Queens County Bar Association

CPLR Update 2023

April 20, 2023

5:30 p.m. – 8:00 p.m.

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and

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We have been too long cowed by the Civil Practice Act, by a monster of complexity created by us and for us, so that no one dares-except on an ad hoc basis-reexamine this creature that controls so much of what we do. Pg. 308

This is a subject on which only we lawyers and judges can and should speak with authority. For, if we have any special competence and responsibility, surely it is in the procedures by which litigation is handled, the practice under which our judicial system vindicates the substantive rights of all the people of the state. Pg. 309

Jack B. Weinstein, Revision of New York Civil Practice, New York State Bar Bulletin, 30 N.Y. St. B. Bull. 298 1958

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Author/Presenter Biographies

Katryna L. Kristoferson

KATRYNA L. KRISTOFERSON (katryna@dphpllc.law) and David have worked together since she began her legal career at McNamara & Horowitz, LLP and now at the Law Offices of David Paul Horowitz, PLLC, where she is the managing attorney. She has extensive litigation experience in contract disputes, premises liability, construction law claims, personal injury claims involving construction accidents, slip and falls, motor vehicle accidents, and claims involving elevators and escalators. Katryna has extensive experience drafting and arguing summary judgment motions, and is skilled in all facets of motion and alternative dispute resolution practice. She has written numerous appeals, argued successfully in the Appellate Division, First Department, drafts and reviews contracts, and provides clients with in-depth analysis and solutions to existing and potential issues. Katryna has earned the trust and confidence of the Firm's clients, ranging from individual litigants to major corporations. Katryna has authored CLE programs, lectured at annual CPLR Update programs to lawyers at the New York County Lawyers Association, Defense Association of New York, and the Queens County Bar Association and on the legal impact of Implicit Bias for the New York County Lawyers Association and the Defense Association of New York. She is obtaining her certification from OCA as a Part 137 Fee Dispute Arbitrator, and will be working towards being certified as a Part 146 mediator.

David Paul Horowitz

DAVID PAUL HOROWITZ (david@dphpllc.law) formed the Law Offices of David Paul Horowitz, PLLC, in New York City and has represented parties in personal injury, professional negligence, and commercial litigation for over thirty years. In addition to his litigation practice, David acts as a private arbitrator and mediator, as a discovery referee appointed by courts to oversee pre-trial proceedings, and has been a member of the Eastern District of New York's mediation panel since its inception. He drafts legal ethics opinions, represents judges in proceedings before the New York State Commission on Judicial Conduct, attorneys in disciplinary matters, and serves as a private law practice mentor. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), the most recent supplement to *Fisch on New York Evidence*, and since 2004 has authored the monthly column *Burden of Proof*, first in the NYSBA *Journal* (2004-2018) and since October 2018 in *The New York Law Journal*. David teaches New York Practice, Professional Responsibility, and Electronic Evidence & Discovery at Columbia Law School. He lectures statewide for the New York State Judicial Institute to judges, law secretaries, and referees, and is approved by the Office of Court Administration to conduct Part 146 Advanced Personal Injury Mediation Training, and has conducted that training for OCA. He is also certified by OCA as a Part 36 Guardian, Court Evaluator, and AIP; and Part 137 Fee Dispute Arbitrator. He serves as an expert witness in legal malpractice, ethics, and legal fee dispute litigation, and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

5:30 pm – 5:35 pm Program/Speaker Introduction

5:35 pm – 5:50 pm New Rules & Statutes For Civil Practice

5:50 pm – 6:05 pm Pre-Commencement Issues

6:05 pm – 6:20 pm Commencement Issues

6:20 pm – 6:30 pm Common Mistakes

6:30 pm – 6:40 pm Break

6:40 pm – 7:00 pm Disclosure

7:00 pm – 7:15 pm Motion Practice

7:15 pm – 7:30 pm Summary Judgment & Experts Summary Judgment

7:30 pm – 8:00 pm TBD & Q&A

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2022 Update

I. The "New" Rules for Supreme & County Courts

A. Overview

1. Changes to Court Rules, Effective June 13, 2022

Effective June 13, 2022, by AO/141/22, the Chief Administrative Judge amended the Uniform Civil Rules for the Supreme Court and the County Court and the rules governing matrimonial actions.

