

**Pomeroy v State of New York**

2022 NY Slip Op 34967(U)

February 1, 2022

Court of Claims

Docket Number: Claim No. 136901

Judge: Diane L. Fitzpatrick

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This opinion is uncorrected and not selected for official publication.

New York State Court of Claims  
Decision

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Case information:

<b>UID:</b>	2022-018-301
<b>Claimant(s):</b>	KIM POMEROY
<b>Claimant short name:</b>	POMEROY
<b>Footnote (claimant name) :</b>	
<b>Defendant(s):</b>	STATE OF NEW YORK
<b>Footnote (defendant name) :</b>	
<b>Third-party claimant(s):</b>	
<b>Third-party defendant(s):</b>	
<b>Claim number(s):</b>	136901
<b>Motion number(s):</b>	M-97350
<b>Cross-motion number(s):</b>	CM-97459
<b>Judge:</b>	DIANE L. FITZPATRICK
<b>Claimant's attorney:</b>	ROBERT E. LAHM, PLLC By: Robert E. Lahm, Esquire
<b>Defendant's attorney:</b>	LETITIA JAMES Attorney General for the State of New York By: Heather K. Zimmerman, Esquire Assistant Attorney General
<b>Third-party defendant's attorney:</b>	
<b>Signature date:</b>	February 1, 2022
<b>City:</b>	Syracuse
<b>Comments:</b>	
<b>Official citation:</b>	
<b>Appellate results:</b>	
<b>See also (mult-captioned case)</b>	

### Synopsis:

The claim for personal injuries failed to comply with the jurisdictional requirements of Court of Claims Act § 11 (b) by failing to indicate when it accrued. Accordingly, Defendant's motion to dismiss is granted. Claimant's cross motion for late claim relief fails to demonstrate a meritorious cause of action and is also denied.

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### Recitation:

In her claim, filed on August 13, 2021, Ms. Pomeroy seeks to recover damages for injuries to her head and face she incurred when she encountered an allegedly defective condition in a curb or median on the Erie Canal Pedestrian Trail at the corner of Horan and Gerelock Roads in the Village of Solvay. Claimant alleges that she fell and hit her head, and suffered a disfiguring scar on her face. Claimant further alleges that Defendant was negligent in the design, maintenance, inspection and repair of the defective condition that existed on the curb or median and that this negligence was the proximate cause of her accident.

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### Text of the decision:

In lieu of an answer to the claim, Defendant has filed a motion (M-97350) seeking dismissal of the claim relating to Claimant's alleged failure to satisfy the jurisdictional pleading requirements of Court of Claims Act section 11 (b). In response to Defendant's motion, Claimant has filed a cross motion (CM-97459) requesting permission to file an amended claim or for permission to file a late claim pursuant to Court of Claims Act section 10 (6).

In support of its motion, Defendant argues that the claim is jurisdictionally defective because it fails to comply with the requirements of Court of Claims Act (CCA) section 11 (b). Specifically, Defendant argues that Claimant failed to state the time and date when the accident occurred, and that Claimant's description of where her injury occurred is too vague to permit Defendant to adequately investigate and defend the claim.

In opposition to Defendant's motion, Claimant argues that her claim adequately identifies the location of the accident. Claimant concedes, however, that the claim fails to state the date of accrual. Although Claimant concedes this issue, Claimant argues that the claim was, in fact timely,

and that Defendant has not been prejudiced in any way by this oversight.

However, the requirements contained in section 11 (b) are “substantive conditions upon the State's waiver of sovereign immunity” (*Lepkowski v State of New York*, 1 NY3d 201, 207 [2003]), and noncompliance renders a claim “jurisdictionally defective for nonconformity” (*Id.* at 209; see *Kolnacki v State of New York*, 8 NY3d 277, 281 [2007], rearg denied 8 NY3d 994 [2007]). Furthermore, “[i]t is axiomatic that the sufficiency of a claim rests solely upon the assertions contained therein, and defendant is not required to go beyond the claim in order to investigate an occurrence or ascertain information that should have been provided pursuant to Court of Claims Act §11...(citation omitted).” (*Lepkowski v State*, 302 AD2d 765, 766, aff'd, 1 NY3d 201 [2003]).

