

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for a default judgment denied; complaint failed to allege with any specificity, facts sufficient to determine how the subject accident occurred, and whether a viable negligence cause of action existed against the defaulting defendant.

In *Jose Amaya v. Acar leasing LTD. and Sean Stevens*, Index No.: 623805/2017, decided on Sept. 18, 2018, the court denied the motion for a default judgment. In rendering its decision, the court noted that the verified complaint was submitted, however, it failed to allege with any specificity, facts sufficient to determine how the subject accident occurred, and whether a viable negligence cause of action existed against the defaulting defendant. The court pointed out that the complaint merely stated that the parties' vehicles collided, and alleged in a conclusory fashion, that the defendants engaged in various type of negligent conduct, including speeding and driving recklessly, prior to such collision. Accordingly, the motion was denied.

Motion to dismiss third-party complaint denied; plaintiff did not possess statutory authority to move for dismissal of the third-party action, which was not asserted against her.

In *Karen A. Butts, as Administrator of the Estate of John Liuzzi, deceased v. SJF, LLC, Advanced Dermatology, P.C., South Country Plaza Condominium, Inc., J.M. Iaboni Landscaping, Inc. and J.M. Iaboni SC Enterprises, Inc., J.M. Iaboni Landscaping, Inc. and J.M. Iaboni SC Enterprises, Inc. v. Kenneth Dean Butts*,

Index No.: 36679/2010, decided on Jan. 14, 2019, the court denied the motion by plaintiff for an order dismissing the third-party complaint. Plaintiff moved for dismissal of the third-party complaint against the unrepresented third-party defendant Kenneth Dean Butts, arguing that plaintiff was not properly served with the third-party complaint pursuant CPLR 1007, that the third-party complaint was barred by laches, and that the third-party complaint was devoid of factual and legal basis, which the court construed as a motion pursuant to CPLR 3211(a)(7). In opposition, it was argued that failure to serve the third-party complaint was due to law office failure, which had been corrected, that there was no time limit on the commencement on a third-party action, and that the operator of a private vehicle owed to his passengers a duty of reasonable care when providing a safe place to alight. In rendering its decision, the court noted that while plaintiff is a party, there are no causes of action contained in the third-party complaint asserted against plaintiff. Further, the court noted that the third-party defendant had not as of the date of the filing of the instant motion, interposed an answer to the third-party complaint or obtained counsel. Therefore, plaintiff did not possess statutory authority to move for dismissal of the third-party action, which was not asserted against her. Accordingly, the motion to dismiss was denied.

Honorable William G. Ford

Motion to dismiss plaintiff's complaint for neglect to prosecute pursuant to CPLR §3216 granted; statutory requirements met.

In *Jose Collado-Nunez v. Mykhalo*



Elaine Colavito

Tabaka, Index No.: 7301/2015, decided on Nov. 20, 2018, the court granted the motion to dismiss plaintiff's complaint for neglect to prosecute pursuant to CPLR §3216. In rendering its decision, the court noted that plaintiff commenced the personal injury action on April 24, 2015. Issue was joined on or about May 1, 2015. Discovery

proceeded and a Preliminary Conference Order was entered into on Oct. 26, 2015. The court stated that the matter appeared several times on the court's discovery compliance calendar. As a pre-requisite to the instant application, the defendant made a 90-day demand served on plaintiff on Nov. 30, 2017. Having received no response, defendant now moved for dismissal. Here, the court found that the defendant satisfied the statutory requirements: (1) issue must have been joined; (2) one year must have elapsed following joinder, and (3) the party seeking such relief must have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand. The motion was granted.

Motion to dismiss granted; to the extent that plaintiff sought to collaterally attack and relitigate lienor's standing to litigate, that issue had already been litigated and resolved against her.

