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CPLR 213: Contract Statute of Limitations Applied to Architect's Malpractice Action

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CPLR 213: Contract statute of limitations applied to architect's malpractice action

In determining both the appropriate remedy and the applicable statute of limitations,[34] New York courts historically have looked to the theory of liability underlying the cause of action.[35] This "essence" or "gravamen" test[36] has presented a particular problem in malpractice actions, where liability may be deemed to arise from either the contractual relationship of the parties or the defendant's breach of a duty of care.[37] The traditional approach has been to view suits based on a failure to use due care as essentially tortious[38] and

[34] Statutes of limitation reflect a public policy to "preserve the peace of society by preventing the assertion of stale claims." Recommendation and Study relating to Agreements Extending the Statute of Limitations, [1947] N.Y. LAW REV. COMM'N REP. 133, 145 (footnote omitted); *see* Caffaro v. Trayna, 35 N.Y.2d 245, 254-55, 319 N.E.2d 174, 179, 360 N.Y.S.2d 847, 854 (1974); Schmidt v. Merchants Despatch Trans. Co., 270 N.Y. 287, 302, 200 N.E. 824, 828 (1936) (Breitel, C.J., dissenting); 1 WK&M ¶ 201.01, at 2-6 (1977); J. ANGELL, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW 6 (6th ed. 1876). *See generally* Act and Recommendation relating to Agreements Extending the Statutes of Limitation, [1961] N.Y. LAW REV. COMM'N REP. 93, 97.

Statutes of limitation are procedural provisions which bar only the remedy associated with a particular theory of liability and do not affect the underlying substantive right. Hulbert v. Clark, 128 N.Y. 295, 297-98, 28 N.E. 638, 638 (1891); Dentists' Supply Co. v. Cornelius, 281 App. Div. 306, 308, 119 N.Y.S.2d 570, 572 (1st Dep't), *aff'd mem.*, 306 N.Y. 624, 116 N.E.2d 238 (1953). Thus, if an available remedy is time-barred, the injured plaintiff may invoke a viable alternative remedy. WOODS, LIMITATIONS § 57b (4th ed. 1916); *see* Conklin v. Draper, 229 App. Div. 227, 231, 241 N.Y.S. 529, 533 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

[35] *E.g.*, Schmidt v. Merchants Despatch Trans. Co., 270 N.Y. 287, 299, 200 N.E. 824, 826 (1936); *see* McLaughlin, *Statute of Limitations—Curiouser and Curiouser*, N.Y.L.J., March 13, 1978, at 26, col. 1.

[36] *See, e.g.*, Brick v. Cohn-Hall Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937). Although the "essence" or "gravamen" test has been applied to actions for property damage, *see, e.g.*, Alyssa Originals, Inc. v. Finkelstein, 22 App. Div. 2d 701, 701, 254 N.Y.S.2d 21, 23 (2d Dep't 1964) (mem.), *aff'd mem.*, 24 N.Y.2d 976, 250 N.E.2d 82, 302 N.Y.S.2d 599 (1969); Atlas Assurance Co. v. Barry Tire & Serv. Co., 3 App. Div. 2d 787, 787, 160 N.Y.S.2d 547, 548 (3d Dep't 1957) (mem.), it primarily developed in the context of suits for personal injury, *see, e.g.*, Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978); Webber v. Herkimer & M. St. R.R., 109 N.Y. 311, 16 N.E. 358 (1888); Calhoun v. Gale, 29 App. Div. 2d 766, 287 N.Y.S.2d 710 (2d Dep't) (mem.), *aff'd mem.*, 23 N.Y.2d 756, 244 N.E.2d 468, 296 N.Y.S.2d 953 (1968); Gautieri v. New Rochelle Hosp. Assoc., 4 App. Div. 2d 874, 166 N.Y.S.2d 934 (2d Dep't 1957) (mem.), *aff'd mem.*, 5 N.Y.2d 952, 157 N.E.2d 172, 183 N.Y.S.2d 803 (1959); Loehr v. East Side Omnibus Corp., 259 App. Div. 200, 18 N.Y.S.2d 529 (1st Dep't 1940), *aff'd mem.*, 287 N.Y. 670, 39 N.E.2d 290 (1941). *See generally* Note, *Contractual Recovery for Negligent Injury*, 29 ALA. L. REV. 517 (1978).

