THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 6 | Issue 1

Summer 2003

The Notice of Claim Provision in Breach of Contract Actions Against the City of New York

Steven Isaacs

Mathew Paulose Jr.

The Notice of Claim Provision in Breach of Contract Actions Against the City of New York

Acknowledgements

David A. Drossman, a former Assistant Corporation Counsel for the City of New York consulted on the article.

THE NOTICE OF CLAIM PROVISION IN BREACH OF CONTRACT ACTIONS AGAINST THE CITY OF NEW YORK

*Steven Isaacs and Mathew Paulose Jr.**

This article addresses a little known provision in the Administrative Code called section 7-201(a) that requires service of a notice of claim prior to commencement of a contract action against the City of New York. Practitioners who have failed to take note of the provision have had their cases dismissed, some in which more than half a million dollars were in dispute. This article also offers some suggestions for practitioners faced with a motion to dismiss or a motion for summary judgment for failure to follow the provision's mandate.

The Provision

Section 7-201(a) of the New York City Administrative Code provides, in relevant part, that in "every action" against the City of New York the complaint must contain an allegation that at least thirty days has elapsed since a "demand, claim, or claims" were presented to the comptroller and that the comptroller failed to make an "adjustment or payment" of or for such "demand, claim, or claims" within the elapsed thirty days.[1] Section 7-201(a) does not define the words "every action," "demand, claim, or claims," or "adjustment or payment." Relevant case law reveals that the words, "demand, claim, or claims," mean a "notice of claim"[2] and the words, "adjustment or payment," mean "settlement."[3] With respect to the words, "every action," case law initially suggests that the

* Steven Isaacs is a partner and Mathew Paulose Jr. is an associate at Koehler and Isaacs LLP; David A. Drossman, a former Assistant Corporation Counsel for the City of New York consulted on the article.

1 N.Y.C. ADMIN. CODE § 7-201(a) (2001).

2 *See* PBS Building Systems, Inc. v. City of New York, No. 96-C5014, 1996 U.S. Dist. LEXIS 15006, at 8 (S.D.N.Y. Aug. 28, 1996) (referring to § 7-201 as "notice of claim" provision). This is debatable, however. *Compare* N.Y. EDUC. LAW § 3813(1) (2001) (using words "written verified claim") with N.Y. EDUC. LAW § 3813(2) (using words "notice of claim").

3 *See* PBS Building Systems, Inc. v. City of New York, 1996 U.S. Dist. LEXIS 15006, at 11 (referring to § 7-201 as provision allowing N.Y.C. Comptroller's Office to "investigate and, if appropriate, to settle" claims before commencement of litigation).

words are intended to make the statute "all encompassing."[4] However, closer inspection reveals that the statute is actually intended to be only applicable to those actions involving monetary relief or to those actions involving both equitable and monetary relief where the equitable relief is only incidental to the monetary relief.[5] Further inspection reveals that the statute is also intended to be only applicable to those actions involving causes of action other than tort.[6] Taking all these definitions into consideration then, section 7-201(a) really means that in every non-tort action against the City of New York seeking mainly monetary relief, a notice of claim must be filed with the comptroller before commencement of the action.

The Purpose

The purpose behind the section is somewhat similar to the purpose behind the other notice of claim provisions applicable to actions against the City of New York, two of the best-known provisions being Section 50-i of the New York General Municipal Law and Section 3813 of the New York Education Law.[7] Section 50-i provides that in every tort action against a city, county, town, village fire district or school district a notice of claim must be filed and served upon the defendant prior to the commencement of an action.[8] Section 3813 requires that in every action against a school district, board of education, board of cooperative educational services or school a notice of claim must be filed within three months after the accrual of a claim and be presented to the governing body of a school district or school prior to the commencement of an action.[9]

According to the New York Court of Appeals the purpose of these notice of claim provisions is to:

> allow municipal defendants to conduct an investigation and ex-

---

4 *See* Arol Development Corp. v. City of New York, 59 A.D.2d 883, 884 (1st Dept. 1977) (discussing § 394a-1.0, predecessor of § 7-201).

