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Colorado Supreme Court Spring Real Estate Round-Up: *Forest City v. Rogers, In re Goodman v. Heritage Builders, McShane v. Stirling Ranch Property Owners Association*

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The Colorado Supreme Court recently issued several topical real estate opinions. They address (i) whether privity of contract is required to bring a breach of implied warranty of suitability claim; (ii) the parameters for timeliness of third party claims in construction defect cases; and (iii) the scope of an exculpatory clause that protects, by its terms, a HOA's internal board but not the HOA itself. These cases have notable implications for developers, builders, associations, and homeowners alike.

Forest City v. Rogers

In *Forest City*, the Court held, because breach of the implied warranty of suitability is a contract claim, privity of contract must exist between the developer and a homeowner for the homeowner to bring a claim against the developer. Forest City, the master developer of the Stapleton neighborhood on the old Stapleton Airport site in Denver, subdivides the land and sells lots to homebuilders. Forest City also selects the styles of homes that may be built in each portion of the neighborhood to maintain uniformity of design and architectural character. Infinity Home Collection at Stapleton, LLC ("Infinity") purchased a vacant residential lot from Forest City and contracted with plaintiff Rogers to construct a home on the lot. Rogers paid Infinity extra to include a finished basement. After Rogers moved into the home, he noticed the basement's sump pump was discharging more frequently than normal. Ultimately, the build-up of

water and calcite in the drain around the house rendered the basement uninhabitable.

Rogers sued Forest City, alleging, among other things, breach of the implied warranty of suitability. On appeal, the Court addressed whether privity of contract is required for a homeowner to bring such a claim against a developer. As the basis for his claim, Rogers alleged both Forest City and Infinity had control over the choice of design for the home. Thus, Rogers reasoned, Forest City had impliedly warranted the property was suitable for a home with a basement. Forest City maintained that it merely applied its standard architectural guidelines and provided an unimproved lot for development by Infinity. Forest City further maintained that it was not in privity of contract with Rogers and could not be liable to Rogers for defects in the design of the home.

The Court reaffirmed prior opinions that laid out a three-part test for whether an implied warranty of suitability exists: (i) land is improved and sold for a particular purpose; (ii) a vendor has reason to know that the purchaser is relying upon the skill or expertise of the vendor in improving the parcel for that particular purpose; and (iii) the purchaser does in fact so rely. The Court reasoned that, because a warranty is an express or implied promise that "something in furtherance of the contract is guaranteed by one of the contracting parties", a claim for breach of any warranty—whether express or implied—is premised on privity of contract. Because Rogers was in privity of contract with Infinity but not Forest City, Forest City could not be liable to Rogers for breach of a contract warranty.

Post-*Rogers*, Developers and homebuyers alike should be aware that courts will examine whether privity of contract exists between two parties as a threshold issue in the context of a claim for breach of an implied warranty. The fact that a developer has exercised some control over design and approval of a home will not overcome a lack of privity.

In re Goodman v. Heritage Builders

In *Heritage Builders*, the Court applied principles of statutory interpretation to conclude that third-party claims in construction defect cases are timely so long as they are brought before the ninety-day time frame laid out in C.R.S. § 13-80-104(1)(b)(II), irrespective of the statutes of limitation and repose laid out in other sections of Colorado's construction defect statutes. The case concerned design and construction of a single-family home in Pitkin County. Heritage Builders, Inc. ("Heritage") constructed the home for the original property owners. Goodman purchased the home from them several years later. Within months, Goodman discovered alleged construction defects in the home and gave notice to Heritage of its construction defect claims. Heritage in turn sent notice to Studio B Architects ("Studio B") and Bluegreen, Inc. (Bluegreen) alleging design deficiencies.

In the lawsuit that followed, Heritage brought cross-claims against Studio B and Bluegreen. Studio B and Bluegreen filed a motion for summary judgment, arguing

Heritage's third-party claims were barred by the six-year statute of repose set out in C.R.S. § 13-80-104(1)(a). The trial court entered summary judgment in favor of Studio B and Bluegreen. Finding the issue to be important and a matter of statewide concern, the Court assumed original jurisdiction under C.A.R. 21 to address the timeliness of Heritage's third-party construction defect claims.