[37] *See* CPLR 213, commentary at 326 (McKinney 1972); 1 WK&M, ¶¶ 214.21-.22a; Lillich, *The Malpractice Statute of Limitations in New York's New Civil Practice Law and Rules*, 14 SYRACUSE L. REV. 42 (1962).

[38] Since early common law, courts have held that contracts to use due care are analytically tortious and therefore governed by the 3-year statute of limitations. *See* Webber v. Herkimer & M. St. R.R., 109 N.Y. 311, 16 N.E. 358 (1888). This approach has remained viable

to apply the 3-year statute of limitations.[39] Revising this conceptual framework in *Sears, Roebuck & Co. v. Enco Associates,*[40] the Court of Appeals recently held that, where the duty of care arises out of a contractual relationship, the plaintiff may take advantage of the 6-year statute of limitations.[41]

In 1967, the plaintiff, Sears, Roebuck & Co., entered into a Standard Form (A.I.A.)[42] contract with an architect who agreed to

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and has been consistently applied to malpractice actions. *See, e.g.,* Calhoun v. Gale, 29 App. Div. 2d 766, 287 N.Y.S.2d 710 (2d Dep't) (mem.), *aff'd mem.*, 23 N.Y.2d 756, 244 N.E.2d 468, 296 N.Y.S.2d 953 (1968), where the court equated the breach of a contractual obligation implicit in the doctor-patient relationship with a breach of the common law duty to exercise the standard of care of ordinary physicians in a given locality. Similarly, in Carr v. Lipshie, 8 App. Div. 2d 330, 332, 187 N.Y.S.2d 564, 567 (1st Dep't 1959) (per curiam), *aff'd mem.*, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961) the court refused to sustain a breach of contract action against an accountant, concluding that "where the contracting party either expressly or impliedly promises to perform services of the standard generally followed in the profession or promises to use due care in the performance of the services to be rendered," a breach of contract action will not lie. *See* 530 East 89 Corp. v. Unger, 43 N.Y.2d 776, 373 N.E.2d 276, 402 N.Y.S.2d 382 (1977) (mem.); Buyers v. Buffalo Paint & Specialities, Inc., 199 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. Erie County 1950); CPLR 213, commentary at 326-27 (McKinney 1972).

The courts have permitted a separate contract claim to be maintained, however, where the agreement between the parties either warrants that the work will be done in a specific manner or guarantees a particular result. *See, e.g.,* Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955); Glens Falls Ins. Co. v. Reynolds, 3 App. Div. 2d 686, 159 N.Y.S.2d 95 (3d Dep't 1957); Stitt v. Gold, 33 Misc. 2d 273, 225 N.Y.S.2d 536 (Sup. Ct. Queens County), *aff'd mem.*, 17 App. Div. 2d 642, 230 N.Y.S.2d 677 (2d Dep't 1962); Board of Educ. v. Mancuso Bros., 25 Misc. 2d 122, 204 N.Y.S.2d 410 (Sup. Ct. Madison County 1960).

[39] CPLR 214(4)-(6) governs many tort actions and provides that

> [t]he following actions must be commenced with three years:
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> . . . .
>
> 4. an action to recover damages for an injury to property;
> 5. an action to recover damages for a personal injury . . . ;
> 6. an action to recover damages for malpractice . . . .

CPLR 214(4)-(6) (Supp. 1978-1979).

[40] 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977), *modifying* 54 App. Div. 2d 13, 385 N.Y.S.2d 613 (2d Dep't 1976), *aff'g* 83 Misc. 2d 552, 370 N.Y.S.2d 338 (Sup. Ct. Westchester County 1975).

[41] 43 N.Y.2d at 395-96, 372 N.E.2d at 558, 401 N.Y.S.2d at 771. CPLR 213(2), the general statute of limitations governing contract actions requires that "an action upon a contractual obligation or liability express or implied" be commenced within 6 years of accrual. Although there have been attempts to reduce this statutory period, they have been unsuccessful. SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, [1958] N.Y. LEGIS. DOC. No. 13, 67. Actions on contracts for the sale of goods, however, are governed by a shorter 4-year limitations period. N.Y.U.C.C. § 2-725(1) (McKinney 1964).

