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CIVIL PRACTICE LAW AND RULES

CPLR 203(b)(5): Sixty-day toll available for contractual limitation period provided that delivery of the summons and complaint upon proper official is effectuated within the contractual limitation period

CPLR 203(b)(5) allows a plaintiff to receive an automatic sixty-day extension of the applicable statute of limitations merely by delivering the summons and complaint to the appropriate county sheriff or clerk.¹ Use of this tolling provision is widespread

¹ CPLR 203(b)(5) (McKinney 1972 Supp. 1987). Section 203(b)(5) provides in part:

(b) Claim in complaint. A claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with him when: . . .

5. The summons is delivered to the sheriff of that county outside the city of New York or is filed with the clerk of that county within the city of New York in which the defendant resides, is employed or is doing business, or if none of the foregoing is known to the plaintiff after reasonable inquiry, then of the county in which the defendant is known to have last resided, been employed or been engaged in business, or in which the cause of action arose; or if the defendant is a corporation, of a county in which it may be served or in which the cause of action arose; provided that:

(i) The summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision

Id.

CPLR 203(b)(5), originally CPLR 203(b)(4), was enacted in 1962. Ch. 308, § 203, [1962] N.Y. Laws 1303. The provision is derived from sections 17 and 21 of the repealed New York Civil Practice Act. *See* FIFTH REP. at 32.

Compliance with the provisions of CPLR 203(b)(5) extends not only to the statutes of limitations set forth in the CPLR, but to those in other chapters of New York law, as long as the provisions of CPLR 203 are not inconsistent with those other provisions. *See, e.g.,* Clough v. Board of Educ., 56 App. Div. 2d 233, 234-36, 392 N.Y.S.2d 170, 172-73 (4th Dep't 1977) (one year and 90-day period of limitation prescribed in GML 50-i extended by sixty-day tolling period of CPLR 203(b)(5)). In order to benefit from the sixty-day extension, the summons must be delivered to the appropriate sheriff or clerk and not to a state marshal or special deputy. *See* 1 WK&M ¶ 203.14, at 2-111. In federal court, delivery to the district court's clerk has been held to be the equivalent to service upon a county sheriff. *See* Gold v. Jeep Corp., 579 F. Supp. 256, 258 (E.D.N.Y. 1984). The court noted that a federal litigant in a diversity action does not have to depend on the services of a state official where that litigant is not seeking greater substantive rights than he would be accorded in a state court. *See id.* at 259. If the summons in a state court action is delivered to the wrong sheriff or filed with the county clerk of an improper county, the delivery is deemed insufficient. *See* Roberts v. Schuh, 55 Misc. 2d 996, 997, 287 N.Y.S.2d 609, 610 (Sup. Ct. Orange County 1968) (60-day tolling provision inapplicable when summons delivered to sheriff of wrong county). Literally, the sixty-day extension is to be tacked onto the end of whatever limitations period otherwise remains. However, despite the statutory language, some authorities believe that section 203(b)(5) only gives an alternative sixty-days, measured from delivery to the proper official. *See* SIEGEL § 47, at 48.

because New York, unlike other jurisdictions, does not consider an action commenced until service of the summons has been completed.² Despite the restrictive language contained in CPLR 201³ on the applicability of the article 2 limitations periods, use of the CPLR 203(b)(5) tolling provision has received judicial approval in a variety of actions.⁴ Recently, in *Berkshire Life Insurance Co. v.*

² Compare CPLR 304 (McKinney 1972) (action commenced and jurisdiction acquired by service of summons) with FED. R. Civ. P. 3 (action commenced by filing of a complaint) and N.J. Civ. P.R. 4:2-2 (West 1987) (civil action commenced by filing complaint with court); see also *Markoff v. South Nassau Community Hosp.*, 61 N.Y.2d 283, 288, 461 N.E.2d 1253, 1255, 473 N.Y.S.2d 766, 768 (1984) (action is commenced when service is effected pursuant to appropriate authorized method); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 306, 448 N.E.2d 86, 92, 461 N.Y.S.2d 232, 238 (1983) (civil action not commenced by filing complaint, but is commenced upon service).

