

## Mitigating Risk for Condominium Developers & Contractors in the Wake of *328 Barry Ave, LLC v. Nolan Prop. Group, LLC*

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The dearth of condominium development in the Twin Cities is not a new story. On Nov. 17, 2013, the Star Tribune ran an article titled, “Condo conundrum: Lots of demand, not enough building.” On Aug. 9, 2015, an online article was published on StreetsMN titled, “Are Minnesota’s Construction Defect Laws Causing a Condo Shortage?” On Sept. 4, 2015, MinnPost ran an article titled, “Why developers in Minneapolis love apartment complexes (and hate condos).” The more interesting story is why?

There are three primary and intertwined reasons for the current lack of condominium development in our market: (1) developers and contractors are afraid of the litigation risk; (2) developers and contractors often have difficulty obtaining financing due to the higher volume of litigation in this area; and (3) due to the first two factors, developers and contractors generally deem condominium projects less profit-

able than apartment developments. The good news for those of us who desire more condominiums in our market is that there are steps developers and contractors can take to significantly mitigate, if not eviscerate, their risk.

Lawsuits against condominium developers and contractors often involve claims for breach of contract or negligence due to alleged defective construction. Such claims may be brought against anyone designing, planning or constructing the property for “ten years after substantial completion of the construction.” Minn. Stat. § 541.051, subd. 1(a). “Substantial completion” is “determined by the date when construction is sufficiently completed so that the owner or the owner’s representative can occupy or use the improvement for the intended purpose.” *Id.* Yet where a cause of action arising under this subpart accrues during the ninth or tenth year after substantial completion of construction, then the “substantial completion” period is extended to 12 years. Minn. Stat. § 541.051, subd. 2. It is not surprising that, with this lengthy liability tail, developers and contractors are afraid of the risk.

The risk is significantly limited, however, by another aspect of the statute. The 10- and 12-year “substantial completion” period in which parties are allowed to bring breach of contract and negligence claims is limited by a two-year statute of limitations. Minn. Stat. § 541.051, subd. 2. In other words, although owners and homeowners’ associations have 10 to 12 years after “substantial completion” of a condominium development to assert breach of contract or negligence claims against the developers and contractors for defective construction, such parties cannot assert their claims “more than two years after discovery of the injury.” Minn. Stat. § 541.051 subd. 1(a). Stated differently, the action to recover damages must be brought “within two years after the date on which the cause of action accrued.” Minn. Stat. § 541.051, subd. 2.

The key to overcoming construction defect claims is to figure out when the plaintiff’s claim was discovered or should have been. See *Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing and Heating*, 660 N.W.2d 146, 150 (Minn. Ct. App. 2003) (holding that the limitations period under Minn. Stat. § 541.051, subd. 1 “begins to run when an actionable injury is discov-

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ered, or with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known”). The Minnesota Supreme Court recently reaffirmed this holding in the case of *328 Barry Ave, LLC v. Nolan Prop. Group, LLC*, 871 N.W.2d 745 (Minn. 2015). The *328 Barry Ave.* court reversed the dismissal of a negligence claim against a contractor because there was a “genuine issue of material fact” about when the injury was or should have been discovered. The parties agreed that the defective construction was water intrusion, but they disputed whether the discovery of a leak near a window in 2009 was the cause of the problem that generated the plaintiff’s damages sufficient to trigger the statute of limitations, or whether the plaintiff’s damages stemmed from a separate incident of leakage that began in 2010. If the 2009 leak was the cause, the claim was barred by the statute of limitations and the case would be dismissed. The *328 Barry Ave* court decided that there was enough of a question on this issue that it must be decided by a jury.

Although *328 Barry Ave* makes clear that the 10- to 12-year liability tail is alive and well for certain legal claims involving defective construction in Minnesota, the facts of the case also reveal that developers and contractors can manage their risk by diligently documenting the details and timing of owners’ claims regarding defective construction, repairing problems successfully in the first instance, and perhaps most importantly, obtaining wrap-up or builders’ risk insurance policies prior to the commencement of development in order to protect the developers and contractors from such risks.

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