5 *See* Kaselaan & D'Angelo Associates, Inc. v. City of New York, No. 98-C7497, 1999 U.S. Dist. LEXIS 18133, at 7 (S.D.N.Y. 1999); Brooklyn School for Special Children v. Crew, No. 96-C5014, 1997 U.S. Dist. LEXIS 12974, at 51 (S.D.N.Y. 1997). *But see* Clempner v. Town of Southold, 546 N.Y.S.2d 101, 105 (2d Dept. 1989).

6 *See* Ferrara v. City of New York, 65 N.Y.S.2d 327 (N.Y. City Ct. Bronx County 1946) (§ 7-201(a) superseded by N.Y. GEN. MUN. LAW § 50-e, applicable to tort actions against City of New York).

7 *See* PBS Building Systems, Inc. v. City of New York, 1996 U.S. Dist. LEXIS 15006, at 8 (comparing § 7-201 with §§ 50-i and 3813).

8 N.Y. GEN. MUN. LAW § 50-I (1999).

9 N.Y. EDUC. LAW § 3813(1) (2001).

> amine the plaintiff with respect to the claim, and to determine whether the claims should be adjusted or satisfied before the parties are subjected to the expense of litigation.[10]

The provisions are also intended to give "prompt notice of claims so that the investigation may be made before it is too late for investigation to be efficient."[11] Generally, these principles can be more succinctly stated as the principles of investigation, settlement, and freshness.

Courts have found these underlying principles applicable to section 7-201(a), but not entirely. While they have found the principles of investigation and settlement applicable to section 7-201(a), the courts have not found the principles of freshness applicable.[12] Apparently, this is because section 7-201(a) does not prescribe a time limit in which an individual must file a notice of claim.[13] Section 50-i, for instance, prescribes a 90-day time limit.[14] Section 3813 prescribes a three-month time limit.[15] Section 7-201(a), on the other hand, prescribes no time limit.[16] As one federal court sitting in New York accurately analyzed:

> It may be assumed, therefore, that the policy consideration behind § 7-201 is to provide for a period during which a settlement may be negotiated without having to resort to litigation, rather than to preserve the freshness of claims by notification soon after the claim arises.[17]

Despite the loss of this particular principle, courts readily dismiss actions that fail to respect the primary principles of investigation and settlement for which notice of claim provisions are so strictly enforced.[18] Any court failing to strictly enforce the provisions would be in essence failing to enforce the doctrine of *stare*

---

10 Davidson v. Bronx Mun. Hosp., 64 N.Y.2d 59 (1984) (addressing N.Y. GEN. MUN. LAW § 50-h).

11 Parochial Bus Systems, Inc. v. Board of Ed. of City of New York, 60 N.Y.2d 539, 547 (1983) (addressing N.Y. EDUC. LAW § 3813).

12 *See, e.g.*, American Telephone and Telegraph Co. v. N.Y.C. Dept. of Human Resources, 736 F. Supp. 496, 499 (S.D.N.Y. 1990).

13 N.Y.C. ADMIN. CODE § 7-201(a) (2001).

14 N.Y. GEN. MUN. LAW §50-I(1)(c)(1999).

15 N.Y. EDUC. LAW §3813(1) (2001).

16 N.Y.C. ADMIN. CODE §7-201(a) (2001).

17 *See, e.g.*, American Telephone and Telegraph Co. v. N.Y.C. Dept. of Human Resources, 736 F. Supp. 496, 499.

18 *See, e.g.*, PBS Building Systems, Inc. v. City of New York, 1996 U.S. Dist. LEXIS 15006 at 9 (citing Republic of Argentina v. City of New York, 25 N.Y.2d 252, 265 (N.Y. 1969)). *See* Kaselaan & D'Angelo Associates, Inc. v. City of New York, 1999 U.S. Dist. LEXIS 18133 at 5 (citing Davidson, 484 N.Y.S.2d at 535); Chateau D'If Corp. v. City of New York, 1990 U.S. Dist. LEXIS 8001 at 5-6 (S.D.N.Y. June 29, 1990); American Telephone and Telegraph Co. v. N.Y.C., 736 F. Supp. 496, 499.

decisis – unacceptable in the judicial decision-making process. Thus, when faced with a motion to dismiss for the failure to file a notice of claim, courts may consider not dismissing the underlying action only after strictly observing whether the principles of investigation and settlement are indeed inapplicable or satisfied through other means. Accordingly, in the eyes of the practitioner, notice of claim provisions have become essential in actions against a municipality.

