

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion to join Action 1 and Action 2 for trial denied; while both actions arose out of the plaintiff's stay at the defendant's facility, the claims asserted in Action 1 and Action 2 involved vastly different issues of law and fact.

In *Susan Furman v. Sabiene "Doe"* (name being fictitious, as presently unidentified nurse aide) and *Nesconset Center for Nursing & Rehabilitation*, Index No.: 65197/2014, decided on January 6, 2015, the court denied plaintiff's motion to join Action 1 and Action 2 for trial.

In rendering its decision, the court noted the applicable facts as follows: plaintiff was a patient from September 26, 2013 to May 30, 2014 at a nursing and rehabilitation facility operated by the defendant. She was admitted for nursing home care, and it was claimed that she suffered personal injuries on November 15, 2013 as a result of a fall that occurred when she was using the bathroom facilities. This was Action 1, which was commenced on July 8, 2014. On July 31, 2014, the defendant herein brought an action against the plaintiff herein alleging that she failed to pay for nursing care and related services provided to her from September 2014 to May 2014 in violation of a written agreement executed in October 2013. There were additional claims of unjust enrichment and for legal fees. This was Action 2. In denying the motion, the court noted that, while both actions arose out of the plaintiff's stay at the defendant's facility, the claims asserted in Action 1 and Action 2 involved vastly different issues of law and fact. Accordingly, the motion to join Action 1 and Action 2 for trial was denied.

Motion for summary judgment dismissing the complaint and cross claims granted; moving defendants established their entitlement to judgment as a matter of law.

In *Jennifer Greenzang v. Town of Brookhaven, Pennysaver Amphitheater at Bald Hill (formerly Brookhaven Amphitheater, JVC Broadcasting Corp., JVC Media, LLC, Long Island Events, LLC and Slomin's Inc.)*, Index No.: 64242/2014, decided on October 2, 2015, the court granted the motion by defendants, JVC Broadcasting Corp. and JVC Media, LLC for summary judgment dismissing the complaint and any cross claims against them.

Plaintiff commenced the action to recover damages for injuries sustained from a trip and fall incident that allegedly occurred at the Pennysaver Amphitheater. The complaint alleged that plaintiff was on the subject premises attending an outdoor concert when she tripped and fell on a Slomins Shield sign. The defendants, JVC Broadcasting Corp and JVC Media, LLC now moved for summary judgment dismissing the complaint and the cross claims against them, arguing that they could not be

liable to plaintiff for the alleged dangerous condition, as they did not own, possess, lease or manage the subject premises. In deciding the motion, the court found that the moving defendants established their entitlement to judgment as a matter of law by submitting evidence that they did not own, possess or control the premises where the plaintiff allegedly tripped and fell. The defendant, Town of Brookhaven's opposition papers, which contained the licensing agreement, was insufficient to create a triable issue of fact, as the moving defendants were not parties to the agreement. Finally, the court explained that with regard to the claim that the motion should be denied because discovery was necessary, that a claim's need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, was insufficient to avoid an award of summary judgment. Accordingly, the motion was granted.

Honorable Peter H. Mayer

Motion for summary judgment granted; defendant received and retained bills without objecting within a reasonable amount of time; plaintiff did not set forth an affirmation of the tasks and actual or estimated hours actually expended for legal services rendered, nor the hourly rates, request for fees denied.

In *J. Kings Food Service Professionals v. Taps Restaurant, Inc. and Outcast Corp., individually and d/b/a Taps*, Index No.: 16991/2014, decided on April 29, 2015, the court granted plaintiff's motion, which sought an order granting summary judgment for the principal amount of \$13,985.09.

In rendering its decision, the court noted that in an action for an account stated, a plaintiff is entitled to summary judgment where plaintiff establishes, with evidence in admissible form, that defendant received and retained bills without objecting within a reasonable amount of time, and made partial payment of some of those bills, and where the defendant fails to set forth evidentiary details as when, where or by whom its alleged objections to amounts due were made, or proof that it ever complained to plaintiff about the quality of work performed. Here, the court found that the plaintiff made a prima facie showing of entitlement to summary judgment as a matter of law by submitting unpaid invoices, which were received and retained by that defendant without objection. The general and conclusory allegations set forth in defendant's answer and motion opposition were insufficient to rebut that showing, or to raise a triable issue of fact.

