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California and Illinois Appellate Courts Uphold Contractual Statute of Limitations Provision Abrogating Delayed Discovery Rule

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Two recent appellate decisions in California and Illinois confirmed the validity of standard 1997 AIA clauses providing that the statute of limitations for causes of action between the contracting parties shall accrue from the date of substantial completion, thereby abrogating common law and statutory delayed discovery rules that generally set the accrual date at when the plaintiff knew or should have known of facts giving rise to the cause of action. However, the Illinois decision keeps the door open for the plaintiff to assert "delayed discovery" theories under equitable estoppel principles.

California Decision

In 1999, plaintiff hotel and defendant general contractor (contractor) entered into an agreement for the design and construction of a 210-room, eight story hotel. The agreement had been "extensively negotiated." The relevant statute of limitations language of the agreement, which was a modified AIA "Standard Form of Agreement Between Owner and Contractor (Cost Plus Fee) and the AIA Document A201 General Conditions" (1997), stated: "As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion."

The hotel was substantially completed on July 31, 2000. In early 2005, the hotel learned of a kitchen sewer line break, which was repaired. Similar problems arose two years later. The contractor returned to inspect the problem, but no repairs were made. The hotel sued the contractor in 2008. The relevant limitations period was four years. Thus, the contractor argued that the hotel's suit should have been filed no later than July 31, 2004 under the statute of limitations provision. It was four years too late, notwithstanding that the problems were latent defects that were not discovered until 2005.

The hotel argued that the statute of limitations provision was void as against California public policy because "it served to preclude [the hotel] from relying on the delayed discovery doctrine in pursuing its claims for the latent defects in [the contractor's] work that did not manifest themselves until years after the construction project was complete."

Question Before the Court

Was "the 1997 standard contract accrual waiver," which alters the normal rules governing accrual of causes of action, including the delayed discovery rule, enforceable?

Yes. This was an issue of first impression in California. However, the court noted "numerous out-of-state authorities" that have examined the same clause and found it was valid and enforceable. The court held that it was not void as against public policy. To the contrary, the authorities reflect a "broader, longstanding established public policy in California which respects and promotes the freedom of private parties to contract." Thus, "where the parties are on equal footing and where there was considerable sophisticated give and take over the terms of the contract, those parties should be given the ability to enjoy the freedom of contract and to structure risk-shifting as they see fit without judicial intervention," even where defects and damage are not discovered until after the limitations period expired. The court distinguished an earlier case involving a residential home inspector and unsophisticated homebuyer in which the court held that public policy required the application of the delayed discovery rule as a contractual requirement in all home inspection contracts. "By contrast, [the hotel] and [the contractor] occupied positions of equal bargaining strength and both parties had the commercial and technical expertise to appreciate fully the ramifications of agreeing to a defined limitations period. This conclusion is reinforced by the fact that both parties had the participation and advice of legal counsel during contract negotiations."

Therefore, the trial court granted summary judgment in favor of the contractor. The appellate court affirmed.

Brisbane Lodging, L.P. v. Webcor Builders, Inc. 2013 WL 2404154 (June 3, 2013)

Illinois Decision

In 1999, plaintiff client hired the defendant architect to perform architectural services for the construction of a new community center. The agreement between the two parties provided in part that:

> causes of action between the parties . . . pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate of Payment for acts or failures to act occurring after Substantial Completion.

(AIA Document B151-1997).

The building was substantially completed by July 1, 2001. In late summer of 2002, the client discovered that the building was sinking into the ground. When the client asked the architect to provide an opinion on the cause, the architect blamed the unstable soils and the excavator in failing to properly compact and fill the subgrade. The architect denied that its design was defective. However, the client was aware that the architect had approved the excavator's revised plan to limit excavation.

On April 15, 2005, the client sued the excavator. On December 8, 2006, more than five years after substantial completion, the client sued the architect. The architect claimed that the action was barred by the applicable four-year statute of limitations and the parties' agreement that accrual of the limitations period would run from substantial completion. Therefore, the statute of limitations expired on

July 1, 2005. The client claimed that the architect should be estopped from relying on the statute of limitations because the architect "actively and affirmatively misled [the client] as to the cause of the problem, shunting blame to the excavator instead of admitting its own fault, and [the client] relied upon these misrepresentations in forbearing from suit against [the architect.]"

Questions Before the Courts

Was the contractual statute of limitations provision enforceable rendering the discovery rule inapplicable?

Yes. The court found that, "the plain language of this section provides that the period of limitations will expire in a fixed time frame from the date of substantial completion, regardless of whether the complained-of injury was discovered or even discoverable within that time period." The "practical effect . . . is to transform the statute of limitations into a statute of repose."

Did inapplicability of the discovery rule automatically bar the plaintiff's claims of equitable estoppel?

No. The court held that "Illinois law dealing with statutes of repose shows that, even where the discovery rule is not in effect, equitable estoppel may still apply in cases where a defendant makes misrepresentations that delay discovery of a cause of action."

Did the client's evidence of the architect's misrepresentations support its claims of equitable estoppel and fraudulent concealment?

No. The client was aware of the architect's involvement in approving the revised excavation. Thus, where the plaintiff has a suspicion of wrongdoing by the defendant, the defendant's alleged misrepresentations as to the cause of the problem do not support equitable estoppel. The court noted that, "a party claiming the benefit of equitable estoppel may not shut its eyes to the facts and then charge its ignorance to others." The court also noted that one of the alleged misrepresentations was made after the period of limitations expired, "so it could not have influenced the . . . decision not to bring suit . . . within the limitations period." The court found that the architect did not take an active role in remediation sufficient for the client to rely on such efforts in forbearing from suit. Finally, fraudulent concealment was not available because the architect did not occupy a relation of confidence to the client. The parties were "operating at arm's length." "[M]ere allegations that [the client] trusted [the architect] to fulfill its contractual obligations are insufficient to transform the relationship into one of confidence."

Therefore, the trial court granted summary judgment in favor of the architect. The appellate court affirmed.

J.S. Reimer Inc. v. The Village of Orlando Hills, 2013 IL App (1st) 120106

What These Decisions Mean For Practitioners

A guiding principle of both decisions is that freedom of contract, as long as the parties are negotiating at arms-length and one party does not have undue influence over the other, is paramount. Thus, if the parties agree to modify the time in which they must bring suit against each other, including abrogation of common law discovery rules, such clauses will be generally upheld. However, as shown in the Illinois decision, the plaintiff may still (theoretically) argue equitable estoppel: the defendant's representations and conduct (i.e., promises and efforts of repair), while the limitations period is pending, caused it to refrain from timely filing suit. (*See, e.g. Lantzy v. Centex Homes,* 31 Cal. 4th 363, 374 (2003): "Accordingly, (1) if one potentially liable for a construction defect represents, *while the limitations period is still running,* that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false *after the limitations period has expired,* and (4) the plaintiff proceeds diligently once the truth is discovered . . . the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." [Emphasis added].)

It should be also noted that the clauses at issue in these decisions, Article 13.7.1.1 (AIA A201-1997) and Article 9.3 (AIA B151-1997) were revised in the 2007 editions of the AIA documents to reincorporate the discovery rule (if applicable under state law), with an outside limit of ten years. The 2007 AIA A201 strikes out Article 13.7.1.1 in its entirety and replaces it with the following:

> The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7.

Likewise, the revised Article 9.3 provides:

> The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 9.3.