PACE UNIVERSITY SCHOOL OF LAW

STATUTE OF LIMITATIONS, UNJUST ENRICHMENT, PLEADINGS AND DAMAGE LIMITATIONS FOR CRIMINAL LEGAL MALPRACTICE ACTIONS

MARCH 18, 2013

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I. STATUTE OF LIMITATIONS

A. Basics

1. A statute of limitations is an arbitrary period of time within which an action must be commenced. Article 2 of the CPLR contains the principal statutes of limitations in New York but there are many others. The CPLR also includes two rules of general applicability which are essential for analyzing statutes of limitations cases.

The first rule, CPLR 203(a), states that "the time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." To determine if there is a time limit in an action one must first determine which period set forth in CPLR 211-217 (or from another source is relevant; then determine when the claim accrued and when it was interposed. Finally consider the effect of any applicable tolls or extensions.

The second rule, CPLR 201, states that, "no court shall extend the time limited by law for the commencement of an action." Thus, courts must often defer to the legislatures' judgment as written in the statute as to when a particular claim has expired. There are fundamental policy goals underlying statutes of limitations. These concerns include notions of fairness, repose, meritorious claims, stale evidence and credibility. Repose is the paramount policy consideration in New York. This means that, as applied, New York's statutes of limitations are often defendant-orientated.

In federal diversity cases New York State statutes of limitations are applied under the Erie doctrine. In 1990 Congress adopted a uniform federal statute of limitations but it applies only to causes of action created after the date of its enactment. See 28 U.S.C. Section 1658, enacted as Section 313 of the Judicial Improvements Act of 1990, P.L. 101-650 (1990). This section states: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the enactment of this section may not be commenced later than 4 years after
the cause of action accrues." The United States Supreme Court has held that the four-year period of 28 U.S.C. Sec. 1658 applies to all causes of action created by Congress after 1990, even if the new cause of action was added to an existing act of Congress by an amendment. See Jones v. R.R. Donnelly & Sons, 541 U.S. 369, 124 S. Ct. 1836, 158 L.Ed.2d 645 (2004)

2. The general rule is that the statute starts to run when the wrong is committed, i.e. at the point where the right to sue is complete, regardless of whether the person wronged is aware of the fact. However the legislature may postpone the accrual to the date of discovery.

3. Claims are deemed interposed and the statute of limitations stops running when the claim is filed.

4. Tolls and extensions are set forth in the CPLR. See Article II.

5. In medical malpractice actions the statute of limitations may be tolled by the continuing treatment doctrine, the foreign object exception and the fraudulent concealment exception. (See CPLR 214-a and cases cited.)


B. 2011 and 2012 Cases

1. In Roslyn Union Free School District v. Barken, 16 N.Y.3d 643, 896 N.Y.S.2d 406 (2011) the question was whether a three or six year statute of limitations applied to causes of action for negligence and breach of fiduciary duty by a school district against a former member of the school board. The Court of Appeals held that the six-year limitations period of CPLR 213 (7) was applicable and that the plaintiff's action was timely commenced.

2. In Kahn v. NYC Dept. of Education, 18 N.Y.3d 457 (2012) the Court of Appeals held that employees were not required to exhaust internal review procedures created by collective bargaining agreement and department's bylaws before brining suit under Article 78 of the CPLR to challenge their termination, and thus were required to commence their lawsuit within four months from the date their
probationary service ended. Thus, a determination to discontinue a probationary school employee’s service becomes final and binding on that employee on his or her last day at work and a lawsuit challenging the determination must be commenced within four months after that date.

C. SPECIFIC CASES

1. **Walton v. Strong Memorial Hospital**, 2012 WL 3631122 (Sup. Ct. Erie Co. Aug. 23, 2012) (Plaintiff brought medical malpractice action against surgeons for allegedly negligently leaving a catheter designed to record arterial pressure inside his body following heart surgery. The Surgeons moved to dismiss on statute of limitations grounds. The Supreme Court held the catheter was not a “fixation device" intentionally left in the body, and that the catheter was not a “foreign object” precluding application of the foreign object discovery exception to the applicable statute of limitations.

