



Statute of Limitations for Design Professionals in New York: 3 Years, 6 Years, 10 Years, or Something Else?

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When an action has been commenced, or is threatened to be commenced, against a design professional counsel representing the design professional must promptly evaluate which defenses apply to such claims. Of the many defenses available to design professionals, asserting the Statute of Limitations defense can result in a complete dismissal of the lawsuit against the design professional. The Statute of Limitations, which is the time within which a party must commence an action against another party, is defined by statute.

Pursuant to the New York Civil Practice Law and Rules, in order to maintain an action for engineering or architectural malpractice, and/or negligence against a design professional, the action must be commenced within three years. A claim for negligence or malpractice against an architect or engineer, arising out of the alleged defective design or construction of a building, accrues for the purpose of Statute of Limitations upon the completion of performance of the design professional's services at the project. New York Courts look to the date of completion of performance to determine when the cause of action accrued, no matter whether the claim is characterized as one for negligence, breach of contract, or fraud. The New York Court of Appeals has defined completion of performance as completion of the actual physical work, even though incidental matters may remain. This portion of the statute applies when the design professional has a contractual relationship with the party claiming damages (privity of contract). However, when there is no privity of contract, for example when a person walking by a construction site trips and falls and sustains personal injuries or property damage, that party has three years to commence the action from the date when the injury occurs.

Notably, while a design professional may claim that their services were completed on a particular date, should the design professional be requested to return to the project to assist in correcting an issue for which the design professional had

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originally been retained, the "Continuous Treatment" doctrine may be applied to extend the Statute of Limitations. Specifically, in the event the initial Statute of Limitations has not yet expired and a design professional returns on a number of dates to address an issue for which the design professional was retained, the Statute of Limitations accrual date is extended until the date that the design professional's further association with the party on that issue is completed.

In addition to the three year Statute of Limitations applicable to design professionals in New York, a breach of contract claim is often also asserted against the design professional. The breach of contract Statute of Limitations is six years from the date of the alleged breach. It is important for the design professional and their counsel to carefully evaluate the elements supporting the alleged breach of contract claim, as the courts have often held that the claim is actually one sounding in negligence and therefore subject to the three year limitations, rather than a breach of contract subject to a six year Statute of Limitations. In this regard, once the design professional performs a service, which is claimed by others not to have been properly performed and resulted in damages, such claims are often viewed by courts as being associated with negligence, and not breach of contract.

Another issue that is often addressed in evaluating Statute of Limitations is the Statute of Repose. A Statute of Repose is a statute that cuts off certain legal rights if they are not acted on by a particular deadline. New York does not have a specific Statute of Repose with respect to claims asserted against design professionals. Notwithstanding, the New York legislature modified the existing law by providing additional elements which must be satisfied should a party seek to pursue a claim against a design professional more than ten years after the services were performed by the design professional. To proceed in this manner, the claimant must file a Notice of Claim prior to the service of a Summons and Complaint. Should the claimant properly proceed with a Notice of Claim, 90 days thereafter they may pursue a claim against the design professional. Under such circumstances, in response, the design professional often proceeds with a motion for summary judgment arguing that there is no substantial basis in fact and law to establish that the conduct of the design professional was negligent, and that such conduct was the proximate cause of the claimed damages. Under the statute, the burden rests on the claimant to establish a substantial basis for advancing such a claim. This is a rather high threshold and as such, it is a rarity when such claims are permitted to proceed so far after the design professional's services are completed at a project.

CONCLUSION

In evaluating the viability of a Statute of Limitations defense, it is incumbent upon the design professional's counsel to promptly obtain and review all relevant project records in the design professional's possession. Proceeding in this manner should provide counsel with information that either supports or refutes the Statute of Limitations

defense. This necessary step early on often results in the design professional obtaining a voluntary discontinuance or, if necessary, dismissal of the claims against the design professional. With respect to the Statute of Repose, while it exists and is an avenue for a claimant to potentially pursue a claim against a design professional, it is one that is not often pursued based, in part, on the difficult threshold of establishing a substantial basis for advancing the claim.

Thus, whether or not a viable claim may exist against a design professional based on the design professional's actions or inactions at a project, immediate and proper evaluation of the applicable Statute of Limitations may result in prompt dismissal of such action and, in turn, the inability of the claimant to recover damages against the design professional for such claims.

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