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COURT OF APPEALS

STATE OF NEW YORK

VILLAGE OF FREEPORT,

Respondent,

-against-

NO. 63

FREEPORT PLAZA WEST,

Appellant.

20 Eagle Street
Albany, New York
May 20, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Village of Freeport v. Freeport Plaza West.

3 MR. HARFENIST: Got to move the mic down a little
4 bit. Good afternoon, Your Honors. I'm Steve Harfenist. I
5 represent the appellant in this case. I'll reserve two
6 minutes for rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. HARFENIST: Almost 50 years ago, this court
9 decided a case, the Salesian Society case, that held that
10 peculiar circumstances - - - and they didn't define
11 specifically peculiar circumstances - - - can prevent a
12 municipality from asserting the failure of the - - - of a
13 party from - - - from filing a notice of claim. In this -
14 - -

15 JUDGE RIVERA: So what's - - - what's peculiar?

16 MR. HARFENIST: Well - - -

17 JUDGE RIVERA: You say they breached. You should
18 have filed a notice.

19 MR. HARFENIST: Well, and that - - -

20 JUDGE RIVERA: You didn't. Doesn't that end it
21 there?

22 MR. HARFENIST: What was peculiar in Salesian was
23 how long they waited to - - -

24 JUDGE RIVERA: Okay.

25 MR. HARFENIST: - - - to do it. And that's a

1 whole separate issue in here because - - -

2 JUDGE HALLIGAN: No. But let's focus on that for
3 a minute - - -

4 MR. HARFENIST: Sure.

5 JUDGE HALLIGAN: - - - because I read Salesian as
6 being as much about waiver as I do about equitable
7 estoppel, because I believe there that the issue wasn't
8 raised until after final judgment. Is that right?

9 MR. HARFENIST: That's correct.

10 JUDGE HALLIGAN: And the Appellate Division
11 raised its sua sponte. So I don't think it was actually
12 raised by the party.

13 MR. HARFENIST: That's all correct.

14 JUDGE HALLIGAN: And - - - and we don't have
15 either of those circumstances here.

16 MR. HARFENIST: We do not. But - - -

17 JUDGE HALLIGAN: So why doesn't that case really,
18 you know, turn as much on principles of waiver as equitable
19 estoppel?

20 MR. HARFENIST: Well, I think - - -

21 JUDGE HALLIGAN: It's a short opinion. It's a
22 little hard to tell, I think.

23 MR. HARFENIST: Well, I think the answer is, is
24 that the cases that have all interpreted it have basically
25 merged the two concepts together. And if you look at the -

1 - - the opinions that have come down after Salesian, they
2 call it waiver. They call it estoppel.

3 JUDGE HALLIGAN: But since we - - - we don't have
4 a delay until after final judgment, and here the party
5 raised it themselves as opposed to the Appellate Division
6 raising it sua sponte, why isn't Salesian distinguishable
7 for those two reasons?

8 MR. HARFENIST: Well, on its facts, it's
9 distinguishable for sure.

10 JUDGE HALLIGAN: No. I mean distinguishable in
11 terms of whether or not equitable estoppel can be applied.

12 MR. HARFENIST: Well, because I think Salesian
13 stands for - - - and just about every court that's looked
14 at Salesian has said Salesian stands for the concept of a -
15 - - that peculiar circumstances, not limited to - - -

16 JUDGE HALLIGAN: That's what we have to decide, I
17 think, right, is how much - - -

18 MR. HARFENIST: Well, that's - - -

19 JUDGE HALLIGAN: - - - play in the joints that
20 case provides.

21 MR. HARFENIST: Well, and not only that case, but
22 a whole series of other cases that have come down - - -
23 that have come down since then. There's a large body of
24 law that have - - -

25 JUDGE HALLIGAN: In this court?

1 MR. HARFENIST: Not in this court. This court
2 hasn't touched it since Salesian.

3 JUDGE HALLIGAN: Well, so let me - - - let me
4 back you up for a minute and - - -

5 MR. HARFENIST: Sure.

6 JUDGE HALLIGAN: - - - and ask you about Bender.
7 So in Bender, there's wrongful or negligent conduct, right?
8 Are you - - - that's what the court identifies as - - -

9 MR. HARFENIST: They identified a series of - - -

10 JUDGE HALLIGAN: - - - the basis for - - -

11 MR. HARFENIST: - - - words.

12 JUDGE HALLIGAN: Well, I think what it says is
13 wrongful, misleading, or negligent conduct, right?

14 MR. HARFENIST: Wrongful, misleading, or
15 negligent conduct.

16 JUDGE HALLIGAN: Okay. Are you alleging that
17 that's what we have here? And if so, what is it?

18 MR. HARFENIST: Yes. I'm alleging that the
19 conduct is misleading.

20 JUDGE HALLIGAN: Okay. So what is it?

21 MR. HARFENIST: What's misleading is when the
22 municipality files a lawsuit alleging breach of contract,
23 they are telling the party to that contract, we are putting
24 everything with regard to that contract before necessarily
25 the court. There is no - - -

1 JUDGE HALLIGAN: Again, but the - - - I mean, I
2 litigated for a while, and it seemed to me like neither me
3 nor my adversary were required to disclose all of our
4 defenses right out of - - - of the gate. And so I'm not
5 clear how it's - - -

6 MR. HARFENIST: So here's the - - -

7 JUDGE HALLIGAN: - - - negligent or misleading
8 so.

9 MR. HARFENIST: So here - - - well, what's
10 misleading is, is your - - - is when you file a lawsuit on
11 a breach of contract, are you expecting a party to - - - to
12 raise the fact that, no, we didn't breach, but you may have
13 breached? You got to remember, in this case, the breach
14 and the counterclaim rely on the same paragraph of the
15 contract. There's no - - - it's all transactionally
16 identical. So in other words - - - and here's where this
17 is really - - -

18 JUDGE HALLIGAN: But the statute doesn't have
19 some carve-out for - - - I think what you're getting at is,
20 is it's a mere counterclaim. Yes?

21 MR. HARFENIST: Yeah, exactly.

22 JUDGE HALLIGAN: Right? Okay. But the statute
23 doesn't - - -

24 MR. HARFENIST: The statute doesn't say anything
25 about counterclaims.

1 JUDGE HALLIGAN: No. And so - - -

2 MR. HARFENIST: The courts have said it applies
3 to counterclaims.

4 JUDGE HALLIGAN: Well, right. But I think you're
5 asking us to make an exception.

6 MR. HARFENIST: I'm asking you to - - - to say
7 that when a municipality sues a party on a breach of
8 contract, that the - - - that the municipality - - - that
9 the defendant, the private party, doesn't have to file a
10 notice of claim to say I didn't breach that provision - - -

11 JUDGE GARCIA: That sounds a lot like - - -

12 MR. HARFENIST: - - - you did.

13 JUDGE GARCIA: - - - legislating though, doesn't
14 it? If they wanted to write that into statute, they could
15 have written that. In fact, they carved excusing late
16 notice out of the statute here, right?

17 MR. HARFENIST: Well, I don't know that - - -

18 JUDGE GARCIA: For contract claims.

19 MR. HARFENIST: They actually didn't really carve
20 it out. I don't know how - - - no one really knows how
21 9802 wound up - - -

22 JUDGE GARCIA: Can we get back to Salesian? I
23 read Salesian as at the end of that opinion the court says,
24 however, the case before us, as the Village in its brief
25 agrees, involves a continuing trespass and as the Appellate

1 Division noted, plaintiff in the face of dismissal on the
2 narrow issue of notice alone, could therefore now file a
3 notice of claim and bring a new action.

