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Lum Law Notes
Fall 2017

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FIRM NEWS

Dennis Drasco participated in oral argument before the Supreme Court of New Jersey in the case Capital Health System, Inc. v. Horizon Healthcare and St. Peter's University Hospital, Inc. v. Horizon Healthcare, __ N.J. __, 165 A.3d 729 (2017).

Wayne J. Positan, Immediate Past President of the Boston University Alumni Association was the MC and speaker, with BU President Robert Brown, welcoming home the "Golden Terrier" Class of 1967 at BU Alumni Weekend 2017 on September 16.

Christina Lee was elected a member of the New Jersey Fellows of the American Bar Association.

Arthur Owens was recognized by ALM and the New Jersey Law Journal as a "New Leader of the Bar" at the 2017 Professional Excellence Awards Dinner on June 20, 2017.

Salvatore J. Alfieri has joined the Firm as an associate. He is a 2016 graduate of Rutgers School of Law - Newark and served as the law clerk to the Hon. Clarkson S. Fisher, Jr., P.J.A.D., of the Superior Court of New Jersey, Appellate Division.

The Firm is pleased to announce that the following thirteen of the Firm's attorneys have been selected for inclusion in the list of ***Best Lawyers in America 2018*** in fourteen practice areas:

Dennis J. Drasco – Commercial litigation, Construction Law, Litigation-Construction, Litigation – Insurance, Litigation – Land Use and Zoning, and Litigation – Real Estate

Wayne J. Positan – Commercial Litigation, Employment Law – Management, Labor Law – management, and Litigation – Labor and Employment

Paul A. Sandars, III – Commercial Litigation, Construction Law, and Litigation – Construction

Kevin J. O'Connor – Commercial Litigation

Christina Silva – Employment Law – Management, Labor Law – Management, and Litigation – labor and Employment

Bernadette H. Condon – Construction Law, and Litigation – Construction

Daniel M. Santarsiero – Employment Law – Management, Labor Law - Management

Elizabeth Moon – Employment Law – Management

Scott E. Reiser – Commercial Litigation

Cynthia A. Matheke - Personal Injury Litigation – Defendants, and Personal Injury Litigation - Plaintiffs

Philip L. Chapman – Corporate Law, and Real Estate Law

Donald J. Volkert – Arbitration

Edward M. Callahan, Jr. – Construction Law

Newsletter Title

For Whom the Bell Tolls: Condominium Association's Claims for Common Element Defects Commence No Sooner Than Statutory Turnover and Discovery of the Claims

A Strategic Approach To Effective Workplace Investigations

FOR WHOM THE BELL TOLLS:
Condominium Association's Claims for Common Element Defects Commence No Sooner than Statutory Turnover and Discovery of the Claims

By Paul A. Sandars, III, Esq. and Bernadette H. Condon, Esq.

The unit owners of a condominium are especially vulnerable to damages caused by latent construction defects. The Association, as the unit owner's representative, has the exclusive authority to prosecute claims regarding the common elements of the condominium.[i] Recently, the New Jersey Appellate Division, in an unpublished opinion, analyzed when a cause of action in a construction defect case brought by a condominium association against the developer and various contractors accrued for purposes of determining when the statute of limitations began to run. In The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC, et al,[ii], the Appellate Division of the Superior Court of New Jersey applied the discovery rule to toll the statute of limitations, finding that the plaintiff, condominium association's claims did not accrue until the unit owners had full control of the governing Board and the Association was reasonably aware that it had actionable claims.

Background

In 1998, a developer purchased what was then an eleven-story garage that had been constructed in the 1970's and adjacent property. The developer engaged various design professionals and hired a general contractor ("GC") to construct a garage, plaza, large residential tower, and related facilities (the "Project"). The GC hired various subcontractors for the Project. Construction on the Project was substantially complete in May 2002. Thereafter, the developer operated the Project as a rental property for two years.

In June, 2004, the developer sold the property to 100 Old Palisade, LLC, which converted the property to a condominium form of ownership. In that regard, 100 Old Palisade, LLC ("the Sponsor"), as sponsor, filed a Master Deed and Public Offering Statement. Notably, included with and incorporated into the Public Offering Statement was an engineering report setting forth an assessment of the existing condition of the property. The report identified certain construction defects. The Sponsor began selling units in the condominium in January, 2005. The Sponsor controlled the Condominium Association until control of the Association was assumed by the unit owners in July, 2006 after 75% of the units were sold.[iii] In connection with the transition of control of the Association from sponsor to unit owner, the Association engaged an engineering firm to perform a "transition" engineering inspection of the Palisades Property. The engineering firm performed the inspection and issued a written report to the unit-owner controlled Association, which detailed many significant construction defects in the Project ("Transition Engineering Report"). The Association received the Transition Engineering Report on or about June 13, 2007, which identified a myriad of construction defects and deficiencies in the construction of the Project.