By the Administrative Order, the following Rules were amended:

Exhibit A:	Section 202.5(a)(2) Papers filed in court
	Section 202.8-b Length of Papers.
	Section 202.8-g Motions for Summary Judgment; Statements of Material Facts.
	Section 202.20 Interrogatories.
	Section 202.20-a(b) Privilege Logs.
	Section 202.20-c(c) Requests for Documents.
	Section 202.20-h Pre-Trial Memoranda, Exhibit Book, and Requests for Jury Instructions.
	Section 202.20-i Direct Testimony by Affidavit.
	Section 202.20-j Parties and non-parties should adhere to the Electronically Stored Information ("ESI") guidelines set forth in Appendix hereto.
	Section 202.26(c) Settlement and Pretrial Conferences.
	Section 202.34 Pre-Marking of Exhibits.
	Section 202.37 Scheduling Witnesses.

Exhibit B:	Section 202.16 Matrimonial actions; calendar control of financial disclosure in actions and proceedings involving alimony, maintenance, child support and equitable distribution; motions for alimony, counsel fees pendente lite, and child support; special rules.
	Section 202.16-b Submission of Written Applications in Contested Matrimonial Actions.

2. Additional Amendments to Court Rules

(i) **Rule 6, Rules of Practice for Commercial Division**

Effective September 12, 2022, a new subdivision (d) was added to Rule 6. It provides:

(d) Interlineation of Responsive Pleadings (1) For every responsive pleading, the party preparing the responsive pleading shall interlineate each allegation of the pleading to which it is responding with the party's response to that allegation, and in doing so, shall preserve the content and numbering of the allegation. (2) The party who prepared a pleading to which a responsive pleading is required shall, upon request, promptly provide a copy of its pleading in the same word processing software application in which the pleading was prepared to the party preparing the responsive pleading. This rule applies to D's answer to the complaint, P's reply to a counterclaim, co-D's answer to a cross-claim when answer is demanded, and a third-party D's answer. Interlineation is defined as "the act of writing something between the lines of an earlier writing." (Black's Law Dictionary [11th ed.]). As noted in Siegel & Connors, NY Practice (6th ed) §12A (Jan. 2023 Supp.): "The aim of the amendment is to, for example, permit the parties and the court to read the answer as a single document without having to refer back to the complaint to ascertain the allegations being addressed."

To stay up to date on additional changes to Court Rules, *see* https://ww2.nycourts.gov/rules/amendments.shtml

B. Amendments To The CPLR

(i) **CPLR 214-j CPLR 214-j – Adult Survivors Act**

Provision was enacted effective May 24, 2022. L. 2022, c. 203, §1. It revives claims for adult survivors of sexual abuse, *i.e.*, those who were 18 or over at the time they were abused:

> *Notwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a notice of*

> *claim or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against such person who was eighteen years of age or older, or incest as defined in section 255.26 or 255.27 of the penal law committed against such person who was eighteen years of age or older, which is barred as of the effective date of this section because the applicable period of limitation has expired, and/or the plaintiff previously failed to file a notice of claim or a notice of intention to file a claim,* ***is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than one year and six months after the effective date of this section.*** *In 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.*

(emphasis added)

(ii) **CPLR 321(d) – Limited Scope Appearance**

L. 2022, ch. 710 amended CPLR 321 to add a new subdivision (d), effective on December 16, 2022. It provides:

"(d) Limited scope appearance. 1. An attorney may appear on behalf of a party in a civil action or proceeding for limited purposes. Whenever an attorney appears for limited purposes, a notice of limited scope appearance shall be filed in addition to any self-represented appearance that the party may have already filed with the court. The notice of limited scope appearance shall be signed by the attorney entering the limited scope appearance and shall define the purposes for which the attorney is appearing. Upon such filing, and unless otherwise directed by the court, the attorney shall be entitled to appear for the defined purposes.

