Construction Case Law Update

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Cendent Mobility Financial Corp. v. Asuamah
285 Ga. 818 (2009)

The Georgia Supreme Court refused to extend the rule that the defense of *caveat emptor* does not apply to a purchaser's claim of negligent construction against the builder/seller of a home regarding latent construction defects of which the purchaser/homeowner did not know and in the exercise of ordinary care would not have discovered, if the defects either were known to the builder/seller or in the exercise of ordinary care would have been discovered by the builder/seller.

In *Asuamah*, a purchaser had attempted to extend this exception for claims against a seller who was not the builder of the home, alleging that the seller had negligently performed repairs. The court held that because the defendant was the seller of a previously-owned home and not the builder/seller of the home, *caveat emptor* applied, and the trial court had not erred in granting it summary judgment.

Rosenberg v. Falling Water, Inc.
302 Ga. App. 78 (2009)

In *Rosenberg*, the court of appeals clarified that Georgia's statute of repose, O.C.G.A. § 9-3-51, is not tolled by fraud.

The case involved a claim by a homeowner against a deck builder. The homeowner's deck collapsed 11 years after it had been constructed. The homeowner argued that the original builder should be equitably estopped from asserting the statute of repose to bar his claims, due to the builder's alleged fraud in covering up its alleged negligence when the deck was constructed. The court of appeals held that, by definition, a statute of ultimate repose cannot be tolled to permit actions to be brought for injuries which occur after the statutory period expired. Therefore, the court held that the homeowner's claims against the builder were barred by the statute of repose.

America's Home Place, Inc. v. Cassidy
301 Ga. App. 233 (2009)

This matter once again illustrated the difficult standard that must be met in order to vacate an arbitration award. A homeowner moved to vacate an arbitration award in favor of a homebuilder on the grounds of manifest disregard of the law, under O.C.G.A. § 9-9-13(b)(5). The court of appeals reiterated that for manifest disregard of the law to apply, the disregard must be both evident and intentional. An arbitrator who incorrectly interprets the law has not manifestly disregarded it and has, instead, simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and completely ignore it.

In *Cassidy*, the homeowners challenged the arbitrator's finding that the builder had substantially completed the home, pointing out that no occupancy permit had been issued, and arguing that the arbitrator had ignored the contract language which required an occupancy permit for substantial completion and for their occupying the home.

The court found that, although an arbitrator cannot ignore the plain language of the contract, " 'courts must not decide the rightness or wrongness of the arbitrator's contract interpretation, only whether the decision draws its essence from the contract.' "

The court found that the contract required payment to be made upon the earliest of substantial completion or the date of certificate of occupancy. Accordingly, it found that under the terms of the contract, substantial completion did not depend upon the issuance of the certificate of occupancy and could be considered to have occurred before the certificate of occupancy was issued. The court further noted that the contract did not define "beneficial use and occupancy of the home" as a requirement for substantial completion, which made that phrase subject to interpretation by the arbitrator. Therefor, the court found that the homeowners failed to establish any grounds for vacating the arbitration award.

Bailey v. Annistown Road Baptist Church, Inc.
301 Ga. App. 677 (2009)

This is a storm water nuisance and trespass case. The plaintiff property owners filed suit against a neighboring church and the county for trespass and nuisance. The court of appeals clarified Georgia law on several issues regarding storm water cases.

The defendant church argued on appeal that the trial court had erred in failing to grant it a directed verdict or a judgment notwithstanding the verdict, because the evidence had shown that the church was an innocent trespasser as a matter of law and that the court should have charged on that defense.

The court of appeals held that an innocent trespass occurs when there is an unintentional and non-negligent entry into another's land, even if it causes harm to the possessor, and that the innocent trespasser defense protects individuals who enter the land under the mistaken belief that it is permissible to do so. Here, however, the court found that there was no evidence that the church had thought it had the right to let excess storm water run onto the plaintiff's property, and therefore the trial court had properly denied the motion for directed verdict.

The church contended that it should have received a JNOV because there was no evidence of negligence or proximate cause linking it to the plaintiff's injuries.

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The court found that there was some evidence that there was an initial leak on church property which had been caused by underground voids that continued to divert water onto the plaintiff's property.

There also was evidence that the church and the county had been alerted to the problem and yet had failed to remedy the problem in order to stop the excess water from flowing onto the plaintiff's property. The court found that even though the church may not have caused the initial leak, may not have owned the water that leaked, and may not have had any responsibility for the original compaction of the soil around the underground utility lines which had resulted in the voids, there was evidence that later excessive flooding had been caused by a condition on the Church's property which had resulted from the initial leak.

