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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Filing for Benefits Under September 11th Victim Compensation Fund Results in Waiver of Right to Maintain Civil Action

VCF Legislation Provides Choice of Remedies: File a Claim or Bring an Action

As the website advises, "[t]he September 11th Victim Compensation Fund (VCF) is a federally funded program that was established to compensate for physical harm or death caused by the September 11, 2001, terrorist attacks, or the debris removal efforts in the immediate aftermath." The issue in *Brennan v. MacDonald*, 2025 N.Y. Slip Op. 03994 (2d Dep't July 2, 2025) was whether the plaintiff had waived the right to maintain a civil action after filing with the VCF.

The plaintiff was a Bay Constable for the Town of Hempstead who was sent to the World Trade Center on September 12, 2001 to act as a law enforcement officer. For two weeks he provided security and transported workers there. The defendant is the plaintiff's primary care physician, who the plaintiff alleges delayed in diagnosing and treating plaintiff's prostate cancer. The plaintiff commenced this medical malpractice action in January 2021 and within one to two months thereafter filed a claim with the VCF in connection with his prostate cancer.

After the note of issue was filed in the action and jury selection scheduled, the defendant moved for leave to amend his answer to include certain affirmative defenses and upon amendment to dismiss on the ground that the action was barred by the Air Transportation Safety and System Stabilization Act (the "Act"), which established the VCF. The defendant alleged that the Act provided that when the plaintiff filed through the VCF, he waived the right to bring this civil action. The trial court granted the defendant's motion and dismissed the complaint. The Second Department affirmed.

Initially, the Appellate Division acknowledged that the motion to amend was "made almost on the eve of trial"; that in such circumstance "judicial discretion should be exercised sparingly"; and that "[w]hile the defendant claims, in effect, that the plaintiff did not provide certain discovery relating to the VCF claim, this does not necessarily explain why the defendant was unaware of the possible waiver defense until the time of the motion, particularly where the plaintiff gave testimony at his July 2021 deposition to the effect that he had filed a VCF claim." *Id.* at *3.

Nevertheless, the court found there to be no prejudice to the plaintiff here, that no further discovery was necessary since the waiver defense was a defense at law, and that the plaintiff was not entitled to a "double recovery."

> That the defendant may have been slow in making this motion does not permit the plaintiff to obtain a double recovery in contravention of the waiver provision of the Air Stabilization Act. We find unavailing the plaintiff's contention that he was prejudiced by the defendant's delay, because the plaintiff could have chosen to withdraw his VCF claim had the waiver defense been raised earlier. As discussed below, a party waives the right to file a civil action upon the submission of a VCF claim, not upon a recovery under that claim. Also, it is noted that the plaintiff was represented by counsel both in relation to his VCF claim and in this action.

Id.

The plaintiff argued that while his VCF claim was based on a link between his prostate cancer and his work after September 11, this action was not related to the events of that day. Rather, his claims "are based on the defendant's failure to timely diagnose the plaintiff's prostate cancer, whatever its origin, resulting in the plaintiff requiring exceedingly more

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aggressive and consequential treatment." Moreover, he argued that even if there was a connection between his VCF payment and the claims here, the action should not be dismissed. Rather, his recovery in the action should be reduced by the VCF payment, pursuant to CPLR 4545.

In rejecting the plaintiff's arguments, the Second Department looked to a Second Circuit Court of Appeals decision in *Virgilio v. City of New York*, 407 F.3d 105, 109 (2d Cir. 2005). There, the Second Circuit noted that the Act provided, among other things, "an election of remedies — all claimants who filed with the [VCF] waived the right to sue for injuries resulting from the attacks except for collateral benefits." The Act was subsequently amended by the Aviation and Transportation Security Act, which contained the following waiver provision, in part: "Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, or for damages arising from or related to debris removal."

Significantly, the Second Circuit dispensed with the plaintiffs' argument that the waiver did not impact defendants' alleged tortious conduct, because the defendants' acts independently caused the plaintiffs' injuries. "[I]n fact, the injuries to plaintiffs and their loved ones resulted from a series of interrelated events that began with the terrorist attack. Even assuming independent, successive tortious acts by both the terrorists and defendants, as we must on this motion to dismiss, we are hard pressed to find plaintiffs' damages did not result — at least in part — from the terrorist attacks." *Id*. at 114.

