

OUTSIDE COUNSEL

Expert Analysis

Statute of Limitations Rules In Fraudulent Transfer Cases

As any seasoned litigator knows, statute of limitations issues can be difficult and complex. Given the harsh result if an action is commenced too late, it is imperative to analyze any potential statute of limitations issue immediately. Indeed, this should be done before you agree to take on the case.

Statute of limitations rules governing fraudulent transfer cases, which in New York arise under Article 10 of the Debtor and Creditor Law (DCL), are even more complex than those encountered in garden variety civil litigation. The general rule is deceptively straight-forward: An action (or special proceeding under CPLR 5225(b)/CPLR 5227) seeking to set aside a fraudulent transfer or property is six years.

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By
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This comes from the residual statute of limitations provision (CPLR 213(1)) governing claims for which no specific limitations period is provided by law.

Consistent with New York's general rule that a claim accrues when all elements of the claim exist, *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169 (1986), fraudulent transfer causes of action accrue on the date the property at issue was transferred. Generally, it does not matter that the plaintiff had no knowledge or notice of the transfer. See *Citicorp Trust Bank, FSB v. Makkas*, 67 A.D.3d 950 (2d Dep't 2009). However, the statute of limitations may be equitably tolled if

the plaintiff was unaware he had a cause of action because of some action by the defendant to conceal the facts. See *Grace v. Rosenstock*, 169 F.R.D. 473 (E.D.N.Y. 1996).

Because a fraudulent transfer claim is a species of fraud, a fraudulent transfer plaintiff has the option of invoking the two-years-from-date-of-discovery statute of limitations accrual rule provided

Although fraudulent transfer causes of action have existed since 1571, the principles governing these claims, including those involving the statute of limitations, are still being fleshed out in our courts.

by CPLR 213(8) ("An action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time

the plaintiff or the person under whom the plaintiff claims discovered the fraud, or with reasonable diligence could have discovered it"). However—and this is a big however—CPLR 213(8) only applies to a fraudulent transfer cause of action under DCL 276, which allege transfers of property with "actual intent to hinder, delay or defraud creditors." See *Dowlings v. Homestead Dairies*, 88 A.D.3d 1226 (3d Dep't 2011).

All other fraudulent transfer causes of action in the DCL do not require proof of actual fraudulent intent. They are considered to be "constructive fraud" claims, whereby a transfer is considered to be fraudulent based upon proof of certain facts alone, without the need to prove intent, e.g., the defendant was insolvent at the time of the transfer and he did not receive fair consideration (DCL 273). Accordingly, a plaintiff pleading claims under the five "constructive fraud" provisions of the DCL (DCL 273 (conveyances by insolvent), DCL 273-a (conveyance by a defendant), DCL 274 (conveyances by person in business), DCL 275 (conveyance by person about to incur debts), DCL 277 (conveyance of partnership property) does not get the benefit of the alternate limitations period provided by CPLR

213(8). In these cases, the limitations period is six years.

Where the CPLR 213(8) alternate date-of-discovery rule is applicable, it begins to run when the circumstances reasonably suggest to the plaintiff that he or she may have been defrauded, which triggers a duty to inquire. See *Pericon v.*

The 'Settlers' court held LLCL 508(c) applies only to claims by LLCs to recover improper distributions made to members. The shortened limitations period does not govern fraudulent transfer claims made by outside creditors. This ruling resolved a recurring issue that had divided the lower courts.

