TRAUB LIEBERMAN

CONSTRUCTION LAW BLOG

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California Supreme Court Holds that the Right to Repair Act is a Homeowner's Exclusive Remedy for Damages Arising from Construction Defects for New Residential Construction

BY:

In McMillin Albany LLC et al. v. The Superior Court of Kern County (Van Tassel) [Case No. S229762], the California Supreme Court held that California Civil Code §§ 895 *et seq*. (the "Right to Repair Act") provides the exclusive remedy for construction defect claims for economic loss and resulting property damages arising from new residential construction. The Supreme Court also held that homeowners are required to engage in the pre-litigation notice and cure procedures under the Right to Repair Act.

The long-awaited holding in *McMillin* resolved a split in authority among the California Court of Appeals, and effectively overruled the holdings in *Liberty Mutual Insurance Company v. Brookfield Crystal Cove LLC* [(2013) 219 Cal.App.4th 98 ("Liberty")] and *Burch v. Superior Court* [(2014) 223 Cal.App.4th 1411 ("Burch")], to the extent inconsistent with *McMillin*. In *Liberty* and *Burch*, the California Court of Appeals held that the Right to Repair Act is not the exclusive remedy for construction defect lawsuits that allege resulting property damage arising from new residential construction. Homeowners were thus not required to engage in the pre-litigation notice and cure procedures under the Right to Repair Act because such lawsuits could be maintained as common law claims. As to construction defect lawsuits where resulting property damage had not occurred (i.e. pure economic loss), such claims are barred by the holding in *Aas v. Superior Court* [(2000) 24 Cal.4th 627] unless they can be brought under the Right to Repair Act.

In *McMillin*, a construction defect lawsuit was brought by the purchasers of 37 new single-family homes from McMillin Albany LLC. The homes were purchased at various times after January 2003, thus implicating the Right to Repair Act. In 2013, the homeowners initiated the lawsuit against McMillin Albany LLC alleging numerous construction defects in their respective homes. The complaint included common law causes of action for negligence, strict products liability, breach of contract and breach of warranty, as well as a claim for violation of the Right to Repair Act.

In the trial court, McMillin Albany LLC moved for an order staying litigation to allow the parties to engage in the pre-litigation notice and cure procedures under the Right to Repair Act. The trial court denied the motion, relying upon the California Court of Appeals holding in *Liberty*. McMillin Albany LLC appealed the trial court ruling.

On appeal, and disagreeing with the holdings in *Liberty* and *Burch*, the California Court of Appeals ruled that the parties must follow the pre-litigation notice and cure procedures because the Right to Repair Act is the exclusive remedy for construction defect claims where property damage has occurred. The Court of Appeals observed that "the Legislature intended that all claims arising out of defects in residential construction involving post-2003 sales of new homes be subject to the standards and requirements of the Act."

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The California Supreme Court affirmed the ruling of the California Court of Appeals. In its analysis, the Supreme Court looked to the language of the Right to Repair Act and its legislative history to determine whether the common law had been supplanted where construction defect claims resulted in property damages. In this regard, the Supreme Court recognized that Section 896 states the Right to Repair Act applies to "any action" seeking damages for construction defect. This section also states that "claims or causes of action shall be limited to violation of" the functionality standards set forth in the Right to Repair Act and apply only to "original construction intended to be sold as an individual dwelling unit."

Moreover, Section 944 identifies what damages may be recovered under the Right to Repair Act by a homeowner, which covers the kinds of damages recoverable in a construction defect lawsuit, and Section 943 establishes that such damages may only be recovered under the Right to Repair Action, absent an express exception. The damages recoverable under the Right to Repair Act include pure economic losses, unlike a common law claim.

Furthermore, the Supreme Court recognized that "the creation of a mandatory pre-litigation process and the granting of a right to repair, would be thwarted if we were to read the Act to permit homeowners to continue to sue as before at common law, without abiding by the procedural requirements of the Act, for construction defect claims involving damages other than economic loss."

Accordingly, the Supreme Court held the Right to Repair Act shows a legislative intent to modify the common law and effectively "provides that construction defect claims not involving personal injury will be treated the same procedurally going forward whether or not the underlying defects gave rise to any property damage." Therefore, "claims seeking recovery for construction defect damage are subject to the Act's pre-litigation procedures regardless of how they are pleaded."

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