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CONSTRUCTION LAW

Expert Analysis

Statutes of Limitations for Design and Construction Defects

An owner who has suffered damages as a result of defects in the design or construction of its building generally has two classes of defendants it can pursue: the architect (or engineer) that was responsible for the design and may have been responsible for overseeing construction and certifying payments to the contractor, and the contractor or construction manager that was responsible for the physical construction. Although the owner's damages may stem from a single condition or defect, there are different statutes of limitation that apply to the different classes of defendants and the claims against each may accrue at different times.

In this article, we will discuss the respective statutes of limitations that apply to claims relating to construction and design defects, as well as the factors that determine when the statutes begin to run.

Under New York Law, claims against an architect or other non-medical professional, are generally governed by the three-year statute of limitations contained in CPLR 214(6). Claims for construction defects against a contractor or construction manager generally sound in breach of contract and are, therefore, governed by the six-year statute of limitations contained in CPLR 213(2).

As a general rule, an owner's claims against its architect and contractor begin to accrue upon the completion of the project. The fact that the design or construction defect may be latent and is not discovered until long after the work is complete does not affect the date of accrual of the claims. *In re Arbitration Between Oriskany Central School*



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Disrict & Edmund J. Booth Architects, A.I.A., 85 N.Y.2d 995, 630 N.Y.S.2d 960 (1995); *Rite Aid of N.Y. Inc. v. R.A. Real Estate Inc.*, 40 A.D.3d 474, 474, 837 N.Y.S.2d 48, 49 (1st Dept. 2007). However, since the architect's service may continue for some time after the completion of physical construction, there are instances when the claims against the architect may not begin to accrue until long after the statute of limitations for claims against the contractor have begun to run.

There may also be third party claims for personal injury or property damage that result from the design or construction defect. Claims for personal injury or property damage are also governed by the three year statute of limitations

contained in CPLR 214; however, those claims do not begin to accrue until the injury occurs—meaning that a design professional or contractor could, theoretically, be sued for personal injury or damage to property 10 or 20 years after its work is complete.

Claims Against the Architect

As mentioned previously, an owner's claims against its architect for defective design or construction administration are governed by the three-year statute of limitations contained in CPLR 214(6) and the claims accrue upon the completion of the architect's services.

The contract between the owner and the architect will typically impose upon the architect specific contractual requirements. If the owner sues the architect for breach of a specific contractual obligation, the owner may believe that it is entitled to bring the claim within the six-year statute of limitations contained in CPLR 213(2) for breach of contract. Prior to 1996, the owner would likely have been successful. Although the pre-1996 version of CPLR 214 contained the same three-year statute of limitations for non-medical malpractice claims, courts nevertheless allowed claims for breach of contract to be brought against non-medical professionals more than three years but less than six year after the claims accrued.

Two of the leading cases were *Sears, Roebuck & Co. v. Enco Associates Inc.*, 43 N.Y.2d 389, 401 N.Y.S.2d 767 (1977) (breach of contract claims against an architect) and *Santulli v. Englert, Reilly & McHugh, P.C.*, 78 N.Y.2d 700, 579 N.Y.S.2d 324 (1992) (breach of contract claims against an attorney). In *Sears, Roebuck*, the plaintiff hired the defendant to design and to supervise the construction of a system of ramps for a parking deck at one of the plaintiff's retail facilities.

The plaintiff sued the defendant for negligent design, breach of implied warranty and breach of contract after the ramps developed cracks and needed to be replaced. Since the action was commenced more than three years after the ramp system was completed, defendant moved to dismiss the complaint on the grounds that the statute of limitations had expired. The court held that despite the fact that the statute of limitations for a claim of malpractice had expired, plaintiff was entitled to maintain an action for breach of contract. The court ruled:

Inasmuch as the relationship between Sears, Roebuck as property owner and Enco Associates as architects had its genesis in the contract between them, in an action commenced more than three but less than six years after the completion of the ramp system with respect to which the architects' services were rendered, the owner may recover contract damages against the architects either on the theory of breach of a particular contract provision or on the theory of failure to exercise due care in the performance of the contract services.

43 N.Y.2d at 392-393. The court, following reasoning it had used in previous decisions, held that the applicable statute of limitations turns on the remedy that is sought, rather than the theory of recovery. Since the three-year statute of limitations had run with respect to claims for malpractice, the plaintiff's recovery was limited to damages recoverable in breach of contract. As an example, the court wrote that the plaintiff would be able to recover the costs to replace the ramp system (under a theory of contract damages), but might not be able to recover consequential damages such as lost profits which, in the court's view, are typically not recoverable for breach of contract. 43 N.Y.2d at 397.

