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SEPTEMBER 25, 2019

Updates to statute of limitations for real estate securities claims

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The New York State Legislature and a New York State Court have recently spoken on the statute of limitations for construction defect claims. The New York State Court, confronted with language in an offering plan restricting the statute of limitations for construction defect claims found such provisions enforceable. On the other hand, the New York State Legislature extended the statute of limitations for the Martin Act, under which the New York Attorney General (NYAG) may bring state securities claims, including those related to real estate securities involving new construction cooperatives and condominiums.

Offering plan six-month limitation of latent construction defect claims upheld by Court

The recent decision, *Tribeca Space Mgrs., Inc. v. Tribeca Mews Ltd.*,[1] denying the plaintiff board's motion to strike certain limitation-related affirmative defenses, provides a potential roadmap for sponsors as to how to limit liability for construction defect-related claims.

Construction defect claims

In this construction defect case brought by the board of managers of the Tribeca Space Condominium against the sponsor and sponsor's principals, the sponsor relies on language disclosed in the offering plan that limits the time in which the board may assert defect claims.[2] The relevant language, essentially allowing the sponsor to create its own statute of limitations for defect claims as long as it is disclosed in the offering plan, is explained succinctly by the Court as follows:

> The condominium offering plan here provides that the Sponsor is obligated to correct patent defects in the common elements of the building only if, among other things, the Board of Managers gives the Sponsor written notice of the patent defects "within two months after the first meeting of Unit Owners." The plan provides that the

[1] *Tribeca Space Mgrs., Inc. v. Tribeca Mews Ltd.*, 2019 NY Slip Op 51373(U) (August 19, 2019).

[2] The limitations provisions in question relate to allegations in the complaint about patent and latent defects in the common elements of the condominium building (as distinct from defects in individual units within the building).

> Sponsor would be obligated to correct latent defects only if the Board gives written notice "within six months after the first meeting of Unit Owners." (Offering Plan, NYSCEF No. 351, at 49.) The plan also provides that "Sponsor shall be deemed to have discharged any obligation it may have with respect to patent or latent defects" if the Board fails to notify the Sponsor "within the time periods specified above." *(Id.)*

The Court rejected plaintiff board's arguments that this provision is not "impossibly short" or does not "effectively nullify any construction defect claim" and cites *Talbi v. ZCWK*, 179 AD2d 475, 476 (1st Dept 1992).

The Court also found that while the six-month defect claim limitation does not prevent independent breach-of-contract claims, "[t]o the extent that any breach-of-contract claims rest ultimately on the existence of patent or latent construction defects, those claims merely duplicate claims based directly on those construction defects—and therefore are potentially also subject to the ninth and tenth affirmative defenses." The Court's analysis here is surprising considering that if the defect claims are otherwise ultimately bared by the affirmative defenses of timeliness, then the breach-of-contract claims are not duplicative of any surviving claims.

The Court also upheld another affirmative defense based on language in the offering plan limiting the sponsor's liability for consequential damages. The Court, however, found that claims for direct damages are not limited by this provision in the plan.

Breach-of-contract claims

The Court allowed breach-of-contract claims to survive, holding that:

> Plaintiff could conceivably introduce evidence that defendants harmed plaintiff by breaching requirements in the offering plan outside its warranty provision—such as, for example, defendants' obligations to construct the building in accordance with the filed plans and specifications, to obtain a permanent certificate of occupancy, and to supply a copy of the as-built building plans to the Board. (*See Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99-101 [1st Dept 2012]; *Tiffany at Westbury Condominium*, 40 AD3d at 1075-1076.) Such breach-of-contract claims, at least to the extent that they are not based on the presence of patent or latent defects, may be maintained at trial, and plaintiff [may] introduce evidence of the damages they suffered due to defendants' asserted breaches of contract.

The Court did, however, provide a roadmap for sponsors to bar such claims: by simply disclosing this in the offering plan: "If the Sponsor wished to categorically bar *all* monetary liability for breach-of-contract or breach-of-warranty claims, the Sponsor could easily have drafted the plan to say so. But it did not."

Bill extending statute of limitations to six years for Martin Act and Executive Law claims brought by the NYAG

Passed by the New York State Legislature in June, on August 26, 2019, Governor Cuomo signed into law the extension of the statute of limitations to six years for all claims brought by the NYAG under the Martin Act, Article 23-A of the General Business Law, and the Executive Law section 63(12). This legislation, amended the CPLR to add section 213(9), which explicitly places all claims brought by the NYAG pursuant to the Martin Act and Executive Law 63(12) under the six-year

statute of limitations of CPLR 213. This amendment to the CPLR was necessitated after the 2018 Court of Appeals decision in *People v. Credit Suisse Securities (USA) LLC*, No. 40, 2018 WL 2899299 (N.Y. June 12, 2018), where the Court of Appeals found that the fraud alleged under the Martin Act did not fall under the six-year limitation period of CPLR 213(8) common law fraud; instead the catch-all three-year limitation period of 214(2) governing actions created by statute was applicable.

The amended CPLR 213(9) now makes clear that a six-year limitations period governs actions brought by the NYAG under the Martin Act and Executive Law 63(12).

Takeaways

When drafting an offering plan, sponsors may wish to consider including language modifying the statute of limitations for purchasers to pursue claims against them. These modifications should be special-risked and included in the purchase agreement to ensure they are read by purchasers.

Sponsor may attempt to insert language baring all monetary liability for breach-of-contract as well as for breach-of-warranty claims, and under *Tribeca*, such provision would be enforceable. While the *Tribecca* decision provides a roadmap for sponsors to restrict statute of limitations for breach-of-warranty claims, as well as potential breach-of-contract claims, it may also have the effect of increasing the scrutiny of these provisions by the NYAG during the review stage. As a result, counsel for sponsor has to consider whether this would still be deemed reasonable by the NYAG and therefore may wish to advise their sponsor clients not to go this far in limiting their liability. While it is well established that parties may negotiate a restricted statute of limitations, such limitations must be deemed "reasonable."[3]

Also relevant to note is that the NYAG now has six years to bring Martin Act claims against sponsors, including those related to the offering of real estate securities. The NYAG's authority cannot be limited by language inserted into an offering plan. As a result, even where the offering plan limits the amount of time a purchaser may bring certain construction defect claims, the NYAG's authority to bring such claims lasts six-years.

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[3] *See Rudin v. Disanza*, 202 A.D. 2d 202 (1st Dep't 1994) (the Court enforced a contractual provision in the sale of a cooperative apartment limiting the statute of limitations period to one year; *citing Kassner & Co. v. City of New York,* 46 N.Y.2d 544, 550 (1979) ("an agreement which modifies the Statute of Limitations by specifying a shorter, **but reasonable period** within which to commence an action is enforceable provided it is in writing") (emphasis added); *See also*, N.Y. C.P.L.R. §201: "[a]n action ... must be commenced within the time specified in this article unless ... a shorter time is prescribed by written agreement").