The History

Section 7-201(a) derives its heritage from the New York City Charter of 1860. The language used then is nearly identical to the language used today.[19] The charter was subsequently amended in 1873, 1882, 1896, and 1897, but the language of section 7-201(a) remained relatively the same.[20] In 1901, section 7-201(a), which was then called section 261, was found in the Revised Charter of the City of New York and read as follows:

> No action or special proceeding for any cause whatever shall be prosecuted or maintained against The City of New York unless it shall appear by and as an allegation in the complaint or necessary moving papers that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the comptroller of said city for adjustment and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.[21]

Noticeably, for the exception of some reordering and changes in the words "for any cause whatever" to "every action," the language is identical to the language found in the present version of section 7-201(a). In 1937, the section was renamed and relocated to section 394a-1.0 of the Administrative Code of the City of New York.[22] In 1980, the section was renamed and rearranged once more to its current cognomen and form.[23]

During this long era, relevant case law reveals that the underlying principles of section 7-201(a) have always been investigation

---

19 *See* Bernreither v. City of New York, 123 A.D. 291, 292-93 (1st Dept. 1908).

20 *See id.* at 292-93 (listing history of section 261 of Revised Charter (City of New York) (Laws of 1901, ch. 466)).

21 *Id.* at 292 (quoting Revised Charter).

22 *See* Holmes v. City of New York, 269 A.D. 95, 100 (2d Dept 1945) (dissent mentioning Laws of 1937, ch. 929).

23 *See* Termine v. City of New York, 139 Misc. 2d 672, 674 (N.Y. Civ. Ct. Kings County 1988).

and settlement. This is no more clearly seen than in the 1903 case of *Smith v. City of New York*,[24] where the court stated:

> The object sought to be accomplished by this provision of the charter is to give an opportunity to the comptroller to examine the validity of the claim presented, and if valid, to adjust and pay the same, in order to avoid the expenses of litigation.[25]

Other cases further illustrate these principles such as in the 1908 case of *Bernreither v. City of New York*,[26] where the court noted that one of the objectives of section 7-201(a) was to give authorities time to investigate and, if the claim was good, pay without the necessity of a lawsuit.[27]

Over the years, this precedent evolved into stricter wording, culminating in the following statement by Justice Cardozo:

> The Legislature has said that a particular form of notice, conveyed with particular details to particular public officers, shall be a prerequisite to the right to sue. The courts are without power to substitute something else.[28]

This language is cited regularly in judicial decisions dismissing an action for the failure to file a notice of claim.[29] Thus, it has come to a general understanding that section 7-201(a) must be strictly enforced. Its history is long and its precedent unyielding.

Rectifying the Failure to File a Section 7-201(a) Notice of Claim

There is no statutory relief for the failure to file a notice of claim in a monetary non-tort action against the City of New York. This is because, unlike the other notice of claim provisions applicable to actions against the City of New York, section 7-201(a) does not provide a statutory mechanism for seeking leave to file a late notice of claim. Section 50-e (5), for example, provides that leave to file a late notice of claim may be allowed if it can be proven that notwithstanding the absence of a timely notice of claim the City of New York acquired actual knowledge of the essential facts consti-

---

[24] Smith v. City of New York, 88 A.D. 606, 608 (1st Dept 1903) (discussing section 261 of Greater New York charter (City of New York) (Laws of 1897, ch. 378)).

[25] *Id.* at 608.

[26] Bernreither v. City of New York, 123 A.D. 291 (1st Dept 1908) (discussing section 261).

[27] *Id.* at 292- 93.