2. Unless otherwise directed by the court upon a finding of extraordinary circumstances and for good cause shown, upon completion of the purposes for which the attorney has filed a limited scope appearance, the attorney shall file a notice of completion of limited scope appearance which shall constitute the attorney's withdrawal from the action or proceeding."

This new provision is thoughtfully discussed in Connors, "New CPLR 321(d)", NYLJ, March 23, 2023, p.3, col. 3.

(iii) **CPLR 325(d) (I)(A)(2) – Removal**

Uniform Trial rule 202.26 that addresses transfers down under CPLR 325(c) and (d). It was amended by deleting the rule's former subdivision (g), effective February 23, 2021. As a result, there are no time restrictions governing transfers down.

(iv) **CPLR 3012(a) – Summons With Notice**

L.2021, chapter 593, effective May 7, 2022, amended CPLR 3012(a) to preclude the use of a summons with notice to commence an action arising out of a consumer credit transaction.

(v) **CPLR 3215 (j)**

Subdivision (j) was added by L. 2021, ch. 593, §11, eff, May 22, 2022. It provides:

(j) Affidavit**.** A request for a default judgment entered by the clerk, must be accompanied by an affidavit by the plaintiff or plaintiff's attorney stating that after reasonable inquiry, he or she has reason to believe that the statute of limitations has not expired. The chief administrative judge shall issue form affidavits to satisfy the requirements of this subdivision for consumer credit transactions.

C. Civil Court Act

(i) **Jurisdictional limit of New York City Civil Court increased to $50,000**

b. The court of city-wide civil jurisdiction of the city of New York shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such court in the manner provided by law: actions and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of mechanics liens and liens on personal property where the amount sought to be recovered or the value of the property does not exceed fifty thousand dollars exclusive of interest and costs, or such smaller amount as may be fixed by law; over summary proceedings to recover possession of real property and to remove tenants therefrom and over such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law. The court of city-wide civil jurisdiction shall further exercise such equity jurisdiction as may be provided by law and its jurisdiction to enter judgment upon a counterclaim for the recovery of money only shall be unlimited.

NY CLS Const Art VI, § 15 An amendment to subdivision b. of this section was adopted a first time in 2019 (A 7714), a second time in 2021 (S 514), and was passed by the electorate at the general election held in November, 2021.

Amendment Notes

The 2021 amendment substituted “fifty thousand dollars” for “twenty-five thousand dollars” in b.

(ii) **Jurisdictional Limit of the NYC Small Claims Court Increased to $10,000**

The Small Claims Court has monetary jurisdiction up to $10,000.00. Claims for more than $10,000.00 may not be brought in Small Claims Court. They must be started in the Civil Part of the court or in a different court. A claim for damages for more than $10,000.00 cannot be "split" into two or more claims to meet the $10,000.00 limit (that is, bringing one $10,000.00 claim and another $1,500.00 claim to recover damages for $11,500.00).

See https://www.nycourts.gov/courts/nyc/smallclaims/general.shtml

D. Other Statutory Amendments

(i) **Business Corporation Law (BCL) §304, as amended by L. 2021, Ch.56, §1, part KK, §§1,1-b**

Laws 2021, ch 56, § 1 (Part KK), eff January 1, 2023, provides:

§ 1. **Electronic service of process authorized by the provisions of this act is an optional program. Any corporation, association, limited liability company, or partnership will continue to receive service of process by mail unless such corporation, association, limited liability company, or partnership makes an affirmative choice to receive service of process through electronic means.** The department of state’s division of corporations, state records and uniform commercial code shall conspicuously display on their website a description of each available method of submitting a copy of process to the department of state along with the disclosure that using any such method of submission will not result in any extra cost to the consumer.

Laws 2021, ch 56, § 54 (Part KK), eff January 1, 2023, provides: § 54. This act shall take effect January 1, 2023.

Amendment Notes

The 2021 amendment by ch 56, § 1-a (Part KK), rewrote (d), which formerly read: “Any designated post-office address to which the secretary of state shall mail a copy of process served upon him as agent of a domestic corporation or a foreign corporation, shall continue until the filing of a certificate under this chapter directing the mailing to a different post-office address.”

