

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable William G. Ford

Attorney relieved as counsel; unsuccessful in attempts at reaching or communicating with client to gain cooperation and assistance in defending the action.

In *Commissioner of the State Insurance Fund v. Affordable Installation Inc.*, Index No.: 614450/2017, decided on January 19, 2018, the court granted defendant's counsel's order to show cause to be relieved.

The court stated that defense counsel made the application to withdraw as counsel indicating that since her firm's retention by the client, she had been unsuccessful in attempts at reaching or communicating with the client to gain cooperation and assistance in defending the action. Further, movant indicated that the client had not satisfied any of counsel's legal fees agreed to in the retainer agreement. The court granted the application.

Motion to vacate default judgment granted; prior to applying for an obtaining entry of default judgment, that plaintiff failed to give additional notice required by statute.

In *Leslie Rawlings LSCW v. Kimberly Slicklein*, Index No.: 608477/2015, decided on August 10, 2017, the court granted the branch of the defendant's motion to vacate a prior default judgment.

In granting the motion to vacate, the court reasoned that CPLR 3215(g)(3) provides that when a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation that person is entitled to additional notice of the action which is provided by mailing the summons to his or her place of residence.

Plainly construing the statute's express requirements, defendant was a natural person and plaintiff had asserted a breach of contract which explicitly and naturally encompassed an action sourced in contractual obligation. Defendant asserted, without challenge by plaintiff, that prior to applying for an obtaining entry of de-



Elaine Colavito

fault judgment, that plaintiff failed to give additional notice required by statute. Moreover, defendant argued that prior to obtaining a money judgment, plaintiff failed to serve a copy of the proposed judgment on defendant. Accordingly, the motion to vacate the default judgment was granted.

Motion to compel further deposition of plaintiff denied; issue of liability was rendered moot and irrelevant by the court's prior summary judgment determination.

In *Smit Zambrano v. Roadmaster Limousine, Inc. & Anthony Morlock*, Index No.: 613384/2015, decided on August 27, 2017, the court denied the defendant's motion to compel plaintiff appear at and submit to an additional or continued examination before trial. The court noted that this was a personal injury matter involving three cars. Plaintiff was allegedly rear-ended by a limousine, operated by defendant. Summary judgment as to liability was previously granted and thereafter, the parties commenced discovery. Plaintiff was deposed.

At the deposition, the parties had a dispute and reached an impasse requiring the court's intervention. Defendant now argued that plaintiff's counsel improperly instructed plaintiff not to answer certain questions or made several speaking objections calculated to suggest an answer to the witness or to interrupt the proceedings. Plaintiff emphasized that given the court's prior order assessing liability against defendants for a rear-end motor vehicle accident, the only discovery that was material and necessary or relevant to prepare for a damages trial was limited to causation, treatment, or prior or subsequent injuries of plaintiff as alleged in the complaint or bill of particulars. In denying the motion to compel, the court stated that defendants were not wholly frustrated from conducting a discovery deposition. Plaintiff was questioned and gave answers concerning a prior motor vehicle accident and related injuries, which were apparently similar to those claimed in this matter. Nonetheless, defendants' sole remaining basis to conduct a liability examination appeared to be to determine whether adequate grounds existed for impleading the other non-party operator.

(Continued on page 24)

Bench Briefs

(Continued from page 4)

The court concluded that defendants' insistence that it should be able to probe liability was rendered moot and irrelevant by the court's prior summary judgment determination.

Honorable William B. Rebolini

Motion for a protective order granted; defendants' submissions demonstrated that the examination before trial of their infant son would prejudice and disadvantage them.

In *B. Carlisi, an infant by his legal guardian, Jennifer Armetta v. Kimberly Santoro and Anthony Santoro*, Index No.: 600692/2016, decided on March 20, 2018, the court granted the defendants' motion for a protective order.

The instant matter was for injuries sustained when the infant plaintiff was allegedly bitten by defendants' dog at their home. Plaintiffs demanded a non-party examination of defendants' infant son, a non-party to this action. Plaintiffs are seeking to depose defendants' son in order to attempt to establish the dog's propensities to bite or attack people. It was undisputed that the defendants' son was not present at the time of the alleged incident.

