BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion by the plaintiff for an order, granting leave to amend the caption by deleting the word "proposed" in reference to his status as administrator of the estate denied; letters not issued when action commenced so plaintiff had no capacity to sue.

In *Michael Jackson, Michael Jackson as guardian of Todd Jackson and Michael Jackson as proposed administrator of the estate of Elsa Jackson v. James Moore and island Sales and Leasing, Inc.*, Index No.: 607875/2017, decided on March 26, 2018, the court denied the motion by the plaintiff for an order, granting leave to amend the caption by deleting the word "proposed" in reference to his status as administrator of the estate.

The court noted that the action was to recover damages for personal injuries arising from a motor vehicle accident which took place on May 11, 2014. The action was commenced on April 25, 2017 and at that time, plaintiff had not yet received letters to administer his wife's estate and so denominated himself as her "proposed administrator." On May 23, 2017 letters of administration were granted to the plaintiff. In rendering its decision, the court stated that a persona representative who has obtained letters of administration to administer the estate of a decedent is the only party who is authorized to commence an action to recover damages for conscious pain and suffering sustained by a decedent. Here, since the letters had not yet been issued at the time that the action was commenced, the court was constrained to find that the plaintiff was without the capacity to sue on his wife's behalf. Neither substitution nor amendment was available to cure the deficiency or to render those claims actionable.

Motion for leave to amend granted; permitted so long as the court has acquired jurisdiction over the intended misnamed defendant.

In *Mary Juckles v. the Stop & Shop Supermarket Company LLC, Bimbo Bakeries USA Inc. and Bimbo Foods Bakeries Distribution, LLC,* Index No.: 622938/2017, decided on June 4, 2018, the court granted plaintiff's motion for leave to amend the summons and complaint to correctly reflect the name of defendant "Bimbo Bakeries USA, Inc."

The court noted that on April 12, 2018, the defendants interposed an answer to the complaint in which they identified "Bimbo Bakeries UDA, Inc." as "BBU UDA, Inc." The defendants did not raise a jurisdictional objection in their answer. The plaintiff sought to correct the name of the misnamed defendant. In granting the motion by plaintiff, the court noted that leave to correct is a misnomer, as here, it will be permitted so long as the court has acquired jurisdiction over the intended misnamed defendant, and provided that the defendant was fairly appraised that it was the party the action was intended to affect and would not be prejudiced by allowing the amendment.

Honorable Joseph Farneti

Defendants' motion to dismiss the plaintiffs' amended complaint on the grounds of judicial estoppel denied; plaintiffs never claimed, acknowledged or admitted in any prior proceeding, that they did not have ownership interest

Elaine Colavito

In *95 Meadowmere LLC, James Callanan, Mary Callanan, Jay Fensterstock, Elizabeth Fensterstock, Eichler Frank Investments, James Frank, Brian Frank, Cynthia Frank as Trustee of the Amanda Frank trust, Cynthia Frank, Jerome Leff, Gabriella M. Leff, Gabriella M. Leff and Nancy Leff Lerner as Trustees of the Article Third Trust UW Dora Leff, Francesca Schwartz v. MPPR, LLC, Meadowmere Place, LLC, Claus Moller, individually and as a member of MPPR, LLC and Meadowmere Place, LLC, Marcello P. DA S. Dorea, Hydrangea Hill LLC, 31 Meadowmere Place, LLC, Meadowmere I, LLC, Majorie Wallis as Trustee of the Majorie Wallis Revocable Trust,* Index No,: 4869/2014, decided on May 16, 2018, the court denied the defendants' motion to dismiss the plaintiffs' amended complaint on the grounds of judicial estoppel.

In rendering its decision, the court noted that the doctrine of judicial estoppel precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed. Here, the court found that the defendants had not established that in prior Small Claims Assessment Review matters regarding tax assessments for 95 Meadowmere Place Property by the Picards and for 126 Meadowmere Lane by the Leffs, that plaintiffs' represented that they had no property interest in Meadowmere Place. Moreover, the affidavits established that the respective plaintiffs never claimed, acknowledged or admitted in any prior proceeding, that they did not have ownership interest in the bed of the Meadowmere Place.

