BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion to dismiss denied; proposed excuse was essentially law office failure.

In *Endurance American Specialty Insurance Company v. FRX Construction, Inc. d/b/a DEV Construction,* Index No.: 10782/2016, decided on Feb. 1, 2019, the court denied plaintiff's motion for a default judgment against defendant. In deciding the motion, the court noted that plaintiff commenced the action on Sept. 25, 2015, and defendant was served through the secretary of state on Oct. 25, 2015. The parties entered a stipulation transferring venue to Suffolk County. The motion was granted by court order dated Nov. 15, 2016. Plaintiff served a motion for a default judgment on March 23, 2018, more than two years after the defendant had been served. In denying the motion, the court stated that if plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned. Since plaintiff failed to move for a default within one year after the defendant's default in answering, they were required to demonstrate the merits of the cause of action and a valid excuse for a delay. Although plaintiff's moving papers demonstrated a meritorious claim, the proposed excuse was essentially law office failure. Accordingly, plaintiff's claim was dismissed as abandoned.

Honorable Sanford Neil Berland

Motion to amend complaint denied; since no responsive pleading had been served, and the court previously ruled that the service of the summons and complaint was not effectuated in accordance with the CPOLR, the plaintiff was free to amend her complaint.

Elaine Colavito

In *Michele Antonio v. Annette Antonio Dickerson, Samantha Theresa Dickerson,* Index No.: 308/2017, decided on April 18, 2018, the court denied the motion to amend the complaint.

The court noted that plaintiff commenced this declaratory action and purported to serve her original summons and complaint by mail upon defendants on Dec. 30, 2016. Having received no responsive pleadings, she moved for a default. Justice Asher, in an Aug. 25, 2017 order, denied the motion on the ground that service of the original summons and complaint was deficient and not in the requirements of the CPLR. She now moved to amend her complaint. In denying the motion, the court noted that since no responsive pleading had been served, and the court previously ruled that the service of the summons and complaint was not effectuated in accordance with the CPOLR, the plaintiff was free to amend her complaint, and her time to effectuate service was extended pursuant to CPLR §306-b to 120 days of the date of the order.

Honorable Martha L. Luft

Petition dismissed; no indication that respondent was served.

In *Sherrie Godfrey v. Suffolk Federal Credit Union,* Index No.: 6829/2018, decided on Feb. 25, 2019, the court dismissed the petition.

The court noted that the plaintiff commenced a pro se petition naming Suffolk Federal Credit Union as the sole respondent by filing a petition and notice of petition on Dec. 31, 2018. The notice of petition set a return date of Jan. 21 and the court calendared the return date for Jan. 22, 2019. The affidavit of service form returned to the court on the return date was blank and did not indicate who was served or how they were served. Other than the signature of the process server and the notarization, the affidavit of service was blank. There was a US post office racking receipt attached to the affidavit of service indicating that a package was delivered in the borough of the Bronx, but it contained neither an address nor the name of an address. There was no affidavit of personal service. Since there was no indication that the named respondent, Suffolk Federal Credit Union was served with the notice of petition, the petition was dismissed.

Honorable Joseph A. Santorelli

Motion to dismiss denied; failure to include a request for judicial intervention did not constitute a jurisdictional defect.

In *In the Matter of an application of Shelly Massain v. Paul M. Dechance, Chairman, James Wisdom, Howard Bergson, Ronald Lindsay, Wayne Rodgers, Rick Cunha, Charles Lazarou, constituting the zoning board of appeals of the town of Brookhaven, county of Suffolk State of new York, and the Board of Zoning Appeals of the Town of Brookhaven,* Index No.: 5995/2018, decided on March 11, 2019, the court denied the motion to dismiss.

The respondents moved to dismiss the petition on the ground that it was time barred and for lack of jurisdiction. In support of the motion, the respondents argued that the petitioner did not timely commence the action. The respondents acknowledged that the notice of petition and petition were timely filed but argued that a request for judicial intervention was not filed with the court until Dec. 10, 2018, and therefore, the action was not commenced before the statute of limitations expired on Nov. 10, 2018. The court noted that pursuant to CPLR §304(a), in pertinent part, an action is commenced by the filing of a summons and complaint or summons with notice and a special proceeding is commenced with the filing of a petition. The court further pointed out that in pertinent part, 22 NYCRR §202.6 states that at any time after service of process, a party may file a request for judicial intervention. The court also noted that the failure to include a request for judicial intervention did not constitute a jurisdictional defect. The court found that the petition was timely filed and accordingly, denied the motion.