In 1996, the New York Legislature responded to *Sears, Roebuck* and *Santulli*, and found that "[t]he Courts have recently expanded the statute of limitations, in cases where the essential actions complained of consist of malpractice, to six years under breach of contract theory, thereby abrogating and circumventing the original legislative intent." New York Sponsor's Memorandum, L. 1996, Ch. 623. Accordingly, the Legislature amended CPLR 214(6) to provide that an action for non-medical malpractice must be commenced within three years "regardless of

whether the underlying theory is based in contract or tort." CPLR 214(6) (emphasis added).

In *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co. Inc.)*, 3 N.Y.3d 538, 788 N.Y.S.2d 648 (2004), decided after the 1996 amendment of CPLR 214(6), the plaintiff sued the defendant architect for breach of a specific term in the architect's contract that required the architect's plans and specifications to comply with applicable building codes. The plaintiff

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argued that since it was alleging failure to comply with a specific contractual provision, its claims were not for malpractice, but were true breach of contract claims governed by the six-year statute of limitations in CPLR 213(2). The Court of Appeals disagreed. The court held:

[Plaintiff] correctly notes that this case differs from the cases previously decided by this Court in that it alleges the breach of an express, rather than implied, term of the agreement. However, while compliance with the relevant building code may have been a particular bargained-for result, that result is not inconsistent with an architect's ordinary professional obligations. Making such ordinary obligations express terms of an agreement does not remove the issue from the realm of negligence as argued by [plaintiff], nor can it convert a malpractice action into a breach of contract action.

3 N.Y.3d at 542-543.

On first blush, the above quoted language from *Kliment* appears to stand for the proposition that an owner can never have a breach of contract claim against its architect. In other words, no matter how characterized, the claim is always for malpractice. However, in the very next paragraph, the court left open the possibility of a breach of contract claim where the architect has "guarantee[d] a particular result or agree[d] to perform a service above or beyond that which it might be expected to accomplish using due

care even in the absence of the specific term in the agreement." 3 N.Y.3d at 543.

Despite the door left open by *Kliment*, it is clear that, with two possible exceptions, any claim by an owner against its architect that stems from the architect's failure to use reasonable care or that alleges acts of negligence or omission, regardless of whether the claim is styled as breach of contract or malpractice, will be subject to the three year statute of limitations contained in CPLR 214(6). 3 N.Y.3d at 541-542 (citing Revised Assembly Memo in Support, Bill Jacket, L 1996, ch 623). Therefore, the inquiry turns to when the claim accrues.

As a general rule, an owner's claims against its architect, whether styled as breach of contract or as malpractice, accrue "upon the actual completion of the work to be performed and the consequent termination of the professional relationship." *Frank v. Mazs Group, LLC*, 30 A.D.3d 369, 369-70, 815 N.Y.S.2d 738, 738-39 (2d Dept. 2006). The completion of the architect's services, however, may not correspond with the completion of the physical work, and the architect may have responsibilities that extend well beyond the date when the contractor's work is complete. Accordingly, determining when the architect's work is complete becomes a fact-specific inquiry. *Board of Education of Tri-Valley Central School District at Grahamsville v. Celotex Corp.*, 88 A.D.2d 713, 714, 451 N.Y.S.2d 290 (3d Dept. 1982).

In *Frank*, the plaintiff hired the defendant to design and to oversee the construction of the plaintiff's home. Plaintiff brought an action against defendant more than three years after the completion of physical construction of the home. The defendant argued that the action was time barred, but the supreme court disagreed. In affirming the lower court, the appellate division noted that the contract between plaintiff and defendant required defendant to obtain a certificate of occupancy for the home. The court held that the plaintiff's claims against the defendant did not begin to accrue until the issuance of the certificate of occupancy in 2001 and the plaintiff's action, filed in 2004, was, therefore, timely.

Accordingly, the specific responsibilities of the architect contained in the architect's agreement with the owner will be significant in determining when claims against the architect accrue.

Claims Against the Contractor

An owner's claims against a contractor for construction defects typically sound in breach of contract, which, under CPLR 213(2), are governed by a six-year statute of limitations that begins to run at completion of the actual physical work. *Cabrini Medical Center v. Desina*, 64 N.Y.2d 1059, 1061 (1985).