Construction defect claims are generally subject to a two-year statute of limitations per C.R.S. § 13-80-102 and a six-year statute of repose per C.R.S. § 13-80-104(1)(a). A series of Colorado Court of Appeals opinions held that third-party claims brought after the six-year statute of repose were barred, even if they were brought before the ninety-day period set forth in C.R.S. § 13-80-104(1)(b)(II). The Court overruled these opinions because "they render the controlling language of C.R.S. § 13-80-104(1)(b)(II) superfluous." Because C.R.S. 13-80-104(1)(b)(II) states that it applies "notwithstanding" other statutory sections, the Court held the two-year statute of limitations and six-year statute of repose to be inapplicable to third-party construction defect claims.

The Court reaffirmed its prior interpretation that C.R.S. § 13-80-104(1)(b)(II) allows third-party claims to be brought, irrespective of the two-year statute of limitations and six-year statute of repose, so long as they are brought during the construction defect litigation or within ninety days following the date of judgment or settlement.

McShane v. Stirling Ranch Property Owners Association

In *McShane*, the Court analyzed a HOA Declaration and Design Review Board Design Guidelines that expressly exculpated the Design Review Board from liability associated with review and approval of architectural plans, but were silent as to exculpation from liability of the Association itself. The Design Review Board approved architectural plans for the McShanes' home that were later found to be in violation of Garfield County's height restrictions. The McShanes received a stop-work order mid-construction, causing them to hire a new architect and go through two additional rounds of review with the Design Review Board. Alleging more than $260,000 in damages, they sued both the Design Review Board and the Association. The trial court concluded, and the Court of Appeals upheld, that the exculpatory clauses in the HOA Declaration and Design Guidelines were valid and protected both the Association and the Design Review Board, barring the McShanes' claims.

The Court focused on two provisions of HOA Declaration and Design Guidelines. The pertinent section of the HOA Declaration read: "[n]either the Design Review Board nor any individual Design Review Board member will be liable to any person for any official act of the Design Review Board . . . [i]n all events, the Design Review Board will be defended and indemnified by the Association in any such suit or proceeding. . . ." The pertinent section of the Design Guidelines read that the Design Review Board is exempt from liability for "any damages, loss, or prejudice suffered or claimed on account of . . . approving or disapproving any plans . . . constructing or performing any

work . . . [or] development or manner of development of any land within Stirling Ranch . . . .” While protecting the Design Review Board, neither the Declaration nor the Design Guidelines expressly exculpated the Association itself from damages flowing from actions of the Design Review Board.

In reviewing whether the exculpatory clauses of the Declaration and Design Guidelines extended to the HOA, the Court emphasized that exculpatory clauses should be strictly construed and, under principles of corporate law, an Association is a separate entity from its agents (such as its internal design review board). Therefore, the Court held, the HOA may not avail itself of exculpatory clauses that, by their terms, protect the Design Review Board but not the Association. In so holding, the Court declined to overturn the precedent set in *Dworak v. Olson Constr. Co.*, 551 P.2d 198 (Colo. 1976), holding a party may sue a principal on a theory of respondeat superior even if he executes a covenant not to sue the agent and that covenant does not expressly reserve the right to sue the principal. Under *Dworak*, the Court held, in the absence of specific language exculpating the Association, the Association remains open to suit, even though the exculpation clauses limit the liability of the Association’s agents (the Design Review Board).

Conclusion

Forest City eliminates any ambiguity as to whether privity of contract is required for the assertion of a breach of an implied warranty claim in Colorado, regardless of whether a developer exercises some degree of design control. *Heritage Builders* overrules a line of Colorado Court of Appeals opinions that purported to apply the two-year statute of limitations or six-year statute of repose to third-party construction defect claims, clarifying that such limitations are inapplicable to third-party claims. *McShane* instructs that, in order to insulate both an HOA’s internal board and the Association itself from liability for the actions of the internal board, the Declaration and any internal board documents must expressly exculpate each body from liability associated with the actions of the other.

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950 Seventeenth Street, Suite 1600, Denver, CO 80202

Phone 303.825.8400 | Fax 303.825.6525 | ottenjohnson.com