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COURT OF APPEALS

STATE OF NEW YORK

ANN VANYO,

Appellant,

-against-

NO. 99

BUFFALO POLICE BENEVOLENT ASSOCIATION,
INC. AND CITY OF BUFFALO,

Respondents.

20 Eagle Street
Albany, New York
November 19, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

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Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: First case on this
2 afternoon's calendar is Vanyo v. Buffalo Police Benevolent
3 Association. Counsel?

4 MR. OSWALD: Good afternoon. May it please the
5 court, Phillip Oswald, for the plaintiff-appellant, Ann
6 Vanyo.

7 Beginning with the timeliness of the first two
8 causes of action, the appellant respectfully submits that
9 that issue can be resolved through a straightforward
10 application of Section 203(c) of the CPLR, simply that the
11 - - - those two causes of action were interposed at the
12 date that the pleading containing them was first filed,
13 which was within the four-month statute of limitations.

14 JUDGE RIVERA: What's the pleading your client's
15 proceeding on, the complaint or the amended complaint?
16 Just to be clear?

17 MR. OSWALD: Judge, we're proceeding on the
18 amended complaint, Your Honor.

19 JUDGE RIVERA: Okay. So that, you agree, is not
20 - - - in terms of the filing, filed within the statute of
21 limitations. But as I understood your briefing, you have
22 abandoned your argument about the relation-back theory,
23 relating back to the timing of the filing of the original
24 complaint; or have I misunderstood?

25 MR. OSWALD: No, Your Honor. We respectfully



1 submit that 203(f), the relation-back doctrine, simply does
2 not apply to the first two causes of action, just because
3 that - - - that section, paragraph (f), has been applied to
4 new claims or new parties that were not included in the
5 original complaint.

6 That is the way this court - - - that's - - -
7 that's what this court said in Buran. It wasn't directly
8 at issue in Buran, but that is reflective of the common
9 practice of the relation-back doctrine.

10 The other thing, Your Honor, is 203(f) nor any
11 other part of Section 203, states that when you file an
12 amended pleading, the commencement or the interposition
13 date for any claims that were initially included in the
14 first pleading are - - - is somehow undone.

15 And I'd like to quote the dissent on that point,
16 which is simply that the commencement of the action is not
17 superseded by the amended complaint, even though the
18 original complaint for pleading purposes may have been
19 superseded.

20 JUDGE FAHEY: But the first and second causes of
21 action are exactly the same in both complaints; aren't
22 they?

23 MR. OSWALD: Correct, Your Honor. Verba - - -
24 verbatim.

25 JUDGE FAHEY: So - - - so if the issue is



1 resolved on some other issue, like personal jurisdiction,
2 then - - - and they're waived, it wouldn't make any
3 difference? The - - - the relation-back doctrine wouldn't
4 even have to be addressed by this court?

5 MR. OSWALD: Correct, Your Honor.

6 JUDGE FAHEY: Yeah. Okay.

7 MR. OSWALD: Correct.

8 JUDGE FAHEY: That's what I thought.

9 MR. OSWALD: Your Honor, it's the - - - the
10 appellant's position - - - and Your Honor, may I still
11 reserve time for rebuttal?

12 CHIEF JUDGE DIFIORE: I res - - - I took the
13 liberty of reserving two minutes.

14 MR. OSWALD: Thank you, Your Honor.

15 JUDGE RIVERA: But I don't understand. I thought
16 your whole argument is that the first filing is the one
17 that counts.

18 MR. OSWALD: For the enter - - -

19 JUDGE RIVERA: How do I get - - - how do I get to
20 the first filing - - -

21 MR. OSWALD: You get to - - -

22 JUDGE RIVERA: - - - if not through the relation-
23 back doctrine?

24 MR. OSWALD: Your Honor, because 203(c) states
25 that claims included in the initial filing are deemed



1 interposed as the date of - - - on the date that they are
2 filed - - - initially filed.

3 JUDGE FEINMAN: So in other words, because when
4 they amended and went towards a commencement by filing - -
5 - you sort of separated service and filing for the purpose
6 of tolling the statute of limitations?

7 MR. OSWALD: Correct, Your Honor. And that was
8 directly addressed by this court in Spodek where it
9 referred to the commencement date for the claims initially
10 pled in the first pleading, as the crucial date for tolling
11 purposes of the statute of limitations.

12 JUDGE STEIN: So does this boil down, then, to
13 whether they waived any defense based on lack of service of
14 that first complaint? Is - - - is that - - - do we have to
15 - - - is that what we have to grapple with here?

16 MR. OSWALD: Correct, Your Honor. Your Honor,
17 the appellant submits that the - - - the commencement has
18 been conflated with the service. I believe that the
19 service is a separate issue which is highlighted by the - -
20 - by the switch to the commencement by ser - - - by filing
21 system, Your Honor.