In March 2009, the Association initiated a lawsuit as the legal representative of the unit owners and asserted claims for damages to the common elements. Protracted discovery and litigation ensued. Ultimately, the Association was able to resolve its claims against all but four defendants: the GC hired by the Sponsor and three subcontractors.

The remaining defendants filed motions for summary judgment, arguing that Plaintiff had not asserted its claims against them within the six year statute of limitations.[iv] Plaintiff opposed the motions. The trial court granted the motions for summary judgment finding that the statute of limitations on the Association's claim began to run upon substantial completion of the Project in May 2002; thus, Plaintiff's Complaint that was filed seven years later was out of time. Plaintiff sought reconsideration, which was denied. Plaintiff appealed and, in an unpublished decision dated February 1, 2016, the Superior Court of New Jersey, Appellate Division, reversed and remanded.

Decision

Generally, the statute of limitations in construction defect cases begins to run on the date that the project is substantially complete.[v] However, in the case of condominium associations, under New Jersey law, only the Association has standing to assert claims regarding the common elements.[vi] Quite often, the association is still under developer control on the date of substantial completion. As such, there exists no legal standing for an association to bring an action with respect to defects in the common elements until such time that control of the Association is turned over to the unit owners. Recognizing this, the Appellate Division in Palisades noted that the unit owners did not assume full control of the Board until July 2006, after 75% of the units had been sold. Thus, the Association did not have standing to prosecute the claims relative to the common elements until July 2006, the earliest.

The Appellate Division then continued its analysis of the facts in Palisades and held that the Association's cause of action did not accrue until it received the Transition Engineering Report in July 2007 at the earliest and that pursuant to N.J.S.A. 2A:14-1, the Association had six years from that date to file its complaint. In so holding the Court noted that the Association could not take action before then because it was not

"reasonably aware that it had actionable claims regarding the full range of construction defects."

The Court rejected the trial court's finding that it would be unfair to allow the Association to assert claims against the contractors because "defendants could not have reasonably anticipated that the property would be converted to a condominium, that the Association would eventually be formed, and that they would be 'forever liable'…" citing the Statute of Repose, which bars claims against contractors more than ten years after substantial completion of a project. The Statute of Repose is firm in nature, and is a bright-line limitation. In Palisades, the defendants had the benefit of the Statute of Repose which provides contractors with the security of knowing that they will not be forever liable for defective construction on the projects on which they perform.

Conclusion

The implications of Palisades are three fold: (1) a condominium association does not have standing to bring a claim for defects in the common elements until statutory control of the Association is vested in the unit owners; (2) the discovery rule may be applied to toll the Statue of Limitations so that condominium association gets the full benefit of the Statute of Limitations from the date when the defects are discovered; and (3) application of the discovery rule to toll the statute of limitations, in no way affects the statute of repose. The decision gives developers, contractors and condominium associations alike reason to be wary of latent defects.

Paul A. Sandars, III, Esq. is a member of Lum, Drasco & Positan,, LLC in Roseland. He is a member of the ABA Section of Litigation, and former co-Chair of the Construction Law and ADR committees. He is also former co-Chair of the Construction and Public Contract Law Section of the NJSBA. He has chaired, moderated and lectured at numerous seminars for the ABA Forum on the Construction Industry, ABA Section of Litigation, as well as The New Jersey ICLE on Construction law and litigation issues.

Bernadette H. Condon, Esq. is a member of Lum. Drasco & Positan, LLC in Roseland. As part of the firm's litigation department, Ms. Condon handles all aspects of construction law, including bid disputes, project management, delay and defect claims. She has co-authored articles on legal issues involved with public bidding, construction defects and community associations as well as lectured for NJICLE.

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[i] Siller v. Hartz Mountain Assoc., 93 N.J. 370, 380 (1983)
[ii] A-4292-13T (App. Div. February 1, 2016)
[iii] Pursuant to the New Jersey Condominium Act, once 75% of the units have been sold, statutory control of the Board is then transferred to the unit owners, which occurred here in July, 2006. N.J.S.A. 46:8B-12.1.
[iv] N.J.S.A. 2A:14-1.
[v] Mahoney-Troast Constr. Co. v. Supermarkets Gen. Corp., 189 N.J. Super. 325, 329 (App. Div., 1983); Rus
[vi] Siller., supra

A Strategic Approach To Effective Workplace Investigations

By Christina Silva, Esq.

