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Article 47

GML § 50-e: Counterclaim Barred by Failure To Comply with 90-Day Notice of Claim

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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 Muncipal 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

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[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).

which gives rise to the main claim.[141] This position has recently been confirmed in *County of Nassau v. Wolfe*,[142] where the county sued for damages resulting from the collision of one of its motor vehicles with the defendant's automobile. Defendant counterclaimed for damages to his car. His counterclaim was dismissed because he had not notified the county within ninety days of the accident. The court recognized that the county had actual notice of the accident, but justified the dismissal on the ground that failure to notify deprived the county of an authorized examination of the complainant.[143]

The effect of this holding will be felt in those cases where an individual would prefer not to sue either because the damages recoverable are minimal, or because the question of liability is close. The holding of the present case gives the municipality an unwarranted advantage in this situation. It can wait until ninety days have elapsed and then bring suit without risking liability on a counterclaim. Even if the municipality seeks a settlement, its immunity gives it a superior bargaining position. It is questioned whether this discrimination was intended by the legislature. But until a different rule is adopted, an individual should file a notice of claim regardless of his intention not to sue.

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[141] Broome County v. Binghamton Taxicab Co., 190 Misc. 925, 75 N.Y.S.2d 423 (Sup. Ct. Broome County 1947). The court offered no rationale, but merely relied on the authority of two cases treating analogous situations. Bank of United States v. Frost, 142 Misc. 589, 255 N.Y. Supp. 763 (Munic. Ct. N.Y. 1932) (involving a different cause of action); see City of New York v. Seidman, 138 Misc. 524, 246 N.Y. Supp. 393 (App. T. 1st Dep't 1930) (involving the same cause of action).

[142] 51 Misc. 2d 848, 273 N.Y.S.2d 984 (Dist. Ct. Nassau County 1966).

[143] "Wherever a notice of claim is filed . . . [a municipality] shall have the right to demand an examination of the claimant. . . ." N.Y. GEN. MUNIC. LAW § 50-h(1).