In *Ginette Laviolette v. Wells Fargo bank, National Association as Trustee for SABR 2004-OP1 Mortgage Pass through Certificates, Series 2001-OP1*, Index No.: 10073/2016, decided on May 7, 2018, the court granted the defendant's motion to dismiss pursuant to CPLR 3211(a)(1). In rendering its decision, the court stated that it

was clear that the Supreme Court's determination awarding the bank judgment of foreclosure and a sale, affirmed by the Second Department, clearly and conclusively established the validity of the bank's lien and its equitable right to have foreclosed on that lien. Plaintiff's contentions that any and all rival claims, liens and encumbrances must be extinguished lacked merit given that determination. Further, the court concluded that to the extent that plaintiff sought to collaterally attack and relitigate lienor's standing to litigate, that issue had already been litigated and resolved against her. Hence, the motion was denied.

Honorable Vincent J. Martorana

Plaintiffs ordered to appear for depositions; portion of motion seeking dismissal of the complaint denied; willfulness and contumaciousness not demonstrated.

In *Rafael R. Landron and Jeffries De La Rosa Mendoza v. Carlos Orellana and Maria Escobar*, Index No.: 4769/2016, decided on Sept. 20, 2018, the court ordered plaintiffs to appear for depositions. The court noted that the action was commenced on May 11, 2016 and issue was joined on June 29, 2016. A preliminary conference was held on March 6, 2017. Depositions were to be completed by June 6, 2017. Plaintiff failed to appear for several depositions and defendants' counsel asserted that their offices had been unable to schedule another deposition.

In granting the motion, the court stated that depositions were more than a year past due and there was no evidence that any recent attempt had been made by the plaintiffs to appear. Plaintiffs would be precluded from testifying at trial if they failed to appear for depositions. The por-

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tion of the defendants' motion seeking dismissal of the complaint was denied as the court found that the standard of willfulness and contumaciousness required to grant such relief had not been demonstrated.

Honorable Robert F. Quinlan

Plaintiff's request to stay the motion for judgment of foreclosure and sale denied; while a bankruptcy proceeding operates to stay most civil litigations, it only stays proceedings against the debtor.

In *CitiMortgage, Inc. v. Tulio Cabal a/k/a Tulio E. Cabal; Adriana Tamayo; Cach, LLC; Capital One Bank (USA), N.A.; Chase Bank USA, N.A.; Ford Motor Credit Company LLC; KMT Group LLC; Petro, Inc.; Bank of America, NA; Village of Lindenhurst; Tulio Cabal Sr*, Index No.: 4958/2014, decided on Oct. 25, 2018, the court denied plaintiff's request to stay the motion for judgment of foreclosure and sale. In rendering its decision, the court pointed out that while a bankruptcy pro-

ceeding operates to stay most civil litigations, it only stays proceedings against the debtor. In the instant proceeding the plaintiff was proceeding against the defendant mortgagors and made no claim against defendant Cach LLC had not answered or appeared and their default was fixed and set by the court's Jan. 12, 2016 order. The court reasoned that the pendency of a bankruptcy proceeding involving someone other than the mortgagor would not prevent a foreclosure action from going forward in state court. As such, the motion was denied.

Honorable William B. Rebolini

Motion to disqualify denied; plaintiff could not demonstrate that the prior representation was substantially related to the current representation, and counsel for the defendant had shown that he possessed no confidential information.

In *Joseph Burgio v. Christopher G. Holland, Joseph M. Bananno, Benny Romano and Salvatore Romano*, Index

No.: 617199/2016, decided on June 14, 2018, the court denied the motion to disqualify defendant's counsel. The court noted that a party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification was warranted. A party seeking to disqualify an attorney of law for an opposing party on the ground of conflict of interest has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. Here, plaintiff asserted that defendant's counsel represented plaintiff in a prior action brought against Bayville Auto Diagnostics and plaintiff as one of the principals of the business, which prior action concerned repairs performed to a customer's vehicle. In denying the motion, the court stated that disqualification was

unwarranted as plaintiff could not demonstrate that the prior representation was substantially related to the current representation, and counsel for the defendant had shown that he possessed no confidential information pertaining to the plaintiff in this unrelated personal injury case.

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.