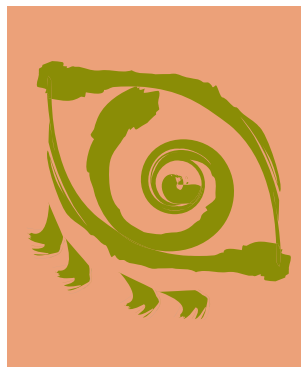


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IMPACT OF THE CONTINUOUS REPRESENTATION DOCTRINE

on the Commencement of the Three-year Statute of Limitations for New York Land Surveyors

By Patrick F. Palladino, Esq.

Several years ago, I authored an article, published in the July/August 2007 issue of *Empire State Surveyor*, entitled “Three-Year Statute of Limitations Now Applies to New York Land Surveyors”, which discussed a ground-breaking decision issued on April 13, 2007 by Bronx County Supreme Court Justice George D. Salerno, which placed professional land surveyors in the category of licensed professionals that are protected by a three-year statute of limitations for non-medical malpractice under NY CPLR § 214(6).¹ Since then, I have received several inquiries from New York professional land surveyors regarding the often vexing issue of how to properly calculate the specific date for the commencement of the three-year statute of limitations. Thus, this article will offer an explanatory overview and response to those inquiries.

As a threshold matter, there have been no significant judicial developments since the issuance of Justice Salerno’s April 13, 2007 decision in the action entitled *Vistamar Complex Ltd. v. Citywide Home Builders Corp., et al.*, bearing Index No. 16629/06, that have affected Justice Salerno’s holding and the issue has not been construed by other higher level courts or courts of coordinate jurisdiction. In fact, Justice Salerno’s decision remains the premiere legal precedent in New York establishing the principle that the three-year statute of limitations instituted by NY CPLR § 214(6) for licensed professionals is applicable to professional land surveyors.²

Now that it has been verified that the three-year statute of limitations under NY CPLR § 214(6) applies to professional land surveyors, we must decipher when the three-year period commences in order to determine the proper expiration date

for the statute. In New York, it is established law that, under NY CPLR § 214(6), the statute of limitations for direct claims by a party contracting with a licensed professional, including claims for breach of contract, negligence or professional malpractice, against design professionals, begins to accrue at either the completion of the work by the design professional, the completion of the designs which were contracted for, the completion of actual construction, or, in the case of professional land surveyors, the completion of the survey for which they were retained to draft.³

However, in order to properly calculate the accrual date for the commencement of the statute of limitations under any matter falling within the scope of NY CPLR § 214(6), one must first decipher the applicability, if at all, of the Continuous Representation Doctrine, which solely affects and impacts claims falling within the purview of NY CPLR § 214(6).⁴ The NY CPLR § 214(6) Continuous Representation Doctrine tolls the accrual of the time toward the three-year deadline while the professional continues to represent and/or work for the client in connection with the project or matter which was the subject of the malpractice.⁵ It was initially created through case law to mirror the Continuous Treatment Doctrine established for medical malpractice actions.⁶ “The theory is that the client cannot be expected to challenge the quality of the [professional’s] performance in a particular matter while it is still in progress.”⁷

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[T]he Court stressed that the doctrine of continuous representation requires a “mutual understanding” between the professional and the patient/client as to the need for continuing services for a particular problem. Awareness of the need for ongoing services relating to a particular problem lies at the heart of the doctrine. Such awareness creates a “dilemma” for a patient/client who may wish to continue with a given professional who is addressing a problem but fears that the operation of a time-bar will necessitate the commencement of an action, thereby destroying the relationship.⁸

As such, the Continuous Representation Doctrine was initially created in an effort to permit the professional to cure the potential issue or defect which may potentially expose the client to damages and the professional to liability, while, at the same time, protect the client by preventing “the potential abuse where the negligent [professional] attempts to avoid liability by diverting the client from bringing a legal action until the limitations period expires.”⁹

For example, a professional land surveyor drafts and finalizes a site survey on June 1, 2012 that incorrectly displays the dimensions of the footprint of a building, increasing its size in violation of the local building code due to lack of sufficient parking spaces. The defect is discovered after the foundation of the building has been poured. The client may permit the professional land surveyor to attempt to resolve the issue by allowing the professional land surveyor to draft a revised plan with a reconfigured parking lot, which increases the number of parking spaces in an attempt to comply with the local building code. If the revised plan is completed on July 1, 2012, and if the court deemed the Continuous Representation Doctrine applicable, the three-year statute of limitations pursuant under NY CPLR § 214(6) would expire on July 1, 2015, three years after the date of completion of the continuous representation, and not on June 1, 2015, three years after the date the professional land surveyor committed the alleged malpractice.

