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Delaware LLCs in NY Real Estate Transactions, Part 4: Statutes of Limitations

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In the last of her four-part series, Adrienne Koch discusses how New York's "borrowing statute" can shorten the statute of limitations for Delaware LLCs involved in New York real estate contracts, and outlines strategies to mitigate the risks.

This article is the last in a four-part series that examines issues surrounding the use of Delaware Limited Liability Companies (LLCs) for real estate transactions in New York.

The first article discussed some of the general factors that should be taken into account in choosing that entity form for such transactions; the second reviewed considerations in choosing a forum for the resolution of disputes arising under the operating agreement of a Delaware LLC that is formed for the purpose of a New York real estate transaction; the third addressed waivers of fiduciary duties. This fourth article will discuss the statute of limitations applicable to claims by the Delaware LLC under the New York contracts that will likely govern such transactions.

The Issue: New York's 'Borrowing Statute'

A Delaware LLC that enters into a contract in connection with a New York real estate transaction might assume that, if New York law governs the contract, any claim for breach will be subject to New York's six-year limitations period for such claims. See CPLR 213(2). But this may not be so. Under New York's "borrowing statute" (CPLR 202), if a plaintiff is determined to be a resident of a state other than New York, a New York court will require that plaintiff's claim to be timely both under New York's statute of limitations and under the statute of limitations of the place where the claim accrued. See *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372, 377 (2018).

A claim for damages for breach of contract is generally understood to accrue "where the plaintiff resides and sustains the economic impact of the loss." *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.3d 525, 529 (1999) (collecting cases; citations omitted). This means that if the Delaware LLC is determined to "reside" in Delaware, its claim will be governed by Delaware's limitations period—which is only three years. See 10 Del.C. § 8106(a).

The difference between a three-year limitations period and a six-year one is substantial. And the risk is real: although a Delaware LLC whose sole business is owning and operating property in New York may be able to claim New York as its "principal place of business" (and accordingly be treated as a New York resident for statute of limitations purposes—see *Oxbow Calcining USA Inc. v. American Indus. Partners*, 96 A.D.3d 646, 651 (1st Dept. 2012)), one that simply maintains passive real estate investments may be deemed a resident of Delaware. See *Interventure 77 Hudson LLC v. Falcon Real Estate Investment Co., L.P.*, 172 A.D.3d 481 (1st Dept. 2019). As the business reality for many companies may be somewhere between these two extremes, it may be difficult to know with certainty what determination a court will make.

Possible Solutions, and Their Drawbacks

What can be done to mitigate this risk? One way to be on the safe side if there is any doubt as to “residence” is to bring suit on any claim within three years. This will certainly avoid any argument over whether the claim is subject to a longer limitations period.

But New York’s long statute of limitations for contract claims exists for a reason: parties who are in business together in a long-term project such as a real estate transaction may want the possibility of working things out over a longer period of time, rather than feeling the pressure to litigate that comes with a shorter limitations period.

It may therefore be tempting to try to negotiate for a contractual limitations period that mirrors New York’s six-year statutory period. This workaround would ostensibly eliminate any confusion. But there is a wrinkle: although Delaware law permits parties to agree to a limitations period of as long as 20 years for actions “based on a written contract, agreement or undertaking involving at least \$100,000” (10 Del.C. § 8106(c)), New York law does not permit parties to contractually lengthen the statute of limitations before a claim has accrued. See Gen. Oblig. Law § 17-103(1); *John J. Kassner & Co., Inc. v. City of New York*, 46 N.Y.2d 544, 552 (1979).

It is unclear how these provisions would dovetail in a New York court. On the one hand, a contract governed by New York law that specifies that claims under it will be governed by a six-year limitations period does not purport to lengthen the New York statute of limitations: New York’s limitations period for such claims is six years. While it does lengthen Delaware’s limitations period, it does so in a way that is expressly authorized by Delaware law.

This analysis suggests that the provision should be enforceable. Cf. *Freedom Trust 2011-2 v. HSBC Bank USA, N.A.*, 214 A.D.3d 404, 405-06 (1st Dept. 2023) (suggesting that, where a shorter Delaware limitations period would apply by virtue of the borrowing statute, a tolling agreement that would be unenforceable under New York law but valid under Delaware law could be enforced—provided that if that extension made Delaware’s “net” limitations period longer than New York’s, then New York’s period would apply).

On the other hand, New York courts have so far not squarely addressed this question. To the contrary, in *2138747 Ontario, supra*—where the Court of Appeals held that the borrowing statute mandated application of Ontario’s two-year limitations period rather than New York’s six-year period, despite the governing agreement’s specification that it would be “enforced” according to New York law—the court expressly declined to address the question of whether a straight provision “that disputes would be governed by New York’s six-year statute of limitations” would “violate New York’s public policy against contractual extensions of the statute of limitations before accrual of the cause of action.” 31 N.Y.3d at 381 (citation omitted). It may therefore be risky to assume that this workaround will be successful.

Another Alternative

There is still an alternative to quickly resorting to the courts: New York law permits a limitations period applicable to a contract claim to be contractually extended after the claim has accrued. See Gen. Oblig. Law § 17-103(1).

Accordingly, a Delaware LLC that believes it has a claim under a New York contract could obtain some of the breathing room afforded by New York's long statute of limitations (while avoiding any doubt about the possible application of Delaware's shorter one) by negotiating for an extension of time before the claim is three years old. Such an extension can be attractive to both sides if it is possible that the passage of time might eliminate the need to litigate. But the applicable rules require careful drafting.

Specifically, under New York law such an extension must be in writing and specify an end date that is no later than the date the limitations period would have expired if the claim had accrued on the date of the extension agreement. See *id.* This is important: although an indefinite extension may be permissible under Delaware law (see *Freedom Trust*, *supra*), under New York law an agreement that purports to extend the limitations period for a breach of contract claim indefinitely—or to a date beyond the date the limitations period would have expired if the claim had accrued on the date of the extension—is invalid. *Bayridge Air Rights, Inc. v. Blitman Const. Corp.*, 80 N.Y.2d 777, 779-80 (1992); accord *Deutsche Bank National Trust Company v. Flagstar Capital Markets Corp.*, 32 N.Y.3d 139, 153 (2018). Successive extensions, however, are permissible. See *Freedom Trust*, 214 A.D.3d at 405.

It remains unclear whether these restrictions will apply if the statute of limitations that the parties are seeking to extend is Delaware's rather than New York's. See *Freedom Trust*, *supra*. But if the goal is to provide a safety net in a case of doubt, the answer is to take care that the extension agreement complies with the requirements of both New York and Delaware law. This way, it should be effective in a New York court regardless of which state's statute of limitations would otherwise apply under the borrowing statute.

Conclusion

Because a misstep with respect to the statute of limitations is fatal to a claim, it is critically important to avoid risk. A Delaware LLC involved in a New York real estate transaction should therefore assume that any claim it might wish to assert in connection with its contractual rights will be governed by Delaware's three-year limitations period unless it is crystal clear that it is a New York "resident."

Acting vigilantly—either by bringing suit on the claim within three years, or by obtaining a protective extension before the expiration of that period—will ensure that the claim is not irretrievably lost.

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