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Litigating the Late Notice of Claim Against the State New York

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Litigating against New York state can be challenging under the best of circumstances. Failure to file a timely Notice of Claim is a procedural impediment in the Court of Claims Act that can bar an action at the outset. This article will explore the requirements that must be met in order to obtain permission to file a Late Notice of Claim, various defenses the state will likely invoke to defeat such a motion, and recent trends in the law.

If the deadline to file the Notice of Claim passed, the viability of filing a motion to seek permission to file a late Notice of Claim should be fully evaluated. New York's Court of Claims Act 10 (6) provides that the court, upon application and in its broad discretion, may permit the late filing and service of a claim "at any time before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the Civil Practice Law and Rules." *Martin v. The State of New York*, #2016-041-029, Claim No. 126048.

When considering a motion seeking permission to file a late Notice of Claim, the court will consider the following six factors:

- Among other factors, whether the delay in filing the claim was excusable;
- whether the state had notice of the essential facts constituting the claim;
- whether the state had an opportunity to investigate the circumstances underlying the claim;
- whether the claim appears to be meritorious;
- whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state;
- and whether the Claimant-Respondent has any other available remedy. See 10(6) of the Court of Claims Act.

If some of the factors cannot be met, it is not necessarily the end of the evaluation. "While the court must consider the six factors delineated in Court of Claims Act §10(6), those factors are not exhaustive and the presence or absence of any one factor is not controlling." *Matter of Gavigan*, 176 A.D.2d at 1118. "No one factor is deemed controlling, nor is the presence or absence of any one factor determinative." *Qing Liu v. City Univ. of N.Y.*, 262 A.D.2d at 474; see *Morris v. Doe*, 104 A.D.3d at 921.

Indeed, since the court has broad discretion in granting or denying a motion to permit a late notice of

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claim, it "may place as much or as little weight on any of the six factors to be considered pursuant to the statute." *Allen v. State of New York*, 2002 WL 31940720, at *2 (Ct. Cl. 2002). "A determination by the Court of Claims to grant or deny a motion for permission to file a late notice of claim lies within the broad discretion of that court and should not be disturbed absent a clear abuse of that discretion …." See also *Ledet v. State*, 207 A.D.2d 965, 965-66 (4d Dep't 1994); *Matter of Gavigan v. State*, 176 A.D.2d 1117, 1118 (3d Dep't 1991); *Donovan*, 87 A.D.2d at 665 (the "[Appellate Division] may reverse decisions only when the court's discretionary power has been clearly abused."). Clear abuse of the discretion is a high bar.

Abuses of discretion may occur, among other instances, when the court accepts a late claim "in the absence of the appearance of merit." *McCarthy v. New York State Canal*, 244 A.D.2d 57, 61 (3d Dep't), lv. den., 92 N.Y.2d 815 (1998). The rationale is that "'it would be futile to permit a defective claim to be filed even if the other factors in Court of Claims Act §10(6) supported the granting of the claimant's motion.'" *Martinez v. State of New York*, 62 A.D.3d 1225, 1226 (3d Dep't 2009) (quoting *Savino v. State of New York*, 199 A.D.2d 254, 255 (2d Dep't 1993)).

However, "the reasonable cause standard is appropriate … because the court need only determine whether to allow the filing of the claim, leaving the actual merits of the case to be decided in due course." *Estate of Santana*, 399 N.Y.S.2d at 402. The meritorious claim factor, like the other six factors, is "not an absolute requirement, and is simply one of the factors which the court must consider in determining whether to exercise its discretion in favor of a Claimant-Respondent." *Estate of Santana*, 399 N.Y.S.2d at 401.

