

# Daily Journal

## VERDICTS & SETTLEMENTS

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FRIDAY, JANUARY 5, 2018



### Top Verdicts



**\$55,000,000**

L.A. Superior Central / BC504178  
 Topic: Construction  
 Subtopic: Construction Defects  
 Plaintiff – Joel B. Castro (Castro & Associates)

#### By Amount

Amount	Plaintiff Attorney	Defendant Attorney	Judge, Arbitrator, Mediator	Page
\$55,000,000	Joel Castro	Vacchio/ et al.		5
\$35,000,000	D. Waite/E. Quigley/A. DeGood	Confidential		7
\$22,170,000	J. Satterley/D. Clancy/H. Steinberg	DeJardin/ et al.	Winifred Y. Smith	8

## CONSTRUCTION

### CONSTRUCTION DEFECTS

**Settlement: \$55,000,000**

CASE/NUMBER Wilshire Vermont Housing Partners, LP. v. Taisei Construction Corporation, et al. / BC504178

COURT/DATE: Los Angeles Superior / Nov. 20, 2017

#### ATTORNEYS:

##### Plaintiff –

##### **Joel B. Castro (Castro & Associates) for Wilshire Vermont Housing Partners LP**

Jason M. Booth, Benjamin L Caplan, Katherine M. de Guzman, Megumi Horiuchi (Booth LLP) for Cal-State Steel Corp.; Russell A. Franklin, Alexander J. Chen, Bradley V. DeBlanc, Cynthia Arm Kitchen (Chen, Horwitz & Franklin) for Keenan, Hopkins, Suder & Stowell Contractors, Inc. aka KHS&S Contractors; Matthew B. McDonald (Collins Collins Muir & Stewart LLP) for Cefali & Associates Mollenhauer Group; Kery D. Christoph, Michael W. Goodin (Clausen Miller) Superior Gunite; Jeffrey S. Behar, Jon A. Hammerbeck, Deborah J. Taddeucci (Ford, Walker, Haggerty & Behar) for Antieri & Associates Consulting Engineers, Inc. aka Antieri & Haloossim Consulting Engineers, Inc.; Howard Scott Sirlin, Simrandeep S. Tiwana (Gordon & Rees LLP) for Simpson, Gumpertz & Heger, Inc. Webcor Construction LP, fdba Webcor Concrete, erroneously sued as Webcor Builders, Inc. aka Webcor Concrete; Marc S. Feldman, Kristyn J. Mintesnot (Koletsky, Mancini, Feldman & Morrow) for RPG Enterprises, Inc., Valverde Construction Alex Tramontano (Lorber, Greenfield & Polito LLP) for Taisei Construction Corp.; David Crawford III (Mavredakis, Cranert & Crawford) for Pacific Coast Steel; Michael T. Montgomery (McCluskey & Montgomery LLP) for Calex Engineering Co.; Matthew J. Eschenburg

(Mokri, Vanis & Jones LLP) for Hydroquip Pump & Dewatering Corp.; Mitchell J. Resnick, Lena M. Louis, Kenneth O. Taylor (Resnick & Louis PC) for C & R Plumbing Co.; Daniel C. Drummy, Jeffrey A. Kent (Poindexter & Doutré Inc.) for Limbach Company, LP., fka Western Air Limbach dba Western Air & Refrigeration Co.; Lauren Fierro, Jack R. Reinholtz (Prindle, Goetz, Barnes & Reinholtz) for Mike Zarp Inc.; Benedict E. Idemundia, Brendan B. Penney (Selman Breitman LLP) for Calnex Engineering Co.; Edward C. Schroeder Jr. (Selman Breitman LLP) for Proulx Company Inc.; Justin A. Bubion, Robert D. Dennison (Traub, Lieberman, Straus & Shrewsbury) for InsulFlow Inc.; David C. Dorsey, Matthew J. Gunby III, Devon B. Moore (Wolfenzon Rolle) for Malcolm Drilling Co. Inc.; James A. Terpanjian (Youngerman & McNutt LLP) for Taisei Construction Corp.; Mikouya Sargizian, Jenny S. Choi, Sheila E. Fix (Wood, Smith, Henning & Berman LLP) for Keller CMS, Urban Partners LLC; J. Stacie Johnson, Thomas B. McNutt, Stephen G. Youngerman (Youngerman & McNutt LLP) for Taisei Construction Corp.

