final payment.*" *Id.* at 708 (emphasis added). The Fifth DCA reviewed the language of section 95.11(3)(c), Florida Statutes, which reads in relevant part: "[T]he action must be commenced within 10 years after ... the date of completion ... of the contract."

In contrast with the trial court, the Fifth DCA held the contract was not "completed" on the date when work was finished. Rather, it held that "[c]ompletion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor." *Cypress Fairway*, 164 So. 3d at 708. Thus, the court reasoned completion of performance by the contractor failed to trigger the period of repose, because the contract was



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not completed until tender of final payment.

Recognizing the *Cypress Fairway* interpretation could potentially allow owners to self-determine an infinite period of repose, the Florida Legislature introduced two companion bills in the House and Senate (House Bill 297 and Senate Bill 316), both of which would

amend section 95.11(3)(c) to make clear that completion of work by the contractor triggers the period of repose. The relevant language reads: "The date of completion of the contract ... is the last day during which the ... contractor furnishes labor, services, or materials, excluding labor, services, or materials relating to the correction of deficiencies in previously performed work or materials supplied." It will be interesting to see the results of the 2016 legislative session and the impact it may (or may not)

have on this key construction issue concerning repose.



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