

NEW YORK COURT OF APPEALS ROUNDUP

STATUTE OF LIMITATIONS RULINGS IN TWO CASES

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This month we discuss a case in which the Court of Appeals overturned the dismissal of a \$120 million lawsuit against Goldman Sachs arising out of the subprime mortgage crisis and two cases involving statutes of limitations. In one, the court determined when a prior action terminates for purposes of the tolling provisions of CPLR 205(a). In another, the court found the statute of limitations inapplicable to an action to cancel an interest in real property based on an allegedly forged deed.

Claims Reinstated

The court's decision in [*ACA Financial Guaranty Corp. v. Goldman, Sachs & Co.*](#) has received a fair amount of attention from the press and the financial industry. In that case, the court reversed a decision of the Appellate Division, First Department, that had dismissed a bond insurer's \$120 million claim that Goldman Sachs made misrepresentations concerning a pool of securities backed by subprime mortgages before the outbreak of the recent financial crisis.

Monoline bond insurance company ACA Financial Guaranty Corp. alleged that Goldman Sachs fraudulently induced it to provide financial guaranty insurance for a synthetic collateralized debt obligation known as ABACUS that was based on a portfolio of subprime mortgage-backed securities largely selected by Goldman Sachs' hedge fund client, Paulson & Co. ACA claimed that Goldman Sachs induced it to believe that Paulson was an "equity investor" in ABACUS—in other words, that Paulson had an economic interest in the success of ABACUS—when, in reality, Paulson had taken a short position so that its economic interests were adverse to those of ACA as the bond insurer.

ACA alleged that if it had known that Paulson had taken a short position, it never would have provided financial guaranty insurance for ABACUS and would not have suffered the losses it incurred when ABACUS failed after the collapse of the housing market.

Goldman Sachs filed a motion to dismiss which was denied by the trial court. Goldman Sachs appealed, and, in a 3-2 decision, the First Department found that ACA did not adequately allege justifiable reliance, reversed the trial court and dismissed the complaint.

In a memorandum decision, the Court of Appeals reversed and remitted the case to the First Department for consideration of the issues raised but not determined on appeal. The court explained that in order to plead fraudulent inducement, a plaintiff must allege facts to support the claim that it justifiably relied on the alleged

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misrepresentations. The court noted that this is not generally a question that can be resolved on a motion to dismiss.

The court acknowledged that if the allegedly misrepresented facts are not peculiarly within the defendant's knowledge and the plaintiff has the means of discovering the truth or falsity of those facts, the plaintiff must make an effort to learn the truth before it can plead justifiable reliance. The court, however, pointed to ACA's allegations that it specifically asked Goldman Sachs about Paulson's role in the transaction and that Goldman purportedly misrepresented that Paulson would be an equity investor. Accepting these allegations as true and providing ACA with the benefit of every possible favorable inference, the court found that ACA had alleged sufficient facts to support a justifiable reliance claim.

Judge Susan P. Read, joined by Judge Sheila Abdus-Salaam, dissented. The dissenters noted that a sophisticated party like ACA must do more than just allege it relied on Goldman Sachs' alleged misrepresentations; it must also allege that it took reasonable steps to protect itself against any misrepresentation—particularly when it had access to the relevant information (i.e., that its reliance was justifiable). Here, the dissent argued, ACA did not take any steps to protect itself despite the fact that it worked closely with Paulson on the transaction and easily could have asked Paulson directly about the nature of its interest in ABACUS.

If Paulson's "long" position in ABACUS was as important as ACA claims, it should have simply asked Paulson rather than relying blindly on Goldman Sachs' alleged assurances. The dissent brushed aside as irrelevant ACA's assertion that Paulson would have lied about its interest and that, in any event, whether Paulson would have been truthful is a factual matter that cannot be resolved on a motion to dismiss.

To the dissenting judges, whether Paulson would have disclosed the true facts is immaterial; what matters is the fact that ACA failed to even inquire. It was this purported failure to take reasonable steps that led Judges Read and Abdus-Salaam to dissent from the majority's memorandum decision. The case is now headed back to the First Department for consideration of issues raised by Goldman Sachs but not addressed in the First Department decision.

CPLR 205(a) Tolling

In [*Malay v. City of Syracuse*](#), the court addressed the question of when a prior action terminates for purposes of CPLR 205(a)'s statute of limitations tolling provisions if an appeal taken as of right in the prior action is dismissed for failure to perfect. CPLR 205(a) provides:

The Malay case arose in March 2007 when plaintiff was at home in her apartment and her landlord shot his wife and took other family members hostage in the building where plaintiff lived. During a standoff with the landlord, police fired CS gas canisters into plaintiff's apartment. Plaintiff called 911 and was able to evacuate her apartment, but the gas contamination has prevented her from returning to the property since the incident.

Plaintiff commenced an action against the City of Syracuse and others in the U.S. District Court for the Northern District of New York in June 2008. She alleged that she suffered lasting injuries from the gas exposure and that gas contamination resulted in a loss of all her personal property in the apartment. She asserted claims for violations of her federal and state constitutional rights and for common law negligence.

