



The Fourth District recently held that homeowners commenced an “action,” when they served a pre-suit notice of construction defect claim.



The Fourth District Court of Appeal recently held that homeowners in a construction defect class action lawsuit commenced an “action,” for statute of repose purposes, when they served a pre-suit notice of construction defect claim under Chapter 558, Florida Statutes (2014), even though they had not yet filed a lawsuit or arbitration action. *Robert Gindel, et al. v. Centex Homes, et al.*, 2018 WL 4362058 (Fla. 4th DCA Sep. 12, 2018) (The opinion has not been released for publication in the permanent law reports. Until it is released, it is subject to revision or withdrawal.)

Centex built townhomes that homeowners closed on and took possession of on March 31, 2004. On February 2, 2014, not quite ten years later, the homeowners provided Centex a pre-suit notice of construction defect claim under Chapter 558. In response, Centex notified the homeowners, under Chapter 558, that it would not cure the alleged defects. The homeowners then sued Centex on May 2, 2014, more than ten years after they closed on and took possession of the townhomes.

The trial court found that the homeowners had commenced an “action” when they filed the lawsuit against Centex. The action was

therefore untimely because it was commenced after the 10-year statute of repose for actions founded on the design, planning, or construction of an improvement to real property had expired. *See* § 95.11(3)(c), Fla. Stat. (2014).

In ruling that the action was untimely, the trial court rejected the homeowners’ argument that they had commenced the action when they provided Centex the pre-suit notice of construction defect claim under Chapter 558, which occurred before the expiration of the 10-year statute of repose. According to the homeowners, they would have sued earlier if Chapter 558 had not contained mandatory pre-suit procedures.

The Fourth DCA noted that, while section 558.002(1), defines “action” as “any civil action or arbitration proceeding,” section 95.011 more broadly defines an “action” as “a civil action or proceeding” without limiting the meaning and without relying on or referring to Chapter 558. The Fourth DCA agreed with the homeowners that Chapter 558 is a mandatory “proceeding” and thus an “action” for purposes of the statute of repose. The Fourth DCA acknowledged that the

homeowners could have filed a lawsuit earlier and taken advantage of the stay provision in section 558.003, but it opined that the stay provision in Chapter 558 has no bearing on whether an action was commenced before the statute of repose period lapsed. It concluded that the homeowners had commenced the action when they served Centex with the pre-suit notice of construction defect claim under Chapter 558, even though they had not yet filed a lawsuit.

Motions for rehearing and for certification are fully briefed and pending disposition by the Fourth

DCA. Until the issues raised in *Gindel* are finally resolved, *Gindel* will have implications for all involved in construction disputes when the statute of repose is at issue.



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