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**Construction law practice tip: The discovery rule bar is high for breach of contract claims**

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Two cases from Houston appellate courts show the relatively high bar that breach of contract claims must meet to satisfy the discovery rule. The cases show that parties in the construction industry must mind the details and cede no opportunity to confirm contractual performance – or risk waiving potential breach of contract claims that will materialize years after the project's completion.

*Accrual, Limitations and the Discovery Rule*

"A claim for breach of contract accrues when the contract is breached."[1] But, in the construction industry, breaches can remain hidden for years. For example, a contractor might take a shortcut and sink fewer or shorter piles than specified, and let the owner discover the breach years later when the building's façade starts to crack. Accordingly, in construction-defect cases, the general rule is that "limitations begin to run when an owner becomes aware of property damage."[2]

The limitations clock starts ticking as soon as the claimant becomes "aware of enough facts to apprize him of his right to seek judicial remedy."[3] Knowledge of an injury, "'however slight,'" triggers accrual and the duty of reasonable diligence to inquire, "'even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.'"[4]

The discovery rule tolls the accrual date of a cause of action "until the injured party learned of, or in the exercise of reasonable diligence should have learned of, the wrongful act causing the injury."[5] Importantly, the limitations clock continues to run even if the plaintiff still ignores:

- The specific cause of the injury
- The party responsible for it
- The full extent of it
- The chances of avoiding it[6]

The judicial intent is to apply the discovery rule "in limited circumstances where 'the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.'"[7] "'An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence.'"[8]

The "discovery rule is a plea in confession and avoidance."[9] Whether it applies is a question of law.[10] The Texas Supreme Court has expressly opined that it did not hold that the rule could "never apply to breach of contract claims."[11] Instead, whether the rule applies "is decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury [or cause of action] was discoverable."[12] Some contract breaches may qualify under the discovery rule, "[b]ut those cases should be rare, as diligent contracting parties should generally discover any breach during the relatively long four-year limitations period provided for such claims."[13]

*The discovery rule does not toll claims when facts are included in the contract that would place the plaintiff on notice of a potential injury.*

In *Ammerman v. Ranches of Clear Creek Cmty. Ass'n, Inc*., the trial court granted summary judgment to the community association and one of its homeowners on limitations grounds, and the First Court of Appeals affirmed.[14] The Ammermans purchased a 30.6-acre parcel in a gated community in 2006 and built their residence in 2008. Each parcel in the community was sold with a pre-defined and carefully located "building envelope," *i.e.*, perimeters within which owners had to build their residences. The subdivision's developers and the association had drawn the building envelopes with the intent of maintaining the secluded nature of the overall community, and had done so before placing the first parcel on sale.

The Wilsons also purchased a 16.8-acre parcel adjacent to the Ammermans' in 2006, but waited until 2015 to build their retirement home within its three-acre envelope. In 2016, the Ammermans sued the community association, its architectural review committee, and the Wilsons for breach of contract, declaratory action, injunctive relief, and other claims. The Ammermans alleged that the Wilsons' building envelope and residence location both violated the association's covenants.

The trial court held that the Ammermans' claims were time-barred, and the court of appeals agreed. The record showed that the Wilsons' residence was within its prescribed envelope, and that the latter was established and disclosed when the Ammermans purchased their parcel in 2006. Any potential breach of the association's covenants was discoverable by the Ammermans by 2006, at which time the limitations period started running. The Ammermans' 2015 breach of contract and other claims were, therefore, past the applicable limitations periods.

*The discovery rule does not toll claims when facts are discoverable in storage that would place the plaintiff on notice of a potential injury.*

In *B. Mahler Interests, LP v. DMAC Constr., Inc*., Mahler sued DMAC for breach of contract and warranty for alleged defective construction of an event center.[15] Substantial completion occurred on October 25, 2006, but DMAC continued to work on punch list items and change orders into 2007. Mahler made its final payment in January 2008. An engineering firm it hired in August 2007 flagged several construction problems with the building. Additional building problems began to materialize in late 2010 and Mahler requested a second inspection in May 2012. Mahler sued DMAC on October 26, 2012, asserting breach of contract and warranty claims regarding issues with a porch roof, outside doors, and indoor flooring. Mahler invoked the discovery rule. The trial court granted DMAC's limitations-based summary judgment motion.

