FILED November 7, 2013 03:04 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

PIH BEAVERTON, LLC,
Plaintiff-Appellant,
Respondent on Review

61488

v.

SUPER ONE, INC.
Defendant-Respondent,
Petitioner on Review,

and

GARY THOMPSON, dba Portland Plastering Company; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing; WOOD MECHANIX, INC.; T. T. & L. SHEET METAL, INC.,
Defendants-Respondents,

and

DOES 1 through 8; ESKEW CONTRACTING, INC.; DAN RIMA, dba Dan Rima Construction; and DOES 1 and 2,

Defendants.

SUPER ONE, INC.,
Third-Party Plaintiff,

v.

DAN RIMA, dba Dan Rima Construction; ESKEW CONTRACTING, INC.; T. T. & L. SHEET METAL, INC.; STO CORP.; ROSE CITY BUILDING SUPPLY, an assumed business name of L & W Supply Corp., WOOD MECHANIX, INC.; DEMIAN DAWSON, dba Spectra Caulking; VIPS MOTOR INNS, INC.; DAVID ESKEW; and MICHAEL ESKEW, dba Eskew Roofing,
Third-Party Defendants.

Washington County Circuit Court No. C072107CV

Court of Appeals No. A142268 (Control)

PIH BEAVERTON, LLC,
a Delaware limited company,
Plaintiff,

v.

SUPER ONE, INC., an Oregon corporation; GARY THOMPSON, dba Portland Plastering Company; DOES 1 through 8; ESKEW CONTRACTING, INC., an Oregon corporation; DAN RIMA, dba Dan Rima Construction; WOOD MECHANIX, INC., an Oregon corporation; DEMIAN DAWSON, dba Spectra Caulking; T. T. & L. SHEET METAL, INC.; DOES 1 and 2; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing;
Defendants.

SUPER ONE, INC.,
an Oregon corporation,
Third-Party Plaintiff-Appellant,
Petitioner on Review,

v.

DAN RIMA, dba Dan Rima Construction, an individual; ESKEW CONTRACTING, INC., an Oregon corporation; T. T. & L. SHEET METAL, INC., an Oregon corporation; STO CORP.; a foreign corporation; Rose City Building Supply, an assumed business name of L & W SUPPLY CORP., an Oregon corporation; DEMIAN DAWSON, dba Spectra Caulking, an individual; VIPS MOTOR INNS, INC., an Oregon corporation; DAVID ESKEW; and MICHAEL ESKEW, dba Eskew Roofing,
Third-Party Defendants,

and

WOOD MECHANIX, INC., an Oregon corporation; and GARY THOMPSON, dba Portland Plastering Company,
Third-Party Defendants-Respondents,
Respondents on Review.

Washington County Circuit Court No. C072107CV

Court of Appeals No. A142301

No. S061488 (Control)

PIH BEAVERTON, LLC,
Plaintiff-Appellant,
Respondent on Review,

v.

SUPER ONE, INC.; GARY THOMPSON, dba Portland Plastering Company; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing; WOOD MECHANIX, INC.,
Defendants-Respondents,

and

T. T. & L. SHEET METAL, INC.
Defendant-Respondent,
Petitioner on Review,

and

DOES 1 through 8; ESKEW CONTRACTING, INC.; DAN RIMA, dba Dan Rima Construction; and DOES 1 and 2,
Defendants.

SUPER ONE, INC.,
Third-Party Plaintiff,

v.

DAN RIMA, dba Dan Rima Construction; ESKEW CONTRACTING, INC.; T. T. & L. SHEET METAL, INC.; STO CORP.; ROSE CITY BUILDING SUPPLY, an assumed business name of L & W Supply Corp., WOOD MECHANIX, INC.; DEMIAN DAWSON, dba Spectra Caulking; VIPS MOTOR INNS, INC.; DAVID ESKEW; and MICHAEL ESKEW, dba Eskew Roofing,
Third-Party Defendants.

Court of Appeals No. Al42268 (Control)

PIH BEAVERTON, LLC,
a Delaware limited company,
Plaintiff,

v.

