

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley Jr.

Motion for an order consolidating the action with another action and to amend the caption denied without prejudice to renew; no application made to substitute a legal representative for the deceased defendant.

In *Alyssa Riviccio v. Peter Mcardle, Maureen Mcardle, Daniel J. Hall and Edmund J. Hall*, Index No.: 24333/2011, decided on May 26, 2015, the court denied the motion for an order consolidating the action with another action and to amend the caption, without prejudice to renewal. The court noted that this was an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident, which happened when a vehicle operated by defendant Daniel Hall and owned by defendant Edmund Hall cut in front of a vehicle operated by defendant Peter Mcardle. The defendant, Daniel Hall, died on August 30, 2011.

Plaintiff now moved to consolidate this action with an action entitled, *Alyssa Riviccio, plaintiff, v. Suffolk County Public Administrator as Administrator of the*

Estate of Daniel J. Hall, deceased, defendant. Plaintiff also moved for leave to amend the action to “reflect the substitution” of the Suffolk County Public Administrator in place and stead of deceased defendant Daniel Hall. In denying the application, the court pointed out that the death of a party divested the court of jurisdiction and operated to stay the proceedings until a proper substitution had been made pursuant to CPLR §1015(a) and CPLR §1021. The court stated that any determination with a proper substitution is generally deemed a nullity. Further, the court stated the death of a party also terminated an attorney’s authority to act on behalf of the deceased client, and any actions by such attorney after the client’s death, unless authorized by a properly substituted party, were null and void. There was no application made to substitute a legal representative for the deceased defendant. As such, the motion was denied.

Honorable Peter H. Mayer

Motion denied without prejudice; notice of motion failed to specify the date, time and place of the hearing of the motion.



Elaine Colavito

In *Richard Oberlander v. Richard Fischer*, Index No.: 37794/2011, decided on January 22, 2015, the court denied the motion of the defendant, with leave to resubmit, which appeared to seek an order for leave to amend the answer for failure to comply with CPLR §2214 regarding the specificity of the time and place of the hearing of the motion. In denying the application, the court noted that CPLR §2214(a) required that a notice of motion specify the time and place of the hearing on the motion, the supporting papers upon which the motion was based, the relief demanded and the grounds therefor. Since plaintiff’s notice of motion failed to specify the date, time and place of the hearing of the motion, it was denied.

Honorable Arthur Pitts

Motion to compel plaintiffs to appear for and submit to a vocational rehabilitation examination denied; no claim for lost wages in bill of particulars.

In *Regina Rouge and Jacqueline Mangrillo v. Judith Klemperer and Hampton Jitney, Inc., and Sergio Albizures*, Index No.: 18172/2011,

decided on May 1, 2015, the court denied the defendant’s motion for an order compelling plaintiffs to appear for and submit to a vocational rehabilitation examination.

The matter at bar was for personal injuries sounding in negligence. On September 29, 2014, defendant Klemperer noticed the plaintiffs to appear for a vocational rehabilitation examination. By letter dated October 23, 2014, plaintiffs’ counsel advised the defendant they would not comply, thereby necessitating the instant motion. In deciding the application the court stated that since there was no prescriptive regarding the examination by a vocational rehabilitation expert, the guidepost was whether the discovery was material and necessary to a proper defense or prosecution; whether the effect of the examination was overly burdensome to the affected party; and whether, in allowing the examination, the fact finder would receive sufficient information to ensure a fair trial to all parties, serving the interest of justice and pursuit of truth. The court concluded that upon a review of the plaintiffs’ verified bill of particulars, there was no claim for lost wages and as such, it was unnecessary for the defendant to conduct the subject examination. Accordingly, the motion was denied.

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Bench Briefs (Continued from page 4)

Motion seeking class action status denied; application was untimely.

