BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Sanford Neil Berland

Motion to dismiss complaint granted; single cause of action alleging breach of the settlement agreement insofar as asserted against it accrued 30 days after November 6, 2006, the date of the signing of the settlement agreement, when the Long Island railroad was to send the agreed upon settlement checks to plaintiff's then-counsel.

In *Andre Rubin Holder v. Long Island Rail Road,* Index No.: 6228/2017, decided on February 23, 2018, the court granted the motion of the defendant pursuant to CPLR §3211, dismissing plaintiff's complaint.

The action was commenced by plaintiff on or about December 4, 2017 by filing of a Summons and Complaint against the Long Island Railroad alleging a breach of a settlement agreement dated November 6, 2006. Defendant moved to dismiss the action claiming that it was barred by the applicable statute of limitations. In granting the motion, the court noted that the defendant demonstrated that the single cause of action alleging breach of the settlement agreement insofar as asserted against it accrued 30 days after November 6, 2006, the date of the signing of the settlement agreement, when the Long Island Rail Road was to send the agreed upon settlement checks to plaintiff's then-counsel. Thus, the statute of limitations for that cause of action expired on or about December of 2012, approximately five years before the commencement of this action. As such, the complaint was dismissed.

Elaine Colavito

Honorable Martha L. Luft

Matter set down for Traverse hearing; defendant denied residing at the premises where service allegedly was made; sworn denial, combined with documentary and other evidence supporting such claim sufficient to rebut prima facie showing of proper service.

In *Bayview Loan Servicing v. Laurie Valenzuela, George C. Valenzuela, Citibank, NA, Brookhaven Memorial Hospital, People of the State of New York, "John Doe" and "Jane Doe," said names being fictitious, parties intended being possible tenants or occupants of premises,* Index No.: 27607/2008, decided on January 12, 2018, the court granted the motion of defendant, George C. Valenzuela, to the extent that the matter was set down for a traverse hearing to determine the jurisdiction of the court.

In granting the application, the court noted that a defendant can rebut a process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations contained in the process server's affidavit. Where there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence. Here, the defendant denied residing at the premises where service allegedly was made, the sworn denial, combined with documentary and other evidence supporting such claim, was sufficient to rebut the plaintiff's sworn prima facie showing of proper service and to necessitate an evidentiary hearing. Accordingly, the court granted the motion to the extent that the matter was set down for a traverse hearing.

Motion to substitute party denied; in order for a plaintiff mortgagee to establish standing in a foreclosure it was the mortgage note that was the dispositive instrument, not the mortgage indenture.

In *JP Morgan Chase Bank, National Association, as purchaser of the loans and other assets of Washington Mutual Bank, formerly known as Washington Mutual Bank, FA v. Jane A. Grimm, New York State Department of taxation and Finance, Steve Glazer,* Index No.: 318181/2009, decided on November 13, 2017, the court denied plaintiff's motion to substitute PennyMac Corp. as the plaintiff herein without prejudice to renew upon the submission of proper papers.

In support, plaintiff argued that the language in the mortgage assignment, which stated that the mortgage was assigned to PennyMac Corp. "with all interest, all liens, any rights due or to become due thereon" also sufficed to assign the note. Defendant's opposition to the motion was based upon the assertion that the mortgage note had not been properly assigned to PennyMac Corp. and that the plaintiff had not demonstrated that the note was in PennyMac Corp.'s possession. In denying the motion, the court noted that in order

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for a plaintiff mortgagee to establish standing in a foreclosure it was the mortgage note that was the dispositive instrument, not the mortgage indenture. The court explained that this is because a mortgage is a security for the debt, the obligations of the mortgage pass as an incident to the passage of the note. Thereafter, a foreclosing plaintiff has standing if it is either the holder or assignee of the underlying note at the time that the action is commenced. Accordingly, the motion was denied, without prejudice with leave to renew upon proper papers.

Honorable Peter H. Mayer

Respondents' motion in lieu of an answer, which sought dismissal of the petitioner's second cause of action granted; "class of one" or selective enforcement of equal protection claims are not viable in New York.

In *In the matter of the application of William Pollina v. Setauket Fire Department, Inc. and Setauket Fire District Board of Fire Commissioners,* Index No. 8375/2016, decided on December 13, 2017, the court granted the respondents' motion in lieu of an answer, which sought dismissal of the petitioner's second cause of action.

Petitioner's second cause of action was premised upon a theory that he was denied non-line of duty medical leave not because of his membership in an identified class of individuals based on categories such as race, sex, and national origin, but simply for arbitrary and capricious reasons. Contrary to such contentions, however, such as "class of one" or selective enforcement of equal protection claims are not viable in New York. Consequently, the respondents' motion for partial dismissal was granted.

Motion for consolidation granted; proper venue for the consolidated action lies in the county where the first action was commenced.

In *Denise Torres v. Flambouyant Transport Inc. and Abdullah Barnes, Flambouyant Transport Inc. and Abdullah Barnes v. Edward J. Scott,* Index No.: 7030/2016, decided on January 9, 2018, the court granted the motion by third-party defendant for an order directing that the two actions be tried jointly. The court noted that as a general rule, where the actions were commenced in two different counties, proper venue for the consolidated action lies in the county where the first action was commenced. Deviation from this rule was permitted only whether there was a showing of special circumstances. In the instant case, the court found that there were no such special circumstances and would warrant deviation from the general rule. The court concluded that a venue of the consolidation should be Supreme Court, County of Suffolk.

Honorable Thomas F. Whelan

Motion for an order vacating judgments granted to the plaintiff pursuant to CPLR §5015(a)(3) denied; issue of standing was previously sought to be raised in the prior motions and had been waived by the defendants; also, motion untimely.

In *US Bank National Association, as Trustee for CSFB Heat 2006-4 c/o America's Servicing Company, 3476 Stateview Blvd., Ft. Mill, SC 29715 v. Brian Livingston, Camile Cascone, American Business Mortgage Services, Inc. and Vincent Cascone,* Index No.: 24168/2007, decided on January 11, 2018, the court denied the motion by defendants' for an order vacating judgments granted to the plaintiff pursuant to CPLR §5015(a)(3).

In deciding the motion, the court noted that a judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties and concludes all matters of defense which were or might have been litigated in the foreclosure action. The court continued and stated, no matter how new counsel seeks to mask this motion, the issue of standing was previously sought to be raised in the prior motions and had been waived by the defendants. The defendants were precluded from seeking to raise the issue again and precluded from making endless motions to vacate pursuant to CPLR §5015. The court concluded and states that this motion, made six years after entry of the judgment of foreclosure and sale was simply untimely. Accordingly, 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 a Partner 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.