(Business Corporation Law § 304 (Consol., Lexis Advance through 2023 released Chapter 1-49, 61-121)).

II. Pre-Commencement Issues

A. Notice Of Claim

(i) **Lack of nexus between infancy and failure to timely file notice of claim leads to reversal of grant to file late notice; of other factors, only lack of substantial prejudice favored granting the application**

Antoinette C. v. County of Erie, 202 AD3d 1464 (4th Dept 2022)

Decided February 4, 2022

***

Memorandum: In mid-November 2018, claimants' son, who was then eight years old, was a passenger in a vehicle operated by a family member when the driver lost control on a road maintained by respondent County of Erie (County) and crashed into a tree. The son sustained physical and psychological injuries as a result of the accident. In early September 2020, claimants sought leave, pursuant to General Municipal Law § 50-e (5), to serve a late notice of claim alleging, inter alia, that the accident and the son's injuries were caused by the County's negligence in failing to properly maintain and treat the road, which resulted in a dangerous accumulation of snow and ice. The County appeals from that part of an order that granted claimants' application for leave to serve a late notice of claim on the County. We agree with the County that Supreme Court abused its discretion in granting that part of the application (*see generally Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013]). We therefore reverse the order insofar as appealed from and deny the application in its entirety.

"Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation . . . must serve a notice of claim on the prospective [respondent] 'within ninety days after the claim arises' " (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "General Municipal Law § 50-e (5) permits a court, in its discretion, to [grant leave] extend[ing] the time for a [claimant] to serve a notice of claim" (*id.* at 460-461; *see Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020]). "The decision whether to grant such leave 'compels consideration of all relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5)" (*Dalton*, 107 AD3d at 1518, quoting *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [public corporation] acquired actual knowledge of the

essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [public corporation] in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). " '[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative' . . . , and '[t]he court is vested with broad discretion to grant or deny the application' " (*Dalton*, 107 AD3d at 1518). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*id.* [internal quotation marks omitted]).

Initially, we agree with the County that, contrary to claimants' assertion, " '[i]t is well settled that an extension of the statutory period within which to serve a notice of claim will not automatically be granted merely because the claimant is an infant' " (*Matter of Mahan v Board of Educ. of Syracuse City School Dist.*, 269 AD2d 834, 834 [4th Dept 2000]; *see generally Harris v City of New York*, 297 AD2d 473, 475 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]; *Matter of Meredithe C. v Carmel Cent. School Dist.*, 192 AD2d 952, 953 [3d Dept 1993]). ***Rather, in determining whether to grant an extension, the court must consider the claimant's infancy as a factor*** (*see* General Municipal Law § 50-e [5]; *Williams*, 6 NY3d at 537-538; *Mahan*, 269 AD2d at 834). ***In that regard, although the absence of a causal nexus between a claimant's infancy and the delay in serving a notice of claim is not fatal to an application for an extension, "[a] delay of service caused by infancy would make a more compelling argument to justify an extension," whereas "the lack of a causative nexus may make the delay less excusable"*** (*Williams*, 6 NY3d at 538).

Here, claimants did not demonstrate any nexus between the son's infancy and the delay in service of a notice of claim (*see id.* at 537-538; *Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601, 1602 [4th Dept 2016]; *Rose v Rochester Hous. Auth.*, 52 AD3d 1268, 1269 [4th Dept 2008]). ***The record demonstrates that, despite the son's infancy, claimants were immediately aware of the accident and were aware of the son's injuries, both physical and psychological, within 90 days after the accident and certainly well before they sought leave to serve a late notice of claim. There is no evidence in the record that the lengthy delay in serving a notice of claim was attributable to any difficulty in discovering or diagnosing the son's injuries due to his infancy*** (*see Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 979-980 [4th Dept 2020]; *Matter of Lamprecht v Eastport-South Manor Cent. Sch. Dist.*, 129 AD3d 1084, 1085 [2d Dept 2015]; *Matter of Scala v Westchester County Med. Ctr.*, 233 AD2d 514, 514 [2d Dept 1996]).