[28] Thomann v. City of Rochester, 256 N.Y. 165, 172 (1931), *cited in* PBS Building Systems, Inc. v. City of New York, 1996 U.S. Dist. LEXIS 15006, at 9.

[29] *See, e.g.,* PBS Building Systems, Inc. v. City of New York, 1996 U.S. Dist. LEXIS 15006, at 9.

tuting the claim within the applicable time period.[30] Similarly, section 3813(2-a) provides that leave may be allowed if it can be proven that the school district acquired actual knowledge of the essential facts constituting the claim.[31] The legislature specifically enacted these exceptions to the general notice of claim requirements in actions for tort against a municipality and for any action against a school district to relieve the harshness of abrupt dismissals.[32] But the legislature failed to enact a similar exception under section 7-201(a). Thus, because of this failure, it can only be interpreted that there is no exception to the failure to file a section 7-201(a) notice of claim. Any non-tort monetary action against the City of New York commenced without a section 7-201(a) notice of claim must be dismissed without exception.

There is, however, some potential of relief as section 7-201(a) does not require a specific form of notice of claim. For example, section 50-i requires a written notice of claim specifying rather particular details.[33] In contrast, section 7-201(a) does not expressly require a written demand. Therefore, it can be interpreted that the section merely requires a demand, either oral or written, articulating the essential facts constituting a monetary claim. This rule provides relief against a motion to dismiss or for summary judgment for the failure to file a formal section 7-201(a) notice of claim.

In *Kaselaan & D'Angelo Associates v. City of New York*,[34] the plaintiff was faced with a motion for summary judgment for the failure to file a section 7-201(a) notice of claim. The underlying action entailed a breach of contract claim for payment of overdue interest from the Human Resources Administration Agency of the City of New York ("HRA") for work done at various New York City day care centers. The plaintiff had by letter and invoice notified the General Counsel of HRA that it was making a demand for the payment of overdue interest. During the summary judgment motion, the plaintiff seized upon these communications and argued that section's mandate for a notice of claim had been satisfied. The court acknowledged the argument. After first recognizing that notice of

---

30 *See* N.Y. GEN. MUN. LAW § 50-e (5) (1999) (application for leave to file late notice of claim).

31 *See* N.Y. EDUC. LAW § 3813(2-a) (application for leave to file late notice of claim in tort actions only).

32 *See generally* Pierson v. City of New York, 56 N.Y.2d 950 (1982).

33 *See* N.Y. GEN. MUN. LAW § 50-e (2) (2001) (form of notice of claims).

34 Kaselaan & D'Angelo Associates v. City of New York, 1999 U.S. Dist. LEXIS 18133, at 8.

claim requirements are strictly enforced, the court stated that "[f]iling of a formal notice of claim may be excused . . . [when] . . . the defendant has 'received clear notice' "of the nature of the claims, and . . . [the] . . . time . . . place . . . and manner in which the claims arose."[35] In the instant case, while the invoice and possibly the letter were measured to give sufficient notice, they had been provided to the wrong official, the general counsel of HRA, rather than to the Comptroller of the City of New York, as expressly mandated by section 7-201(a). Accordingly, the court was left with no other recourse but to dismiss the action.[36]

In *PBS Building Systems, Inc. v. City of New York*,[37] the plaintiff was similarly faced with a motion for summary judgment for the failure to file a section 7-201(a) notice of claim. The underlying action entailed a breach of contract claim for payment of approximately half a million dollars from the Department of General Services of the City of New York ("DGS") for the design and construction of four buildings on Rikers Island. Plaintiff had, as mandated by the contract between plaintiff and DGS, submitted several notices of claim to DGS regarding payments due which DGS had or should have had forwarded to the Comptroller's Office. On defendant's motion for summary judgment, the plaintiff argued, as did the plaintiff in *Kaselaan*, that section 7-201(a)'s notice of claim mandate had been satisfied. Again, the court acknowledged that the argument had some merit. After first recognizing that a failure to file a statutory notice of claim required outright dismissal of the underlying action, the court credited plaintiff's argument that a contractual notice of claim, as opposed to a statutory notice of claim, could have met section 7-201(a)'s mandate. But, in this particular case, the statutory notice of claim failed to sufficiently indicate the plaintiff's intention to litigate statutory claims as a formal notice of claim would have done. This conclusion was derived from an affidavit written by the Comptroller provided in support of the defendant's motion. In the affidavit, the Comptroller affirmed that the demands made in the contractual notices of claim did not give the Comptroller notice that plaintiff intended to litigate the demand as would have a formal notice of claim. Accordingly, the court dismissed the action.[38]

These cases demonstrate that when faced with a motion to dis-

---

[35] *Id.* at 5-6.