[42] The standard form contract generally used by architects, *Standard Form Agreement Between Owner and Architects,* AM. INST. ARCH. (A.I.A.) DOC. No. B141 (13th ed. 1977) [hereinafter cited as A.I.A. contract], expressly provides that an architect is "not required to make exhaustive or continuous on-site inspections . . ." but "shall endeavor to guard the owner against defects . . . in the Work of the Contract" and "[certify the quality of the contractor's work] to the best of [his] knowledge, information and belief." *Id.* at 3-4. One

design and supervise the construction of a system of ramps leading to the plaintiff's parking facilities.[43] In 1970, 2 years after the project had been completed, cracks appeared and threatened the "structural integrity of the ramp system."[44] Claiming that the ramp was improperly designed, Sears commenced suit against the architect in 1972.[45] The plaintiff's complaint set forth causes of action in breach of contract, breach of implied warranty and breach of a professional duty of care.[46] Damages were alleged in the amount of $1,000,000, the cost of replacing the defective ramp and $350,000, representing profits lost while repairs were being made.[47] Reasoning that the warranty and contract counts were in reality malpractice claims, the trial court held that all three counts were barred by the 3-year statute of limitations.[48] The Appellate Division, Second Department, affirmed.[49] On appeal, the Court of Appeals modified the appellate division's decision and reinstated the plaintiff's malpractice and contract claims.[50]

In reaching this result, Judge Jones, writing for a unanimous Court, reaffirmed the holding in *Paver & Wildfoerster v. Catholic High School Association,*[51] wherein the Court suggested that the

court has observed that the standard of care established by the A.I.A. contract is the level of skill commensurate with a reasonably prudent architect. Major v. Leary, 241 App. Div. 606, 606, 268 N.Y.S. 413, 414 (2d Dep't 1934) (per curiam); *see* Naetzker v. Brocton Cent. School Dist., 50 App. Div. 2d 142, 146, 376 N.Y.S.2d 300, 306 (4th Dep't 1975), *rev'd mem.*, 41 N.Y.2d 929, 363 N.E.2d 351, 394 N.Y.S.2d 627 (1977); J. ACRET, ARCHITECTS AND ENGINEERS THEIR PROFESSIONAL RESPONSIBILITIES § 4.1, at 57 (1977) [hereinafter cited as ACRET].

[43] 43 N.Y.2d at 393, 372 N.E.2d at 556, 401 N.Y.S.2d at 769.

[44] *Id.*

[45] *Id.* at 393-94, 372 N.E.2d at 556-57, 401 N.Y.S.2d at 769. Generally, a malpractice cause of action against an architect is deemed to accrue at the time the construction project is completed. Sosnow v. Paul, 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975) (mem.). Where the architect continues to work on the building, however, the courts have applied the "continuous treatment" doctrine, which results in a tolling of the statute of limitations until the professional relationship terminates. *E.g.*, County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (Sup. Ct. Broome County 1974); *cf.* Siegel v. Kranis, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968) (continuous treatment doctrine applied to attorneys); Wilkin v. Dana R. Pickup & Co., 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (Sup. Ct. Allegheny County 1973) (continuous treatment doctrine applied to accountants). *See generally* CPLR 214, commentary at 432-39, 62-69 (McKinney 1972 & Supp. 1977-1978); 1 WK&M ¶¶ 214.10, .13, .17, -a.04.

[46] 43 N.Y.2d at 393-94, 372 N.E.2d at 556-57, 401 N.Y.S.2d at 769.

[47] *Id.* For a discussion of the types of damages available in suits against architects, see ACRET, *supra* note 42, at 231-53.

[48] 83 Misc. 2d at 556, 370 N.Y.S.2d at 342.

[49] 54 App. Div. 2d at 13, 385 N.Y.S.2d at 613.

[50] 43 N.Y.2d at 394, 372 N.E.2d at 557, 401 N.Y.S.2d at 769. The *Sears* Court, however, left intact the trial court's holding that an architect may not be sued for breach of implied warranty. *See* 83 Misc. 2d at 557, 370 N.Y.S.2d at 344.