³ CPLR 201 (McKinney 1972). Section 201 provides that:

An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

Id. The purpose of the limitations periods enumerated in article 2 is to compel a plaintiff to bring his claim in a timely fashion while giving a defendant prompt notice and eliminating the uncertainty surrounding stale claims. See *Vastola v. Maer*, 48 App. Div. 2d 561, 564, 370 N.Y.S.2d 955, 958 (2d Dep't 1975), *aff'd*, 39 N.Y.2d 1019, 1021, 355 N.E.2d 300, 300, 387 N.Y.S.2d 246, 246 (1976).

Notwithstanding the public policy of giving repose to human affairs, the CPLR does provide for extensions and tollings of the statutes of limitations. See, e.g., CPLR 207 (McKinney 1972) (defendant outside state when action accrues, statute of limitations tolled until return); CPLR 208 (McKinney 1972 & Supp. 1987) (infancy and insanity of plaintiffs result in tolling).

⁴ See, e.g., *Zarcone v. Condie*, 62 F.R.D. 563, 568 (S.D.N.Y. 1974) (CPLR 203(b)(5) extension available in wrongful death action); *S & J Deli, Ltd. v. New York Property Ins. Underwriting Ass'n*, 119 App. Div. 2d 652, 652, 501 N.Y.S.2d 93, 94 (2d Dep't 1986) (tolling available to extend insurance contract limitation period); *Place v. Schwartz*, 100 App. Div. 2d 963, 963, 475 N.Y.S.2d 84, 85 (2d Dep't 1984) (mem.) (60-day extension proper in personal injury action); see also *Cohoes Bronze Co., Inc. v. Georgia Home Ins. Co.*, 243 App. Div. 224, 225, 276 N.Y.S. 619, 621 (3d Dep't 1935) (applying § 17 of Civil Practice Act to insurance policy contest); cf. *In re Selwyn Realty Corp.*, 184 App. Div. 355, 358-363, 170 N.Y.S. 491, 493-96 (1st Dep't) (§ 399 of Code of Civil Procedure, an early statutory section allowing service on sheriff, applied to Lien Law action), *aff'd mem.*, 224 N.Y. 559, 120 N.E. 876 (1918).

It should be noted, however, that New York courts have not uniformly granted the sixty-day tolling of CPLR 203(b)(5). See, e.g., *De Luca v. New York City Transit Auth.*, 119 Misc. 2d 523, 523, 464 N.Y.S.2d 340, 340-41 (Sup. Ct. N.Y. County 1983) (extension unavailable in personal injury action against Port Authority because of compact between New York and New Jersey); *Garr v. State*, 102 Misc. 2d 350, 353, 423 N.Y.S.2d 407, 409-10 (Ct. Cl. 1979) (tolling provision not applicable to service of notice of intention under § 10 of Court of Claims Act); *Family Bargain Centers, Inc. v. Village of Herkimer*, 56 Misc. 2d 768, 770, 290 N.Y.S.2d 207, 210 (Sup. Ct. Herkimer County 1968) (60-day toll not available to extend time limitation under GML).

Fernandez,⁵ the Appellate Division, Second Department, held that use of the section 203(b)(5) extension period was available to the plaintiff where, pursuant to Insurance Law section 3203(a)(3),⁶ the limitation period for commencing an action was fixed by an insurance contract.⁷ In *Fernandez*, the plaintiff insurance company issued a policy on the life of the defendant-husband on November 5, 1982.⁸ Shortly thereafter, the plaintiff received notification of the insured's disappearance.⁹ Prior to the expiration of the two-year incontestability period¹⁰ contained in the policy, the plaintiff insti-

⁵ 124 App. Div. 2d 120, 511 N.Y.S.2d 348 (2d Dep't 1987).

⁶ N.Y. INS. LAW § 3203(a)(3) (McKinney 1985); see *infra* note 10 and accompanying text.

⁷ *Fernandez*, 124 App. Div. 2d at 121, 511 N.Y.S.2d at 348.

⁸ See *id.* at 121, 511 N.Y.S.2d at 349.

⁹ *Id.* Charles Fernandez, the insured, disappeared while fishing off the coast of Florida on November 13, 1982, eight days after the policy was issued. *Id.*

¹⁰ See N.Y. INS. LAW § 3203(a)(3) (McKinney 1985 & Supp. 1987). This section provides:

(a) All life insurance policies, except as otherwise stated herein, delivered or issued for delivery in this state, shall contain in substance the following provisions, or provisions which the superintendent deems to be more favorable to policyholders: . . .