Article 78 petition dismissed; one-year delay constituted laches.

In *In the Matter of the Application of Pinehaven Custom Homes, Inc. v. The Town*

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INSIDE THE COURTS

Waiver of the Right to Appeal in Criminal Cases

By Hon. Stephen L. Ukeiley

This month's column addresses the waiver of the right to appeal in connection with a criminal defendant's plea agreement. It is the court's responsibility to ensure that the waiver is given knowingly, voluntarily and intelligently. This is typically accomplished through the combination of an oral colloquy on the record and a written waiver signed by the defendant. The court and counsel should both be mindful of the requirements and adequately preserve the record.

The Waiver

In People v. Batista, the Appellate Division, Second Department addressed the scope and impact of a criminal defendant's waiver of the right to appeal (86 N.Y.S.3d 492 (2018)). In that case, the defendant plead guilty to robbery in the first degree after getting a commitment to a determinate prison sentence of no longer than 17 years to be followed by five years of post-release supervision (id., at 494). The undisputed facts established that defendant and another individual assaulted a pizza delivery driver at the residence from which they had placed a delivery order. During the attack, defendant repeatedly struck the victim in the head with a baseball bat causing multiple brain fractures (id.). Defendants left the scene with the victim's wallet.

Hon. Stephen L. Ukeiley

At the time of the plea, defendant waived his right to appeal. The trial court conducted a colloquy on the record and defendant executed a written waiver. The court subsequently sentenced defendant to a determinate term of imprisonment of 16 years and five years of post-release supervision (id. at 495). Defendant thereafter appealed arguing that the waiver was invalid and the sentence was excessive.

The Appellate Division disagreed and affirmed the conviction. However, the court pressed upon future courts to give greater attention to the waiver colloquy. To illustrate this point, the Appellate Division noted that during the past five years (between 2013 - 2018) in the Second Department alone, more than 200 waivers of the right to appeal convictions were found insufficient and unenforceable (id. at 499).

Scope of what may be waived

It is well-established that a criminal defendant has the right to appeal a judgment of conviction and sentence. However, that right may be waived where the court is satisfied that the waiver was given voluntarily and with full knowledge of the rights waived.

To accomplish this, the court must be convinced that the defendant "has a full appreciation of the consequences of such waiver" and that the waiver "[i] s separate and distinct from those rights automatically forfeited upon a plea of guilty" (id.). This requires the examination of all relevant circumstances and facts including, but not limited to, the terms of the plea agreement and the "age, experience and background of the accused." The defendant's understanding and voluntariness of the waiver must be "apparent on the face of the record" (id., at 495-96).

Counsel should be mindful that a waiver does not bar the defendant from filing an appeal. Rather, the waiver merely minimizes that which may be raised on appeal. As the Appellate Division noted, a waiver generally bars an appeal on the grounds that the sentence was excessive and "[a]ny issue that does not involve a right of constitutional dimension going to the very heart of the process" (id. (quoting People v. Lopez, 6 N.Y.3d 248 (2006))). However, the right to appeal constitutionally protected actions and conduct, such as the right to a speedy trial under Criminal Procedure Law section 30.30, are not precluded by a waiver (see People v. Callahan, 80 N.Y.2d 273 (1992)).

Sufficiency of the Waiver Colloquy

In Batista, the Appellate Division upheld the waiver — calling it a very close question — because the written waiver cured any deficiencies in the trial court's "terse" colloquy (Batista, 86 N.Y.S3d at 496). Although there are no required scripts or litany of questions that must be included in the colloquy, the onus is on the trial court to make a clear record that the waiver was done knowingly, voluntarily and intelligently.

Some of the topics to be included are set forth in the Criminal Jury Instructions & Model Colloquies. The colloquy should include an advisement from the court and acknowledgment of understanding from the defendant that the defendant is being asked to waive the right to appeal which is ordinarily afforded to all defendants, even where there is a plea. The court should then explain the "nature of the right to appeal," which can essentially be described as the opportunity to argue before a higher court "any issues pertaining to the conviction and sentence and to have that higher court decide whether the sentence or conviction should be set aside based upon any of those issues" (id. at 497-98). The court should further advise the defendant that in an appeal, an attorney would be appointed to represent the defendant should he or she be unable to afford counsel.

