

NEW YORK MUNICIPAL LAW UPDATE

In an effort to keep our municipal clients apprised of new case law, we have summarized the following cases and issues from the New York Court of Appeals.

Plaintiff Must Purchase a New Index Number Despite Having Paid For and Obtained an Index Number for a Prior Special Proceeding under G.M.L. §50-e.

Harris v. Niagra Falls Board of Education, No. 8, 2006 Slip Op 1113, 2006 N.Y. LEXIS 147 (Feb. 14, 2006).

Plaintiff sustained injuries when he was hit by a vehicle owned and operated by the defendant-municipalities. Plaintiff failed to file a notice of claim within ninety days of the accident pursuant to General Municipal Law section 50-e. Accordingly, plaintiff commenced a special proceeding under G.M.L. §50-e(5) for leave to serve a late notice of claim. Upon such application plaintiff purchased and obtained an index number for that proceeding.

Plaintiff subsequently appointed new counsel and commenced a second proceeding for leave to file a late notice of claim. The second proceeding bore the same index number as the first proceeding and the Supreme Court granted plaintiff's application. Plaintiff thereafter filed and served the notice of claim and then commenced the main action against defendants by filing a summons and complaint using the same index number from the prior special proceedings.

Defendants moved for dismissal under C.P.L.R. §3211 for failing to bring the action within the statute of limitations asserting that plaintiff was required to purchase a new index number. The lower court rejected defendants' motion but the Appellate Division First Department reversed and dismissed plaintiff's complaint. The Appellate Division held that plaintiff's action was time-barred without a new index number and therefore created a lack of subject-matter jurisdiction. The Court of Appeals affirmed the Appellate Division.

The Court of Appeals first explained that a defect in commencement-by-filing procedures does not deprive the court of subject-matter jurisdiction as long as the responding party does not waive the defect. The Court held that dismissal for a defect in such filing procedures arises only when the plaintiff or petitioner has failed to comply with the filing requirements and the defendant or respondent timely objects.

The Court then stated that plaintiff failed to commence the underlying lawsuit properly by paying a filing fee, obtaining a new index number and filing a summons and complaint pursuant to C.P.L.R. §304 and C.P.L.R. §306-a. Plaintiff instead used the index number from the

previous special proceeding which becomes a "commencement infirmity that is waivable." However, since the municipality never waived the defect and the plaintiff failed to connect it, the lawsuit was dismissed.

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