

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley

Motion for summary judgment denied; speculative assertion concerning the speed of plaintiff's vehicle unsupported by evidence insufficient to defeat a motion for summary judgment.

In *Christine A. Ireland v. Jeffrey B. Stanek and Alice S. Stanek*, Index No.: 602184/2016, decided on July 27, 2016, the court granted plaintiff's motion for summary judgment.

In granting the motion as to liability, the court noted that the movant bore the burden of establishing his cause of action or defense sufficiently enough to permit the court, as a matter of law, to direct judgment in his favor. The court continued and said that the showing must be in admissible proof of the absence of any material issues of fact. Here, the court found that the plaintiff established her entitlement to summary judgment on the issue of liability by submitting evidence that her vehicle was

struck by defendant's vehicle after it failed to yield the right of way and that she had no time to avoid the collision. The court pointed out that the burden proof, therefore, shifted to the defendants to establish the existence of a triable issue of material fact.

In opposition, defendants submitted only the affirmation of their counsel and an affidavit from the defendant, Jeffrey Stanek. The defendants alleged that the plaintiff's vehicle was traveling at a high rate of speed immediately prior to the accident and that the collision occurred as Jeffrey Stanek was making a left turn.

The court stated that a speculative assertion concerning the speed of plaintiff's vehicle, unsupported by evidence, was insufficient to defeat a motion for summary judgment.

Motion to dismiss complaint granted; the submissions and the court's records reflected that plaintiff exhibited a pattern of noncompliance with both the de-



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fendants' discovery demands and the orders of the court.

In *Jose Joel Rodriguez Torres v. Dayton Hudson Corporation, Kir Copague L.P. and Target Corporation*, Index No.: 488/2015, decided on Aug. 2, 2017, the court granted the defendants' motion to the extent that the complaint against the movants was dismissed.

In rendering its decision, the court noted that at a compliance conference on Jan. 26, 2017, the court granted a self-executing order directing plaintiff to provide four enumerated items of discovery. The order was signed by plaintiff's counsel "over objection." Thereafter, plaintiff provided a partial response but failed to provide all of the items enumerated in the order. A further motion was made.

Although plaintiff had now provided responses to defendant's outstanding demands, including the post depositions demands, the court concluded that the responses were incomplete and inadequate.

In dismissing the complaint, the court

reasoned that the submissions and the court's records reflected that plaintiff exhibited a pattern of noncompliance with both the defendants' discovery demands and the orders of the court. It was undisputed that plaintiff failed to comply with the Jan. 26, 2017 order. In his submissions in opposition, the court found that plaintiff offered no explanation for his repeated noncompliance, giving rise to an inference that the failure was willful. Accordingly, the complaint against movants was dismissed.

Honorable C. Randall Hinrichs

Motion to vacate granting of summary judgment on default denied; no evidence whatsoever was proffered to demonstrate that any of the alleged conduct by the plaintiff, however characterized, prevented the defendant from fully or fairly litigating the matter.

In *U.S. Bank National Association, as Trustee for the Holders of Mastr Adjustable Rate Mortgage trust 2006-OA1 v. Susan Swanson, Mortgage Electronic Registration Systems, Inc., as nominee for*

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American Home Mortgage, Index No.: 37543/2009, decided on Aug. 7, 2017, the court denied the defendant's motion to vacate pursuant to CPLR 5015(a)(3).

In support of the motion, the defendant contended that the plaintiff misrepresented the merits of the action, specifically the chain of title, which she claimed was defective and that this misrepresentation warranted vacatur under CPLR 5015(a)(3). The defendant further alleged that the note was never transferred to the plaintiff, and that the mortgage assignments contained improper notarization and were therefore invalid. The defendant additionally contended that plaintiff's representations to the court that the defendant's affirmative defenses of unclean hands and "defense founded on documentary evidence" were not valid, was another misrepresentation.

The defendant also argued that the misrepresentations amounted mail and/or wire fraud. On these grounds, plaintiff requested that summary judgment should be vacated and the complaint should be dismissed.

In denying the application, the court found that the defendant did not provide a reasonable excuse for failing to oppose the plaintiff's motion for summary judgment. The court also stated, that while defense counsel couched his argument under the banner of "misrepresentations" by plaintiff's counsel to the court, the true essence of his challenge was to the merits of the action itself. The court said that no evidence whatsoever was proffered to demonstrate that any of the alleged conduct by the plaintiff, however characterized, prevented the defendant from fully or fairly litigating the matter.

