BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley

Motion pursuant to CPLR §602 denied; defendants failed to establish that the convenience of the parties or any witnesses or the interest of justice would warrant consolidating or joining the actions for trial and placing venue of the actions in Suffolk County.

In *Sabrina Bencivenga and Michael Mulligan v. Onexim Sports and Entertainment Holding, USA, Inc., Brooklyn Sports & Entertainment, Brooklyn Events Center, LLC and AEG Management Brooklyn, LLC,* Index No.: 610277/2017, decided on July 2, 2018, the court denied defendants' motion pursuant to CPLR §602 consolidating or joining for trial this action with the related Supreme Court, Kings County actions and transferring venue of all the actions to Supreme Court, Suffolk County.

In denying the application, the court noted that the pleadings submitted herein indicated that the first action was the instant action, commenced in Suffolk County but the claims of all four actions arose from an incident which occurred in Barclays Center in Kings County. The court noted that at least two of the plaintiffs resided in Kings County. As such, the court found that the defendants failed to establish that the convenience of the parties or any witnesses or the interest of justice would warrant consolidating or joining the actions for trial and placing venue of the actions in Suffolk County. Thus, while the actions involved common issues of law and fact, the court found that joining the actions for trial was not warranted.

Elaine Colavito

Honorable Martha L. Luft

Article 78 petition dismissed; application for preliminary injunction denied; temporary restraining order granted on January 9, 2018 vacated; relief from the TPVA order by way of an appeal, not an Article 78.

In *In the Matter of an Application of Scott Lockwood v. Suffolk County Traffic and Parking Violations Agency, Alan Wolinsky, Paul Margiotta, Justin Smiloff, and John Does 1-100,* Index No.: 107/2018, decided on June 3, 2018, the court dismissed the petition, denied the application for a preliminary injunction, and vacated the temporary restraining order granted on Jan. 9, 2018 (Rouse, J.).

The matter was a request to vacate a Traffic and Parking Violations Agency's ("TPVA") Order, which required the petitioner to obtain prior permission from a judicial hearing officer in order to be able to make motions in the SCTPVA. According to the record, petitioner made numerous motions raising identical challenges to the jurisdiction of the SCTPVA. The earlier motions were denied and appeals brought were dismissed by the Appellate Division. The court imposed a sanction requiring prior authorization for the petitioner to make motions.

In dismissing the petition, the court reasoned that the petitioner should have sought relief from the TPVA order by way of an appeal, not an Article 78 since it may not be used to seek review of issues that could have been raised on direct appeal. Moreover, the court concluded that the relief sought was only available to correct an error of fact but was not available to correct errors of law.

Motion to dismiss granted; petition filed one day beyond the statute of limitations.

In *In the Matter of the Application of Zhi Ming Shi v. Michael Kane, chairperson, Thomas Weinschenk, Burton Koza, John Farrell, Delores Quintyne and John Miller, Duly constituting the members of the Town of Babylon, Zoning Board of Appeals,* Index No.: 250/2018, decided on Aug. 6, 2018, the court granted respondent's motion to dismiss.

The court noted that the action was an Article 78 proceeding to challenge a determination of the Town of Babylon Zoning Board of Appeals ("ZBA"). The ZBA moved to dismiss on the grounds that the petition was barred by the applicable statute of limitations.

In granting the application, the court noted that pursuant to Town Law §267-c(1), the statute of limitations for challenging a zoning board determination was 30 days from the filing of the de-

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cision with the Town Clerk. Here, the decision was filed on Dec. 15, 2017. Thirty days expired on Sunday Jan. 14, 2018 and the next day was the Martin Luther King holiday. Thus, the petition needed to be filed with the Suffolk County Clerk on Jan. 16, 2018. The filing date stamped on the petition was Jan. 17, 2018, which was one day beyond the statute of limitations.

Motion for default judgment denied; no excuse for late filing.

In *PV Holding Corp. d/b/a Avis Rent a Car System, LLC c. Shatina Hopson a/k/a Shatina Moore and Reginald D. Moore, Jr.*, Index No.: 2685/2016, decided on April 18, 2018, the court denied plaintiff's motion for a default judgment and dismissed the complaint as abandoned.

The court noted that the plaintiff moved for a default judgment on Sept. 29, 2017, more than one year after the defaults. The court continued and stated that CPLR §3215(c) mandated that where a plaintiff failed to seek leave to enter a default judgment within one year after the default had occurred, the court should not enter judgment, but should dismiss the complaint as abandoned, unless sufficient cause was shown why the complaint should not be dismissed. To avoid dismissal, a plaintiff must offer a reasonable excuse for the delay and must establish that the complaint is meritorious. Here, plaintiff offered no excuse for the late filing.