22 And it's our position with respect to service,
23 that any objection to service in particular or personal
24 jurisdiction in general was effectively waived when the
25 respondents made motions under CPLR 3211(a)(5) and (a)(7).



1 JUDGE STEIN: But does it matter whether they
2 knew or didn't know that that first complaint ever existed?

3 MR. OSWALD: Your Honor, I would - - - there's -
4 - - the appellant would respectfully submit that it does
5 not matter, Your Honor. And even if it did matter, the - -
6 - the switch to the - - - the e-filing system, Your Honor,
7 made that complaint readily available to the respondents.

8 In fact, when they went to file their motions,
9 they would have had to asse - - - access the e-filing
10 system. And the complaint is merely, literally, a click
11 away. They could click on it and see it.

12 Additionally, the amended complaint said that it
13 was amended, and it also said that it was the third
14 document filed in the case, Your Honor.

15 JUDGE WILSON: Let's go back to why you say it
16 doesn't matter. So then if I understand the rule as you're
17 sort of expounding it, I can file a complaint that
18 commences the action; I can choose not to serve it for a
19 couple of years, and then can serve it in sort of - - -
20 have given myself, maybe an extension on the statute of
21 limitations, if that's what I choose to do?

22 MR. OSWALD: Well, Your Honor, by doing that you
23 - - -

24 JUDGE WILSON: And the - - - and the only
25 recourse that the defendant has is to move under 306-b.



1 MR. OSWALD: Your Honor, the - - - the defendant
2 could move under 3211(a)(8) or it could move under 306-b,
3 Your Honor. But by doing that, if a litigant wants to
4 adopt that approach, you would be subjecting the entire
5 case to dismissal for failing to properly serve it, Your
6 Honor.

7 I just believe - - -

8 JUDGE WILSON: But that requires a motion?

9 MR. OSWALD: Correct, Your Honor.

10 JUDGE WILSON: Okay.

11 MR. OSWALD: But the - - - the proper way - - -
12 there is a proper procedure to deal with effective service,
13 and the appellant respectfully submits that that is
14 distinct from timeliness issues.

15 The proper manner is to make a motion under
16 3211(a)(8) or 306-b, and the - - - the action can be
17 dismissed for failure to effect service in that respect.

18 JUDGE STEIN: But isn't your point that you're
19 not extending the statute of limitations; the statute of
20 limitations was met when you filed those pleadings?

21 MR. OSWALD: Correct, Your Honor. The - - - the
22 - - - the claims in the initial pleading were interposed.
23 They met the statute of limitations at the date that they
24 were filed, which was within the applicable four-month
25 limitations period here, Your Honor.



1 Now, those same claims carried forward in the
2 amended complaint, verbatim, which added a new claim, the
3 fifth - - - the fifth claim for violation of - - - of due
4 process based on - - - on gender discrimination, which we
5 are not appealing the dismissal of that, Your Honor.

6 But - - -

7 JUDGE FEINMAN: And what about the fourth claim?

8 MR. OSWALD: Your Honor, the fourth claim, the
9 appellant respectfully - - -

10 JUDGE FEINMAN: The due process one against the
11 City?

12 MR. OSWALD: Correct, Your Honor. To be clear,
13 the due process claim is only against the City; it's not
14 against the respondent - - - the Police Benevolent
15 Association. The - - - the appellant respectfully submits
16 that there have been allegations in the amended verified
17 complaint - - - ample amount of allegations, Your Honor - -
18 - that clearly lay out that although there was a CBA and a
19 memorandum of agreement in effect, that the procedure - - -
20 the procedural protections that the appellant was entitled
21 to under those agreements were not followed. She was not
22 afforded them.

23 And we would respectfully submit that - - - that
24 in response to the respondent's argument that that - - -
25 the mere existence of that is sufficient - - -



1 JUDGE RIVERA: And where - - - and where is the
2 pleading - - - where are the pleading allegations that - -
3 - that the due process that she's entitled to flowed from
4 the City as opposed to the union?

5 MR. OSWALD: Well, Your Honor, first we would say
6 that the appellant - - - the appellant was bound to
7 settlements without her consent. That's alleged in
8 paragraph 32, paragraph 34, 37 - - -

9 JUDGE RIVERA: But if the union is her
10 representative, isn't that a claim, really, against the
11 union?

12 MR. OSWALD: Your Honor, we would - - - we would
13 say that the - - - the - - - we were bound to
14 determinations by the City without her consent and without
15 her con - - - or without her right to make a decision as to
16 whether to exercise further procedural protections to fight
17 that claim.