Employers often question how they can avoid the impact and expenses associated with defending against claims raised by employees for misconduct in the workplace. The employer wants to take employment action against an employee but hesitates to do so because of the risk of costly litigation for a claim of wrongful termination. When a complaint about employee misconduct is received, or the employer becomes aware of employee misconduct through an anonymous source or a demand letter, the employer may inquire whether it can go on with "business as usual" or be required to take steps to address the alleged conduct. In such cases, as well as those in which any claim of harassment, discrimination, breach of confidentiality, security, or any other form of employee misconduct comes to the attention of the employer, the employer's investigative response can potentially increase or decrease the employer's risk of liability.

Employers are tasked with the duty of ensuring its workplace complies with federal and state laws which prohibit a hostile, discriminatory or retaliatory work environment, and which are intended to protect employee safety. This duty requires the employer to promptly determine whether there is any merit to a claim of employee misconduct, and effectively act to address such misconduct to prevent any further recurrence. In addressing allegations of improper workplace conduct, the manner in which the employer responds is of critical importance to its ability to assert defenses. A faulty investigation can result in the employer's failure to prevent repeated misconduct, failure to remedy conduct which violates state and federal law, failure to comply with its own employment policies against harassment, discrimination, retaliation, and safety regulations in the workplace, and can also result in claims of defamation and intentional infliction of emotional distress by employees who participated in the investigation process. By implementing an effective and responsive workplace investigation plan, employers can establish a defense to such claims and increase the likelihood of being successful if faced with litigation.

I. EMPLOYER'S AFFIRMATIVE DEFENSE

The United States Supreme Court has determined that investigations of workplace harassment[1] are a key component of an employer's response to allegations of employee misconduct, providing employers with an affirmative defense to vicarious liability for a supervisor's hostile work environment where the employer's action does not result in a tangible employment action, provided that: (1) The employer exercised reasonable care to prevent and correct promptly harassment; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

Employer liability may be premised on negligence based on failure to have effective policies and procedures for addressing employee complaints. See Lehmann v. Toys 'R' Us, 132 N.J. 587, 621 (1993) (finding that "a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training and monitoring mechanisms). An employer may avoid liability if its procedures for investigating and remediating alleged discrimination are sufficiently effective. See e.g., Bouton v. BMW of North America, Inc., 29 F.3d 103, 106 (3rd Cir. 1994). Through an effective

investigation, an employer reaffirms commitment to, and enforcement of, policies against employee misconduct. See Ilda Aguas v. State of New Jersey, 220 N.J. 494 (2015). The goal of deterring employee misconduct is promoted by an employer's "responsible efforts to detect, address and punish it" to prevent violations. Aguas, supra, at 519, citing Burlington, supra, 524 U.S. at 764; Faragher, supra, 524 U.S. at 805-06) (Employer may have an affirmative defense if it exercised reasonable care to prevent and correct misconduct). An affirmative defense cannot be asserted by employers who fail to implement effective anti-harassment policies, and "employers whose policies exist in name only." Aguas, supra, at 523; see also Gaines v. Bellino, 173 N.J. 301, 314 (2002) (finding that employer's due care is demonstrated through effective complaint, sensing and monitoring mechanisms, and through showing of commitment to workplace policies through consistent practice).

An employer's remedial action is adequate if it is "reasonably calculated to prevent further harassment. Knabe v. Boury Corp., 114 F.3d 407, 412, n.8 (3rd Cir. 1997). "The prospect of an affirmative defense in litigation is a powerful incentive for an employer to unequivocally warn its workforce that [harassment] will not be tolerated, to provide consistent training, and to strictly enforce its policy… [A]n employer that implements an ineffective anti-harassment policy, or fails to enforce its policy, may not assert the affirmative defense." Aguas, supra, at 523. Effective remedial measures include the process by which the employer arrives at the sanction that it imposes on the alleged harasser. If the effective measures are those reasonably calculated to end the harassment, then neither a court nor a jury can evaluate the effectiveness without considering the entire remedial process…. [t]he effectiveness is gauged by the process of investigation – including timeliness, thoroughness, attitude toward the allegedly harassed employee, and the like." Lehmann, supra, at 623; Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 537 (1997).

