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Memorandum in Opposition

MUNICIPAL LAW SECTION

MLS #1 April 21, 2014

S. 5072 By: Senator Bonacic
A. 6550 By: M. of A. Weprin
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: On the first of January next succeeding the date on which it shall have become a law

AN ACT to amend the civil practice law and rules, in relation to certain notices of claim, pleading an affirmative defense and making a motion to dismiss.

LAW & SECTION REFERRED TO: CPLR 3018 and 3211

THE MUNICIPAL LAW SECTION OPPOSES THIS LEGISLATION

Under current law, a tort action may not be brought against a county, city, town, village, fire district, or school district unless three conditions are met: (1) a notice of claim has been served on the municipality within 90 days after the claim arises; (2) the complaint contains an allegation that the notice of claim has been served and payment refused or neglected; and (3) the action is commenced within one year and ninety days after the happening of the event. Gen. Mun. Law §§ 50-e(1)(a) and 50-i(1). "The purpose of the notice of claim is to enable the public corporation to investigate claims and obtain evidence promptly." David D. Siegel, New York Practice § 32, at 37 (5th ed. 2011) (footnote omitted).

This Bill would turn this decades old procedure on its head, casting upon the municipality the burden to plead that a notice of claim was not timely served. Indeed, if the Bill is enacted, the burden of pleading as to notices of claim will rest upon both the plaintiff (pursuant to Gen. Mun. Law § 50-i(1)(b)) and the municipality (pursuant to proposed CPLR 3018(b)), a curious result indeed. More significantly, failure to plead lack of a notice of claim would result in the municipality's waiver of that defense under proposed CPLR 3211(e).

Worse yet, for waiver purposes, the Bill would treat a defense of failure to serve a notice of claim the same as the defense of lack of personal jurisdiction: if the absence of a notice of claim is not raised in a CPLR 3211(a) motion to dismiss or the answer, *whichever comes first*, then it is forever waived. Proposed CPLR 3211(e). Yet notices of claim and personal jurisdiction are completely unrelated. Personal jurisdiction goes to the power of the court over the defendant while notices of claim, as noted above, go to the ability of the municipality to investigate claims and obtain evidence promptly, protecting the public purse. Not even the defenses of lack of capacity, statute of limitations, and statute of frauds are treated so harshly. See CPLR 3211(e) (requiring that such defenses be raised either in a motion to dismiss or in an answer, but not in the first one served). Moreover, while a plaintiff who has failed to plead service of a notice of claim may look to the court for leave to amend the complaint under CPLR 3025(b) to assert that service (or even permission to serve a late notice of claim under Gen. Mun. Law § 50-e(5)), the defendant municipality who fails to raise the absence of a notice of claim as required by the Bill would be forever barred from doing so. *See* Iacovangelo v Shepherd, 5 N.Y.3d 184, 833 N.E.2d 259, 800 N.Y.S.2d 116 (2005). Unlike with other defenses, such as statute of limitations, the court would therefore possess no authority to grant a municipality leave to amend its answer to assert plaintiff's failure to serve a notice of claim. *Id.*

But the Bill's unfair impact on municipalities would be even greater than that. Not only would the absence of a notice of claim be treated like lack of personal jurisdiction for waiver purposes; that absence would be subjected to the same restrictions as the defense of improper service of process, which, having properly been raised in an answer, must be brought before the court by way of a summary judgment motion within 60 days after the answer is served, or the defense is waived, absent proof of undue hardship. Proposed CPLR 3211(e). By contrast, the other grounds for lack of personal jurisdiction (lack of a jurisdictional basis and a jurisdictional defect on the face of a summons), having been properly preserved, may be a ground for dismissal throughout the litigation. David D. Siegel, Practice Commentary 3211:59, at 91, in McKinney's Consolidated Laws of New York Annotated.

Failure to move for summary judgment within those 60 days will result in waiver of the defense, absent a showing of "undue hardship," a difficult burden to meet. "The standard set by the Legislature for an extension of time [of the 60 days under CPLR 3211(e)] is not merely 'for good cause shown,' or 'in the interest of justice'….[A] showing of 'undue hardship' in this context requires proof that the motion *could not have been made* within the time limited by CPLR 3211(e) by the exercise of ordinary diligence." Abitol v. Schiff, 180 Misc.2d 949, 691 N.Y.S.2d 753 (Sup. Ct., Queens County, 1999) (emphasis added).

Protections already exist for plaintiffs who improperly serve a notice of claim or serve a defective one or serve it late or not at all. *See* Gen. Mun. Law §§ 50-e(3)(c), (3)(d), (5), (6). Decisions excusing such errors are legion. *See, e.g.,* Annotations to Gen. Mun. Law § 50-e, in McKinney's Consolidated Laws of New York Annotated. So, too, as noted above, a plaintiff who fails to plead service of the notice of claim may amend his or her complaint to assert such service. CPLR 3025. *See, e.g.,* Kelly v. City of Rochester, 98 Misc.2d 435, 413 N.Y.S.2d 1006 (Sup. Ct., Monroe County, 1979).

No compelling basis exists for reversing these decades of law and precedent and imposing upon municipalities, in effect, the burden of ensuring that plaintiffs suing them meet their obligation to plead that they have properly served the municipality with a notice of claim, an important weapon in municipalities' unending struggle to protect their diminishing resources in the face of growing state mandates. This Bill may well have no fiscal impact upon the state, but it certainly will have a fiscal impact on the state's taxpayers, as the costs required to meet the new municipal burdens imposed by this Bill are nothing short of a tax increase.

For the foregoing reasons, the Municipal Law Section **OPPOSES** this legislation.

Chair of the Section: Mark Davies, Esq.