(3) that the policy shall be incontestable after being in force during the life of the insured for a period of two years from its date of issue

Id. This statement, which is required to be in every life insurance policy, is commonly known as an "incontestability clause." 18 G. COUCH, COUCH ON INSURANCE 2d § 72:1 (rev. ed. 1983); 1A J. APPELMAN, INSURANCE LAW AND PRACTICE § 311 (1981). "The word 'incontestable,' as used in policies providing that they shall become incontestable, means indisputable, and amounts to a guaranty that no objection shall be taken to defeat the policy on the death of the person whose life was insured." 18 G. COUCH, *supra*, § 72:1 (footnote omitted).

The use of the incontestability clause in insurance policies first achieved widespread use in the United States in 1879. See L. VILLARONGA, THE INCONTESTABLE CLAUSE: AN HISTORICAL ANALYSIS 12 (1976). Insurance companies adopted the use of these clauses in response to negative public opinion concerning unfavorable policy provisions, and to gain a competitive advantage over those companies that did not adopt such clauses. *Id.* at 14-15. The primary benefit of the clause to the insured is that after the policy has been in effect for two years, the insurer cannot contest its validity on the grounds that the insured obtained the policy by fraudulent misrepresentations. See *Berkshire Life Ins. Co. v. Weinig*, 290 N.Y. 6, 8-10, 47 N.E.2d 418, 420-21 (1943); see generally 18 G. COUCH, *supra*, § 72:2 (purpose of clause is to nullify warranties and conditions that might defeat insured's rights after stipulated time passes). However, should the insured die before the clause has expired, the insurer has a continuing right to contest the policy on the grounds of misrepresentation. See *Simon v. Government Employees Life Ins. Co.*, 79 App. Div. 2d 705, 705, 434 N.Y.S.2d 447, 449 (2d Dep't 1980) (mem.) Although the clause is made a part of the policy, it is not entirely a contractual provision, and is considered to some extent to be a statute of limitations. See 1A J. APPELMAN, *supra*, at 312. "The incontestable clauses are enforced with particularity by the courts because of the desirable purpose which they have. It is their purpose to put a checkmate upon litigation; to prevent, after the lapse of a certain period of time, an expensive resort to the courts . . ." *Id.* at 311. Inclusion of incontestability clauses is now re-

tuted this action to rescind the policy, maintaining that the defendant-husband had fraudulently misrepresented the condition of his health in his insurance application.¹¹ On October 5, 1984, the plaintiff delivered copies of the summons and complaint to the sheriff, pursuant to CPLR 203(b)(5), in order to receive a sixty-day extension of the incontestability period.¹² Service was not accomplished until December 15, 1984, more than two years after the policy had been issued.¹³ Consequently, the defendant-wife moved to dismiss the complaint on the ground that service was untimely as the summons and complaint were not delivered until after the incontestability period had expired.¹⁴ Finding that the sixty-day extension of CPLR 203(b)(5) was unavailable to extend a contractual limitations period, Supreme Court, Special Term, granted the motion to dismiss.¹⁵ However, on plaintiff's motion for reargument, the court vacated its prior decision and reinstated the complaint.¹⁶

The Appellate Division, Second Department, unanimously affirmed Special Term's denial of the defendant-wife's motion to dis-

quired by statute in a majority of states. See *Developments in Georgia Law—Insurance: Incontestability Clauses in Georgia Insurance Contracts*, 13 GA. L. REV. 850, 853 & n.19 (1979).

¹¹ *Fernandez*, 124 App. Div. 2d at 121, 511 N.Y.S.2d at 349. The New York Court of Appeals, in a memorandum opinion, has affirmed a lower court holding that an applicant's material misrepresentation when answering health questions in a life insurance application is enough to defeat recovery. See *Barrett v. State Mut. Life Assurance Co.*, 58 App. Div. 2d 320, 323-24, 396 N.Y.S.2d 848, 851-52 (1st Dep't 1977), *aff'd mem.*, 44 N.Y.2d 872, 873, 378 N.E.2d 1047, 1047, 407 N.Y.S.2d 478, 478 (1978), *cert. denied*, 440 U.S. 912 (1979).

