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Ct. Cl. Act § 10: Statutes of Limitations or Conditions Precedent?

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where the ninety-day statute of limitations[203] is pleaded as an affirmative defense, the date of delivery of the award must be stated.

CPLR 7511(b)(1)(ii): Arbitration award affirmed, where challenged arbitrator had prior attorney-client relationship with one party, when opposing party knowingly waived its objection.

CPLR 7511(b)(1)(ii) empowers a court to vacate an arbitration award when a "neutral" arbitrator is actually "partial."[204] In *Baar & Beards, Inc. v. Oleg Cassini, Inc.*,[205] the parties made an exclusive licensing agreement which provided for the arbitration of disputes according to current rules of the American Arbitration Association (AAA). A dispute arose, and Baar & Beards, Inc., the appellant, sought arbitration. One of the arbitrators appointed by the AAA had represented the appellant's president six years earlier, a fact of which Oleg Cassini, Inc., the respondent, was immediately notified by the appellant. The respondent objected, but the AAA refused to remove the contested arbitrator. The respondent subsequently signed a statement accepting the arbitration panel.

Following the award, the appellant sought confirmation in the Supreme Court, New York County, and the respondent opposed on the grounds of bias and misconduct. The court vacated the award as unfair. The Appellate Division, First Department,[206] affirmed, holding that the appearance of bias was present.

The Court of Appeals reversed and ordered the matter remitted to special term for proceedings in accordance with its decision. In reviewing the order vacating the award, the Court held that the respondent had knowingly waived its objection.[207]

COURT OF CLAIMS ACT

Ct. Cl. Act § 10: Statutes of limitations or conditions precedent?

In *Lewis v. State*,[208] the Court of Claims recently held that the time provisions set forth in section 10(2) of the Court of Claims Act for wrongful death actions against the state are conditions precedent

203 The ninety-day period is a limitations provision which establishes a maximum time for proceeding, but sets no minimum time period, and does not impinge on a party's right to move under other CPLR sections. Foreign Operations, Ltd. v. Miller, 52 Misc. 2d 828, 276 N.Y.S.2d 942 (Sup. Ct. N.Y. County 1967).

204 *See* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 368-71 (3d ed. 1970). *See generally The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 345 (1968).

205 30 N.Y.2d 649, 282 N.E.2d 624, 331 N.Y.S.2d 670 (mem.), *motion for reargument denied*, 30 N.Y.2d 790, 285 N.E.2d 322, 334 N.Y.S.2d 1027 (1972).

206 37 App. Div. 2d 106, 322 N.Y.S.2d 462 (1st Dep't 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 335, 385 (1971).

207 30 N.Y.2d at 649, 282 N.E.2d at 685, 331 N.Y.S.2d at 670.

208 69 Misc. 2d 1031, 332 N.Y.S.2d 292 (Ct. Cl. 1972) (mem.).

rather than statutes of limitation. In *Torsiello v. State*,[209] however, the Court of Claims held that an amendment to section 10(1) of the Act is retroactive, thus viewing the time provision in section 10(1) as a true statute of limitations. *Lewis*, in finding that the time periods in section 10(2) were conditions precedent, offers a much stricter and more questionable construction of the statute.[210]

GENERAL MUNICIPAL LAW

GML 50-a to 50-i: Notice of claim not required in contract action.

Generally, section 52 of the Nassau County Law and section 11-4.1 of the Nassau County Administrative Code provide that prior to commencing an action against Nassau County, it must be served with a notice of claim which complies with section 50-e of the General Municipal Law.

In *Meed v. Nassau County Police Department*,[211] the plaintiff, a former patrolman, sought recovery of salary and fringe benefits accruing during the period of his suspension from the police department. The county raised a preliminary objection that the plaintiff had failed to comply with section 52 of the Nassau County Law and section 11-4.1 of the Nassau County Administrative Code by not serving it with a notice of claim. The Supreme Court, Nassau County, accepting the plaintiff's contention, held that no notice of claim was necessary to support the plaintiff's contract-based action.[212] In so doing, the court relied on an examination of the language of the General Municipal Law, which limits its application to negligence, malpractice, and other tort-based litigation.[213] It further found that the language of section 52 of the County Law and section 11-4.1 of the Nassau County Administrative Code did not specifically encompass actions on contract or breach of contract or claims for salary.[214] Noting that the Education Law,[215] the Town Law,[216] and the Village Law[217] specifically require a

209 70 Misc. 2d 294, 332 N.Y.S.2d 794 (Ct. Cl. 1972) (mem.).

210 "Construction as a statute of limitations is favored." McLaughlin, *Civil Practice*, 15 SYRACUSE L. REV. 381, 394 (1963). The two-year time period under the wrongful death statute (N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967)) has been uniformly held to be a statute of limitations. *See* McLaughlin, *supra*. It can be argued, however, that in waiving its immunity from suit, the state limited its liability to situations where the claimant has strictly complied with the time provisions of the Court of Claims Act. *See* Phillips v. State, 35 App. Div. 2d 750, 314 N.Y.S.2d 951 (3d Dep't 1970) (mem.).

211 70 Misc. 2d 274, 332 N.Y.S.2d 679 (Sup. Ct. Nassau County 1972) (mem.).

212 *Id.* at 275, 332 N.Y.S.2d at 680.

213 *Id.*

214 *Id.*

215 N.Y. EDUC. LAW § 3813(1) (McKinney 1970) (requiring a notice of claim for all claims).

216 N.Y. TOWN LAW § 65 (McKinney 1965); Le Fever v. Town of Marbletown, 284 App. Div. 1085, 135 N.Y.S.2d 831 (3d Dep't 1954) (mem.).