

# New York Construction

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Construction Law

## Not So Fast...

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**A recent decision from the state's highest court highlights complexities in determining the statute of limitations in construction claims.**

One of the most important pieces of information to anyone making a claim in court is the "statute of limitations" that applies to their particular claim. The statute of limitations period is the time during which a claim can be made in court and is imposed by law to avoid litigation of claims long after the acts in question occurred, when memories have faded and records have been destroyed or discarded. The importance of the statute of limitations cannot be understated because, as a general matter, if a party is too late in bringing its claim in court, it loses the right to make that claim forever.

While the concept sounds simple enough, it is not. There are many different statutes of limitation periods, depending on the type of claim involved and, sometimes, the person or entity against whom it is being made. For example, most contract claims have a six year statute of limitations, while claims based on negligence generally have a three year statute of limitations. In the construction industry, it gets even more complex because, if either type of claim is against certain public agencies, different statutes of limitation may apply. Further complicating the issue, different statutes of limitations begin to "run," meaning that the clock starts ticking on the time to make a claim, at different times. The date that the statute of limitations begins to run is also determined by the facts of the case and the type of claim involved.

A recent case decided by New York Court of Appeals, New York's highest court, *Bloomingdales v. New York City Transit Authority*, highlights some of the statute of limitation complexities involved in construction cases. In the *Bloomingdales* case, NYCTA hired Janus, Inc., a construction contractor, to perform excavation work between 59th and 60th Streets in Manhattan as part of a NYCTA project. During the course of its work on the project, in September 1999, Janus uncovered what it thought was a non-functioning – or "dead" – water main. Because it was in the way of Janus' work, Janus cut the "dead" main and installed a concrete encased conduit in its place.

On a rainy day after Janus cut the "dead" main, *Bloomingdales'* nearby store flooded. More than two years after Janus did its work, in February 2002, *Bloomingdales* hired its own contractor to investigate the cause of the flood and to fix the problem. *Bloomingdales'* contractor discovered that the "dead" water main that Janus cut was not a water main at all and was actually an active drainpipe for *Bloomingdales'* store. It concluded that the cut drainpipe was the cause of the flood. *Bloomingdales* paid its contractor approximately \$165,000 to replace the cut drainpipe and then, in January 2003, sued Janus and NYCTA for the cost of that work.

In response to the lawsuit, NYCTA argued that the case was late and had to be dismissed. The court agreed. The court found that the statute of limitations period began to run when Janus cut the drainpipe in 1999. It continued that, because a special one year and 90 day statute of limitations applied to the public agency, NYCTA, and its contractors, *Bloomingdales* had to bring its case within a year and 90 days of September 1999 to be within the statute of limitations. Therefore, *Blooming-*



*dales'* case, which it started in January 2003, was late.

*Bloomingdales* appealed this decision and won. The Court of Appeals found that if the case was only about Janus' cutting of the pipe, which admittedly occurred more than one year and 90 days before *Bloomingdales* sued NYCTA, the case would have to be dismissed. However, the court agreed with

*Bloomingdales* that installation of the conduit in place of the pipe was a "continuing trespass" on *Bloomingdales'* property. This meant that a new statute of limitations period began to run every day that the conduit remained in place. Since it was in place within one year and 90 days of the date that *Bloomingdales* started its case, the Court of Appeals found that *Bloomingdales* had started its case on time.

In the *Bloomingdales* case, the facts supported *Bloomingdales*, whose case was allowed to proceed. However, the case highlights some of the complexities involved in analyzing the statute of limitations and shows that it is vitally important to quickly determine the legal theory of any claim and the party against whom it is being asserted. A failure to do so may result in a case being dismissed and the rights sought under the claim being lost forever. <<