II. POLICY ENFORCEMENT THROUGH AN EFFECTIVE WORKPLACE INVESTIGATION

An investigation is not only worth doing, it is worth doing well. An employer's policy against harassment, discrimination and retaliation, and policies for the protection of its employees, are only as effective as the measures utilized to implement and enforce such policies. A poorly conducted investigation can compound an employee's complaints about wrongful conduct in the workplace, and provide evidence that the employer knew of unlawful conduct and failed to take appropriate action to remedy it. A properly conducted workplace investigation sends a message to employees that the employer is committed to enforcing its policies on workplace conduct and employee protection.

A. Employer's Pit-falls in Investigating Employee Complaints.

An employer may be defeated in asserting an investigation as an affirmative defense if it engages in action or inaction that is reflective of a "sham" investigation rather than an effective investigation. Examples of such conduct include: delaying the commencement of an investigation or taking too long to complete an investigation; conducting the investigation with pre-determined intention to shield the employer from liability or protect the accused, rather than address the employee's legitimate concerns; failure to select an unbiased investigator; making an employment decision before the investigation even commences, or reaching conclusions based on one-sided information; showing disrespect for the individual interviewed, or not affording a full opportunity to respond

(e.g., rolling eyes, raising voice, aggressive questioning); making pre-judgment statements during the interview (e.g., "I don't believe this, that does not sound like something he/she would do"); failing to take down names of additional witnesses; refusing to interview key witnesses; interviewing key witnesses in the presence of company management showing lack of independence; taking a dismissive approach to the investigation, particularly if the complaining employee has a history of making complaints; failing to conduct an investigation when the employee says that he or she wants to make the employer aware of a concern, but does not want anything done or said about it at this time; promising the complaining employee that the employer will keep the complaint completely confidential,[2] (complaint and investigation should be kept on a need-to-know basis); failing to conduct a sufficiently thorough investigation, including interviews of all parties, or not talking to all relevant witnesses; failing to properly and appropriately document the investigation; failing to monitor the workforce, address and remedy potential situations or interactions which violate employer policies.

B. Employer's Investigation Plan.

The primary goal of an investigation is to provide the employer with the appropriate findings and facts to make a decision regarding the matter. For an employer to legitimately rely on the results of an investigation, the investigation must commence promptly upon receipt of complaint or notice of misconduct; be conducted thoroughly through review of all allegations, interviews with all relevant witnesses, review of all relevant documentation and applicable employment policies; be conducted by the investigator in an objective, fair and neutral manner; and the investigation's findings must create a proper foundation for carrying out effective remedial measures, and provide the company with the grounds upon which to initiate appropriate steps for resolution of the matter.

The company should be prepared to promptly identify employees who may have information pertinent to the investigation, and gather all relevant documents to be reviewed as part of the investigation. These include: written allegations of complaints by complainant (or by anonymous note or other employee writing); written policies and procedures; personnel files; electronic files; e-mails; texts; voice mail messages; prior complaints and investigation files; organizational charts; and information from social media websites to the extent permitted by state law.

1. <u>Selection of Investigator</u>

An employer should give careful consideration to the selection of an investigator to conduct the workplace investigation. The investigator selected must be impartial, objective, fair, and unbiased; be knowledgeable about relevant laws and applicable workplace policies; have effective communication and interviewing skills; be sensitive to the situation and persons involved; and be able to conduct a thorough investigation and prepare an accurate report.

Investigations may be conducted internally by in-house counsel or a member of the employer's human resources department or senior management team, or by outside counsel for the employer, or by an independent third party investigator. There are certain pros and cons depending upon whether the employer elects to have the investigation

conducted internally or through an outside third party, particularly outside counsel. Some benefits to having an investigation conducted by in-house counsel or a member of the Human Resources department or management, is that the investigator will have a pre-existing knowledge of the corporation, its structure, its policies and procedures, its record-keeping practices, its culture, and possibly even the personalities and politics involved in the underlying claims, and be in a position to start the investigation almost immediately.

In contrast, an "internal" investigator may not be viewed as independent enough to conduct a thorough and impartial inquiry; may become a witness in litigation resulting from the matter being investigated; and if the in-house investigator is also legal advisor to the company, may face issues relating to the confidentiality and privilege of information obtained during the course of the internal investigation.

In circumstances where the attorney conducts the investigation and becomes a witness to the content of information and documentation obtained during an investigation, it must be understood that the attorney may later be disqualified from representing the company as its legal counsel in litigation ensuing from the allegations of workplace misconduct and/or accompanying investigation. Similarly, an attorney who appears at an investigation interview with his/her client, the complainant, and thus becomes an investigation witness, may be disqualified from representing the complainant in subsequent litigation.

Regardless of how time and cost efficient an internal investigation could be, if it fails to thoroughly and fairly address the allegations or workplace misconduct, or is seen as partial or otherwise lacking in credibility, it could ultimately cause the employer more expense and risk of liability in the event the matter proceeds to litigation.