The Fourteenth Court of Appeals affirmed. It held that the breach of contract "occurred at the latest by January 2008 when all construction was completed and final payment was made."[16] Mahler's claims were, therefore, time-barred unless the discovery rule applied. The court held that it did not. The record showed that by January 2008 at the latest, Mahler had been informed by the August 2007 report about the issue that formed the basis of his porch roof claim, that he actually knew about the issue behind his outside door claim, and that he had enough information to discover the issue behind his indoor flooring claim. As to the latter, Mahler claimed that he learned in 2012 that the contractor had installed residential-grade floors after he had allegedly represented and warranted to install commercial-grade floors. But, DMAC had left behind at the event center a box of surplus residential-grade flooring material. The court held that Mahler's injury was, therefore, "not inherently undiscoverable" because Mahler could have contacted the manufacturer to confirm the flooring material's grade. Mahler could not avail itself of the discovery rule because it had taken no measures to verify DMAC's contractual performance.

Procedurally, a plaintiff seeking to avail itself of the discovery rule must affirmatively plead it, "either in its original petition or in amended or supplemental petition, in response to defendant's assertion of limitations defense as matter in avoidance," or it is deemed waived.[17] In *Shipp v. O'Dowd*, the Shipps signed a residential construction contract in February 1964.[18] The house was completed in May of that year. The subcontractor sank twelve fewer piers than the construction plans specified. The Shipps apparently discovered the alleged construction legerdemain, and resulting house settling and damage, in late 1966. They sued for breach of contract on November 1, 1968 but did not affirmatively plead the discovery rule. The court found that the suit was, "on its face . . . not filed within the statutory period" and held that it was barred by limitations.[19] One can infer that the court reasoned that the completion of construction marked, at the latest, the start of the limitations period, as in *Mahler*.

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[1] *Cosgrove v. Cade*, 468 S.W.3d 32, 39 (Tex. 2015).
[2] *J.M. Krupar Constr. v. Rosenberg*, 95 S.W.3d 322, 329 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (emphasis added) (citing cases).
[3] *Booker v. Real Homes, Inc.*, 103 S.W.3d 487, 491 (Tex. App.—San Antonio 2003, pet. denied) (citing *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990)).
[4] *G.R. Auto Care v. NCI Group, Inc.*, Nos. 01-17-00068-CV, 01-17-00243-CV, 2018 WL 4087295, *4 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018, no pet.) (mem. op.) (citations omitted).
[5] *Cosgrove*, 468 S.W.3d at 36.
[6] *PPG Indus. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93–94 (Tex. 2004) (internal citations omitted).
[7] *Cosgrove*, 468 S.W.3d at 36.
[8] *Via Net v. Tig Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (citation omitted).
[9] *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988).
[10] *Via Net*, 211 S.W.3d at 314; *Velocity Databank, Inc. v. Shell Offshore, Inc.*, 456 S.W.3d 605, 609 (Tex. App.—Houston [1st. Dist] 2014, pet. denied).
[11] *Via Net*, 211 S.W.3d at 314.
[12] *Id*. (emphases in original).
[13] *Id.* at 315.
[14] Nos. 01-17-00015-CV and 01-17-00445-CV, 2018 WL 4131883, --- S.W.3d ---, at *1 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no. pet. h.), *motion for reh'g en banc filed*).
[15] 503 S.W.3d 43, 47 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
[16] *Id*. at 49.
[17] *Woods*, 769 S.W.2d at 518.
[18] 454 S.W.2d 845, 846 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.).
[19] *Id.* at 847.