The court must further discuss the consequences of the waiver. Specifically, that

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President's Message (Continued from page 1)

So now, a look back.

"Another Night" was a singular achievement for our Bar Association and the Academy, and it would not have been possible without the help of everyone on the committee. That is why I have chosen the members of this committee as recipients of this year's President's Award. Past President Donna England provided some sage advice when I asked her about the award. She said, in short, reward the people who helped you leave a legacy. I believe this will leave a lasting achievement for our bar, and I was happy to be part of it, but again, it doesn't happen without a huge assist from everyone on our committee. So thank you one and all.

We had seemingly unprecedented cooperation and coordination with neighboring bar associations. We worked together with Nassau County on 18B issues and attended a joint meeting with Nassau County where we were able to have a dialogue with Judge Lawrence Marks. We also forged a burgeoning coalition among many local bars in creating the Regional Bar Leaders Council. In the same spirit, we worked jointly with a number of other bar associations to honor Visionary Women of Justice. We created a new-found spirit of camaraderie that I trust will serve our Association well moving forward.

Judge Rowan Wilson of the Court of Appeals visited. It was a truly enjoyable event, one that was met with universal acclaim (other than the fact that, since he is rather soft-spoken and our audio system needs re-working, it was somewhat difficult to hear him . . . but more about that later). He gave us a true vision of the workings of the court, and tremendous insight into his persona, his legal philosophy, and his sense of humor and humility.

Speaking of our audio system, together with Dean Patrick McCormick of the Academy and the Tech Task Force, comprised of Justice John Leo, Erin Benesch, Glenn Warmuth and, of course, Barry Smolowitz, we evaluated the existing audio system, solicited bids, and have just now signed the contract to replace the 27-year-old audio system with one that, quite frankly, will work all the time. Thanks to everyone there too.

We held a couple of membership meetings, bringing our Association back into our communities. War Stories Night, in Riverhead, was fun for me, and I think everyone else who attended. And the tribute to Scott Karson, in Smithtown, was well-attended and enabling Scott to see just how much he is loved. Plus, it got us out of the Bar Association building and back out into our neighborhoods.

Thanks to the aforementioned Vinny Messina, we resurrected the Legislative Breakfast and started to re-build the bridge between the bar and our local legislators. This just cannot be anything but a benefit to us in the future and I look forward to watching it grow in both size and importance as the years go on.

Oh, and the newspaper situation has been resolved, and it looks like that will work to everyone's advantage now and in the future. We were able to restore an important member benefit while, at the same time, reducing Jane LaCova's stress level, at least a little bit. Speaking of which, thanks to Laura Lane for making me sound reasonably articulate. While we're about it, thanks to the staff at the bar for making the bar engine run smoothly, and for keeping me humble every time I walked in. They all definitely make the job easier.

There are countless people to thank. I'm sure I will forget some, so please forgive me if you feel slighted. I meant no insult.

Thanks to the Executive Committee. The successes we achieved, and the issues we navigated, were handled in large part with your support and sound advice. Your dedication to the bar is second to none. The same can be said of our Board of Directors, a group of hard-working volunteers who unfailingly gave practical, sage advice and tremendous support throughout. One could not find a better group of people with whom to work.

I cannot let another minute go by without extending my sincere heartfelt thanks to my cohort and partner, Sarah Jane LaCova. Past Presidents told me that, while I had seen what Jane can do and has done, I would not truly appreciate it until I became president. Talk about understatement? She truly is the heart, soul and brain of our Association, and words just cannot describe how much I value her insight, her opinion, her input but most important, her friendship. A bond was created that can never be broken. I will miss our nearly daily chats, emails, texts and face-to-face conversations. She is absolutely the best friend one could ever wish for, the best advocate one could ever hope for, and the best partner one could ever imagine.

And thanks to everyone who attended a bar event, gave me the benefit of their thoughts on how we could do things better, gave us their ideas for new projects and programs, and otherwise supported our bar. We are the product of our members, and we can't do anything without you.

In sum, it has been a privilege and a pleasure to serve you, our members, as President of the Suffolk County Bar Association. When I took the job, I said I wanted to do a few things. First, I wanted to make the practice of law better and, hopefully, a little more fun for our members. Second, I wanted to abide by the Hippocratic Oath, namely to do no harm (in other words, don't break the bar). Third, I wanted to leave the bar in as good a position as it was when I got here, or maybe even a little better. Hopefully I did all three, and maybe a few more. We all took the work, but not ourselves, very seriously, and managed to deal with some difficult issues in a civil, professional manner, with even a hint of humor now and again.

