

***Sierra Pacific Industries, Inc. v. Bradbury, ___ P. 3d
___, 2016 WL 4699116 (2016)***

***Substantial Completion for A Subcontractor is When It
Finishes Its Work on the Improvement***

By

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Substantial Completion for A Subcontractor is When It Finishes Its Work on the Improvement

Under the Construction Defect Action Reform Act (“CDARA”), C.R.S. § 13-80-104(1)(b), the statute of repose bars claims against a construction professional after six years from when it has substantially completed an improvement to real property.¹ In determining when substantial completion occurs, the Court of Appeals in *Shaw Constr., LLC v. United Builder Servs., Inc.*, 296 P. 3d 145 (Colo. App. 2012), held that an improvement to real property can be a discrete component of a project such as a building. The *Shaw* Court then determined that substantial completion occurred when the certificate of occupancy issued for that building and not for the entire project. More recently, the Colorado Court of Appeals defined substantial completion as when a subcontractor finished its work on an improvement to begin the running of the statute of repose in *Sierra Pacific Industries, Inc. v. Bradbury*, ___ P. 3d ___, 2016 WL 4699116 (2016). The *Sierra Pacific* Court expanded the holding in *Shaw* to specifically look at when the work performed by the subcontractor was completed, including any repairs performed by it to determine substantial completion.

Sierra Pacific was hired by the general contractor, the Weitz Company, to supply windows and doors at a condominium project. Bradbury was retained by Sierra Pacific to install the windows and doors at a condominium project. Bradbury finished its work in 2002, and completed some repairs in 2004. The City and County of Denver issued a certificate of occupancy for all units on June 4, 2004. However, residents complained of water intrusion into the units. At the direction of the condominium association, Weitz and Sierra Pacific repaired the reported leaks and water damage between 2004 to 2011. Bradbury participated in some of the repairs during 2004, but did no further work on the project.

¹ The six year statute of repose can be extended if in the fifth or six year if a defect is discovered. Then the owner has an additional two years to bring an action, C.R.S. § 13-80- 104. Thus, exposing a construction professional to a claim up to eight years after completion of its work on the improvement.

The condominium owners' association filed suit against Weitz in November 2011 for defective construction. In turn, Weitz filed suit against Sierra Pacific. The cases were consolidated and settled on July 31, 2014. Sierra Pacific then filed suit against Bradbury on October 20, 2014. Bradbury moved for summary judgment asserting that the claims were barred by the statute of repose since they were brought ten years after it completed its work. Sierra Pacific argued that its claim did not arise until after the underlying case was settled in 2014 in which it had ninety (90) days to file a complaint pursuant C.R.S. § 13-80-104(1)(b), and if not, the period of repose did not begin to run until 2011 when repairs were completed. Bradbury responded that there was no settlement exception to the statute of repose and that the statute of repose began to run upon the completion of its work in 2004. The trial court granted Bradbury's motion and Sierra Pacific appealed.

The Court of Appeals cited to *Thermo Dev. Inc. v. Cent. Masonry Corp.*, 195 P. 3d 1166, 1167 (Colo. App. 2008), for the precedent that C.R.S. § 13-80-104(1)(b)'s settlement tolling provision only applied to the statute of limitation and not the statute of repose under C.R.S. § 13-80-104(1)(a) and (2). Thus, there was no applicable settlement exception to the statute of repose to toll the claims against Bradbury.

It then turned to the language of C.R.S. § 13-80-104(1)(a) which states:

“in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property.”

While the statute does not define substantial completion or improvement to real property. the holding in *Shaw Constr., LLC v. United Builder Servs., Inc.*, 296 P. 3d 145 (Colo. App. 2012), substantial completion may be to a discrete component of an entire project as opposed to the entire project. Prior to *Sierra Pacific*, substantial completion occurs depends on the circumstances in the case. It has been held that substantial completion of a project can occur by

the time mechanic's liens could be filed after the completion of a building, structure or other improvement, *May Dep't Stores Co. v. Univ. Hills, Inc.*, 789 P. 2d 434, 439 (Colo. App. 1989), or when subcontractors working on the last building in a condominium complex and the certificate of occupancy is issued for it. *Shaw*, 2012 COA at ¶¶ 47 - 50.