SUPER ONE, INC., an Oregon corporation; GARY THOMPSON, dba Portland Plastering Company; DOES I through 8; ESKEW CONTRACTING, INC., an Oregon corporation; DAN RIMA, dba Dan Rima Construction; WOOD MECHANIX, INC., an Oregon corporation; DEMIAN DAWSON, dba Spectra Caulking; T. T. & L. SHEET METAL, INC.; DOES 1 and 2; MICHAEL ALFORD ESKEW; DAVID LEE ESKEW; ESKEW & ESKEW, dba Eskew Roofing;
Defendants.

SUPER ONE, INC.,
an Oregon corporation,
Third-Party Plaintiff-Appellant,

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DAN RIMA, dba Dan Rima Construction, an individual; ESKEW CONTRACTING, INC., an Oregon corporation; T. T. & L. SHEET METAL, INC., an Oregon corporation; STO CORP.; a foreign corporation; Rose City Building Supply, an assumed business name of L & W SUPPLY CORP., an Oregon corporation; DEMIAN DAWSON, dba Spectra Caulking, an individual; VIPS MOTOR INNS, INC., an Oregon corporation; DAVID ESKEW; and MICHAEL ESKEW, dba Eskew Roofing,
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WOOD MECHANIX, INC., an Oregon corporation; and GARY THOMPSON, dba Portland Plastering Company,
Third-Party Defendants-Respondents.

Court of Appeals No. A142301

No. S061505

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I. SUMMARY OF ARGUMENT

Plaintiff-Appellant, Respondent on Review PIH Beaverton, LLC ("PIH") filed suit to recover damages caused by the defective construction of a hotel in Beaverton, Oregon (the "Hotel"). Defendant-Respondent, Petitioner on Review Super One, Inc. ("Super One") was the general contractor. The other Defendant-Respondent Petitioner on Review TT&L Sheet Metal, Inc. ("TT&L") was a subcontractor hired by Super One. Both Super One and TT&L argue that PIH's claims are barred by the statute of ultimate repose, ORS 12.135.[1] PIH contends that the timeliness of its claims is a question of fact for the jury.

Both the plain text and legislative history of ORS 12.135 reflect that the legislature intended to create a bright-line rule to determine when the statute of ultimate repose began running on a construction project: the statute begins with a written acceptance by the owner at some time before final completion, or (if there is no written acceptance) with final completion of the improvement. Here, the Notice of Completion posted by the owner was not a written acceptance; consequently, the statute of repose began running at final completion, which, as the evidence in the record establishes, occurred less than

[1] Before the Court of Appeals, Super One and several subcontractors argued that ORS 12.115 was the applicable statute of repose. Defendants now appear to have abandoned that argument before this Court. If the Court is considering that issue on review, PIH refers the Court to PIH's briefing before the Court of Appeals.

ten years before PIH initiated this lawsuit. Accordingly, this Court should affirm the ruling of the Court of Appeals and remand this case to the trial court.

II. ARGUMENT

ORS 12.135 requires that construction-defect claims "be commenced within ten years from the substantial completion or abandonment of such construction, alteration or repair to the improvement of real property." In turn, "substantial completion" is defined in two ways: "Substantial completion" means:

> (1) *the date when the contractee accepts in writing* the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose
>
> or
>
> (2) if there is no such written acceptance, *the date of acceptance of the completed construction*, alteration or repair of such improvement *by the contractee*.

ORS 12.135(3) (emphasis added).[2]

The trial court erred in granting summary judgment based on the defendants' affirmative defense under the ten-year statute of repose for the following reasons: (1) VIP's never accepted "in writing" the completion of the Hotel to start the repose period on any date; and (2) summary-judgment

[2] Since the trial court's summary-judgment order, ORS 12.135 has been amended, which resulted in new numbering for parts of this statute. The numbers in this brief correspond with the former version of ORS 12.135.

evidence showed that construction was not completed on the Hotel, and there was additional work on the Hotel, after the February 13, 1997 date that the trial court determined was the start the repose period.[3] Thus, there is a question of material fact as to when the statute of repose began to run, making summary judgment inappropriate.

A. A Notice of Completion under ORS 87.045 is not a "written acceptance" of completion for purposes of ORS 12.135.

As the Court of Appeals noted, the first half of the ORS 12.135 definition of substantial completion requires the owner's "written acceptance" of completion. Accordingly, the first question for the Court, is whether the ORS 87.045 Notice posted by VIP's satisfies the ORS 12.135(3) qualifications for such a "written acceptance." As discussed below, this ORS 87.045 Notice is not a written acceptance of completion under ORS 12.135(3).

