

## BENCH BRIEFS

By Elaine Colavito

## SUFFOLK COUNTY SUPREME COURT

## Honorable Paul J. Baisley, Jr.

*Motion for leave to file a late notice of podiatric action granted; plaintiffs severely prejudiced if motion denied.*

In *Keith Topper and Andrea Topper v. DR. Paul Drucker and Plainview Foot care*, Index No.: 1320/2009, decided on September 3, 2015, the court granted plaintiffs' motion for leave to file a late notice of podiatric malpractice action.

Plaintiff commenced the instant action on January 7, 2009 by filing a summons with notice. Defendants served a notice of appearance and demand for complaint dated May 6, 2009. Plaintiffs thereafter served a complaint. Then, on November 17, 2009, plaintiffs served an amended complaint dated November 12, 2009. Defendants served their answers to the amended complaint. Plaintiffs now moved for leave to file a late notice of podiatric malpractice action. Plaintiffs' current attorney argued that an attorney at his firm who left due to health issues initially handled the instant matter. In addition, he stated that his firm believed that said attorney had filed the requisite notice. In opposition, the defendants contended that this matter languished for years and that they would be severely prejudiced if plaintiffs were permitted to resume prosecution of the action at this late day by filing a late notice of podiatric malpractice. They noted that the relevant treatment occurred almost nine years ago, the medical records have probably

been destroyed and the unavailability of witnesses and the fading of their memories increases with the passing of time. In granting plaintiffs' motion, the court reasoned that the parties were engaging in discovery, and there was no demonstration of actual prejudice to the defendants, whereas the plaintiff would be severely prejudiced if the motion was denied. The court also noted that mere delay alone did not constitute neglect to prosecute without an appropriate motion by the defendants, and none had been made here.

## Honorable Arthur G. Pitts

*Motion for leave to make a payment into the court of the death benefit granted; upon granting of leave, no accrual of pre-judgment interest; proof as to amount owed and defendant discharged from liability.*

In *Jennifer S. Brunner and Jill Fifield, individually and as Administrators of the Estate of Raymond E. Fifield, Jr., Estate of Raymond E. Fifield, Jr. Raymond W. Fifield and Stephanie Fifield v. Jackson National Life Insurance Company of New York and Susan K. Schneider*, Index No.: 5353/2014, decided on August 11, 2015, the court granted the motion of defendant for leave to make a payment into the court of the death benefit of the Jackson National Life Insurance Policy, and upon the granting of such motion, stopping the accrual of pre-judgment interest.

The court noted the facts as follows: Raymond E. Fifield died on the morn-



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ing of December 10, 2013. On that same day, defendant Susan Schneider allegedly presented forms to William Anderson, a represent of Invest Financial Corporation, removing Raymond E. Fifield's children as the beneficiaries of his IRA annuities and designating her as the sole beneficiary. Several other account beneficiaries were changed as well. Schneider was Raymond E. Fifield's girlfriend the last four years of his life, and Anderson was his financial advisor. Subsequently, plaintiffs commenced this action against Jackson National and Schneider, alleging in part that Raymond E. Fifield did not execute the change. Alternately, plaintiffs claimed that Schneider exerted undue influence over the decedent in the days before his death and fraudulently induced him to execute the change of beneficiary forms. Simultaneously with the filing of the summons and complaint, the plaintiffs moved by order to show cause for a preliminary injunction, as well as for a temporary restraining order, prohibiting Jackson National from disbursing the funds. Defendant Jackson National moved for leave to pay into the court proceeds of the subject policy and discharging it from liability. Upon proof as to the amount owed the beneficiary pursuant to the annuity, the court granted the motion for leave to deposit the funds into court and to discharge it from liability.

*Motion to strike complaint denied; no facts to established that business existed and that the plaintiff even had an ownership interest or was employed by it.*

In *Mariko Pichardo v. Prudential Douglas Elliman Real Estate, Kevin Butler and Barbara Butler*, Index No.: 19235/2013, decided on February 29, 2016, the court denied the motion to strike the complaint. The instant action was one for personal injuries sounding in negligence, which arose from an accident that occurred when the plaintiff slipped and fell on the exterior steps of the premises located in Westhampton Beach. By way of supplemental bill of particulars, plaintiff claimed lost wages and pursuant to a "so ordered" stipulation, plaintiff agreed to supply documentary evidence in support of the lost wages claim. The court noted that the defendants were seeking all records of a business that the plaintiff allegedly owned with her husband as well as the locations of certain real estate that she sold. In denying the motion to strike, the court reasoned that it had not been established that such business existed and that the plaintiff even had an ownership interest or was employed by it. Furthermore, the court stated that there

was no basis to request the location of the properties sold by the plaintiff and that documentary proof of commissions paid was sufficient. The court continued and noted that if the defendants could establish ownership or employment at the alleged business after the plaintiff's deposition was held, they could serve a post EBT demand for those documents.