The Court notes that in *Wilson v State of New York*, 61 AD3d 1367, (4th Dept 2009), the Appellate Division, Fourth Department dismissed the claim of a pro se claimant who had provided the month and day of her injury, but had inadvertently left out the year. Despite the fact that the this pro se claimant had also alleged that less than 90 days had passed (thereby implying that the injury occurred in the same year the claim was filed) the Appellate Division, Fourth Department, nonetheless, found that the failure to provide the year was an incurable jurisdictional defect requiring dismissal of the claim.

Accordingly, here, arguments about the validity of the identification of the location of the accident notwithstanding, the claim’s failure to give the date of accrual is a jurisdictional defect that cannot be overlooked by the Court, and Defendant’s motion must be granted.

However, and apparently in recognition of the soundness of Defendant’s position, Claimant has filed a cross motion in which she requests either permission to amend her claim to correct the jurisdictional defects or permission to file a late claim.

With regard to Claimant’s request for permission to file an amended claim to address the jurisdictional deficiencies identified above, the Court notes that it does not have the authority to grant that request. The law in New York is clear that the failure to satisfy the jurisdictional requirements of CCA section 11 (b) cannot be cured by amendment (*see Kolnacki v State of New York*, 8 NY3d 277 [2007]; *Hogan v State of New York*, 59 AD3d 754 [3d Dept 2009]). An amendment to a claim over which the Court has no jurisdiction cannot confer jurisdiction.

With regard to Claimant’s request for permission to file a late claim, the Court notes that Claimant (having identified in her application the accrual date of May 15, 2021) correctly argues that the time in which to bring a late claim application has not yet expired. However, Claimant has failed to address the factors set forth in Court of Claims Act section 10 (6), including the crucial factor of the appearance of merit of the claim, and in the absence of any argument in Claimant's affidavit addressing those factors, Claimant has failed to meet her burden of persuasion on the motion, and it must be denied (*Lee v State of New York*, 124 AD2d 312, 313 [3d Dept 1986] [“(t)he Court of Claims . . . properly exercised its discretion in denying claimant's motion for permission to file a late claim” where the pro se claimant “failed to address the several factors set forth in Court of Claims Act § 10 (6)”]).

Moreover, and apart from the factors specified in CCA section 10 (6), the Claimant’s submissions provide insufficient detail to permit a late filing application. The nature of the defect that caused Claimant’s injury is unclear. What Claimant was doing at the time she was injured is unclear. Even if one were to accept that the location Claimant identified was sufficiently specific, (and this the Court cannot do without knowing more about the nature of the injury) there is simply too little information about the how Claimant was injured and the nature of the alleged defective condition to grant Claimant’s application at this time.

Accordingly, it is hereby

ORDERED, that Defendant's motion is granted and the claim is hereby dismissed in its entirety; and it is further

ORDERED, that Claimant's cross motion for permission to amend the claim is denied; and it is further

ORDERED, that Claimant's cross motion for permission to file a late claim is denied without prejudice.

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### Appendices:

The following papers were considered by the Court in determining these motions:

- 1) Defendant's Notice of Motion (M-97350) filed October 6, 2021;
- 2) Affirmation of Heather K. Zimmerman, Esq., dated October 4, 2021, with Exhibit;
- 3) Claimant's Notice of Cross Motion (CM- 97459) filed October 26, 2021;
- 4) Affidavit of Robert E. Lahm, Esq., sworn to October 26, 2021, with Exhibits;
- 5) Reply Affirmation of Heather K. Zimmerman, Esq., dated November 1, 2021;
- 5) Filed Documents: Claim filed August 13, 2021.