SJC-12891

LIZ D'ALLESSANDRO, trustee,[1] & others[2] vs. LENNAR HINGHAM HOLDINGS, LLC, & others.[3]

Suffolk. September 10, 2020. - November 3, 2020.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Condominiums, Common area. Repose, Statute of. Practice, Civil, Claim barred by statute of repose.

Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.

Christopher Weld, Jr., for the defendants.
Hugh J. Gorman, III, for the plaintiffs.
The following submitted briefs for amici curiae:
Edmund A. Allcock & Norman F. Orban for New England Chapter of Community Associations Institute.
David J. Hatem & Jon C. Cowen for American Council of Engineering Companies of Massachusetts & another.

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[1] Of the Hewitts Landing Condominium Trust.

[2] Jane Freeman, Tod McGrath, Jay Driscoll, and Mike Nappi, as trustees of the Hewitts Landing Condominium Trust.

[3] Hewitts Landing Trustee, LLC; Lennar Northeast Properties, Inc., doing business as Lennar Northeast Urban; and Lennar Corporation.

Thomas O. Moriarty & Kimberly A. Bielan for Real Estate Bar Association for Massachusetts, Inc., & another.

LENK, J. In this case, we answer a certified question posed by a judge in the United States District Court for the District of Massachusetts concerning the application of the six-year statute of repose in G. L. c. 260, § 2B, to claims regarding alleged defects in the design and construction of the common and limited common areas of a multi-phase, multi-building condominium. The question, as posed by the District Court judge, is the following:

> "Where the factual record supports the conclusion that a builder or developer was engaged in the continuous construction of a single condominium development comprising multiple buildings or phases, when does the six-year period for an action of tort relating to the construction of the condominium's common or limited common elements start running?"

We respond to the certified question as follows: Where a condominium development is comprised of multiple buildings, regardless of how many phases of the development there may be or how many buildings are within each phase, each building constitutes a discrete "improvement" for purposes of § 2B, such that the opening of each individual building to its intended use, or the substantial completion of the individual building and the taking of possession for occupancy by the owner or owners, triggers the statute of repose under § 2B with respect to the common areas and the limited common areas of that

building. In addition, where a particular improvement is integral to, and intended to serve, multiple buildings (or the condominium development as a whole), the statute of repose begins to run when that discrete improvement is substantially complete and open to its intended use.[4]

Background. In her decision denying the defendants' partial motion for summary judgment, the District Court judge recited the relevant facts from the summary judgment record. We rely on her recitation of the facts, and on other undisputed facts in the record.

The Hewitts Landing Condominium consists of 150 units, contained in twenty-eight buildings, built over the course of twenty-four "phases" between 2008 and 2015.[5] From time to time

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[4] We acknowledge the amicus briefs submitted by the New England Chapter of Community Associations Institute; Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club; and the American Council of Engineering Companies of Massachusetts and the Massachusetts Chapter of the American Institute of Architects.

[5] The condominium's master deed, recorded on June 25, 2010, states that the condominium "is planned to be developed as a phased condominium." The first phase of the development is described as including three buildings, containing twelve units. The deed reserves the rights of the declarant to expand the condominium by the addition of "certain building(s) containing up to a total of 138 additional units in multiple phases," for a total of up to 150 units, within fifteen years of the recording of the master deed. The deed further states that the declarant "shall have no obligation" to expand the condominium beyond the first phase.

during the course of construction, the project's architect submitted affidavits to the town of Hingham, swearing that individual units or buildings were "substantially complete" and ready for occupancy, and the town issued certificates of occupancy for the individual units or buildings.

The plaintiffs, trustees of the Hewitts Landing Condominium Trust, commenced this action in the Superior Court on November 3, 2017, seeking damages from the defendants[6] for alleged design and construction defects to the common and limited common

[6] The defendants include the developer of the condominium (Lennar Northeast Properties, Inc.); the contractor, construction manager, and condominium declarant (Lennar Hingham Holdings, LLC); the entity that served as trustee of the condominium trust from 2010 to 2015 (Hewitts Landing Trustee, LLC); and their parent company (Lennar Corporation).

elements of the condominium,[7] among other claims.[8] The complaint discussed four main aspects of the common areas in which defects were alleged: "decks and columns," "roofing/flashing," "exterior walls/flashing/building envelope," and "irrigation system." The complaint also stated, however, that "[the plaintiffs'] claims [were] not limited to those described [above]" and that the plaintiffs expressly reserved the right to amend the complaint to assert any additional claims as they were discovered.