First, the ORS 87.045 Notice does not include an acknowledgement that the improvement "reached the state of completion when it may be used or occupied for its intended purpose" as required by ORS 12.135. Again, ORS 12.135(3) specifically describes what is an "acceptance in writing": an acceptance in writing of the improvement "as having reached that state of completion when it may be used or occupied for its intended purpose."

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[3] Notably, the trial court determined that the "notice of completion" did not constitute written acceptance. The trial court went on to rely on the contract between the parties, not ORS 12.135(3), in determining that the Hotel was "substantially complete" on February 13, 1997. ER-31-33.

Defendants ask the Court to look to facts outside of the writing itself to find, as a matter of law, that the Notice they rely on is an "acceptance in writing" meeting the requirements of ORS 12.135(3). By comparison, the Certificate of Substantial Completion set forth in the contract between VIP's and Super One does include statements closely tracking the requisite language under ORS 12.135(3) regarding the "substantial completion" of the Hotel. TCF 135 (Henderson Dec., Ex. A). A true written acceptance of completion under ORS 12.135 would reflect the parties intent for the statute of limitations to begin running and for VIP's to take control of the Hotel. The Notice here does *not* reflect such an intention by the owner, VIP's.

Second, the ORS 87.045 Notice serves a different function than a Certificate of Substantial Completion contemplated by the parties' contract here and ORS 12.135. The ORS 87.045 Notice deals with the timeliness of contractors' construction liens on a project. In the absence of an ORS 87.045 Notice, the court must look at the actual date of substantial completion in order to determine a construction lien's timeliness. *See Dallas LBR. & Supply v. Phillips*, 249 Or 58, 59-60, 426 P2d 739 (1968) (notwithstanding the posting of an ORS 87.045 Notice, the Court looked at other evidence to determine when a building was actually substantially complete); *see also Star Rentals, Inc. v. Seeberg Constr*., 66 Or App 822, 829, 677 P2d 708 (1984) (the Court of Appeals, describing the options available under ORS 87.045 as: "The owner

and mortgagee may do nothing and rely on establishing a date of substantial completion, or they may post and record the notice after the original contractors have substantially performed their contracts.").

On the other hand, the written acceptance required by ORS 12.135 provides a clear date when the statute of repose begins to run. Moreover, as contemplated by the contract between Super One and VIP's, the Certificate of Substantial Completion requires the Architect, as the owner's agent, to determine when the work is "substantially complete" as defined by the contract.

Super One argues that "[i]t would be incongruous to hold that that notice operated only to start the time running for [the contractors] to perfect their liens so that [the contractors] may be paid, but not to start the time running for when VIP's or its successors may sue those contractors, when VIP's had in fact opened the hotel's doors to paying guests." Super One's Brief on the Merits, p. 8. This argument suffers several flaws: first, it ignores this Court's prior statements that a "notice of completion permitted by ORS 87.045 is neither the exclusive nor conclusive test for deciding when completion of a structure has occurred." *Dallas LBR*, 249 Or at 60. Second, the argument fails to appreciate that the two statutes have different purposes; while both statutes use the words "substantial completion," it is neither incongruous, nor illogical, that that term could mean different dates in different contexts. Finally, the argument ignores the parties' contract, in which the project architect would provide a Certificate

of Substantial Completion evidencing the owner's clear intent to accept in writing the completed Hotel.

Both ORS 87.045 and ORS 12.135 leave two options for determining a substantial completion date: one established by a written document, or one established, as a matter of fact, by the date construction was actually completed or was abandoned. Had the legislature intended a writing for the purpose of one of those statutes to serve the purpose of the writing for the other, it could have referenced ORS 87.045 in ORS 12.135, and vice versa. But the legislature did not provide that connection.

As a matter of law, the Court should conclude that the Notice posted by VIP's was not an "acceptance in writing" for the purposes of ORS 12.135(3). However, at the very least, if the Court determines that the Notice is some evidence of an "acceptance in writing," then there is a question of fact for the jury whether the Notice posted by VIP's was, as a matter of fact, an "acceptance in writing." Accordingly, the Court should remand this case to the trial court.