Additional repairs performed by the contractor after completion of the physical construction will not typically extend or toll the running of the statute of limitations. In *Cabrini Medical Center*, the court held a plaintiff's claims for construction defects, brought in 1983, were time-barred because the construction had been completed in 1975, although the contractor had made repairs in 1977 and 1981. 64 N.Y.2d at 1060-61.

Some plaintiffs have attempted to extend the limitations period for construction defects by claiming fraud in addition to breach of contract. *Cabrini Medical Center*, 64 N.Y.2d 1059. The limitations period for fraud is the greater of either six years from the time the claim accrued or two years from the time the plaintiff discovered, or with reasonable diligence should have discovered, the fraud. CPLR 213(8). However, courts are not generally receptive to such attempts. In *Cabrini Medical Center*, for example the court held that the plaintiff's fraud claim was incidental to its breach of contract claim, which accrued upon completion of the work. 64 N.Y.2d at 1061.

Injury, Property Damage

Claims for personal injury and damage to property are also governed by the three year statute of limitations contained in CPLR 214. CPLR 214(4) and 214(5). As a general rule, a cause of action for personal injury or property damage accrues when the injury occurs. Accordingly, a third party who suffers an injury as a result of a construction or design defect, could, theoretically, bring an action against an architect or a contractor 10 or 20 years after the project is complete.

Those in privity with the architect and the contractor cannot, however, claim the benefit of the later date of injury as the date of accrual for property damage claims stemming from construction or design defects. In *City School District of City of Newburgh v. Hugh Stubbins & Associates Inc.*, 85 N.Y.2d 535, 626 N.Y.S.2d 741 (1995), the defendants, design professionals and a contractor, were hired by the New York State

Urban Development Corporation to construct a library for the Newburgh School District. Fifteen years after the completion of the project, a water pipe in the library ruptured, allegedly as a result of a design or construction defect, and the resulting flood damaged the library, as well as more than \$1,000,000 worth of books and furniture. The Newburgh School District argued that its claims for damage to its personal property (the books and furniture) did not accrue until the injury occurred.

The court disagreed and held that "no matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract—an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties." 85 N.Y.2d at 538. The court reasoned that since a claim for damage to the plaintiff's real property would begin to accrue on the date of completion of the work, there was no rational reason to apply a different rule to the plaintiff's personal property. 85 N.Y.2d at 539.

It is important to note that in *Newburgh* the school district was not in direct privity of contract with the design professionals or the contractor. The court pointed out, however, that the Newburgh School District was the intended beneficiary of the project and retained a certain amount of control over the construction, including budget and change orders, which amounted to the "functional equivalent" of privity." 85 N.Y.2d at 539 (quoting *Ossining Union Free School District v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 419, 541 N.Y.S.2d 335 (1989)).

The CPLR was amended in 1996 to make it more difficult for third parties to sue architects and engineers for personal injury or property damage more than 10 years after the performance of the services that gave rise to the claim. CPLR 214-d, imposes certain procedural notice requirements upon the prospective plaintiff that must be complied with before an action can be commenced. CPLR 214-d does not, however, extend any applicable statutes of limitation, nor does it affect the dates of accrual for claims against architects and engineers. *Gelwicks v. Campbell*, 257 A.D.2d 601, 684 N.Y.S.2d 264 (2d Dept. 1999).

In *Gelwicks*, the plaintiffs sued their engineer for negligent design of a septic system constructed on the plaintiffs' land. The plaintiffs argued, among other things, that CPLR 214-d extended the statute of limitations for the plaintiffs' claims since CPLR

214-d specifically contemplates property damage claims brought more than ten years after the performance of the services that gave rise to the injury. The court disagreed and confirmed that the plaintiffs' claims accrued upon the completion of the engineer's work and that CPLR 214-d, while adding certain procedural requirements for certain plaintiffs, did not affect the applicable statute of limitations.

Conclusion

Owners aggrieved by construction and design defects must understand that different statutes of limitation apply to different classes of defendants. With two possible exceptions, the statute of limitations for claims against an architect is three years from the completion of the architect's services. Claims against a contractor must be brought within six years after the work is complete. Moreover, claims against architects and contractors, even when they stem from a single defect or condition, may not accrue at the same time. Accordingly owners must be cognizant of the applicable limitations periods and the factors that affect dates of accrual of claims so as not to jeopardize important rights.