4 MR. HARFENIST: Yeah. We could - - -

5 JUDGE GARCIA: So even in that case - - -

6 MR. HARFENIST: Let me tell you why this case is
7 different and - - - and why it becomes - - - creates such
8 an absurd result.

9 JUDGE GARCIA: But why isn't that a critical fact
10 in Salesian?

11 MR. HARFENIST: It's - - - it's not because - - -
12 well, it may be a critical fact in Salesian, but peculiar
13 circumstances can take forms other than necessarily.

14 JUDGE GARCIA: Even with the peculiar
15 circumstances in Salesian, at the end of the day, in doing
16 something as drastic as applying estoppel or waiver or
17 however you phrase it in that case, the court said, and no
18 matter what, even as you, the municipality, agree, this is
19 a continuing tort, a continuing trespass.

20 MR. HARFENIST: Uh-huh.

21 JUDGE GARCIA: So they could - - - if we dismiss
22 it now, after all of this, they're just going to refile and
23 you're going to have another trial.

24 MR. HARFENIST: So here's what the problem - - -
25 here's why it's a problem in this particular case. Let's -

1 - - let's assume for a second the municipality sues - - -
2 and they did - - - alleging breach of contract. And let's
3 assume that my client did not file a counterclaim and
4 defends and says we didn't breach. The municipality is
5 putting - - - by requiring a - - - a notice of claim under
6 those particular circumstances, the municipality, if they
7 don't file a notice of claim, can't lose, they win
8 automatically. So what we're doing - - - what the - - -
9 what the notice of claim is doing is creating - - - forcing
10 a compulsory counterclaim.

11 JUDGE RIVERA: And I don't - - - I'm not
12 following this.

13 MR. HARFENIST: All right. I'll try - - - let -
14 - - let me run it through - - -

15 JUDGE RIVERA: I think I understand what you're
16 saying about the compulsory. But if - - - if in your
17 response you say we didn't breach.

18 MR. HARFENIST: Okay. So let's - - - what
19 happens if we lose? When - - - they get to forfeit the
20 down payment, which is what they were asking for. What
21 happens if we win?

22 JUDGE RIVERA: That you didn't breach?

23 MR. HARFENIST: We didn't breach. What happens
24 if we win?

25 JUDGE RIVERA: Yeah. But I thought your



1 counterclaim was we didn't breach, you breached.

2 MR. HARFENIST: That's exactly right.

3 JUDGE RIVERA: You didn't show that. That's not

4 - - -

5 MR. HARFENIST: But my point is, is that - - -

6 JUDGE RIVERA: That's not what their argument is.

7 MR. HARFENIST: - - - if you're requiring a
8 notice of claim in this particular circumstance, I will - -
9 - the party who's defending the claim will lose the right
10 to obtain any relief if - - - even if they're found not to
11 have been in breach without - - -

12 JUDGE CANNATARO: The notice of claim requirement
13 doesn't preclude you from asserting a defense. It
14 precludes you from making a claim.

15 MR. HARFENIST: Well, but here's the - - - that's
16 correct. But so let's assume for a second that - - - let's
17 assume for a second - - -

18 JUDGE RIVERA: And I don't know how you lose the
19 compulsory counterclaim.

20 MR. HARFENIST: I'll tell you why. Because - - -

21 JUDGE RIVERA: All you have to do is file the
22 notice of claim. That's the whole argument.

23 MR. HARFENIST: First off - - - but follow me for
24 a second. If we defend the claim and there's no
25 counterclaim and it's determined that we didn't breach, do

1 we get our contract deposit back? The answer is no. But
2 we've just litigated that, and the court has already said
3 no, because they - - - if you don't file a - - -

4 CHIEF JUDGE WILSON: You get to enforce the
5 contract. No?

6 MR. HARFENIST: I can't.

7 CHIEF JUDGE WILSON: Why?

8 MR. HARFENIST: Because - - - well, in theory, I
9 have to go back and I would have to file a new case
10 alleging that they've breached the contract, but I would be
11 out of time. It would be beyond the year and 90 days.

12 CHIEF JUDGE WILSON: Why would - - - you know,
13 why would you have to allege they breached? Why wouldn't
14 you simply - - - you didn't breach the contract. The
15 contract is still in force. And you can then - - - why
16 isn't the contract in force?

17 MR. HARFENIST: Well, then they're not - - - if
18 they don't comply, what do I have to do?

19 CHIEF JUDGE WILSON: Well, if they then don't
20 comply, you get a new suit.

21 MR. HARFENIST: No. But they - - - that suits
22 untimely because they breached when - - -

23 CHIEF JUDGE WILSON: No, no, no.

24 MR. HARFENIST: - - - they filed the - - - they
25 breached when there was a determine - - - when they filed

1 the action. That's the problem.

2 CHIEF JUDGE WILSON: Filed - - -

3 JUDGE RIVERA: That's your claim.

4 MR. HARFENIST: Well, that's the - - - that's
5 what this court said in - - -

6 JUDGE RIVERA: Is that what makes it different?

7 MR. HARFENIST: That is - - -

8 JUDGE RIVERA: This is not about some other
9 breach, it's about the fact that they filed the complaint.
10 And that's the nature of the breach.

11 MR. HARFENIST: That's exactly right. It's all
12 about the - - - it's the fact that they're litigating this
13 particular clause of action. And with regard to - - -

14 JUDGE HALLIGAN: This particular cause of action
15 being what exactly? I want to make sure I follow you.

16 MR. HARFENIST: That we breached paragraph 3 of
17 the contract. And what we're saying is we did not breach
18 paragraph 3 of the contract. And by you suing us, you've
19 now - - - you have now breached.

20 JUDGE HALLIGAN: So what - - - what I find
21 challenging about - - - about what you're laying out is - -
22 - is this. There are a lot of lawsuits involving
23 municipalities around the state, right? And - - - and I'm
24 not sure how to identify, even if we were to agree with
25 you, the circumstances that you're getting at - - -

1 MR. HARFENIST: It's very easy. I'll tell you -
2 - - I'll tell you how it's easy. There's two reasons. One
3 - - - and I'm stealing Judge Rosenblatt's decision in Frink
4 from 1977.

5 JUDGE HALLIGAN: Let's assume we don't want to
6 say that all breach of contract claims are not - - - are
7 not subject to this - - -

8 MR. HARFENIST: So then it would - - - if you
9 want to limit it, it would have to be that where it's - - -
10 where the breach of contract claim and the counterclaim are
11 transactionally identical relating to the same paragraphs
12 of the - - - of the contract. In other words, a mirror
13 image.

