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Article 42

# GML 50(i): Construed in a Wrongful Death Action

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to prevent granting relief in a case where claimant adheres to his contract and seeks arbitration. The sections apparently do not forbid provisional remedies where the claimant goes to court first in contradiction of his agreement to arbitrate.

*CPLR 7503(c): Conflict as to service resolved in second department.*

Under CPLR 7502 a special proceeding is used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. After a notice of intention to arbitrate is served, CPLR 7503(c) allows an application to stay the arbitration to be served. A conflict has arisen as to whether the application to stay may be served on the attorney named in the notice of intention to arbitrate or whether it must be served on a party.

*Matter of Bauer*,[157] a fourth department case, held that service has to be made on a party. *Appis v. Employers Liability Assurance Corp.*,[158] a Westchester County case, held that the claimant's attorney was designated as his representative in the notice of intention to arbitrate and therefore service by certified mail on the attorney was within the intendment of 7503(c).

In *Statewide Insurance Co. v. Lopez*,[159] the appellate division, second department, has resolved the conflict for its own department by holding that service must be made upon a party. The court explained that while under the CPA arbitration was itself a special proceeding, commenced when a notice to arbitrate was served, such is no longer the case. Today, if there is no action pending, a special proceeding must be initiated to bring before a court the first application arising out of an arbitrable controversy. Since, as a general rule, initiatory process must be served upon the party over whom jurisdiction is sought, service upon his attorney was deemed a jurisdictional defect.

## GENERAL MUNICIPAL LAW

*GML § 50-i: Construed in a wrongful death action.*

Section 67 of the Town Law provides that any claim against a town "for damages for wrong or injury to person or property or for the death of a person" must be made and served in compliance

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[157] 55 Misc. 2d 991, 287 N.Y.S.2d 206 (Sup. Ct. Wyoming County 1968); *see The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 344-45 (1968).

[158] 56 Misc. 2d 969, 290 N.Y.S.2d 617 (Sup. Ct. Westchester County 1968).

[159] 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968).

with section 50-e of the General Municipal Law and an action upon the claim must be commenced pursuant to section 50-i of that law.

Section 50-e provides for notice of claim to be given within ninety days after the claim arises. Two wrongful death cases, affirmed by the Court of Appeals, have held that the period for filing a notice of claim in such an action begins to run from the time of the appointment of an estate representative.[160] Section 50-i provides that an action must be commenced within one year and ninety days "after the happening of the event upon which the claim is based." This section has been recently construed in a wrongful death action.

In *Erickson v. Town of Henderson*,[161] plaintiff's intestate died due to the alleged negligence of the defendant town. The administrator was appointed five days short of the second anniversary of the intestate's death. Four days after the appointment, the notice of claim and summons and complaint were served on the town clerk. The town's motion to dismiss for lack of jurisdiction was denied and the town appealed.

The appellate division, fourth department, reversed, holding that the court lacked jurisdiction to entertain the wrongful death action because, although the notice of claim was timely filed in accordance with section 50-e and applicable case law, the action was not commenced in accordance with section 50-i, *i.e.*, within one year and ninety days from the happening of the event upon which the claim was based. The court did not see any anomaly in holding that the notice of claim was timely while the summons and complaint served at the same time was not.

Although the decision in the instant case is justified by a literal interpretation of section 50-i, it is difficult to accept this effective emasculation of previous case law which construed the notice of claim period to begin at the time an administrator is appointed.

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[160] Joseph v. McVeigh, 285 App. Div. 386, 137 N.Y.S.2d 577 (1st Dep't 1955), *aff'd*, 309 N.Y. 877, 131 N.E.2d 289 (1956); Buduson v. Curtis, 285 App. Div. 517, 139 N.Y.S.2d 392 (4th Dep't 1955), *aff'd*, 309 N.Y. 879, 131 N.E.2d 290 (1956).

[161] 30 App. Div. 2d 282, 291 N.Y.S.2d 403 (4th Dep't 1968).