BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion for leave to enter a default judgment against defendant Brodbeck denied; neither the complaint nor plaintiff's affidavit in support of the motion contained an allegation as to what caused her to fall in the parking lot.

In *Kelly Amantea v. BMB Management, LLC & Jon Neil Brodbeck,* Index No.: 2572/2015 decided on August 18, 2015, the court denied the motion for leave to enter a default judgment against defendant, Brodbeck.

The court stated that on a motion for leave to enter a default judgment based on a defendant's failure to appear or answer the complaint, a plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim against the defendant, and proof of the defendant's default. The court continued and pointed out that while a verified complaint may be submitted as an affidavit of the facts constituting the claim, it must allege enough facts to enable a court to determine that a viable cause of action existed, and a person having personal knowledge of the facts must verify it. In denying the application, the court reasoned that the plaintiff failed to allege sufficient facts to allow the court to ascertain whether she had a viable negligence claim against the defendant, as neither the complaint nor plaintiff's affidavit in support of the motion contained an allegation as to what caused her to fall in the parking lot. Accordingly, the motion was denied.

Elaine Colavito

Honorable Peter H. Mayer

Motion for summary judgment in lieu of complaint granted; counsel fee application denied; no proof of reasonable attorneys' fees incurred in connection with the matter.

In *Marty Borenstein v. Gina Lienick & Susan Lienick,* Index No.: 18501/2014 decided on May 4, 2015, the court granted the motion, which sought summary judgment in lieu of a complaint.

In this action, the court noted that plaintiff submitted proof that the defendants borrowed from plaintiff the amount of $30,000.00 at an interest rate of 12 percent per annum, pursuant to the terms of a promissory note dated April 30, 2009, and that defendants had failed to make any of the payments due thereunder. In relevant part, the court stated that CPLR §3213 provides that when an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendants to submit answering papers on the motion within the time provided in the notice of motion.

Since the plaintiffs' motion was unopposed, the uncontroverted facts were deemed admitted, and accordingly the motion was granted. However, with regard to the legal fee request, the court found that although Section 5(E) of the promissory note entitled plaintiff to reasonable attorneys fees for enforcement of the provisions of the note, in the event of the defendants' default, plaintiff's counsel had not submitted any proof of reasonable attorneys' fees incurred in connection with the matter. As such, the request for $5,000.00 in attorneys' fees was unsubstantiated and denied without prejudice.

Motion for default judgment denied; failure to submit evidentiary proof of compliance with the personal service provisions of CPLR §308; failure to submit an affidavit: stating whether or not the defendant is in military service.

In *Brentwood Plaza, LLC v. Imad Alden Yousef Nasser Mansour, Talal Rashid and Ali Mohammed,* Index No.: 16045/2014 decided on April 29, 2015, the court denied the portion of the motion which sought a judgment against defendants, Imad Alden Yousef

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Nasser Mansour, and Ali Mohammed, as the application failed to submit evidentiary proof of compliance with the personal service provisions of CPLR §308 regarding "due diligence" for those defendants served by the "nail and mail" method pursuant to CPLR §308(4). This was sufficient to establish jurisdiction over said defendants, not merely a showing of several attempts to serve the defendants at their residences without a showing that there was first a genuine inquiry about the defendants' whereabouts and place of employment; and failure to submit an affidavit: stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine that, as requires by 50 USCS §521[b].

Motion to dismiss granted; since all five causes of action may be characterized as those for economic loss due to alleged product failure, all claims were dismissed.

In *Sears Ready Mix, Ltd. V. Continental Tire the Americas, LLC a/k/a Continental Tire AG and Dave Kunzler Tire Service, Inc., d/b/a Dave Kunzler Tire Service,* Index No.: 9271/2014 decided on June 17, 2015, the court granted the motion by defendant for dismissal of the first, second, third, fourth, and fifth causes of action asserted by plaintiff against defendant Continental.

In the complaint, plaintiff alleged that on July 30, 2012, while plaintiff's truck was en route to a job site, two tires on the truck blew out causing plaintiff to sustain damage to the truck, as well as monetary damages related to delayed production of plaintiff's concrete work. Defendant Dave Kunzler Tire Service, Inc. d/b/a Kunzler Tire Service is alleged to have sold the subject tires to the plaintiff. Continental now moved pursuant to CPLR §3211(a)(7) for dismissal of all causes of action. In deciding the application, the court noted that the economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract, and personal injury is not alleged or at issue. The rule is applicable even where the allegedly defective product is or may be unduly hazardous. Here in rendering its decision, the court pointed out that each of plaintiff's five causes of action was premised upon property damage and consequential damages from the allegedly defective tires. Accordingly, since all five causes of action may be characterized as those for economic loss due to alleged product failure, all claims were dismissed.

Honorable William B. Rebolini

Motion to compel disclosure of housing program records in personal injury matter denied; records not shown to be material and necessary to the defense of the action.

In *Sonja Hawkins v. Brook Alyssa Simeone and Chris D. Simeone,* Index No.: 3180/2012 decided on November 4, 2015, the court denied the motion to compel to the extent that it sought disclosure of records from the housing program that provides services to the plaintiff. The court stated the pertinent facts as follows: plaintiff commenced the action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident. The defendants sought an unrestricted authorization to obtain records from the Concern for Independent Living, which operates a group home in which plaintiff resides.

In rendering its decision, the court noted that while there shall be full disclosure of information that is material and necessary in the defense of an action, a party is not entitled to unlimited and uncontrolled unfettered disclosure. Here, since the defendants failed to demonstrate how records from a housing program that provided services to the plaintiff were either material or necessary to the defense of the action, the application to compel their disclosure was denied.

Complaint to be dismissed unless the plaintiff appeared for a deposition and appeared for an independent medical examination within Suffolk County; plaintiff failed to establish that traveling from his home in Florida to New York to be deposed and to submit to a medical examination would cause undue hardship.

In *Thomas Shelton v. Maurocio O. Larrea,* Index No.: 31012/2012 decided on February 3, 2015, the court granted the defendant's motion to dismiss the complaint to the extent that the complaint was to be dismissed unless the plaintiff appeared for a deposition and appeared for an independent medical examination within Suffolk County.

The court noted that the determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound distribution of the trial court. The court pointed out that the plaintiff did not dispute that he adjourned the deposition scheduled for September 26, 2013 and that he continued to adjourn depositions for December 16, 2013, April 16, 2014, June 20, 2014, and October 1, 2014. Plaintiff's contention was that he adjourned the depositions for "personal reasons" and he submitted that he is readily available to submit to an electronic/digital/live deposition in the state of Florida but cannot return to the state of New York for the EBT and IME.

In rendering its decision, the court stated that depositions of parties to an action are generally held in the county where the action is pending. And the defendant who will retain a doctor in whom the defense has confidence and who is in a position to testify at the time of trial will generally specify the location and time of the examination. Since plaintiff failed to establish that traveling from his home in Florida to New York to be deposed and to submit to a medical examination would cause undue hardship, the deposition and independent medical examination of plaintiff will be conducted within the county in which the action is pending.

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 an associate at Sahn Ward Coschignano, PLLC in Uniondale, concentrating her practice in matrimonial and family law, civil litigation and immigration