Buffalo Law Review

Volume 7 | Number 1 Article 83

10-1-1957

Municipal Corporations—Municipal Disposal of Garbage—Governmental Function

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The petitioner, who was the defendant in a personal injury action, was seeking indemnification pursuant to section 193(a) of the Civil Practice Act which permits a defendant to implead a third party in the original law suit. Since the petitioner was served a summons over 90 days after the claim arose, it made an application to the Supreme Court for an extension of the time limit under section 50(e)(5) of the General Municipal Law. That section gives the court discretion to extend the time for notice for a reasonable period after 90 days. However in order to exercise this discretion, the applicant must be an infant or mentally or physically incapacitated.[3] The Supreme Court ruled that these were the only conditions upon which the application could be granted. This was affirmed by the Appellate Division.[4] The Court of Appeals held that the lower court was correct in denying the application and further stated as dictum that notice was not necessary in a third-party indemnification action.

The Court of Appeals gave no arguments to sustain this position but it seems to have made a valid assumption. Section 50(e) of the General Municipal Law makes no provision for a third-party action and the legislative intent of the statute is to give the public corporation adequate opportunity to investigate the facts while readily available.[5]

"A statute requiring that notice of claim be given prior to institution of action against a public corporation should be construed in the light of its underlying purpose and such a statute is not a trap to catch the unwary or ignorant."[6]

If notice is required and section 193(a) of the Civil Practice Act is barred, the purpose or intent of section 50(e) of the General Municipal Law would be defeated. The petitioner would have to wait for a judgement against it before it could give a notice of an indemnity claim. This could take many years and the public corporation would have a very difficult time acquiring facts. Thus, the statute would operate as a hindrance, rather than an aid to public corporations.

Municipal Disposal Of Garbage—Governmental Function

In *Nehrbas v. Incorporated Village of Lloyd Harbor*[7] the Court held that a village was not restricted by its zoning restrictions when using residentially zoned land for the purpose of storing vehicles used by the police force, highway

3. Rudolph v. New York, 191 Misc. 947, 77 N.Y.S.2d 788 (Sup. Ct. 1947).
4. 1 A.D.2d 976, 151 N.Y.S.2d 86 (2d Dep't 1956).
5. Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952); Sweeney v. City of New York, 225 N.Y. 271, 273, 122 N.E. 243, 244 (1919).
6. Sandak v. Tuxedo Union School District No. 3, Town of Tuxedo, 308 N.Y. 226, 124 N.E.2d 295 (1954).
7. 2 N.Y.2d 190, 159 N.Y.S.2d 145 (1957).

department, and in the collection of garbage, for the village was performing a governmental function.

A village is restricted by its zoning restrictions when performing a proprietary function, but not so when performing a governmental one.[8] If the functions are governmental, the village may store and maintain vehicles necessarily used in performing these functions.[9] The issue in this case thus resolved itself into whether the furnishing of a police force, the maintenance of a highway department, and the collection of garbage were of a proprietary or governmental nature.

The distinction between a proprietary and governmental act of a municipality is whether the municipality is exercising its private rights as a corporate body and performing a proprietary function, or is exercising the legislative mandate related to a public duty generally and performing a governmental function.[10] Prior to this case it had already been well established that furnishing a police force was a governmental function,[11] and that maintenance of a highway department was a governmental function.[12] Thus, appellant had no real basis for challenging the proposed transgression of the zoning ordinance by the village with regard to these uses. With regard to the remaining use, appellant did have a positive basis for challenging the village for in the lower courts a conflict existed as to whether disposal of garbage by a village constituted a proprietary function[13] or a governmental one.[14] The Court corrected the inconsistency by holding that collection of garbage is a governmental function. The basis of the Court's decision was that the preservation of the well-being and health of the community places a duty upon the village to assure the collection and disposal of garbage, and that performance of this duty is a governmental function.

It is common knowledge that accumulated garbage can breed diseases. Since such diseases are detrimental to the health and well-being of people living in the crowded living conditions of a typical modern village, it is reasonable to place the duty of assuring the collection of garbage upon the village and hold that a governmental function is being performed when such duty is being performed.

8. Village of Larchmont v. Town of Mamaroneck, 239 N.Y. 551, 147 N.E. 191 (1924); Oaks Mfg. Co. v. City of New York, 206 N.Y. 221, 99 N.E. 540 (1912).

9. Stiger v. Village of Hewlett Bay Park, 283 App. Div. 827, 129 N.Y.S.2d 38 (2nd Dep't 1954).

10. O'Brien v. Town of Greenburgh, 239 App. Div. 555, 268 N.Y. Supp. 173 (2nd Dep't 1933), *aff'd*, 266 N.Y. 582, 195 N.E. 210 (1935).

11. Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933); Augustine v. Town of Brant, 249 N.Y. 198, 163 N.E. 732 (1928).

12. People v. Grant, 306 N.Y. 258, 117 N.E.2d 542 (1954); Markey v. County of Queens, 154 N.Y. 675, 49 N.E. 71 (1897).

13. O'Brien v. Town of Greenburgh, *supra* note 10.

14. Hewlett v. Town of Hempstead, 3 Misc.2d 954, 133 N.Y.S.2d 690 (Sup. Ct. 1954), *aff'd*, 1 A.D.2d 954, 150 N.Y.S.2d 922 (2nd Dep't 1956), *motion for leave to appeal denied* 1 N.Y.2d 643, 154 N.Y.S.2d 49 (1956).