2. In **Zimmerman v. Poly Prep County Day School**, __F. Supp.2d__ (E.D.N.Y. Aug. 28, 2012) (2012 WL 368333930) the United States District Court for the Eastern District of New York allowed eleven of twelve plaintiffs to proceed with New York state law negligence claims and permitted claims in violations of the Title IX prohibition on sexual abuse to go forward. The Court dismissed RICO claims against the school, but allowed racketeering claims brought by two plaintiffs against school administrators and officials to go forward. The Court scheduled a September 14 court appearance to establish hearing dates to determine if the defendants can be equitably stopped due to their alleged fraud from using New York’s three year statutes of limitations to bar plaintiff’s lawsuit.

II. Unjust Enrichment Pleading Requirements
A. Georgia Malone & Co., Inc. v. Ralph Rieder, et al., __N.Y.3d__, __N.Y.2d__ (2012) A real estate broker prepared due diligence reports for a developer in connection with the potential purchase of a commercial properties filed an action for unjust enrichment against a competing broker that acquired the reports from the developer and then obtained a commission on the final sale of the properties. The Supreme Court dismissed the unjust enrichment claim and the broker appealed. The Appellate Division affirmed as modified and leave to appeal to the Court of Appeals was granted. The Court held that the plaintiff did not have a sufficient relationship with her rival broker to provide a basis for the unjust enrichment claim. The Court of Appeals majority recognized its holding was unfair but applied strict pleading requirements. The dissent, relying on precedent, focused on whether it violated equity and good conscience to permit the defendant to retain what the plaintiff sought to recover. The dissent, speaking through Chief Judge Lippman, stated, "It is apparent that equity and good conscience do not permit Rosewood to retain the benefits of Malone’s diligent work, and that plaintiff has adequately pleaded that Rosewood was unjustly enriched."

B. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 919 N.Y.S.2d 465 (2011) The Appellate Division, with two Justices dissenting, affirmed an order of the Supreme Court which had granted a motion by defendants to dismiss plaintiff’s complaint. Plaintiff’s claims sounded in fraud, negligent misrepresentations, breach of contract and unjust enrichment. A unanimous Court of Appeals held plaintiff’s claims failed to state causes of action. The Court stated that "A plaintiff must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered". The Court concluded that "Manderin’s unjust enrichment claim fails for the same deficiency as its other claims-the lack of allegations that would indicate a relationship between the parties, or at least an awareness by Wildenstein of Mandarin’s existence. Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated."
C. **IDT Corp. v. Morgan Stanley Dean Witter & Co. et. al.,** 12 N.Y.3d 132, 879 N.Y.S.2d 132 (2009) In large money action plaintiffs sued defendants alleging claims including breach of fiduciary duty, misappropriation of confidential and proprietary business information and unjust enrichment. A motion to dismiss was granted by Supreme Court with respect to the claim of tortuous interference with prospective business relations and denied with respect to other claims. The Defendants appealed and the Appellate Division affirmed. A unanimous Court of Appeals held that the unjust enrichment claim could not form the basis of plaintiff’s demand that Morgan Stanley return the ten million dollar fee paid in relation to the underlying transaction because that fee arose from a contract. The Court stated, “The theory of unjust enrichment lies as a quasi-contract claim” (citation omitted) “It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded.”

D. **Sperry v. Crompton Corp.,** 8 N.Y.3d 204, 831 N.Y.S.2d 760 (2007) A unanimous court of Appeals affirmed dismissal of plaintiff’s unjust enrichment claims and stated, “While we agree with Sperry that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, we nevertheless conclude that such a claim does not lie under the circumstances of this case. Here, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim. Additionally, in this situation it is not appropriate to substitute unjust enrichment to avoid the statutory limitations on the cause of action created by the Legislature.”

III. **LEGAL MALPRACTICE**
A. In Dombrowski v. Bulson, 19 N.Y.3d 347, __N.Y.2d__ (2012) a unanimous Court of Appeals held that a plaintiff, suing his former criminal defense attorney in legal malpractice, could not recover nonpecuniary damages. The Court reversed the Appellate Division which had found a parallel between actions for malpractice in criminal claims and claims for false arrest and malicious prosecution. The Court of Appeals rejected this conclusion and further relied on policy reasons to support its decision. The Court stated, “Allowing this type of recovery would have, at best, negative and, at worst, devastating consequences for the criminal justice system. Most significantly, such a ruling could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions.”