With regard to attorney fees, in its credit application, defendant agreed to pay all attorney's fees and additional costs including court costs incurred in order to enforce collection, which fees were not to exceed 25 percent of indebtedness. Since plaintiff did not set forth an affirmation of the tasks and actual or



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estimated hours actually expended for legal services rendered, nor the hourly rates applicable to such tasks, the plaintiff's request for fees was denied.

Charging lien granted, which affixed to the proceeds of the litigation of the divorce; in a matrimonial action, the charging lien was available to the extent that an equitable distribution award reflected the creation of a new fund by an attorney greater than the value of the interests already held by the client.

In *Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP v. Robert Schroeder*, Index No.: 18880/2014, decided on September 10, 2015, pursuant to Judiciary Law §475, the court granted the petitioner a charging lien, which affixed to the proceeds of the litigation of the divorce action, captioned *Diane Schroeder v. Robert Schroeder, Jr.*

The court noted that pursuant to Judiciary law attorney who appeared for a party had a lien upon his or her client's cause of action, claim, or counterclaim, which attached to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof. The court continued in stating that an attorney of record who was discharged without cause possessed a charging lien pursuant to judiciary law, which constituted an equitable ownership of the cause of action and attached to any recovery in the client's favor. In a matrimonial action, the charging lien was available to the extent that an equitable distribution award reflected the creation of a new fund by an attorney greater than the value of the interests already held by the client.

Honorable William B. Rebolini

Motion to dismiss complaint denied; complaint set forth allegations sufficient to sustain a cause of action for breach of contract as well as a cause of action in unjust enrichment.

In *Francine Jones, individually and Francine Jones, as Administratrix of the Estate of Richard D. Jones, deceased and Jones's Hardware, Inc. v. Steven Druiek and Druiek's Hardware, Inc.*, Index No.: 20105/2014, decided on May 28, 2015, the court denied the motion by the defendants for an order dismissing the complaint.

The action was commenced to recover damages for the alleged breach by the defendants of a certain stipulation of settlement, which had been entered into among the parties to resolve prior litigation arising out of an agreement under which the defendants were to purchase from the plaintiffs certain real property and the assets of a hardware store, subject to certain conditions. Certain property taxes were due. It was alleged in the complaint that the defendants breached the agreement by failing to redeem the property from the county and by failing to pay rent in accordance with the terms of the stipulation. In rendering its decision, the court pointed out that a review

of the complaint revealed that it set forth allegations sufficient to sustain a cause of action for breach of contract as well as a cause of action in unjust enrichment. Under the unique facts of the case, the court noted that where the parties enter into a stipulation based, in part, upon an acknowledgement that "Mr. Druiek [sic] is prepared to undertake, as part of the settlement to take [sic] the steps necessary to redeem the property from the County and to pay the taxes, penalties, and fees necessary to [sic] do so..." the stipulation did not provide specifically for the payment of rent to plaintiffs upon the failure to redeem the property. Accordingly, since the separate cause of action for unjust enrichment was not a duplication of the cause of action for recovery in breach of contract, dismissal was not warranted on this basis as well.

Preliminary injunction denied; temporary injunction lifted; plaintiffs failed to demonstrate each element required for the issuance of a preliminary injunction.

In *Gail Liner, Rubie Associates, LLC and R & G 23 LLC v. Joseph L. Cardaci, Jr. Lynne A. Cardaci and Hampton Pest Control, Inc.*, Index No.: 17154/2014, decided on October 6, 2015, the court denied the motion by plaintiff's for an order enjoining the defendants from selling their property located at 19 West Tiana Road, Hampton Bays, New York.

In denying the motion, the court noted that the plaintiffs failed to demonstrate each element required for the issuance of a preliminary injunction. The court continued and stated that plaintiffs' conclusory assertions failed to establish that the defendants were acting in violation of the town code and plaintiffs otherwise failed to show a success on the merits. In lifting the temporary injunction, the court noted that the plaintiffs failed to show that defendants' use of their property created unreasonable noise of that the installation of defendants' dock impeded plaintiffs' access to the waterway. Plaintiffs' evidence was also insufficient to show that they would suffer irreparable harm without injunctive relief. Additionally, there was no evidence whatsoever before the court that the plaintiffs had been exposed to allegedly harmful pesticides, nor was there any evidence of unreasonable or elevated noise.

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. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.