*Motion for protective order granted; issues that go to the heart of the matter not the proper subject for a notice to admit.*

In *Joann Pilocane v. Incorporated Village of Patchogue, Patchogue Village Center for the Performing Arts, Inc., John Ashline, Individually, Clara Iacopelli, Individually, Mickey's Entertainment and Promotions, Inc., Somewhere in Time and Greater Patchogue Chamber of Commerce, Inc.*, Index No.: 33060/2013, decided on August 25, 2015, the court granted defendants' motion for a protective order as to the notice to admit to the extent provided therein.

The court noted that the matter at hand was for personal injuries sounding in negligence arising, which according to the bill of particulars occurred when a metal garbage receptacle fell on the plaintiff. On or about March 30, 2015 the Incorporated Village of Patchogue and the Greater Patchogue Chamber of Commerce were served with a notice to admit by co-defendants, Patchogue Village Center for the Performing Arts, Inc., John Ashline and Clara Iacopelli containing 19 statements for admission. Statements 1-7 sought an admission related to the ownership, control, and maintenance of the subject metal receptacle. Statements 11-13 sought an admission that the moving defendants managed, maintained and repaired the property. Statements 15-16 sought an admission as to the maintenance and repair of the exterior of the subject property. Statements 18 and 19 sought an admission as to the moving defendants' maintenance and repair of the sidewalk in front of the subject property. In granting the motion, the court reasoned that issues that go to the heart of the matter such as whether a lessee or lessor of the property were responsible for the maintenance of the exterior of the subject property and sidewalk, and who was responsible for the maintenance, ownership and repair of a metal receptacle located at the site of the accident are not the proper subject for a notice to admit.

*Motions for summary judgment granted; a moving defendant can meet its prima facie burden by submitting evidence that it did not perform any work on the portion of the walkway where the accident occurred*

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## Bench Briefs (Continued from page 4)

In *Christine Stacey v. Town of Riverhead, Woolworth Revitalization, LLC, W.J. Northridge Construction, Corp., A1 Reliable Industries Corp., C.M. Richey Electrical Contractors, Inc. and Gray Gold Contracting, Inc.*, Index No.: 89/2015, decided on January 25, 2016, the court granted the defendants' motions for summary judgment.

The court noted that this personal injury matter arose when plaintiff slipped and fell in front of the premises located at 130 East Main Street, Riverhead, Suffolk County, New York. At the time of the subject accident, there was ongoing construction in front of the building, a vacant store front, and there were wood planks on the sidewalk, which the plaintiff alleges that she tripped over. She further alleged by way of her complaint that both of the moving defendants were hired to perform constructions services at the site and they created the dangerous condition, which led to her

injuries. In granting the summary judgment motions, the court reasoned that although a contractor may be liable for an affirmative act of negligence, which results in the creation of a dangerous condition upon a public street or sidewalk,. Herein, both defendants met such burden and the plaintiff failed to raise a triable issue of fact, which would warrant denial.

*Motion for summary judgment granted; documentary evidence proffered by the plaintiff clearly established that the Estate's decedent was a tenant in common with the defendant as the ownership of the subject property and as such, there is no valid defense to the action for partition.*

In *Sara Tyson, as Executor of the Estate of James Joseph Rainey v. Susan S. Murphy*, Index No.: 6748/2015, decided on September 1, 2015, the court granted the plaintiff's motion for summary judgment.

The court stated that the instant

action sounded in partition of the premises known as 75 Osseo Avenue, Southold. In support of the instant motion, the plaintiff submitted a copy of a deed dated May 5, 2000, which conveyed the subject property from William R. Cook and Christine A. Cook as grantors, to the defendant Susan S. Murphy and the plaintiff's decedent, James Rainey, as tenants in common. By decision and order of the Suffolk County Surrogate's Court dated March 6, 2015, the plaintiff was granted leave to commence within the partition action. In opposition to the motion, the defendant averred that the plaintiff did not have standing because she was the executor of the estate and James Rainey held title to the subject premises. The court rejected the argument given the leave granted by the Surrogate's Court. The defendant further opposed the motion on the basis that it was premature because discovery had not been completed. In granti-

ng the motion, the court noted that the fact that discovery had not been completed was not a basis to defeat a motion for summary judgment absent a showing that facts essential to justify opposition to the motion may exist, but cannot be stated.

*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.*