14 JUDGE HALLIGAN: So why isn't that something, to
15 Judge Garcia's point, that we would have expected the
16 legislature to do when it's drafting 9802? I mean, that -
17 - - that's a very concrete - - -

18 MR. HARFENIST: Well, I'm not really going to get
19 into the quality of the legislative drafting of the notice
20 of claim places - - -

21 JUDGE HALLIGAN: I'm not - - - I'm not - - -
22 that's not - - -

23 MR. HARFENIST: But that's what you're asking me.

24 JUDGE HALLIGAN: No.

25 MR. HARFENIST: No. This is - - -



1 JUDGE HALLIGAN: What I'm suggesting, I think, is
2 something different, which is you're asking us to read and
3 apply statutory provision, right? And you are suggesting
4 that there is a very concrete exception there. And so I'm
5 asking you, aren't you asking us to effectively rewrite the
6 statute - - -

7 MR. HARFENIST: I'm not.

8 JUDGE HALLIGAN: - - - which we generally decline
9 to do and leave to the legislature?

10 MR. HARFENIST: And you should, but that's not
11 what - - - this is not a statutory instruction issue. This
12 is an equitable estoppel waiver issue. That's the
13 distinction. It's - - - is it - - - is it inequitable?

14 JUDGE RIVERA: And did the legislature understand
15 at the - - - at the point in time that it passed the
16 particular - - - enacted the - - - the language that we're
17 talking about in this statute, this notice of claim
18 requirement, was it aware that collateral estoppel applied
19 in these kinds of circumstances?

20 MR. HARFENIST: I have - - - I don't - - - I
21 don't know whether they would have thought that or not.
22 Maybe - - -

23 JUDGE RIVERA: Well, historically, I'm asking
24 you.

25 MR. HARFENIST: But I mean - - -

1 JUDGE RIVERA: We assume that they understand the
2 law as it stood at the time that they enacted legislation.

3 MR. HARFENIST: Well, 9802 happened - - - came
4 before Salesian and Bender. So you - - - in theory, they
5 may not have known that equitable estoppel applied to - - -
6 to a potential notice of claim - - -

7 CHIEF JUDGE WILSON: Well, I thought you had - -
8 - in an earlier - - - in an earlier answer, you said that
9 the notice of claim doesn't refer to counterclaims at all.

10 MR. HARFENIST: Well, the - - - the statute
11 doesn't.

12 CHIEF JUDGE WILSON: Right.

13 MR. HARFENIST: It just says claims, you know - -
14 -

15 CHIEF JUDGE WILSON: Right.

16 JUDGE RIVERA: Yeah.

17 MR. HARFENIST: - - - so I think it actually was
18 - - -

19 CHIEF JUDGE WILSON: Or it may be that they
20 weren't thinking about counterclaims, period.

21 MR. HARFENIST: I don't think they were. I mean
22 - - - and by the way, I mean - - -

23 JUDGE CANNATARO: Or it could mean that they're
24 not making an exception for counterclaims.

25 MR. HARFENIST: Well, we're all guessing what

1 they're thinking, right? I mean, that's really what it
2 comes - - - and that's why - - -

3 JUDGE CANNATARO: And that's why we have to apply
4 the rules of statutory construction.

5 MR. HARFENIST: Yeah. Because that's why we have
6 - - -

7 JUDGE HALLIGAN: That's why we're looking at the
8 words.

9 MR. HARFENIST: That's why we have equitable - -
10 - I mean, no one could possibly think that - - - first of
11 all, let me - - - let me walk it back this way. I think
12 everybody can agree that the municipality was on - - - the
13 principles of why we have notice of claims are all met
14 here. They had notice of the - - - you're going to give
15 them notice of a claim so that they can investigate. They
16 investigated. They sued. They have the right to
17 potentially settle it. They decided not to. They decided
18 to sue. And there's a third one says if - - - to prevent
19 fraud on municipal employees. That obviously doesn't
20 apply. So - - -

21 JUDGE SINGAS: So just the fact that they
22 defended themselves in - - - is you're saying they - - -
23 they lulled you into some kind of complacency?

24 MR. HARFENIST: No. They didn't defend
25 themselves. They sued us. It would be different if - - -

1 this case would be completely different.

2 JUDGE SINGAS: Yeah. But under your rule any
3 countersuit would just negate - - -

4 MR. HARFENIST: No. That's - - -

5 JUDGE SINGAS: Yes.

6 MR. HARFENIST: It's not the rule. That's not
7 what we're suggesting. What we're suggesting is, is that
8 when you sue, it's the language from the Second
9 Department's case in Jet Park Paper. When you sue on a
10 contract and it's the mirror image - - - the counterclaim
11 is based on the mirror image of the claim, you're estopped
12 from the - - - from asserting notice of claim as a defense
13 - - - as a defense.

14 JUDGE SINGAS: And where is that? Where is that
15 written, and where is that in our case law?

16 MR. HARFENIST: It's not - - - it hasn't been
17 decided. It's never been decided before. But it is in - -
18 - it has been decided in - - - in the lower courts. There
19 are lower court decisions.

20 JUDGE GARCIA: If we disagreed with that rule,
21 what's your next argument? Because you could have filed a
22 notice of claim here, right? I mean, it wasn't - - -

23 MR. HARFENIST: Well, first off - - -

24 JUDGE GARCIA: - - - precluded from it.

25 MR. HARFENIST: - - - we get to the - - - we have

1 to start off with what's the - - - is the notice of claim -
2 - - the purpose of the notice of claim, was it comply - - -
3 is it necessarily complied with and is it a trap? Is it
4 something that's going to - - - supposed to catch the
5 unwary?

6 JUDGE TROUTMAN: But the notice of claim rules
7 have existed for a long time.

8 MR. HARFENIST: Sure.

9 JUDGE TROUTMAN: So it looks like possibly it was
10 a mistake just not filing them and now saying, well,
11 because they asserted their rights, that somehow made it
12 that I don't have to file a notice of claim that is
13 generally always required and to be strictly complied with.

14 MR. HARFENIST: That is true. But these - - -
15 there are all the - - - there are this long line of cases.
16 It's not like there's not - - - not cases where the - - -
17 where the municipality have not been estopped from
18 asserting it. And they have been estopped from asserting
19 it in circumstances where it didn't reach what Salesian,
20 where it went to another case. There are two federal
21 district court cases where they - - - where the courts
22 estopped - - -

23 JUDGE CANNATARO: A lot of lower courts are faced
24 with these very compelling sets of facts where, you know,
25 the - - - the municipality or the governmental entity is

1 litigating or lulling them into a false sense of security.
2 And when - - - when they come up, they get pushback because
3 of, you know, some of the things that Judge Troutman was
4 just suggesting, which is it's not just about the purpose
5 of the notice of claim. It's that the whole idea of the
6 notice of claim goes back to this theory that we're dealing
7 with sovereign immunity here. They have to be strictly
8 construed. You don't just lightly set aside these
9 limitations on governmental liability.

10 MR. HARFENIST: I don't disagree with the
11 sovereign immunity issue, but the purpose of the notice of
12 claim has nothing to do with the sovereign immunity.

13 JUDGE CANNATARO: But it's part of that complex.

14 MR. HARFENIST: Everything's part about - - - and
15 everything's part about that contract.

16 JUDGE HALLIGAN: Well, but we have said that
17 because the purpose of that cluster of statutes is to
18 protect the public fisc, that these requirements need to be
19 strictly construed. And I don't think that we have parsed
20 - - - if I can. I don't think that we have parsed whether
21 the purpose is fully, completely, not much, not at all
22 served on a case-by-case basis. We've applied it.

23 MR. HARFENIST: The issue - - - the issue comes
24 down to - - - and this - - - this court actually has said
25 it many, many years ago. The notice of claim is not a

1 sword, it's a shield. And in theory it's not a defense.