The Second Department in *Brennan* referenced other federal court decisions and a New York State trial court decision that have similarly applied the waiver provision.

Thus, the court held that plaintiff waived his right to maintain this action by submitting a claim under the VCF:

> While the plaintiff seeks, in this action, to recover damages for injuries he allegedly sustained due to the defendant's malpractice in failing to timely diagnose the plaintiff's prostate cancer, the plaintiff's prostate cancer resulted, as evidenced by his filing of a VCF claim, from his work in and around the World Trade Center site in the aftermath of the attacks on September 11, 2001.

Id. at *3.

The court pointed to a VCF personal injury claim document checklist submitted by the defendant which provides that "[i]f the victim, a representative of the victim, a dependent, spouse, or beneficiary participated in any lawsuit related to September 11th or an eligible condition, you must provide documents showing the lawsuit was withdrawn, settled, or dismissed." Moreover, the VCF website states that (i) "[a] lawsuit against a product manufacturer for product liability, or against a doctor for medical malpractice, is based on the legal theory that it was the product or the doctor that caused, contributed to, or exacerbated the 9/11-related condition. These types of lawsuits fall within the terms of the lawsuit waiver set out in the statute under which the VCF operates."; and (ii) "[t]his means that in order to be eligible for compensation, when you file your VCF claim, you must waive your right to participate in these types of lawsuits. . .".

Thus, when considering the plain language of the VCF legislation, a plaintiff has a choice: pursue a claim under the VCF or bring a civil action. He cannot choose both.

Second Department Holds Adult Survivors Act Applies Where Prior Action Dismissed for Lack of Personal Jurisdiction

Court Sees Nothing in Language or Legislative History of CPLR 214-j Supporting a Contrary Conclusion

As part of the 2022 enactment of the "Adult Survivors Act" (ASA), CPLR 214-j was added. It revived otherwise time-barred actions in favor of persons who were 18 years or older when they were sexually abused. The revival includes the filing of a notice of a claim or a notice of intention to file a claim as a condition precedent to the commencement of an action. CPLR 214-j further provides that, "[i]n any such claim or action, dismissal of a previous action, ordered before the effective date of this section, on grounds that such previous action was time barred, and/or for failure of a party to file a notice of claim or a notice of intention to file a claim, shall not be grounds for dismissal of a revival action pursuant to this section."

In *Esposito v. Isaac*, 2025 N.Y. Slip Op. 04231 (2d Dep't July 23, 2025), the plaintiff brought a timely action under the ASA arising out of alleged sexual assault committed against her in 2005. She had previously sued the defendant in 2006 based on the same conduct, which action was dismissed for lack of personal jurisdiction. The defendant moved to dismiss the current action on the ground that the ASA did not revive causes of actions previously dismissed for lack of personal jurisdiction. The trial court granted the motion.

The Second Department reversed. The court acknowledged that "[s]pecial laws that revive causes of action are extreme example[s] of legislative power and are narrowly construed." *Id*. at *2 (citations omitted). However, even so limited, CPLR 214-j does not prohibit the revival of plaintiff's causes of action here. The statute uses the expansive phrase "every civil claim or cause of action," which "imports no limitation and evidences the Legislature's intent for revival to apply to all claims and causes of action that would otherwise be barred on statute of limitations grounds (citations omitted)." *Id.*

The court dismissed the defendant's argument that because the statute expressly references the revival of actions dismissed for the failure to file a notice of claim or a notice of intention, it evidenced that the Legislature intended to exclude from revival any other previously dismissed actions:

> Had the Legislature intended for such a blanket exclusion to apply, it would have stated so with its words. Of course, "[w]here the legislature has addressed a subject and provided specific exceptions to a general rule . . .

> the maxim *expressio unius est exlusio alterius* applies." Here, however, the statute's language expressly permitting revival of such previously-dismissed causes of actions does not create a proviso or exception to the general rule allowing for revival of "every" claim or action that would otherwise be barred on statute of limitations grounds (citations omitted).

Id.

