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Article 26

GML § 50-e: Service Upon Superintendent of Schools Not Sufficient Against Board of Education

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DOMESTIC RELATIONS LAW

DRL § 211: Amendment spurs conflict.

Domestic Relations Law section 211 was amended in 1968 to add a provision governing temporary alimony and counsel fees.[83] The language of the amendment has caused conflicting decisions in two recent supreme court cases.

In *Morrison v. Morrison*,[84] the Supreme Court, Queens County, held that under the new amendment an application for temporary alimony and counsel fees is to be made to the court and thus awarded the relief requested, despite the pendency of the conciliation proceedings. The court cited the amendment to section 211 and Article 11-B in support of its holding.

In *Krakower v. Krakower*,[85] the Supreme Court, New York County, took issue with the *Morrison* holding and also with the Nassau County rules which similarly provide that such application is to be made to the court. The court drew upon the legislative intent behind the enactment of Articles 11-A and 11-B, which provide for conciliation procedures, and specifically section 215-e of the DRL, in holding that the application must be made to the conciliation commissioner.

It would seem that the clear mandate of DRL 215-e, requiring that the application be made to the conciliation commissioner, has not been affected by the amendment of DRL 211. It is submitted that the amendment as it is presently worded merely allows a petition for temporary alimony and counsel fees to be served with the summons and complaint.[86]

GENERAL MUNICIPAL LAW

GML § 50-e: Service upon Superintendent of Schools not sufficient against Board of Education.

General Municipal Law section 50-e provides that, in a suit against a public corporation, notice of claim must be served within

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[83] The amendment to section 211 added, in part, the following language:
> . . . provided, however, a notice of petition and petition to the court for temporary alimony, child support and counsel fees, based on financial ability and need only, may be served with such summons or any time prior to the termination of such conciliation proceedings.

[84] 160 N.Y.L.J. 18 (Sup. Ct. Queens County Sept. 17, 1968).

[85] 58 Misc. 2d 345, 295 N.Y.S.2d 298 (Sup. Ct. N.Y. County 1968).

[86] See N.Y. Sess. Laws 1968, Leg. Mem. at 2309, where the statement in support of the amendment to DRL 211 noted:
> The bill would authorize service of motion papers for temporary alimony, child support and counsel fees, based on financial ability and need only, simultaneously with the service of a summons, or at any time prior to the termination of conciliation proceedings.

90 days after the claim arises upon a person "designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered."

Under CPLR 311(7) and Education Law section 3813, the person designated to receive service of such notice in a suit against a Board of Education is a member or trustee of the Board of Education or the Board's clerk. The Superintendent of Schools, although a "school officer" under section 2(13) of the Education Law, is not a member of the Board of Education under sections 2(14), 1702(2), and 1711(2).

In *Bayer v. Board of Education*,[87] an unwary plaintiff was caught in the trap created by the present statutory requirements. There, a young child was injured during school gymnastic exercises. The child's parent immediately sent a letter to the Superintendent of Schools. In his reply, the Superintendent acknowledged receipt of the plaintiff's letter and also stated that he had referred the matter to the school insurance agency. The insurance agency began an investigation and took a written statement from the injured plaintiff. All of this occurred within 90 days of the injury.

The Supreme Court, Nassau County, while realizing the inequity involved, felt compelled to dismiss the complaint because the notice of the claim had not been actually received by the persons designated under the statute. Even though it was recognized that the statutory purpose of affording a municipality the opportunity to conduct an early investigation had been fulfilled in the case, the complaint was dismissed. A legislative revision of the relevant statutes was advocated.

Another potential solution to the problems created by the notice of claim provision was exhibited in *Quintero v. L.I.R.R.*[88] There, the Supreme Court, Kings County, applied CPLR 2004 [89] to extend the time allowed to file the requisite notice of claim. *Quintero* would allow a judge to have limited discretion in permitting the late filing of a claim "upon such terms as may be just and upon good cause shown."

It would seem appropriate for the legislature to restudy the effect of this statute with a view towards revision so as to effect its announced purpose and to alleviate the present situation where

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[87] 58 Misc. 2d 259, 295 N.Y.S.2d 131 (Sup. Ct. Nassau County 1968).

[88] 55 Misc. 2d 813, 286 N.Y.S.2d 748 (Sup. Ct. Kings County 1968); *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 349-51 (1968).

[89] CPLR 2004 provides:

> Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

"honest claims may still be defeated on a technicality rather than on the merits." [90]

GML § 50-e: Service of notice on water district not required.

General Municipal Law section 50-i requires that the notice, contemplated by section 50-e, is to be given when plaintiff intends to bring an action against "a city, county, town, village, fire district or school district. . . ."

In *Martin v. Town of Esopus*,[91] plaintiff allegedly failed to serve a notice of claim upon the defendant Port Ewen Water District. Upon a motion to dismiss the complaint the court reasoned that section 50-i was intended to qualify the reference to public corporations contained in section 50-e. As a water district is not directly covered by 50-i, the court concluded that no notice of claim was required to be served on the water district.

The decision is in accord with current case law holding a water district to be without the scope of section 50-i.[92]

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[90] 58 Misc. 2d at 261, 295 N.Y.S.2d at 133 (Sup. Ct. Nassau County 1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 498, 532-33 (1969).

[91] 57 Misc. 2d 487, 293 N.Y.S.2d 571 (Sup. Ct. Albany County 1968).

[92] Harrigan v. Town of Smithtown, 54 Misc. 2d 793, 283 N.Y.S.2d 424 (Sup. Ct. Suffolk County 1967).