Motion to dismiss or vacate default denied; to the extent that the defendant may either seek dismissal of the complaint or vacatur on the ground that the plaintiff allegedly lacks standing to prosecute its claims for foreclosure, the defendant waived such defense by failing to timely interpose an answer or file a pre-answer motion which asserted the defense of standing; he did not provide a reasonable excuse for his failure to answer.

In *Wells Fargo Bank, N.A. v. Lee Salzmann, National City Bank, Corina Salzmann*, Index No.: 12637/2008, decided on July 21, 2017, the court denied defendant's motion to dismiss or vacate pursuant to CPLR 5015(a)(3)(006). The court noted that the instant matter was one for foreclosure, wherein defendant executed a note in the amount of \$417,000.00 in favor of EverHome Mortgage Company. The defendant failed to timely appear or answer the complaint.

An order of reference on default was granted on April 14, 2010. There were further motions decided by the court

and conferences held. Ultimately, the defendant made a motion to dismiss or vacate, contending that the note was factually defective due to robo-signatures (stamps that are not signatures and not actual signatures), which make the indorsements on the note void, and amount to fraud.

In opposition, plaintiff contended that the defendant's claims were really a challenge to the plaintiff's standing in disguise, and that the defense of standing had been waived. In deciding this aspect of the motion, the court stated that a party may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint pursuant to CPLR 3211, without successfully moving to vacate its default. It continued, and said that while the defendant asserted that his challenges to the validity of the note, its indorsement and the plaintiff's holder status were being made pursuant to CPLR 5015(a)(3), to the extent that the defendant may either seek dismissal of the complaint or vacatur on the ground that the plaintiff allegedly lacks standing to prosecute its claims for foreclosure, the defendant had waived such defense by failing to timely interpose an answer or file a pre-answer motion which asserted the defense of standing.

The defendant's motion to vacate pursuant to CPLR 5015(a)(3) was denied on the grounds that he did not provide a reasonable excuse for his failure to answer. Moreover, the court found that the defendant failed to otherwise demonstrate that the invocation of the court's inherent power to vacate a judgment in the interest of substantial justice was warranted in this case.

Honorable Arthur G. Pitts

Motion for a preliminary injunction granted; plaintiffs met burden.

In *Susan Ferdinand and David Ferdinand, individually and as trustee of the East Coast Trust v. Gary Salino and Karen Salino*, Index No.: 612821/2016, decided on November 15, 2016, the court granted the motion for an order enjoining defendants Gary Salino and Karen Salino from placing signs on the plaintiffs' property for the purpose of deterring others from entering, harassing and intimidating the plaintiffs' invitees, blocking the driveway of the subject property, insulting the plaintiffs' invitees, videotaping or photographing the premises as well as the plaintiffs and their invitees, and any other action with the intent to chill the economic value of the property such as deterring potential workers, utility service workers or other occupants.

The plaintiffs purchased a property with two single family dwellings. Shortly after the plaintiffs started mak-

ing improvements to the property, the defendants placed a sign by the entrance, which stated that the cottages could not be legally occupied. When requested to move the sign, the defendants contacted the Town of Brookhaven.

The Town of Brookhaven commenced an action to enjoin plaintiffs from performing any work on the property, however, the application was denied. The court noted that in order to prevail on a motion for a preliminary injunction, the movant must clearly demonstrate the likelihood of success on the merits; irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in his or her favor. The court concluded that plaintiffs met their burden.

Motion for summary judgment denied; general release inapplicable to defendant

In *Christine McDonald v. Pllumb Bajraktari*, Index No.: 2531/2015, decided on March 22, 2017, the court denied the defendant's motion for summary judgment dismissing plaintiff's complaint.

The case at bar was one for personal injuries sounding in negligence that arose from a motor vehicle accident. There was a prior action filed by plaintiff against Gina M. Ulrich, which arose from the same accident. In the prior action, discovery was conducted and depositions of defendant Ulrich and the defendant herein Bajraktari, as a non-party witness, were held. Both Ulrich and Bajraktari testified that Ulrich was the owner and driver of a vehicle and Bajraktari was a passenger in her vehicle at

the time of the subject accident.

The prior action was settled and a general release was issued to Ulrich. The defendant now moved for summary judgment averring that plaintiff was barred from bringing this action because she issued a general release related to this accident. In denying the branch of the motion as to whether or not the general release barred the instant action against Bajraktari, the court noted that the words of a general release are operative not only as to all controversies and causes of action between the releaser and releases which had ripened into litigation, but to all such issues which might then have been adjudicated as a result of a pre-existing controversy.

Herein, the court concluded that the general release was inapplicable as to Bajraktari, who was not specifically released by the plaintiff. As such, summary judgment on such grounds was denied.

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.