#### **EXPERTS:**

**Plaintiff** - Steven B. Norris (architect / lightweight concrete / dewatering / general contractor); Ernest R Orchard (waterproofing); Gregory P. Luth (structural engineering); Piotr D. Moncarz Ph.D., P.E., S.C.P.M. (structural / concrete/ shotcrete); Richard M. Cartmell PE. (plumbing /mechanical); Thomas A. Ysasi (cost estimator)

**Defendant** - Steven W. McCormick (cost estimator); Patrick A. Stremel (plumbing /mechanical); Arshud Mahmood (geotechnical and civil engineering / dewatering); Navid Nastar (structural engineering); Gregg E. Brandow (structural engineering); Christopher A. Allen (architecture / lightweight concrete)

#### **FACTS:**

Plaintiff Wilshire Vermont Housing Partners LP, a partnership including Klein Financial Corp. and California Public Employees Retirement System (CalPERS), owns Wilshire Vermont Station, a mixed-use Transit Oriented Development, with a portal to the MTA subway station at the corner of Wilshire Blvd. and Vermont Ave. in Los Angeles. The project was completed in August 2007 with final payment issued based upon representations that all work had been performed correctly and any course of construction errors had been corrected. Wilshire Vermont Station consists of seven-story residential buildings (449 rental units) with 36,500 square feet of ground-floor retail space and a three-story subterranean parking garage.

Plaintiff sued the general contractor, Taisei Construction Corp., and more than 40 subcontractors and design professionals in relation to the construction project.

#### **PLAINTIFF'S CONTENTIONS:**

Plaintiff contended, inter alia, that defendants' fiduciary duty and concealed breach precluded contractual abrogation of the delayed discovery rule. The court's ruling in the Brisbane bifurcated trial was only that non-warranty causes of action arising from construction conduct lapsed. However, even under defendants' analysis, the court's ruling allowed warranty and implied warranty claims, which do not require resulting damage under *Aas v. Superior Court*. Moreover, tolling applied, and all of plaintiff's

causes of action alleged conduct occurring three years or less before the complaint, so were timely filed. Plaintiff argued that its warranty claims were enforceable because the UCC cases requiring pre-trial notice do not apply to contracts for labor and materials, and sufficient notice was provided under California law, and/or was waived. Plaintiff contended that defendants' failure to follow plans and specifications for the construction of Wilshire Vermont Station led to project-wide construction deficiencies. Additionally, plaintiff contended that Taisei breached its contractual fiduciary duty of trust and confidence owed to plaintiff in not supervising its subcontractors, not insuring the best of all kinds of workmanship, and not using its best efforts in pursuing warranty claims against its subcontractors.

The primary construction defects included piles for shoring system to retain excavation were improperly installed. Lag boards for shoring walls were not extended to the bottom of footings, causing sloughing and voids behind lag board retaining walls. The de-watering system was not constructed to the water table specified by the soils engineer, causing sloughing and voids behind lag board retaining walls. The de-watering system was damaged by excavators cutting footings and perimeter footings. The below grade drainage system for below grade construction was not followed or constructed, causing clogging of drainage system. The subdrains and perimeter wall drains for sump system drainage of below grade garages were commingled, causing clogging of the drainage system. Vertical shotcrete garage walls moved one to four inches towards excavation after wall construction, damaging the bentonite waterproofing system. The bentonite waterproofing system became wet and damaged, activating the bentonite membrane during installation. Water intrusion and efflorescence damaged the shotcrete garage walls. Reinforcing steel (rebar) was improperly placed within the below grade shotcrete walls. Structural slabs were improperly formed, and shoring was dropped too soon (before the slabs were able to carry their own weight), resulting in sagging and cracking. Reinforcing steel (rebar) was improperly placed within the horizontal structural slabs, affecting the specified cover and "d" distance, resulting in weaker slabs. Significant cracking, sagging and water intrusion damaged the horizontal concrete structural slabs. Water intrusion damage, through concrete slabs and shotcrete garage walls. Drainage and cracking damage to Plaza drains and/or slab. The specified Seismic Force Resisting System was damaged in the residential and commercial units. SureBoard shear wall assemblies were manufactured and installed without required structural blocking. Specified 1.25- inch shot pins were substituted with unapproved unauthorized .5-inch shot pins that were too short to make the required structural connections. SCBF structural frames that acted as exterior shear walls were improperly fabricated and installed, damaging the Seismic Force Resisting System. The roof diaphragm to vertical shear wall connection was not constructed as specified, damaging the seismic force resisting system. The copper recirculating system was design built and defectively installed and/or designed causing velocity erosion pin hole leak damage to both residential and commercial units. Mechanical systems for cooling tower, grease tanks and HVAC lines were defectively installed. Fire alarm boxes were damaged by water leaking through concrete slabs, fire sprinkler lines were defectively installed and developed pin hole leaks. Fire doors were defectively installed and wracked. Repairs of some major defects commenced during litigation. Plaintiff asserted a claim for pervasive construction defects.