Proving the state had notice of the essential facts constituting the claim is imperative but not dispositive. The following are examples of adequate notice of essential facts constituting the claim to the state. In *Carmen v. State,* the state had "abundant notice" where "[a] full report of the accident was filed by an officer of the Capitol Police force, the nurse employed in the State Capitol treated Claimant-Respondent and made a record of the matter, and official records of the incident were filed with the Workmen's Compensation Board." 49 A.D.2d 965, 966 (3d Dep't 1975). In *Avila v. State of New York*, an accident report prepared by the New York State Department of Motor Vehicles' office manager concerning the incident as well as a statement prepared by a security officer on the day of incident establish "actual notice of the essential facts constituting the claim" and "notice to the State." 131 Misc.2d 449, 450 (Ct. Cl. 1986). In *Crawford v. City University of New York*, notice the day after the incident constituted prompt notice to the defendant and the defendant would not be substantially prejudiced by the granting of a motion to file a late claim. 502 N.Y.S.2d 916, 918 (Ct. Cl. 1986). Additionally, in *Reinmuth v. State of New York*, where "the state had notice of the essential facts constituting the claim, [it] will suffer no prejudice if relief is granted." 65 A.D.2d 648, 649 (3d Dep't 1978). The court in *Eagle Ins. Co. v. State*, held the state will not be substantially prejudiced by a late filing where the "state had timely notice of the essential facts constituting the claim and an opportunity to investigate the claim's underlying circumstances." 71 A.D.2d 726, 727 (3d Dep't 1979).

In *Avila*, the state was not prejudiced by the granting of a motion to file a later claim where "the State ha[d] the opportunity to explore the circumstances surrounding the mishap" and based on "[an accident report and a witness statement], it did, in fact, investigate the claim." 131 Misc.2d at 450-51. In *Remley v. State*, "because much of what occurred is memorialized in documents and because more than the passage of

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time is needed to establish that the delay in filing has caused substantial prejudice to defendant, the state has not been substantially prejudiced in its ability to defend against the claim."). 665 N.Y.S.2d 1005, 1007 (Ct. Cl. 1997). In *Tyson v. Roswell Park Cancer Institute*, "[r]egarding prejudice, the court has considered that the records necessary to investigate the circumstances underlying the claim are within defendant's control, and that the delay does not appear to have impaired its ability to conduct such a review." 780 N.Y.S.2d 704, 709 (Ct. Cl. 2003).

The state may also claim governmental immunity, which protects the state from liability for negligence claims caused by governmental functions involving the exercise of discretion. See *Matter of World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 452 (2011). Governmental immunity "reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." Id.; see *Sebastian v. State of New York*, 93 N.Y.2d 790, 792-93 (1999) (finding that a claim lacked the appearance of merit under Court of Claims Act §10(6) because it was barred by governmental immunity); *Karras v. State of New York*, 26 N.Y.S.2d 327, 328 (3d Dep't 1975) (same), lv. den., 37 N.Y.2d 708 (1975).

However, not every function exercised by a government is "governmental." Some functions exercised by a government are "proprietary" and thus are subject to ordinary tort liability. "As a general rule, the distinction is that the government will be subject to ordinary tort liability if it negligently provides 'services that traditionally have been supplied by the private sector.'" *Applewhite v. Accuhealth*, 21 N.Y.3d 420, 426 (2013) (quoting *Sebastian*, 93 N.Y.2d at 795), and essentially "acts as a legal individual voluntarily assuming a duty, not imposed upon it," *Augustine v. Brant*, 249 N.Y. 198, 206 (1928); see also *McEnaney v. State of New York*, 267 A.D.2d 748, 750 (3d Dep't 1999) (finding a function to be governmental in part because it involved "legislative … decision making").

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Examples of governmental functions include the operation of police forces (*Riss v. City of New York*, 22 N.Y.2d 579, 581-83 (1968)), public schools (*Brown v. Board of Trustees of Hamptonburg Sch. Dist.*, 303 N.Y. 484, 488-89 (1952)), and employment initiatives for the disadvantaged. *Tara N.P. v. Western Suffolk Bd. of Coop. Educ. Servs.*, 28 N.Y.3d 709, 713 (2017). "Governmental Immunity is designed to encourage governments in "undertaking activities to promote the general welfare." *O'Connor v. City of New York*, 58 N.Y.2d 184, 191 (1983); see *Jarmolowski v. State*, 23 A.D.3d 786, 786-87 (3d Dep't 2005), lv. den., 6 N.Y.3d 714 (2006).

The state may argue that "[g]overnmental entities perform a variety of functions. Some of these functions are purely proprietary, others are purely governmental, and others have characteristics of both. The distinction between proprietary and governmental functions is important because the governmental function immunity doctrine applies only to the actions of a governmental entity that are properly categorized as a governmental functions … . Governmental entities acting in the furtherance of a proprietary function will be subject to liability under ordinary principles of tort law." *Heeran v. Long Island Power Authority*, 141 A.D.3d 561, 563 (2d Dep't 2016).

