

CAREFULLY CRAFTED ALLEGATIONS STILL CONTROL EARLY RESOLUTIONS

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In a recent Fifth District Court of Appeal's case in Florida (5th DCA), the court confirmed the age old maxim that the allegations of the complaint control the analysis when evaluating a motion to dismiss a complaint. In *Busch v. Lennar Homes, LLC*, 42 Fla. L. Weekly D863a (April 13, 2017), Lennar sought an early resolution of the case claiming that the statute of repose, pursuant to Fla. Stat. 95.11 (3)(c) had expired, based upon the closing date of the residence.

Fla. Stat. 95.11 (3)(c) states in pertinent part, as follows:

In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

The trial court accepted Lennar's logical argument and dismissed the case with prejudice. However, upon review the 5th DCA rejected Lennar's argument and reversed the lower court's decision.

The 5th DCA noted that when ruling on a motion to dismiss a complaint, the trial court must look no further than the complaint and its attachments and must treat as true all of the complaint's well-pleaded allegations. *Morin v. Florida Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 3d DCA 2007). Given these constraints the 5th DCA relied on 2 main issues. First, that nothing in the allegations of the Complaint clearly established that the construction work was complete by the time of the closing on the residence. And secondly, that the contract between Lennar and the initial homeowner, which importantly was attached as an exhibit to the complaint, specifically allowed for a closing prior to completion of all work.

Given these issues and lack of any allegation in the Complaint that the work was completed by the closing date, the 5th DCA reversed the lower court and remanded the case to Lake County Circuit Court for further action.

As such, it remains important to consider the limitations of the Court when filing a motion to dismiss. Clear issues that can easily be proven, but may require reliance on additional documentation or testimony to actually prove, are usually better suited for an early motion for summary judgment or other form of disposition – not a motion to dismiss. Moreover, a crafty plaintiff can create and sustain a cause of action past the initial pleading stage with the thoughtful inclusion or absence of certain allegations in the complaint.