



Alerts

Illinois Court Holds That \$6.5 Million Malpractice Claim Barred By Statute of Repose

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Terra Foundation for American Art, et al. v. DLA Piper LLP (US), 2016 IL App (1st) 153285

Brief Summary

Plaintiffs filed a legal malpractice action against defendant law firm that plaintiffs had retained in connection with the sale of real estate. The trial court dismissed plaintiffs' complaint finding that it was barred as a matter of law by the six-year statute of repose. 735 ILCS 5/13-214.3(c). The appellate court affirmed the dismissal.

Complete Summary

In 2005, the plaintiffs, Terra Foundation for American Art, a not-for-profit organization, and Terra Michigan Avenue Property, LLC (collectively "Terra"), agreed to sell three pieces of property in Chicago (the property) to entities controlled by Prism Development Co., which were later succeeded in interest by NM Project. Defendant represented Terra throughout the negotiations for the sale, including the final closing in 2013. NM Project intended to build a 40-story mixed-use building (the building) on the property, which would include retail, office and residential parcels. As part of the sale, Terra was to receive an "up front" payment of \$17.5 million, and upon closing, ownership of the retail and office parcels. NM Project would own the residential parcel.

Because the ultimate square footage of the retail parcel would control its potential rental income and its resulting economic value to Terra, NM Project's cash payment was to be adjusted at the closing based on the completed size of the retail parcel (the retail parcel credit). On April 27, 2005, Terra and NM Project executed a term sheet that included a formula for determining the retail parcel credit using baseline estimates for the space of the retail parcel.

Consistent with Terra's wish that the common space for the other parts or parcels of the building not be included in the measurement of the retail parcel, the term sheet referred only to the "contiguous" space of the first floor of the retail parcel, and expressly excluded "the Common Area Parcel and lobbies for the Office Parcel and Condominium/Parking Parcel [residential parcel] and building service areas (including, but not limited to, loadings docks, freight elevator lobby, mechanical space and other 'back of the house' space)" (exclusionary language) from the rentable area of the retail parcel. In the

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several years following execution of the term sheet, but before the final closing, Terra and NM Project entered into a series of agreements that governed the transaction (collectively the "agreements"). The first amendment to the purchase agreement (first amendment), which was executed on May 29, 2007, provided for how the retail parcel would be measured for purposes of determining the retail parcel credit. Specifically, paragraph 5 of the first amendment provided that rentable square footage or rentable square feet was to be calculated pursuant to the "Standard Method for Measuring Floor Area in Office Buildings" (ANSI/BOMA Z65.1–1996), An American National Standard (hereinafter "BOMA 96").

Ultimately, Terra disagreed with NM Project's calculations, because they included an allocated share of the common areas for the other parcels. Terra contended NM Project would owe an additional \$4,737,000 at the closing as the retail parcel credit. To resolve the dispute, Terra and NM Project engaged in the agreed alternative dispute procedures. An October 11, 2010 arbitration award provided that based on the final plans, Terra would owe NM Project in excess of \$3.8 million at the closing as the retail parcel credit, and was therefore required to post an appropriate line of credit pursuant to the third amendment.

Near the completion of the building in late 2012, NM Project asserted that based on the measurements, Terra would owe a retail parcel credit of \$4,265,000 at closing. Terra again challenged NM Project's measurements, contending that only the contiguous space within the retail parcel should be measured. Terra maintained that NM Project would owe a retail parcel credit of \$2,643,619 at the closing. To resolve their differences, NM Project and Terra again engaged in arbitration. On January 30, 2013, the arbitration panel issued an award, which provided that the BOMA 96 calculations showed certain square feet of rentable space. Pursuant to this award, Terra paid NM Project approximately \$3.8 million as the retail parcel credit at the February 13, 2013 closing.

