

10-1-1956

Civil Procedure And Evidence—Municipal Corporations—Notice of Claim

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Recommended Citation

Richard F. Griffin, *Civil Procedure And Evidence—Municipal Corporations—Notice of Claim*, 6 Buff. L. Rev. 27 (1956).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol6/iss1/7>

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case the state would benefit from the collection of damages and state funds expended would be repaid.

Further, when this action was originally brought the Statute of Limitations in Pennsylvania had expired. The widow then had a choice of forum in three states: New York,⁹ Ohio¹⁰ and Michigan.¹¹ The plaintiff chose to sue in New York, which assumed jurisdiction; but by the time of remand to the Appellate Division the Ohio and Michigan Statutes of Limitations had run. The Appellate Division's subsequent dismissal¹² left plaintiff without a forum and precluded her from bringing any further action.

While the subsequent exercise of discretion by the Appellate Division may seem harsh because of the plaintiff's present lack of forum, it cannot be said that the Appellate Division abused its discretion in view of the fact that the state's interest, in the instant case, and under its particular facts, was administrative only.

Municipal Corporations—Notice of Claim

Where it is a condition precedent to the bringing of a tort action against a municipality that a prior notice of claim be made, such notice must be given within 90 days after the claim arises.¹³ However, where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a timely notice, the court in its discretion may grant leave to serve the notice of claim within a reasonable time after the expiration of the 90 day period if application is made within one year after the claim arises.¹⁴

Leave to file a late notice has been granted where claimant's affidavit disclosed a physical and mental incapacity during the statutory period;¹⁵ but when claimant's papers do not show that application was within a reasonable time after the

9. N. Y. DECEDENT ESTATE LAW §130 . . . Administrator duly appointed in this state, . . . of a decedent who has left him . . . surviving a wife or next of kin, may maintain an action to recover damages for . . . neglect . . . by which the decedent's death was caused, against a . . . corporation which, would have been liable to an action in favor of decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after decedent's death.

10. OHIO GENERAL CODE §10509 - 167.

11. MICHIGAN STATUTES ANNOTATED §27.711; *Summar v. Besser Mfg. Co.*, 310 Mich. 347, 17 N.W. 2d 209 (1945).

12. See Note 6 *supra*.

13. N. Y. GENERAL MUNICIPAL LAW §50(E)(1).

14. *Id.*, §50(E)(5).

15. *Sullivan v. City of Watervliet*, 282 App. Div. 1097, 126 N.Y.S. 2d 438 (3rd Dep't 1953).

expiration of 90 days, the court may not exercise its discretion and permit a late filing.¹⁶

In *Rosenberg v. City of New York*¹⁷ the plaintiff and her two infant children were seriously injured in a collision on July 3, 1954. On November 16, 1954, 105 days after the claim arose, plaintiff applied on behalf of herself and children for leave to file a notice of claim against the City of New York.¹⁸ Plaintiff's papers stated that she was hospitalized for 77 days, was under the influence of drugs during much of the 105 days prior to her application, and was unable to perform normal tasks during this time.

The Appellate Division¹⁹ reversing in part a decision of Special Term denying all three applications, allowed late filing of the notice on behalf of the infants but refused to allow plaintiff leave to file a late notice on the ground "that the appellant or someone on her behalf was capable of executing a notice within the statutory period."

The Court of Appeals reversed that part of the Appellate Division's decision which denied leave to plaintiff. The Court reasoned that the Appellate Division's theory must have been that plaintiff was not incapacitated because her husband could have filed a notice of claim for her. In holding this theory erroneous, the court decided that an element of incapacity is not the absence of someone who is capable of filing on claimant's behalf, for courts ought not engage in such speculation.

One wonders, however, whether the Appellate Division's language in denying the plaintiff's application indicated that the decision was reached solely because plaintiff's husband could have filed a notice on her behalf. In any event, the decision in the *Rosenberg* case should settle the uncertainty in this area caused by recent decisions.²⁰

16. *Murray v. City of Watervliet*, 280 App. Div. 1012, 116 N.Y.S. 2d 76 (3d Dep't 1952).

17. 309 N.Y. 304, 130 N.E. 2d 629 (1955).

18. New York City requires a notice of claim to be filed before an action can be commenced against the city. ADMINISTRATIVE CODE OF CITY OF NEW YORK §394 (A - D).

19. 285 App. Div. 1085, 140 N.Y.S. 2d 140 (2d Dep't 1955).

20. *Halloran v. Board of Education of City of New York*, 271 App. Div. 830, 65 N.Y.S. 2d 569 (2d Dep't 1946); *Axell v. City of New York*, 109 N.Y.S. 2d 406 (1951); *Haas v. Village of Cedarhurst*, 272 App. Div. 1031, 74 N.Y.S. 2d 72 (2d Dep't 1947).