

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to disqualify denied; parties had not commenced discovery in this action and the court could not determine the possibility or probability of a conflict between the plaintiffs herein.

In *Betty Crowley and Maryann Byrne v. Mario Rene Garcia Tocay and Sergio Haroldo Garcia Saban*, Index No.: 23718/2014, decided on Nov. 20, 2015, the court denied the motion to disqualify Kenneth S. Feraru, P.C. from representing the plaintiffs in the action.

In this personal injury action that resulted from a motor vehicle accident, the defendants moved to disqualify plaintiffs' counsel claiming that the attorney's representation of both plaintiffs was a conflict of interest. In denying the application to the extent that it sought to disqualify counsel, the court stated that the disqualification of an attorney was a matter that rests solely in the discretion of the trial court and a client's right to the counsel of its own choosing was an invaluable right that should not be tampered with unless a

clear showing of disqualification had been made. The court further reasoned that the parties had not commenced discovery in this action and the court could not determine the possibility or probability of a conflict between the plaintiffs herein. In addition, the court could not determine whether counsel for the plaintiffs' belief that he was capable of competently and diligently representing each plaintiff, as expressed in his affirmation in opposition was reasonable. Accordingly, the motion was denied, with leave to renew.

Motion to amend caption granted; although the plaintiff had not obtained letters of administration when this action was commenced, the defendant failed to raise the plaintiff's lack of capacity to sur by a pre-answer motion to dismiss or in its answer.

In *Patricia Persico, as Proposed Administrator of the Goods, Chattels and Credits of Paul F. Wojcik, deceased v. CVS Albany, LLC, CVS Albany, LLC v. Donna Henig, M.D.*, Index No.: 61465/2014, decided on Aug. 18, 2015, the court granted the plaintiff's motion to amend the caption.



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The court noted that pursuant to EPTL 11-3.2(b), if a person who has a cause of action to recover damages for personal injuries dies, the cause of action does not terminate as it did under common law but rather, his personal representative may bring or continue an action on behalf of the estate. If however, the action is brought or continued by someone other than the personal representative, it will be subject to dismissal. In granting the motion, the court found that although the plaintiff had not obtained letters of administration when this action was commenced, the defendant failed to raise the plaintiff's lack of capacity to sur by a pre-answer motion to dismiss or in its answer.

Honorable Arthur G. Pitts

Motion to dismiss deemed untimely; plaintiffs' motion for a default and to proceed to an inquest granted; no indication that, through words or actions, that the defendants counsel agreed to plaintiffs' conditions for a second extension.

In *Emmanuel Amaral and Stephanie Amaral v. The Smithtown News, Inc.*,

Bernard Paley, Jennifer Paley and David Ambro, Index No.: 14974/2014, decided on Nov. 24, 2015, after an evidentiary hearing, the court granted the plaintiffs' motion for a default and to proceed to an inquest and denied the defendants' motion to dismiss.

The court noted that the evidentiary hearing was held to determine whether an extension to serve an answer or pre-answer motion was granted on Nov. 14, 2014 with the plaintiff's consent or if the defendants were in default. The testimony established that as the extension to Nov. 14, 2014 was about to expire, there were attempts to extend it. Although the parties seemed close to an agreement on the terms of the extension, there was no indication that, through words or actions, that the defendants counsel agreed to plaintiffs' conditions for a second extension. Inasmuch as there was no second extension, the defendants' motion to dismiss was deemed untimely, and the plaintiffs' motion for a default and to proceed to an inquest was granted.

Motion to dismiss denied; lack of personal jurisdiction and documentary evidence waived unless asserted in
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Bench Briefs

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answer or pre-answer motion.

In *Bellhaven Center for Rehabilitation v. Carmen Alvarado*, Index No.: 11242/2015, decided on March 4, 2016, the court denied plaintiff's motion to dismiss the complaint.

The court noted that the cause of action was for breach of contract. The instant motion was made on the grounds that the court lacked personal jurisdiction over the defendant and that dismissal was claimed to be founded on documentary evidence. In deciding the motion, the court pointed out that both a defense based upon lack of personal jurisdiction or documentary evidence were waived if the defendant failed to assert them in her answer or in connection with a pre-answer motion. Herein, the court held that the defendant filed and served an answer, which did not raise either defense, and as such, they were waived and accordingly, the motion was denied.

Motion to dismiss cause of action

granted; statute of limitation expired.

In *Francisco Vasquez-Santana v. Richard Groom and Chrysler Group, LLC*, Index No.: 23578/2014, decided on Sept. 3, 2015, the court granted the motion to dismiss the third cause of action.

In granting the motion, the court noted that a claim for breach of warranty had a four-year statute of limitations that begins to run when the defendant sells or delivers the product. Herein, defendant Chrysler had proffered documentary evidence that the subject vehicle was sold and delivered by an authorized dealer in February of 2010. The within action was commenced on Dec. 4, 2014 and the underlying incident occurred on April 10, 2014, well outside the applicable statute of limitations.

Honorable William B. Rebolini

Motion to dismiss granted; no subcontractor could assert a cause of action to recover damages for breach

of contract against a party with whom it was not in privity.

In *APCP Insulation Co., Inc. v. Irwin Contracting of Long Island, Inc., Fidelity and Deposit Company of Maryland, Accord Inc. and State University of New York at Stony Brook*, Index No.: 63750/2014, decided on Oct. 8, 2015, the court granted the defendant's cross-motion for summary judgment in its favor dismissing plaintiff's first and second causes of action against it.

In rendering its decision, the court noted that the plaintiff commenced this action to recover sums allegedly due and owing for insulation work and materials allegedly furnished in connection with certain improvements made at the Louis and Beatrice Laufer Center for Physical and Quantitative Biology at Stony Brook University. The defendant, Irwin served as the prime contractor and it entered into a sub contract with defendant, Accord. Plaintiff claims that it served as a subcontractor for Accord and after

"Accord was kicked off the job," it continued to serve as a subcontractor for Irwin. In granting the motion to dismiss, the court reasoned that no subcontractor could assert a cause of action to recover damages for breach of contract against a party with whom it was not in privity.

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