18 But even if that were the case, Your Honor, the
19 appellant also is clearly allowed to present relevant
20 evidence in her - - - defense of her case. And we have
21 alleged that that was provided for in the CBA, however she
22 was denied that opportunity - - -

23 JUDGE STEIN: So how - - - how does the fourth
24 cause of action differ from the second cause of action?

25 MR. OSWALD: Well, Your Honor, we would allege



1 that the - - - that the fourth cause of action would apply
2 irresp - - - would apply irrespective of the - - - of the -
3 - - of the CBA. More of an analysis that also encompasses
4 whether those protections in the CBA were sufficient.

5 And I would note that the CBA - - - and I
6 apologize, but I was not counsel below - - - for the - - -
7 the case below, but the CBA is not in the record. So
8 realistically, the - - - the - - - based on the record
9 before the court, it cannot be assessed as to whether the
10 CBA protections were sufficient.

11 So there is some duplicity there, Your Honor,
12 admittedly. However, the second cause of action would
13 relate directly to the breaches of the CBA, while the
14 fourth cause of action is somewhat broader and could extend
15 beyond to protections that were outside of the bounds of
16 the CBA, but she - - - but that Ms. - - - but the - - -
17 that the appellant was entitled to under - - - under due
18 process.

19 JUDGE FEINMAN: So I - - - I just want to clarify
20 two things. If we were to rule in your favor, would we
21 have to remit for this issue of whether or not the first
22 cause of action address - - - states a cause of action?
23 Because I don't - - - I don't think the Appellate Division
24 or the court below actually addressed that.

25 MR. OSWALD: I'm sorry, Your Honor. Could - - -



1 could you - - -

2 JUDGE FEINMAN: The first cause of action - - -

3 MR. OSWALD: Yes, Your Honor.

4 JUDGE FEINMAN: - - - whether or not it states a
5 cause of action under 3211(a)(7), would we have to remit on
6 that issue?

7 MR. OSWALD: Your Honor, I - - - I do believe,
8 reading the Appellate Division's decision, they did not - -
9 - they did not address that issue.

10 JUDGE FEINMAN: Right, that's my point. If we
11 were to rule in your favor and - - - and - - - would we
12 still have to remit for that issue to be fleshed out?

13 MR. OSWALD: Well, Your Honor, that issue was
14 briefed by the - - - the respondent Benevolent Police
15 Association (sic) at the Fourth Department. The Fourth
16 Department did not rule on it. I think it is preserved for
17 this court's review. And I know that the - - - the
18 respondent did raise it in this appeal.

19 And our response to those arguments are simply
20 that the - - - to accept the - - - the Buffalo Police
21 Benevolent Association, the respondent's arguments in that,
22 you would have to assume the allegations in the complaint
23 to be untrue. And there is no document in the record to
24 support that.

25 JUDGE FEINMAN: Okay. Yeah, I get it. You're



1 saying we can actually reach it on its merits.

2 So what is the simplest path - - - without - - -
3 and there are a lot of issues raised in this case involving
4 - - - it's almost like a CPLR exam - - - final exam - - -
5 what is the simplest path that you can suggest to the
6 result that you are seeking?

7 MR. OSWALD: Well, Your Honor, first - - - first
8 the appellant respectfully would submit that the - - - the
9 first two causes of action are timely, and this court - - -
10 the appellant is not asking this court to do anything
11 groundbreaking or novel in that respect. We are merely
12 asking for a fair and honest reading of CPLR 203(c) which
13 is simply that those two causes of action were timely
14 interposed when the action was commenced. So - - -

15 JUDGE GARCIA: Counsel, could we - - - on that
16 point, could we just go back, I think, to what Justice - -
17 - Judge Wilson was saying, which is notice/not notice. So
18 not a strategic call, but let's say you file your complaint
19 and you don't serve, as in this case. Right? It's a mis -
20 - - I don't think that was a strategic call, I'm guessing.
21 It just slipped.

22 You realize that. You now serve an "amended
23 complaint", but you don't write it in in handwriting that
24 it's amended, you just serve it. You have service. It's
25 years later. Defendant gets that complaint. They look at



1 it. I've been served. You know, it's not a personal
2 jurisdiction issue. So I respond: you're out of time.

3 You then say, no, no, no, no, I have this other
4 complaint back here. So it's actually timely, and now
5 you've waived your personal jurisdiction argument. Why is
6 that something we would encourage?

7 MR. OSWALD: Your Honor, the appellant is not
8 asking the court to encourage that. The appellant would
9 respectfully submit that under those circumstances, Your
10 Honor, it could conceivably be warranted for an exception
11 to - - - to what we are advocating. We would - - -

12 JUDGE GARCIA: I thought you said notice didn't
13 matter?

14 MR. OSWALD: I do - - - I do maintain that - - -
15 that notice in - - - in respect - - - with respect to
16 service is a distinct issue from interposition and the
17 timeliness of claims under the statute of limitations.