¹² *Fernandez*, 124 App. Div. 2d at 121, 511 N.Y.S.2d at 349.

¹³ *Id.* at 122, 511 N.Y.S.2d at 349. The plaintiff had attempted to serve the defendants during October of 1984, and if this service had been successful, it clearly would have been valid under the restrictions of the incontestability clause. *Id.* at 121, 511 N.Y.S.2d at 349. Before service was effectuated, the defendant-wife, Mary Ann Fernandez, who was the beneficiary of the policy, moved for dismissal on December 10, 1984. *Id.* The defendant-wife contended that the attempted services were flawed and that the court lacked personal jurisdiction over either of the defendants. *Id.* at 122, 511 N.Y.S.2d at 349. During the pendency of the the dismissal motion, the defendant-wife was personally served on December 15, 1984. *Id.* Thereafter, pursuant to court order, the absentee defendant-husband was served on January 2, 1985 by certified mail addressed to Mary Ann Fernandez. *Id.* Thus, both defendants were served after the expiration of the two-year period contained in the incontestability clause, but within the sixty-day extension period allotted by CPLR 203(b)(5). *Id.* at 122-23, 511 N.Y.S.2d at 349-50.

¹⁴ *Id.* at 122, 511 N.Y.S.2d at 349.

¹⁵ *Id.* at 123, 511 N.Y.S.2d at 350. The Supreme Court, Special Term, without citing authority, stated that the CPLR 203(b)(5) tolling provision was "not applicable to a contractual agreement between the parties." *Id.*

¹⁶ *Id.* On reargument, Special Term held that the two-year incontestability period of the policy had been extended by delivery of the summons and complaint to the sheriff. *Id.*

miss the complaint.¹⁷ Writing for the court, Justice Mangano held that the incontestability clause was, in effect, a statute of limitations,¹⁸ and, as such, the tolling provision of CPLR 203(b)(5) was available to afford the plaintiff an additional sixty days in which to accomplish service.¹⁹ The court, in reaching its decision, relied heavily on the opinion of the Appellate Division, First Department, in *Unionmutual Stock Life Insurance Co. of New York v. Kliever*,²⁰ where the First Department addressed issues similar to those presented in *Fernandez*.²¹ In light of the pervasive application that CPLR 203(b)(5) has received in the past,²² it is submitted that the Appellate Division, Second Department, correctly adjudicated the appeal in the *Fernandez* action. Furthermore, a continued broad application of CPLR 203(b)(5) is needed to insure that plaintiffs receive a judicial determination of their claims when attempting to serve problematic defendants. However, it is suggested that the need for a CPLR 203(b)(5) extension would be obviated by changing the New York view that deems a civil action commenced only upon delivery of the summons to the defendant.²³

¹⁷ *Id.* at 125, 511 N.Y.S.2d at 351.

¹⁸ *Id.* at 124, 511 N.Y.S.2d at 350 (citing *Berkshire Life Ins. Co. v. Weinig*, 290 N.Y. 6, 10, 47 N.E.2d 418, 421 (1943)). New York has long recognized the similarities between an incontestability clause and a statute of limitations. *See, e.g.*, *Killian v. Metropolitan Life Ins. Co.*, 251 N.Y. 44, 49, 166 N.E. 798, 800 (1929) (clause is akin to statute of limitations); *Wright v. Mutual Benefit Life Ass'n*, 118 N.Y. 237, 243, 23 N.E. 186, 187 (1890) (incontestability clauses and statutes of limitations serve similar purposes).

¹⁹ *See Fernandez*, 124 App. Div. 2d at 125, 511 N.Y.S.2d at 351. After delivery of process to the sheriff "within the contestability period, the plaintiff was afforded an additional 60 days after the incontestability period had expired, i.e., until January 4, 1985, to commence the instant action." *Id.* (citation omitted).

²⁰ 83 App. Div. 2d 805, 442 N.Y.S.2d 6 (1st Dep't 1981) (mem.).