Proprietary functions include the maintenance of roads and highways in a reasonably safe condition and the operation of a park (id.; *Agness v. State*, 159 A.D.3d 1395, 1396 (4d Dep't 2018)), and the failure to minimize a risk posed at a park with a relevant warning implicates a proprietary duty and not a governmental duty. See *Agness*, 159 A.D.3d at 1396. "As a landowner, [defendant] is subject to

the same rules of liability as a private citizen and must act reasonably in view of all the circumstances.'" As such, the state "has a duty to take reasonable precautions to prevent accidents which might foreseeably occur as the result of dangerous terrain on its property" (see *Walter v. State of New York*, 185 A.D.2d 536, 538 (1992)) by posting warning signs or otherwise neutralizing dangerous conditions (see *Preston v. State of New York*, 59 N.Y.2d at 999; *Walter v. State of New York*, 185 A.D.2d at 538).

However, the duty to take reasonable precautions does not extend to open and obvious conditions that are natural geographic phenomena which "can readily be observed by those employing the reasonable use of their senses." *Tarricone v. State of New York*, 175 A.D.2d 308, 309 (1991), lv. den. 78 N.Y.2d 862 (1991); see *Cramer v. County of Erie*, 23 A.D.3d 1145, 1146 (2005); *Rosen v. New York Zoological Socy.*, 281 A.D.2d 238, 238-39 (2001); *Duclos v. County of Monroe*, 258 A.D.2d 925, 926 (1999); *Tushaj v. City of New York*, 258 A.D.2d 283, 284 (1999), lv. den. 93 N.Y.2d 818 (1999); *Coote v. Niagara Mohawk Power*, 234 A.D.2d 907, 908 (1996); *Plate v. City of Rochester*, 217 A.D.2d 984, 985 (1995), lv. den. 87 N.Y.2d 801 (1995); *Diven v. Village of Hastings-On-Hudson*, 156 A.D.2d 538, 539 (1989); see also *Cohen v. State of New York*, 50 A.D.3d 1234, 1235 (3d Dep't 2008). In such situations, the state may not be liable for injuries caused thereby.

Nevertheless, the state is responsible for implementing "reasonable precautions to prevent accidents which might foreseeably occur as the result of dangerous terrain on its property' … by posting warning signs or otherwise neutralizing dangerous conditions." *Cohen v.* 50 A.D.3d at 1235. Similarly, in *Preston*, the state "had a duty either to inspect and remove hazards from the water or to give warnings that the waters were used at the swimmer's risk."). *Preston v. State of New York*, 59 N.Y.2d at 998.

In *Walter v. State of New York*, the court held that "[w]ere a dangerous condition is latent and readily discoverable or known to the state, the state has a duty to take reasonable measures to neutralize the condition, including a duty to post a warning sign, or to otherwise prevent injuries." 185 A.D.2d 536, 538 (3d Dep't 1992). In *King v. Cornell University*, the court held that a landowner owes a duty "to warn of a latent, dangerous condition of which the landowner is or should be aware." 119 A.D.3d 1195, 1197 (3d Dep't 2014). "To satisfy the duty to warn, the warnings provided by the state must be sufficient to apprise an individual of the specific danger that he or she ultimately encountered." *King v. Cornell University*, 973 N.Y.S.2d 534, 538 (2013); see also *Arsenault v. State*, 946 N.Y.S.2d 276, 280 (3d Dep't 2012) ("[T]he question is whether the signs that were provided by defendant … sufficiently conveyed the specific danger to which Claimant-Respondents and decedent would be exposed by entering the creek bed and proceeding to the base of the falls."

If the deadline to file a Notice of Claim has passed, evaluating the six criteria in the Court of Claims Act is critical in assessing the viability of seeking permission to file a Late Notice of Claim. The case law has been trending toward granting of such motions as "[t]he Court's focus should … be on the substance of the allegations, and not on their form or location." *Estate of Santana*, 399 N.Y.S.2d at 402. The analysis "does not, and should not, require [the Claimant-Respondent] to definitively establish the merits of his claim, or overcome all legal objections thereto, before the Court will permit him to file." Id. at 403. Finally, a claimant does not need to prove her prima facie case against the state for the purpose of allowing a motion to file a claim late. See *Allen*, 2002 WL 31940720, at *3-*4; see also *Estate of Santana*, 399 N.Y.S.2d at 401-02.