18 JUDGE GARCIA: But how do I know the complaint is
19 there? I mean, you say it's in the filing system. But
20 let's say it didn't say - - - I know it said "amended
21 complaint" here. But let's say it didn't? So when I go to
22 file my 3211 motion in the system I see it in there, I have
23 to pull it back? What if, you know, this is the last day I
24 have to file?

25 MR. OSWALD: Well, Your Honor - - -



1 JUDGE GARCIA: Had I known there was a complaint
2 in there - - -

3 MR. OSWALD: Your Honor, what I would suggest,
4 which is in my experience, common practice, Your Honor, is
5 that a personal jurisdiction defective service defense
6 would be pled in the answer. And in initial discovery, you
7 would demand an affidavit of service, which is course and
8 custom, from my experience, Your Honor. And that would - -
9 - that would disclose any defect in service of the initial
10 papers, Your Honor.

11 And additionally, Your Honor, it would be a
12 matter of a simple - - - it could be a matter of a simple
13 call to the clerk's office. Now that the courts are - - -
14 are changing to meet the technology realities of today,
15 it's fairly simple to access what has been filed in a case,
16 Your Honor.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MR. OSWALD: Thank you, Your Honors.

19 CHIEF JUDGE DIFIORE: Counsel?

20 MS. CREIGHTON: May it please the court, my name
21 is Catherine Creighton. I'm the attorney for the Buffalo
22 PBA, and I was during all relevant times.

23 Ann Vanyo is a police officer, as you know - - -
24 she was a police officer. The PBA is the exclusive
25 collective bargaining representative of all the police



1 officers, detectives, lieutenants, and captains in the
2 Buffalo Police Department.

3 JUDGE FEINMAN: So let me ask you this. In their
4 reply brief, the plaintiff withdraws their argument rega -
5 - - you know, seeking the benefit of the relation-back
6 doctrine.

7 MS. CREIGHTON: I don't - - -

8 JUDGE FEINMAN: What's your view about whether we
9 have to consider relation back?

10 MS. CREIGHTON: It seems to me that you have to
11 consider relation back, because if the - - - the - - - so
12 what happened here is - - - if I can go back just a little
13 bit? What happened here is a complaint was - - - a summons
14 and complaint was filed but never served. We were unaware
15 of it.

16 And then when the amended complaint was served on
17 the PBA, I did not see that it said "amended complaint", so
18 I moved as you suggested, Your Honor, that I move to - - -

19 JUDGE STEIN: Well, how could you not see that it
20 said that? That - - - that - - -

21 JUDGE FEINMAN: It says "amended" with a
22 misspelling of double M.

23 MS. CREIGHTON: On the top. I just did not see
24 that.

25 JUDGE FEINMAN: It says "document 3".



1 MS. CREIGHTON: And this was very soon after the
2 electronic filing went into effect. So we moved, as you
3 said, under 3211. I didn't do a general answer with all of
4 the affirmative defenses; I just did a 3211 motion to
5 dismiss as untimely and - - - and that it failed to state a
6 claim.

7 Then during - - - then it was brought to our
8 attention - - - my attention and the City's attention - - -
9 that it was - - - there had been a complaint filed.

10 We brought up the issue of 3 - - - of 306-b. And
11 then the plaintiff - - -

12 JUDGE FEINMAN: Did you?

13 MS. CREIGHTON: - - - then - - -

14 JUDGE FEINMAN: Did you actually ever move to
15 dismiss pursuant to 306-b?

16 MS. CREIGHTON: I did not, because what happened
17 was we brought - - - we brought it up during - - - I
18 brought it up in my papers.

19 JUDGE FEINMAN: Um-hum.

20 MS. CREIGHTON: And then the plaintiff brought
21 the 306-b motion. And the judge ruled on that motion
22 saying that - - - and I don't think there's any dispute
23 before Your Honors that there's no dispute that the court
24 did not - - - it said the lower court didn't abuse its
25 discretion in denying plaintiff's motion under 306-b for an



1 extension of time to serve the original summons and
2 complaint.

3 JUDGE FEINMAN: Right, right. That's all the
4 procedural history that we're familiar with. I - - - I
5 guess the question is what's the consequence of not having
6 moved to dismiss under 306-b?

7 MS. CREIGHTON: I - - - I do not believe - - - I
8 mean, that is what the - - - the dissent said. But there
9 was a 306-b motion. And before the court were all the
10 issues that were present - - -

11 JUDGE RIVERA: You - - - you interpret the
12 statute to not require a freestanding written motion; is
13 that what you mean?