Honorable William G. Ford

Motion to discontinue granted; exception where a party's demise does not affect the merits of the case there is no need for strict adherence to the requirement that the proceeding be stayed pending substitution.

In *Citibank, N.A. v. Aaron C. Harkin a/k/a Aaron Harkin, Charles Harkin, CitiFinancial Services, Inc., New York State Department of Taxation & Finance, Capital One Bank USA, N.A., Midland Funding Bank, LLC,* Index No.: 30726/2013, decided on Aug. 1, 2018, the court granted the motion to discontinue the action as against decedent defendant Charles Harkin or his estate. In rendering its decision the court noted that generally where a cause of action survives the death of a party, such death divests the court of jurisdiction until a duly appointed personal representative is substituted for the deceased party. However, courts do acknowledge the exception in providing that where a party's demise does not affect the merits of the case there is no need for strict adherence to the requirement that the proceeding be stayed pending substitution. The court possesses inherent authority to assist in the matter to prevent undue delay and in furtherance of substantial justice. Consequently, the court granted the plaintiff's motion to discontinue the action against defendant decedent Charles Harkin or his estate.

Honorable Joseph C. Pastoressa

Motion for summary judgment denied; issue of petitioner's right to a charging lien under New York law was not raised, litigated or determined in that action.

In *In the Matter of the Application of John L. Juliano and John L. Juliano, P.C. v. To enforce a charging lien pursuant to New York Judiciary Law 475 against Howard Hazlett,* Index No.: 5593/2015, decided on May 3, 2018, the court denied the motion for summary judgment.

It was undisputed that the petitioner commenced an action in New York on behalf of the respondent and performed work on the case before it was refiled in North Carolina. The respondent now contended that the claim was barred by collateral estoppel based upon the dismissal of the petitioner's action in North Carolina. In denying the motion, the court noted that collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity. The doctrine only applies if the issue in the second action is identical to an issue which was

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raised, necessarily decided and material in the first action and the party had a full and fair opportunity to litigate the issue in the earlier action. Here, the petitioner asserted a claim for unjust enrichment against Jensen in North Carolina based upon the agreement reached with Jensen, McGrath and Podgorny law firm. The issue of petitioner's right to a charging lien under New York law was not raised, litigated or determined in that action. Therefore the court concluded that the respondent failed to demonstrate that this proceeding was barred by collateral estoppel. Here, the petitioner was only seeking his portion of fees for work that he performed. The petitioner attempted to obtain a share of the fees from Jensen but the claim was denied in North Carolina. Therefore, the remedy was to assert a charging lien in New York against the proceeds distributed to the respondent. Accordingly, the respondent's motion for summary judgment was denied.

Honorable Joseph A. Santorelli

Motion for summary judgment denied; plaintiffs had not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party.

In *Charlene Woltin and Ronald Woltin, her husband v. Macy's Inc., Simon Property Group, Inc., Christian Dior, Inc., Christian Dior LLC, Chanel, Laura Mercier, "John Doe" Maintenance Company, fictitious name intended to be the person or entity who performed maintenance at the premise, and "john Doe" Electric Company, fictitious name intended to be the person or entity who performed electrical service and repair at the premises*, Index No.: 8081/2016, decided on April 12, 2018, the court denied the motion for summary judgment by defendant, Macy's Inc.

In denying the motion, the court found that the motion was premature as the plaintiffs had not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party as to the workers' compensation self-insurance and excess coverage with Liberty Mutual Insurance company as well as discovery on the corporate entities and subsidiary entity allegations made by defendant, Macy's. Accordingly, the motion was denied.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is a partner at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation, immigration, and trusts and estate matters. She is also the President of the Nassau County Women's Bar Association.