2 JUDGE HALLIGAN: We said that, or the Appellate
3 Division said that?

4 MR. HARFENIST: No. You guys have - - - you said
5 it when you affirmed the City of Syracuse case. And I
6 think the - - - the language is actually also in - - -
7 there's some language to that effect in Bender as well.
8 But the - - - the notice of claim is not a defense. It's
9 part of the plaintiff's burden of proof. That - - - I
10 mean, so - - -

11 JUDGE RIVERA: So look, if we - - - if we
12 disagree with you, okay.

13 MR. HARFENIST: I'm going to - - -

14 JUDGE RIVERA: We disagree with you and - - - go
15 right ahead. And notice of claim strictly construed, you
16 had to satisfy it. You didn't. What - - - the next day,
17 what happens to parties in this position? Don't they just
18 have to go file a notice of claim? What's the burden?

19 MR. HARFENIST: Well, what we - - -

20 JUDGE RIVERA: If it doesn't already exist, you
21 already have to file a notice of claim.

22 MR. HARFENIST: True. If you think that you have
23 to, or if you - - -

24 JUDGE RIVERA: No. That's what I'm saying.
25 Let's say we disagree with you - - -

1 MR. HARFENIST: I mean, you could in - - -

2 JUDGE RIVERA: - - - and we say you have to.

3 MR. HARFENIST: In theory you could file - - -
4 well, here's what would happen in this lawsuit.

5 JUDGE RIVERA: Yes.

6 MR. HARFENIST: Here's what would have happened
7 in this lawsuit.

8 JUDGE RIVERA: Uh-huh.

9 MR. HARFENIST: If we had early - - - if we had
10 known before the statute of limitations - - -

11 JUDGE RIVERA: Yes, understood.

12 MR. HARFENIST: - - - expired to file a notice,
13 we would have had to - - -

14 JUDGE RIVERA: Well, they filed.

15 MR. HARFENIST: They filed.

16 JUDGE RIVERA: The clock starts at that point,
17 because that's the nature of your claim, right?

18 MR. HARFENIST: True. So - - - no.

19 JUDGE RIVERA: Okay.

20 MR. HARFENIST: Yes, yes. Right. Correct. Once
21 they filed their lawsuit.

22 JUDGE RIVERA: That's your - - -

23 MR. HARFENIST: That's correct. Now we would
24 have to - - -

25 JUDGE RIVERA: Now the next day you can file that

1 notice of claim.

2 MR. HARFENIST: Now we have to file a notice of
3 claim.

4 JUDGE RIVERA: You could do it the next day.

5 MR. HARFENIST: We have to wait - - - we have to
6 wait 40 days.

7 JUDGE RIVERA: Okay.

8 MR. HARFENIST: We have to - - - in the interim,
9 we have to answer the lawsuit.

10 JUDGE RIVERA: Right.

11 MR. HARFENIST: And then we have to make a motion
12 to amend the complaint.

13 JUDGE RIVERA: All of that fair.

14 MR. HARFENIST: What is the point of all of that?
15 It's oxymoronic. It makes no sense. It's an utter waste
16 of judicial resources.

17 JUDGE RIVERA: But we've already said even if
18 they have notice, you have to - - - you have to file a
19 notice - - -

20 MR. HARFENIST: But it's not about notice. I
21 mean, it's - - - it's about, you know, what's the - - - is
22 it - - - what's the purpose?

23 JUDGE RIVERA: Well, it's a very good argument to
24 take to the legislature.

25 MR. HARFENIST: It's - - - it's exactly why Judge

1 Driscoll ruled the way he necessarily did. 20 months of
2 litigation, nine court appearances where he asked the
3 defense - - - asked the plaintiffs, are there any legal
4 issues I have to decide. And they stood silent. And he
5 didn't do it - - - and they didn't do it. He did - - - and
6 then - - - and then right on the eve of trial, we were like
7 less than a month away from trial, they file that motion.
8 The Third Department has said that that's no good. Can't
9 do it. They've estopped it. The Second Department in the
10 - - - in the Hartsdale Fire Department case says you can't
11 sit on it like that and cause the other party to make - - -
12 to expend all that money, and it's not - - - and by the
13 way, all the litigation was over the counterclaims for the
14 - - - for the vast majority of the expense. You can't do
15 it. You - - - when you sue somebody and bring them in on a
16 claim and they're just saying the flip side of it is - - -
17 is that you - - - is the counterclaim is the flip side, you
18 can't sit on your rights like that. It's the offensive use
19 of the collateral estoppel. And in 1919 this court said -
20 - - excuse me, offensive use of the counterclaim. In 1919,
21 this court said, you can't do that. And it has nothing to
22 do with the - - - the legislative - - - the language of
23 9802. 9802 is a disaster. It's the only notice of claim
24 statute. It was pulled from the Village Law, and it wound
25 up in the CPLR, which some of the courts have - - - lower



1 courts have said you have much more - - - a court has much
2 broader ability to forgive the failure notice of claim
3 under the CPLR because of section, I think it's 103(c).

4 CHIEF JUDGE WILSON: Your red light's on.

5 MR. HARFENIST: I apologize.

6 CHIEF JUDGE WILSON: That's okay. You have your
7 rebuttal.

8 MR. CORBETT: May it please the court. Keith
9 Corbett, Harris Beach Murtha for the respondent Village.
10 Your Honors, I think - - -

11 JUDGE TROUTMAN: Are the notice of claim rules
12 different when a counterclaim is involved?

13 MR. CORBETT: Absolutely not. The statute was
14 clear. It is unequivocal. Has to be interpreted in the
15 way it's written. And it says no other action. Very
16 broad. No other action, claims, counterclaims, any type of
17 thing that can make its own action cannot be brought. But
18 I think the purpose of the statute was a little thwarted by
19 my colleague. The purpose of the statute is the taxpayer.
20 Why do Village - - -

21 JUDGE HALLIGAN: Are you - - - are you arguing
22 that you didn't know here? That - - - that seems unlikely
23 to me.

24 MR. CORBETT: What I'm arguing here is the
25 purpose of the statute is for the taxpayer to not have

1 their money wasted. It's all our money going to these
2 municipalities.

3 JUDGE HALLIGAN: But I'm asking - - -

4 MR. CORBETT: And they need a chance to settle
5 it. If they filed a notice of claim - - - let's take this
6 case, for instance - - -

7 JUDGE HALLIGAN: Let me ask you a question, if I
8 can. Are you suggesting that the purpose of the statute,
9 which is to make sure that the municipality is on notice,
10 was - - - was served here? How were you not on - - -

11 MR. CORBETT: That's not the purpose of the
12 statute.

13 JUDGE HALLIGAN: Okay. If - - - if I disagree
14 with you and I think the purpose of the statute is to make
15 sure that the government is on notice. You were on notice
16 here, right?

17 MR. CORBETT: We were not on - - - we did not
18 have an opportunity to settle the claim.

19 JUDGE CANNATARO: So let's take your - - -

20 MR. CORBETT: The notice of claim gives Village -
21 - -

22 JUDGE CANNATARO: Let's take your articulation.

23 MR. CORBETT: - - - the opportunity to settle the
24 claim.

25 CHIEF JUDGE WILSON: Wait, I'm sorry - - -

1 JUDGE CANNATARO: Counsel, you say that the
2 purpose of the statute is to give you an opportunity to
3 settle, basically to evaluate the claim that's being made
4 and to settle it once you know.

