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Agency Overseeing Berkeley Builder Unaware of Suits, Settlements

By Jaxon Van Derbeken

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For more than a decade, the company that constructed the Berkeley apartment building where a balcony collapse killed six people was being targeted in lawsuits claiming its work was shoddy. It paid out \$26.5 million in settlements in the past three years alone.

And the state agency responsible for regulating the firm and renewing its license didn't learn about any of it.



A gap in state law, a Chronicle investigation has found, allowed the millions of dollars in construction-defect settlements involving the Pleasanton contractor, Segue Construction Inc., to go unreported to the Contractors State License Board, the agency that oversees 300,000 contractors in California.

“We didn't know — that's a problem,” said David Fogt, the board's enforcement chief, who said his agency found out only after the June 16 collapse that Segue had a long history of construction-defect lawsuits.

“Somebody has to let us know about it,” Fogt said. “It's troubling that we didn't. We had no prior complaints. There is nothing in place that would notify us of a lawsuit.”

Had the state known, Fogt said, it would have at least opened an investigation into Segue, and possibly taken action against the company's contractor license.

“Any allegation of a contractor having poor workmanship or acting out of compliance of building code requirements is taken very seriously by the contractors board,” he said.

Potential Red Flags

The defect suits and settlements date to before Segue built the apartment complex in downtown Berkeley where a fifth-floor balcony collapsed during a party. City inspectors found that moisture had rotted out the balcony's support beams, just eight years after the building was completed.

Fogt said even the early suits against Segue — including one settled for \$120,000 in 2004 over a town-house renovation project in Oakland — could have raised red flags about the company.

“Any lawsuit that relates to allegedly defective work that results in the contractor paying damages would be of great interest to us,” Fogt said. Ultimately, he said, the state could well consider “if administrative action against the license is appropriate for consumer protection.”

Pressing for Change

Contractors are not required to report anything to the state board besides a failure to adhere to a court judgment. As a result of the Berkeley collapse, Fogt said, he will press for changes that would mandate that contractors report settlements for construction defects to the board within 90 days.

“This is a good example of why we need to fix it, so we can get notice sent to us,” Fogt said. “Perhaps this horrible tragedy will make that happen.”

The state board has opened a formal investigation and ultimately could revoke Segue’s license, which was originally issued in 1992 and was last renewed in 2014.

Asked for comment, Segue executives said only that they were fully cooperating with all investigations.

Secrecy is the norm in construction defect litigation nationwide — and critics say the California license board’s ignorance is just one of the consequences.

“This does not allow the average consumer to know which builders are making mistakes time and again and which aren’t,” said attorney Tom Miller, who sued Segue and won \$3.5 million in a 2013 settlement for rotting balconies and other problems that showed up just two years after completion of the Park Broadway condominium project in Millbrae.

Since 2012, court records show, Segue has settled at least four water-damage-related cases on projects it built in the Bay Area, for a total of \$26.5 million. Lawyers associated with three of those lawsuits say they are barred from discussing them because of confidentiality rules.

“In my experience, that’s extremely high,” Fogt said of the settlement total. “It’s just amazing that insurance companies are paying this out — they should be notifying us.

“If they are settling for that amount of money, there must be gross construction defects,” Fogt said. “Otherwise, why are they paying out?”

Secrecy Slipup

Confidentiality cloaks 95 percent of construction-defect lawsuit settlements, Miller said. He said it was only an apparent oversight by defense lawyers that allowed him to talk about the \$3.5 million settlement he won against Segue in the Millbrae case.

“With all these confidentiality agreements, for the average person just looking to buy a home, they will never be able to find out,” Miller said.

While the reasons for confidentiality agreements vary, Miller said, one is preeminent.

“The builders want to keep their reputation intact,” he said. “It is very blatant what they are doing and why — it’s a business decision.”

Bruce Edwards, a mediator who has heard thousands of construction defect claims over his 30-year career, said there’s a good reason for confidentiality provisions: Court calendars would otherwise be clogged with construction defect lawsuits.

“The courts would collapse under the weight of the volume,” he said. “The sheer size of the construction cases would darken the horizon for the courts.”

Edwards, who works with Judicial Arbitration and Mediation Services Inc., said developers and condominium owners — typically the plaintiffs in such cases — also have an interest in avoiding the limelight: Their property might otherwise be stigmatized, hurting its value.

However, Miller said, owners don’t usually have a choice on confidentiality. “Oftentimes, it’s a deal-breaker,” he said. Defendants “are not going to settle unless they get confidentiality.”

One key benefit for construction companies, Miller and Edwards said, is keeping the Contractors State License Board out of the loop. “Unless there is an actual court-ordered judgment or jury, and that judgment goes unsatisfied — that’s when it becomes a disclosable event,” Edwards said.

Moment of Change

Edwards said the Berkeley balcony collapse case is a wake-up call that construction cases can involve life-and-death issues.

“I’m in the middle,” Edwards said. But he added, “Moments like this tip the scale in favor of not having confidentiality in an agreement.”

Frank Nunes, executive director of the Wall and Ceiling Alliance — a contractor trade group that promotes training — said confidentiality agreements can keep companies from learning from other contractors’ mistakes.

“It’s in the shadows, you don’t know the outcome, you don’t know who the players are,” Nunes said. “If you are not in that circle, you wouldn’t even know what was going on.”

‘There’s a Learning Curve’

Onne Broek, a forensic inspector and former builder who examined Segue’s problem-plagued Millbrae complex, said confidentiality provisions make it easier for “a certain cast of characters (to) keep popping up over and over again. When they have to pay out a few settlements, they do get better. But it takes time. There’s a learning curve.

“For the consumer, they get the downside of the learning curve.”