14 MS. CREIGHTON: There was - - - well, there was -
15 - -

16 JUDGE RIVERA: But you - - - you put in your
17 reply, correct?

18 MS. CREIGHTON: There was, though - - -

19 JUDGE RIVERA: In the opposition.

20 MS. CREIGHTON: - - - the plaintiffs did have a
21 freestanding motion - - -

22 JUDGE RIVERA: Yes, yes. But the question is you
23 - - - I thought you objected and then sought as relief,
24 right - - -

25 MS. CREIGHTON: Yes.



1 JUDGE RIVERA: - - - dismissal - - -

2 MS. CREIGHTON: Yes.

3 JUDGE RIVERA: - - - for failure to serve, as
4 opposed to a freestanding motion independent of that.

5 JUDGE FAHEY: But don't - - -

6 JUDGE RIVERA: But let me ask you this. Let's
7 say we agree - - - let's say we agree with him, for the
8 moment, can you now go back and file a 306-b motion?

9 MS. CREIGHTON: Well, I've been pondering that.
10 And I - - - it seems that if we did go back, we would file
11 the 306-b motion - - -

12 JUDGE RIVERA: And - - - and let's say the court
13 agreed with you. What - - - how can his amended complaint
14 survive?

15 MS. CREIGHTON: It wouldn't survive.

16 JUDGE RIVERA: If there's nothing to relate back
17 to, there's no earlier filing that's timely, on the - - -
18 on the first two causes of action.

19 MS. CREIGHTON: Right. My - - - there would be
20 nothing to go back to.

21 JUDGE GARCIA: But how do you square that with
22 the problem with 3211? I mean, there's been a number of
23 missteps in this case which, you know, I think we have to
24 sort of pull back and look at first principles. And one of
25 the first principles in the CPLR is once you appear and you



1 don't object to personal jurisdiction, you're out.

2 And you filed a 3211 motion - - - (a) motion, and
3 you didn't object to personal jurisdiction. Isn't that the
4 easiest way to address this?

5 MS. CREIGHTON: Well, actually, I think the
6 easiest way to - - - to address it would be to say that - -
7 - on the first cause of action, that plaintiff failed to
8 state a claim, which the Appellate Division didn't address
9 at all, and which the lower court dismissed the complaint -
10 - -

11 JUDGE GARCIA: Well, that goes to Judge - - -

12 MS. CREIGHTON: - - - on both - - -

13 JUDGE GARCIA: - - - Feinman's point on whether
14 we could get to that.

15 But really on the jurisdictional issue, isn't a
16 basic principle, when you appear, you have to put in an
17 objection to personal jurisdiction or it's waived? And
18 isn't that the rule we would want to reinforce?

19 MS. CREIGHTON: But then we get back to what you
20 said earlier, Your Honor, where if we - - - if we just
21 thought that there was a complaint - - - that this was the
22 complaint - - - and I know it seems crazy to say there
23 wasn't, but that both - - - it was written in light pencil,
24 and we did not see that.

25 JUDGE GARCIA: But I think that - - - I mean,



1 look, I think that gets into a different area of how much
2 you're going to want to have hearings on notice. But in
3 this case, I think it's fairly straightforward: you had
4 something that said "amended", and you had docket 3, and
5 it's in the docket. You know, that's not as hard a case as
6 if it just said "complaint", to me.

7 I don't know what the answer is either way. You
8 know, that's what we're trying to figure out. But that's a
9 harder fact pattern than you're responding to an amended
10 complaint, you make your first appearance, so to speak, and
11 you don't object to personal jurisdiction.

12 MS. CREIGHTON: We did raise the 306-b. And then
13 the plaintiff - - - 306-b is different than 3211(8) - - -
14 (a)(8). But we - - - and so those issues were all before
15 the court on the plaintiff's motion.

16 JUDGE STEIN: Are you aware of any cases under
17 3211 in which it was held that waiver - - - that the - - -
18 I mean, I think the statute is pretty clear about waiving
19 your right to object if you don't make the objection at the
20 appropriate time - - - but any cases which say well,
21 because of these circumstances, because maybe it wasn't
22 clear that their - - - you know, that something had been
23 filed, that un - - - that that statute, that that waiver,
24 that there would be an exception to that rule?

25 MS. CREIGHTON: No, Your Honor.



1 JUDGE STEIN: Okay. So - - - so are you asking
2 us to make such a rule?

3 MS. CREIGHTON: No, I don't think that you need
4 to - - - to reach that. I think because the 306-b motion
5 was raised - - -

6 JUDGE FEINMAN: Well, so but what do you do about
7 the 306-b language that basically says - - -

8 MS. CREIGHTON: On a motion - - -

9 JUDGE FEINMAN: - - - the court doesn't have the
10 ability to do it sua sponte, and that it has to be upon
11 motion?

12 MS. CREIGHTON: But wasn't it upon - - -

13 JUDGE FEINMAN: We just ignore that language?

14 MS. CREIGHTON: I don't think we are ignoring
15 that language. I think the - - - it was brought on motion.

16 JUDGE FAHEY: So it really comes down, then, to
17 whether or not we decide a cross-motion is necessary,
18 right?

19 MS. CREIGHTON: Yes. I think that's what - - -

20 JUDGE FAHEY: Okay.

21 MS. CREIGHTON: - - - what - - - I mean - - -

22 JUDGE FAHEY: Yeah, I got it.

23 MS. CREIGHTON: Hindsight is 20/20.

24 JUDGE RIVERA: Well, what - - - what is it that
25 the court can do upon the motion? What's the only relief



1 the statute allows?

