

*Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. 70, 97 P.3d 607 (Nev. 2004).<sup>1</sup>

## **CONSTRUCTION DEFECT – CIVIL PROCEDURE – STATUTE OF LIMITATIONS**

### **Summary**

Petition for a writ of mandamus challenging a district court order denying a motion to dismiss in a construction defect action.

### **Disposition/Outcome**

Petition denied. A third-party litigant’s claim arises when the litigant discovers or should have discovered the defects. General notice of a construction defect claim given to a general contractor is sufficient to toll the statute of limitations for claims against a third-party subcontractor even when the subcontractor is not involved in the initial proceeding against the general contractor.

### **Factual and Procedural History**

General contractors, Saxton Incorporated and Saratoga Land & Development (“Saxton”), built the Sunrise Ridge Condominium project. Saxton subcontracted with Desert Fireplaces to manufacture and install windows on the Sunrise Ridge project. The project was completed between March and July 1998. On October 29, 1998, Sunrise Ridge Homeowners Association notified Saxton of its construction defect claims, including window defects attributable to Desert Fireplaces. On December 31, 1998, Desert Fireplaces dissolved, selling all assets and liabilities.

Sunrise Ridge filed suit against Saxton on August 1, 2001 for construction defect. On August 30, 2001, Saxton filed a third-party complaint against Desert Fireplaces. Desert Fireplaces filed a motion to dismiss pursuant to NRCP 12(b)(5), arguing that the complaint was not filed within the two-year time limit specified in NRS 78.585.

After a hearing, the district court denied the motion. The district court thereafter held a rehearing on the motion to dismiss. Saxton conceded that Desert Fireplaces had dissolved in October 1998 but argued that because insurance was available, it should be allowed to pursue its third-party claim. The district court agreed and again denied the motion.

### **Discussion**

The supreme court has original jurisdiction to issue a writ of mandamus.<sup>2</sup> A writ of mandamus shall be issued when there is no “plain, speedy and adequate remedy in the

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<sup>1</sup> By Hilary Barrett Muckleroy

<sup>2</sup> NEV. CONST. art. 6, § 4.

ordinary course of law.”<sup>3</sup> A writ of mandamus is not to be issued unless the district court manifestly abused its discretion.<sup>4</sup> Normally, the supreme court will not exercise its discretion to consider writ petitions which challenge orders denying motions to dismiss. There is an exception, however, when there is an important issue of law which requires clarification. When a construction defect statute of limitations is tolled for claims against absent third-parties is a matter of first impression in Nevada.

Sunrise Ridge and Saxton argued that the NRS 78.585 should be construed to allow litigation to commence subsequent to the two-year time limit, and the court agreed. NRS 40.695 tolls any statute of limitations for a construction defect claim and provides that the tolling provision applies to third parties regardless of whether the party is required to appear.

The statute does not specifically mention dissolved corporations but provides that construction defect claims are tolled from the time notice of the claim is given; even to absent third-parties.

NRS 78.585 outlines the statute of limitations for commencing a cause of action against a dissolved corporation for claims which were discovered or should have been discovered prior to the corporation’s dissolution, and provides that the lawsuit must be commenced within two years of the date of dissolution.

Sunrise Ridge gave Saxton notice of the construction defect claims two months prior to Desert Fireplace’s dissolution.

Under NRS 40.695, the limitations period is tolled once the plaintiff gives notice to the general contractor. NRS 40.695(2) provides that the tolling provision applies to third-parties. NRS 40.695 requires a general notice of construction defect claims as outlined in NRS 40.645. Therefore, when a party provides general notice to the general contractor, the statute of limitations is tolled for claims against third-party subcontractors, even when they are absent from the proceedings.

Desert Fireplaces was apparently not aware of the construction defect claims until Saxton filed its third-party complaint. However, neither NRS 40.645 nor NRS 40.695 requires actual notice to third-parties.

## **Conclusion**

A third-party litigant’s claim arises when the litigant discovers or should have discovered the defects. General notice of a construction defect claim given to a general contractor is sufficient to toll the statute of limitations for claims against a third-party subcontractor even when the subcontractor is not involved in the initial proceeding against the general contractor.

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<sup>3</sup> NEV. REV. STAT. 34.170 (2004).

<sup>4</sup> Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (Nev. 1981).