Ruck, 56 A.D.3d 635 (2d Dep't 2008); *Saphir Intl., SA v. UBS Painewebner*, 25 A.D.3d 315 (1st Dep't 2006); *Prestandrea v. Stein*, 262 A.D.2d 621 (2d Dep't 1999). A failure to ascertain that an allegedly fraudulent conveyance of property has occurred through the inspection of public records—even records easily available for review—is not a basis for imputing knowledge in the absence of other circumstances that would reasonably require the plaintiff to investigate further. See *McGuinness v. Standard Drywall*, 193 A.D.2d 518 (1st Dep't 1993); *Azoy*

v. Fowler, 57 A.D.2d 541 (2d Dep't 1977)). Nor does nonpayment of the Judgment by itself start the alternate limitations period running. *Citicorp Trust Bank, FSB v. Makkas*, 67 A.D.3d 950, 953 (2d Dep't 2009), overruled on other grounds, *Coyle v. Lefkowitz*, 89 A.D.3d 1054 (2d Dep't 2011).

Furthermore, the recording of a deed also is not by itself notice that a fraudulent conveyance may have occurred. See *Guedj v. Dana*, 11 A.D.3d 368, 368 (1st Dep't 2004) ("Mere fact that deeds had earlier been recorded was insufficient to constitute constructive notice of the conveyances"). Note also that a conveyance does not occur when a deed is executed; rather, a conveyance is complete only when the deed is delivered to and accepted by the grantee. See *Ten Eyck v. Whitbeck*, 156 N.Y. 341 (1898); *Hoffman v. Seniuk*, 88 A.D.2d 954 (2d Dep't 1982). Thus, where a debtor secretly executes a deed in favor of another, such as a spouse or friend, but does not deliver it, there is no conveyance. This is true even if the deed was recorded. *Meyers v. Key Bank, N.A.*, 68 N.Y.2d 744, 746 (1986) (recording only creates a presumption a deed was delivered to and accepted by the grantee, which can be overcome by evidence to the contrary).

There is another important statute of limitations accrual rule for fraudulent transfer cases, but it applies only to one type of claim: a fraudulent transfer cause of action under DCL 273-a, which concerns conveyances made by defendants in an action for money damages. The elements of this claim are that a defendant in an action (or a respondent in an arbitration, see *Sardis v. Frankel*, 113 A.D.3d 135 (1st Dep’t 2014)) transfers property to another without “fair consideration” (DCL 272) and then fails to pay a Judgment (or Arbitration Award) thereafter entered against him.

For many years, New York courts held that the statute of limitations on a DCL 273-a claim began to run on the date of the transfer, as it does for all other “constructive fraud” causes of action under the DCL. However, in *Coyle v. Lefkowitz*, 89 A.D.3d 1054, 1056 (2d Dep’t 2011), the Second Department reviewed and then overruled these precedents. It held that the six-year limitations period for DCL 273-a claims begins to run from the date a money judgment is entered. This of course can be many years after the a transfer occurred. The court reasoned that a different accrual rule for DCL 273-a claims was logical and necessary because an unsat-

isfied judgment is a substantive element of this cause of action. It would thus be unfair for the statute of limitations to be running during a time then the plaintiff could not plead the substantive elements of the claim. The First Department has since adopted the same DCL 273-a statute of limitations accrual rule, citing *Coyle* with approval. See *Matter of Setters v. AI Props. & Devs. (USA)*, 139 A.D.3d 492 (1st Dep’t 2016).

The *Setters* case is also important for another reason. The First Department also considered the applicability of a provision in New York’s Limited Liability Company Law, LLCL 508(c), which several lower courts had interpreted as shortening the usual six-year statute of limitations for fraudulent transfer claims to three years where the claims were made against members of LLCs alleged to have improperly received money or property from an LLC, e.g., when the LLC was insolvent. The *Setters* court held LLCL 508(c) applies only to claims by LLCs to recover improper distributions made to members. The shortened limitations period does not govern fraudulent transfer claims made by outside creditors. This ruling resolved a recurring issue that had divided the lower courts.

Although fraudulent transfer causes of action have existed since 1571, when the Statute of Elizabeth was enacted by Parliament to allow creditors to challenge “feigned, covinous and fraudulent feoffments, gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore ...,” the principles governing these claims, including those involving the statute of limitations, are still being fleshed out in our courts.