2 MS. CREIGHTON: Well, the - - - the relief is is
3 that it can be dismissed without prejudice, right?

4 CHIEF JUDGE DIFIORE: Thank you, Counsel - - -

5 JUDGE RIVERA: If - - - I'm sorry, go ahead.

6 I just want to clarify. You're not arguing that
7 - - - that 3211(a) - - - I think it's (8) motion is only
8 specifically addressing the amended complaint, which still
9 left you open with the 306-b motion on the original
10 complaint?

11 MS. CREIGHTON: Can you say that again? I'm not
12 sure I understand.

13 JUDGE RIVERA: I'm sorry. I - - - I'm adding
14 confusion to what is already confusing. My apologies.

15 MS. CREIGHTON: It's quite confusing.

16 JUDGE RIVERA: Yes. Okay, so the motion to
17 dismiss for failure to serve, you're not arguing that you
18 couldn't make that against the amended complaint, because
19 obviously that one was served.

20 MS. CREIGHTON: Right.

21 JUDGE RIVERA: Right? And so since that's your
22 motion on the pleading about which you know - - - hold
23 aside for the moment whether or not you were on
24 constructive notice - - -

25 MS. CREIGHTON: Right.



1 JUDGE RIVERA: - - - let's put it that way - - -
2 of the original complaint - - - that nevertheless the CPLR
3 left you the option - - - the opportunity to file the 306-b
4 motion against the original complaint, that that might be
5 the path - - -

6 MS. CREIGHTON: Yes.

7 JUDGE RIVERA: - - - that the CPLR allows you to
8 pursue?

9 MS. CREIGHTON: Yes, I think that is a path.

10 JUDGE RIVERA: Okay. Thank you.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.
12 Counsel?

13 MR. LEE: Good afternoon, Your Honors. May it
14 please the court, David Lee, Assistant Corporation Counsel
15 for the City of Buffalo.

16 Judge Feinman, you asked a question to
17 plaintiff's counsel about what's the fastest way we can - -
18 - or the simplest way to - - -

19 JUDGE FEINMAN: So - - -

20 MR. LEE: - - - get to - - -

21 JUDGE FEINMAN: - - - I was actually going to ask
22 you the same question. The fastest - - - or - - - not only
23 the fastest - - - the narrowest way to get to the result
24 that you seek.

25 MR. LEE: Okay, so when the plaintiff makes the



1 306-b motion for an extension of time to serve, the statute
2 of limitations, at that point in time, is expired.

3 So the court has two options in that
4 circumstance. The court can either dismiss the action - -
5 - and that would have to be with prejudice, because the
6 statute of limitations is now expired. You don't get the
7 recommencement benefit. So it either has to be dismissed
8 with prejudice or the court could grant extra time to
9 serve.

10 JUDGE STEIN: I - - -

11 MR. LEE: If the point - - -

12 JUDGE STEIN: - - - I don't know why - - - I
13 don't understand why you - - - why the - - - the statute of
14 limitations would expire depending upon whether it was
15 served or not.

16 MR. LEE: Because - - -

17 JUDGE STEIN: Can you show me where in the CPLR
18 it says nowadays that - - - that - - - that complying with
19 the statute of limitations depends on service?

20 MR. LEE: It - - - it depends on service, Your
21 Honor, to - - - to the extent that the CPLR still requires
22 that - - - that the complaint be served. So if you don't -
23 - - if you don't serve - - -

24 JUDGE WILSON: But the - - - but the result of
25 the 1992 amendment, its whole purpose was to change us from



1 a service commences the action to filing, right?

2 MR. LEE: Understood, Your Honor.

3 JUDGE WILSON: And the statute of limitations
4 runs from the filing date, right?

5 MR. LEE: Yes, yes, that's - - - that's true.
6 But you - - -

7 JUDGE WILSON: So how is that then affected by
8 the service?

9 MR. LEE: Because you still have to serve the
10 complaint.

11 JUDGE WILSON: You do.

12 MR. LEE: We - - - we can't just ignore the CPLR
13 provision that says you need to serve the complaint. I
14 mean, the alternative is - - - and I think this has been
15 discussed generally - - - is that the plaintiff could file
16 a complaint, wait years to serve it, and then just do an
17 amended complaint. And the big problem with that is then
18 you could get around 306-b by - - -

19 JUDGE STEIN: But maybe this is a technicality.
20 But then the - - - the complaint - - - the action isn't
21 being dismissed on statute of limitations grounds; it's
22 being dismissed on some other ground. And - - - and - - -
23 and maybe - - - and that's where, maybe, the two tie in
24 together. One party is seeking an extension; and the other
25 party is seeking dismissal. And there are different



1 burdens, maybe, on those motions.

