BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Linda Kevins

Judgment of foreclosure and sale granted, and referee's report confirmed, except as to legal fees; insufficient evidence submitted as to legal fees.

In *The Bank of New York Mellon-as Trustee for Citi Mortgage Loan Trust 2007 v. Ali Gooya, Clerk of the Suffolk County District Court and John Doe #1 through John Doe #10, the last 10 names being fictitious and unknown to the plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint*, Index No.: 608163/2015, decided on June 19, 2018, the court granted the judgment of foreclosure and sale and confirmed the referee's report, except as to legal fees.

In the instant motion, plaintiff sought a judgment of foreclosure and sale and confirmation of the referee's report, including legal fees. In opposition, defendant argued that the referee's report was defective because defendant was not afforded a hearing, and because the business records relied upon by the referee were not adequately authenticated. Defendant also averred that attorney's fees should be denied because plaintiff failed to provide adequate information warranting such an award. In reply, plaintiff asserted that criticism of the business records was incorrect because they met the admissibility requirement of CPLR §4518(a). Plaintiff also asserted that defendant was served with a copy of the proposed referee report before it was signed by the referee and submitted to the court, and defendant did not challenge any of the calculations either before the report was finalized or in this motion. Plaintiff left the award of attorneys' fees to the discretion of this court. Based upon "law of the case," among other reasons, the court concluded that the plaintiff's business records were determined on the merits in the Oct. 20, 2017 order and therefore, this court was bound by the terms of that order and would not revisit it. As to the request for legal fees, the court noted that to award reasonable fees, a court must possess sufficient information to make an informed and reasoned assessment, and thus considers factors such as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation.


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In denying the application for attorneys' fees, with leave to renew, the court concluded that affirmation of legal services did not identify what attorney performed the work or whether a predecessor firm had performed any of the work. The court also pointed out that even though the schedule correlated time spent or to be spent per task, the mathematical calculation of costs did not reflect the actual services rendered. Further, there was no statement offered regarding the effort, skill, difficulty or questions posed, name or experience of the attorney in handling residential mortgage foreclosures, the attorney's ability and reputation, and the customary fees changed for similar services. The court said that plaintiff asked for a total of $4,950.00, however, the fees in the affirmation were greater than requested. Yet, plaintiff did not affirmatively state whether a flat fee was charged and paid by the client. Finally, the court stated that anticipatory fees were not permitted.

Honorable Martha Luft

Motion to dismiss granted; conclusory and unsupported allegations; county not properly served pursuant to CPLR §311.

In *Roseanne Benisatto v. John F. O'Neill, Suff. Co. Commissioner Social Services, Mike Brown, Suff Co Dept. Econ. Devel/Real Prop Acq.*, Index No.: 880/2017, decided on July 13, 2017, the court granted the respondent's motion seeking dismissal of petitioner's article 78 petition. In granting the motion to dismiss, the court noted that in examining the sufficiency of the pleading, the court found that the petition consisted of solely a litany of conclusory and unsupported statements that, even with the most liberal interpretation, did not set forth a cognizable legal theory. By way of example, the court pointed out that the respondent's affidavit referred to an "agreement which Suffolk County entered into with petitioner," however, no copy of such agreement was annexed, nor were the terms of such agreement even set forth in any discernable detail. The court continued and stated that the petitioner also failed to properly serve the County of Suffolk pursuant to CPLR §311, and the two affidavits of service filed with the court were improper as neither indicated the name of the party upon whom service was purportedly made, nor was there an indication that any attempt at personal service was made before copies of the papers were mailed. Thus, the relevant provisions of CPLR §308 were not complied with.

Honorable William B. Rebolini

Motion to dismiss the complaint granted; no allegations of any agreement between plaintiff and moving defendant, directly or through any of its agents, and no allegations that moving defendant exercised a high degree of control over the operations.

In *Meglio I Corp. v. AMS Services Inc., Servicemaster, AMS Services Inc., AMS Services a/k/a Service Master Restore, Frank Catalano, Servicemaster a/k/a Ser-*

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vicemaster Corporation a/k/a Service Master Clean, Yvette and Ernest Cosby and "John Doe" Insurance Company, Index No.: 607935/2017E, decided on May 30, 2018, the court granted the motion by defendant Servicemaster a.k.a Servicemaster Corporation a.k.a Service Master Clean for an order dismissing the complaint against it.

The action filed by plaintiff alleged breach of contract and damages for misconduct. In support of its motion, defendant argued that although it sold a franchise to defendant AMS, it is not vicariously liable for the acts of defendant AMS or pursuant to any contract entered into between the AMS defendants and plaintiff. Defendant further averred that any claims for nonpayment alleged by plaintiff regarding its contract with the AMS defendants provided no legal basis for a cause of action against moving defendant.

In rendering its decision, the court found that the complaint did not allege a contractual relationship between plaintiff and defendant Servicemaster. The court further noted that plaintiff admitted as such and there was no dispute that there was no contract between plaintiffs and moving defendant. The court continued and stated that to hold moving defendant, as franchisor, vicariously liable under the contract between plaintiff and the AMS defendants or to hold moving defendant liable for any alleged misconduct on the part of the AMS defendants, the complaint must allege that moving defendant exercised a high degree of dominion and/or control over the AMS defendants.

