

## BENCH BRIEFS

By Elaine Colavito

## SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

*Motion to file late notice of medical malpractice; no demonstration of actual prejudice to the defendants.*

In *Alyssa Bradley, an infant, by her mother and natural guardian, Christine Bradley v. Amy Richter, M.D., Paul Lograno, M.D. and St. Charles Hospital*, Index No.: 64010/2013, decided on August 18, 2015, the court granted the plaintiff's motion for an order granting leave to file a late notice of medical malpractice. In granting the application, the court noted that although moving counsel stated that he was delayed in responding to the defendants' discovery demands due to a problem communicating with his client, he established that the plaintiff is complying with the defendants' various demands for discovery, and thus, there had been no demonstration of actual prejudice to the defendants.

*Motion for default judgment denied; that plaintiff failed to alleged sufficient facts to allow the court to ascertain whether he had a viable negligence claim.*

In *Gandolfo Logiudice v. Sun Dance Plaza, LLC, Shirley Plaza LLC, Atrium Plaza LLC*, Index No.: 70348/2014, decided on December 22, 2015, the court denied the motion by plaintiff for leave to enter a default judgment on the issue of liability against the defendants, Sun Dance Plaza, LLC, and Atrium Plaza, LLC. Plaintiff commenced the action to recover damages for personal injuries he allegedly sustained when he tripped and fell while walking in a commercial parking lot. The complaint alleged that the defendants owned, operated, maintained, controlled and managed the premises, and that plaintiff fell due to the defective condition of the parking lot. The complaint further alleged that the defendants breached a duty to maintain the parking lot in a reasonably safe condition, and that they had notice or created the alleged defective condition that caused plaintiff's



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accident. The court pointed out that on a motion for leave to enter a default judgment based in a defendant's failure to appear or answer the complaint, a plaintiff was 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 defendants' default. In denying the application, the court found that plaintiff failed to allege sufficient facts to allow the court to ascertain whether he had a viable negligence claim against Sun Dance or Atrium Plaza, as neither the complaint nor his affidavit in support of the motion contained an allegation as to what caused him to fall in the parking lot. Accordingly, the court denied the motion.

*Motion to sever cause of action denied; leave to renew upon the completion of discovery and the filing of the note of issue.*

In *Thomas Perrota, C.P. an infant under 14 years, by his f/n/g Thomas Perrota, and Thomas Perrota, individu-*

*ally v. 608698/2015*, decided on January 29, 2016, the court denied the defendant, Perrota's cause of action from those involving the infant plaintiff with leave to renew upon the completion of discovery and the filing of the note of issue. The court noted that this was an action to recover damages for injuries sustained by the plaintiff Thomas Perrota, when he was allegedly bitten by a dog owned by the defendant on November 24, 2014, and by the infant plaintiff, when he was allegedly bitten by a dog owned by the defendant on July 13, 2015. In rendering its decision, the court stated that the grant or denial of a request for severance is a matter of judicial discretion. However, severance should be used sparingly. In addition, the court said that severance should not be ordered where there are common factual and legal issues involved in the claims and the interests of judicial economy will be served by having a single trial. Moreover, the court continued, severance is not called for where there is the possibility of inconsistent verdicts in the event that the actions are tried separately. The court concluded that it remains to be

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seen whether the plaintiffs could establish that the defendant knew of her dog's vicious propensities before Perrota's claim arose, whether there is any prejudice, should they be successful, and whether the same is a common issue which might result in inconsistent verdicts. Accordingly, the motion to sever Perrota's cause of action from those involving the infant issue was denied with leave to renew upon the completion of discovery and the filing of the note of issue.

*Motion to dismiss for want of prosecution denied; defendant seeking such relief must serve a written demand by registered or certified mail requiring the plaintiff to resume prosecution and file note of issue within 90 days of such demand.*

In *Pierre W. Prophete v. Jennifer L. Grillo and William A. Grillo 3d*, Index No.: 2398/2011, decided on March 22, 2016, the court denied the defendants' motion for an order pursuant to CPLR §3216, dismissing the complaint for want of prosecution. In rendering its decision, the court noted that CPLR §3216 expressly and unequivocally precludes dismissal for failure to prosecute, or even the making of such a motion, unless the defendant seeking such relief served a written demand by registered or certified mail requiring the plaintiff to resume prosecution of the action and served and filed a note of issue within 90 days after receipt of such demand. Here, the court concluded that the record was devoid of any proof of service or receipt of the requisite demand.

tiff moved this court for a temporary restraining order to bar enforcement of the stipulation of settlement pending resolution of this plenary action. That application was denied. By summons and complaint filed April 21, 2015, plaintiff alleged one cause of action to set aside the stipulation of settlement as unconscionable, grossly inequitable, and a product of overreaching and duress. Plaintiff submitted an order to show cause for a permanent injunction and the defendant cross-moved for an order dismissing the complaint and counsel fees.

The motion for a permanent injunction was denied as the court concluded that since enforcement proceedings were settled in the Family Court, the plaintiff was unable to show irreparable injury, and adequate remedies at law existed. As to the cross-motion to dismiss, the court concluded that when viewing the pleadings, in the light most favorable to the plaintiff, the complaint did not state a cause of action. The court reasoned that the complaint failed to provide sufficient facts to state a cause of action that the separation agreement, viewed as a whole, was unconscionable. Similarly, the husband's complaint failed to state a cause of action as to duress as he did not allege facts that he was under "relentless pressure" from his wife. Further, the court found that the husband's nearly five-year delay in seeking to set aside the agreement barred him from raising the issue of duress. Accordingly, the court dismissed the complaint and awarded counsel fees in favor of the defendant.

sure action had expired. In denying the plaintiffs motion, the court noted that to maintain a cognizable cause of action under RPAPL Article 15, a plaintiff must describe in her or her complaint the nature of the plaintiff's interest in the real property and the source of the interest.

Since the plaintiffs failed to [properly] allege that they possessed a current interest in the subject property, their motion was denied. As to the defendants' cross-motion, the court noted that the document that the defendants sought to introduce in support of their application as not properly authenticated and therefore, the defendant could not establish judgment as a matter of law. Furthermore, the court stated that since Bakshi was not a debtor on the note, the letter sought to establish same did not constitute an acknowledgement

by the debtor of the obligation to pay the existing debt. As such, summary judgment was denied.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at [elaine\\_colavito@live.com](mailto: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 an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.*