By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for Summary judgment granted language of the subject notice did not indicate any failure within the sewer system, so it failed to place the defendants on notice as to any alleged defective condition.

In *Laura Serrano v. County of Suffolk, Suffolk County Department of Public Works and Suffolk County Sewer District,* Index No.: 36305/2006, decided on Nov. 29, 2018, the court granted the defendants' motion for summary judgment dismissing plaintiff's complaint. In rendering its decision, the court noted that the defendants established their prima facie entitlement to summary judgment through the submission of affidavits, in which they contend that they conducted a search of the records and files maintained by their respective offices and found no records indicating that the defendant had received prior written notice of the alleged defective condition of the sewer system where this incident occurred.

In opposition, the plaintiff contended that the notice of claim served in February of 2006, after the October 2005 incident, established that the defendants had actual knowledge of the events. Plaintiff did not address that portion of the defendants' motion regarding the lack of written notice prior to the October 2005 incident. Thus, plaintiff's claims involving the October 2005 incident was dismissed. To the extent that plaintiff's opposition could be read to contend that the notice of claim served in February of 2006 served as prior written notice of an alleged defect in the interceptor at the intersection, the court found that it was without merit as the notice of claim stated that the claim arose due to the negligence of the defendants in failing to timely respond to the backup. Since the language of the subject notice did not indicate any failure within the sewer system, it failed to place the defendants on notice as to any alleged defective condition.

ELAINE COLAVITO

Honorable Joseph Farneti

Court denied branch of motion which sought attorney disqualification; petitioner's application for attorney disqualification may not be brought in the context of this proceeding as motion practice in special proceedings is very limited.

In *In the Matter of the Application of Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO (Grievant-William T. Perks) v. Town of Huntington, Huntington Town Attorney's Office, Huntington Town Attorney Cindy Elan-Mangano, Assistant Huntington Town Attorney/Records Access Officer Jacob Turner, Assistant Huntington Town Attorney/F.O.I.L. Officer Deidre Butterfield, Huntington Town Clerk's Office, Huntington Town Clerk Jo Ann Raia, Huntington Deputy Town Clerk Stacy H. Colamussi,* Index No.: 19688/2015, decided on Feb. 2, 2018, the court denied that branch of the motion which sought disqualification of the town's current attorneys from representing the town in connection with the order to proceed to arbitration.

The court noted that in a prior matter, under Index No. 10/23474, the court granted the town's motion for a preliminary injunction; in so ruling, the court effectively stayed arbitration on the issue of damages pending a judicial determination on the matter of attorney disqualification. Local 342, plaintiff-therein did not then proceed to seek a judicial ruling on the matter of attorney disqualification. This proceeding then followed, with Local 342 not only challenging the denial of FOIL requests under CPLR 78 but also seeking to place the unresolved issue of attorney disqualification before the court.

In rendering its decision, the court noted that the petitioner's application for attorney disqualification may not be brought in the context of this proceeding as motion practice in special proceedings is very limited. Article 4 of the CPLR, which governs special proceedings, does not envision any motion practice in such proceedings apart from motion to dismiss on objections in point of law, as here, and corrective motions. Here, the court stated that it could not sever the application and allow it to proceed as an action because the request for disqualification had no meaning or import outside the context of an already-pending or proceeding related to the arbitration. However, since such a proceeding existed and since CPLR permitted subsequent applications concerning an arbitration to be made by motion in the same proceeding in which the first application was made, the petitioner may, if it be so advised, renew its motion for disqualification in that proceeding.

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Bench Briefs (*continued from page 5)*

Honorable William G. Ford

Petitioner's application for relicensure denied, however, action timely commenced; petition seeking review of respondent's appeals board denial of relicensure was timely under the 4 month statute of limitations

In *In the Matter of the Application of Curtis L. Prussick v. New York State Department of Motor Vehicles,* Index No.: 4404/2017, decided on Jan. 29, 2019, although the court denied petitioner's application for relicensure, the court found that the action had been timely commenced. With regard to the argument as to statute of limitations, the court noted that in order to commence a timely proceeding pursuant to CPLR article 78, a petitioner must seek review within four months after the determination to be reviewed becomes final and binding upon the petitioner, or after the respondents' refusal, upon the demand of the petitioner, to perform its duty. To the extent that the proceeding sought to undo the petitioner's underlying DUI arrest and prosecution in 2008 as well as the administrative DMV chemical test refusal hearing and license suspension and revocation, petitioner was time barred, which were clearly outside the 4 month look back period. However, as to the accrual of the instant claim, the court stated that the petitioner commenced the proceeding on Aug. 23, 2017.