5 MR. CORBETT: And plus it's taxpayer funds that
6 are being expended. Yes.

7 JUDGE CANNATARO: But what's - - - where's the
8 flaw in your adversary's argument that you've brought the
9 same suit against them? There isn't a lot you don't know
10 about this purported claim by virtue of the fact that
11 you're suing for the very same thing.

12 JUDGE RIVERA: And you're already in litigation.
13 That's the whole point. You're already in litigation. You
14 could settle at any time with them if you want.

15 MR. CORBETT: Just so we're clear, I know the
16 court had hypotheticals this morning.

17 JUDGE RIVERA: Yes.

18 MR. CORBETT: Let's assume - - - let's assume
19 that the Village attorney got off his base here and started
20 litigation, okay. Village attorney. He did a counterclaim
21 to an outside counsel. Mayor never got it. Village clerk
22 never got it. Board never had a chance to settle. The
23 notice of claim that is clear. All actions verified, given
24 to the Village clerk. That wakes the Village clerk up.

25 CHIEF JUDGE WILSON: I'm sorry. You're not - - -

1 MR. CORBETT: Village clerk goes to the mayor - -
2 -

3 CHIEF JUDGE WILSON: You're not actually - - -

4 MR. CORBETT: - - - and determines if there's
5 something that has to be done in this case.

6 CHIEF JUDGE WILSON: Would you like to answer our
7 questions?

8 MR. CORBETT: I would.

9 CHIEF JUDGE WILSON: Okay. Then two things. Try
10 not to talk over everybody when we're trying to ask a
11 question and try to pay attention to the questions that
12 you're being asked. So two of my colleagues have asked you
13 a question. Would you like to try to answer it?

14 MR. CORBETT: Yes. I believe - - -

15 CHIEF JUDGE WILSON: Why couldn't after, you
16 filed the suit, you have settled?

17 MR. CORBETT: The case could be settled at any
18 time, as any litigation could.

19 CHIEF JUDGE WILSON: And you thought - - - well -
20 - -

21 MR. CORBETT: But we did not - - -

22 CHIEF JUDGE WILSON: And you started a case.

23 MR. CORBETT: And we started the case.

24 CHIEF JUDGE WILSON: Why were you disabled from
25 settling it and also wiping out their claim at the same

1 time?

2 MR. CORBETT: You could settle the case at any
3 time. However, not knowing they're bringing an
4 anticipatory claim is the issue here. And the Village is
5 entitled by the language in the statute to know that that -
6 - - that they may be bringing a claim.

7 CHIEF JUDGE WILSON: If you settled the claim you
8 brought, it would necessarily extinguish their claim, even
9 if it hadn't been brought. No?

10 MR. CORBETT: I don't know that in this
11 particular case, if that's actually the way it would have
12 played out. They were doing an anticipatory breach claim.

13 CHIEF JUDGE WILSON: Right.

14 MR. CORBETT: Wasn't really pled to its extent.
15 They could have still continued with their claim. It could
16 have been severed.

17 CHIEF JUDGE WILSON: Every settlement that I've
18 ever seen extinguishes all disputes between the parties
19 arising from the contract as of that date, right?

20 MR. CORBETT: There is a possibility - - -

21 CHIEF JUDGE WILSON: Every single one that I've -
22 - -

23 MR. CORBETT: - - - it could be settled, yes,
24 Your Honor.

25 CHIEF JUDGE WILSON: I mean, I practiced for a

1 really long time. I never saw a settlement - - - and I saw
2 hundreds of them. I never saw one that didn't have
3 language like that.

4 MR. CORBETT: Your Honor, I am not in any way
5 saying they could not settle. I'm saying they need to be
6 given notice of the opportunity to address the claim after.

7 CHIEF JUDGE WILSON: And the question is, why
8 isn't your filing the suit that notice?

9 MR. CORBETT: Because the notice is on the person
10 bringing the other action. The words again, no other
11 action.

12 CHIEF JUDGE WILSON: And so that would be a
13 really good argument if they were bringing a counterclaim
14 that was not compulsory. If they were suing you for
15 something else. But this is just a mirror image.

16 MR. CORBETT: I don't believe it's a mirror image
17 here. They don't have to bring that claim. They could win
18 - - - on their affirmative defenses they could win their
19 case.

20 JUDGE CANNATARO: But the - - - the action is
21 arising under the same section of the contract, is it not?

22 MR. CORBETT: The action is arising under the
23 same sections of the contract. Just goes to - - - the
24 Village brought affirmative action against them. Does that
25 mean they're on notice that they may turn around and bring



1 affirmative action back? And just to point out, they had
2 three opportunities to file a notice of claim. There was a
3 prior action - - -

4 CHIEF JUDGE WILSON: Is it a mischaracterization
5 that their - - - that the breach they alleged is your
6 bringing the suit? Is that a mischaracterization or is
7 that accurate?

8 MR. CORBETT: Well, the way I read their verified
9 answer and their counterclaims, I think it's broader than
10 just us bringing the suit being the breach. And I think
11 anyone who looks at the four corners of that document could
12 see it was more than just that. So I do believe that's a
13 very narrow view, and there was no way for us to know - - -

14 JUDGE RIVERA: What - - - what else was it?

15 MR. CORBETT: - - - which is the purpose of
16 notice of claim.

17 JUDGE RIVERA: What else was it, if it - - - if
18 it didn't turn on - - - not only we didn't breach, that's
19 their defense, but you breached by filing this action.

20 MR. CORBETT: I think - - -

21 JUDGE RIVERA: What more was there?

22 MR. CORBETT: There were - - - this was a
23 contract that was entered into. There was zoning, there
24 was planning. There were plenty of other things they could
25 have been arguing. This was a complicated set of

1 circumstances for development of the property, that they
2 could argue that maybe the Village breached or was
3 anticipatory going to breach by bringing the action,
4 basically saying contract's over, you breached. They could
5 have brought various claims. It's not just on that narrow
6 issue. And again, that's just by me reading their verified
7 answer - - -

8 CHIEF JUDGE WILSON: I think we were asking what
9 they actually pleaded.

10 MR. CORBETT: I'm sorry, Your Honor?

11 CHIEF JUDGE WILSON: I think we're asking what
12 they actually pleaded in the counterclaim, not what they
13 might have pleaded.

14 MR. CORBETT: What they actually pleaded in the
15 counterclaim, I think is broader when you read the language
16 of that counterclaim.

17 CHIEF JUDGE WILSON: And Judge Rivera was asking
18 you beyond the fact that you filed, what other things can
19 you point to in their actual counterclaim that are
20 different?

21 MR. CORBETT: In their actual counterclaim - - -

22 CHIEF JUDGE WILSON: Uh-huh.

23 MR. CORBETT: - - - they raise an anticipatory
24 breach - - -

25 CHIEF JUDGE WILSON: Yeah.

1 MR. CORBETT: - - - without clearly stating what
2 that anticipatory breach could or would not be.

3 CHIEF JUDGE WILSON: They didn't say what it was.
4 They just said you breached anticipatorily, period?

5 MR. CORBETT: They said by bringing the action.
6 And I think they had a catchall language in there that we
7 could pull to, to look at that, where they could go more
8 than just what they were arguing, Your Honor. It's just by
9 the verified complaint.