[36] *Id.* at 6-7.

[37] PBS Building Systems, Inc. v. City of New York, 1996 U.S. Dist. LEXIS 15006, at 9.

[38] *Id.* at 13-15.

miss or for summary judgment for failure to file a formal section 7-201(a) notice of claim, the first relief to seek should be whether any non-formal notices were provided. If so, it should then be determined whether the non-formal notice was given to the proper public official, the Comptroller, and if it sufficiently gave notice of an intent to litigate. In contract cases, invoices for amounts due should be found. This is because invoices by nature provide a detail equivalent to that found in a formal notice of claim: the nature of the claim, and the time, place and the manner in which the claim arose.[39] Invoices also by nature provide notice of an intent to litigate: the failure to pay an invoice amount ordinarily results in litigation for the invoice amount due. The principal concern with invoices is that they are customarily not forwarded to the Comptroller's Office. Therefore, as general practice, concerned persons or businesses doing contract business with the City of New York should forward copies of invoices to the Comptroller contemporaneously with copies to the related city agency or entity responsible for payment of the invoices.

Other Options

There are two other options to consider when faced with a motion to dismiss or for summary judgment for the failure to file a formal section 7-201(a) notice of claim. As stated earlier, section 7-201(a) applies only to those actions involving monetary relief or to those actions involving both equitable and monetary relief where the equitable relief is only incidental to the monetary relief. Therefore, it may be worthwhile to amend the underlying complaint to allege equitable rather than monetary relief. In *Brooklyn School* for Special Children v. Crew,[40] plaintiffs had brought an action claiming more than five million dollars due on a memorandum of understanding. When faced with a motion for judgment on the pleadings for the failure to file a section 7-201(a) notice of claim, the plaintiffs pointed out that the underlying action was primarily for declaratory and injunctive relief and the monetary relief was ancillary at best. The court took notice and denied the motion, finding that since notice of claims did not apply to actions seeking equitable relief, the section 7-201(a) notice of claim did

---

[39] *See, e.g.,* Hygrade Insulators, Inc. v. Middle Country Central School District, 207 A.D.2d 430, 431 (2d Dept. 1994) (finding invoice sufficiently similar to notice of claim).

[40] Brooklyn School for Special Children v. Crew, 1997 U.S. Dist. LEXIS 12974, at 1.

not apply.[41]

The other option is to amend the underlying complaint to allege a federal claim, rather than a state claim. As already evident, section 7-201(a) is a municipal statute and, generally speaking, only applies to common law causes of action. In *American Telephone and Telegraph Co. v. City of New York*,[42] the plaintiff brought an action claiming more than half a million dollars due under a contract for telephone services. When faced with a motion to dismiss for the failure to file a section 7-201(a) notice of claim, the plaintiffs pointed out that the underlying action was brought pursuant to the Federal Communications Act (FCA), a federal statute and, therefore, the state code section 7-201 was inapplicable. The court agreed, finding that the requirement of state notice was not necessary. As a result, the court denied the defendant's motion.[43]

These two options provide some potential relief when defending a motion to dismiss for failure to file a section 7-201(a) notice of claim. According to case law, however, these options are rarely available. Thus, while there is some relief from section 7-201(a)'s underlying principles and strict interpretation, the section's strict requirements should be complied with at all times as it maintains its historical gospel-like reputation.

---

41 *Id.* at 51.
42 American Telephone and Telegraph Co. v. City of New York, 736 F. Supp. 496.
43 *Id.* at 500-02.