SIX-YEAR LIMITATIONS PERIOD AND ENFORCEMENT MOTIONS[1]

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Fragin v. Fragin,[2] *Bayen v. Bayen*,[3] and *Denaro v. Denaro*,[4] represent a *troika* of *uber* hyperbolic statutory construction as the epicenter of a solution in search of a problem where none existed before in the Land of Limitations: that the procedural device by which a party chooses to enforce an agreement governs the applicability of the Statute of Limitations. Otherwise stated, the quantum of substantive justice is procedure dependant. This is evident from *Fragin*'s inability (the first of the decisions) to cite the *stare decisis* on which it rested, which appellate courts do when referencing existing authority. Alluding to Article 2 in the CPLR and its failure to include "motions" but only "actions", *Fragin* does not complete that thought, saying no more than "only actions are subject to a six-year statute of limitations pursuant to CPLR 213(2)." While arising in a matrimonial context, the language of this triumvirate broadly claims all areas of practice: "motions to enforce the terms of a stipulation of settlement are not subject to statutes of limitations [see, *Bayen, Denaro*]." Diverse principles of law and legislative intent have always worked quietly and synergistically to obviate such a result. Hopefully, the judiciary will soon abandon these cases.

CPLR 213(2) states that "an action upon a contractual obligation or liability, express or implied" is governed by a six-year limitations period. The Court of Appeals has historically equated marital agreements to ordinary contract doctrine and construction,[5] which includes the applicability of the six-year limitations period to marital agreements.

Public Policy and Limitations Periods

A review of the public policy which envelops limitations-periods[6] immediately demonstrates that the three decisions are erroneous and otherwise troublesome. One lower court has already applied this new rule mechanically.[7]

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[1] N.Y.L.J., Jan. 26, 2012).

[2] 80 A.D.3d 725 (2d Dept. 2011).

[3] 81 A.D.3d 865 (2d Dept. 2011).

[4] 84 A.D.3d 1148 (2d Dept. 2011).

[5] Gray v. Pashkow, 79 N.Y.2d 930 (1992); Meccico v. Meccico, 76 N.Y.2d 822 (1990); Goldman v. Goldman, 282 N.Y. 296 (1940).

[6] See E. Scheinberg, Contract Doctrine and Marital Agreements in New York, New York State Bar Association, Chapter 26, § 26.1.

[7] Uzzo v. Hoth-Uzzo, 32 Misc.3d 861 (NYSup., 2011).

The Court of Appeals has explained that "the statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but it simply bars a remedy thereon."[8] "The moral obligation to pay always remains, although the remedy cannot be enforced."[9]

The histories of statutory and common law defenses to contract actions, to wit, Statutes of Limitations, waiver, abandonment, equitable estoppel, and laches, represent parallel determinations by the Legislature and the judiciary to relieve debtors from living in perennial uncertainty attributable to creditors' inexcusable delays to timely and diligently prosecute their claims. Both bodies of law acknowledge that after a protracted period of time it is unfair to require a defendant to attempt to piece together his defense to an old claim.[10]

In *Flanagan v. Mount Eden General Hospital*,[11] the Court of Appeals explained that the origin of the statute of limitations had at its exclusive purpose to shield and to "afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of *ordinary diligence* would bring an action":

> The statutes embody an important policy of giving repose to human affairs. 'The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations ...'

Flanagan quoted the U.S. Supreme Court *[Riddlesbarger v. Hartford Ins. Co.,* 74 U.S. 386, 390 (1868)*]*:

> Statutes of Limitation are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist.

Although Statutes of Limitations are generally viewed as a personal defense, they advance a "combined private and public interest" "to afford protection to defendants against stale claims", and they also express a societal interest or public policy "of giving repose to human affairs."[12] In *Hernandez v. New York City Health and Hospitals Corp.,*[13] the Court of Appeals

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[8] Hulbert v. Clark, 128 N.Y. 295 (1891).

[9] Johnson v. Albany & S.R. Co. 54 N.Y. 416 (1873); Quadrozzi Concrete Corp. v. Mastroianni, 56 A.D.2d 353 (2d Dept.,1977).

