

By Elaine Colavito

## Suffolk County Supreme Court

## Honorable William G. Ford

*Motion seeking the sanction of spoliation against defendant for failing to keep, preserve or retain discoverable evidence and seeking an entry of an order for an adverse inference as the remedy of same denied; the defendant was not on notice of the reasonable possibility of future litigation.*

In *Janet Fischetti v. Savino's Hide-away, Inc.*, Index No.: 3177/2015, decided on June 12, 2017, the court denied the plaintiff's motion seeking the sanction of spoliation against defendant for failing to keep, preserve or retain discoverable evidence and seeking an entry of an order for an adverse inference as the remedy of same.

The instant case was a premises liability negligence action brought by plaintiff against defendant for personal injuries allegedly sustained on the premises of defendant's restaurant. After commencing the action, plaintiff sent a form demand letter wherein, plaintiff's counsel advised defendant that they believed

that plaintiff's incident was due to defendant's negligence. The letter, however, did not make any demand or request that defendant preserve or maintain any evidence of any kind pertaining to the claim.

During discovery, it was learned that the defendant employed the use of nine electronic digital video recorder and surveillance cameras for anti-theft purposes. It was also discovered that the storage system held two weeks' worth of footage. Upon receipt of the demand letter by plaintiff, defendant consulted with his video contractor, and it was confirmed that the footage the day of the incident had been erased or recorded over, since the request came well over two weeks from the incident.

Based upon all of this, plaintiff moved seeking sanctions against defendant in the nature of spoliation of evidence. In denying the motion, the court found that the defendant was not on notice of the reasonable possibility of future litigation so as to be under a duty to suspend its regular two-week video retention policy. Furthermore, the court pointed out that the plaintiff had not adduced any ar-



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gument or proof countering established Second Department precedent that a party, such as defendant here, should not be sanctioned for following its ordinary course of business concerning the retention of records. Consequently, the motion was denied.

*Issue ripe for judicial review; upon review, denial of petitioners' applications was for arbitrary, capricious and/or irrational reasons, and did not withstand judicial scrutiny and was not supported by credible, objective, factual or scientific evidence to counter petitioners' submissions on this matter.*

In *In the Matter of the Application of 7-eleven, Inc. & Louhal Properties, Inc. v. the Town of Babylon, the Town of Babylon Planning Board, & Ann Marie Jones, in her capacity as the Commissioner of the Town of Babylon Department of Planning & Development*, Index No.: 9290/2016, decided on July 7, 2017, the court determined that the issue was ripe for judicial review.

In rendering its decision, the court noted that courts reviewing an agency's administrative determination must con-

clude whether it had arrived at a definitive position on the issue that inflicted, an actual concrete injury and whether the resolution of the dispute required any fact-finding, for even if an administrative action was final, however, it would still be inappropriate for judicial review, and, hence, unripe, if the determination of the legal controversy involved the resolution of factual issues. In determining that the issue was ripe, the court reasoned that the petitioners sought both site plan review and a permit to commence demolition and new construction on their intended site.

Respondents granted neither application, with the practical import of each denial being that petitioners cannot move their project forward. Thus, to conclude that petitioners have not yet been injured or rather, that respondents' determination was not yet final form contorted logic.

The court concluded that the matter was ripe for judicial review. After concluding that the issue before the court was ripe, the court held that the denial of petitioners' applications was for arbitrary, capricious and/or irrational reasons, and did not withstand judicial

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scrutiny and was not supported by credible, objective, factual or scientific evidence to counter petitioners' submissions on this matter.