The district court dismissed a number of claims, including the state constitutional claims, on a motion to dismiss and the parties conducted discovery on the remaining claims. On Sept. 30, 2011, the district court granted defendants summary judgment dismissing the remaining federal claims and declining to exercise jurisdiction over plaintiff's remaining state law claims. Plaintiff filed a motion for reconsideration, which was denied, and then took an appeal as of right to the U.S. Court of Appeals for the Second Circuit. Although

plaintiff appeared at a conference in the Second Circuit, she did not perfect her appeal, and it was dismissed by the Second Circuit effective July 10, 2012.

On June 25, 2012, before the Second Circuit dismissed her appeal, plaintiff commenced a new action against the City of Syracuse and the other defendants in Supreme Court, Onondaga County, in which she asserted the common law claims for which the district court declined to exercise jurisdiction. Defendants moved to dismiss the case as untimely on the grounds that the new action was commenced almost nine months after the district court dismissed her claims and, accordingly, CPLR 205(a)'s tolling period had already expired.

Plaintiff argued that the operative date was not the Sept. 30, 2011, district court dismissal of her claims but the Second Circuit's July 10, 2012, dismissal of her appeal. Since she commenced her state action before that dismissal, she argued, CPLR 205(a) rendered her claims timely. The trial court disagreed and granted defendants' motion to dismiss. The Appellate Division, Fourth Department, affirmed and the court granted leave to appeal.

In a unanimous decision written by Judge Eugene M. Fahey, the court ruled that the operative date was the July 2012 dismissal of plaintiff's appeal and reversed the Fourth Department. The court noted that in prior cases, including *Lehman Bros. v. Hughes Hubbard & Reed*, 92 NY2d 1014 (1998), it had held that a prior action terminates for purposes of CPLR 205(a) when an appeal taken as of right is exhausted. Any further efforts to obtain discretionary review of a decision do not extend the tolling period unless review is granted on the merits. In that instance, the action terminates when the reviewing court reaches a decision on the merits. If discretionary review is not granted, the action is deemed to terminate on the date of the decision from which discretionary review was sought.

This was the first instance in which the court was faced with a prior action in which an appeal had been taken as of right, but dismissed for plaintiff's failure to perfect. The court determined that plaintiff's prior action terminated when the Second Circuit dismissed her appeal for failure to perfect, not when the district court dismissed her underlying claim, even though plaintiff had effectively abandoned her appeal from that dismissal.

The court rejected defendants' arguments that this would encourage plaintiffs to file frivolous appeals they have no intention of perfecting and found that it was consistent with CPLR 205(a)'s remedial purpose of enabling plaintiffs to avoid dismissal on statute of limitations grounds where defendants had fair notice of the claims. The court declined to consider, as unreserved for review, whether the dismissal for failure to perfect constituted "voluntary discontinuance" or "neglect to prosecute" under CPLR 205(a).

Forged Deed

In *Faison v. Lewis*, the court divided 4-3 on the question of whether the statute of limitations applies to an action to set aside and cancel an interest in real property conveyed on the basis of an allegedly forged deed. The property at issue was a house in Brooklyn that two siblings, Gogins and Lewis, inherited as tenants in common from their mother. In May 2000, Lewis conveyed her half-interest in the property by quitclaim deed to her daughter Tonya Lewis. In February 2001, Tonya recorded a "corrected" deed dated Dec. 14, 2000, which claimed to convey Gogins' half-interest to Tonya as well as Lewis' half-interest. The corrected deed therefore appeared to convey a fee interest in the entire property to Tonya.

Gogins passed away in March 2001, and in September 2002, his daughter, plaintiff Dorothy Faison, filed an action on behalf of his estate against Lewis and Tonya, claiming the corrected deed was void because Gogins' signature was forged. The Supreme Court dismissed the complaint in April 2003 on the basis that Faison lacked capacity to sue because Gogins' widow, not Faison, was the estate administrator. In July 2010, Faison

was appointed administrator. Faison claimed that she delayed in seeking appointment because her mother's lawyer led her to believe he had secured a judgment on the estate's behalf, when in fact he had not.

In August 2010, Faison filed an action against Lewis, Tonya, Bank of America (BOA) from which Tonya had secured a mortgage, and Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for BOA, to declare the deed and mortgage null and void. The Supreme Court granted BOA's motion to dismiss the action as time-barred under CPLR 213(8). The Appellate Division, Second Department, affirmed, but modified the order to deny the motion as against Tonya and Lewis because they did not raise the statute of limitations defense in their answer or in a motion to dismiss and as against MERS because it did not join BOA's motion to dismiss. The Court of Appeals granted Faison leave to appeal against BOA.

The court, in an opinion by Judge Jenny Rivera, and joined by Judges Read, Fahey and Eugene Pigott, found the statute of limitations inapplicable because the forged deed was void ab initio. The court distinguished this situation from circumstances where a signature is procured by fraud, in which case the deed is voidable but not void. The court concluded that the deed's legally void status cannot be changed regardless of how long it may take for the forgery to be discovered.

In a dissent, Chief Judge Jonathan Lippman, joined by Judges Abdus-Salaam and Leslie Stein, concluded forgery is "essentially a type of fraud," so a forgery claim should receive the same treatment as a fraud claim under the statute of limitations. The dissent also opined that the absence of a statute of limitations could allow plaintiffs to bring claims long after the events in question, making cases impractical to try. The majority responded that the two-year discovery rule in CPLR 213(8) already can extend the life of a claim beyond the six-year statutory term, and moreover, the interest in "ferret[ing] out forged deeds and purg[ing] them from [the] real property system" is equal to or greater than the interest in repose.

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