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ASK THE FORMER REGULATOR

Expert Analysis

Enforceability of Shortened Period For Suing Condo Sponsor

By **Erica F. Buckley**

Question: I am a condominium sponsor, and I have seen provisions in new construction offering plans where a sponsor has shortened the statute of limitations for unit owners and the condominium board to sue sponsor. Is this enforceable, and how common is this practice?

Answer: Let me start by reminding the reader about the Martin Act—New York's blue sky law that regulates the disclosure requirements of the offer and sale of real estate securities in New York, including new construction condominium units. N.Y. Gen. Bus. Law §352-e, et seq. With the exception of certain requirements related to the escrow of funds, the Martin Act merely dictates the contents of an offering plan, and does not weigh in on the nature of the offer being made to the public. N.Y. Gen. Bus. Law §352-e; see also *Council for Owner Occupied Housing v. Abrams*, 125 A.D.2d 10 (3d Dep't 1987). Moreover, there is no private right of action under the Martin Act, and the statute of limitations for the Attorney General to commence an action or special proceeding under the Martin Act is three years. See *People v. Credit Suisse Sec. (USA)*, 31 N.Y.3d 622 (2018). However, it is not uncommon for the Attorney General to try to limit certain provisions in an offering plan that are not explicitly governed by the Martin Act, usually with the idea that such provisions violate public policy. However, the standard for modifying a statute of limitations is one of reasonableness, which has been interpreted in various situations by a court of law to be appropriate, and actually in furtherance of the public policy goals of the Civil Practice Laws and Rules of New York (the CPLR).

The statute of limitations for breach of contract (six years) or common law fraud (six years) are not governed by the Martin Act and governing regulations, but instead by the CPLR. N.Y. C.P.L.R. §213. Absent an explicit statutory provision against modification or waiver, the courts have repeatedly held that parties may agree to waive their rights under the law. See *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*,

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86 N.Y.2d 685 (1995). Moreover, §201 of the CPLR states that "[a] n action … must be commenced within the time specified in this article unless … a shorter time is prescribed by written agreement." N.Y. C.P.L.R. §201. In terms of modifications or waivers of rights to seek remedies afforded by the CPLR, the principles of freedom of contract should prevail in almost all situations, as recently held by the Court of Appeals in *159 MP Corp. v. Redbridge Bedford*, where the court reasoned that "[h]ere, the declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract." See *159 MP Corp. v. Redbridge Bedford*, 2019 NY Slip Op 03526 (May 7, 2019).

More on point, the First Department in *Rudin v. Disanza* enforced a contractual provision limiting the statute of limitations period to one year, which involved the sale of a cooperative apartment. See *Rudin v. Disanza*, 202 A.D. 2d 202 (1st Dep't 1994). The modification of the statute of limitations was found in the rider to the purchase agreement which stated, "representations and covenants … shall survive Closing, but any action based thereon must be instituted within 1 year from Closing." Id. The court in *Rudin* relied upon the holding in *Kassner & Co. v. City of New York*, which held that "parties may cut back on the Statute of Limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. Such an agreement does not conflict with public policy but, in fact, 'more effectively secures the end sought to be attained by the statute of limitations.'" See *Kassner & Co. v. City of New York*, 46 N.Y.2d 544 at 550 (1979), quoting *Ripley v. Aetna Ins. Co.*, 30 N.Y. 136 at 163 (1864).

Regardless of the above, it may still take thoughtful negotiation to get the Attorney General to agree to any request to modify the statute of limitations for breach of contract or common law fraud claims, so the best course of action is to try to be reasonable. Since the statute of limitations to bring a Martin Act claim or proceeding is three years, a modification to match should be deemed reasonable. Moreover, given the fact that many new construction condominiums are occupied in advance of procuring the permanent certificate of occupancy, it is advisable to exclude claims regarding certificates of occupancy from any modification, which should be seen as good for the public policy goals of the Attorney General. Finally, sponsors must explicitly state that amendments to the offering plan do not extend the statute of limitations modifications previously agreed to by parties. This is necessary since sponsors must state in each amendment that the plan remains true and accurate, which can be used to argue that the statute of limitations newly accrues each time an amendment is filed, unless otherwise so stated. See *61 W. 62 Owners Corp. v. Harkness Apt. Owners Corp.*, 222 A.D.2d 358 (1st Dep't 1995).

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