

OFFICE OF SPECIAL MASTERS
No. 91-195V

(Filed: September 11, 1997)

DENISE POLANCO, as Mother
and Natural Guardian of,
JASMINE POLANCO,

Petitioners,

vs.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

Ronald C. Homer, Esq., Boston, Massachusetts, for petitioner.

David L. Terzian, Esq., U.S. Department of Justice, Washington, D.C., for respondent.

ORDER

ABELL, Special Master:

This matter is now before me upon respondent's motion to dismiss filed 16 July 1997. Respondent argues that petitioner is barred from compensation because she violated Section 11 (a)(6) of the National Childhood Vaccine Injury Compensation Act (hereinafter Vaccine Act or Program)⁽¹⁾ by bringing a civil action after 15 November 1988, for a vaccine-related injury associated with a vaccine administered before 15 November 1988. Respondent's Motion to Dismiss (Resp. Motion), at 4. After consideration of the record, existing precedent, and New York state law, the court hereby denies respondent's motion.

BACKGROUND

Jasmine was born on 20 June 1986 in Brooklyn, New York. Petitioner's Reply to Respondent's Motion to Dismiss (Pet. Reply), at 1. She received a diphtheria-pertussis-tetanus (DPT) vaccination on 28 October 1986. *Id.* Petitioner alleges that Jasmine suffered seizures on 30 October 1986 as a result of the

immunizations. *Id.*

On 16 July 1990, petitioner filed, in the Supreme Court of the State of New York, County of Kings, a Request for Judicial Intervention for permission to serve a late notice of claim on New York City Health and Hospitals Corporation (Bellevue Hospital Center, Kings County Medical Center) for injuries which include the negligent administration of a vaccine. P. Ex. W, at Tab B-page 1 & Tab F-page 1. On 18 December 1990, petitioner's motion for leave to serve and file a late notice of claim was granted and deemed served on the New York City Health and Hospitals Corporation. P. Ex., at Tab J-page 4. On 29 January 1991, two days before the end of the extended filing deadline for vaccine injuries, petitioner filed a petition for compensation under the Vaccine Act. Pet. Reply, at 2.

DISCUSSION

The National Childhood Vaccine Injury Act of 1986 represents a waiver of sovereign immunity. *Mass v. Secretary of DHHS*, 31 Fed.Cl. 523, 528 (1994). The special master must strictly construe Program provisions. *Id.* Section 11(a)(6) states:

If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administrations of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) of this section for such injury or death.

Id. The United States Claims Court⁽²⁾ has determined that the language of § 11(a)(6) is "crystal clear." *Greider v. Secretary of DHHS*, 23 Cl.Ct. 348, 349 (1991); *see also Lamb v. Secretary of DHHS*, 24 Cl.Ct. 255, 257 (1991). The common meaning of the term "civil action" controls. *Schindler v. Secretary of DHHS*, 29 F.3d 607, 609 (Fed.Cir. 1994). A civil action is an "action[] brought to enforce, redress, or protect private rights." Black's Law Dictionary 245 (6th. ed. 1990); *see also Schindler*, 29 F.3d at 609.

Respondent argues in her motion to dismiss that petitioner violated the jurisdictional requirements of § 11 (a)(6) when petitioner served a notice of claim on New York City Health and Hospitals Corporation (Bellevue Hospital Center, Kings County Medical Center) for injuries related to the administration of a vaccine. Resp. Motion, at 1-2. As a consequence of petitioner's actions, the respondent argues the case should be dismissed for lack of jurisdiction.

The petitioner argues in her Brief in Support of Her Compliance with 42 U.S.C.A. §§ 300aa-11 (Pet. Brief) and in her Reply to Respondent's Motion to Dismiss (Pet. Reply) that the filing of a notice of claim is not the commencement of a civil action. Instead, in New York it is simply a condition precedent to the filing of a civil action against a governmental entity. Pet. Reply at 3. Petitioner's arguments are persuasive for the reasons discussed *infra*.

