BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court Honorable William G. Ford

Motion for leave to withdraw as counsel granted; client has disagreed with his firm's handling of her matter and has differed with her attorneys concerning litigation strategy; plaintiff has been consistent in advising that she is dissatisfied in the firm's prosecution of the action.

In *Congeta Armstrong v. Peter Stellman & Deborah Stellman,* Index No.: 603233/2015, decided on July 12, 2017, the court granted counsel's motion to withdraw as counsel. The court noted that a lawyer may withdraw from representing a client if the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for extension, modification, or reversal of existing law and further that a lawyer may withdraw from representing the client if the client, by his or her conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.

Additionally, courts have ruled that irreconcilable differences between the attorney and the client, with respect to the proper course to be pursued in litigation, is also suffice as adequate grounds to support an attorney's application to withdraw as counsel. Plaintiff's counsel was retained to prosecute plaintiff's claims in a premises liability personal injury matter seeking the recovery of money damages based upon defendant's alleged negligence. Plaintiff's counsel advised that his client has disagreed with his firm's handling of her matter and has differed with her attorneys concerning litigation strategy.

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The movant asserted that plaintiff has been consistent in advising that she was dissatisfied in the firm's prosecution of the action, further straining the attorney-client relationship. Movant's firm wrote plaintiff suggesting that she seek or obtain substitute counsel. The correspondence was returned to sender unclaimed, suggesting that plaintiff relocated and changed her address without informing her attorneys. Movant then conducted a post office search ascertaining that plaintiff relocated to Florida without apprising her attorneys. Based upon the showing, the court granted the application by counsel for plaintiff seeking leave to withdraw as counsel.

Motion to strike defendant's answer granted in part and denied in part; motion record clearly demonstrated that movant's attempt at providing the court with an affirmation of good faith was deficient in that it made no mention of any substantive conversations or communications by and between counsel at resolving this discovery dispute, before plaintiff relegated to motion practice; given the court's prior orders, the court would not excuse defendant's unexplained and unexcused absences and refusals to cooperate in the litigation.

In *NRT New York LLC d/b/a The Corcoran Group v. Michael White & Emanon East Corp.,* Index No.: 605332/2016, the court granted in part and denied in part plaintiff's motion seeking an order striking defendants answer or to preclude their offering of testimony at the time of trial for alleged willful and contumacious conduct in failing to appear at court ordered examinations before trial.

Plaintiff commenced this breach of contract action against the defendants arising out of a realty brokerage exclusivity agreement entered into by and between the parties on or about August 28, 2012 in connection with the purchase/sale of property located in Southampton. By its complaint, plaintiff claimed that it was due payment of a 5 percent brokerage commission from defendants, which it alleged was never paid. A preliminary conference order was entered, providing for examinations before trial on September 6, 2017.

In opposition, defendant argued that plaintiff's counsel did not submit an affirmation in good faith. Further, defendant argued that plaintiff did not demonstrate willful or contumacious conduct to support her request to strike defendant's answer.

The court stated that plaintiff's failure to provide the court with the required affirmation of a good faith effort to resolve the discovery dispute could by itself support a denial of plaintiff's motion. Here, the motion record clearly demonstrated that movant's attempt at providing the court with an affirmation of good faith was deficient in that it made no mention of any substantive conversations or communications by and between counsel at resolving this discovery dispute, before plaintiff relegated to motion practice. Nevertheless, given the court's prior orders, the court did not excuse defendant's unexplained and unexcused absences and refusals to cooperate in the litigation. This was all the more the case where approximately 8 months had elapsed with plaintiff attempting to secure defendants' attendance. Thus, the court did not dismiss the motion for procedural defects. The court ordered all party depositions to be conducted on or before April 16, 2018 and further held that should any party deposition not occur as outlined above, counsel for that party shall have leave to renew an application pursuant to CPLR §3124 and/or CPLR §3126 for appropriate relief.

Honorable William B. Rebolini

Motion to dismiss granted; doctrines of res judicata, collateral estoppel, and law of the case bar plaintiff from relitigating issues herein already decided by this court and the Second Department.

