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Important Statute of Limitations Considerations for Fraud and Other Commercial Claims

By Kevin Schlosser, Esq.

This article addresses some important issues relating to the statute of limitations that impact commercial claims and causes of action.

The Covid-19 Toll

First, recall that due to the Covid-19 pandemic, then-Governor Cuomo issued Executive Order 202.8 on March 20, 2020 temporarily relieving parties of filing deadlines. That engendered some debate as to whether the Order constituted a “toll” or simply a “suspension” of the statute of limitations periods. A toll removes the period encompassed within the Order from the calculation of the statute, while a suspension would just hold off any filing deadlines until the Order expired, which was November 3, 2020. Most courts found it was a toll, while there were pockets of decisions with the opposite holding.

With little fanfare and no other citations or analysis, on March 19, 2024 the New York Court of Appeals definitively recognized that Executive Order 202.8 constituted a toll of the statute of limitations. Buried in its opinion in *Favourite Ltd. v. Cico*, 2024 NY Slip Op 01496 (Mar. 19, 2024), the Court noted:

In any case, the motion here was also made within the six-month time limit to bring a new action under CPLR 205 (a). The Appellate Division order dismissing the complaint was made on March 3, 2020. On March 20, 2020, Executive Order 202.8 was enacted and tolled all filing periods until November 3, 2020. The clock then ran until the motion for leave to amend was submitted on January 8, 2021 (see *Perez v Paramount Communications, Inc.*, 92 NY2d 749, 755 [1999]).

Subtracting the tolling period, the motion to amend was filed well within the six months provided by CPLR 205 (a). Thus, for any statute of limitations applicable to any commercial claims, the Covid-19 toll should be considered.

Enhanced Limitations Periods Where Fraud Alleged

As many Commercial Litigators know, there is a special statute of limitations afforded to claims of actual fraud, including a two-year discovery period. What is less known is that allegations of fraud, even if they are not asserted as a separate cause of action for fraud, can serve to extend the statute of limitations for other commercial claims.

For the cause of action for “actual fraud” itself, New York gives an extended period of time to assert the claim: CPLR 213(8) provides that for “an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.”

When allegations of fraud permeate other commercial claims, the otherwise standard statute of limitations can be extended. For example, for claims of breach of fiduciary duty, courts apply a multitiered analysis. A great, often-cited decision laying it all out is the First Department’s opinion

in *Kaufman v. Cohen*, 307 A.D.2d 113 (1st Dep’t 2003). Another leading decision is the Court of Appeals opinion in *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 (2009). As explained in these decisions, the claim of breach of fiduciary duty does not have its own dedicated statute of limitation period in the New York CPLR. So the courts have to do the work themselves. As succinctly summarized in *IDT*, courts therefore apply the following analysis:

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks (*Loengard v Santa Fe Indus.*, 70 NY2d 262, 266 [1987]). Where the remedy sought is purely monetary in nature, courts construe the suit as alleging “injury to property” within the meaning of CPLR 214 (4), which has a three-year limitations period (see e.g. *Yatter v Morris Agency*, 256 AD2d 260, 261 [1st Dept 1998]). Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies (*Loengard*, 70 NY2d at 266-267). Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8) (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

In *Statharos v. Statharos*, 219 AD3d 651 (2d Dep’t 2023), the Sec-

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ond Department applied the two-year discovery period in CPLR 213(8) to the cause of action for breach of fiduciary duty, ruling that the “allegations of actual fraud are essential to, not merely incidental to, the breach of fiduciary duty cause of action.”

Similarly, in *Star Auto Sales of Queens, LLC v Filardo*, 203 AD3d 865 (2d Dep’t 2022), the Second Department ruled that the conversion claim enjoyed the benefit of an extended statute of limitations because of the defendant’s fraudulent conduct. The Second Department explained:

A cause of action alleging conversion typically must be commenced within three years of the alleged conversion (see CPLR 214[3]). However, when the allegations of fraud are essential to a cause of action alleging conversion based upon actual fraud, the cause of action is governed by the limitations period for fraud set forth in CPLR 213(8). ... Here, the fifth cause of action, alleging conversion, was based on an alleged actual fraud. Specifically, the amended complaint alleged, among other things, that [defendant] Filardo owed a fiduciary duty to the plaintiff, and that he engaged in a fraudulent scheme by making material omissions of fact and fraudulently concealed from the plaintiff the fact that he was diverting monies from it. The amended complaint also alleged that Filardo intended that the plaintiff rely on those misrepresentations and omissions and would not discover the misappropriation, that the plaintiff reasonably relied on those misrepresentations and omissions, and that plaintiff was damaged thereby. Since the fifth cause of action, alleging conversion, is based upon fraud, it is governed by the statute of limitations period for fraud set forth in CPLR 213(8) (see *Loeuis v Grushin*, 126 AD3d at 765; see also *Monteleone v Monteleone*, 162 AD3d at 762).

The Second Department was careful to point out, correctly, that the “fraud” required to extend the statute

for the additional two-year period must be “actual” fraud as opposed to constructive fraud or negligent misrepresentation, which do not get the benefit of the two-year discovery period.

In fact, courts apply the extended fraud discovery rule even when a separate cause of action for fraud has not been alleged. In the recent case of *Board of Mgrs. of the 443 Greenwich St. Condominium v. SGN 443 Greenwich St. Owner LLC*, 2024 NY Slip Op 00450 (1st Dep’t Feb. 1, 2024), units owners of a marketed “ultra-luxurious residential condominium” in New York City sued the condominium sponsor, its principals and board members (collectively “Sponsors”) as well as others, including the architect on the construction, alleging that the building as built experienced a host of defects and that the Sponsors “fraudulently passed on to the unit owners the costs of construction and maintenance disguised as condominium common charges, and that they deliberately cut corners when renovating the building by making the renovations in a manner departing from the operating plan and calculated to save the sponsor money.”

Although a number of causes of action were alleged, including breach of fiduciary duty, plaintiff did not allege a separate cause of action for fraud. Rather, plaintiff merely sprinkled into the allegations concerning breach of fiduciary duty that the individual defendants generally acted fraudulently in passing on the renovation charges by mischaracterizing them as common charges.

The First Department affirmed the Commercial Division’s denial of defendants’ motion to dismiss the breach of fiduciary duty claim on statute of limitations grounds, ruling:

Contrary to defendants’ position, the cause of action is not time-barred under the circumstances of this case. A cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limita-

tions period, except where the fraud allegation is “only incidental to the claim asserted” (*Cusimano v Schurr*, 137 AD3d 527, 529 [1st Dept 2016] [internal quotation marks omitted]). According to the allegations in the complaint, the sponsor’s principals’ actions in concealing renovation charges in common charge assessments is not incidental to the cause of action pleaded, but rather underpins it, because plaintiff alleges that the sponsor’s principals fraudulently used common charges to pay for the building renovation and concealed their actions by disguising the payments as relating to maintenance and repairs. Thus, the cause of action is subject to a six-year limitations period.

Conclusion

The Covid-19 toll should be considered in calculating the statute of limitation issues involving any commercial claims. Further, the tort known as fraud is a robust legal flavor enhancer that produces all kinds of powerful legal remedies and benefits, such as the remedy of rescission, punitive damages, and avoidance of discharging debts in bankruptcy arising from intentional fraudulent misconduct. Another huge benefit of alleging fraud is the legal life-extending or resuscitating of causes of action that would otherwise be time-barred under applicable statute of limitations. 🌱



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