

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to quash subpoena granted; facially invalid; no special circumstances that warranted taking the testimony, and no showing that information sought could not be obtained from other sources.

In *Danielle Friaglia v. Richard D. Kaplan, Joshi A. John, Philip V. Felice, David Lofit, David Lofit, M.D., P.C., and North Shore University Hospital at Syosset*, Index No.: 23435/2009, decided on November 7, 2012, the court granted plaintiff's motion for an order quashing the subpoena, directing non-party witness William Friaglia to appear for deposition.

In rendering its decision, the court noted that the subpoena served on non-party witness William Friaglia (plaintiff's father) was facially invalid, as it did not contain a notice setting forth the circumstances or reasons why such non-party disclosure was sought. Moreover, the court pointed out the defendants' submissions in opposition to the motion failed to establish the existence of special circumstances to warrant taking the testimony of plaintiff's father, or that any information sought from him could not be obtained from other sources. The court additionally added, "that the plaintiff had previously been fully deposed and that the defendants thereafter sought and obtained the non-party deposition of plaintiff's mother, who testified

that she was present at all relevant times and that she was the principal contact with her daughter's treating physicians. Finally, the court stated that there was no showing that the additional testimony of plaintiff's father was required in order for the defendants to prepare for trial. As such, the motion to quash the subpoena was granted.

Application of petitioner for an order permanently staying the arbitration demanded by respondent; hearing to be scheduled; additional party respondents to be added.

In *In the Matter of the Application of Progressive Northern Insurance Company v. Kenneth Lindsay, Jr., and Praetorian Insurance Company and Andre W. Lomax*, Index No.: 30910/2012, decided on March 4, 2013, the court ordered a hearing to determine the application of petitioner for an order permanently staying the arbitration demanded by respondent on the ground that there was insurance coverage on the alleged offending vehicle. In rendering its decision, the court noted that the respondent was allegedly injured when he was struck while riding a bicycle by a vehicle owned by Andre Lomax, which fled the scene. Respondent served petitioner with a demand for arbitration under the uninsured motorist endorsement of the insurance policy issued by petitioner to respondent. Petitioner commenced this proceeding to stay the arbitration on the grounds that the



Elaine Colavito

offending vehicle was insured at the time of the accident by Praetorian Insurance Company. The submissions were insufficient to determine whether or not this policy was in fact canceled, and as such the court ordered a hearing to determine whether or not the policy was properly canceled. Further, the court ordered the petitioner to join Praetorian Insurance Company and Andre Lomax as party respondents in the proceeding.

Honorable Peter H. Mayer

Motion for an extension of time to answer granted; motion for a default denied; public policy favoring resolving cases on the merits.

In *Joseph Cruz and Christina T. King, a/k/a Christina Cruz v. Jets Towing, Inc.*, Index No.: 21341/2012, decided on May 7, 2013, the court granted defendant's motion for an extension of time to answer the complaint and denied plaintiffs' motion for a default. In rendering its decision, the court noted that after receiving plaintiffs' summons and complaint, the defendant's president forwarded a copy to defendant's insurance carrier. The defendant believed that the insurance carrier was handling the defense of the matter. Thereafter, the defendant received a call that the company was disclaiming coverage, as such, he contact his attorney, who prepared and served an answer with affirmative defenses, the next day, October 19, 2012. According to

plaintiff's attorney, the answer was due by August 30, 2012. Here, the court pointed that in light of the public policy favoring the resolution of cases on the merits, the court may excuse a defendant's failure to timely answer. The court further pointed out that here, the delay in answering was relatively short, there was no showing of prejudice to the plaintiff, a potential meritorious defense existed, and no willfulness on the part of the defendant was shown. Accordingly, the court granted the defendant's motion for an extension of time to answer, and denied plaintiffs' motion for a default judgment.

Cross-motion to disqualify plaintiff's counsel denied; doubts resolved in favor of disqualification, however, party's entitlement to be represented by counsel of his or her choice is a valued right

In *Gus Vattes and Maria Vattes v. Savco Corporation, Savvas Meitamis, Richard Kistela and Quinteros Construction Corp.*, Index No.: 35311/2011, decided on April 29, 2013, the court denied defendant's cross-motion which sought disqualification of plaintiff's counsel. In denying the motion, the court noted that the disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court. The court further stated that although any doubts are to be resolved in favor of disqualification, a party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted. The party

(Continued on page 20)

Bench Briefs (Continued from page 4)

seeking disqualification bears the burden on the motion. Here, the court found that the defendants failed to meet their burden.

Honorable Arthur G. Pitts

Motion to compel deposition denied; defendant conceded to negligence, and as such, plaintiff would not be aided by deposition testimony.

In *Maria Brosnahan v. Gruenberg & Kelly, P.C.*, Index No.: 2558/2011, decided on August 13, 2013, the court denied that branch of plaintiff's motion which sought an order compelling the defendant to appear for an examination before trial. In rendering its decision, the court noted that the defendant conceded that it was negligent in that it failed to timely file a summons and complaint within the applicable statute of limitations. The court further pointed out that in this matter which sounded in legal malpractice, there were three essential elements to the cause of action: negligence of the attorney, the negligence was the proximate cause of the loss sustained; and proof of actual damages. To establish proximate cause of the loss sustained, the court cited that the plaintiff must show that she would have been successful

in the underlying personal injury case. Here, notwithstanding the defendant's concession of negligence, the plaintiff still sought the defendant's examination before trial. In denying plaintiff's application, the court said that although CPLR 3101(a) required the "full disclosure of all information that is material and necessary to the defense or prosecution of an action," it was undisputed that the defendant acknowledged negligence and the remaining elements to be established by the plaintiff would not be aided by any deposition testimony of a member of the defendant firm. Accordingly, the motion was denied.

Motion to direct plaintiffs to provide supplementary responses to defendant's interrogatories and combined demands and for a protective order staying the party and non-party depositions until plaintiffs provide "proper" responses to interrogatories and discovery demands denied; demands overly broad and unduly burdensome.

In *GMC Realty, Inc. and Mr. G's Pizzeria, Inc. v. North Country Insurance Company*, Index No.: 2432/2011, decided on January 5, 2012, the court denied defendant's motion to direct plaintiffs to

provide supplementary responses to defendant's interrogatories and combined demands and for a protective order staying the party and non-party depositions until plaintiffs provide "proper" responses to interrogatories and discovery demands. In rendering its decision, the court noted that plaintiffs had responded to 31 interrogatories and all but nine of the responses were claimed to be deficient by the defendant and of 15 combined discovery demands, defendant alleged responses to seven were inadequate or incomplete.

With regard to the demands, the court found same to be overly broad and unduly burdensome, and thus, improper. The court pointed out that a trial court's broad authority to supervise discovery included the discretion to direct the priority in which the parties may use disclosure devices and if it found, under the particular circumstances that the action would be expedited by the use of one device prior to another. The court stated that here, after deposing the plaintiffs, the defendant may be entitled to further documentation and more complete responses to some of defendant's interrogatories and combined discovery demands, depending upon the testimony elicited at the examination. However, at this juncture in the discovery

process, the court found that the interrogatories and combined discovery demands were overly broad and burdensome, and thus improper.

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 & 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.