The parties differed as to the appropriate measurement of accrual of petitioner's claim. The court noted that petitioner brought the proceeding after petitioner applied for relicensure on Dec. 21, 2016. That application was denied on Feb. 24, 2017, with requests for reconsideration denied on April 25, 2017. The record was unclear precisely how petitioner was apprised of these determinations, but assuming service by mail and adding 5 days, that aspect of the petition seeking review of respondent's appeals board denial of relicensure was timely under the 4 month statute of limitations.

Honorable Joseph C. Pastoressa

Motion for summary judgment granted; plaintiff failed to submit sufficient facts to demonstrate that the motion was premature.

In *Roseann Burger v. Metropolitan Transportation Authority, Long Island Railroad, Starrett-RDC Corporation, Starrett Corporation, Grenadier Realty Corp., Greystone and Greystone & Co., Inc.,* Index No.: 60427/2013, decided on Oct. 15, 2018, the court granted the motion for summary judgment. In opposition, the plaintiff contended that the motion was premature because depositions had not been conducted. The court noted that to defeat a motion for summary judgment based upon outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were within the exclusive knowledge and control of the moving party. Here, the court found that the plaintiff failed to submit sufficient facts to demonstrate that the motion was premature.

The plaintiff's contention that Greystone might have been obligated to procure insurance was not sufficient to warrant further discovery since a mere agreement to maintain insurance is not an indicia of control and has no bearing on the issue of liability to the plaintiff. In addition, the court pointed out that the case had been pending since 2013 and the plaintiff had ample opportunity to obtain discovery prior to the filing of the motion.

Motion for the issuance of a subpoena duces tecum denied; youthful offender statue provides that all official records and papers concerning the adjudication are sealed.

In *Malina Stylianos, an infant by her mother and natural guardian, Michele Stylianos and Michele Stylianos, individually v. Town of Brookhaven,* Index No.: 68386/2014, decided on Sept. 10, 2018, the court denied the motion by plaintiffs for the issuance of a subpoena duces tecum.

The plaintiff requested a subpoena duces tecum for the production of a complete criminal file and investigation of the Suffolk County Police Department and the Suffolk County District Attorney's Office. The defendant cross-moved to deny the motion, asserting that the files were sealed because the defendant therein was adjudicated a youthful offender. In denying the motion, the court noted that the youthful offender statue provides that all official records and papers concerning the adjudication are sealed. The privilege attaches not only to the physical documents constituting the record, but also, the information contained within those documents. The language in the statue permitting access to the confidential records "upon specific authorization of the court" refers only to the court which rendered the youthful offender adjudication. The court continued and states that absent a statute or order of the court which rendered the youthful offender adjudication, disclosure of the information in the confidential records may not be compelled unless the youthful offender waived the privilege. Accordingly, the plaintiff's motion was denied.

Honorable William B. Rebolini

Motion to compel deposition or in the alternative striking defendant's answer denied with leave to renew; under similar circumstances, precluding testimony of the party of the time of trial would be the appropriate sanction.

In *Yesenia Jiminez v. Jose M. Romero and Miguel A. Torres,* Index No.: 611780/2016, decided on Feb. 20, 2019, the court denied the plaintiff's motion compelling the defendant, Jose M. Romero, to appear at an examination before trial, or in the alternative, striking defendant's answer, was denied with leave to renew.

In denying the motion, the court noted that the plaintiff had not complied with the requirements of 22 NYCRR 202.7[c]. Notwithstanding same, the court noted that counsel for the defendants opposed the motion indicating that their office had been unable to make contact with the defendant Romero to advise him of his scheduled deposition. Counsel for defendants' retained an investigator to attempt to located defendant Romero. According to the report, defendant was no longer residing in New York and may no longer be in the United States. Counsel for defendants asserted that should defendant Romero not appear for a deposition, then defendants' answer should not be stricken, but defendant Romero would be precluded from testifying at the time of trial. The court noted, that under similar circumstances, it had been found that precluding testimony of the party of the time of trial would be the appropriate sanction.

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 percent 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.