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EST. 1952
BUILDING RELATIONSHIPS & PRACTICING LAW

CONSTRUCTION UPDATE

When Is A Supplier Not A Supplier?

A recent case out of the 4th District has laid out some changes when it comes to suing a supplier. Under, Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc., in order to sue a manufacturer for a defective product you must first show that the manufacturer was also a supplier to the Project. 4D12-3693, 2013 WL 4726923 (Fla. Dist. Ct. App. Sept. 4, 2013).

In Port Marina Condo, the Developer entered into a contract with a subcontractor for the installation of a roof on its boat storage building. TOPCOAT, a roof product made by GAF, was to be utilized. When the construction was completed and turned over the Condo Association noticed leaks in the roof. The subcontractor attempted several unsuccessful roof repairs and finally alleged that the real problem with the roof was that the TOPCOAT product was defective. TOPCOAT's manufacturer, GAF, countered that it was not the product itself that caused the defects, but the way in which it was installed.

As neither the installer nor the manufacturer would take responsibility, the Condo Association sued the manufacturer for Breach of Warranty under the Condominium Statute §718.203(2), Florida Statutes. The Condo Association alleged that GAF, as the supplier, owed a duty to exercise reasonable care, technical skill and ability in performing its obligations in supplying the roof system materials.

Under §718.203(2), Florida Statutes, to bring an action against the manufacturer of construction materials, one must allege three necessary elements:

1. The defendant is a ***supplier*** of materials to a condominium;

2. The materials failed to conform to the generally accepted standards of merchantability applicable to goods of that kind, or that the materials failed to conform to the requirements specified in the contract; and

3. The failure of the goods to conform was a proximate cause of the plaintiff's damages.

But, to be a "supplier" under §718.203(2), requires more than just being the manufacturer of a product. Instead, the Court held that in order for its claim to stand, the Condo Association should have alleged that GAF had knowledge of the Project that its TOPCOAT product was being used on. Merely pleading that GAF owed a duty to exercise reasonably care in supplying the TOPCOAT product is not enough.

Does a Transom Window Make Your Door No Longer "Your Product"?

The "Your Product" exclusion has long been the source of insurance coverage issues in construction litigation. Under most Commercial General Liability ("CGL") policies, there is no coverage for damage to or replacement of "Your Product". A recent case out of the Second District only further solidifies this exclusion.

In Liberty Mut. Fire Ins. Co. v. MI Windows & Doors, Inc., MI manufactured sliding glass doors, which were then sold to All Seasons for installation in five (5) condominium projects along the Alabama coast. All Seasons subsequently subcontracted the installation work to third parties. On some of the projects, transom windows (manufactured by All Seasons) were installed above the sliding glass doors. 2D12-2793, 2013 WL 4734045 (Fla. Dist. Ct. App. Sept. 4, 2013).

Several tropical storms hit the Alabama coast in 2004, resulting in lawsuits being filed against MI related to their sliding glass doors. The allegations against MI included that their sliding glass doors resulted in damage to the condominiums. MI in turn sued Liberty Mutual Fire Insurance Company ("Liberty Mutual"), its CGL carrier, to recover the consequential damages and cost of repairing/replacing the defective doors at each condominium. The underlying Court ruled that the "Your Product" exclusion did not apply to the sliding glass doors as they were "significantly changed by others after the sale" when the transom windows were installed on top of the sliding glass doors, which then contributed to the consequential damage suffered by MI.

On appeal, Liberty Mutual challenged this ruling and argued that the "Your Product" exclusion was not extinguished by the addition of the transoms. The Appellate Court agreed, reasoning:

> The addition of transoms to the sliding doors did not fundamentally change the nature and function of those doors. . . Common sense dictates that the doors were not 'made into something else.' [citing Imperial Casualty & Indemnity Co. v. High Concrete Structures, Inc., 858 F.2d 128 (3d Cir. 1988)] The doors retained their identity after being hung on transoms. They continued to operate as sliding glass doors. Thus, the doors remained MI's product, and the "your product" exclusion precludes any damages awarded to replace them.

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