[51] 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976), *discussed in The Survey*, 50 ST. JOHN'S L. REV. 771, 797 (1976). *Paver* involved an arbitration proceeding against an

remedy requested, rather than the nature of the theory of liability, should control the determination of which limitations period is applicable.[52] Pointing out that the obligations of the parties would not have arisen but for their contractual relationship, the Court stated that the 6-year statute of limitations was applicable regardless of the form in which the cause of action was "verbalized."[53] Moreover, according to the Court, the plaintiff should be permitted to introduce evidence to establish failure to conform to professional standards of care as well as breach of a contractual duty.[54] Since "the selection of the applicable statute of limitations is related to the remedy sought,"[55] however, the Court reasoned that the recoverable damages should be limited to those that normally flow from breach of contract.[56] Thus, in the Court's view, the plaintiff could recover only the cost of replacing the defective ramps; the loss of anticipated profits, usually available only in tort actions,[57] would be

architect to recover damages resulting from the faulty construction of a school building. Departing from the traditional "essence" or "gravaman" approach, *see* nn. 3 & 6 and accompanying text *supra*, the *Paver* Court held that the controversy was cognizable in either contract or tort and therefore was not time-barred although the 3-year statute of limitations for malpractice had run. 38 N.Y.2d at 672, 345 N.E.2d at 566, 382 N.Y.S.2d at 23.

[52] 38 N.Y.2d at 676, 345 N.E.2d at 569, 382 N.Y.S.2d at 25. Although the *Paver* Court stressed that the "essence test" is especially inappropriate in arbitration proceedings, it suggested that its holding might not be limited to actions to compel arbitration. *See id.* at 676, 345 N.E.2d at 569, 382 N.Y.S.2d at 25; 1 WK&M ¶¶ 214.10, at 2-289 n.35, 214.14, 214.22a, at 2-312.

[53] 43 N.Y.2d at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 770. The *Sears* Court reaffirmed the traditional rule that malpractice actions for personal injury are essentially tortious and therefore governed by CPLR 214-a or 214(6). 43 N.Y.2d at 395, 372 N.E.2d at 558, 401 N.Y.S.2d at 770. For a discussion of the different policy considerations underlying statutes of limitation applicable to causes of action against medical professionals, see Acts, Recommendations and Study relating to the Statute of Limitations [1942] N.Y. LAW REV. COMM'N REP. 129, 167-72.

[54] 43 N.Y.2d at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 771.

[55] *Id.*

[56] *Id.* at 397, 372 N.E.2d at 559, 401 N.Y.S.2d at 771-72. If the suit had been commenced within 3 years, both contract and tort damages might have been permitted. *Id.* at 396-97, 372 N.E.2d at 558-59, 401 N.Y.S.2d at 771.

Generally, damages in breach of contract actions are designed to "place the aggrieved party in the same economic position he would have had if the contract had been performed." J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 205, at 327 (1970) (footnote omitted); *see* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589, 374 N.E.2d 97, 99-100, 403 N.Y.S.2d 185, 188 (1978); 1 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 50, at 186 (4th ed. 1916) [hereinafter cited as SUTHERLAND]. Tort damages, on the other hand, are available to redress all consequences naturally and proximately flowing from the wrong, including lost profits. 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 111a, at 195 (9th ed. 1912) [hereinafter cited as SEDGWICK]; SUTHERLAND, *supra*, § 48, at 183-84; *see* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d at 589, 374 N.E.2d at 100, 403 N.Y.S.2d at 188.

[57] 43 N.Y.2d at 396-97, 372 N.E.2d at 558-59, 401 N.Y.S.2d at 771. Lost profits are a form of consequential damages usually not permitted in actions for breach of contract. *E.g.*, Griffin

unavailable in the instant case, since the 3-year statutory period for tort damages had passed.[58]

In focusing on the remedy requested rather than the underlying theory of liability to determine whether the plaintiff's claim was time barred, the Court of Appeals has expanded the *Paver* holding, previously thought to pertain only to arbitration proceedings,[59] and made it applicable to the broader area of actions at law. In so doing, the Court in effect, has rejected well-established legal precedent[60] and heralded a significant shift in the criteria for determining which limitations periods are applicable in malpractice suits for pecuniary or property damage. The *Sears* opinion suggests that where the plaintiff seeks damages traditionally associated with contract actions, he may take advantage of the 6-year limitations period if any facts exist which indicate breach of contractual obligation. Thus, while plaintiffs who wait more than 3 years before filing a claim generally will be precluded from recovering consequential damages, some form of relief will now be available.