10 JUDGE RIVERA: So that's what you're hanging your
11 hat on. There's some other additional language other than
12 that straight explanation that this is anticipatory breach
13 by filing this lawsuit.

14 MR. CORBETT: What we're hanging our hat on is
15 the clear language of the statute that a notice of claim is
16 required to give notice.

17 JUDGE RIVERA: Well, but this is the nature of
18 his claim. That's what we're talking about.

19 MR. CORBETT: And the nature of his claim. And
20 yes, we're hanging our hat on the fact that they would
21 still have to give us notice that they want to bring that
22 claim and give the taxpayer the opportunities to settle it.

23 Just to get to estoppel for a second, if I may.
24 There was no misleading. There was no intentional conduct.
25 There was no negligence. In our affirmative defenses off

1 the bat, we raised the fact that there were conditioned
2 precedents that were not met. So any type of lull or lying
3 in wait did not occur here. Additionally, they had three
4 opportunities to file a notice of claim and never did.
5 They brought an action initially against the Village, which
6 was settled on a stipulation. Never filed a notice of
7 claim for that one. When we made our motion, it was ten
8 months. It's a year under 9802. Now I believe they would
9 have to file before bringing the action, but they could
10 have at least went right to the Village clerk and filed the
11 notice of claim and at least met the one-year deadline.

12 This definitely - - - I think, Judge Halligan,
13 you were getting out in your questions of the appellant.
14 This does not fit any peculiar circumstances. There was a
15 failure of them to actually get to the Village clerk and
16 file what their claim would be again, so the taxpayers
17 don't have a waste of money, can actually see if things get
18 resolved.

19 Just because the Village brought an action,
20 Village attorney has an action, that's his authority.
21 Doesn't mean the Village board and the Village mayor are
22 contemplating what's occurring. When you serve that notice
23 of claim on a Village clerk, that makes it before a village
24 board and a village mayor. That gives them the
25 opportunity, maybe to really look into what types of

1 conduct is being engaged in. And that's the purpose of the
2 notice of claim. That's why it's there, and that's why it
3 protects municipalities. Not because the municipalities,
4 because it's protecting the taxpayer. And that is what - -
5 -

6 JUDGE RIVERA: So then it's about notice to
7 particular individuals or particular officeholders?

8 MR. CORBETT: I'm sorry. I did not hear the
9 question, Your Honor.

10 JUDGE RIVERA: It's about notice to particular
11 individuals or particular officeholders. Unless I'm
12 misunderstanding what you're - - -

13 MR. CORBETT: No, no. It's just required that it
14 get filed with the Village clerk. So you have a - - - you
15 have a - - -

16 JUDGE RIVERA: Right. But then you said it's
17 particular individuals will then be aware.

18 MR. CORBETT: Well, anything filed with the
19 Village clerk and most village - - - and definitely in
20 Freeport - - -

21 JUDGE RIVERA: So then it is about notice. It is
22 about notice because I thought early on you said, oh, no,
23 this is not - - -

24 MR. CORBETT: Well, it's - - -

25 JUDGE RIVERA: - - - this is not a notice

1 statute.

2 MR. CORBETT: If you look back - - -

3 JUDGE RIVERA: It's about a settlement statute.

4 MR. CORBETT: No, no, no. The purpose of the
5 statute is for the taxpayers to be protected and not
6 wasting sums of money. That gives the taxpayers - - -

7 JUDGE RIVERA: And they're protected - - -

8 MR. CORBETT: - - - the opportunity to settle.
9 They can't settle if they don't have notice.

10 JUDGE RIVERA: And how are they protected?

11 MR. CORBETT: By getting notice of a claim.

12 JUDGE RIVERA: Right. Notice.

13 MR. CORBETT: Then the board can look at it - - -

14 JUDGE RIVERA: Right.

15 MR. CORBETT: - - - and determine if that action
16 should be settled.

17 JUDGE RIVERA: Okay. Yes. They have to be put
18 on notice.

19 MR. CORBETT: In order - - -

20 JUDGE RIVERA: That's the point.

21 MR. CORBETT: - - - for them to protect the
22 taxpayer. Yes.

23 CHIEF JUDGE WILSON: So what protected the
24 taxpayers from the Village spending money to file a suit in
25 the first place?

1 MR. CORBETT: Well, again, that's where a village
2 attorney has the authority to commence legal litigation.
3 In most village - - -

4 CHIEF JUDGE WILSON: So there's no protection
5 from the taxpayers over your example of a rogue village
6 attorney?

7 MR. CORBETT: If the board were so inclined - - -

8 CHIEF JUDGE WILSON: Is that what's going - - -
9 is that what's going on here?

10 MR. CORBETT: - - - to oversee the Village
11 attorney - - -

12 CHIEF JUDGE WILSON: I mean, some of this seems
13 to be a little bit of kind of a fantasy world in that if a
14 claim - - - if a notice of claim is filed with the clerk's
15 office, my expectation is the first person that goes to is
16 the Village attorney.

17 MR. CORBETT: In the Village of Freeport I can
18 tell you it goes to the mayor and the Village attorney, and
19 it also goes to the comptroller's office.

20 CHIEF JUDGE WILSON: Yeah. And I would bet that
21 the Village attorney doesn't file a lawsuit without telling
22 the mayor I'm filing this.

23 MR. CORBETT: Again, we were talking in
24 hypotheticals of why this may not have been notice. So it
25 is possible that the board and the mayor who are there - -

1 - and the Village clerk who are there to ensure that
2 taxpayers' dollars are not wasted, could have stepped in on
3 a notice of claim coming in and said, what's going on with
4 this litigation? Why are we involved in this? And it
5 would have addressed the situation. And I think, as Mr.
6 Harfenist has said, the vast majority of the dollars spent
7 was on the counterclaims. But we could have avoid a lot of
8 that expense, potentially, if the notice of claim was given
9 to the Village clerk and allowed the Village to address it
10 appropriately on behalf of the residents. That ultimately
11 is the purpose of the statute. It's for the taxpayer, and
12 it only happens - - -

13 JUDGE RIVERA: And by - - - by - - -

14 MR. CORBETT: - - - through notice.

15 JUDGE RIVERA: By deciding they did actually have
16 a claim, and maybe it's in your interest to settle, or
17 maybe they don't have a claim and it's still in your
18 interest to settle, or - - - or we're going to proceed with
19 this litigation and we'll just fight it?

20 MR. CORBETT: Correct. But again, notice that
21 there is a claim coming back affirmatively against them.

22 JUDGE RIVERA: I don't see how that - - - I don't
23 see how the notice of claim functions any better than just
24 their answer and the counterclaim for your purpose.

25 MR. CORBETT: No. And I - - -



1 JUDGE RIVERA: You haven't - - - certainly have
2 explained why you think the Village is trying to save
3 money, but what about his point that the reality is then
4 he's got to do all this other work that is not going to
5 give you better notice or different notice, and it's just
6 going to expend the time of the parties and the judiciary?

7 MR. CORBETT: Well, I think Judge Wilson was
8 getting at it earlier. There are other remedies. I mean,
9 they could always sue the Village for breach of contract.
10 They could have brought a notice of claim and came after us
11 on that issue. But here again - - -

12 JUDGE RIVERA: What I'm saying, if they want to
13 do it in the same action because they're already in court.
14 Now you're saying start a whole different one too?

