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Article 27

GML 50-a to 50-i: Notice of Claim Not Required in Contract Action

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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.).

notice of claim to maintain such an action, the court reasoned that the absence of such a mandate in the instant sections reflected the Legislature's intent that none be necessary.[218]

The instant decision, which is supported by decisional law,[219] is a sound construction of the pertinent statutes.

GML 50-e: Infant permitted to file late notice of claim where infancy may have been important factor in failure to timely file.

Section 50-i of the General Municipal Law permits actions in tort against a municipality only if a notice of claim is served within ninety days after the claim arises. Section 50-e(5) provides, *inter alia*, that the court may, in its discretion, permit an infant to file a notice of claim within a reasonable time after expiration of the ninety-day period if he fails to serve a timely notice "by reason of" his infancy. There exists a marked divergence within the appellate division with respect to the level of proof required to establish the nexus between the fact of infancy and the delay. The problem is further complicated when counsel is timely retained, but a delay in filing nonetheless occurs.

The First Department has generally required that a causal relationship between the fact of infancy and the delay be demonstrated. Where the delay is attributable to the attorney's error or inadvertence, the statutory standard is not met.[220] The other departments approach the issue more liberally, presuming disability from the fact of infancy, even where the infant's attorney has been derelict, upon a showing that the delay was attributable in any substantial degree to infancy.[221]

217 N.Y. VILLAGE LAW § 341-b (McKinney 1966); Caruso v. Incorporated Village of Sloatsburg, 35 App. Div. 2d 988, 317 N.Y.S.2d 959 (2d Dep't 1970) (mem.).

218 70 Misc. 2d at 275, 332 N.Y.S.2d at 680.

219 Sullivan v. Whitney, 25 N.Y.S.2d 762 (Sup. Ct. Westchester County 1941).

220 *See* Clark v. Manhattan & Bronx Surface Transit Operating Authority, 34 App. Div. 2d 770, 311 N.Y.S.2d 339 (1st Dep't 1970) (mem.), *aff'd mem.*, 28 N.Y.2d 614, 268 N.E.2d 803, 320 N.Y.S.2d 76 (1971); Shankman v. New York City Housing Authority, 21 App. Div. 2d 968, 252 N.Y.S.2d 707 (1st Dep't 1964) (mem.), *aff'd mem.*, 16 N.Y.2d 500, 208 N.E.2d 175, 260 N.Y.S.2d 442 (1965); Goglas v. New York Housing Authority, 13 App. Div. 2d 939, 216 N.Y.S.2d 756 (1st Dep't 1961) (mem.), *aff'd mem.*, 11 N.Y.2d 680, 180 N.E.2d 910, 225 N.Y.S.2d 756 (1962); Ringgold v. New York City Transit Authority, 286 App. Div. 806, 141 N.Y.S.2d 365 (1st Dep't 1955) (mem.); Schnee v. City of New York, 285 App. Div. 1130, 141 N.Y.S.2d 88 (1st Dep't 1955) (mem.), *aff'd mem.*, 1 N.Y.2d 697, 134 N.E.2d 69, 150 N.Y.S.2d 801 (1956).

221 *See* Perry v. Board of Educ., 34 App. Div. 2d 1089, 312 N.Y.S.2d 640 (4th Dep't 1970) (mem.); Brooks v. Rensselaer County, 34 App. Div. 2d 708, 309 N.Y.S.2d 659 (3d Dep't 1970) (mem.); Kern v. Central Free School Dist. #4, 25 App. Div. 2d 867, 270 N.Y.S.2d 137 (2d Dep't 1966) (mem.); Klee v. Board of Coop. Educ. Servs., 25 App. Div. 2d 715, 270 N.Y.S.2d 230 (4th Dep't 1966) (mem.); Spanos v. Town of Oyster Bay, 23 App. Div. 2d 881, 259 N.Y.S.2d 917 (2d Dep't) (mem.), *aff'd mem.*, 16 N.Y.2d 951, 212 N.E.2d 535, 265 N.Y.S.2d 101 (1965); Pandoliano v. New York City Transit Authority, 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.); Biancoviso v. City of New York, 285 App. Div. 320, 137 N.Y.S.2d 773 (2d Dep't 1955); Every v. Ulster County, 280 App. Div. 155, 112 N.Y.S.2d 367 (3d Dep't 1952) (per curiam),