

## BENCH BRIEFS

By Elaine Colavito

### Suffolk County Supreme Court

#### Honorable W. Gerard Asher

*Motion to discontinue without prejudice denied; plaintiff's application for the requested relief was addressed and denied by a court of coordinate jurisdiction.*

In *Michael Marinelli v. Eckard Wimmer and Susanne Holubar*, Index No.: 5398/2015, decided on March 29, 2016, the court denied the plaintiff's motion for leave to discontinue without prejudice. The court noted that this personal injury matter was commenced on October 16, 2014 in Kings County and issue was joined on November 14, 2014. Defendants' motion to change venue to Suffolk County was granted and the matter was transferred to this court by a March 12, 2015 order.

The Kings County Court noted that plaintiff's cross-motion to discontinue the action without prejudice was also denied. Plaintiff now sought an order granting leave to discontinue without

prejudice. In support of his application, plaintiff argued that the Appellate Division, Second Department has held that a plaintiff should be granted leave to discontinue when if he seeks relief specifically so that he can re-file in another venue. In denying the application, the court noted that plaintiff's application for the requested relief was addressed and denied by a court of coordinate jurisdiction and accordingly, the plaintiff's remedy would have been to move to reargue the order of Hon. Karen B. Rothenberg and/or serve notice of appeal and perfect same. The court further stated that as this court was not an Appellate Court, and the previous order was "Law of the Case." Plaintiff's application to discontinue without prejudice was denied.

*Motion to dismiss complaint granted; defendant not alleged to be present at soccer match in question; complaint failed to establish a relationship between LISRA*



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*and referee/game official.*

In *Kiana Telano, a minor under the age of eighteen years, by her parents and natural guardians, Steven G. Telano and Lisa Telano, and Steven G Telano and Lisa Telano, individually v. Maria Daume, a minor under the age of eighteen years, by her mother and natural guardian, Maureen Daume, Long Island Soccer League, Inc., Long Island Soccer Referees Association, and Lake Grove-Newfield Soccer Club, Inc.*, Index No.: 1360/2015, decided on May 9, 2017, the court dismissed the complaint against defendant, Long Island Soccer Referees Association Inc. ("LISRA").

The court noted that it was alleged that plaintiff was injured when her body and defendant Maria Daume's body came into contact with each other while playing soccer. Plaintiff alleges that she was injured as a result of violent and intentional acts on the part of defendant. The complaint alleges that LISRA and

other defendants are liable for injuries sustained by the plaintiff.

In granting the motion to dismiss, the court noted that construing the complaint liberally, LISRA is not alleged to be present at the soccer match in question, rather the causes of action are based upon vicarious liability. The court found that the complaint also failed to establish a relationship between LISRA and the referee/game official present at the game. The court concluded that the complaint's legal conclusions were contradicted by the documentary evidence submitted by the defense. Accordingly, the complaint against defendant LISRA was dismissed.

#### Honorable Arthur G. Pitts

*Cross motions to dismiss granted; agency finding was a final determination; no indication that party served was agent authorized to accept service.*

In *Virginia Thomas and David Thomas, as Trustee of the Thomas Family Irrevocable Trust v. New York State Office of*

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## Bench Briefs (Continued from page 6)

*Temporary and Disability Assistance and Suffolk County Department of Social Services*, Index No.: 9760/2016, decided on May 2, 2017, the court granted the cross motions by Suffolk County Department of Social Services (“DSS”) and New York State Office of Temporary and Disability Assistance (“NYSOTD”).

The court noted that the petition sought an order vacating and setting aside a decision after a fair hearing by New York Department of Health’s designee, which confirmed respondent DSS’s denial of community medical assistance. The court reasoned that such a finding was the final determination, not respondent DSS’s denial, and accordingly, the petition as to it must be dismissed.

With regard to NYSOTD’s cross motion to dismiss, the court noted that petitioners proffered an affidavit of service which provided that the petition was delivered to the DSS offices in Hauppauge, New York with no indication that the party served was an authorized agent designated to accept service. As such NYSOTD’s cross-motion was also granted.

*Motion to dismiss first, third, fourth, and fifth causes of action granted; moving defendant was not a party to promissory note.*

In *Three C L LLC and Thomas Dowd v. City Settlement Services Inc., Edward Dowd and Darmin Bachu*, Index No.: 6662/2016, decided on March 22, 2017, the court granted that branch of defendant Dowd’s motion to dismiss the first, third, fourth and fifth cause of action.