15 MR. CORBETT: Unfortunately - - -

16 JUDGE RIVERA: Again, I'm back to my question.
17 Isn't that a greater expenditure of resources and - - - and
18 the time of the judiciary rather than just the
19 counterclaim?

20 MR. CORBETT: No. Because they would have filed
21 the notice of claim and had the opportunity to potentially
22 have the claim resolved.

23 JUDGE SINGAS: Why did the Village wait so long?

24 MR. CORBETT: The Village actually did not wait
25 long. They raised it as an affirmative defense.

1 JUDGE SINGAS: Well, it was 15 months. Yeah.
2 They raised the affirmative defense. And then you waited
3 15 months before you made the motion to dismiss.

4 MR. CORBETT: Well, the action - - - and what was
5 discussed with the court was prior to the 12-month clock
6 expiring, and then the motions came forward. So one, they
7 knew when they brought their initial action where they
8 didn't file a notice of claim. Two, they knew what our
9 affirmative defense - - -

10 JUDGE SINGAS: I'm saying, you knew all of that
11 right at the - - - at the get-go. Like - - - so why did -
12 - - why did you wait 15 months before you made your motion
13 to dismiss because - - -

14 MR. CORBETT: Well, there was still discovery
15 ongoing in the case. And then it got to a point we could
16 finally make your motions. That's what happened.

17 JUDGE SINGAS: You knew that they hadn't claim -
18 - - they hadn't filed their claim.

19 MR. CORBETT: I'm sorry, Your Honor. I didn't
20 hear you.

21 JUDGE SINGAS: But you knew that they hadn't
22 filed their notice of claim, and yet you still waited 15
23 months.

24 MR. CORBETT: Well, again, you have outside
25 counsel representing a village in this action. Ultimately,

1 the action makes its way through. You make your own
2 dispositive motion. That's what was done. I mean - - - so
3 I mean, I don't know - - - again, the Village - - -

4 JUDGE RIVERA: But I thought you argued - - - I
5 thought you argued that you actually responded by saying
6 they didn't satisfy conditions proceeding. So you must
7 have known, otherwise, what was the basis of that?

8 MR. CORBETT: The outside attorney definitely
9 knew, and that's why they were properly defending the
10 Village when they did so. What I'm getting at here is the
11 Village having that specific piece of paper, that notice of
12 claim - - -

13 JUDGE RIVERA: Yeah.

14 MR. CORBETT: - - - which is very easy to fill
15 out, and everyone fills out in municipalities - - -

16 JUDGE RIVERA: Yes.

17 MR. CORBETT: - - - has a different set of
18 factors that allow the Village to engage in the case and
19 protect the taxpayer, which is the purpose of the clear and
20 unequivocal language in the statute.

21 JUDGE RIVERA: Okay.

22 MR. CORBETT: I would just state that again on
23 the estoppel grounds, I think the Second Department's been
24 pretty strong on this issue. I hope this court follows
25 suit with it. There's no misleading action here. The

1 Salesian case that was brought up earlier, it went on for
2 six years. Was not raised by a party. It was sua sponte
3 raised by the Department, was ultimately dismissed. But
4 every single case cited by appellants, cited by
5 respondents, every single case on this issue across the
6 state all acknowledges there is a condition precedent that
7 the notice of claim must be filed. No other action.
8 Clearly, bringing a claim back against a village is another
9 action.

10 So I mean, the fact of the matter is the clear
11 language - - - I think, Judge Garcia, you got at it
12 earlier. I think this court would potentially be
13 legislating if they would start to cull away and build
14 exceptions when the language is very clear on its face. If
15 there are no other questions of the court.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. CORBETT: I appreciate your time very much.
18 Thank you.

19 MR. HARFENIST: All right. Let's - - - I want to
20 clear up a couple factual misstatements. They didn't wait
21 15 months. They waited 19 months. And why is 19 months so
22 important? Because the statute of limitations runs after
23 18 months. They waited until the statute of limitations
24 was expired to make the motion. Why - - -

25 JUDGE CANNATARO: They raised the affirmative

1 defense, though, right?

2 MR. HARFENIST: It's not an affirmative defense.

3 It says - - -

4 JUDGE CANNATARO: Or they - - -

5 MR. HARFENIST: Here's what the - - - here's what
6 it says.

7 JUDGE CANNATARO: They argued it in papers.

8 MR. HARFENIST: Well, first off, they waived that
9 argument because they took a position before the Supreme
10 Court that they didn't have to give us any notice. And
11 that because Judge Driscoll raised the question though, you
12 have to raise it in affirmative defense. And they took the
13 position that they didn't, number one. Number two, they
14 never raised that - - -

15 JUDGE RIVERA: But they didn't or they didn't
16 have to?

17 MR. HARFENIST: They argued they didn't have to.
18 That's correct.

19 JUDGE RIVERA: Okay. So they may have anyway
20 even though they didn't have to.

21 MR. HARFENIST: That's true. But they never
22 argued before Supreme Court that they gave us notice,
23 number one. And number two, they never argued that before
24 the Appellate Division ever. It's not in the papers. It's
25 not in the briefs. It's not in the record. Zero. So that

1 argument has been waived.

2 But what's more important about it is the
3 language of what that's - - - what's in there. It says if
4 they - - - it doesn't say you failed to file a notice of
5 claim. It says you failed to meet a condition precedent.
6 The contract itself, inc - - - particularly paragraph 3,
7 had multiple condition precedents. So - - -

8 JUDGE CANNATARO: Well, a notice of claim is also
9 commonly known as a condition precedent. As a matter of
10 fact, you misstated before when you said a notice of claim
11 is part of your burden of proof. It's not - - - that's not
12 what the nature of a notice of claim is.

13 MR. HARFENIST: Well, I have to put it in - - -

14 JUDGE CANNATARO: It's a condition precedent to
15 making a claim.

16 MR. HARFENIST: That's why it's part of my burden
17 of proof. I have to - - -

18 JUDGE CANNATARO: Well - - -

19 MR. HARFENIST: I have to put it into evidence.
20 If I don't put it into evidence - - -

21 JUDGE CANNATARO: The burden of proof - - -

22 MR. HARFENIST: - - - the case gets dismissed.

23 JUDGE CANNATARO: - - - sort of diminishes the
24 nature of what it is.

25 MR. HARFENIST: But the bottom line - - - and

1 maybe - - - maybe it does, but the reality is I still have
2 to prove that I filed it. So to me, in my mind - - -

3 JUDGE RIVERA: Are you saying you also have to
4 plead it?

5 MR. HARFENIST: I have to plead it, yes. But if
6 you look at the - - - why didn't they say you failed to
7 file a notice of claim?