B. In the absence of a written acceptance, there is a question of material fact regarding when the Hotel reached "substantial completion" as defined by ORS 12.135.

Super One also challenges the Court of Appeals's interpretation of the second part of the definition of "substantial completion." Based upon a straight-forward reading of ORS 12.135, the Court of Appeals determined that

if there is no written acceptance under ORS 12.135, then the improvement reaches "substantial completion" on the "date of acceptance of the completed construction."

1. The plain meaning of ORS 12.135 supports PIH's interpretation.

As before the Court of Appeals, Super One argues that the acceptance referred to in the first part of the definition (as "having reached that state of completion when it may be used or occupied for its intended purpose") applies to both written acceptance and non-written acceptance. However, as the Court of Appeals stated, the clause in question modifies the verb accepts, not the noun "improvement." *PIH Beaverton, LLC v. Super One, Inc.*, 254 Or App 486, 496 n 8, 294 P3d 536 (2013).

Super One's argument rests on the words "such improvement." The word "such" appears twice in the second portion or ORS 12.135(3):

> "if there is no *such* written acceptance, the date of acceptance of the completed construction, alteration or repair of *such* improvement by the contractee."

(Emphasis added.) The first "such" modifies "written acceptance" which is further described in the first portion of the statute as "as having reached that state of completion when it may be used or occupied for its intended purpose." The second "such" modifies "improvement," which is more expansively defined as "improvement to real property or any designated portion thereof." Thus, the second "such" tells the reader that completion could exist for less than

a full improvement, if only a designated portion of the improvement is at issue (for example, if a contract was for only a specific phase of a large project or for the remodel of a kitchen). Below is a version of the statute, with relevant sections repeated to avoid the use of "such." This represents the only reasonable meaning of the term "such" as used in the statute:

> "the date when the contractee accepts in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or if there is no [acceptance in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose], the date of acceptance of the completed construction, alteration or repair of [the improvement to real property or any designated portion thereof] by the contractee."

Thus, as determined by the Court of Appeals, if there is no written acceptance, the date of "substantial completion" is "the date of acceptance of the *completed construction*, alteration or repair of [the improvement to real property or any designated portion thereof] by the contractee." ORS 12.135(3) (emphasis added).

2. The legislative history also supports PIH's interpretation.

The history of ORS 12.135 makes clear that the legislature intended to create a bright-line rule to help contractors determine when the statute of repose would begin running on construction projects. If there is a written acceptance from the owners, that date would be clear and that date would control. If there

is no written acceptance, using the date "when it may be used or occupied for its intended purpose" would hardly create the bright line the legislature intended. There would always be a question of fact as to when, precisely, was the first day an owner could have used a building for its intended purpose.

Here, although VIP's began using part of the Hotel for its intended purpose, as a hotel, other parts of the improvement were not yet being used for their intended purposes and were not completed, as evidenced by VIP's president, Mr. Johnson's statements that there was work to be done "having to do with the storm drainage and wetlands" after VIP's began occupying the some portion of the improvement. ER 10-12. The storm drainage system could not be used for its intended purpose at that point, and the storm drainage system was part of the improvement that Super One contracted to build.

Testimony in support of HB 1259 reflects that the purpose of the statute was both to create a bright-line rule for contractors and also in ensure that proper evidence was available for construction defect cases. In a letter in support of HB 1259, W.M. Smith stated a concern that "[t]he Architects or Contractors have no control over the building after it is turned over to the owner. Structural changes, additions, remodeling and other changes are often made in buildings after completion by the owners." Testimony, House Financial Affairs Committee, HB 1259, March 25, 1971, Exhibit 4 (Letter from W.M. Smith, Smith & Nelson Contractors & Engineers to Representative Cole)

(APP-3-4). Thus, Mr. Smith was concerned that contractors would be blamed for actions taken by the owners. As the Court of Appeals described, Mr. Heifield, counsel for the Association of General Contractors, echoed the idea that the transfer of control was an important indication of completeness. Tape Recording, House Financial Affairs Committee, HB 1259, May 10, 1971, Tape 16, side 2 (statement of Mr. Heifield); Tape Recording, Senate State and Federal Affairs Committee, HB 1259, May 24, 1971, Tape 14, side 2 (statement of Mr. Heifield).