We further agree with the County that, as the court properly determined, claimants' other offered justifications for the delay do not constitute reasonable excuses. First, "where, as here, a parent alleges that he or she was consumed with the infant's medical care and unable to serve a timely notice of claim, it does not constitute a reasonable excuse unless it is supported by evidence demonstrating that the delay was directly attributable to the infant's medical condition" (*Matter of Ramos v Board of Educ.*

of the City of N.Y., 148 AD3d 909, 911 [2d Dept 2017]; *see Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 [1st Dept 2006]; *Matter of Drozdzal v Rensselaer City School Dist.*, 277 AD2d 645, 646 [3d Dept 2000]; *see generally Matter of Kliment v City of Syracuse*, 294 AD2d 944, 945 [4th Dept 2002]). In this case, claimants' submissions, including the son's medical records, failed to substantiate their assertion that the son required such extraordinary care that they were unable to serve a timely notice of claim (*see Ramos*, 148 AD3d at 912; *Nieves*, 34 AD3d at 337; *Drozdzal*, 277 AD2d at 646; *cf. Matter of Quick v New York City Health & Hosps. Corp.*, 106 AD3d 493, 494 [1st Dept 2013]). Second, it is well settled that ignorance of the notice of claim requirement does not provide a sufficient excuse for the failure to serve a timely notice of claim, and we thus conclude that claimants' further assertion that they were "unaware of the notice of claim requirement . . . did not establish a reasonable excuse for their delay" (*Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]; *see Matter of Borrelli v County of Erie*, 196 AD3d 1059, 1060 [4th Dept 2021]; *Ficek*, 144 AD3d at 1602).

We also agree with the County that claimants failed to demonstrate that the County acquired actual knowledge of the essential facts constituting the claim within the 90-day period following the accident or within a reasonable time thereafter. We note that "[i]t is well settled that actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim" (*Ficek*, 144 AD3d at 1603; *see Turlington*, 143 AD3d at 1248). Moreover, " '[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)' . . . , and the claimant has the burden of demonstrating that the respondent had actual timely knowledge" (*Turlington*, 143 AD3d at 1248).

Here, claimants repeatedly conceded before the court that the County did not receive timely actual knowledge. By conceding that factor, claimants waived any contention that the County acquired timely actual knowledge (*see generally Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246 [4th Dept 2012]; *Matter of Allstate Ins. Co. v Ramirez*, 208 AD2d 828, 830 [2d Dept 1994]), and thus their assertion on appeal that a deputy sheriff's accident report provided the County with actual knowledge is not properly before us (*see generally Leonard v Motor Veh. Acc. Indem. Corp.*, 175 AD3d 1795, 1796 [4th Dept 2019]; *Matter of Polanco v New York City Hous. Auth.*, 39 AD3d 320, 321 [1st Dept 2007]; *Santiago v City of New York*, 294 AD2d 483, 484 [2d Dept 2002]).

In any event, we agree with the County that the accident report did not provide it with the requisite actual knowledge. Preliminarily, the fact that the County Sheriff's Office " 'had knowledge of this incident, without more,' " does not constitute actual knowledge of the claim against the County (*Brown*, 100 AD3d at 1441; *see generally Caselli v City of New York*, 105 AD2d 251, 255-256 [2d Dept 1984]; *Williams v Town of Irondequoit*, 59 AD2d 1049, 1050 [4th Dept 1977]). Moreover, even if the deputy sheriff's knowledge was imputed to the County itself, " 'for a [police] report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially

actionable wrong had been committed by the public corporation' " (*Brown*, 100 AD3d at 1440; *see Caselli*, 105 AD2d at 257-258), and here the accident report "made no connection between the accident and any alleged negligence on the part of [the County]" (*Kliment*, 294 AD2d at 945; *see Brown*, 100 AD3d at 1440-1441; *Matter of Taylor v County of Suffolk*, 90 AD3d 769, 770 [2d Dept 2011]; *cf. Innes v County of Genesee*, 99 AD2d 642, 643 [4th Dept 1984], *affd* 62 NY2d 779 [1984]).

