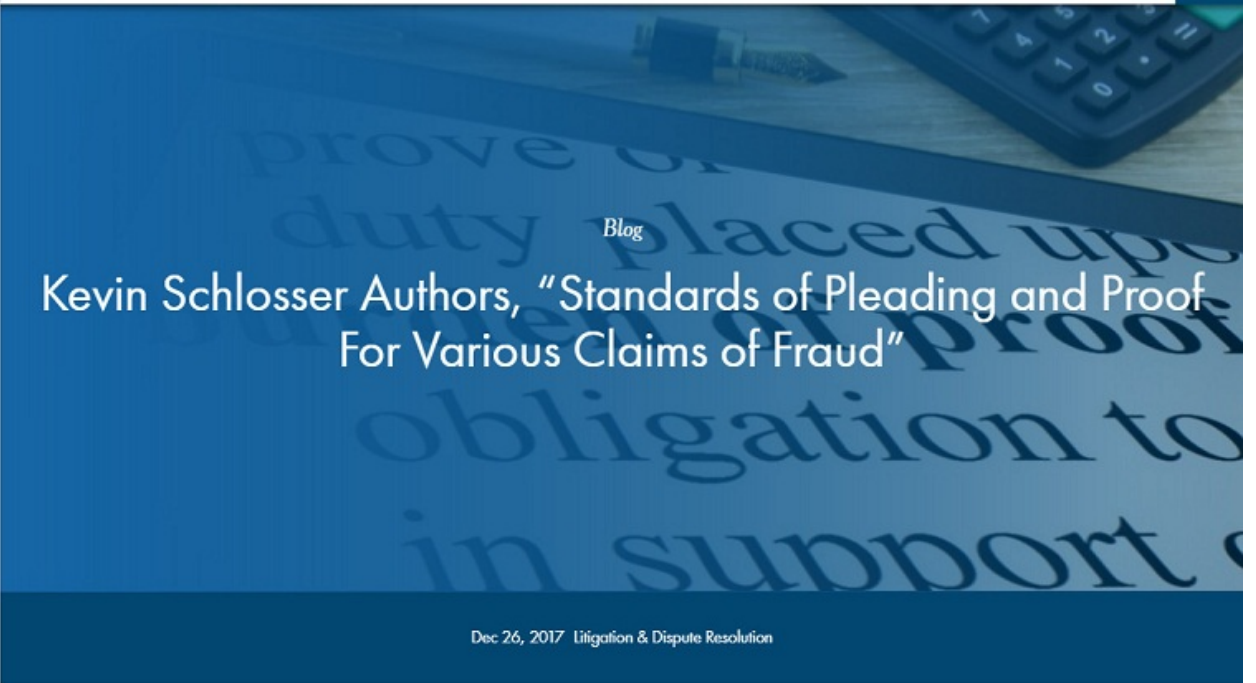


# Exhibit "A"



Dec 26, 2017 Litigation & Dispute Resolution

Source: [www.nyfraudclaims.com](http://www.nyfraudclaims.com)

My previous post addressed the different statutes of limitations that apply to claims of actual fraud, where intent to defraud is a necessary element, and constructive fraud, where proving intent to defraud is not required. The difference is that claims for actual fraud receive the benefit of the extended two-year period from the time the fraud was discovery or could reasonably have been discovered, while the statute of limitations for constructive fraud claims is a straight six years from when the wrong occurred.

This post addresses other differences in causes of action that do not require actual intent to defraud. Careful attention to these details is required to avoid unintended consequences.

Pleadings Particularity Requirement

The New York Debtor Creditor Law (DCL) has a number of provisions dealing with species of fraud in connection with conveyances of property that affects creditors. DCL Section 276 requires an actual intent by the debtor to avoid claims of creditors. The so-called constructive fraud sections of the DCL do not require actual intent as an element – DCL 273 (conveyances by insolvent), DCL 273-a (conveyance by a defendant), DCL 274 (conveyances by person in business), DCL 275 (conveyance by person about to incur debts), DCL 277 (conveyance of partnership property).

“Pursuant to CPLR 3016(b), where a cause of action is based on fraud, the ‘circumstances constituting the wrong’ must be ‘stated in detail,’ including ‘specific dates and items’ (Orchid Constr. Corp. v Gottbeter, 89 AD3d 708, 710 [internal quotation marks omitted]; see Doukas v Ballard, 135 AD3d 896, 898).” Swartz v Swartz, 145 AD3d 818 (2d Dep’t 2016). Recent cases discussing this pleadings standard can be found using the search function in this blog by simply searching for “3016.”

This special pleadings standard does not apply to certain “constructive fraud” claims. As observed by the Fourth Department in the recent and informative decision in Matter of City of Syracuse Indus. Dev. Agency (Amadeus Dev., Inc.), 2017 NY Slip Op 08945 (4th Dep’t Decided December 22, 2017), “claims for fraudulent conveyances under Debtor and Creditor Law §§ 273, 274, and 275 ‘are not subject to the particularity requirement of CPLR 3016, because they are based on constructive fraud’ (Ridinger v West Chelsea Dev. Partners LLC, 150 AD3d 559, 560 [1st Dept 2017]; see Gateway I Group, Inc. v Park Ave. Physicians, P.C., 62 AD3d 141, 149-150 [2d Dept 2009]).”