I

NEW YORK GENERAL MUNICIPAL LAW

The central issue in this case is whether petitioner commenced a civil action for vaccine related injuries when she filed a late notice of claim on the New York City Health and Hospitals Corporation. To determine if a civil action was commenced in New York state court, an analysis of the applicable New York state law is necessary. The state of New York has established special rules for plaintiffs who wish

to sue governmental entities for medical malpractice. New York General Municipal Law (N.Y.G.M.L.) § 50(d)(2) states:

No action shall be maintained under this section against such municipality, resident physician, physician unless a notice of claim shall have been made and served in compliance with section [50(e)] of this chapter. Every such action shall be commenced pursuant to the provisions of section [50(i)] of this chapter.

Id. The applicable provisions of § 50(e) state:

In any case founded upon tort where a notice of claim is required by law as a *condition precedent* to the commencement of an action or special proceeding against a public corporation . . . the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.

N.Y.G.M.L. § 50(e)(1)(a)(emphasis added). The section quoted above is important because it shows that a notice of claim is a condition precedent to the commencement of an action, and therefore, cannot itself be the commencement of an action. Also, the notice of claim must be served upon the governmental entity within 90 (ninety) days of the event causing the injury.

Section 50 (e)(7) states:

All applications under this section shall be made to the supreme court or to the county court: (a) in the county where the action *may properly be brought for trial*, (b) if an action to enforce the claim *has been commenced*, in the county where the action is pending.

N.Y.G.M.L. § 50(e)(7)(emphasis added). This section is relevant because it clearly indicates that a notice of claim should be filed where the action *may* be filed *at some latter time*. Or, if an action has already been improperly filed, the notice of claim is to be filed where the action has already been filed. Under both circumstances, the statute differentiates between the filing of the notice of claim and the filing of an action. Also, the statute expressly says an action "may" be brought at a later time, thus indicating that the filing of the action is permissive and not compulsory.

The second major section which must be analyzed to understand N.Y.G.M.L. section 50(d) is N.Y.G.M.L. § 50(i)(1). It states:

No action or special proceeding shall be prosecuted or maintained against a city, county, town . . . unless, (a) a notice of claim shall have been made and served upon the city, county, town . . . in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation of the complaint or moving papers that at least 30 days have elapsed since the service of such notice and that adjustment of the claim or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.

Id. This section reiterates that the filing of a notice of claim is a condition precedent to the filing of an action against a governmental entity. In addition, after the plaintiff has filed a notice of claim, he or she must wait an additional 30 (thirty) days before filing the action. This again indicates that there is a difference between a notice of claim and an action and also that the filing of a notice of claim does not equate to the filing of an action. After the plaintiff has filed his or her notice of claim, the plaintiff can wait 30 (thirty) days and subsequently file an action or the plaintiff can choose to do nothing for one year and ninety days from the injury date and the action will be barred by the statute of limitations. Finally, the

statute of limitations for the filing of a notice of claim is 90 (ninety) days from the date of injury, while the statute of limitations for the filing of an action is one year and ninety days from the date of injury. The fact that there are different statutes of limitations for the two filings again indicates that the filing of a notice of claim is distinct from the commencement of an action.

The plain language of the statutes is sufficient to hold that the filing of a notice of claim is not the commencement of a civil action for purposes of section 11(a)(6) of the Vaccine Act. In addition to the statutory reading, there is also New York case law which supports this view. First, in *Colantuono v. Valley Central School District, Orange County*, 90 Misc.2d 918, 920, 396 N.Y.S.2d 590, 591 (1977) the court defined the words "prosecuted or maintained" used in N.Y.G.M.L. section 50(i) to mean "commenced." Therefore, according to New York law, and N.Y.G.M.L. section 50(i), no action can be commenced until a notice of claim has been filed and 30 (thirty) days have elapsed. A filing has become a civil action against a defendant when a summons is delivered and served upon the defendant. *Family Bargain Centers, Inc. v. Village of Herkimer*, 56 Misc.2d 768, 290 N.Y.S.2d 207 (1968). Service of a notice of claim is a condition precedent to commencement of an action and is required to be alleged in the complaint. *Doran v. Town of Cheektowaga*, 54 A.D.2d 178, 182, 388 N.Y.S.2d 385, 387 (1976). Compliance with the notice of claim requirement is jurisdictional and must be both pleaded and proved. *Iorio v. City of New York*, 96 Misc.2d 955, 959, 410 N.Y.S.2d 195, 198 (1978).

