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NEW YORK MUNICIPAL LAW UPDATE

In an effort to keep our municipal clients apprised of new case law we summarize the following four recent cases from the New York Court of Appeals.

A Municipality Is Not Liable For "Discretionary Acts" Of Its Agents Absent A "Special Relationship"

Kovit v. Estate of Hallums, 4 N.Y.3d 499, 797 N.Y.S.2d 20 (May 3, 2005)

A New York City police officer instructed a woman who had been involved in a motor vehicle accident to move her car forward out of the intersection. The testimony of eyewitnesses was that she was "hysterical". The plaintiff was standing directly behind the woman's car when she moved it back instead of forward crushing the plaintiff's legs between her car and the one behind her. At trial the City was found 97% at fault. The Appellate Division affirmed.

In reversing the Second Department, the Court of Appeals found that in order to hold the City liable for the negligent performance of a discretionary act, the plaintiff must establish a special relationship with the municipality. No such relationship was found under the facts in Kovit. Establishing a special relationship based on a municipality's assumption of a duty requires:

> (1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

The third element was not satisfied. The police officer's contact was with the driver, not the plaintiff. Legally, the plaintiff and the police officer were strangers.

Lazan v. County of Suffolk, 4 N.Y.3d 499, 797 N.Y.S.2d 20 (May 3, 2005)

The plaintiff was pulled over on the Long Island Expressway by a Suffolk County highway patrol officer. Plaintiff told the officer he was not feeling well and had chest pains. The officer directed the plaintiff to drive to the nearest service station. Plaintiff drove off, lost control of his car and struck a guardrail and telephone pole suffering serious injuries. The Appellate Division affirmed the lower Court's denial of the County's summary judgment. The Court of Appeals reversed.

The Court reasoned that in order for a special relationship to exist between the municipality's agent and the plaintiff, the municipal agent must have "knowledge...that inaction could lead to harm."

In Lazan, the Court of Appeals held that one could not expect a police officer to make a refined, expert medical diagnosis of a motorist's latent condition. Since the damages must be so obvious that a layman could detect it, the officer was found not to be on notice to satisfy the standard required.

Municipality Has No "Capacity" To Contest Equalized Tax Assessment For Component Town

Town of Riverhead v. New York State Board of Real Property Services, 5 N.Y.3d 36, 799 N.Y.S.2d 753 (June 9, 2005)

Riverhead Central School District is comprised of the Towns of Riverhead, Southampton and Brookhaven. The Town of Southampton complained of a disproportionate tax burden as compared to the other two towns. The State Board of Real Property Services established a special equalization rate for Southampton.

The Court of Appeals affirmed the Appellate Division and found that the Town of Riverhead lacked capacity to contest the Board's action. Section 1218 of the Real Property Tax Law provides that the Board's determination may be reviewed in Court "upon application of [the municipality] for which the vote or votes were established." Since the rates were established for Southampton, Riverhead lacked capacity to sue.

The decision leaves room for the consideration that while the town itself may be barred individual taxpayers may not be and can bring suit.

Notice Of Claim Required Before Contract Dispute Arises

C.S.A. Contracting Corp. v. New York City School Construction Authority, 5 N.Y.3d 189, 800 N.Y.S.2d 123 (July 6, 2005)

Plaintiff entered into a contract to perform asbestos abatement work at New York City public schools. The plaintiff's corporate president testified that all work was completed before December 1993. In May of 1994 plaintiff served a Notice of Claim seeking monies due under the contract.

It is well settled that a contractor's claim accrues when its damages are ascertainable. Generally, damages are ascertainable where work is substantially completed or a detailed invoice of the work performed is submitted.

The Court concluded that the Notice of Claim was not submitted within three months of the accrual of the claims and affirmed the Court's below.

This case may stand for the proposition that contractors dealing with governmental units may have to serve a formal Notice of Claim on the unit as soon as they complete their work. On the defendant's side, untimely Notice of Claim may be a complete defense on construction cases.