Contrary to the County's further contention, however, we conclude that claimants met their initial burden of making a showing, albeit not an extensive one, that late notice will not substantially prejudice the County (*see generally Newcomb*, 28 NY3d at 466). In particular, claimants "presented a *plausible argument* that the late notice will not substantially prejudice the [County] because the alleged [snowy and] icy condition was highly transitory such that the [County] would have been in the same position regarding any investigation even if the notice of claim had been timely served" (*Matter of Shumway v Town of Hempstead*, 187 AD3d 758, 759 [2d Dept 2020] [emphasis added]; *cf. Matter of Miskin v City of New York*, 175 AD3d 684, 685-686 [2d Dept 2019]; *Matter of Smiley v Metropolitan Transp. Auth.*, 168 AD3d 631, 631 [1st Dept 2019]; *Matter of Moroz v City of New York*, 165 AD3d 799, 800 [2d Dept 2018]). We further conclude that the County failed to "respond with a particularized evidentiary showing that [it would] be substantially prejudiced if the late notice [was] allowed" (*Newcomb*, 28 NY3d at 467). Indeed, "[t]he speculative assertions of [the County's] counsel, unsupported by any record evidence, failed to satisfy [the County's] burden to establish that late notice [would] substantially prejudice[ ] its ability to defend against [claimants'] claim" (*Sherb v Monticello Cent. Sch. Dist.*, 163 AD3d 1130, 1134 [3d Dept 2018]; *see Newcomb*, 28 NY3d at 465-468; *Matter of Kranick v Niskayuna Cent. Sch. Dist.*, 151 AD3d 1262, 1263-1264 [3d Dept 2017]).

Based on the foregoing, of all the relevant circumstances evaluated—infancy, reasonable excuse, actual knowledge, and substantial prejudice—only one, lack of substantial prejudice, favored granting claimants' application. Despite the well-settled principle that "actual knowledge of the claim is the factor that is accorded 'great weight' in determining whether to grant leave to serve a late notice of claim" (*Ficek*, 144 AD3d at 1603), the court here failed to give the appropriate weight to that factor (*see Zarrello v City of New York*, 93 AD2d 886, 886 [2d Dept 1983], *affd* 61 NY2d 628 [1983]) and instead "weigh[ed] heavily" the lack of substantial prejudice, even though claimants' showing in that regard, while adequate, was not particularly strong. Under these circumstances—which include the nearly 22-month period between the accident and claimants' application for leave to serve a late notice of claim, the improper weighing of the substantial prejudice factor at the expense of the actual knowledge factor, and claimants' failure to demonstrate a nexus between the son's infancy and the delay or to otherwise proffer a reasonable excuse for the delay—we conclude that the court abused its discretion in granting that part of the application seeking leave to serve a late notice of claim on the County (*see generally Matter of Nunez v Village of Rockville Ctr.*, 176 AD3d 1211, 1214-1216 [2d Dept 2019]). Present—Peradotto, J.P., Carni, Lindley, Winslow and Bannister, JJ.

(ii) CPLR 9802 notice of claim not timely filed; defendant was not estopped from asserting defense

Incorporated Vil. of Freeport v. Freeport Plaza W., LLC, 206 AD3d 703 (2d Dept. 2022)

June 8, 2022

In March 2017, the parties entered into contract wherein the defendant agreed to purchase real property located in the Village of Freeport from the plaintiff. In February 2018, the plaintiff commenced this action against the defendant, alleging, inter alia, that the defendant breached the contract. The defendant answered the amended complaint, and asserted a counterclaim against the plaintiff alleging that the plaintiff's commencement of this action constituted an anticipatory repudiation of the contract. The plaintiff moved pursuant to CPLR 3211 (a) (7) to dismiss the counterclaim on the ground that the defendant failed to file a notice of claim as required by CPLR 9802. The Supreme Court denied the motion, and the plaintiff appeals.

Pursuant to CPLR 9802, "no action shall be maintained against the village upon or arising out of a contract of the village . . . unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued." " '[S]tatutory requirements conditioning suit [against a governmental entity] must be strictly construed' " (*Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532, 536 [2005], quoting *Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724 [1992]). This is true even when the municipality " 'had actual knowledge of the claim or failed to demonstrate actual prejudice' " (*Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d at 536, quoting *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 548 [1983]).

