

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion to vacate court order denied; adjournment request one day after motion submitted; reasonable excuse for delay not established.

In *Joseph Grant v. Edwin D. Espinal and Tamara I. Giunta*, Index No.: 610071/2018, decided on Jan. 4, 2019, the court denied the motion for an order pursuant to CPLR §5015, vacating the order of this court dated Sept. 18, 2018.

Pursuant to CPLR §5015, the defendants moved for vacature of the order granting plaintiff summary judgment on the issue of liability. Defendants argued that their failure to oppose the motion by plaintiff should be excused due to the failure of counsel to timely ensure that an intended adjournment request was received and granted by the court. In denying the motion, the court noted that when moving pursuant to CPLR §5015, a party must demonstrate both a reasonable excuse and meritorious opposition to the motion. The court noted that the adjournment request was made one day after the motion was

submitted. In finding that the defendant did not establish a reasonable excuse, the court did not address the issue of whether defendant demonstrated a potentially meritorious opposition to the motion for partial summary judgment.

Honorable Martha L. Luft

Motion for recusal denied; spouse had no interest in the outcome of the case whatsoever; nor was he an officer, director, or other active participant in the affairs of the institution.

In *Locksley C. Amos, as Administrator of the Estate of Amy Jane Cleopatra Smith Amos, deceased, and Locksley C. Amos and Erica Smith, individually v. Southampton Hospital, Flushing Ultrasound Services, Inc. Southampton Pediatric Associates, P.C., Hampton Ob/Gyn, Jennine Marie Varhola, M.D., Robert J. Gottlieb, M.D., and Carol Lund, NP*, Index No.: 2829/2009, decided on May 21, 2019, the court denied the motion which sought recusal.

In rendering its decision, the court found that recusal based upon 22 NYCRR §100.3(E)(1)(d)(iii), which requires disqualification from a case where a judge's



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spouse "has an interest that could be substantially affected by the proceeding" was not warranted. It was determined that judge's spouse had no interest in the outcome of the case whatsoever. Further, he did not know or work with any of the parties to the case, nor did he attend at the hospital in question. Also, he had no ownership interest in the institution, nor was he an officer, director, or other active participant in the affairs of the institution. Accordingly, the motion was denied.

Motion for summary judgment denied; insufficient information in the record to determine whether there were other agreements which might confer standing upon the plaintiff in his individual capacity.

In *George Pamos v. Captain Hulbert House LLC, Tyche Fortune LLC, and Jeanne Kisikatos*, Index No.: 621261/2017, decided on April 8, 2019, the court denied defendants' motion for summary judgment.

The court noted that the action was for breach of contract. The defendants brought a summary judgment motion alleging that the agreement at issue was with AVH and not the plaintiff in his personal capacity such

as that the plaintiff lacked standing. The movants further argued that the agreement did not provide for the relief claimed in the complaint. In denying the motion, the court found that the stipulation attached as an exhibit to defendants' motion did not seem to be the agreement which the complaint was referring. Further, the court reasoned that there was insufficient information in the record to determine whether there were other agreements which might confer standing upon the plaintiff in his individual capacity, as he alleged. The court could not issue summary judgment on the insufficient and confusing record.

Honorable Vincent J. Martorana

Motion seeking to rescind transfer of an interest in real property denied with leave to renew upon proper papers; proof provide was insufficient.

In *Yatia Hopkins v. Telisha Brown*, Index No.: 2207/2016, decided on Jan. 3, 2019, the court denied plaintiff's motion seeking to rescind transfer of an interest in real property with leave to renew upon proper papers.

The court noted that to consider plaintiff's

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motion, sufficient information must be provided so that the court may determine whether the requested relief is factually, procedurally, and legally appropriate. Plaintiff claimed that the entire financial investment and obligation for the purchase in question and presumably the maintenance of real property was hers and that the interest in the real property conveyed to defendant was only a gift in contemplation of marriage. The implication being that defendant had no financial or equitable entitlement to any portion of the value of the property at issue. Yet, the court pointed out that the only proof that plaintiff provided was plaintiff's affidavit. In denying the motion with leave to renew upon proper papers, the court concluded that in light of the many questions raised by the procedural history of this case and the long delays in seeking relief, along with the paucity of evidence provided in support of plaintiff's application seeking to divest the defendant of an interest in real property, there was an insufficient basis to grant plaintiff's motion.

Motion to compel deposition of additional witness granted; witness produced lacked sufficient specific knowledge.

In *MF, an infant by his parent and legal guardian, Thomas Fasano and Thomas Fasano, individually v. Town of Babylon*, Index No.: 20173/2012, decided on May 6, 2019,

the court granted the motion seeking to compel deposition of an additional witness.

In deciding the motion, the court noted that in seeking to compel a party to produce additional witnesses to be deposed, the movant must establish that the previously deposed witness lacked sufficient knowledge of the transactions or incidents at issue, or that such witness was otherwise inadequate, and must also establish that there is a substantial likelihood that the person whose deposition is sought possesses information that is material and necessary to the prosecution of the case. Although a corporation does have a right to designate its employee who will be examined, if such witness has insufficient knowledge, the adverse party has the right to compel deposition of an additional witness. Here, the court found that the public works coordinator lacked sufficient specific knowledge regarding the composition, features, maintenance and history of accidents of the interactive pool. As such, the court directed defendant to produce the manager of the Phelps Lane Memorial Park Pool or in the alternative, an individual with similar specific knowledge dating to the time of the incident, for deposition by plaintiff's counsel.

Honorable John H. Rouse

Motion for default judgment denied; third

party plaintiff commenced its action upon an unverified complaint and had not filed with the court an affidavit of merit providing facts upon which a default judgment may be entered.

In *Chip Hunter v. Stone Source LLC, Kate Spade & Company, d/b/a Kate Spade New York, Kate Spade & Company, d/b/a Kate Spade New York v. C2 Resources Studio, Inc.*, Index No.: 617190/2016, decided on Jan. 7, 2019, the court denied the motion for a default judgment against third party defendant, C2 Resources Studio, Inc.

In denying the motion, the court noted that the third party plaintiff commenced its action upon an unverified complaint and had not filed with the court an affidavit of merit providing facts upon which a default judgment may be entered. Further, the court noted that it examined the verified complaint for the plaintiff himself and the facts as alleged by the plaintiff did not support a claim for liability against C2 Resources Studio, Inc. Hence, the motion was denied.

Honorable William B. Rebolini

Motion for default judgment denied; allegations insufficient on causes of action for fraud and undue influence.

In *Estate of Harriet L. Kraft by Linda A. Meyers Executor, and Estate of Richard J. Kraft, Sr., by Linda A. Meyers, Executor v.*

David J. Kraft Sr. and Anna May Delaney, Index No.: 605394/2018, decided on April 2, 2019, the court denied plaintiffs' motion pursuant to CPLR §3215[a] for a default judgment against defendant, Anna May Delaney.

In denying the motion, the court found that on plaintiffs' fraud claim, they did not allege the circumstances constituting the fraud with particularity, as required pursuant to CPLR §3016[b]. Bare allegations of fraud without any supporting detail are insufficient. As to the cause of action for undue influence, the court noted that the allegations were not sufficient to state a claim of undue influence and an inference of undue influence could not be found under the circumstances. There were no allegations as to the manner in which any alleged undue influence was actually exercised upon the decedent by the defendants. Accordingly, the motion for a default judgment was denied.

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 the Immediate Past President of the Nassau County Women's Bar Association.