DOES THE FLORIDA LEGISLATURE FINALLY HAVE A FIX TO CONSTRUCTION DEFECT LAW?

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Chapter 558 of the Florida Statutes contains a pre-suit notice and opportunity-to-repair process for construction defect claims. The statute was intended to be a more efficient, alternative dispute resolution mechanism involving a property owner providing written notice of claim to the responsible contractor, subcontractor, supplier, or design professional as a precondition for a construction defect lawsuit. Despite numerous amendments to Chapter 558 over the years, the prevailing view is that the statute is ineffective and subject to abuse. Two related bills pending in the Florida Legislature (SB 270 and HB 21) seek to substantially revise the mandatory procedures under Chapter 558.

The legislation seeks to amend three areas of the dispute resolution process:

1. The preliminary notice of claim and corresponding requirements allege building defects.
2. The pre-litigation requirements regarding building code violations.
3. The notice a prevailing claimant must provide to someone who possesses a security interest in a property when a construction defect settlement or judgment is obtained.

From the perspective of the contractor, subcontractor, supplier, or design professional, the legislation has the potential to reduce fraudulent construction defect claims and prevent costly litigation if the builder agrees to repair the defects. However, the legislation may also increase costs to property owners who cannot bring civil actions and recover damages for Florida Building Code violations that do not meet the threshold of materiality and have to ultimately pay to repair damages themselves. The most significant proposed changes are discussed below.

New Preliminary Requirement to Exhaust Warranty Claims

The legislation requires a property owner to exhaust any warranty claims before serving a notice of claim by first submitting a claim to the warranty provider to determine whether the alleged defect might be covered under a warranty provision. If the warranty provider either denies the claim or does not offer a remedy satisfactory to the claimant within the time limits in the warranty, the claimant may proceed with a notice of claim.

Changes to the Notice of Claim

The legislation will change the content of a notice of claim and require a claimant to:

1. Describe in specific, not reasonable, detail each alleged construction defect.
2. Include at least one photograph of the alleged defect or evidence of the defect if it is visible, any repair estimates or expert reports relating to the alleged defect, and a description of the damage or loss that results from the alleged defect if that information is known.
3. Identify the specific location of each alleged construction defect.
4. Affirms that he or she has personal knowledge of the alleged construction defect.

5. Acknowledge that a false statement is subject to penalties of perjury.

Changes to Claims for Violations of the Florida Building Code

Chapter 553, Florida Statutes, provides a civil cause of action for any person or party damaged by violating the Florida Building Code. The legislation amends the statutory cause of action for building code violations to limit lawsuits to those alleging a “material” violation of the code. A material violation is defined as a violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to someone or significant damage to the performance of a building or its systems.

Notice to Mortgagee of Assignee

The legislation creates a new section in Chapter 558 that provides if a property owner prevails in a construction defect claim and receives a monetary settlement or judgment and a mortgagee or assignee has a security interest in the property, within 90 days, the owner must notify the holder of the security of:

1. The specific nature of the defect.
2. The outcome of the claim, specifying any monetary settlement reached or any judgment awarded.
3. Any repairs made or plans to repair the property.

Conclusion

The pending legislation to repair Florida's broken construction defect law is commendable. Still, it does not address the exploding cost of construction defect litigation, the pre-suit obstacles and impractical hurdles for owners with genuine defect claims, and litigation of negligence and breach of contract lawsuits involving minor defects. We will closely monitor SB 270 and HB 21 as they make their way through the Florida Legislature.

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