"The doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances" (*Sanchez v Jericho Sch. Dist.*, 180 AD3d 828, 830 [2020] [internal quotation marks omitted]). " '[E]stoppel against a [municipality] will lie only when the [municipality's] conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct was justifiably relied upon by that party' " (*Khela v City of New York*, 91 AD3d 912, 914 [2012], quoting *Mohl v Town of Riverhead*, 62 AD3d 969, 970 [2009] [internal quotation marks omitted]).

Here, there is no dispute that the defendant failed to file a notice of claim with the village clerk within one year after its cause of action for breach of contract accrued, as required by CPLR 9802. The Supreme Court erred in determining that the plaintiff, in effect, was estopped from raising a defense based on the defendant's failure to comply with CPLR 9802. Contrary to the defendant's contention, the plaintiff's exchanging of discovery and participation in the depositions of witnesses did not estop

it from raising a defense pursuant to CPLR 9802, as mere participation in litigation does not constitute action calculated to mislead or discourage the defendant from filing a notice of claim (*see Hochberg v City of New York*, 99 AD2d 1028, 1029 [1984], *affd* 63 NY2d 665 [1984]; *Khela v City of New York*, 91 AD3d at 914; *Dorce v United Rentals N. Am., Inc.*, 78 AD3d 1110, 1111 [2010]; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677 [2005]). ***Moreover, it cannot be said that the plaintiff's participation in the litigation was merely an attempt to lull the defendant to sleep on its rights, as the plaintiff was participating in the litigation to prosecute its own breach of contract claim. In addition, contrary to the defendant's contention, the plaintiff had no obligation to apprise the defendant that it had failed to timely serve a notice of claim*** (*see Khela v City of New York*, 91 AD3d at 914; *Dorce v United Rentals N. Am., Inc.*, 78 AD3d at 1111; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677 [2005]). *Town of Smithtown v Jet Paper Stock Corp.* (179 AD2d 634 [1992]) is distinguishable on its facts and is not controlling.

Contrary to the defendant's contention, notice of claim statutes must be strictly construed, even where the municipality " 'had actual knowledge of the claim or failed to demonstrate actual prejudice' " (*Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d at 536, quoting *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d at 548; *see Matter of Jovasevic v Mount Vernon City Sch. Dist.*, 186 AD3d 1219, 1220 [2020]). The Supreme Court therefore erred in determining, in effect, that the plaintiff was barred from raising a notice of claim defense because it had knowledge of the claim and suffered no prejudice from the lack of a formal notice of claim. Furthermore, the requirements of notice of claim statutes apply to the filing of counterclaims (*see City of New York v Kraus*, 110 AD3d 755, 757 [2013]; *Town of Philipstown v Garrison Contr., Inc.*, 85 AD3d 1014 [2011]; *City of New York v Candelario*, 223 AD2d 617, 618 [1996]). Therefore, the fact that the plaintiff commenced an action based on the same transaction as the defendant's counterclaim did not excuse the defendant from complying with CPLR 9802.

(iii) **Exact date on which abuse occurred not required in Child Victim Act notice of claim**

Wagner v State of NY, ___AD3d___, 2023 NY Slip Op 01546 (2d Dept. 2023)

Decided March 22, 2023

The claimant commenced this claim against the State of New York pursuant to the Child Victims Act (hereinafter the CVA), inter alia, to recover damages for negligent hiring, retention, and supervision. The claimant alleged in the claim that in 1993, when she was 14 years old, she was sexually abused by a staff member of Sagamore Children's Psychiatric Center (hereinafter Sagamore) while she was admitted as a resident thereof. The claimant alleged that a staff member by the name of "Brian" sexually assaulted her in a "theater" within Sagamore "during gym" class. The claimant alleged that,

prior to the date of the incident, the State "learned or should have learned that Brian . . . was not fit to work with children," and that it "became aware, or should have become aware," of Brian's "propensity to commit sexual abuse." As a result of the incident, the claimant allegedly suffered, inter alia, "serious personal injuries, emotional distress, conscious pain and suffering, mental anguish[,] and/or physical manifestations thereof."

