

BCL § 307: Court May Extend Time Limit for Proof of Service

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BUSINESS CORPORATION LAW

BCL § 307: Court may extend time limit for proof of service.

Business Corporation Law § 307 contains a flaw in its provision for filing proof of service. Service upon a foreign corporation unauthorized to do business in New York is effected by service upon the Secretary of State and by registered mailing of notice to the defendant. Proof of service, by affidavit and return receipt, must be filed "within thirty days after such service. . . ." ¹³⁶ However, if the receipt is not returned to the plaintiff within the thirty days, he cannot possibly comply with the statute as worded. Until the section can be appropriately amended, the best remedy, as permitted in *Sassand Ilio v. Calzaturificio San Giorgio*,¹³⁷ is to allow the plaintiff to file the affidavit nunc pro tunc, as authorized by CPLR 2004.¹³⁸

GENERAL MUNICIPAL LAW

GML § 50-e: Counterclaim barred by failure to comply with 90-day notice of claim.

Section 50-e of the General Municipal Law provides that filing a notice of claim within ninety days after the claim arises is a condition precedent to the commencement of an action against a municipality. This notice requirement is intended to protect governmental bodies from stale claims and to prevent fraud by permitting investigation while the evidence is still fresh.¹³⁹ Early notice also provides opportunity for out-of-court settlement.¹⁴⁰

However, where the municipality itself initiates the litigation, it apparently has investigated the incident and is not interested in a settlement. Thus, when the defendant asserts a counterclaim arising out of the *same* incident, imposition of the notice condition would seem unjustified in view of its purpose. Nevertheless, it has been held that failure to notify within the ninety days is fatal to a counterclaim even if it arises out of the same occurrence

¹³⁶ N.Y. BUS. CORP. LAW § 307(d). Contrast with VEHICLE & TRAFFIC LAW § 52 and GEN. BUS. LAW § 250, models for the BCL section, whereby proof of service must be filed within thirty days after the plaintiff obtains the return receipt or other official proof of delivery. 6 MCKINNEY'S BCL § 307, Legislative Studies and Reports 148 (1963).

¹³⁷ 51 Misc. 2d 553, 273 N.Y.S.2d 502 (Sup. Ct. N.Y. County 1966).

¹³⁸ To preserve the defendant's rights as regards time to answer, service of process will not be deemed complete until ten days after actual filing. *Ibid.*

¹³⁹ N.Y. Judicial Council, Tenth Annual Report, 265 (1944).

¹⁴⁰ *Brown v. Board of Trustees*, 303 N.Y. 484, 104 N.E.2d 866 (1952).