In granting that branch of the defendant’s motion, the court noted that it was undisputed that the subject’s promissory note was not executed by the moving defendant and the moving defendant averred that he was not an officer of the defendant Three CL LLC. In deciding same, the court stated that on a motion to dismiss on the ground that a defense is founded upon documentary evidence, the documentary evidence must conclusively establish a defense as a matter of law. Herein, the court concluded that the promissory note, which was the subject of the plaintiff’s cause of action for breach of contract and unjust enrichment, clearly indicated that Edward Dowd was not a party to the agreement either as an individual or an officer of the defendant corporation.

### Honorable William B. Rebolini

*Conditional order of preclusion granted; plaintiff to appear for deposition with reasonable accommodations.*

In *Estate of Florence Jurzenia, Jean Jurzenia Burden, as co-executor of the Estate of Florence Jurzenia, Edward Jurzenia, as co-executor of the Estate of Florence Jurzenia, Silver Sands Motel, Inc., Jean Jurzenia Burden, as share-*

*holder in Silver Sands Motel, Inc., Edward Jurzenia, as shareholder in Silver Sands Motel, Inc., Richard Terry Keefe IV, as shareholder in Silver Sands Motel, Inc., and Walter H. Burden III, Edward Jurzenia, individually, and Jean Jurzenia Burden, individually v. Jerry M. Mims, Eric Friedlander, Long Island Capital Management Corp., PM Advisory Group, Sol LoPiccolo, Anthony Galeotafore, AJG Capital Group Associates, Inc., Deborah Loftain, Peter Shembri, Gail Shembri, Patricia A. Judd, Richard Olivio, Philip Solomon, Angela Sivillo, Susan Bonitch, also known as Susan Sivillo, AnneMarie Prokopiak, also known as AnneMarie Panagos, Patricia Warner, Jennifer R. Hain, Elizabeth R. Reis, The Gross Family Holdings, LLC, The Wheatley Harbor, LLC, Stanley Weisz and Stanley Gross, Titleland Abstract, also known as Titleland Guarantee, Inc., Affirmative Land Services, Inc., and Excel Abstract, Inc.*, Index No.: 13490/2013, decided on October 2, 2017, the court granted the motion of defendants only to the extent as to those claims asserted by plaintiff Walter Burden is precluded from offering evidence upon the trial of this action as to those claims asserted by him or on his behalf and as to defenses and counterclaims asserted against him unless he submits to a deposition under reasonable accommodations within 30 days from the date of service of the order with notice of entry.

The cross-motion by plaintiffs for a protective order prohibiting the deposition of Walter Burden and directing that he respond to interrogatories was denied. In deciding the motion, the court noted that here, the defendants indicated a willingness to accommodate Burden’s needs by conducting the deposition in a “non-confrontational” setting at or near plaintiff’s residence, and to conduct the deposition in the presence of only one or two of the numerous defense attorneys. It was also suggested that the deposition be conducted in the presence of a physician of his choosing.

While the plaintiffs’ suggested the use of interrogatories in place of the deposition, the court concluded that severe prejudice would result to the defendants from their inability to explore Burden’s claims through the vehicle of a deposition, accordingly, a conditional order of preclusion was appropriate.

*Motion for summary judgment denied; records, as well as the conclusions allegedly drawn therefrom, were not in proper evidentiary form; failure to set forth proper credentials of expert to support analysis.*

In *Sea Empty Aviation, LLC, Charles Weeks, Larry Sribnick, Eileen Sribnick, Aircrafts of Long Island Inc., David hertz, Ronald Meltzer, Charles Dundas, James F. Cear, Sanborn Land & Devel-*

*opment Corp., W. Peter Oakes and Norma McGuigan v. Sea Empty Equipment, Inc. and Charles Tutt*, Index No. 9910/2009, decided on September 26, 2016, the court denied the plaintiffs’ motion for summary judgment.

In denying the motion, the court noted that in support of their motion, plaintiffs submitted the affidavit of Raymond Wallman, a non-party to the action, who was identified as a shareholder member of Sea Empty Aviation, LLC, and “basic financial reports” allegedly prepared by Wallman from information contained in the Aviation checkbook. The court found that such records, as well as the conclusions allegedly drawn therefrom, were not in proper evidentiary form and Wallman failed to set forth proper credentials as an expert to support his analysis. Ac-

cordingly, the court concluded that the plaintiffs failed to establish their prima facie entitlement to summary judgment.

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 an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.*