8 JUDGE SINGAS: I mean, we're - - - we're going to
9 ask parties now to give you their defenses and give you - -
10 -

11 MR. HARFENIST: That's my - - - that's my point,
12 though.

13 JUDGE SINGAS: I mean, they're saying - - - no.
14 But they said here like, you failed to - - - you failed to
15 satisfy all conditions precedent. I mean - - -

16 MR. HARFENIST: Precedent to what?

17 JUDGE SINGAS: Precedent to everything. I mean,
18 like, they gave you a clue that you didn't have something -
19 - -

20 MR. HARFENIST: The contract had - - -

21 JUDGE SINGAS: - - - that you needed to have.

22 MR. HARFENIST: - - - so many condition
23 precedents, and we had been in litigation with them on - -
24 - on multiple condition precedents - - -

25 JUDGE SINGAS: I know, but these are adversarial

1 - - -

2 MR. HARFENIST: - - - before that.

3 JUDGE SINGAS: - - - proceedings, aren't they? I
4 mean, to suggest that they - - -

5 MR. HARFENIST: But is that the point of the
6 notice - - -

7 JUDGE SINGAS: - - - have to tell you - - -

8 MR. HARFENIST: - - - of claim?

9 JUDGE SINGAS: - - - that they didn't notice - -
10 -

11 MR. HARFENIST: Is it - - -

12 JUDGE SINGAS: - - - that you didn't file your
13 notice of claim - - -

14 MR. HARFENIST: Is it a sword or is it a shield?
15 I mean, if that - - - I mean - - -

16 JUDGE SINGAS: It's a requirement - - -

17 MR. HARFENIST: But are you - - -

18 JUDGE SINGAS: - - - that the legislature has
19 deemed has to be done in every single case, so.

20 MR. HARFENIST: But this court has said
21 repeatedly for over a hundred years, you can't use it as a
22 sword. You use it as a shield to protect yourself against
23 frivolous claims. That's what it comes down to. And
24 there's one more other important point. We were in
25 litigation with them before. We - - -

1 JUDGE RIVERA: Well, one doesn't know if it's
2 frivolous, because the reality is, if you don't file a
3 notice of a claim, nobody's going to look any further.

4 MR. HARFENIST: Well, that's the whole point of
5 the notice of claim.

6 JUDGE RIVERA: Maybe it's not frivolous. Maybe
7 it's a fantastic claim.

8 MR. HARFENIST: But look at what we - - - look at
9 what our notice - - - our counterclaim was. It was a very
10 simple claim. By suing us, you breached the contract.

11 JUDGE RIVERA: The notice of claim - - -

12 MR. HARFENIST: That's all it is.

13 JUDGE RIVERA: The notice of claim requirement
14 doesn't turn on the complexity of the claim.

15 MR. HARFENIST: I agree with that. It could be -
16 - - most of them are usually slip and fall cases, is for
17 the most part is what they are. But the fact of the matter
18 is, is - - - by the way, the counterclaim in this case is
19 not anything more than we didn't breach paragraph 3. And
20 by you saying that we breached it and try and terminate the
21 contract under Princess Point v. Muss, which is your case,
22 that constitutes an anticipatory breach. I didn't have to
23 prove anything - - -

24 JUDGE RIVERA: Would you have included anything
25 more in the notice of claim?

1 MR. HARFENIST: I'm sorry?

2 JUDGE RIVERA: Would you have included anything
3 more - - -

4 MR. HARFENIST: No.

5 JUDGE RIVERA: - - - in your notice of claim - -
6 -

7 MR. HARFENIST: That was the only issue.

8 JUDGE RIVERA: - - - than what you've just said?

9 MR. HARFENIST: No. That was the whole - - -
10 that's the whole claim. I actually, in reality, to win my
11 counterclaim had to prove nothing. I didn't have to prove
12 anything. All I had to do was defeat their claim. But if
13 I hadn't filed a notice of claim, I could defeat their
14 claim and get no relief. That's the oxymoronic piece here.
15 I can't - - - I have to - - - what they - - - why - - -
16 while the CPLR doesn't require me to have - - - file a
17 counterclaim. The - - - requiring a notice of claim in
18 this particular circumstance prohibits me from getting
19 relief, even if I win. And they can't lose because I can't
20 force them to give me - - - either pay me damages or comply
21 with the contract. And the statute of limitations had run
22 already when they made their motion. That's why I couldn't
23 file another - - - that's why we couldn't file another
24 complaint.

25 JUDGE RIVERA: Well, how could they file it



1 earlier?

2 MR. HARFENIST: I'm sorry?

3 JUDGE RIVERA: How could they file it earlier?

4 You still had time to file the notice of claim.

5 MR. HARFENIST: Who could file it earlier?

6 JUDGE RIVERA: Them.

7 MR. HARFENIST: Well, they - - - they could have
8 filed it at any time. They don't have a statute of
9 limitations problem.

10 JUDGE RIVERA: No. But what - - -

11 MR. HARFENIST: I do.

12 JUDGE RIVERA: Their argument is, you didn't file
13 the notice of claim, right?

14 MR. HARFENIST: Correct.

15 JUDGE RIVERA: So don't they have to wait until
16 the time expires for you to file a notice of claim, to then
17 argue that you didn't file a notice of claim?

18 MR. HARFENIST: No. Most of the time they get
19 filed - - -

20 JUDGE RIVERA: To move - - - well, to move.
21 That's what I'm saying.

22 MR. HARFENIST: They move all the time. The City
23 of New York files pre-motion answers all the time.

24 JUDGE RIVERA: Well, I understand that, but I'm
25 just saying they didn't have to - - -



1 MR. HARFENIST: Why did they wait?

2 JUDGE RIVERA: - - - is my point.

3 MR. HARFENIST: They were using it as a - - -
4 they were using it as - - -

5 JUDGE TROUTMAN: Are you suggesting they were
6 required to alert you that you had failed to do so?

7 MR. HARFENIST: Here's the bottom line. The
8 answer is, gen - - - generally speaking, no. Unless their
9 conduct is potentially either misleading or inequitable.
10 That's - - - and that's what these cases are saying. I
11 mean, when - - - when you sue me - - -

12 JUDGE RIVERA: And they continued litigation
13 without - - -

14 MR. HARFENIST: 20 months.

15 JUDGE RIVERA: - - - without this motion earlier
16 is what's misleading?

17 MR. HARFENIST: That's correct. And that's what
18 - - - I mean, that's - - -

19 JUDGE RIVERA: But they were litigating anyway,
20 right?

21 MR. HARFENIST: Well, but here's the bottom line.
22 So yeah. They were litigating anyway.

23 JUDGE RIVERA: Yes.

24 MR. HARFENIST: But - - -

25 JUDGE RIVERA: They had their claim.

1 MR. HARFENIST: But the reality is, is that if
2 they had moved - - -

3 JUDGE RIVERA: Yes.

4 MR. HARFENIST: - - - earlier on, we could have
5 necessarily amended the complaint. So this idea that they
6 - - -

7 JUDGE RIVERA: I think that's the point, yes.

8 MR. HARFENIST: They - - - they were - - - they
9 were litigating any - - - in fact, if they were litigating
10 anyway really is sort of beside the point, because the
11 misleading conduct is hauling us into court and saying
12 we're going to - - - we're suing you on a breach of
13 contract. Why would anybody think - - - and to get to
14 Judge Wilson's point, I would have to give them any
15 additional notice about the breach of contract claims so
16 that they can - - - what, they're going to adjudicate the
17 claim, they're going to settle it? They sued me. All
18 we're saying is that if you lose, I win. That's it. They
19 knew that. But they played a game. They were - - - my
20 mother would say they were being cute. They waited until
21 the statute of limitations arised and call - - - appeared
22 in nine conferences with Judge Driscoll every time asked
23 them - - -

24 CHIEF JUDGE WILSON: I think we got your point.

25 MR. HARFENIST: Thank you.

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CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Bobby Hodges, certify that the foregoing transcript of proceedings in the Court of Appeals of Village of Freeport v. Freeport Plaza West, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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