Citing O.C.G.A. § 41-1-1, the court noted that a "nuisance is anything that causes hurt, inconvenience or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance." Under Georgia law, liability for nuisance arises out of responsibility for the continuance or maintenance of the nuisance in addition to the creation of one, and it is the control, not ownership, of the relevant property that is at issue. "'In order to be held liable for nuisance, ownership by the tortfeasor is not an element, but control is; the essential element of nuisance is control over the cause of harm. The tortfeasor must be either the cause or concurrent cause of the creation, continuance, or maintenance of the nuisance.'" Therefore, the court found that because there was evidence that the church had exercised control over the property from which the storm water was flowing, there was sufficient evidence to overcome a motion for JNOV.

The church further contended it was entitled to JNOV because O.C.G.A. § 41-1-5(b) required the plaintiff to give it notice to abate the nuisance. The court of appeals found that this argument was without merit because the statute applies "only in cases where 'the alienee of the property injured' makes the claim against 'the alienee of property causing the nuisance.'" The court found that the homeowner did not fall into this category, and therefore this statute did not apply.

Finally, the church contended that it was entitled to JNOV because any water that initially leaked from the sprinkler vault was the legal responsibility of the county because it owned the water and the utility easement. The court found that this argument failed to address the law of continuing nuisance as explained earlier in its opinion.

RSN Properties, Inc. v. Engineering Consulting Services
301 Ga. App. 52 (2009)

This case involved a claim by a real estate developer against an engineering firm for breach of contract and negligence. The developer sought to recover more than $100,000 in the law suit. The engineers moved for partial summary judgment, arguing that the parties' contract contained a limitation of liability provision, which limited the firm's liability to the developer for engineering errors to the value of the engineering services or the sum of $50,000, which ever was greater.

The court found that the limitation of liability provision was not barred by public policy and was enforceable. The court noted that, as a general rule, a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy, except when such an agreement is prohibited by statute. The court found no statute which would prohibit the engineer firm from limiting its liability to the real estate developer. The court found that, although professional engineers are subject to statutory regulations which require adherence to rules of professional conduct and practices designed to protect the safety, health and welfare of the public, the public policy expressed in these regulations was not violated by limiting liability in the contract.

The court noted that both parties to the contract were in relatively equal bargaining positions and were in a commercial setting. Generally, the inclusion of a limitation of liability provision in a contract of this nature recognizes that the fee for services is relatively small compared to the substantial liability that could arise from an error in providing services, and therefore, in exchange for the services for an agreed upon fee, the liability can be capped.

The court noted that this limitation of liability provision did not release the engineering firm from liability for its engineering errors, and that it remained liable to developer for up to $50,000. It also noted that nothing in the contract exculpated, held harmless, or otherwise limited the engineer's liability to third parties. Under these circumstances, the court found that the limitation of liability provision of the contract represented a reasonable allocation of risk in an arm's length business transaction and did not violate public policy.

Torres v. Piedmont Builders, Inc.
300 Ga. App. 872 (2009)

Torres is arbitration case between homeowners and their builder. The homeowners had filed a motion with the superior court to appoint arbitrators pursuant to O.C.G.A. § 9-9-7(b)(1). The superior court dismissed the owner's action and ordered that an arbitration be administered by Construction Arbitration Associates, Inc. ("CAA") as required in the arbitration agreement. The owners appealed the order.

The owner's first enumeration of errors was that the construction contract did not provide a method for appointing the arbitrator.

However, the court of appeals pointed out that the contract stated, "The Contractor and the Owner agree that any disputes or claims arising out of the contract or breach thereof shall be decided by arbitration in accordance with the Official Code of Georgia Annotated § 9-1-1, *et seq.* and with the rules and procedures of Construction Arbitration Associates, Ltd. and shall be made within a reasonable time but not less than 30 days after the dispute has arisen."

The rules and procedures of CAA provided that, to initiate an arbitration, "two copies of the contract including the arbitration provision shall be submitted with a demand. Upon receipt, CAA shall appoint an arbitrator from the construction arbitration panel. After that selection, CAA shall give notice of such appointment to both parties." The court of appeals found that, based upon the plain language of the construction contract, the trial court did not err in sending the arbitration to CAA for resolution.

The owners also contended that the superior court had erred in failing to disqualify CAA because CAA allegedly demonstrated bias. The appellate court disagreed, noting that the question of whether or not to disqualify an arbitrator on grounds of partiality addresses itself to the sound discretion of the trial court, and that the trial court will be upheld absent an abuse of discretion.

The builder, prior to responding to the owners' application in superior court, had written a letter to CAA with a copy to the owners' attorney, seeking clarification as to whether CAA allows other companies to use its rules of arbitration, whether CAA had experience with cases involving similar contract language, and how CAA rules determine who the arbitrator will be. The court of appeals held that, because the builder's letter requested a response to both parties, there was no issue of *ex parte* contact.

Because the owners did not present any allegations that CAA had any special relationship to the builder or any interest in the outcome of the arbitration, and the CAA had provided little or no analysis of the issues other than to quote its procedures for initiating an arbitration proceeding, the trial court did not abuse its discretion in failing to disqualify CAA. ❖