Moreover, the Second Department insisted that permitting the revival of plaintiff's claims was consistent with the ASA's legislative intent:

> The Legislature intended for the ASA to greatly expand a victim's ability to seek redress against his or her abusers in court. The Sponsor's Memorandum explained that the ASA, as well as the Child Victims Act (CPLR 214-g), "were predicated on the widespread recognition that New York's existing statutes of limitations were insufficient in giving survivors of these heinous crimes enough time to pursue justice through criminal charges or filing a civil lawsuit. . . . Those who have had justice denied them as a result of New York's formerly insufficient statutes of limitations should be given the opportunity to seek civil redress against their abuser or their abuser's enablers in a court of law." During the Assembly Debate, the Assembly Sponsor of the ASA explained the decision to reopen the statute of limitations was because "the statute of limitations was short [and victims] deserve the right to go back to court to seek justice." Thus, by allowing revival of the plaintiff's causes of action under CPLR 214-j, the plaintiff may once again seek civil redress for her injuries in a court of law without the hindrance of the "insufficient" limitations period previously provided by CPLR 215(3) (citations omitted).

Id. at *2–3.

The court rejected a distinction between those who previously did not file an action (for fear of doing so, for example) or could not (perhaps because of suppressed memories) and those who were previously able to and did bring a prior action that was dismissed, and which "could not be recommenced solely because such action would be time-barred." That conclusion "would improperly exclude the plaintiff from the ambit of CPLR 214-j based on an artificial distinction unsupported by either the plain language of the statute or its legislative purpose (citation omitted)." *Id.* at *3.

Court Finds Lack of Subject Matter Jurisdiction of Court of Claims . . . Twice

Once for Claims Against Individuals; the Other for Failing Properly to Serve the Attorney General

As we have noted in the past, New York State can only be sued for damages in the Court of Claims. Conversely, the Court of Claims jurisdiction is limited to claims "against the State itself, or actions naming State agencies or officials as defendants, where the action is, in reality, one against the State — i.e., where the State is the real party in interest." *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300 (1987). In addition, "actions against State officers acting in their official capacity in the exercise of governmental functions are deemed to be, in essence, claims against the State and, therefore, suable only in the Court of Claims." *Id.* However, the court lacks jurisdiction over claims against individual persons, who do not fall into the latter category. Thus, in *Cappetta v. State of New York*, 2025 N.Y. Slip Op. 04207 (3d Dep't July 17, 2025), the Third Department dismissed claims against the individual defendants (and against a college, various agencies and the District Attorney) for lack of subject matter jurisdiction.

In addition, the court held that with respect to the remaining defendants, the claim was improperly served. As we noted in the June 2025 edition of the *Law Digest*, in order properly to commence an action in the Court of Claims, service upon the Attorney General must be effected. That service must be done personally or by certified mail, *return receipt requested*. In *Cappetta*, while the mailing envelope indicated the use of certified mail, there was no evidence that a return receipt was requested. Thus, "the manner of service did not strictly comply with the statutory requirements," divesting the court of subject matter jurisdiction.

The court rejected the claimant's argument that because the State had received actual notice of the claim, dismissal should not eventuate because " 'notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court,' (citation omitted). . .". *Id.* at *2.

Second Department Holds That Personal Delivery of Initiating Pleadings to Assistant Superintendent for Curriculum & Instruction Qualified as Delivery to "School Officer"

Finds Duties Related to Defendant's Administration of Affairs

CPLR 311(a)(7) provides that personal service on a school district is made "to a school officer, as defined in the education law." The question in *Aideyan v. Mount Vernon City Sch. Dist.,* 2025 N.Y. Slip Op. 03787 (2d Dep't June 25, 2025) was whether personal delivery of the summons and complaint to an "Assistant Superintendent for Curriculum & Instruction" (Doggett) qualified as delivery to a "school officer." The Second Department concluded that it did.

The defendant argued that Doggett was not an authorized agent to accept service of process. An affidavit from Doggett represented that he was hired as Assistant Superintendent for Curriculum & Instruction, he was not the defendant's officer, and was not elected or appointed to his position. Furthermore, he never represented to the process server that he was authorized to accept service on behalf of the defendant.

The Second Department noted that no appellate court in New York had yet to determine whether an assistant superintendent of a school district can be considered a school officer. However, several New York federal district courts have concluded that it can under Education Law § 2(13), and at least one district court has held that an assistant superintendent is a school officer in the context of service of process.

The reference in CPLR 311(a)(7) to the Education Law implicates § 2(13), which defines a "school officer" as:

> a clerk, collector, or treasurer of any school district; a trustee; a member of a board of education or other body in control of the schools by whatever name known in a union free school district, central school district, central high school district, or in a city school district; a superintendent of schools; a district superintendent; a supervisor of attendance or attendance officer; or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system.