In his testimony before the House and Senate committees, Mr. Heifield used the example of medical malpractice statutes of limitations for surgeons several times to explain the policy behind having the statute begin running at completion, rather than injury. Tape Recording, House Financial Affairs Committee, May 10, 1971, Tape 16, side 2 (statement of Mr. Heifield).[4] This example is of somewhat limited utility in application to construction, because a surgery generally occurs all on one day, rather than over the course of days, months, or years, as can be the case in construction; however, his example highlights idea that the legislature was thinking about finality in enacting this statute: When the construction is done, the statute of repose begins.

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[4] Super One argues that the Court of Appeals took Mr. Heifield's statements out of context in *Sunset Presbyterian Church*. Super One's Brief on the Merits, 18-19. However, Mr. Heifield was, as Super One states, addressing *his amendments*, which related to non-written acceptance. *See* Super One's Brief on the Merits, 17-18 (describing the amendment process).

Here, although VIP's began operating the Hotel, the transfer of control and responsibility for maintenance of the entire improvement is not clear on this record. *See* ER 29 (deposition of Andrew Ilg, Super One's owner). After the ORS 87.045 Notice and after the VIP's began accepting guests, there was still significant work being done on the wetlands and storm drainage and, as Super One's owner stated in his deposition, Super One remained onsite doing this work. Moreover, Super One did not obtain a certificate of final occupancy for the Hotel, as required by its contract, until September 1997. ER 30. Thus, the record reveals that the type of completion considered by the legislature did not occur until much later than when VIP's first started accepting guests.

3. There is a question of material fact as to when VIP's accepted the completed construction of the Hotel.

The Court of Appeals concluded, there is

> "a genuine issue of material fact as to whether VIP's' 'acceptance of the completed construction' of the improvement to real property occurred on February 13, 1997, as the trial court found, or some time after May 23, 1997—and thus within 10 years of the date on which plaintiff's complaint was filed."

PIH Beaverton, LLC, 254 Or App at 500. That conclusion is supported by the record on summary judgment. Notably, Super One does not argue that if PIH is correct about the meaning of ORS 12.135(3), there is nonetheless still no question of fact for the jury.

There is ample evidence that VIP's did not accept the completed construction until after May 23, 1997. As described in PIH's Opening brief

before the Court of Appeals, VIP's president, the architect on the project, the superintendent for Super One, and Super One's owner each testified that the construction on the Hotel was not complete until a final certificate of occupancy was obtained, which occurred in September 1997. Additionally, there is evidence that Super One continued to work on the improvement, including work on the storm drainage system and wetlands, after February 1997.[5] From all of this evidence, a reasonable juror could find that the Hotel did not reach substantial completion, as defined by ORS 12.135(3) until after May 23, 1997. Accordingly, this Court should not conclude, as a matter of law, that PIH's claims are barred by the statute of repose, but instead should remand for trial on the merits.

[5] In its Petition for Review, TT&L argues that the Court of Appeals erred in considering the testimony of Mr. Johnson, the president of VIP's, regarding when the Hotel was substantially complete. TT&L's Petition for Review, p. 5-6. Relatedly, Super One argues that issuance of the final Certificate of Occupancy is not evidence of the "owner's acceptance" of the completed construction under ORS 12.135. Super One's Brief on the Merits, p. 21. Mr. Johnson's testimony is evidence of when the contractee (VIP's) accepted the completed construction. His testimony that the Certificate of Occupancy was required before he considered construction complete (ER-15) makes the date of the Certificate of Occupancy important evidence of when the contractee accepted the completed construction.

III. CONCLUSION

The Court should affirm the Court of Appeals and remand for trial on the merits, for the reasons set forth above and as set forth in PIH's briefs before the Court of Appeals.

Dated: November 7, 2013.

/s/ Daniel T. Goldstein

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation of ORAP 5.05(2) and is 3,383 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

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I certify that, on November 7, 2013, I served two true copies of the foregoing *Respondent's Brief on the Merits* on:

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I certify that, on November 7, 2013, I caused the foregoing Respondent's Opening Brief to be electronically filed with the Appellate Court Administrator at this address:

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