

## BENCH BRIEFS

By Elaine Colavito

## SUFFOLK COUNTY SUPREME COURT

## Honorable Paul J. Baisley, Jr.

*Proposed cause of action for wrongful death did not appear to have been pleaded on behalf of the decedent's distributees who suffered pecuniary loss because of her death; application to add cause of action denied.*

In *Debra Marino and Richard Kresberg v. William B. Kerr, M.D., Wainscott Walk-in Medical Carem P.L.L.C., Bernard D. Raxlen, M.D. and Carolyn B. Welcome, PA-C*, Index No.: 7348/2013, decided on September 30, 2015, the court granted the motion for leave to serve a supplemental summons and amended complaint, which added the cause of action for wrongful death, was granted to the extent of substituting Richard Kresberg as executor of the estate of Debra Marino, and amending the caption accordingly, lifting the stay and setting the matter down for a preliminary conference, and was otherwise denied. In rendering its decision, the court noted that the proposed cause of action for wrongful

death did not appear to have been pleaded on behalf of the decedent's distributees who suffered pecuniary loss because of her death. As such, no supplemental summons was required.

*Motion to dismiss granted; neither the verified complaint nor the bill of particulars alleged negligence on the part of moving defendant.*

In *R.G., by his mother and natural guardian, Yolanda Moore v. Central Islip Union Free School District, Central Islip Public Schools and Dr. Craig Carr, Superintendent, Central Islip Public Schools*, Index No.: 15912/2014, decided on July 22, 2015, the court granted the motion by defendant Dr. Craig Carr as asserted against him personally. The court mentioned that the infant plaintiff alleged that on September 13, 2013, he injured his finger at the Mulligan Intermediate School while closing a window in a classroom. The court found that neither the verified complaint nor the bill of particulars alleged negligence on the part of Dr. Carr. Thus the plaintiff had



Elaine Colavito

not shown any legal basis to proceed against the superintendent of the Central Islip Public Schools in his individual capacity. Accordingly, the motion to dismiss was granted.

## Honorable William B. Rebolini

*Motion for leave to amend complaint denied as to cause of action pursuant to a general power of attorney; authority to raise claims on the decedent's behalf under the power of attorney terminated when the decedent died.*

In *Paul Berndt v. Joseph Riccardo and Robert Riccardo*, Index No.: 7925/2014, decided on February 3, 2015, the court dismissed the portion of the plaintiff's motion which sought leave to amend the complaint to include a cause of action pursuant to a general power of attorney. In rendering its decision, the court found that to the extent that the plaintiff sought to assert claims pursuant to a general power of attorney, his authority to raise claims on the decedent's behalf under the power of attorney terminated when the decedent died.

*Motion to strike answer denied; sufficiency of the defendants' responses to plaintiff's disclosure demands could not be evaluated because copies of the demands were not provided to the court.*

In *Lorraine A. Fort, formerly known as Lorraine Tsunis v. Coram 440 LLC, George Tsunis, Avalonbay Communities, Inc., State of New York, "John Doe #1-5" and "Jane Doe #1-5,"* said names being the intention of plaintiff's to designate any and all occupants, tenants, persons, or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein, Index No.: 12292/2012, decided on July 6, 2015, plaintiff's motion to strike the answer of the defendant was denied. The court reasoned that while the Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes, the sufficiency of the defendants' responses to plaintiff's disclosure demands could not be evaluated because copies of the demands were not provided to the court. Furthermore, the court stated that there was no evidence that the defendants' alleged failure to comply with the discovery demand in a timely

*(Continued on page 22)*

Bench Briefs *(Continued from page 4)*

manner was willful or contumacious, which was required to strike the answer.

*Motion to appoint receiver denied; no clear evidentiary showing that the property was in danger of being removed from the state, or lost, materially injured or destroyed.*

In *Niki Mouzakiotis v. Styliani Mouzakiotis*, Index No.: 11682/2013, decided on September 21, 2015, the court denied the motion by the defendant for an order appointing a receiver to sell certain real property. In denying the application, the court noted that the appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. Here, the court determined that no evidence of the value of the property had been submitted to the court, nor was there sufficient evidence to support the defendant's claim that a foreclosure sale was inevitable. The defendant had not made a clear evidentiary showing that the property was in danger of being removed from the state, or lost, materially injured or destroyed. Accordingly, the application was denied.

*Motion to compel disclosure of certain medical records denied; impossible for the court to determine whether the records were subject to disclosure, as no effort had been made to link plaintiff's alleged drug use to either*

*the cause of the underlying accident or to plaintiff's availability to record from the injuries that she sustained as a result of the accident.*

In *Victor Sabatino v. Simon Property Group, Inc. and mall at Smith-haven, LLC*, Index No.: 32092/2012, decided on April 20, 2015, the court denied the defendant's motion for disclosure of certain medical records of plaintiff. In rendering its decision, the court noted that plaintiff commenced the action to recover for personal injuries as the result of a slip and fall. The attorneys for the parties entered into a preliminary conference under which it was agreed that plaintiff would supply relevant detox records to the court for the purpose of an in-camera inspection to determine whether such records were to be subject to disclosure. The purpose of the in-camera review was to keep the records private until a determination was made, however, the records were electronically filed. Nonetheless, the court concluded that it was impossible for the court to determine whether the records were subject to disclosure, as no effort had been made to link plaintiff's alleged drug use to either the cause of the underlying accident or to plaintiff's availability to record from the injuries that she sustained as a result of the accident.

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.*