## **DEFENDANTS CONTENTIONS:**

Defendants contended that all of plaintiff's non-warranty claims were untimely under the bifurcated trial rulings on the contractual accrual/Brisbane and flow-down issues, and that plaintiff's warranty claims were unenforceable because the requisite pre-trial UCC notice of warranty claim was not provided, and/or the notice was improper/ inadequate. Defendants claimed the court's Brisbane ruling barred tort and contract claims as untimely by abrogating the delayed discovery rule under section 13.7. Defendants denied the existence of most of the construction deficiencies and contended that the majority of the repairs were unnecessary betterment. Defendants' primary defenses to plaintiffs allegations included inconclusive defects/resulting damage was shown by plaintiff. Defendants claimed plaintiff was aware of defective conditions during course of construction and argued that the statutes of limitations ran from the time of defects discovered during course of construction. The subcontractor and general contractor repair of "course of construction" defects does not reset the statute of limitations time clock, and therefore, defects were patent, not latent. Defendants claimed plaintiff failed to inspect work installed by subcontractors and plaintiffs retained inspectors failed to perform reasonable inspections to discover defective work performed by subcontractors. Defendants argued that the defective design was by plaintiff's design professionals and plaintiff had failed to coordinate with Design Build subcontractors. Plaintiffs project repairs during litigation were unnecessary and unreasonable, improper/ inadequate notice was given for warranty claims, and some of the major defects were repaired during litigation.

## **DAMAGES:**

Plaintiff's damages included multiple repair contracts of over \$38 million. Additionally, plaintiff claimed consequential damages.

## **SETTLEMENT DISCUSSIONS:**

Plaintiffs settlement demand at the court ordered MSC was \$80 million. A mandatory three-day settlement conference conducted by court appointed Special Master Ross Hart, following multiple mediation sessions, resulted in a global settlement.

## **RESULT:**

A \$55 million settlement was entered for plaintiff Wilshire Vermont Housing Partners from the general contractor, over 40 subcontractors, and design professionals for defective construction of Wilshire Vermont Station. Hon. Maren E. Nelson granted a Motion for Good Faith Settlement Determination for all settling defendants, barring any and all further equitable indemnity claims against them based on comparative fault.

## **OTHER INFORMATION:**

Pursuant to their prime contract, plaintiff and Taisei Construction Corp. jointly moved for judicial reference at the outset of the case. Citing Tarrant Bell Property v. Superior Court (2011) 51 Cal.4th 538, the court refused to order judicial reference because of the risk of multiple proceedings and conflicting results. In 2015, the fourth judge, Hon. Amy D. Hogue, ordered that a bifurcated trial be held on the enforceability of the prime contract's prevailing party attorney fees clause, then held that the fees clause did not apply because it only was enforceable in judicial reference. Plaintiff filed a writ petition

on the ground that CCP section 638 does not apply where there is a mandatory judicial reference provision.

In 2016, in a second bifurcated trial ordered over plaintiff's objection, Judge Hogue ruled that under *Brisbane Lodging LP v. Webcor Builders Inc.* (2013) 216 Cal. App.4th 1249, section 13.7 of the prime contract eliminated the discovery rule as to plaintiff's non-warranty tort and contract causes of action against the general contractor arising from conduct during construction. Plaintiff filed a writ petition on the ground that under *Brisbane*, the general contractor's fiduciary duty to plaintiff voided any contractual elimination of the discovery rule.

In 2017, in a third bifurcated trial ordered over plaintiffs objection, the sixth judge, Hon. Maren E. Nelson, ruled that all prime contract provisions flowed down to the subcontractors, including section 13.7. All of the three bifurcated trial rulings were made as a matter of contractual interpretation, with factual matters reserved for later jury trial.

FILING DATE: Mar. 27, 2013