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**SUING OR DEFENDING A MUNICIPALITY:  
AN OVERVIEW OF THE NOTICE OF CLAIM FORM**

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**THE KING CAN DO NO WRONG - WAIVER OF SOVEREIGN  
IMMUNITY**

1. At common law, the State is immune from suit unless it waives its sovereign immunity.
2. State's waiver of sovereign immunity applies to counties, towns, special districts.
3. Municipal corporations are not entitled to sovereign immunity.
4. Condition precedent for tort and contract claims.
5. No municipal liability for punitive damages.

**NOTICE OF CLAIM REQUIREMENT: TWO SOURCES, GMI §50-i AND  
CPLR §9802**

1. GML § 50-i. Presentation of tort claims; commencement of actions

No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been

sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, ... unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice, or if service of the notice of claim is made by service upon the secretary of state pursuant to section fifty-three of this article, that at least forty days have elapsed since the service of such notice, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

## 2. CPLR § 9802. Liability of villages in certain actions

Except as provided otherwise in this chapter no action shall be maintained against the village upon or arising out of a contract of the village unless the same shall be commenced within eighteen months after the cause of action therefor shall have accrued, nor unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued, and no other action shall be maintained against the village unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law. The omission to present a claim or to commence an action thereon within the respective periods of time above stated applicable to such claim, shall be a bar to any claim or action therefor against said village; but no action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the village clerk.

## 3. Extensions of time to file notices of claim are governed by GML § 50(e)(5) “Application for leave to serve a late notice”:

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation....

See also, Court of Claims Act § 10 (6), regarding extensions of time to serve notices of claim under that Act.

In appropriate cases, courts will grant leave to file a late notice of claim, *nunc pro tunc*.

However, a trial judge is not allowed to disregard a failure to file within the statute of limitations. An application to file a late notice of claim could not be made after the statute of limitations had run.

- Goldenberg v Westchester County Health Care Corp., 16 N.Y.3d 323, 328 (2011)
- Pierson v City of New York , 56 N.Y.2d 950, 954 (1982)

4. A Notice of Claim is also required for a counterclaim meeting the above criteria.

- Town of Philipstown v. Garrison Contr., Inc., 85 A.D.3d 1014 (2d Dept. 2011) (“The counterclaims asserted by the defendant required, as a condition precedent, a timely served notice of claim pursuant to General Municipal Law § 50-e”)
- County of Orange v. Grier, 30 A.D.3d 556 (2d Dept. 2006)

5. State notice-of-claim statutes apply to state law claims in federal court.

- Hardy v. New York City Health & Hosps. Corp., 164 F.3d 789, 793 (2d Cir. 1999)

- DeCarolis v. Town of Vienna, 322 Fed. Appx. 25, 26 (2d Cir. 2009)

However, notice-of-claim provisions do not apply to 42 U.S.C. §1983 actions for violation of constitutional rights under color of state law.

- Mahadeo v. N.Y. City Campaign Fin. Bd., 514 Fed. Appx. 53, 55 (2d Cir. N.Y. 2013)

6. Various cases stood for the proposition that notice of claim requirements do not apply to equitable actions, even if the complaint also sought money damages which were incidental to the requested injunctive relief.

- Stanton v. Town of Southold, 266 A.D. 2d 277 (2d Dept. 1999),
- Fontana v. Town of Hempstead, 18 A.D. 2d 1084 (2d Dept. 1963), *aff'd*, 13 N.Y. 2d 1134 (1964),
- Watts v. Town of Gardiner, 90 A.D. 2d 615 (3d Dept. 1982),
- Baumler v. Town of Newstead, 198 A.D. 2d 777 (4th Dept. 1993),
- Grant v. Town of Kirkland, 10 A.D. 2d 474 (4th Dept. 1960), “notice of claim in suits against municipalities need not be given where the action is brought in equity to restrain a continuing act.”

