Environmental Assessment/Engineering Firm: Massachusetts Appellate Court Addresses Application of Statute of Limitations to Malpractice Claim

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The Appeals Court of Massachusetts ("Appellate Court") addressed in an April 12th opinion whether a malpractice action against a former engineering firm and its owner was barred by the statute of limitations. See *Cedar Crest Condominium Trust v. Cosmo Capobianco,* 2019 WL 17 68802.

The alleged malpractice was in connection with an environmental site assessment.

The opinion notes that taking the allegations in the Complaint as true, a Plaintiff in 1985 hired the engineering firm and its owner ("collectively Defendants") to perform a surface and subsurface investigation of a property that the Plaintiff was considering purchasing. The Defendants are stated to have certified that the site was "clean according to acceptable limits." This conclusion was reached despite the fact that a commercial laundry repair business operated on the property for many years.

The Plaintiff, therefore, purchased the property and built a multiunit residential building.

A prospective buyer retained IES, Inc. ("IES") some years later to perform an Environmental Assessment ("EA") of the site. The EA identified reportable releases of hazardous materials in the soil and groundwater. The Plaintiff claimed that until such point it "was never aware that, contrary to the [defendants'] certification, the site in 1985 was contaminated by hazardous oil and/or waste materials beyond acceptable limits."

The Plaintiff filed on August 4, 2017, claims of negligence, negligent misrepresentation, and alleged a state statutory violation against the Defendants.

The Defendants' response included an argument that the statute of limitations began running no later than 2004 when IES and another environmental consulting firm:

- assessed the site,
- observed potential environmental threats, and
- recommended further environmental investigation.

The lower court accepted this argument. It concluded that under the discovery rule the Plaintiff's claims accrued in 2004. This was based upon the EAs that were conducted that year putting the Plaintiff on

inquiry notice that there might be hazardous materials on the property. The lower court dismissed the Complaint.

The Appellate Court stated that under the discovery rule a cause of action accrues when the Plaintiff discovers or with reasonable diligence should have discovered that:

1. he has suffered harm,
2. his harm was caused by the conduct of another; and
3. the Defendant is the person who caused that harm.

The Appellate Court concludes that the lower court was correct in determining that the Plaintiff had reasonable notice of his claims by at least 2004. It cites the initial EA undertaken at the site which included a report noting evidence of "recognized environmental conditions" at the property and recommending that a subsurface investigation be performed to determine whether the past use of the subject property impacted the soil and/or groundwater. This report was provided to another firm which subsequently conducted a limited assessment of the site in November 2004. This firm concluded that the site was a high cleanup risk and a high environmental risk in terms of soil and/or groundwater. Also referenced was an observation that no groundwater testing was performed as part of the 1985 investigation.

The Appellate Court concludes that these reports put the Plaintiff on inquiry notice of the alleged errors and the Defendants' 1985 certification. Regardless of the fact that it was not until 2004 that the Plaintiff learned with certainty that the 1985 certification was erroneous, the Appellate Court concludes that not every fact must be proved in support of the claim but rather simply acknowledge that an injury has occurred. As a result, the Appellate Court upholds the lower court's determination that the malpractice action is time barred.

A copy of the opinion can be found here.