## Honorable Howard H. Heckman, Jr.

*Motion for summary judgment granted; business records will be admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own record or routinely relied upon by the recipient in its business.*

In *Wells Fargo Bank, N.A. v. Salah U. Akand*, Index No.: 17259/2010, decided on June 27, 2017, the court granted the plaintiff's motion for summary judgment. The action was one for foreclosure. Plaintiff made a motion for summary judgment. In opposing the motion, the defendant argued that plaintiff failed to submit sufficient evidence to prove that it owned the promissory note and mortgage. The court noted that plaintiff's proof consisted of three copies of the promissory note signed by the defendant; three copies of the mortgages signed by the defendant; and an affidavit from defendant's vice-president testifying about the contents of the loan (business) records maintained by the lender. As to whether or not the court could consider the documents submitted by the plaintiff, the court pointed out that the records would be admissible if the recipient could establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own record or

routinely relied upon by the recipient in its business. The court concluded that the affidavit submitted from the Wells Fargo Bank's vice-president of loan documentation provided the evidentiary basis for establishing the mortgage lender's right to foreclose. The defendant did not dispute that he defaulted under the terms of the mortgage. Consequently, the motion for summary judgment was granted.

## Honorable Denise F. Molia

*Motion seeking to enforce a written stipulation denied; plaintiff averred that she refused to settle her cases for the proposed settlement amount.*

In *Phyllis Annunziata and Anthony Annunziata v. Donald Patrick*, Index No.: 13698/2013, decided on June 21, 2017, the court denied the portion of the motion seeking to enforce a written stipulation of discontinuance executed by plaintiff's prior counsel and a General Release executed by Phyllis Annunziata. Phyllis Annunziata submitted a sworn affidavit in which she averred that she appeared at her prior attorney's office to discuss the proposed settlement of her personal injury actions. She further contended she executed one document at that time, but after further discussion refused to sign any other documents and advised her prior attorney that she did not want to settle her pending cases in the amount of \$15,000.00. Consequently, the court denied defendant's motion seeking to enforce the proposed settlement. The parties were directed to continue with the disclosure process.

*Motion to permanently stay arbitra-*

*tion; parties to appear for Framed Issue Hearing; Issue of contact of the vehicles to be resolved prior to determination of petition to permanently stay arbitration.*

In *In the Matter of the Application of Nationwide Affinity Insurance Company of America v. For a Judgment Staying the Arbitration Commenced by Geromimo Abreau-Duran*, Index No.: 3588/2016, decided on May 15, 2017, in deciding the motion to permanently stay arbitration, the court directed the parties to appear for a Framed Issue hearing.

In rendering its decision, the court noted that the petitioner alleged that there was no physical contact between the respondent and the uninsured vehicle. The respondent maintained that there was coverage under the subject policy inasmuch as there was contact between an uninsured vehicle and a third vehicle, which contact cause the respondent to come into contact with the third vehicle. Thus, triggering the uninsured motorist provision of the respondent's policy.

The court found that the evidence submitted was not definitive as to the actual events of the incident and therefore insufficient to permit the court to render a decision on a permanent stay at this time. The issue of contact was to be resolved prior to the determination of the petition and the parties were directed to appear at a Framed Issue hearing.

## Honorable Arthur G. Pitts

*Motion for summary judgment denied; defendant paid for snow removal and electric usage for subject light pole so issue of fact as to ownership and control of subject area.*

In *Luisa Sorrentino and Andrea Sorrentino v. General Realty & Mortgage Corp., Boccard Enterprises, Inc., E.J. Salon, Inc., Southdown Wines & Spirits, Bella Flowers, Inc., and the Town of Huntington*, Index No.: 33077/2012, decided on April 7, 2017, the court denied the motion for summary judgment by defendant, Boccard Enterprises. With regard to the motion by defendant, Boccard Enterprises, the court noted that while Boccard Enterprises contended that it did not own the area where the accident occurred, and had no duty to maintain such area, it failed to establish a prima facie case that it did not own the area. The court pointed out that Peter Boccard testified that Boccard Enterprises had paid for the snow removal for the entire parking lot and the electric usage for the subject light pole. Consequently, the court concluded that there was an issue of fact as to the ownership and control of the subject area. Thus, the motion for summary judgment was denied.

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% 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.*