7. However, in Incorporated Vil. of Muttontown v Ryba, 121 A.D.3d 757, 759 (2d Dept. 2014), the Appellate Division held that the "notice of claim requirements in CPLR 9802 encompass causes of action for equitable relief", citing:

- Mendik v Incorporated Vil. of Lattintown, 76 A.D. 3d 616, 618 (2d Dept. 2010) (an action to recover damages for negligence, trespass, and nuisance)
- Greco v Incorporated Vil. of Freeport, 223 A.D. 2d 674 (2d Dept. 1996) (an action for an injunction and for breach of contract)

- Solow v Liebman, 175 A.D. 2d 867 (2d Dept. 1991).

8. The “no other action” phrase in the second clause of CPLR §9802 “permits no exceptions”.

- Solow v. Liebman, 175 A.D.2d 867 (2d Dept. 1991)

In Solow, the plaintiff sued his neighbor regarding a construction project, and later moved to add the Village of East Hampton as an additional defendant. The Second Department affirmed the denial of the motion to amend. Although the plaintiff argued that he requested only equitable relief, the court pointed out that the proposed amended complaint also “sought extensive monetary damages” and failed to allege service of a notice of claim on the Village.

The Solow opinion states that the “no other action” phrase in the second clause of CPLR §9802 “permits no exceptions”. *Id.* at 869. However, that second clause applies to actions not involving a contract. Cases “arising out of a contract” are already dealt with in the first clause of CPLR §9802, so arguably the “no other action” phrase adds nothing to a contract case.

9. The notice requirement of CPLR §9802 applies in actions by a municipal plaintiff against a municipal defendant.

- Nassau County v. Inc. Village of Roslyn, 182 A.D.2d 678 (2d Dept.), *app. dismissed*, 80 N.Y. 2d 972 (1992)

10. Claims at law for money damages based on a breach of contract that fell within the terms of CPLR §9802, not involving claims for equitable relief, require a notice of claim.

- Judski v. Village of Johnson City, 226 A.D.2d 862 (3d Dept. 1996),
- Ayvee Construction Co., Inc. v. Village of New Paltz, 78 A.D.2d 942 (3d Dept. 1980)

- Lupinski v. Village of Ilion, 59 A.D.2d 1050 (4th Dept. 1977)

11. Notices of Claim are not required in actions brought to vindicate a public interest rather than to enforce a private right.

- Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney, 89 N.Y. 2d 395, 400 (1996), (a prevailing wage enforcement proceeding)
- Union Free School Dist. No. 6 v. New York State Human Rights Appeal Bd., 35 N.Y. 2d 371, 380 (1974), *rearg. denied*, 36 N.Y. 2d 807 (1975) (a claim of disparate treatment brought by a pregnant teacher)
- Funderburke v. Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963 (Sup. Ct. Nassau Co. 1997), *aff'd*, 251 A.D. 2d 622 (2d Dept. 1998) (an action involving insurance coverage for domestic partners)
- Matter of Compass Group USA, Inc. v Deer Park Union Free School Dist., 2009 N.Y. Misc. LEXIS 6387, 11-12 (Sup. Ct., Suffolk Co. Dec. 16, 2009) (involved bidding for a public contract)

But see:

- 423 S. Salina St. v. Syracuse, 68 N.Y.2d 474, 493 (1986) (the public interest exception is for State agency enforcement proceedings, or for class action type proceedings normally involving a private Attorney-General type of action, not for an individual claim for damages)
- Picciano v. Nassau County Civil Serv. Comm'n, 290 A.D.2d 164, 169 (2d Dept. 2001) (The public interest exception did not apply where plaintiff sought eligibility only for himself, and damages only for his lost wages and benefits)

12. The “only legitimate purpose” of notice of claim statutes is “to protect a public corporation against stale or unwarranted claims and to enable it to investigate the facts surrounding the occurrence on which the claim is based.”

- Matter of Felice v. Eastport/South Manor Central School District, 50 A.D. 3d 138, 146 (2d Dept. 2008)

13. The test of a notice’s sufficiency is “whether it includes information sufficient to enable the [municipality] to investigate the claim.”

