BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable W. Gerard Asher

Motion for an order pursuant to CPLR §2104 enforcing the stipulation of settlement of plaintiff's action against the defendant denied; unknown injuries at the time of the mediation; plaintiff did not fully understand the mediation settlement agreement which his attorney entered into on his behalf; plaintiff did not sign the agreement.

In *Santos Soto Aragon v. Juana A. Flores*, Index No.: 12942/2013, decided on February 3, 2015, the court denied the defendant's motion for an order pursuant to CPLR §2104 enforcing the stipulation of settlement of plaintiff's action against the defendant. The court noted that the action was commenced on February 13, 2013 by plaintiff to recover damages for personal injuries. On or about October 17, 2013 counsel for plaintiff and the claims representatives for defendant's insurance carrier, Nationwide Insurance Company, entered into an agreement to mediate the matter. Thereafter, On October 18, 2013 counsel for plaintiff and the representative for nationwide entered into an agreement at the mediation to settle the matter in the amount of $20,000.00. Over eight months passed from when the parties reached the agreement without closing documents being signed by plaintiff. The plaintiff in opposition to the defendant's application claimed that there existed unknown injuries at the time of the mediation and that he did not fully understand the mediation settlement agreement, which his attorney entered into on his behalf. Furthermore and most importantly, plaintiff did not sign the agreement. The court found that no one would be prejudiced by not entering the stipulation and accordingly, the court denied defendant's motion.

Motion to dismiss complaint for lack of personal jurisdiction granted; service not perfected pursuant to the Hague Convention.

In *Donna Truhan v. Osram AG, Osram Sylvania, Inc., Osram Sylvania Products, Inc., Family Dollar Stores, Inc., Family Family Dollar Services, Inc., Family Dollar Stores of New York, Inc., and Family Dollar Store No. 4192*, Index No.: 36181/2012, decided on January 14, 2014, the court granted the defendant Osram AG's motion for an order pursuant to CPLR §3211(a)(8) dismissing the cause of action for lack of personal jurisdiction as the Summons and Verified Complaint were not properly served upon the defendant.

The court stated the pertinent facts as follows: defendant Osram AG was a German Corporation, reorganized as Osram GmbH, a corporation organized under the laws of Germany, with its principal place of business at Hellbrunner Strasse 1, 81543 Munich Germany. As such, the defendant was a corporation existing under the laws of Germany and accordingly, service of process was governed by the Hague Convention. In the matter at hand, the plaintiff did not comply with the service requirements of the Hague Convention but rather attempted to serve the defendant Osram AG pursuant to Section 307 of Business Corporation Law of New York by delivering two copies thereof to the Secretary of State and by mailing one copy by certified mail to the defendant's headquarters in Munich, Germany. The court noted that the Hague convention requires each member (of which Germany is a member) to establish a Central Authority, which would facilitate the service of legal documents in each country. Additionally, the convention provides provisions, specifically, Article 10, which allows service by mail, provided the state/country of designation does not object. However, Germany specifically objected to service by mail, in essence stating service pursuant to Article 10 of the Hague Convention shall not be effected. Accordingly, service via the Central Authority was the only means by which an American plaintiff may serve a German defendant. Since the service was not done in accordance with Hague Convention, service was not perfected and the motion was granted.

Honorable Paul J. Baisley, Jr.

Motion to dismiss complaint against estate granted; an estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity.

In *Glenn Kennedy v. The Estate of Helen Ansbro, deceased and Island Advantage Realty*, Index No.: 63349/2014, decided on February 13, 2015, the court granted the motion by defendant, the Estate of Helen Ansbro, to dismiss the complaint asserted against it. The court noted that their electronic file contained an affidavit of service of process, which indicated that service on the estate was effectuated upon Miller & Milone, P.C. Miller & Milone, P.C. asserted that although they represented Ms. Ansbro prior to her death on July 20, 2012, there had been no appointment of an executor or administrator of her estate.