There are also different standards of proof for constructive fraud claims.

Standard of Proof – Clear and Convincing and Preponderance

The two standards of proof in civil litigation are a preponderance of the evidence and clear and convincing proof. The New York Pattern Jury Instructions provide a straightforward and simple explanation of these respective standards of proof as follows:

[Clear and Convincing evidence] means evidence that satisfies you that there is a high degree of probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction), as I (have defined, will define) it for you.



ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

NEWS & EVENTS  
ATTORNEYS

person or entity to whom the fiduciary duty is owed. In those circumstances, the fiduciary who enters into a transaction with the one to whom it owes a fiduciary duty has the burden of proving by clear and convincing evidence that the transaction was free of improper influence, fraud or other wrongdoing. The New York Court of Appeals in *Matter of Aoki v. Aoki*, 27 N.Y.3d 32 (2016) recently explained the rules applying to transactions involving fiduciaries (see [my post for a full description](#)). The Court of Appeals first pointed out: “It is a well-settled rule that “fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the parties seeking to [be] relieve[d] ... from an obligation on that ground”.” The Court continued: “However, an exception to that general rule provides that where a fiduciary relationship exists between the parties, the law of constructive fraud will operate to shift the burden to the party seeking to uphold the transaction to demonstrate the absence of fraud.” The Court noted that it had applied the constructive fraud doctrine in different contexts, but “the pertinent fact at present is that the fiduciary stood to benefit from the transaction itself.” The Court cited prior case law in describing the doctrine of constructive fraud explaining that

“[when] the relations *between the contracting parties* appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood [emphasis supplied].”

As the New York Pattern Jury Instructions note, the clear and convincing standard applies to the burden placed on the fiduciary to prove the validity of the transaction:

Under the constructive fraud doctrine, where a fiduciary relationship exists between parties, “transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood, and that there was no fraud, mistake, or undue influence. Where those relations exist, there must be clear proof of the integrity and fairness of the transaction, or any instrument thus obtained will be set aside or held as invalid between the parties,” *Ten Eyck v Whitbeck*, 156 NY 341, 50 NE 963 (1898). Although in conventional fraud cases a party seeking rescission must prove the fraud, the burden of proof on that issue is shifted whenever the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality and that—as a result of (a) one side having superior knowledge derived from a fiduciary relation, (b) one side having an overmastering influence, or (c) the other side operating from weakness, dependence, or trust justifiably reposed—unfair advantage in the transaction is rendered probable. In such circumstance, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood, *Gordon v Bialstoker Center and Bikur Cholim, Inc.*, 45 NY2d 692, 412 NYS2d 593, 385 NE2d 285 (1978); *Cowee v Cornell*, 75 NY 91 (1878). *In such situations, the burden of proof is on the stronger party to show, by clear and convincing evidence, that no undue influence was used, Matter of Estate of Nealon*, 104 AD3d 1088, 962 NYS2d 481 (3d Dept 2013), *aff’d*, 22 NY3d 1045, 981 NYS2d 353, 4 NE3d 363 (2014). However, this shift in the burden of proof is applicable only in cases where the fiduciary or stronger party stood to gain as a result of the transaction, *Aoki v Aoki*, 27 NY3d 32, 29 NYS3d 864, 49 NE3d 1156 (2016).

N.Y. Pattern Jury Instr.–Civil 320 (emphasis added).

Commentary

As can be seen from the above, much care should be taken in determining the different standards of pleading and proof for the various types of fraud claims that exist. The rules are not entirely consistent or clear so the relevant authorities must be analyzed and applied in a manner that best suits a party’s position.

← Richard Fromewick Authors, “Real Estate Tax Assessment Cap”

Richard Fromewick Authors, “Nassau County Real Estate Tax Increase In 2018” →



One Commerce Plaza, Suite 1705  
Albany, NY 12260

Phone: (518) 465-5551 | Fax: (518) 465-2033



990 Stewart Avenue, Suite 300  
Garden City, NY 11530

Phone: (516) 741-6565 | Fax: (516) 741-6706



1350 Broadway, Suite 501  
New York, NY 10018

Phone: (212) 239-4999 | Fax: (212) 239-1311



1300 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Phone: (202) 496-2103 | Fax: (202) 223-0358

NEWS & EVENTS

CAREERS

LOCATIONS



Need to speak to someone?

# MEYER SUOZZI

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

GET IN TOUCH

[OUR FIRM](#) | [SERVICES](#) | [ATTORNEYS](#) | [NEWS & EVENTS](#) | [LOCATIONS](#)

©2018 MEYER, SUOZZI, ENGLISH & KLEIN, P.C. ALL RIGHTS RESERVED | [DISCLAIMER](#) | [ATTORNEY ADVERTISING](#) | [RECORD RETENTION & DESTRUCTION POLICY](#)