2. Application of Privileges in an Investigation

The role of in-house or outside counsel in an investigation presents the risk that communications with the lawyer during the investigation may not be protected by the attorney-client privilege or the work-product privilege. When an employer intends to rely on the investigation as a defense that it took reasonable and justified responsive and remedial action, documents related to the employer's internal investigation are subject to discovery since it demonstrates the employer's response to an employee's complaint, inclusive of facts obtained, the timing of the investigation, the employer's evaluation of the facts, and any action taken by the employer in response to the findings of the investigation. See Payton, supra.

What may remain privileged from disclosure, however, is the attorney's legal advice and recommendations. Privilege only applies to confidential communications made to a client "by an attorney acting as such." Upjohn v. United States, 449 U.S. 383, 394-95 (1981) (holding that… "where communications at issue were made by corporate employees to counsel for corporation acting as such, at direction of corporate superiors in order to secure legal advice from counsel, and employees were aware that they were being questioned so that corporation could obtain advice, such communications were protected." See also, Waugh v. Pathmark Stores, Inc., 141 F.R.D. 427 (D.N.J. 2000)

(finding that attorney-client privilege was not waived where employer's in-house counsel attended meeting with employer's decision-makers after internal investigation into employee's discrimination complaints, and reviewed related documents in his capacity as attorney for employer, to provide legal advice on remediation efforts; counsel did not conduct investigation himself or act as decision-maker in employer's remediation efforts); Harding v. Dana Transport, Inc., 914 F.Supp. 1084 (D.N.J. 1996) (finding that any communications between company and counsel involving legal opinions and legal advice was subject to attorney-client privilege).

It should be noted, however, that the attorney-client privilege may be waived if an attorney will be presenting evidence at a trial which was developed during the course of the investigation. The attorney cannot assert the attorney-client privilege for the purpose of restricting disclosure of matters related to the investigation, and subsequently seek to introduce the information, or even selected portions of the information, as evidence on behalf of the employer at trial. See Harding, supra, 914 F.Supp. at 1096) (attorney-client privilege waived as to investigatory files of counsel who conducted investigation of harassment allegations, when employer raised reasonableness of investigation as an affirmative defense; "by asking [the attorney] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor. Consequently, [the employer] cannot now argue that its own processes are shielded from discovery.") The waiver of the attorney-client privilege and work product privilege in this context also extends to documents which relate to the investigation, although the documents may be redacted to exclude attorney communications which reflect legal advice or legal opinion. Id.; see also Payton, 148 N.J. at 551-52.

Where the attorney is acting in a business role, i.e., fact-finder, rather than in a legal role for purposes of offering legal advice or preparing for pending or threatened litigation, privileges may not apply. In addition, the privileges will not protect the underlying facts from disclosure, even if those facts were contained in a communication to the attorney. Upjohn, 449 U.S. at 395-96; see also XYZ Corp. v. United States, 509 U.S. 905 (1993) (communications between attorney and client regarding an internal investigation were privileged, but factual information contained in written communications, including the results of investigation, were not shielded from discovery).

For these reasons, both the attorney and employer should recognize that even where the employer has retained the attorney for purposes of investigating an internal complaint, only the attorney's legal analysis and advice is privileged from disclosure, and the facts uncovered during the investigation are discoverable.

III. CONCLUSION

While no two investigations are exactly the same and there are no mandatory procedural rules or court imposed deadlines for conducting an investigation, an employer is well guided to ensure that any workplace investigation is conducted in a prompt and thorough manner by an unbiased and experienced investigator, resulting in effective remedial action in response to complaints of employee misconduct.

[1] These guidelines are not limited to charges of sexual harassment but also apply to all forms of workplace harassment that violate Title VII of the Civil Rights Act of 1964. *EEOC Enforcement Guidelines (1999).*

[2] Employers may not tell employees who make a complaint not to discuss the matter with co-workers while an investigation is ongoing, since such a request violates employees' rights to discuss the terms and conditions of their employment as protected under Section 7 of the National Labor Relations Act. See Banner Health Systems d/b/a Banner Estrella Medical Center, 358 NLRB No. 93 (July 30, 2012) (holding that employers could not apply a general rule prohibiting employees from discussing ongoing investigations of employee misconduct and that instead, it must first determine whether in any investigation there are grounds to justify a requirement of confidentiality, e.g., for protection of investigation witnesses, to protect evidence that is in danger of being destroyed, where testimony is in danger of being fabricated, or where there is a need to prevent a cover up).

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