In rendering its decision, the court stated that an estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity. Further, the court pointed out that a plaintiff may not commence a legal action or proceeding against a dead person during the period after death and before the appointment of a personal representative. Here, the court found that the papers submitted established that although the estate was named in the action, Ms. Ansbro was deceased on July 20, 2012, prior to the commencement of the action.

Elaine Colavito

Motion for summary judgment on issue of liability denied; field report submitted was hearsay.

In *Niza Lopez and Carlos Lopez v. David Gonzalez and ML Perez Gonzalez*, Index No.: 67849/2014, decided on March 13, 2015, the court denied plaintiffs' motion for judgment on the issue of liability. In deciding a motion for summary judgment, the court noted that all of the competent evidence must be viewed in the light most favorable to the defendants, as the opponents of the motion and all reasonable inferences must be resolved in their favor. Moreover, the court pointed out that it is well established that the burden on the movant is such that summary judgment must be denied even if the existence of a triable issue of fact is only arguable. In reviewing the submissions in support of the motion, court found that the Field Report was hearsay, not competent evidence and had not been considered as it was not certified or authenticated as required by CPLR §4518 (c).

While hearsay evidence may be admissible in opposing a motion for summary judgment, the court stated that there must be an acceptable excuse for failure to tender proof in admissible form. Here, the defendants failed to proffer an excuse. Nonetheless, the court denied the motion as in viewing all evidence in the light most favorable to the defendants and resolving all reasonable inferences, summary judgment as to liability was not warranted as the conflicting affidavits raised a factual issue to be resolved through disclosure or trial.

Honorable Joseph C. Pastoressa

Motion to dismiss complaint for failure to produce discovery denied; movant had not outlined what discovery currently remained outstanding

In *Robert Nalewajk and Susan Nalewajk v. Kolbe & Kolbe Millwork, Co., Inc., Dimensional Millwork, Inc., Millwork Solutions, Florence Corporation d/b/a Florence Building Materials, Kolbe and Kolbe Millwork, Co., Inc. v. Ample Contracting Inc., Jim Makarius, Jim Makarius d/b/a Ample Contracting, J.Z. Woodworks, John Zotos, John Zotos d/b/a J.Z. Woodworks, Synergy Concrete Corp., Vince Capogna and Vince Capogna d/b/a Synergy Concrete*, Index No.: 37842/2011, decided on April 17, 2015, the court denied defendant, Kolbe & Kolbe's motion for dismissal of the complaint for failure to provide discovery. In denying the motion, the court reasoned that counsel's good faith affirmation asserted that on May 4, 2012, defendant requested plaintiffs respond to a discovery demand dated March 9, 2012, which was long overdue. No other good faith effort to communicate and resolve the discovery dispute had been set forth, and movant had not outlined what discovery currently remained outstanding. Without the CD rom, it was impossible for the court to determine from the parties' submissions what discovery had been provided and what remained outstanding. Pursuant to 22 NYCRR 202.7 and *Chervin v. Macura*, 28 A.D.3d 600, the motion was denied.

Honorable Arthur G. Pitts

Motion to quash and for a protective order granted; plaintiff proffered no reason why a non-party deposition should be conducted prior to the completion of party depositions

In *Michael Toohey v. Nausheen Muntiqua, M. D., Michael J. Peterson, M. D., Vascular Associates of Long Island, P.C. and John T. Mather Memorial Hospital of Long Island*, Index No.: 37917/2012, decided on April 1, 2015, granted the motion by defendants quashing the subpoena served by plaintiff on non-party, Lynne Marie Natti to take her deposition as well as for a protective order. In rendering its decision, the court noted that the parties entered into a preliminary conference and stipulation order, which provided for the scheduling of depositions in caption order. The order did not address scheduling of non-party depositions. In granting the motion, the court directed that party discovery proceed first, then non-party discovery afterward. The court stated that the plaintiff proffered no reason why a non-party deposition should be conducted prior to the completion of party depositions.

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 & Baker, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.