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[7] "Ownership of a condominium unit is a hybrid form of interest in real estate, entitling the owner to both exclusive ownership and possession of his unit, . . . and . . . an undivided interest as tenant in common together with all the other unit owners in the common areas" (quotation, citation, and alteration omitted). Berish v. Bornstein, 437 Mass. 252, 262 (2002). See generally G. L. c. 183A, §§ 3-5. Here, the condominium's master deed uses the statutorily defined term "common areas and facilities" interchangeably with the term "common elements." See G. L. c. 183A, § 1. For purposes of this opinion, we also treat the terms interchangeably. As summarized by the Federal District Court judge, the common areas of the condominium here essentially include "all structural components and columns of the buildings, and all areas of the buildings and facilities (e.g., foundations, floor slabs, columns, beams, joints, all conduits, pipes, central services, etc.) with the exception of the unit interiors. . . . The limited common areas are a type of common area that is designated for the exclusive use of one or more, but fewer than all unit owners (e.g., a patio affixed to a unit)."

[8] The plaintiffs' claims include breach of condominium documents, breach of fiduciary duty, intentional misrepresentation, negligent misrepresentation, negligence, breach of express and implied warranty, a claim entitled "piercing corporate veil/equitable remedy," and violation of G. L. c. 93A.

After removing the case to Federal court, the defendants sought partial summary judgment; they argued that the plaintiffs' claims were partially barred by the six-year statute of repose set forth in G. L. c. 260, § 2B.[9] More specifically, the defendants argued that § 2B barred all claims with respect to six of the condominium's twenty-eight buildings.[10] The District Court judge denied the defendants' motion after concluding that only two of the plaintiffs' causes of action (negligence and implied warranty) were appropriate for consideration under § 2B, and, with respect to those, that all twenty-eight of the condominium's buildings should be treated as a single "improvement" for purposes of § 2B. Subsequently, upon

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[9] General Laws c. 260, § 2B, provides in relevant part:

> "Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner."

[10] For these six buildings, it is undisputed that the architect signed affidavits of substantial completion for each unit in the building more than six years before the commencement of this action. And for five of the six buildings, the town issued certificates of occupancy for the buildings and all of their respective units more than six years before the commencement of this action.

the defendants' motion, the judge certified the question that is now before us.[11]

Discussion. As with any statutory provision, § 2B "must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." DiCarlo v. Suffolk Constr. Co., 473 Mass. 624, 628 (2016), quoting Galenski v. Erving, 471 Mass. 305, 309 (2015). See G. L. c. 4, § 6, Third. We begin, therefore, with the plain language of the statute.

Under § 2B, the six-year statute of repose begins to run on the earlier of two dates: "(1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." The plaintiffs focus their argument on the term "improvement." They contend that the relevant improvement in this case is the entire condominium, based on such factors as the terms of the master deed, which creates a single legal entity; the pace and

[11] The District Court judge certified the question to us pursuant to S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981).

continuity of construction; and the fact that the particular defendants in this case participated in the construction process from beginning to end. Our analysis of the term "improvement" in the context of the statutory language as a whole leads us to a different conclusion.

As we previously have noted, § 2B does not define the term "improvement," and the "legislative history of G. L. c. 260, § 2B, does not indicate precisely what the Legislature meant the term to encompass." Dighton v. Federal Pac. Elec. Co., 399 Mass. 687, 696, cert. denied, 484 U.S. 953 (1987), quoting Milligan v. Tibbetts Eng'g Corp., 391 Mass. 364, 366 (1984). Previously, we have found a dictionary definition of "improvement" instructive on the issue of whether particular work or conduct falls within the scope of the statute. See Conley v. Scott Prods., Inc., 401 Mass. 645, 647 (1988), quoting Webster's Third New International Dictionary 1138 (1961) (defining "improvement" as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs"); Milligan, supra at 368 (same).

