Trends In Real Estate Litigation, Part 1: Statutes of Limitations

This four-part series will examine how litigation impacts various aspects of practice in the real estate industry. It will also explore how even well-informed parties (and their counsel) frequently trip up by not anticipating how New York's courts will apply the law in their situation. This first article in the series will discuss some of the hazards of statutes of limitations, which have an appearance of simplicity that can be deceptive.

By Adrienne B. Koch | February 20, 2024

Litigation serves not only as a constant reminder of what can happen if things go wrong but also as one of the main drivers of best practices. The body of case law generated through litigation can and should inform the way business is conducted, contracts are negotiated and terms are enforced. In this way, the ripples from litigation extend far beyond just the facts of a single case.

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Statutes of limitations are obviously very important in litigation. But it is dangerous to wait until filing a lawsuit to consider the applicable statutes of limitations. Courts regularly dismiss cases where plaintiffs expected a longer limitations period to govern. Likewise, defendants can find themselves on the hook for claims they may have thought were time-barred long ago. Here are some reasons why that happens.

Borrowing

One aspect of New York law that can be a source of confusion is CPLR §202, colloquially known as New York's "borrowing statute." Under it, if the plaintiff is not a New York resident and the cause of action accrued outside of New York, a New York court will apply the shorter of (a) New York's statute of limitations or (b) the statute of limitations applicable under the law of the place where the claim accrued.

It may be tempting to assume that this scenario is unlikely to occur in real estate litigation: after all, if the dispute concerns real property located in New York, then surely the claim will have accrued in the state, right? Wrong. When a claim seeks recovery for economic damage (such as damage resulting from a breach of contract or fiduciary duty—types of claims that frequently arise in real estate litigation), New York law treats it as having accrued in the state where the plaintiff resides. *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (2010).

For example, a Delaware entity whose primary place of business is in Delaware—or whose only business is passive real estate investment in multiple jurisdictions—is considered a resident of

Delaware. See, e.g., *Gordon v. Credno*, 102 A.D.3d 584, 585 (1st Dept. 2013); accord *Verizon Directories Corp. v. Continuum Health Partners, Inc.*, 74 A.D.3d 416, 416-17 (1st Dept. 2010) (collecting cases).

If such an entity brought suit in New York for breach of contract, the claim would not be governed by New York's six-year statute of limitations but by Delaware's three-year statute of limitations. See *U.S. Educ. Loan Trust IV, LLC v. Bank of N.Y. Mellon*, 179 A.D.3d 447, 448 (1st Dept. 2020). This is so even if the contract contained a choice of law provision selecting New York law to govern the substance of any claim: New York law treats the statute of limitations as a "procedural" issue that is governed by the law of the forum (including the borrowing statute) unless the contract specifies a different statute of limitations. *Portfolio Recovery Assocs.*, 14 N.Y.3d at, 415-16.

It is easy to imagine how the distinction between a six-year limitations period and a three-year one can mean the difference between a timely claim and one that is time-barred. But as the example above illustrates, the governing statute of limitations might not be obvious at first blush. It is therefore critical to dig deeper before taking comfort in any belief that a potential claim is subject to a long limitations period.

Tolling

The example above shows how a party might have less time to bring a claim than it thinks. But sometimes the opposite is true: a claim that a party thought was time-barred is, in fact, still alive. One way this can happen is through tolling.

Tolling refers to the suspension of a statute of limitations as the result of certain kinds of events. Although tolling can sometimes be triggered by events unique to the parties and their claims, in New York there is one major tolling event whose effects are still being felt across the board: a series of executive orders issued by the governor during the COVID-19 pandemic. Those executive orders tolled all New York limitations periods from March 20, 2020, through Nov. 3, 2020—having the effect of extending by 228 days any limitations period that was running as of the beginning of that tolling. See *Ruiz v. Sanchez*, 219 A.D.3d 1363, 1364 (2d Dept. 2023) (collecting cases).

Although we are now far enough from 2020 that many covered claims have reached the end of their limitations period, the farther we get from 2020, the easier it will be to forget that tolling. Where the statute of limitations is already long (such as New York's six-year limitations period for breach of contract claims), the impact of that tolling may continue to be felt for many years. For example, a breach of contract claim that accrued on March 19, 2020, and is subject to New York's statute of limitations will become time-barred not on March 19, 2026, but nearly eight months after that on November 2—something that may come as a surprise by that point.

Tolling can also lead to surprises in the other direction. For example, parties often agree to toll a particular limitations period while settlement discussions are pending. But once a breach of

contract claim has accrued, its limitations period cannot be extended indefinitely: any toll must be for a finite period that will expire no later than the limitations period for a claim that accrued on the date of the tolling agreement. General Obligations Law §17-103(1).

This prohibition can apply in ways that might be unexpected. For example, an agreement that purports to extend the statute of limitations for a contract claim “until 30 days after receipt of notice” that the other party wishes to end the tolling is void. See *T&N PLC v. Fred James & Co. of New York, Inc.*, 29 F.3d 57, 61-62 (2d Cir. 1994). So is an agreement that provides for a limitations period to begin running as of some indeterminate date in the future. *Bayridge Air Rights, Inc. v. Blitman Const. Corp.*, 80 N.Y.2d 777, 779-80 (1992). The result in such cases is that parties who undoubtedly thought they had tolled the limitations period actually did not do so—much to the chagrin of at least one of them.

Conclusion

Statutes of limitations are technical and can behave in unanticipated ways. While it may be tempting to think of them as only the litigators’ bailiwick, that is a mistake: parties are most likely to be tripped up by the statute of limitations when they are not thinking (or are not thinking clearly enough) about litigation.

In real estate transactions, this is especially important because some potentially applicable statutes of limitations are very long, while some are substantially shorter—and there are numerous other moving parts potentially at play. It is therefore wise to analyze and understand all of these pieces at an early stage, before any possibility that a claim has become time-barred.

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