It is submitted that this extension of the period during which professionals[61] may be held liable is inconsistent with the legislative intent underlying CPLR 214(6), the malpractice statute of limitations. In holding that the 6-year limitations period may be applica-

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v. Colver, 16 N.Y. 489 (1858); SEDGWICK, *supra* note 56, at §§ 144-49; SUTHERLAND, *supra* note 56, at § 45. A limited exception to this general rule has been recognized, however, where it is clear that such damages were foreseeable by both parties. *E.g.*, Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

[58] 43 N.Y.2d at 396-97, 372 N.E.2d at 558-59, 401 N.Y.S.2d at 771.

[59] The *Sears* Court also addressed the choice of law question raised by the parties' agreement that their contract would be governed by Michigan law. Finding that the agreement "operated only to import the substantive law of Michigan," the Court rejected the contention that the suit should be governed by Michigan's 6-year statute of limitations for actions against architects. 43 N.Y.2d at 397, 372 N.E.2d at 559, 401 N.Y.S.2d at 771-72; *see* MICH. COMP. LAWS § 600.5839 (1968). The Court noted, however, that, even if Michigan procedural law were applicable, the use of the Michigan borrowing statute would, in effect, "[reintroduce] the New York State Statute of Limitations" and produce the same result. 43 N.Y.2d at 398, 372 N.E.2d at 559, 401 N.Y.S.2d at 772; *see* MICH. COMP. LAWS § 600.5861(2) (1968).

[60] *See* 38 N.Y.2d at 676, 345 N.E.2d at 569, 382 N.Y.S.2d at 25.

[61] *See* note 39 *supra*. Many jurisdictions have enacted statutes providing specific periods of limitation for malpractice suits against architects. *See generally* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U. OF AM. L. REV. 361 (1969). Some commentators have suggested that the legislature is the proper forum for developing procedural rules to govern malpractice actions, particularly those involving architects. *Id.; Malpractice: The Design Professional's Dilemma*, 10 J. MAR. J. OF PRAC. & PROC. 287 (1977). *See generally* N. WALKER & T. ROHDENBURG, LEGAL PITFALLS IN ARCHITECTURE, ENGINEERING, AND BUILDING CONSTRUCTION (1968).

[61] Since the *Sears* holding was not expressly limited to suits against architects, it would appear that the Court of Appeals has, in effect, extended the time limitations for all malpractice suits involving property damage claims. *See* 1 WK&M ¶ 212.22a.

ble in suits against professionals, the *Sears* Court appeared to rely on the legislature's failure to enact a proposal which would have expressly included contract claims within the 3-year limitation provision.[62] The validity of the Court's inference is questionable, however, since the legislative purpose in creating a separate statute of limitation for malpractice actions was to ensure that "malpractice involving property damage . . . [which could] be based on contract theory" would be governed by the 3-year rather that the 6-year statute of limitation."[63]

The *Sears* decision appears to raise additional questions concerning the liability of professionals such as attorneys and accountants whose relationships with clients are based on implied contracts. Under the "essence" approach, a plaintiff who brought suit within the 3-year limitations period could recover all of the damages proximately flowing from the wrong, since the cause of action was deemed tortious in nature. It therefore was unnecessary for courts using the "essence" test to draw clear distinctions between "benefit of the bargain" damages and those representing plaintiff's consequential loss. Under the *Sears* approach, however, this problematic distinction will become important, since a plaintiff who delays for more than 3 years is permitted to recover contract damages but not his consequential losses. It is suggested that the lower courts must be extremely careful to preserve this distinction when applying the *Sears* holding to future malpractice suits. While such a differentiation may be difficult to make, particularly in cases involving attorneys and accountants,[64] the failure to do so will result in the extension of a professional's tort liability well beyond the length of time prescribed by the New York statute.

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[62] *See* 43 N.Y.2d at 395 n.1, 372 N.E.2d at 558 n.1, 401 N.Y.S.2d at 770 n.1.

[63] Fifth Preliminary Report to the Legislature by the Senate Finance Committee and the Assembly Ways And Means Committee Relative to the Revision of the Civil Practice Act, [1961] N.Y. LEGIS. DOC. No. 15 1, 56; *see* CPLR 214(6).

[64] Generally, the negligence of accountants or attorneys results in consequential loss. *See, e.g.*, Vooth v. McEachen, 181 N.Y. 28, 73 N.E. 488 (1905); Flynn v. Judge, 149 App. Div. 278, 133 N.Y.S. 794 (2d Dep't 1912). Thus, it may be difficult to apply the *Sears* holding to such professionals.