2 But I - - -

3 MR. LEE: Here's - - - I guess here's - - -

4 JUDGE FEINMAN: And the 3211 is filed first, I
5 think. And his motion under 306 is almost like a boots
6 (sic) and suspenders - - - or strap - - - whatever the
7 expression is. Belts and suspenders.

8 JUDGE FAHEY: Belt and suspenders. There you go.

9 JUDGE FEINMAN: Sorry, not boots. I guess the
10 snow has me thinking of - - - of boots.

11 But it's almost a belts-and-suspenders - - -

12 MR. LEE: Yeah, it is - - -

13 JUDGE FEINMAN: - - - type of motion.

14 JUDGE GARCIA: But let's say this case - - - not
15 an amended complaint - - - a - - - a complaint, and it's
16 filed. Defendant answers and makes a statute of
17 limitations motion and doesn't challenge personal
18 jurisdiction, which normally you're out.

19 But now the defendant goes in and files a 306-b
20 motion and says you know what, you never - - - you never
21 served me. Is that okay under the CPLR, or are you out,
22 because you didn't challenge it as 3211?

23 MR. LEE: No, I mean, I - - - I think 306-b is -
24 - - it's related to jurisdiction, certainly, because it's
25 related to service, but I mean, if a defendant gets served



1 with - - - with a complaint, and it's outside the time
2 period allowed by 306-b, the defendant can move pursuant to
3 306-b to dismiss that complaint. They don't have to move -
4 - -

5 JUDGE GARCIA: Let's say you make a 3211(a)
6 motion and you make a statute of limitations motion under
7 3211; and then you realize, oh, you know, oh no, I should
8 have also included a personal jurisdiction objection. But
9 instead of now you can't do that, can you go back and use
10 306-b and challenge the service?

11 MR. LEE: I - - - I think that you can, Your
12 Honor, because 306-b is - - -

13 JUDGE GARCIA: Is there a case that says you can
14 do that? I've never seen that.

15 MR. LEE: I - - - I think what I would say, Your
16 Honor, is we could rely on the - - - on the statute. It
17 doesn't - - -

18 JUDGE WILSON: So do you think you could
19 stipulate to personal jurisdiction and then bring a 306-b
20 motion to challenge service?

21 MR. LEE: I - - - I don't think you could do
22 that.

23 JUDGE WILSON: Okay.

24 MR. LEE: No, I - - - I think 306-b is jur - - -
25 jurisdictional. But I - - - it - - -



1 JUDGE STEIN: But isn't - - -

2 JUDGE RIVERA: But Counsel, what's the - - -

3 JUDGE STEIN: - - - isn't personal - - -

4 JUDGE RIVERA: - - - remedy you could get - - -
5 this is the same question I asked her. What does 306-b
6 allow the court to provide as a remedy? What - - - what
7 can the court do in response to the motion.

8 MR. LEE: Yes, exactly, Your Honor. And this is
9 what I - - - and this is - - - this is a better answer to
10 Judge Stein's first question, I think, is - - - is that if
11 that 306-b motion is made after the statute of limitations
12 expires - - -

13 JUDGE RIVERA: Yeah.

14 MR. LEE: - - - and the court - - - if service is
15 not made - - -

16 JUDGE RIVERA: Yeah.

17 MR. LEE: - - - can - - - it can either dismiss
18 the case or it can grant extra time to serve. And the idea
19 is that once the case is dismissed, now, it doesn't matter
20 that it was timely interposed anymore, because it was - - -
21 because now it's been dismissed, because the plaintiff
22 hasn't met the 306-b criteria.

23 JUDGE RIVERA: And it's says dismiss without
24 prejudice. So what does that mean?

25 MR. LEE: You can't dismiss the case without



1 prejudice - - -

2 JUDGE RIVERA: But that's the only option.

3 JUDGE FEINMAN: That's what the language says in
4 the statute.

5 JUDGE RIVERA: That's the option provided.
6 Doesn't this mean that this motion is only for the person
7 who has filed a pleading or interposed a pleading but not
8 served?

9 MR. LEE: I - - - I don't believe that that's
10 true, Your Honor. And there - - - and there is a case
11 cited in my papers, and there's commentary under 306-b on
12 it. And it - - - it's just not feasible for a court to
13 dismiss an action without prejudice after the statute of
14 limitations is expired.

