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My Brother's Keeper

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“The amended complaint fails to assert, and plaintiff does not dispute, that the alleged fraud could have been discovered with due diligence, such that the two-year discovery rule tolling causes of action for fraud would not apply.”

Mizrabi v. YMZ Realty LLC, Case No. 2021-00629, 2022 NY Slip Op 01741, First Dep’t, 2022

We are pleased to share this victory with our clients and colleagues, and look forward to the opportunity to continue to share good news.



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Family squabbles often put the *fun* in *dysfunctional*. Case in point: Yoel was sued by his brother, Ygal. The dispute dates back to a 2013 deal when Yoel purchased his brother’s interest in a jointly owned company for six million dollars. Ygal alleged that he based his asking price on Yoel’s oral promise that the company was to be quickly flipped for (only) thirteen million dollars.

According to Ygal, seven years later he learned that Yoel flipped the company for sixteen million five hundred dollars, pocketing an extra 3.5 million dollars. Ygal sued Yoel for what he claimed was his share of the extra profit.

Cases such as this are usually brought as a breach of contract, but the statute of limitations prevented Yoel from suing on a contract claim. Accordingly, Ygal had to recast his case. In this version, Ygal was a victim of fraud since Yoel tricked him into selling the company for less than it was worth.

Yoel hired Miller Law Offices. After reviewing the complaint, we decided to file a motion to dismiss.

While pre-answer motions to dismiss usually assume that the facts in the complaint are true, we argued that the alleged wrongdoing was utterly refuted by the documentary evidence. We contended that the asset purchase agreement completely disproved Ygal’s allegations of fraud and exonerated Yoel.

In our motion to dismiss, we also argued that even if there was fraud – which we strenuously denied - Ygal was a day late and a dollar short. The fraud claims were still time barred under New York’s six-year statute of limitations. Ygal countered that his claim fell under the “discovery exception” which allows an aggrieved party to bring a fraud claim, even after the expiration of the statute of limitations, as long as it is brought within two years following discovery of the fraud.

We argued that the “discovery exception” does not apply to cases such as this where the brothers had a strained personal and professional relationship that including a recent and contentious lawsuit. Because Ygal admitted that he distrusted Yoel, it was unreasonable for him to rely on any *alleged* representations from Yoel, especially concerning the future sale price of the company. We also noted that within months of the sale, Ygal could have easily and independently ascertained the \$16,500,000 sale price by searching the free, New York database called ACRIS.

The trial court agreed with us and dismissed the case.

Ygal appealed. Eric Cherches, Esq. took the lead for Miller Law. Building on the successful and persuasive briefs we had submitted to the Trial Court, Eric fine-tuned the appellate arguments and appeared at oral argument ready to present our case. He was spared the hot seat, however, as the panel of five judges didn’t ask him a single question!

A unanimous First Department affirmed the decision in record time, mere weeks after oral argument. The Appellate Division, like the Trial Court, ignored our arguments that the written agreement proved that there was no fraud. Instead, it focused solely on the limitations issue:

The motion court correctly dismissed the amended complaint on the ground that it is barred by the statute of limitations. The report on ACRIS shows that the property was sold on April 10, 2013 for \$16.5 million, not \$13 million, as Ygal had allegedly been informed. As a result, publicly available information was sufficient to put him on inquiry notice of possible fraud. The amended complaint fails to assert, and plaintiff does not dispute, that the alleged fraud could have been discovered with due diligence, such that the two-year discovery rule tolling causes of action for fraud would not apply.

Statutes of limitations may seem unfair because a litigant is deprived of his day in court simply because he failed to assert his claim within an arbitrary time frame. However, as my grandchildren remind me when they sneak the last donut because I’m dozing off on the sofa while babysitting, “you snooze, you lose”. Rules limiting the time to act on a claim benefit society by preventing claimants from bringing stale lawsuits long after the events, when evidence may have been lost and witnesses are no longer available. These rules also promote peace by letting ‘sleeping dogs lie’, preventing parties from fighting grievances that occurred in the distant past. As our case demonstrates, this concern is especially common in intrafamily disputes.

We would have liked the Trial Court and Appellate Court to rule that the evidence proved conclusively that Yoel did not commit fraud. For one thing, it *may* have helped bring personal and emotional closure to the dispute. However, as is often the case, the court(s) took the path of least resistance and dismissed the case on procedural grounds. Of course, we’re not complaining; still, we are always amazed when judges and juries do not see a case through our lenses.