II

VACCINE PROGRAM PRECEDENT

In *Joseph v. Secretary of HHS*, 29 Fed.Cl. 796 (1993), the court stated:

the language of section 11(a)(6) is plain and unequivocal on its face: a petitioner is barred from the National Vaccine Injury Compensation Program if that petitioner initiated 1) a civil action, 2) after November 15, 1988, 3) for damages, 4) for a vaccine-related injury or death.

Id. at 799. In this case, the first of the four elements is in controversy. If a civil action has been initiated by the petitioner, then she is barred from continuing in the Vaccine Program. If a civil action has not been commenced, then § 11(a)(6) is not an impediment and respondent's motion to dismiss should be denied by the court.

In *Lamb v. Secretary of HHS* 24 Cl.Ct. 255 (1991), the court defined the term "bring" in the phrase "bring a civil action" in section 11(a)(6). The court said "[t]he generally accepted rule is that 'filing' an action is equivalent to 'bringing' an action or to 'commencing' an action." *Id.* at 258. In *Taylor v. Secretary of HHS*, No. 90-1036V, 1995 WL 729519 (Fed.Cl.Spec.Mstr. March 27, 1995), the Court decided the issue of whether the petitioner had commenced a civil action in Maryland state court. Maryland law requires a plaintiff in a medical injury case to first file a claim to an arbitration board for review before the plaintiff can commence a lawsuit in state court. After the arbitration board hears the case, then the plaintiff can file a civil action against the defendant. The plaintiff's pleadings in the civil case must affirm that he or she has met the jurisdictional condition precedent of filing with the arbitration board. The petitioner, Mrs. Taylor, had indeed filed an action with the arbitration board. The Special Master held that the filing of the action with the arbitration board was not the commencement of a civil action because according to Maryland state law the arbitration board was a mere screening process and a statutory precondition to filing a medical malpractice action. ⁽³⁾ *Id.* at *4.

CONCLUSION

A petitioner is not entitled to compensation unless she first meets all of the jurisdictional requirements of the Vaccine Act. Each petitioner must satisfy the jurisdictional requirements of § 11(a)(6) which prohibits the bringing of a civil action after 15 November 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before 15 November 1988. The disputed issue in this case is whether the petitioner brought a civil action when she filed a notice of claim against New York City Health and Hospitals Corporation (Bellevue Hospital Center, Kings County Medical Center) in the Supreme Court of the state of New York on 18 December 1990. According to New York General Municipal Law § 50(e)(1)(a), a notice of claim is a condition precedent to the commencement of an action against a governmental entity. *Id.* A notice of claim is filed at a different time than an action to enforce a claim. N.Y.G.M.L. § 50(e)(7). Finally, the statute of limitations for filing a notice of claim is "within ninety days after the claim arises," N.Y.G.M.L. § 50(e)(1)(a), while the statute of limitations for filing an action is "one year and ninety days after the happening of the event upon which the claim is based." N.Y.G.M.L. § 50(i)(1). For these reasons, and in consideration of the relevant case law, this court rules that the filing of a notice of claim is not the commencement or bringing of a civil action as enumerated in § 11(a)(6) of the Vaccine Act.

The undersigned concludes that petitioner did not commence a civil action alleging vaccine-related injuries when her motion to file a late notice of claim was granted (and deemed served) on 19 December 1990 in the Supreme Court of the State of New York, County of Kings. Therefore, petitioner is not prohibited by § 300aa-11(a)(6) of the Vaccine Act from filing a petition for Program compensation and respondent's motion to dismiss is denied.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-1 *et. seq.* (West 1991 & Supp. 1997). Hereinafter, all references will be to the relevant subsection of 42 U.S.C.A. § 300aa.
2. Effective 29 October 1992, the United States Claims Court was renamed the United States Court of Federal Claims. Federal Courts Administrations Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516.
3. The respondent ultimately prevailed in her motion to dismiss the case because after the petitioner filed her grievance with the arbitration board she subsequently filed a vaccine injury claim in state court. *Taylor v. Secretary of HHS*, No. 90-1036V, 1995 WL 729519, at *7 (Fed.Cl.Spec.Mstr. March 27, 1995).