Subsequently, the State moved pursuant to CPLR 3211(a) to dismiss the claim. The State argued that the claim failed to comply with the pleading requirements of Court of Claims Act § 11(b), asserting, among other things, that the claimant's allegations did not satisfy the "time when" and "nature of the claim" requirements of the statute. In the alternative, the State argued that the fifth cause of action, to recover damages under a theory of respondeat superior, failed to state a cause of action. The claimant opposed the motion. By order dated April 1, 2022, the Court of Claims granted the State's motion on the ground that the claim failed to comply with the "time when" requirement of Court of Claims Act § 11(b). The claimant appeals.

"Court of Claims Act § 11(b) requires a claim to specify (1) the nature of the claim; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed" (citation omitted). A failure to comply with the requirements set forth in section 11(b) of the Court of Claims Act is a jurisdictional defect compelling dismissal of the claim (citation omitted). "[A] sufficiently detailed description of the particulars of the claim" is necessary because "[t]he purpose of the section 11(b) pleading requirements is . . . to enable [the State] to investigate and promptly ascertain the existence and extent of its liability" (citation omitted). "Because suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (citation omitted]). However, "'absolute exactness is not required,'" so long as the particulars of the claim are detailed in a manner sufficient to permit investigation (citation omitted).

Here, the Court of Claims incorrectly determined that the claimant was required to allege the exact date on which the sexual abuse occurred (citations omitted). The claimant's allegations, including that the abuse occurred in 1993 while she was 14 years old and attending a gym class at Sagamore, were sufficient to satisfy the "time when" requirement of Court of Claims Act § 11(b) in this claim brought pursuant to the CVA (citations omitted).

Although the Court of Claims did not address the State's arguments relating to the "nature of the claim" requirement of section 11(b) or to the cause of action to recover under a theory of respondeat superior, we nonetheless address those issues in the interest of judicial economy (citation omitted). Contrary to the State's contention, the claimant's allegations set forth the nature of her claim with sufficient particularity in compliance with Court of Claims Act § 11(b), since she adequately "[stated] the manner in which [she] was injured and how the State was negligent" (citations omitted). However,

the State correctly asserted that the cause of action to recover under a theory of respondeat superior was not cognizable as a matter of law and that dismissal thereof was warranted pursuant to CPLR 3211(a)(7) (citations omitted).

See also (*D. G. v State of NY*, ___AD3d___, 2023 NY Slip Op 01183 [2023]) ("[T]he claim was sufficiently specific to satisfy the pleading requirements of Court of Claims Act § 11(b). The claim alleged negligent hiring, training, and supervision of an employee who had subjected the claimant to multiple sexual assaults at Sagamore between June 5, 2013, and September 16, 2013—a period of approximately three months—while the claimant was a patient at Sagamore. This was sufficiently specific to enable the State to investigate the claim promptly and ascertain its liability.").

B. CPLR Article 2

1. CPLR 202 "Borrowing Statute"

(i) **CPLR 202 does not apply to CVA action brought by New York resident for abuse in Massachusetts; statute applies to claim for plaintiff who was a New Jersey resident at the time the claim arose; claim arose at time and place of injury**

Shapiro v. Syracuse Univ., 208 AD3d 958 (4th Dept. 2022)

Decided August 4, 2022

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With respect to plaintiffs' appeal, the relevant causes of action against Greylock stem from the employee's employment in the 1970s as a camp counselor and coach at Camp Greylock for Boys, a summer camp located in Becket, Massachusetts. Plaintiffs contend that their claims are subject to the CVA revival statute and that Supreme Court therefore erred in granting the Greylock defendants' motion insofar as it sought summary judgment dismissing the first and second causes of action against Greylock on statute of limitations grounds.

CPLR 214-g provides, as relevant here: "Notwithstanding any provision of law which imposes a period of limitation to the contrary . . . , every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age . . . which is barred as of the effective date of this section because the applicable period of limitation has expired . . . is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months [*3]after the effective date of this section."