²¹ *Fernandez*, 124 App. Div. 2d at 124, 511 N.Y.S.2d at 350-51. In *Unionmutual*, the plaintiff-insurer instituted an action to rescind a life insurance policy on the ground that the defendant-insured obtained the policy through fraudulent misrepresentation. *Unionmutual*, 83 App. Div. 2d 805, 806, 442 N.Y.S.2d 6, 6 (1st Dep't 1981). The plaintiff's suit was commenced by the filing of the summons and complaint with the New York County Clerk pursuant to CPLR 203(b)(5), but service upon the defendant-insured was not completed until after the policy's two-year incontestability period had expired. *Id.* at 806, 442 N.Y.S.2d at 6. Relying on *New York Life Insurance Co. v. Dickler*, 135 Misc. 594, 238 N.Y.S. 684 (Sup. Ct. N.Y. County 1929), *aff'd mem.*, 229 App. Div. 775, 242 N.Y.S. 909 (1st Dep't 1930), the *Unionmutual* court held that "a delivery of a summons to the sheriff of the county in which defendant resided, two days before the expiration of the period set forth in the incontestability clause[,] was effective[] to commence the action even though personal service was not effected until many days later." *Unionmutual*, 83 App. Div. 2d at 806, 442 N.Y.S.2d at 7.

²² *See supra* note 4 and accompanying text.

²³ *See* CPLR 203, commentary at 114 (McKinney 1972). "The basic rule is that the service of the summons stops the statute of limitations upon all causes of action pleaded in

Moreover, the New York Legislature should adopt a more progressive approach, as embodied in the Federal Rules of Civil Procedure, which deems the commencement of an action to occur upon the filing of the complaint with the clerk of the court.²⁴

The unavailability of the CPLR 203(b)(5) extension has been limited by the courts to those instances where compliance with the time limitation, as fixed by law, is deemed to be a condition precedent to the existence of a cause of action.²⁵ In determining whether a time period is a condition precedent or a statute of limitations, some courts have utilized the "creation of a new right of action" test.²⁶ Accordingly, if the legislature creates a new right of action unknown at common law, and the same statute imposes a limitations period, this period will be deemed a condition precedent to bringing suit.²⁷ A litigant who has failed to observe these time limi-

the complaint." *Id.* See also *Markoff v. South Nassau Community Hosp.*, 61 N.Y.2d 283, 288, 461 N.E.2d 1253, 1255, 473 N.Y.S.2d 766, 768 (1984) (action will not be commenced until there has been proper service); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 306, 448 N.E.2d 86, 92, 461 N.Y.S.2d 232, 238 (1983) (civil action is not instituted by filing of complaint, but is commenced only upon service, delivery or filing of summons).

²⁴ See *FED. R. CIV. P. 3*; see also *FED. R. CIV. P. 5(e)* (filing with clerk constitutes filing with court). Rule 3 simply provides that "[a] civil action is commenced by filing a complaint with the court." *FED. R. CIV. P. 3*. Thereafter, the clerk of the court issues a summons, see *FED. R. CIV. P. 4(a)*, and a plaintiff is afforded 120 days, from the date of issuance of the summons, in which to effectuate service. See *FED. R. CIV. P. 4(j)*.

At first glance, the differences between the federal method and the New York method may not appear significant. However, the differences are readily apparent in the situation where the summons and complaint are filed with the court on the day the statute of limitations is due to expire. The federal litigant would be given 120 days in which to serve his summons and an extension may be available if "good cause" is shown. See *FED. R. CIV. P. 4(j)*. In New York, only if the plaintiff delivers the summons to the proper sheriff or clerk is he afforded an additional sixty days in which to serve the defendant. See *CPLR 203(b)(5)* (*McKinney 1972 & Supp. 1987*). This sixty-day difference could have a meaningful effect on the plaintiff's ability to interpose his claim. Furthermore, New York's adoption of the federal method would obviate the need for *CPLR 203(b)(5)* altogether.