Honorable William B. Rebolini

Motion to compel and motion for protective order granted to the extent provided in the decision; in an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness.

In *Townsend Montant, individually and as Administrator of the Estate of Teresa Montant v. Bradley Gluck, M.D., Hampton Radiology, P.C. East End Radiology, P.C., Southampton Radiology, P.C., North Fork Radiology, P.C. John Hunt, M.D., Beth Josephs, P.A.C., Hamptons Gynecology & Obstetrics, P.C., Peconic Bay Medical Primary Care, P.C., Peconic Bay Medical Care, P.C., and Southampton Hospital,* Index No.: 5619/2011, decided on April 23, 2018, the court granted plaintiff's motion to compel defendant Josephs' continued deposition and the co-defendants' motion for a protective order to the extent set forth in the decision.

This was an action sounding in medical malpractice and wrongful death, wherein plaintiff alleged a failure to diagnose breast cancer in the decedent Teresa Montant. The deposition of defendant Beth Josephs, P.A.C. began but was halted when a disagreement arose between counsel regarding questions posed by plaintiff's counsel. In rendering its decision, the court noted that the Second Department has determined that in an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness. Here, the court found that plaintiff's line of questioning to defendant Josephs sought her opinion regarding radiology reports of the co-defendant radiologist. The court stated that the questions were improper in that defendant Josephs was a physician's assistant and could not comment on the care and treatment rendered by one of the defendant radiologists. Defendant Josephs could not respond to questions regarding a radiologist's function, how a radiologist interprets imaging, the limitations of imaging studies, the process of taking imaging studies nor the thought process of the radiologist who interpreted the imaging studies.

Honorable John H. Rouse

Motion to intervene denied; with due diligence, the movants could have intervened in this action well before the judgment was even entered.

In *JP Morgan Chase Bank, National Association, as Purchaser of the loans and other Assets of Washington Mutual Bank Formerly known as Washington Mutual Bank, FA, from the Federal Deposit Insurance Corporation, acting as receiver for the Savings Bank, and Pursuant to its Authority under The Federal Deposit Insurance Act, 12 U.S.C. §1821(d) 7255 v. Robert E. Clark, Swan Associates, Inc. Forchelli Curtis Schwartz Mineo Carlino & Cohen, LLP, Goldberg and Connolly, Interface Financial Group, LLC, Mortgage Electronic Registration Systems, Inc. as nominee for Greenpoint Mortgage Finding, Inc. North Fork Bank People of the State of New York, Valerie D. Clark, John Doe (Said Name being fictitious, it being foreclosed herein, and any parties, corporations, or entities, if any, having or claiming an interest or lien upon the mortgages premises), Interface Financial Group, LLC v. Joseph A. Aragona a/k/a Joseph A. Aragona, IV a/k/a Joseph A. Aragona, Sr.; Mary A. Aragona; Joseph A. Aragona a/k/a Joseph Aragona V; Joseph A Aragona, Jr., a/k/a Joseph A Aragona, VI and Mary A. Aragona,* Index No.: 19415/2009, decided on May 2, 2018, the court denied movants' motion to intervene and to vacate a default judgment.

The proposed intervention included a claim for equitable subrogation and it sought to reserve rights to make claims against various members of the Aragona family. In denying the application, the court found that there was no basis to vacate the judgment entered that properly secured the lien of Interface Financial, Group LLC, when, with due diligence, the movants could have intervened in this action well before the judgment was even entered. The court continued and stated that particularly, in view of the defaults that have been entered against some of the defendants, it would be improper to conclude that personal jurisdiction could be extended to new claims based only upon service by mail. As such, the motion to intervene was denied, with leave to commence an independent action, file a notice of pendency, and personally serve.

Honorable Joseph A. Santorelli

Motion to quash denied; cellular phone records relevant to issue of defendant's negligence.

In *Lisa and Kevin Daly v. Zohreh Parsa,* Index No.: 613165/2015, decided on May 10, 2018, the court denied defendant's motion for an order quashing the plaintiffs' judicial subpoena duces tecum that sought to compel the production of certified copies of defendant's cell phone records for April 17, 2015.

The instant matter was commenced to recover for personal injuries sustained as a result of a motor vehicle accident. There was an allegation that the defendant was on her cellular phone at the time of the incident. Accordingly, plaintiffs sought defendant's cell phone records from April 17, 2015. In denying the motion to quash and directing AT & T Corporation to produce certified copies of defendant's cell phone records, the court reasoned that the plaintiffs' motion papers were not premised on bare allegations of relevancy. Instead, plaintiffs' motion papers adequately established that the issue of whether the defendant driver was using her cellular telephone at the time of the accident was relevant to the plaintiffs' contention that the defendant driver was negligent in the operation of her motor vehicle.

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 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.