The court focused on the latter phrase, "or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system." It maintained that by that phrase the Legislature clearly meant to include individuals who did not have the titles referenced earlier in the statute. The court acknowledged that not every employee or representative appointed by a school district was a "school officer" under the statute. However, the court concluded that "Doggett is clearly an officer of the defendant whose duties generally relate to the defendant's administration of affairs, particularly, as indicated by the record, the support of teachers and school leaders in ensuring teaching and learning opportunities meet the needs of the defendant's diverse student population." *Id.* at *3.

Moreover, "[a]n assistant superintendent, such as Doggett, directly carries out duties that typically would be carried out by the superintendent. These duties fit closely with the statutory definition of 'school officer' as contemplated by Education Law § 2(13)." *Id.*

The court rejected the defendant's argument that because Doggett was a "mere employee" he could not be a school officer under the relevant statute, since the "two are not mutually exclusive" and the Education Law

> contemplates the dual nature of individuals such as Doggett, providing that "[a]ssociate superintendents and all other employees authorized by section twenty-five hundred three of this article . . . shall be appointed by the board of education, provided, however, that the board of education may enter into an employment contract with an associate, assistant, or other superintendent of school for a period of one to five years."

Id. at *4.

Continuing Uncertainty Regarding Summary Judgment Motion Deadline

While Court Ultimately Holds Motion to be Timely, Lack of Clarity Continues to Abound

We have expressed our concerns with the application of the summary judgment motion deadline. In *Brill v. City of New York*, 2 N.Y.3d 648 (2004) the Court of Appeals stressed that deadlines must be adhered to and, if a litigant fails to move for summary judgment motion within the 30-, 60-, 90-, or 120-day deadline, it will be denied, unless good cause is shown for the delay. A meritorious motion is not an excuse; neither is a lack of prejudice.

In the past, we have dealt with instances in particular counties where a note of issue is filed prematurely and a motion to vacate the note of issue is generally not granted. Or a county where the parties are required to file the note of issue before discovery is complete.

Here, we deal with a more elementary issue: confusion as to the applicable period to file the motion. Note that summary judgment deadlines can be found in numerous locations, including preliminary conference and compliance conference orders, the part rules of individual justices, and local and judicial district rules. Moreover, the deadlines can change from time to time. For example, in *Crawford v. Liz Claiborne, Inc.*, 11 N.Y.3d 810, 812–13 (2008), a preliminary conference order issued by the trial judge directed that dispositive motions be made "per local rule," which deadline was 60 days. At that time, the trial judge's rules did not address the summary judgment deadline. Subsequently, but before the filing of the note of issue, the local rule increased the deadline to 120 days, but about the same time the trial judge adopted a 60-day rule. The Court of Appeals held that "defendants' motion for summary judgment, made 62 days after the filing of the note of issue, was timely and that *Brill* was inapplicable to this case. At the time the PCO was entered, the IAS Judge had no individual part rule; thus, 'per local rule' could only have referred to the Local Rules of Supreme Court, New York County. In that the 120-day amended Local Rule was in effect at the time the note of issue was filed, defendants' motion was actually timely."

More recently, in *Goldstein v. Berenbaum*, 2025 N.Y. Slip Op. 04216 (1st Dep't July 17, 2025), a March 19, 2019 preliminary conference order set the summary judgment deadline as 60 days from the filing of the note of issue. Subsequently, a "September 10, 2020 notice filed by Supreme Court . . . superseded the time limits contained in the March 19, 2019 preliminary conference order," and increased the deadline to 90 days following the filing of the note of issue. In finding the defendants' motion to be timely, the First Department noted that "this enlargement of time fortuitously coincided with the part rules in place when the action was reassigned to Justice King in 2022 and when those rules were circulated to the parties on March 21, 2023, at least four months prior to service of the motion." *Id.* at *1.

It is simply unacceptable that a practitioner does not know with certainty early on in an action a critical deadline like the one to make a summary judgment motion. In the case above, the deadline was increased from 60 to 90 days, and the case reassigned. How about a circumstance where the deadline "somehow" is reduced, perhaps from 60 to 30 days? And if there is outstanding discovery . . . do not get me started!

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