- Ramos v. NYC Transit Authority, 60 A.D. 3d 517, 519 (1st Dept. 2009) (GML § 50-e (6) authorized amendment of a timely served notice of claim for personal injuries to add a wrongful death claim.)

14. In cases involving a continuing wrong, where a plaintiff could file a notice of claim and bring a new action if the present action were dismissed, “[c]onsiderations of judicial economy interdict that course.”

- Salesian Soc. v. Ellenville, 41 N.Y. 2d 521, 526 (1977).

15. The filing of a notice of claim is not the filing of a pleading, and does not start the time for removal of the action to federal court.

- Alexander v. City of Syracuse, 454 Fed. Appx. 6, 8 (2d Cir. 2011)

## **50-H HEARING**

The municipality is entitled to an examination of the claimant under GML § 50-h:

Wherever a notice of claim is filed against a city, county, town, village, fire district, ambulance district or school district the city, county, town, village, fire district, ambulance district or school district shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, which examination shall be upon oral questions unless the parties otherwise stipulate and may include a physical examination of the claimant by a duly qualified physician. ...  
Exercise of the right to demand a physical examination of the claimant as

provided in this section shall in no way affect the right of a city, county, town, village, fire district, ambulance district or school district in a subsequent action brought upon the claim to demand a physical examination of the plaintiff pursuant to statute or court rule.

- A 50-h examination is in addition to all discovery available in an action.
- The 50-h examination may be conducted after the action is commenced. Alouette Fashions, Inc. v. Consolidated Edison Co., 119 A.D.2d 481, 485 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 787 (1987).

### **OTHER CLAIMS AGAINST A MUNICIPALITY: CPLR ARTICLE 78 – GROUNDS**

**(mandamus to compel; mandamus to review)**

1. Failure to perform a lawful duty
2. Action taken without jurisdiction
3. Determination made without following proper procedure
4. Determination is arbitrary and capricious, or an abuse of discretion
5. Determination after hearing unsupported by substantial evidence in the record

### **OTHER CLAIMS AGAINST A MUNICIPALITY: CONSTITUTIONAL RIGHTS: DUE PROCESS, EQUAL PROTECTION**

1. Facial challenges to legislation
2. Procedural Due Process Claims; Takings Claims
3. Class of One Equal Protection Claims

4. Civil Rights Claims: Potential liability includes award of attorney's fees

## **PERSONAL LIABILITY OF MUNICIPAL OFFICERS AND EMPLOYEES FOR CONSTITUTIONAL VIOLATIONS**

1. Absolute immunity

Legislators acting in legislative capacity

2. Qualified immunity

Conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known

3. Defense and indemnification of board members and employees

For loss and legal expense arising from discharge of official duties, except:

(a) acts not within the scope of employment,

(b) willful and wrongful act, and

(c) gross negligence

4. Potential conflicts of interest in dual representation of municipality and individual officer or employee, examples:

(a) acts of officer or employee that are beyond the scope of official duties,

(b) claims for punitive damages

5. Who is the client of a municipal attorney?

(a) Attorney client privilege extends only to clients

(b) Rule 1.13(a) of the NY Rules of Professional Conduct:

When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer of the organization and not for any of the constituents.

(c) Note, Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees

(d) Municipal Attorneys and their clients may also be subject to the standards of conduct set forth in Article 18 of the New York General Municipal Law Conflicts of Interest of Municipal Officers and Employees) , and in any applicable local municipal code of ethics.

## **ACCESS TO GOVERNMENT RECORDS: PUBLIC OFFICERS LAW ARTICLE 6: FREEDOM OF INFORMATION LAW (FOIL)**

1. Most government records are available for public inspection and copying

Personal email – public record?

2. Exemptions (mandatory – must withhold):

Records that are confidential under federal or state law

3. Exceptions (discretionary –may withhold)

- Unwarranted invasion of personal privacy
- Collective bargaining and contract negotiations
- Trade secrets (submitted by applicant)

- Internal communications and agency communications, except: (a) factual data, (b) staff instructions that affect public, (c) final policy determinations, and (d) outside audits