In *Prahlad QA. Navi v. Chase Manhattan Bank, Chase Card Services Asset Acceptance LLC and Mullooly, Jeffrey, Rooney and Flynn LLP,* Index No.: 6023/2017, decided on April 5, 2018, the court granted the motion by defendant, Mullooly, Rooney and Flynn, LLP, dismissing the action against it. In granting defendant's motion, the court noted that the doctrines of res judicata, collateral estoppel, and law of the case barred plain-

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tiff from relitigating issues herein already decided by this court and the Second Department. Moreover, the court stated that plaintiff's claims were bared by the statute of limitations, being that the judgment was entered on November 24, 2009, over eight years ago. Finally, the court concluded that plaintiff's claim to suspend the license of the defendant law finn failed to state a cause of action and was subject to dismissal under CPLR §3211(a)(7).

Honorable David T. Reilly

Motion to dismiss for failure to name a necessary party denied; defendant had not sufficiently articulated any theory of liability which would make Ms. Green a necessary party.

In *Amityville Mobile Home Civic Association, Brenda Brnic, Laurie Nevins, for themselves and the membership of the Amityville Mobile Home Civic Association v. William V. Rapp and Arthur Morrison,* Index No.: 14610/2015, decided on May 1, 2018, the court denied the defendant's application to dismiss the complaint for failure to name a necessary party. The court noted that the action sounded in breach of contract and legal malpractice.

Defendant filed the instant motion which sought dismissal of the complaint for failure to join a necessary party. Specifically, the defendant should have had Shelby D. Green, Esq. added as a party defendant inasmuch as she apparently took part in a litigation involving the plaintiff herein. Plaintiff opposed the motion and directed the court to deposition testimony wherein defendant testified that he was not involved in the litigation wherein Ms. Green was counsel to one of the parties. The court found that inasmuch as defendant had not sufficiently articulated any theory of liability which would make Ms. Green a necessary party, joinder was inappropriate.

Motion to dismiss denied; preliminary conference order not signed by a justice of the court.

In *Donaldo Villatoro v. Muhammad Babar Butt and Muhammad A. Butt,* Index No.: 6311/2016, decided on Feb. 2, 2018, the court denied the defendants' motion to dismiss for plaintiff's failure to appear for an examination before trial. The court noted that the action was to recover money damages for personal injuries allegedly sustained in a motor vehicle accident, which occurred on July 17, 2015.

According to the defendant, the parties entered into a preliminary conference order, which called for all depositions to take place on July 13, 2016. In denying the motion, the court reasoned that the defendant submitted a copy of a preliminary conference order which was not signed by a justice of the court. Therefore, the court concluded that it could not be said that the plaintiff was in violation of a court order. The court found that in the unopposed allegation by defendant that plaintiff was clearly frustrating the discovery process, and accordingly, directed plaintiff to appear for a deposition.

Honorable Thomas F. Whelan

Motion for summary judgment granted; failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned.

In *Wells Fargo Bank, NA v. John Shea, Lisa Miller, Sunrise Credit Corp., Clerk of the Suffolk County District Court, Capital One bank USA NA, First Financial Investment Fund, III, LLC, Barrister Reporting Service, Inc., Clerk of the Riverhead Town Justice Court, FFPM Carmel Holding, LLC Huntington Hospital Assoc., Teachers Federal Credit Union, Bryan L. Salamone, PC, Brookhaven Memorial Hospital, United States of America, Robert F. Casola, New York State Affordable Housing Corporation, subsidiary of the New York State Housing Finance Agency, People of the State of New York o/b/o University Hospital I/P SUNY at Stony Brook, "John Doe #1" to "John Doe #10," the last 10 names being fictitious and unknown to 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.: 14214/2012, decided on Jan. 22, 2018, the court granted plaintiff's motion for summary judgment. The court noted that the instant action was to foreclose a mortgage on real property located in Nesconset.

The defendant defaulted on Jan. 1, 2010. The action was commenced on May 7, 2012. Foreclosure conferences were held with court personnel until Sept. 19, 2014. Once released from the settlement part, plaintiff moved for summary judgment. The defendant, over various adjournments, cross moved to dismiss or for additional discovery. In granting the motion for summary judgment in favor of the plaintiff and denying the defendant's cross motion to dismiss or for additional discovery, the court stated that affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal. Where a defendant fails to oppose some, or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists. In addition, the court concluded that failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without efficacy. The court specifically addressed the first, seventeenth, eighteenth, twentieth and twenty-first affirmative defenses and the first, second and fifth counterclaims and thereafter, the motion for summary judgment was granted.

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 percent 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.