[10] Walker v. Armco Steel Corp., 446 U.S. 740 (1980), cited in Cook v. Deloitte & Touche USA, LLP, 13 Misc.3d 1203(A) (NYSup.,2006).

[11] 24 N.Y.2d 427 (1969).

[12] John J. Kassner & Co., Inc. v. City of N.Y., 46 N.Y.2d 544 (1979).

[13] 78 N.Y.2d 687 (1991).

echoed settled law: “Statutes of Limitation are statutes of repose representing ‘a *legislative judgment* that * * * occasional hardship [resulting from not applying the tolling provisions] is outweighed by the advantage of barring stale claims.’ ”

The Legislature thus spoke that inactivity for more than six years in contract disputes represents an inherent prejudice to debtors earning them the right to live unburdened by plaintiffs’ slovenly mismanagement of their financial affairs. Preventing stale claims promotes justice.[14]

Statutory Prohibition Against
Contractual Extension of Limitations Periods

Because of the combined private and public interests involved to not extend debt inordinately, parties are not entirely free to waive or modify the Statute of Limitations. It is settled law that an agreement that purports to extend the limitations period to an indefinite date in the future cannot be "enforced according to its terms" within the meaning of GOL § 17-103 and is therefore ineffective.[15] An agreement that would “create[ ] an infinite period of challenge vitiates the purpose underlying the statute of limitations.[16]

Breach of Contract

Generally, any Statute of Limitations begins to run when a cause of action accrues (CPLR 203[a]). A breach of contract cause of action accrues at the time of the breach. The Statute runs from the time of the breach though no damage occurs until later.[17] Accrual has occurred when all of the factual elements necessary to maintain the lawsuit and obtain relief come into existence.[18] The time within which a plaintiff must commence an action “shall be computed from the time the cause of action accrued to the time the claim is interposed” (CPLR 203[a]).[19]

Actions v. Motions

An action is an independent application to a court for relief and must be instituted by service of a summons, thus acquiring jurisdiction over the person of the defendant. A motion is but a procedural step connected with and dependent upon the remedy invoked in the particular

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[14] Perez v. Paramount Commc’ns, Inc., 92 N.Y.2d 749 (1999).

[15] Bayridge Air Rights, Inc. v. Blitman Const. Corp., 80 N.Y.2d 777 (1992).

[16] Beneke v. Town of Santa Clara, 36 A.D.3d 1195 (3rd Dept.,2007).

[17] Ely-Cruikshank Co., Inc. v. Bank of Montreal, 81 N.Y.2d 399 (1993).

[18] HP Capital, LLC v. Village of Sleepy Hollow, 68 A.D.3d 928 (2nd Dept.,2009).

[19] McCoy v. Feinman, 99 N.Y.2d 295 (2002).

controversy.[20] In *In re Jetter*,[21] the Court of Appeals explained the distinction:

> A motion "in general relates to some incidental question collateral to the main object of the action." A motion is not a remedy in the sense of the Code, but it is based upon some remedy, and is always connected with and dependent upon the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy.

Plenary Actions

Unlike DRL § 244, which addresses enforcement of defaults in paying any sum of money, achievable by postjudgment motion,[22] implementation of a QDRO is dehors the statutory scope. DRL § 244 specifically treats enforcement as a continuation of the matrimonial action rather than a new action, thus preserving personal jurisdiction over the parties.[23] In order to enforce the terms of a stipulation which is not merged in the judgment, either party can bring a separate plenary action after the divorce judgment,[24] and not by way of postjudgment motion because it is said to have survived the judgment as a separate contract.[25]

Denaro

A review of the three subject cases against the above principles is instructive.

Pursuant to the unmerged agreement in their 1997-divorce judgment, plaintiff, in *Denaro*, would receive a percentage of defendant's retirement benefits, under a QDRO, "to be submitted to the Court as soon as practicable after the Judgment of Divorce is signed." Plaintiff did not submit a QDRO until January 2010, seven years after defendant's retirement and receipt of his pension.