I will see you in the halls of justice, meetings, parties, closings, or maybe just out in a restaurant, park or social event. Thank you for all of your support, encouragement and kind words throughout what has honestly been one of the best years of my life. I bid you all a fond farewell.

And remember, as Jimmy Buffett says, "If we couldn't laugh, we would all go insane."

Meet your SCBA Colleague (Continued from page 5)

I was approached by members to see if I was interested. I decided I would like to become more involved in the bar association and give back to the attorneys. The organization is run by volunteers. If you are part of this profession you should volunteer to who represents you.

Why would you recommend that attorneys join? I recommend every attorney joins, those who are new to the profession and those who are not. This is our public face. For the newer attorney it would be a way to be introduced to other attorneys, to develop relationships and friendships. Also, the CLE's at the SCBA are much better than watching a video or listening to a recording. You hear from well-spoken attorneys in Suffolk County. As a Suffolk County practitioner that's very valuable.

And why should they get involved? I've been able to develop interpersonal relationships with other attorneys, especially those in different practice areas. Being involved even at an introductory level helps you to meet attorneys you would have never met before. It opens your eyes to these attorneys' problems. You learn how they approach their problems and that's a benefit. And sometimes you find that they have the same problems you do. It's interesting to see how they handle it.

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer. She is an award-winning journalist who has written for the New York Law Journal, Newsday, and is currently a senior editor for the Herald Community Newspapers and the editor of the Oyster Bay Guardian, Glen Cove and Sea Cliff/Glen Head Herald Gazettes.

Bench Briefs (Continued from page 6)

of Brookhaven Planning Board and the Town of Brookhaven, Index No.: 2758/2018, decided on March 29, 2019, the court dismissed the Article 78 petition as time barred.

In this Article 78 mandamus proceeding, the petitioner sought an order compelling defendants, to accept for filing and then promptly consider, review and render a decision in regard to a subdivision application. The town respondents moved to dismiss pursuant to CPLR § 3211(a)(2), (7) and (10) and CPLR §217(1). The town argued that the petitioner failed to timely commence the action within the four-month statute of limitations. In rendering its decision, the court stated that the petitioner hired Cramer Consulting Group to submit lot applications and received correspondence form the town dated May 9, 2017 wherein the petitioner was instructed to submit a road improvement application before applications would be accepted. Thereafter, petitioner did not file this Article 878 petition until over one year after the petitioner had the right to make the demand upon the town respondents. The court concluded that the one year delay constituted laches. The motion was granted and the petition was dismissed as time barred.

Motion to intervene granted; movant received a mandatory notice of the administrative hearing before the ZBA and that she fully participated in the proceedings before the ZBA in connection with the petitioner's application.

In *260 BC, LLC and Further Lane Homeowners Dune & Wildlife Conservation Assoc., Inc. v. The Zoning Board of Appeals of the Town of East Hampton, John Whelan (individually and in his capacity as chairman of and member of the zoning board of appeals of the town of east Hampton), Roy Dalene (individually and in his capacity as a member of the zoning board of appeals of the town of East Hampton), Theresa Burger (individually and in his capacity as a member of the zoning board of appeals of the town of East Hampton), and Samuel Kramer (individually and in his capacity as a member of the zoning board of appeals of the town of East Hampton),* Index No.: 2886/2018, decided on Nov. 2, 2018, the court granted the application to intervene by Taya Thurman as Trustee of the Taya Thurman Trust and Taya Thurman Secondary Residence Trust. The court noted that the test to determine whether in a particular proceeding intervention should be granted is whether the proposed intervenor has a real and substantial interest in the outcome of the proceedings. Here, the proposed intervenor was the owner of real property abutting the petitioner's premises. The movant noted that she received a mandatory notice of the administrative hearing before the ZBA in connection with the petitioner's application and that she fully participated in the proceedings before the ZBA in connection with the petitioner's application. She further alleged that should the petitioner be permitted to erect a 4' by 659' elevated walkway, it would severely impact the use and enjoyment of her property. There was a prior matter that the movant was permitted to intervene. The court granted the application to intervene.

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 also the president of the Nassau County Women's Bar Association.