The definition, however, has proved to be of limited utility in certain contexts. See Dighton, 399 Mass. at 697 (utility of Webster's definition was "doubtful" in context of

"decid[ing] which actors were intended to be comprehended by § 2B"). Such is the case here. It is undisputed, and rightly so, that the development of the condominium and its component parts constitutes "the design, planning, construction or general administration of an improvement to real property" within the meaning of the statute. G. L. c. 260, § 2B. See Aldrich v. ADD Inc., 437 Mass. 213, 220-221 (2002) (applying § 2B's statute of repose to claim for damages for negligent design of condominium).[12] Rather, here, the question is whether the statute of repose was triggered only once (when the entire condominium satisfied the statutory requirements of being [1] open to use, or [2] substantially complete and taken for occupancy by the owner); or whether the statute was triggered multiple times, as each individual building (or other relevant component) of the project met those statutory requirements. Ultimately, we conclude that the latter approach adheres most closely to the statutory language and the underlying legislative intent.

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[12] The statutory definition of "condominium" in G. L. c. 183A, § 1, also supports this conclusion:

> "'Condominium,' the land or the lessee's interest in any lease of such land which is submitted to the provisions of this chapter, the building or buildings, all other improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, which have been submitted to the provisions of this chapter" (emphasis supplied).

We view as significant that the applicable language defining the triggering events for the statute of repose in § 2B was added by amendment in 1984, displacing prior language that described the triggering event as "the performance or furnishing of such design, planning, construction or general administration." See St. 1984, c. 484, § 53. By amending the statute in this manner, the Legislature evinced an intent to shift the focus away from such factors as when, and by whom, the particular work was performed, and instead to predicate the analysis on two independent factors: (1) whether the improvement is open to use; or (2) whether the improvement is substantially complete and the owner has taken possession for occupancy.

The defendants contend that the statute of repose was triggered as each building in the development was opened to use, relying principally on the certificates of occupancy issued by the town. Cf. Aldrich, 437 Mass. at 221-222 (§ 2B's statute of repose did not bar suit by condominium trust where action was commenced within six years of date of certificate of acceptance and occupancy, designated date of substantial completion, and date individual units had begun to be occupied).[13] Although the

[13] The defendants here also rely on the affidavits of substantial completion. While such affidavits are relevant to the inquiry, the affidavits in this case do not, in and of

plaintiffs do not dispute that the issuance of a certificate of occupancy can signify that a building is open to use for purposes of § 2B, they argue that, in the context of a multi-phase, multi-building condominium such as this, the relevant event is the issuance of the certificate of occupancy for the last building in the last phase of the development.[14]

Ultimately, we conclude that the plaintiffs' interpretation would stray too far from the statutory language and the legislative intent behind it, and we hold that, under the circumstances here, the issuance of a certificate (or certificates) of occupancy for each individual building (or for all the units in a building) triggered the statute of repose for the common elements and limited common elements pertaining to that building. We further hold that where a particular improvement is integral to and intended to serve multiple buildings within a single phase, or buildings across multiple

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themselves, satisfy either the first prong (open to use) or the second prong (substantially complete and taken for occupancy by owner) of § 2B's statute of repose. See Aldrich v. ADD Inc., 437 Mass. 213, 220-221 (2002) (relying on date of substantial completion along with issuance of certificate of occupancy and actual occupancy by owners).

[14] We note that at the outset of the condominium development here, the total number of phases and buildings was indeterminate. The master deed contemplated the construction of additional buildings beyond the first phase, but only committed the developer to completing the first phase.

phases, or even the condominium development as a whole, the statute of repose begins to run when that discrete improvement is substantially complete and open to its intended use.[15]

As we have discussed in prior cases, "the Legislature's primary objective in enacting § 2B was to limit the liability of architects, engineers, contractors, and others involved in the design, planning, construction, or general administration of an improvement to real property in the wake of case law abolishing the long-standing rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, liability was cut off as a matter of law." Stearns v. Metropolitan Life Ins. Co., 481 Mass. 529, 533-534 (2019), citing Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 353 (2018). "Otherwise, those engaged in the design and construction of real property may have to mount a defense when architectural plans may have been discarded, copies of building codes in force at the time of construction may no