In *Delfina Urias, as the Guardian of the Person & Property of Manuel Urias and Delfina Urias, individually v. Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco, LLC, Daniel P. Buttafuoco, Esq. and John Newman, Esq.*, Index No.: 7186/2011, decided on June 24, 2015, the court denied the motion of plaintiffs seeking class action status. The court noted that pursuant to CPLR §902, within 60 days after the time to serve a responsive pleading expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. This filing was mandatory. Herein, the court found that it appeared that the defendants were served on or around June 9, 2011 although no affidavit of service had been proffered in support of either the within motion or cross motion. After a decision and order was rendered on a pre answer motion to dismiss, issue was joined by the defendants answer on or about December 3, 2012.

The plaintiffs now moved, over two years after that, for an order granting class status. The court concluded that their argument that the application as timely was without merit. The court further noted that an appeal of this court’s prior decision and order, which dismissed some of the causes of actions of the complaint did not extend their time to seek class status.

Motion to compel denied; motion for protective order granted to the extent provided in the decision; defendants failed to proffer anything other than speculation that the plaintiff’s injuries

may be related to a hereditary condition of migraines; no showing that the requested personnel file was in any way material and necessary.

In *Emily Watson, Olivia Cunningham and Douglas Cunningham v. Southampton Brick d/b/a Southampton Masonry and August Bouker*, Index No.: 18327/2011, decided on April 16, 2015, the defendants’ motion to compel was denied and the plaintiff’s cross motion for a protective order was granted to the extent provided for in the decision.

The case at bar was one sounding in negligence, which arose from a motor vehicle accident. The court noted the relevant facts as follows: by Stipulations of discontinuance dated August 29, 2012 and November 3, 2012, Laurie and Joseph Watson discontinued their derivative claims. On September 13, 2013, the defendants served a Notice for Discovery and Inspection on Joseph Watson and Laurie Watson. The defendants now moved for an order directing them to comply with said Demands and the plaintiff cross moved for a protective order. Here, in rendering its decision, the court noted that for disclosure purposes a party was distinguished from a non-party, usually referred to as a witness. CPLR §3010 (a) (1) and (2) allow full disclosure against a party, a party’s agent or a person who previously possessed a cause of action or defense asserted in the action. Consequently, Joseph Watson and Laurie Watson, as former parties to the within action were, accordingly, subject to full disclosure. The plaintiff objected to the defendants’ demand for a copy of Joseph Watson’s personnel file as well as for authorizations for physicians that treated him for migraines. In issuing a

protective order, the court noted that the defendants failed to proffer anything other than speculation that the plaintiff’s injuries may be related to a hereditary condition of migraines from her father. The court further stated that clearly such speculation did not warrant directing of discovery of Mr. Watson’s medical records. The court also denied defendants’ demand for Mr. Watson’s personnel file, finding that there had been no showing that the requested file was in any way material and necessary to the defense of the within action.

Honorable Joseph C. Pastorella

Motion to compel discovery denied; from submissions, impossible to determine what discovery was outstanding.

In *Robert Nalewajk and Susan Nalewajk v. Kolbe & Kolbe Millwork, Co. Inc., Dimensional Millwork, Inc., Millwork Solutions, Florence Corporation d/b/a Florence Corporation d/b/a Florence Building Materials, Kolbe and Kolbe Millwork, Co., Inc. v. Ample Contracting Inc., Jim Makarius, Jim Makarius d/b/a Ample Contracting, J.Z. Woodworks, John Zotos d/b/a J.Z. Woodworks, Synergy Concrete Corp., Vince Capogna and Vince Capogna d/b/a Synergy Concrete*, Index No.: 37842/2011, decided on April 17, 2015, the court denied motion by defendant Kolbe & Kolbe for dismissal of the complaint.

In rendering its decision, the court noted that counsel’s good faith affirmation asserted that on May 4, 2012, defendant required that plaintiffs respond to a discovery demand dated, March 9, 2012, which was long overdue. No other good faith efforts to communicate and resolve

the discovery dispute was set forth and the movant had not outlined what discovery was currently outstanding. Moreover, the court found that after May 4, 2012, a second amended complaint was served on September 23, 2013 and the court had now addressed a total of nine motions by the parties. Finally, the court pointed out that substantial discovery was provided by CD rom and file review at plaintiff’s office. Without the CD rom, it was impossible to determine from the parties’ submissions what discovery had been provided and what remained outstanding. The motion 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, 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.