As demonstrated in the above example, the purpose of the rule is actually to assist in preventing litigation by reserving the client’s right to commence an action against the professional, while, at the same time, allowing the client to maintain a working relationship with the professional because the professional “not only is in a position to identify and correct his or her malpractice, but is best placed to do so.”¹⁰ The continuous representation terminates upon the loss of the “client’s continuing trust and confidence” in the professional.¹¹

“However, in order for the Continuous Representation Doctrine to apply, “the relationship must be continuous, and both parties must expect it to continue.”¹² A significant interrup-

tion in the professional services, or a subsequent resumption of professional services by the licensed professional will not toll the limitations period under NY CPLR § 214(6).¹³ Furthermore, “the continuous representation must be in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.”¹⁴

For example, a professional land surveyor issues an allegedly defective site survey for Project “1” on Date X, and then begins working for the same entity on Project “2” at a different location and under a separate contract, completing Project “2” on Date Y. Then, the Continuous Representation Doctrine most likely would not take effect and the three-year statute of limitations under NY CPLR § 214(6) would expire for the professional land surveyor in connection with Project “1” three years after Date X.

Thus, when attempting to calculate the commencement date for the three-year statute of limitations for professional land surveyors, or any other professional falling within the governance of NY CPLR § 214(6), it is necessary to take into consideration the Continuous Representation Doctrine, as any subsequent work performed which is related to the malpractice may potentially extend the time for which the professional land surveyors or other professionals may have claims asserted against them within the judicial system or applicable alternative dispute resolution program in the State of New York. If an issue or defect is discovered during a project, the Continuous Representation Doctrine may also potentially be utilized as a tool by the professional in order to negotiate a potential resolution wherein the design professional attempts to remediate the issue or defect, while the client still may maintain the right to commence suit within a tolled three-year period.

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This article does not constitute legal advice and is the researched opinion of the author. NYSAPLS recommends land surveyors check with their local attorney when facing issues of this nature, as the facts of each case are different.

Endnotes

- 1 Patrick F. Palladino, Esq., Three-Year Statute of Limitations Now Applies to New York Land Surveyors, *Empire State Surveyor*, July/August 2007.
- 2 *Vistamar Complex Ltd. v. Citywide Home Builders Corp.*, Index No. 16629/06 (Sup. Ct. Bronx Co., filed June 20, 2006).
- 3 Patrick F. Palladino, Esq., Three-Year Statute of Limitations Now Applies

- to New York Land Surveyors, *Empire State Surveyor*, July/August 2007, citing City Sch. Dist. of *City of Newburgh v. Hugh Stubbins & Assoc., Inc.*, 85 N.Y.2d 535, 626 N.Y.S.2d 741 (1995); *State of New York v. Lundin*, 60 N.Y.2d 987, 471 N.Y.S.2d 261(1983); *Tool v. Bouelle*, 91 Misc.2d 464, 398 N.Y.S.2d 128 (Sup. Ct. Albany Co. 1977); *Seger v. Cornwall*, 44 Misc.2d 994, 225 N.Y.S.2d 744 (Sup. Ct. Albany Co. 1964); *E. Midtown Plaza Housing Co., Inc. v. City of New York*, 218 A.D.2d 628, 631 N.Y.S.2d 38 (1st Dep't 1995); *Seger v. Cornwall*, 44 Misc.2d 994, 225 N.Y.S.2d 744 (Sup. Ct. Albany Co. 1964).
- 4 *Castle Oil Corp. v. Thompson Pension Employee Plans, Inc.*, 299 A.D.2d 513, 750 N.Y.S.2d 629 (2d Dep't 2002).
- 5 Vincent C. Alexander, Malpractice Actions. Continuous Representation, *Supp. Practice Commentaries*, C214:6., CPLR § 214(6) (2006).
- 6 Vincent C. Alexander, Malpractice Actions. Continuous Representation, *Supp. Practice Commentaries*, C214:6., CPLR § 214(6) (2006).
- 7 Vincent C. Alexander, Malpractice Actions. Continuous Representation, *Supp. Practice Commentaries*, C214:6., CPLR § 214(6) (2006).
- 8 Vincent C. Alexander, Malpractice Actions. Continuous Representation, *Supp. Practice Commentaries*, C214:6., CPLR § 214(6) (2007).
- 9 In re *Clark Patterson Engineers, Surveyor, and Architects, P.C. v. City of Gloversville Board of Water Commissioners*, 25 A.D.3d 984, 986, 809 N.Y.S.2d 247, 249 (3d Dep't 2006).
- 10 *Aaron v. Roemer, Wallens & Mineaux, LLP*, 272 A.D.2d 752, 754, 707 N.Y.S.2d 711, 714 (3d Dep't 2000).
- 11 *Aaron v. Roemer, Wallens & Mineaux, LLP*, 272 A.D.2d 752, 755, 707 N.Y.S.2d 711, 714 (3d Dep't 2000).
- 12 *City of Binghamton v. Hawk Engineering, P.C.*, 85 A.D.3d 1417, 1420, 925 N.Y.S.2d 705, 709 (3d Dep't 2011).
- 13 *City of Binghamton v. Hawk Engineering, P.C.*, 85 A.D.3d 1417, 1420, 925 N.Y.S.2d 705, 709 (3d Dep't 2011).
- 14 *Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346, 347-348, 595 N.Y.S.2d 772, 774 (1st Dep't 1993) (citations omitted).