Citing *Bayen,* the Appellate Division stated that "our Court has expressly held that an application or motion for the issuance of a QDRO is not barred by the statute of limitations." Although the court cited *Bayen*, the difference is stark because the right in *Bayen* had already

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[20] Lyons Falls Farmers' Co-op. Ass'n v. Moore, 158 N.Y.S.2d 1013 (NYSup.,1956).

[21] 78 N.Y. 601 (1879).

[22] Scheinkman, McKinney's Practice Commentary, DRL § 244 (1999); see Gavin v. Catron, 35 A.D.3d 354 (2nd Dept.,2006); Candela v. Kiel, 33 A.D.3d 833 (2nd Dept.,2006); Luisi v. Luisi, 6 A.D.3d 398 (2nd Dept.,2004).

[23] Holloway v. Holloway, 35 A.D.3d 1126 (3rd Dept.,2006).

[24] Hoyt v. Hoyt, 307 A.D.2d 621 (3rd Dept.,2003).

[25] Hewlett v. Hewlett, 243 A.D.2d 964 (3rd Dept.,1997), lv. to appeal dismissed, 91 N.Y.2d 887 (1998).

vested while it had not yet in *Denaro*, thus satisfying the requirement that all of the factual elements necessary to maintain the lawsuit and obtain relief come into existence (above).

The court further held that the statute of limitations did not bar issuance of the QDRO because: (1) "[M]otions to enforce the terms of a stipulation of settlement are not subject to statutes of limitation", citing *Bayen*; and (2) "[A] QDRO is derived from the bargain struck by the parties at the time of the judgment of divorce, there is no need to commence a separate 'action' in order for the court to formalize the agreement between the parties in the form of a QDRO", citing *Duhamel v. Duhamel*, 4 A.D.3d 739 (4th Dept.,2004).

Point (1) is addressed below. As to Point (2), an enforceable right remains a right, irrespective of its derivation. The CPLR makes every right subject to a limitations period. That a QDRO facilitates or is an aid ("merely a mechanism to effectuate payment") to the enforcement of a right is a distinction without meaning and without authority with regard to Statutes of Limitations. Critically, *Duhamel* did not split such a hair--rather it said that "ERISA defines a QDRO as 'a domestic relations order ... which creates or recognizes the existence of an alternate payee's right ...' " (§ 1056[d][3][B])." Congress thus sees it as a right, not as a"mere mechanism."

Bayen

The unmerged agreement, in *Bayen*, provided that the former-husband would pay the former-wife one-half of the value of his 401(k) pension, or $41,144.15, pursuant to a QDRO. Ten years later, she moved to collect the $41,144.15, or, alternatively, that she be awarded her marital share of the pension pursuant to the Majauskas formula (Majauskas v. Majauskas, 61 N.Y.2d 481 (1984)), which, as an effort to modify the unmerged agreement could only be achieved by plenary proceeding.

The Appellate Division stated: "[c]ontrary to the plaintiff's contention, motions to enforce the terms of a stipulation of settlement are not subject to statutes of limitation." The former wife was allowed to enter a QDRO because payments were to begin only upon the former-husband's retirement, which had not yet occurred, accordingly, her right remained inchoate and not yet vested – there had not yet been a breach. Nevertheless, her application for the $41,144.15 was correctly held time barred, consistent with the definition of a breach which had already accrued, above.

Fragin

Fragin made a lone statement with no more: "that branch of the defendant's motion which was to enforce the parties' separation agreement is not subject to a statute of limitations defense."

Conclusion

McKinney's Statutes, § 111 states: "[I]t is generally the rule that the literal meaning of the words used must yield when necessary to give effect to the intention of the Legislature. In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered and given effect, and the literal meanings of words are not to be adhered to or

suffered to defeat the general purpose and manifest policy intended to be promoted."[26]

It challenges logic that the revivability of a statutorily dead claim hangs in the balance of choice of procedural devices, which can supervene an established history of public policy behind Statutes of Limitations. To rule differently would have long ago opened the floodgates to careless claimants to race to the courthouse, with motion in hand, to revive claims suffering from rigor mortis. To read the CPLR as literally as the three subject decisions defeats legislative intent and purpose and a body of common law.

[26] See McKinney's Statutes, §§ 96, 177.