In Re Goodman v. Heritage Builders, 2017 CO 13, ___ P. 3d ___ (Colo. 2017)

The Two (2) Year Statute of Limitations and Six (6) Year Statute of Repose No Longer Limit a Contractor's Third-Party Claims

By

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The Colorado Supreme Court overturned the Court of Appeals decision in *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P. 3d 1166 (Colo. App. 2008) which held that the ninety (90) day tolling period under C.R.S. § 13-80-104(1)(b)(II) only applied to the two (2) year statute of limitations in C.R.S. § 13-80-104(1)(a). In the case of *In Re Goodman v. Heritage Builders*, 2017 CO 13, ___ P. 3d ___ (Colo. 2017), the *Goodman* Court held that regardless of the two (2) year statute of limitations or the six (6) year statute of repose, claims against a third-party contractor may proceed if filed any time during the underlying first party litigation or within ninety (90) days following the date of judgment or settlement pursuant to the timeframe in C.R.S. § 13-80-104(1)(b)(II). This allows third-party claims to be timely filed if brought in either 1) a construction defect litigation before settlement or entry of judgment

occurs, or 2) in a separate lawsuit within ninety (90) days after settlement or entry of judgment.

In *Goodman*, Heritage Builders, Inc. ("Heritage") constructed a home for Karen and Courtney Lord in Pitkin County, Colorado. The certificate of occupancy was issued in September 2006. In November 2011, Richard Goodman purchased the home. Between March and June 2012, Goodman discovered alleged construction defects in the home. Goodman informally gave Heritage notice of the alleged defects in July 2013. On October 8, 2013, Goodman provided a notice of claim pursuant to the Construction Defect Action Reform Act, C.R.S. § 13-20-801 et seq. Heritage then placed Studio B Architects ("Studio B") and Bluegreen, Inc. ("Bluegreen") on notice of the alleged defects asserting design deficiencies. Goodman filed a lawsuit on December 20, 2013, asserting negligence claims against Heritage and some of the subcontractors. Heritage then filed cross-claims and third-party claims against numerous subcontractors, including Studio B and Bluegreen.

On March 10, 2016, Studio B filed a motion for summary judgment asserting that Heritage's claims were barred by the six (6) year statute of repose in C.R.S. § 13-80-104(1)(a). Bluegreen joined the motion. On May 20, 2016, the trial court granted the motion ruling that Heritage received informal notice of the defects in July 2013 more than six (6) years after substantial completion.[1] The trial court further ruled that the discovery provision in C.R.S. § 13-80-104(2) allowing two (2) additional years to file claims for defects discovered in the fifth or sixth year after substantial completion of the home did not apply to third-party claims. Heritage then petitioned

[1] The certificate of occupancy was issued in September 2006.

the Supreme Court pursuant to C.A.R. 21. The Supreme Court accepted the petition noting that it had never considered the impact of the six (6) year statute of repose on the timeliness of third-party claims in construction defect cases.

The statutes at issue are first C.R.S. § 13-80-104(1)(a) which states:

> Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property, except as provided in subsection (2) of this section.[2]

The second statute, C.R.S. 13-80-104(1)(b)(II), provides the following:

> Notwithstanding the provision of paragraph (a) of this subsection (1), all claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person:
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> (A) Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and
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> (B) Shall be brought within ninety days after the claims arise, and not thereafter.

When considering third-party claims brought pursuant to C.R.S. § 13-80-104(1)(b)(II)(A), the Court turned to its holding in *CLPF-Parkridge One, L.P. v. Harwell Invs.*, Inc., 105 P. 3d 658, 664-665 (Colo. 2005) stating that third-party claims may be brought in either 1) the construction defect litigation before a

[2] C.R.S. § 13-80-102(1)(a) provides a two (2) statute of limitations for tort actions, including but not limited to negligence, etc.

settlement or entry of judgment, or 2) a separate lawsuit within ninety (90) days after a settlement or entry of judgment.[3]

In *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P. 3d 1166 (Colo. App. 2008), the ninety (90) day period in C.R.S. § 13-80-104(1)(b)(II) was held to only apply to the statute of limitations of two (2) years and not the six (6) year statute of repose. Consequently, a contractor could not wait six (6) or possibly eight (8) years under the statute of repose before pursing third-party claims.

In reviewing this ninety (90) day period, the Court in *Goodman* focused on the word "notwithstanding" at the beginning of C.R.S. § 13-80-104(1)(b)(II). It held that this word plainly and unambiguously precludes the application of both the statute of limitations and statute of repose to third-party claims made pursuant to C.R.S. § 13-80-104(1)(b)(II). This holding overturns *Thermo Dev., Inc.*, supra; *Sierra Pac. Indus., Inc. v. Bradbury*, 2016 COA 132, ___ P. 3d ___; and *Shaw Constr., LLC v. United Builder Servs.*, Inc., 2012 COA 24, 296 P. 3d 145, which barred the third-party claims being brought within this ninety (90) day period when asserted beyond the six (6) year statute of repose. Thus, under *Goodman* third-party claims are timely irrespective of the two (2) year statute of limitations or the six (6) year statute of repose so long as they are brought 1) during the underlying first party construction defect litigation before settlement or judgment, or 2) within ninety (90) days after the date of judgment or settlement in a separate lawsuit.

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[3] In *CLPF-Parkridge One, L.P. v. Harwell Invs.*, Inc., 105 P. 3d 658, 664-665 (Colo. 2005), the case initially dealt with cross-claim filed by Harwell Investments, Inc. (general contractor) against FDG, Inc., who did the engineering design, but the Court addressed both cross-claims and third-party claims in its ruling on C.R.S. § 13-80-104(1)(b)(II).

Applying this ruling in *Goodman*, the Court held that since Heritage brought its claims against Studio B and Blugreen prior to any settlement or judgement, the trial court should not have granted the motion for summary judgment. The statute of repose was irrelevant to the third-party claims brought under C.R.S. § 13-80-104(1)(b)(II). What this decision does is to reset third-party claims and suits against contractors back to the effective date of the legislation in 2001.

This section was amended and became effective on August 8, 2001 in conjunction with the Construction Defect Action Reform Act, ("CDARA"), C.R.S. § 13-20-801 et seq. It was seen as a way to streamline construction defect litigation and avoid the shotgun approach of naming everyone who touched the project. One could wait and see how the litigation unfolded before pursuing other contractors and/or subcontractors. However, the Court of Appeals began changing the law with its holdings in *Thermo*, supra; *Shaw*, supra, and *Sierra*, supra; limiting the application of the ninety (90) day period. These cases have now been overturned. For contractors and subcontractors who are not brought into the underlying construction defect lawsuit, the statute of repose is no longer a safe harbor. In theory, a contractor or subcontractor can be exposed to third-party claims for up to eight years and ninety days at a minimum. It could be longer depending on when the settlement or judgment occurs.

Whether the statute of repose bars cross-claims or third-party claims depends on the facts and circumstances of each case. Legal counsel should be sought to determine whether this defense can be appropriately asserted or when cross-claims or third-party claims should be brought.