On February 23, 2015, Terra filed a legal malpractice suit against defendant, alleging negligence in its representation of Terra with regard to the sale. However, pursuant to a tolling agreement, the complaint was "deemed filed on October 7, 2014." Terra asserted that throughout the negotiations of the agreements, it had expressed to defendant its concerns that the exclusionary language of the term sheet had not been included in the agreements. Terra further alleged that defendant breached its duty of care by failing to advise Terra that using BOMA 96 would necessarily include the common areas for the other parcels in the measurements of the rental area of the retail space, and by failing to include the exclusionary language of the term sheet in the agreements. Terra further alleged that had it known that the failure to include the exclusionary language in the agreements would result in the common areas for the entire building being added into the calculation of the rentable area of the retail parcel, it either would not have agreed to the use of BOMA 96 or would have "insisted" on the inclusion of the exclusionary language. Alternatively, Terra would have "insisted" that the baseline estimates, which had not included the common areas, be "grossed up" to include the common area square footage.

Terra believed that if the measurement of the retail parcel had been calculated consistently with its expressed intent at the closing, NM Project would have paid Terra \$2.6 million under the retail parcel credit provision, rather than Terra paying NM Project over \$3.8 million. Terra thus alleged that as a result of defendant's alleged negligence, it had suffered damages in the amount of \$6,449,619 (the total of what Terra paid and the amount Terra contends it was owed as to the retail parcel credit) and had incurred \$500,000 in legal fees and costs.

The trial court granted the motion and dismissed the action with prejudice, based on the language of the statute of repose providing that a legal malpractice claim "may not be commenced ... more than 6 years after the date on which the act or omission occurred." The court concluded that "the alleged negligence occurred when the first amendment was executed [May 29, 2007]. That's the document that contained the ... BOMA 96 as the standard for measuring the retail parcel. It did not include the exclusionary language that was included in the term sheet."

On appeal, Terra first argued the statute of repose did not begin to run until the closing on the sale of the property on February 13, 2013, which was the last day of defendant's representation as to the sale. This argument was based on Terra's belief that a transactional malpractice case is treated differently under the statute of repose than a litigation malpractice case. In the alternative, Terra maintained that the earliest the repose statute could begin to run was at the time of a March 2010 letter agreement which amended the purchase agreement and other agreements. Finally, Terra argued that defendant's negligence did not end at the time of the first amendment; rather, it continued with defendant's separate failures to include the exclusionary language in each of the agreements.



The appellate court rejected Terra's arguments and concluded that the event giving rise to Terra's injuries occurred on May 29, 2007, when Terra and NM Project executed the first amendment and chose BOMA 96 as the method of measuring the retail parcel without the exclusionary language. The measurements of the rentable area under the BOMA 96 standards, without excluding the common space, resulted in the increases of the retail parcel space, which required Terra to engage in arbitrations to dispute the measurements, incur the related attorney fees and expenses and make the retail parcel credit payment at the closing. Terra's claimed damages directly flowed from defendant's allegedly negligent omissions and acts as to the first amendment.

Terra argued that a transactional malpractice action is treated differently from a litigation malpractice action under the statute of repose. According to Terra, in a transactional context, the statute of repose does not begin to run "until the completion of the last affirmative act of representation in the matter that included the attorney's negligence," and in this case, that would be the March 2013 closing. The court rejected Terra's argument, and in doing so, stated: "the statute of repose is not tolled merely by the continuation of the attorney-client relationship [citations omitted], ... nor by the attorney's ongoing duty to correct past mistakes."

Significance of Opinion

This case is significant because the court addressed when the statute of repose commences, and the court rejected the argument that the statute does not commence until the "last act of representation." Rather, the statute starts to run on "the date on which the act or omission occurred," 735 ILCS 5/13-214.3(c), resulting in damages, and the statute of repose is not tolled by the continuation of the attorney-client relationship, nor by the attorney's ongoing duty to correct past mistakes.

For more information, please contact [Terrence P. McAvoy](#) or your regular [Hinshaw attorney](#).

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