²⁵ See, e.g., *Savino v. Demiglia*, 133 App. Div. 2d 389, 390, 519 N.Y.S.2d 384, 385 (2d Dep't 1987) (mem.) (commencing action within one year is condition precedent to bringing suit against Port Authority); *Seguritan v. Northwest Airlines, Inc.*, 86 App. Div. 2d 658, 659, 446 N.Y.S.2d 397, 398 (2d Dep't) (*CPLR 203(b)(5)* does not apply to action under Warsaw Convention where bringing of suit within two years is condition precedent), *aff'd mem.*, 57 N.Y.2d 767, 440 N.E.2d 1339, 454 N.Y.S.2d 991 (1982); *De Luca v. New York City Transit Auth.*, 119 Misc. 2d 523, 523, 464 N.Y.S.2d 340, 340-41 (Sup. Ct. N.Y. County 1983) (one-year limit for claims against Port Authority tantamount to condition precedent).

²⁶ See, e.g., *Romano v. Romano*, 19 N.Y.2d 444, 447, 227 N.E.2d 389, 391, 280 N.Y.S.2d 570, 573 (1967) (if statute creating action attaches time limit for commencement, that is part of the cause of action); *Cimo v. State*, 306 N.Y. 143, 150, 116 N.E.2d 290, 294 (1953) (when legislature creates new cause of action and includes a time limit in statute, action is subject to that limitation alone).

²⁷ See *Cimo*, 306 N.Y. at 150, 116 N.E.2d at 294. Although this approach has been

tations has not satisfied the condition precedent to bringing suit, and this omission, like the failure to observe a statute of limitations generally, will warrant a dismissal of the action.²⁸ Applying this test to the *Fernandez* case, it would appear that an incontestability clause, although a creation of statute, is not in the nature of a condition precedent. A suit on an insurance policy is merely a breach of contract action,²⁹ an action not unknown at common law; hence, the tolling provisions of CPLR article 2 are applicable to extend a limitations period fixed in an insurance policy.³⁰

The broad and consistent application of CPLR 203(b)(5) has again achieved an equitable result, as evidenced by the Appellate Division, Second Department, decision in *Fernandez*. However, even a continuing application of CPLR 203(b)(5) may not assure service within the requisite period when a plaintiff is confronted with an evasive defendant or a condition precedent to suit. It is suggested, therefore, that the more progressive federal approach, which deems an action commenced upon filing of the complaint, be adopted in New York.

John M. Wilson

taken by a number of courts, it is not an absolute. For instance, a wrongful death action, an action unknown at common law, has a two-year limitations period. EPTL § 5-4.1 (McKinney Supp. 1988). This period, however, is a statute of limitations, not a condition precedent. *Sharrow v. Inland Lines, Ltd.*, 214 N.Y. 101, 110, 108 N.E. 217, 220 (1915). Conversely, an action for personal injuries brought under the Warsaw Convention must be brought within two years; a failure to bring an action within this period is a failure of a condition precedent to bringing suit. *See Kahn v. Trans World Airlines, Inc.*, 82 App. Div. 2d 696, 709, 443 N.Y.S.2d 79, 87 (2d Dep't 1981). The *Kahn* court, instead of focusing on whether or not the Warsaw Convention created a new cause of action, looked towards the intent of the Convention's drafters. *Id.* In this regard the *Kahn* court stated:

[R]egardless of whether or not the Convention itself "creates" any causes of action, it is readily apparent that the time limitation incorporated in article 29 was intended to be in the nature of a condition precedent to suit, and that it was never intended to be extended or tolled by infancy or other incapacity.

Id.

²⁸ *See id.* at 709-10, 443 N.Y.S.2d at 87-88.

²⁹ *See Brownell v. Board of Educ.*, 239 N.Y. 369, 374, 146 N.E. 630, 632 (1925) (insurance is personal contract to indemnify insured); *Lett v. Guardian Fire Ins. Co.*, 125 N.Y. 82, 86, 25 N.E. 1088, 1089 (1890) (insurance policy is "distinctly a personal contract"); 1 G. COUCH, *supra* note 10, § 1:1.

³⁰ *See, e.g., S & J Deli, Ltd. v. New York Property Ins. Underwriting Ass'n*, 119 App. Div. 2d 652, 652, 501 N.Y.S.2d 93, 94 (2d Dep't 1986) (two-year statutory period in which to bring action on fire insurance policy not condition precedent); *Unionmutual Stock Life Ins. Co. of N.Y. v. Kliever*, 83 App. Div. 2d 805, 806, 442 N.Y.S.2d 6, 7 (1st Dep't 1981) (two-year incontestability clause in life insurance policy is statute of limitations).