[15] See State v. Perini Corp., 221 N.J. 412, 436 (2015) (under New Jersey law, statute of repose as to high temperature hot water system intended to serve multi-building facility was not triggered until system had been connected to every building it was intended to serve). Because the parties did not brief this issue, we do not draw any conclusion as to whether such an improvement is at issue in this case. Nor do we address other potential scenarios in which work on a building or improvement for which the statute of repose has yet to expire exacerbates a latent defect in a building or improvement as to which the statute of repose already has expired.

longer be in existence, [or] persons individually involved in the construction project may be deceased or may not be located." Stearns, supra at 534, quoting Klein v. Catalano, 386 Mass. 701, 709-710 (1982). "[L]imiting the duration of liability in this way serves a legitimate public purpose, even though it may abolish a plaintiff's cause of action without providing any alternative remedy." Stearns, supra, citing Bridgwood, supra.

Further, we have held that "[i]n establishing the six-year limit, the Legislature struck what it considered to be a reasonable balance between the public's right to a remedy and the need to place an outer limit on the tort liability of those involved in construction." Klein, 386 Mass. at 710. Accordingly, we have consistently enforced § 2B's statute of repose, as we have other statutes of repose, "according to [its] plain terms, despite the hardship [it] may impose on plaintiffs," and we have held that "[u]nlike statutes of limitation, statutes of repose [such as that contained in § 2B] cannot be 'tolled' for any reason" (citation omitted). Bridgwood, 480 Mass. at 353.

If we were to adopt the plaintiffs' view of the statute of repose in this case, it would contravene legislative intent by exposing the defendants in this action to liability with respect to discrete improvements (here, the common elements and limited common elements of certain individual buildings) that were

indisputably open to use more than six years before the commencement of this action.

We recognize that this may present some difficulty for plaintiffs (including the plaintiffs in this case) where the developer retains control of the association of unit owners of a condominium for a period of time after some or all of the condominium's buildings are open to use or substantially complete and occupied. See Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC, 478 Mass. 697, 703-704 (2018), citing Berish v. Bornstein, 437 Mass. 252, 265 (2002) (noting that organization of unit owners has "exclusive" right to seek remedy for defects to common areas and that "developers are not likely to agree to sue themselves").[16]

This concern, however, is appropriately addressed to the Legislature. See Stearns, 481 Mass. at 537, quoting Joslyn v. Chang, 445 Mass. 344, 352 (2005) ("No exceptions ought to be made [to a statute of repose], unless they are found therein;

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[16] Although it is not a perfect substitute for a direct suit, prior to gaining control over the association, the unit owners have standing to file a derivative suit to enforce the rights of the association. See Mass. R. Civ. P. 23.1, 365 Mass. 768 (1974); Cigal v. Leader Dev. Corp. 408 Mass. 212, 218 & n.10 (1990). In addition, once control over the association passes from the developer to the unit owners, the association could -- and in this case, did -- bring a claim against the developer-controlled entities that formerly maintained control of the association for breach of fiduciary duty. See Cigal, supra at 219.

and if there are any inconveniences or hardships growing out of such a construction, it is for the [L]egislature, which is fully competent for that purpose, and not for the court, to apply the proper remedy").

Conclusion. We answer the certified question as follows: Where a condominium development is comprised of multiple buildings, regardless of how many phases of the development there may be or how many buildings are within each phase, each building constitutes a discrete "improvement" for purposes of G. L. c. 260, § 2B, such that the opening of each individual building to its intended use, or the substantial completion of the individual building and the taking of possession for occupancy by the owner or owners, triggers the statute of repose under § 2B with respect to the common areas and limited common areas of that building. In addition, where a particular improvement is integral to and intended to serve multiple buildings (or the condominium development as a whole), the statute of repose begins to run when that discrete improvement is substantially complete and open to its intended use.

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of

Massachusetts, as the answer to the question certified, and also will transmit a copy to each party.