The *Sierra* Court then looked at the legislative intent of C.R.S. § 13-80-104(1)(a) and noted the statutory purpose was to relieve those involved in the construction business of the prospect of potentially indefinite liability for their work. It found persuasive the Texas Court of Appeals case *Gordon v. Western Steel Co.*, 950 S.W. 2d 743 (Tex. App. 1997) which held that this policy was best served by commencing the period of repose when a construction professional has completed its own work on the project. The *Sierra* Court noted:

[W]here different subcontractors were responsible for the construction of different parts of a larger project, the statute of repose should be applied to each of those individual subcontractors when they have completed their respective improvements...

* * *

In most scenarios, the various improvements contained within a larger project will not stretch beyond several years, and the general contractors or beneficiaries ordinarily have opportunities to supervise or disapprove of the work along the way. Secondly, it is not overly burdensome to decipher when respective contractors substantially complete their improvements (e.g. when they submit their final bills and/or walk away from the project).... The legislature has... announced that persons in the construction business should not be liable for an improvement more than ten years after they have completed their contracted-for work and walked away. An alternate construction would undermine the purpose of the statute. Besides the "potentially limitless liability" a subcontractor might face in such a scenario, the supreme court has noted other difficulties created by allowing suit beyond ten years of substantial completion. *See Trinity River Auth. V. URS Consultants, Inc.*, 889 S.W. 2d 259, 264 (Tex. 1994)(noting evidentiary difficulty of defending suit years after completion of an improvement because of faded memories, as well as increased possibilities of third-party neglect, abuse, poor maintenance, mishandling, improper modification, and/or unskilled repair).

...Starting the statute of repose when each subcontractor finishes its improvement conforms with the legislative intent of preventing indefinite liability for those who construct or repair improvements to real property.

Id. at 748-49.

Consequently, the Colorado Court of Appeals held that the statute of repose began to run in 2004 upon completion of repairs. The Court rejected Sierra Pacific's argument that the statute was tolled while others performed repairs because any reliance by the association with regard to the repairs was based on the efforts and promises of Sierra Pacific and not Bradbury. The *Sierra* Court also relied on the precedent in *Smith v. Executive Custom Homes, Inc.*, 230 P. 2d 1186, 1191-92 (Colo. 2010) which held that the General Assembly had taken into account the need for additional time to complete repairs by tolling the statute while repairs were made during the notice of claims procedure thereby nullifying any tolling under the equitable repair doctrine as inconsistent with CDARA. The *Sierra* Court noted that even if there were promises or efforts by Bradbury that the association relied on, it completed its repairs in 2004 and the statute of repose began to run. Given Bradbury did not receive notice of the claim by Sierra Pacific until 2014, Sierra Pacific's claims were barred by the statute of repose.

Sierra Pacific provides subcontractors with a more defined standard for determining when substantial completion occurs. The focus is on the subcontractor's completion of work to the discrete component of the improvement. This approach is consistent with Colorado trial courts that use a unit by unit or building by building approach to determine when a subcontractor finished its work and substantial completion occurs, *see Paradise Villas Owners Association, Inc. v. Vision Development Group, Inc., et al.*, Case Number 2015CV3293, El Paso County District Court, Division 22, Judge William Bain, December 2, 2016; and *Westwood Townhomes Owners Association v. Beazer Homes Holdings Corp., et al.*, Case Number 2012CV845, El Paso County District Court, Division 4, Judge David Shakes, May 21 and June 2, 2014 (Trial courts

also utilize the certificates of occupancy issued for when substantial completion has occurred for a unit or building, and, at least for now, have rejected the entire project approach).

Based on the *Sierra Pacific* case, when a subcontractor receives a notice of claim pursuant to CDARA or is sued, it should determine if the statute of repose bars the claim by verifying 1) the last date it did work on a unit, building and/or project; 2) the final invoice for each unit, building and/or project; and 3) the certificate of occupancy for each unit and building on which it worked. If these documents show that the subcontractor's work was completed more than six years prior to receiving the notice or being sued, it may have a defense that the statute of repose bars the claim. General contractors receiving a notice of claim or being sued should immediately review the same information to make sure claims are brought timely against any subcontractors.

Whether the statute of repose bars a claim depends on the facts and circumstances of each case. Legal counsel should be sought to determine whether this defense can be appropriately asserted.