According to the documentation submitted by the defendants, the proposed non-party witness had thoughts which were often disorganized. He struggled with sequencing and connecting his thoughts in order, he becomes distracted, which can interfere with his ability to recall details, comprehend auditory information, and answer questions.

In this instance, the court found that the defendants' submissions demon-

strated that the examination before trial of their infant son would prejudice and disadvantage them. Moreover, the court pointed out that there were two non-party witnesses identified by plaintiff that could be deposed who may provide the testimony plaintiff sought to elicit from defendants' son. Accordingly, the motion for a protective order was granted.

Motion for summary judgment granted; defendant Mall owed no duty to plaintiff in that it neither possessed ownership, control, or management responsibility for the property where the accident occurred

In *Jacquelin Carrabus v. Mall at Smith Haven, LLC, and Ferrandino & Son, Inc., Mall at Smith Haven, LLC v. Macy's Retail Holdings, Inc.*, Index No.: 18101/2015, decided on March 2, 2018, the court granted the defendant Mall's cross-motion to dismiss the complaint and cross-claims asserted against it.

In support of its motion for summary judgment, defendant Mall submitted a copy of the certified deed of the parcel owned by Macy's, the site map, an affidavit of the general manager of Smith Haven Mall at the time of the incident, the reciprocal operating and Easement Agreement in effect at the time of the accident, the description of the parcel owned by Macy's as contained within the Operating Agreement for the Macy's store and photographs where plaintiff's accident occurred. In granting the motion, the court concluded that based upon the adduced evidence, the defendant Mall established its prima facie entitlement to summary judgment in its favor

by establishing that it owed no duty to plaintiff in that it neither possessed ownership, control, or management responsibility for the property where the accident occurred. Further, the court stated, that because the defendant Mall did not own, control, or maintain the subject premises, defendant mall could not have had actual or constructive notice of any defect alleged by the plaintiff. Moreover, the evidence showed that defendant Ferrandino & Sons, Inc. contracted with and was hired by Macy's, not defendant Mall, to remove snow and ice from the site where the accident occurred.

Motion for trial preference granted; additional trial preference in the interests of justice.

In *Joyce Williams and Ralph Williams v. Kenneth A. Walsh, M.D., Edward Weissman, M.D., Mitchell Sierecki, M.D., Shalimi Patcha, M.D., Sotir Polena, M.D., Sejal Patel, M.D., Jordan S. Laser, M.D., Neha S. Pawar, M.D., Anthony Intinoli, M.D., Valeriy Kraydman, M.D., Nina Alexandrve, M.D., Deborah Neumann, M.D. Pedro J. Torrico, M.D., Brian Strizik, M.D., Mejd Ahmad, M.D., John/Jane Doe [name unknown], M.D., Huntington Hospital, Elliot Salamon, M.D., Kiley Toder, M.D., Rick Esposito, M.D. and North Shore University Medical Center*, Index No.: 608126/2015, decided on May 18, 2017, the court granted the plaintiffs' motion for a trial preference. In rendering its decision, the court noted that it was undisputed that the plaintiffs were entitled to a trial preference on the basis that the matter was a medical malpractice action. It was further stated that the "stacking" of trial preferences

was disfavored. That is, a party is not automatically entitled to a second trial preference.

In support of their application, plaintiffs submitted an affirmation of a licensed physician, who stated that plaintiff Joyce's current medical conditions placed her at a high risk of early demise, and she had little chance of significant recovery. In opposition, defendants argued that they would be severely prejudiced if they were not afforded the opportunity to have the court carefully consider their motions for summary judgment and be given adequate time to prepare for a trial if those motions were not successful, that the plaintiffs already had the benefit of an expedited discovery schedule, and that the plaintiffs' situation was self-imposed. The court determined in the exercise of its discretion that extraordinary circumstances existed, and an additional trial preference was warranted in the interests of justice.

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