Since there were no allegations of any agreement between plaintiff and moving defendant, directly or through any of its agents, and there were no allegations that moving defendant exercised a high degree of control over the operations of the AMS defendants, the court granted the motion to dismiss.

Motion to compel denied; discovery provided; sufficiency of responses improperly raised in reply brief.

In *Hefrey Hill and Tracy Hill v. Suffolk County, Suffolk County v. Bove Industries,* Index No.: 618578/2016E, decided on Feb. 16, 2018, the court denied the motion by third-party defendant for an order compelling third-party plaintiff to provide responses to outstanding discovery demands.

In opposition, third-party plaintiff alleges that it responded to the demands. In its reply, third-party defendant argued that the responses were incomplete, and as such, sought an order directing the county to provide it with copies of all prior discovery demands and responses, and to supplement its bill of particulars. As it was undisputed that several weeks after the instant motion was made, the county served a response, the motion was denied as moot. To the extent that the third-party defendant was challenging the sufficiency of the county's bill of particulars and responses to discovery demands, the court stated that such claim was improperly raised for the first time in its reply brief and in any event was without merit.

Honorable Joseph A. Santorelli

Application for order staying the arbitration granted to extent hearing was to be conducted to determine the preliminary issue of whether the vehicle owned by proposed respondent; exception to the 20-day statute of limitations, if the alleged hit and run vehicle, was insured at the time of the accident.

In *Liberty Mutual Insurance Company v. Pooran Gobin and Kulwantie Gobin,* Index No.: 610557/2017, decided on Nov. 1, 2017, the court granted the application for an order staying the arbitration sought by the respondents under petitioner's uninsured motorist endorsement to the extent that a hearing was to be conducted to determine the preliminary issue of whether the vehicle owned by Valerie A. Piffl-Parker was involved in the accident. The petitioner sought an order staying the arbitration sought by respondents, under petitioner's uninsured motorist endorsement based upon the argument that the other vehicle was insured at the time of the accident. The respondents and proposed additional respondents opposed the application and argued that the application was barred by the statute of limitations.

The respondents were involved in a motor vehicle accident on May 16, 2015 with a hit and run vehicle. The respondents were insured at the time of the accident with Liberty Mutual. On July 30, 2015, respondents filed a demand for arbitration. The demand was sent by certified mail and received by Liberty Mutual on August 12, 2015. On June 6, 2017, this action was commenced.

In rendering its decision, the court reasoned that Liberty Mutual met its burden of coming forward with evidence establishing that the alleged offending vehicle was insured by another insurance carrier at the time of the accident by proffering a copy of the DMV printout indicating the insurance carrier for the SUV along with a letter from National Liability & Fire Insurance Co., indicating that they were denying coverage because their insured denied being involved in the accident. Further, Liberty Mutual showed that it fit within an exception to the 20-day statute of limitations, if the alleged hit and run vehicle, was insured at the time of the accident.

Motion to dismiss denied; first action filed during bankruptcy proceeding; in second action, plaintiffs consented to be bound to recover only from applicable insurance policies for negligence.

In *Jennifer Sierzputowski and Michael Sierzputowski v. Thomas W. Riutta, Jr., D.D.S., Open Wide Dental, P.C., Stony Brook Smiles, Thomas W. Riutta,, J.R. d/b/a Open Wide Dental P.C., Thomas W. Riutta, J.r. d/b/a TD Online Products LLC, and TD Online Products LLC,* Index No.: 607873/2017, decided on Feb. 22, 2018, the court denied defendants' motion to dismiss pursuant to CPLR §3211(a)(5).

The defendants sought an order dismissing the complaint against them arguing that the claims were previously discharged in bankruptcy. Plaintiffs opposed the motion and cross moved for an order dismissing the defendants' tenth affirmative defense because the defendants' insured were not entitled to injunctive relief that the discharge in bankruptcy provided to the nominal defendant's personal obligations solely.

The court stated the facts as follows: Plaintiffs commenced an earlier action on August 2, 2016 for dental malpractice for treatment rendered in June of 2014. Prior to the filing of that complaint, defendant Thomas W. Riutta, Jr., DDS filed a petition under Chapter 7 of the Bankruptcy Code on March 14, 2016. On Aug. 6, 2016, the plaintiffs filed a notice of claim in Bankruptcy Court and annexed a copy of the summons and complaint. The defendants now claim that the first action was a nullity because it was filed during the pendency of the bankruptcy proceeding. On Feb. 22, 2017, the Bankruptcy Judge ordered a bankruptcy discharge under 11 USC §727. On Aug. 25, 2017 the plaintiff filed a summons and complaint under the current index number for treatment rendered in June of 2014.

In denying the motion, the court reasoned that plaintiffs indicated that they consented to be bound to recover only from the applicable insurance policies for negligence to recover only from the applicable insurance policies.

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. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation, immigration, and trusts and estate matters. She is also the President of the Nassau County Women's Bar Association.