

## BENCH BRIEFS

By Elaine Colavito

### SUFFOLK COUNTY SUPREME COURT

#### Honorable Paul J. Baisley, Jr.

*Motion to add party defendant granted; leave to amend a pleading or to add a party should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.*

In *Dawn Smith and Daniel Smith v. Col Properties, LLC*, Index No.: 6029915/2015, decided on April 8, 2016, the court granted the plaintiffs' motion for leave to add JB Squared, LLC as a party defendant. In granting the motion, the court noted that in the absence of prejudice or surprise to the opposing party, leave to amend a pleading or to add a party should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. The court found that when applying this permissive standard, it was appropriate to grant the requested relief.

#### Honorable Peter H. Mayer

*Motion for default denied; failure to comply with additional notice require-*

*ments of CPLR 3215(g)(4).*

In *Carmen Wallace Dixon v. Bohemia Land Holdings, LLC, Bohemia Land Holdings, LLC v. Long Island Landscapes, the Original LLC*, Index No.: 13920/2015, decided on January 23, 2017, the court denied the motion for a default judgment without prejudice.

In denying the application, the court noted that the defendant/third-party plaintiff failed to submit evidentiary proof of compliance with CPLR 3215(f), including but not limited to a proper affidavit of facts, which sets for the facts constituting the claim, the default and the amount due, or a complaint verified by the plaintiff and not merely by an attorney with no personal knowledge. The court found that the defendant/third-party plaintiff failed to establish evidentiary proof of compliance with the additional notice requirements of CPLR 3215(g)(4), which are required when a default is sought against a corporation upon which service was made by the secretary of state. With regard to the notice necessary on a motion for default against a corpora-



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tion, CPLR 3215(g)(4) provides, that "when a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served upon the secretary of state, pursuant to BCL 306(b), an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address, at least 20 days before the entry of judgment.

#### Honorable William B. Rebolini

*Plaintiff to amend bill of particulars; the location of the accident was insufficient and failed to provide defendant with adequate information; plaintiff to identify which were claimed to be permanent.*

In *Nancy Cooper v. WDF, Inc., Markro General Contractors, Inc., and Sorge Construction Corp.*, Index No.: 12989/2015, decided on January 4, 2017, the court granted the motion to the extent that within 15 days of service of a copy of the order with notice of entry, plaintiff, Nancy Cooper was to

serve an amended bill of particulars that was responsive to defendant's demands as set forth more fully in the decision. The action sought recovery of damages for personal injuries allegedly sustained on September 12, 2012, when plaintiff fell, allegedly as a result of a dangerous condition at the MTA subway station. Defendant, WDF, Inc. moved for an order to dismiss the complaint or to compel plaintiff to provide a further bill of particulars responsive to its demands. In deciding the motion, the court noted that the purpose of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial. The court found that plaintiff's response to defendant's request for the location of the accident was insufficient and failed to provide defendant with adequate information so as to enable it to identify with reasonable particularity the place at which the plaintiff claims to have fallen or what it was that plaintiff claims to have caused her fall. In addition, the court stated that plaintiff was to amend her bill of particulars by deleting her claims that all injuries were claimed to be permanent "except

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those which may be superficial" and by identifying which were claimed to be permanent. Plaintiff was also to identify the statutes, laws or rules claims to have been violated by the defendant.

*English language affidavit facially defective and inadmissible; absence of a translator's affidavit.*

In *Michael Coscia v. Capital One, N.A., Capital One Financial Corporation, Jose Guerrero and Lucia Guerrero*, Index No.: 9991/2015, decided on June 24, 2016, the court granted the motion for an awarding a default judgment against Lucia Guerrero only for her failure to timely serve an answer. The court noted that in opposition to the motion, defendant, Jose Guerrero submitted an affidavit in English in which it was asserted that he spoke little English and could not read or write English. The court found that in absence of a translator's affidavit, required of foreign-language witnesses, the witness' English language affidavit was facially defective and inadmissible. The court further stated that CPLR 2101(b) requires that affidavits of non-English speaking witnesses be accompanied by a translator's affidavit setting forth the translator's qualifications and the accuracy of the English version.

#### Honorable Joseph A. Santorelli

*Motion for default judgment denied; in view of the public policy favoring a resolution on the merits, the existence of a potentially meritorious defense, the relatively short delay in serving a reply, and the absence of prejudice, reply deemed served.*

In *Vanessa C. McMillan and Christopher McMillan Jones v. Lisa M. Lanza and Joseph Lanza*, Index No.: 20844/2015, decided on October 11, 2016, the court denied the motion for a default judgment against the plaintiff, Vanessa C. McMillan, on the defendants' counterclaim. The affirmation by plaintiffs' attorney stated that the plaintiff, Vanessa C. McMillan, was served with the answer with counterclaim on February 18, 2016 and to date, she had not filed a reply. In opposition, the plaintiff indicated that her attorney served a reply to the counterclaim the day that the answer with the counterclaim was received by that office. The affidavit of service indicates that it was mailed to the defendant's attorney on August 23, 2016. The court further noted that under the appropriate circumstances, the court had discretion to deem the plaintiff's reply to the counterclaim to be served, even in absence of a formal

cross-motion seeking to serve a late reply. In view of the public policy favoring a resolution on the merits, the existence of a potentially meritorious defense, the relatively short delay in serving a reply, and the absence of prejudice, the plaintiff's reply was deemed served.

*Motion to void transfer of property to trustee of trust granted; power of attorney section (h) Gift Transactions not initialed; gift rider not signed.*

In *Townhouse Operating Co., d/b/a Townhouse Center for Rehabilitation and Nursing v. Hedi Flickstein*, Index No.: 2050/2015, decided on January 26, 2016, the court granted the motion to void the February 25, 2013 transfer of the Real Property from Irwin Schulman to Hedi Flickstein, as trustee of the Irwin Schulman Irrevocable Trust. In granting the motion to void the transfer, the court noted that courts have held that a principal who wishes to authorize an agent to make gifts other than those authorized by General Obligations Law 5-1502(14), including gifts by the agent to himself or herself must expressly grant such authori-

ty in a statutory gifts rider. Upon the court's review of the power of attorney dated July 26, 2011, the court pointed out that the section enumerated as "(h) Certain Gift Transactions: Statutory Gifts Rider (Optional)" was not initialed. Additionally, the respondent did not allege that a statutory gift rider was ever signed granting powers authorized by a statutory gift rider. Therefore, the transfer was invalid.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at [elaine\\_colavito@live.com](mailto: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. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.*