

Fourth DCA Rules Chapter 558 Notice of Defect Can Constitute Commencement of Action Giving Plaintiffs More Time to File Suit

September 19, 2018

On September 12, the Fourth District Court of Appeal ruled that a Chapter 558 notice of defect can be considered the “commencement” of a construction defect action. *Robert Gindel, et al. v. Centex Homes, et al.*, 2018 WL 4362058 (Fla. 4th DCA Sept. 12, 2018).^[1] Generally, prior to *Gindel*, most lawyers would have said an action isn’t commenced until the filing of a lawsuit. The *Gindel* decision changes that notion, at least in the context of construction defect litigation.

By March 31, 2004, the *Gindel* plaintiffs, a collection of several homeowners, took possession of their townhomes, which were constructed by Centex. On February 6, 2014, the plaintiffs discovered a construction defect, and provided a pre-suit Chapter 558 notice of defect to Centex. On May 2, 2014, the plaintiffs filed their lawsuit.

Centex filed a motion for summary judgment asserting that the plaintiffs’ lawsuit was barred by the statute of repose. The statute of repose for construction defects states that an “action founded on the design, planning, or construction of an improvement to real property . . . must be commenced within 10 years after the date of actual possession by the owner[.]” Fla. Statute § 95.11(c)(3). The plaintiffs argued that the issuance of the Chapter 558 notice of defect was the act that commenced the action for purposes of the application of the statute of repose. The Palm Beach County Circuit Court rejected the plaintiffs’ argument and granted Centex’s motion, ruling that the plaintiffs’ action was commenced as of the date the lawsuit was filed, which was more than 10 years after the date the plaintiffs took possession of the townhomes, and thus barred by the statute of repose.

The Fourth DCA disagreed with the lower court’s ruling, and reversed and remanded the case because “compliance with the pre-suit notice requirements of Chapter 558 constitutes an ‘action’ for purposes of the statute of repose in the context of the improvement of real property.” The

mandatory nature of the Chapter 558 notice and the fact that the notice is a procedure that must be complied with before filing suit took center stage for the Fourth DCA's opinion. The Fourth DCA did acknowledge the existence of Chapter 558's stay provision, which allows a plaintiff to file a lawsuit prior to sending the Chapter 558 notice, but wrote that "this provision has no bearing on whether an action was commenced before the statute of repose period lapsed."

For construction defect cases, plaintiffs are afforded a bit more breathing room now that a Chapter 558 notice is considered the "commencement" of a construction defect action. The *Gindel* decision doesn't impact the rights of developers and general contractors under Fla. Statute § 95.11(c)(3) to file crossclaims, counterclaims, and third-party claims "up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred." It is unclear how the *Gindel* decision will impact existing litigation with a potential statute of repose issue.

Centex may appeal the Fourth DCA's ruling to the Supreme Court of Florida. Carlton Fields will monitor the situation closely. Do not hesitate to contact any member of our construction practice group if you have questions about the *Gindel* decision or any other construction contract or litigation matter.

[1] This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

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