15 JUDGE RIVERA: But doesn't that mean, then, 306-b
16 is not available?

17 MR. LEE: No, no, it - - -

18 JUDGE RIVERA: In that scenario?

19 MR. LEE: - - - it means that - - - it means that
20 it is available.

21 JUDGE RIVERA: All it means is that the court
22 denies, which is what they did here.

23 MR. LEE: It would mean that the court - - - if
24 the court found - - -

25 JUDGE RIVERA: So it lets the defendant then make



1 whatever motion they might want to try and make if they
2 can, to try - - -

3 MR. LEE: It - - -

4 JUDGE RIVERA: - - - and get the thing eventually
5 dismissed.

6 MR. LEE: The court would have to find that the
7 plaintiff deserves extra time to serve. And what do you do
8 for that? You look at the good-cause standard. You look
9 at the interest-of-justice standard. And - - -

10 JUDGE RIVERA: Yes, but if the court decides not
11 to do that, which is what happened here, and which the
12 Appellate Division said was not an abuse of discretion?

13 MR. LEE: Yes, and I - - - and I think that was
14 the - - - the proper result.

15 JUDGE RIVERA: Um-hum.

16 MR. LEE: And as a matter of fact, the plaintiff
17 is not even challenging that - - - that - - - that he met -
18 - - that she met the - - - the prongs under 306-b to get
19 extra time to serve.

20 JUDGE FEINMAN: So I want to come back to where
21 you started your argument - - - and I see your red light's
22 on - - - which is what's your simplest answer for the
23 result you want?

24 MR. LEE: Okay. So we know now that it's - - -
25 it's the amended complaint that's the operative pleading.



1 We - - - we know that from plaintiff's counsel's first - -
2 - first answer. So what does the defense do? The defense
3 moves to dismiss on statute of limitations grounds. That's
4 - - - that's what the defendant would always do in these
5 circumstances.

6 Then what does the plaintiff usually do? The
7 plaintiff would make - - - would oppose that motion, and he
8 would have to argue that, okay, even though these claims
9 are - - - are late, they relate back to - - - to the
10 original complaint.

11 And the - - - the problem here is that you can't
12 relate these claims back to the original complaint, because
13 the - - - the original complaint was properly dismissed.
14 And as a matter of fact, the plaintiff is not even
15 challenging, in this case, that the original complaint was
16 - - -

17 JUDGE RIVERA: Well, isn't the real reason you
18 can't relate back is because the original complaint has got
19 to give you notice, and if you never filed, it doesn't give
20 you notice? That's the real reason you can't relate back?

21 MR. LEE: That's the sec - - - that's the next
22 argument after the one I was just making, Your Honor. Yes.
23 We were on - - - we were on notice of nothing in this case.
24 So the relation-back doctrine doesn't apply.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



1 MR. LEE: Okay. Thank you.

2 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

3 MR. OSWALD: Briefly, I just wanted to address
4 the - - - the need for a motion under 306-b, and I'd just
5 like to reaffirm, which is addressed in the appellant's
6 papers, that there have been - - - in the last ten years,
7 there have been three separate cases from three separate
8 departments of the Appellate Division that each held that a
9 cross-motion was necessary under 306-b when it was a
10 plaintiff asking for an extension of time to serve.

11 And each department rejected the plaintiff's
12 request on the grounds that they did not bring a cross-
13 motion, even though there was, in fact, as there was here,
14 a 306-b motion that had been brought by the defendant.

15 JUDGE FEINMAN: Well, and that would be
16 consistent with the general principle that you don't grant
17 a nonmoving party affirmative relief?

18 MR. OSWALD: Correct, Your Honor.

19 JUDGE FEINMAN: Okay.

20 MR. OSWALD: Correct. Which presents a number of
21 problems which I think they dissented on.

22 JUDGE RIVERA: But - - - but the relief that the
23 defendant seeks, I don't - - - where is it in 306-b?

24 MR. OSWALD: It's not there, Your Honor.

25 JUDGE RIVERA: So what - - - what - - - how could



1 they proceed on 306-b?

2 MR. OSWALD: They would have - - -

3 JUDGE RIVERA: That's what I'm asking.

4 MR. OSWALD: Your Honor, they would have to ask
5 for the relief that is there, or they do not proceed on it,
6 or they make a - - - a motion under 3211(a)(8), Your Honor.

7 JUDGE RIVERA: So your position is the only
8 option they had was when they received the amended - - -
9 were served with the amended complaint, is to then file a
10 motion arguing that they weren't served the original
11 complaint, and so the original complaint should be
12 dismissed?

13 MR. OSWALD: Well, they could make a number of
14 arguments in that motion, but I think that has to be one of
15 them, Your Honor.

16 That's all I have. Thank you.

17 CHIEF JUDGE DIFIORE: Thank you.

18 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Ann Vanyo v. Buffalo Police Benevolent Association, Inc. and City of Buffalo, No. 99 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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