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Somerset Owners Ass'n v. Somerset Dev. Co., LTD., 137 Nev. Adv. Op. 35 (July 29, 2021)¹

STATUTES OF REPOSE: “SUBSTANTIALLY COMPLETE” DEFINED

Summary

This is an appeal following the granting of summary judgment regarding unstable rockery walls and their unreliable design. The reason for the dismissal stems from the statute of repose, which is created to allow defendants to be free of liability following a legislatively-determined amount of time.² Here, a six-year period is set by the statute of repose.³ The period begins when the improvement to the property is “substantially complete.”⁴ Somerset Owners Association (SOA) wants to recover damages against those involved in the rockery wall design and construction. However, they failed to give proper support in their argument that they commenced the action within the six-year period. Therefore, the Nevada Supreme Court affirmed the district court decision that granted summary judgment.

I.

In 2006, Q & D Construction, Inc. graded the property that would eventually become a residential area with lots and streets. Parsons Bros Rockeries, Inc., respondent, then constructed over 13 miles of rockery walls around the lots. This construction ended in December of 2006. Stantec conducted a final inspection on the rockery walls and sent a letter to Somerset Development Company to inform them of the completed inspection. Somerset then divided the land and sold the lots to individual builders for housing construction. The rockery walls had an expected lifespan of at least 50 years, however some began declining as early as 2011. In 2017, two walls collapsed

¹ Anna Dreibelbis.

² *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014).

³ NEV. REV. STAT. § 11.202 (2015).

⁴ NEV. REV. STAT. § 11.202(1) (2015); NEV. REV. STAT. § 11.2055 (2017) (which allows for common-law clarification).

on the same day. SOA then hired an inspector to determine if there were defects in the rockery walls. The inspector concluded that the walls were unstable and the rockery walls deviated from the original plans. Following this inspection, SOA sued Somerset, Parsons Bros, Q & D, and Stantec (collectively, respondents) for negligence-based actions. The respondents moved for summary judgement due to the fact that the six-year statute of repose through NRS 11.202 had expired. The district court granted the motion, and this appeal followed.

II.

NRS 11.202 restricts bringing suits for construction defects, such as this one, more than 6 years after the “substantial completion” of the improvement to real property in question.⁵ The primary question of this de novo review is when the rockery walls achieved substantial completion with respect to NRS 11.202.⁶ NRS 11.2055, a companion statute, attempts to define “substantial completion.”⁷ The activation specified in NRS 11.2055(1)(a)-(c) did not apply, so this court used the second provision which stated “the date of substantial completion... must be determined by the rules of the common law.”⁸ Both sides endorsed the definition of substantial completion from the American Institute of Architects (the AIA) which states “the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the contract documents so that the owner can occupy or utilize the work for its intended use.”⁹

This court adopted this definition for the purposes of NRS 11.2055(2). Ultimately, SOA bore the burden of presenting evidence of the circumstances to support the timeliness of the action. Unless SOA set forth a factual demonstration that the action was brought within the proper time

⁵ NEV. REV. STAT. § 11.202 (2015).

⁶ *Wood v Safeway*, 121 Nev. 724, 729 (2005) (summary judgment is subject to de novo review).

⁷ NEV. REV. STAT. § 11.2055 (2017).

⁸ NEV. REV. STAT. § 11.2055(2) (2017).

⁹ Werner Sabo, *Legal Guide to AIA Documents* § 4.56 (6th ed. 2018).

frame, or there was an existence of a genuine factual issue, the district court properly granted the motion for summary judgment. Final project report letters—issued in November and December 2006—were included in the summary judgement record, but there was no argument that these letters qualified as a start to the statute of repose timing. These letters, under NRS 11.2055(1) are relevant as they support the conclusion that the rockery walls were “sufficiently complete” under the AIA’s common law standard. Both factors demonstrate that the walls were substantially complete in December 2006 at the latest. Therefore, the action brought in 2017 was far outside of the 6-year restriction set forth in the statute of repose through NRS 11.202.

III

SOA attempts to use *First Interstate Bank of Denver, N.A. v Central Bank & Trust Co. of Denver* to argue that the period of repose should be tolled.¹⁰ They argue this is due to Somersett controlling the homeowner association board until 2013. However, this case is neither controlling nor persuasive, and therefore is not sufficient. This case presents the option of a waiving rights under a statute of repose agreement, but this waiver is not present here. Statutes of repose generally preclude tolling, as that is typically a characteristic of a statute of limitations.¹¹

IV.

SOA failed to demonstrate the existence of a genuine factual issue of whether they brought this suit within the six-year statute of repose under NRS 11.202. The record demonstrates the period of repose began running in December of 2006, at the latest. Without allegations of fraud or the subjectivity to tolling, this action extends further than the six-year statute of repose. Therefore, the district court’s order granting summary judgment to the respondents is affirmed.

¹⁰ *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 860 (Colo, App. 1996).

¹¹ *See CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014).