

## BENCH BRIEFS

By Elaine Colavito

## SUFFOLK COUNTY SUPREME COURT

### Honorable Paul J. Baisley, Jr.

*Cross-motion for substitution granted; request for sanctions denied; motion for “substitution” treated as motion to amend complaint and denied; failure to include proposed amended complaint; estate not a legal entity capable of suing in its own name.*

In *Geraldine Chustckie v. Steven Chustckie, Jeffery Chustckie, and ABC Shower Door and Mirror*, Index No.: 19380/2014, decided on Jan. 8, 2016, the court denied the motion by defendants for, in part, dismissal for failure to effect a timely substitution, and granted the cross motion by the former attorney for the deceased plaintiff to cross-move, in part, for leave to substitute June Williams, as executor of the state of Geraldine Chustckie, as plaintiff.

Given the relatively brief nature of the delay and that the proper procedure for substitution had been followed, and in view of absence of prejudice to the defendants, and the strong public policy that matters be disposed on the merits, the court granted the cross-motion for substitution. The remaining requests for relief were denied.

As to the defendants’ request for sanctions, the court found no frivolous conduct to warrant such an award at this juncture. To the extent that the plaintiff’s counsel sought to “substitute” parties, other than the executor of the deceased plaintiff’s complaint, the court was constrained to treat the application as one for leave to add parties and to amend the complaint; as such, it was defective for failure to include a proposed amended complaint as required by the CPLR. Further, the court noted that an estate is not a recognized legal entity separate and apart from its representatives, and is not capable of suing in its own name.

### Honorable Joseph C. Pastorella

*Motion for summary judgment decided; questions of fact existed as to whether the defendants acted in self-defense; as to collateral estoppel issue, since burglary in the third degree included the necessary elements of a civil trespass, motion for summary judgment on civil trespass granted.*

In *Jonathan Layton v. Marc Amato, Gregory Amato, Travis Amato and Mr. Lucky’s Pub, Inc.*, Index No.: 16069/2014, decided on Oct. 11, 2016, the court determined the summary judge-



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ment motion as follows: The plaintiff commenced the action to recover for damages for personal injuries arising when the plaintiff allegedly entered the defendant’s bar after hours with a crow bar and was confronted by the defendants, who allegedly assaulted him. The defendants moved for summary judgment on the grounds

that they could not be held liable because they acted in self-defense and that the plaintiff’s conviction precluded him from recovery in this action. Several affidavits were submitted and in view of the conflicting affidavits, questions of fact existed as to whether the defendants acted in self-defense. As to the collateral estoppel issue, i.e., where the issue is identical in both the criminal and civil cases and the defendant had a full and fair opportunity to litigate the issue in the prior criminal proceeding, the court found that since the elements of burglary in the third degree included the necessary elements of a civil trespass, the defendants motion for summary judgment on their counterclaim for civil trespass was granted. Any determination as to damages was to await the trial or other disposition of the remaining claims in the action.

*Motion for summary judgment granted; failure of a municipality to remove ice or snow from a sidewalk considered passive negligence or nonfeasance, requiring written notice before the defendant can be found liable.*

In *Karen Morreale v. Town of Smithtown*, Index No.: 10307/2014, decided on Oct. 20, 2016, the court granted the defendant’s motion for summary judgment dismissing the complaint. The court noted that the action was to recover damages for injuries allegedly sustained by the plaintiff as a result of a slip and fall accident that occurred on a sidewalk or walkway within Charles Toner Park located in the Town of Smithtown. Plaintiff claimed that the Town failed to remove accumulated snow and ice from the sidewalk and created a dangerous and defective condition at the park. The town moved for summary judgment on the grounds that it never received prior written notice of the alleged defective condition, that the notice of claim and complaint were defective and that the plaintiff failed to produce any evidence that the town created the alleged defective condition. In granting the motion, the court stated that the failure of a municipality to remove ice or snow from a sidewalk was considered passive

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negligence or nonfeasance, requiring written notice before the defendant can be found liable. Since the town established its prima facie entitlement to summary judgment in that it did not create the condition that caused the plaintiff's injury, the motion was granted. In addition, the plaintiff did not make any allegations regarding the special use exception in the pleadings or her notice of claim.

*Motion for summary judgment denied without prejudice; municipality may be cast in damages where it assumed all control of a private road and maintained it; discovery is necessary*

In *Nelly Salas, Veronica Plua and Michelle Salas, an infant by her parent and legal guardian Nelly Salas v. Edgar Salas, Lowe's Home Centers, LLC, Town of Huntington, Town of Islip, Town of Smithtown, County of Suffolk, Suffolk County Water Authority and PJ Venture Common, LLC*, Index No.: 10474/2014, decided on Aug. 4, 2016, the court denied the motion for summary judgment by defendant, Town of Smithtown. In deciding the motion, the court noted that in support the Town of Smithtown submit-

ted an affidavit from a Highway Project Inspector who asserted that Henry Street was a private roadway that was not owned or maintained by the town. The court reasoned that despite a lack of ownership, a municipality could be liable for damages where it assumed all control of a private road and maintained it. Since no discovery had been conducted in the action, the court stated that the parties should be entitled to conduct discovery regarding ownership and maintenance of the roads as well as the exact location of the incident. Accordingly, the motion was denied without prejudice.

*Motion to quash granted; subpoena neither contained nor was accompanied by a notice setting forth the reasons such disclosure was sought as required.*

In *Jopal Sayville, LLC d/b/a Sayville Nursing and Rehabilitative Center, as successor to petite Fluer Nursing Home v. Roseanne Freeman, individually, Roseann Freeman as administrator of the estate of Frances Sanfilippo and William Freeman*, Index No.: 18188/2014, decided on Nov. 15, 2016, the court granted the motion to quash the subpoena. Here, the

court found that the plaintiff served a subpoena on Astoria Bank seeking records relating to bank accounts in which the defendants had an interest. However, the subpoena was defective on its face because it neither contained nor was accompanied by a notice setting forth the reasons such disclosure was sought as required by the CPLR.

*Motion to disqualify counsel denied; untimely.*

In *Ann Torres v. Leisure Village Homeowners Association and ABN I Maintenance Corp.*, Index No.: 15682/2014, decided on Nov. 2, 2016, the court denied the motion by defendant, Leisure Village Homeowners Association, for an order disqualifying counsel for plaintiff. Leisure Village moved to disqualify counsel for the plaintiff on the grounds that the law firm had served as general counsel for Leisure Village prior to the incident. In denying the application, the court noted that Leisure Village waited more than a year and a half after this action was commenced to make a motion to disqualify. Since the motion was not time-

ly made, the court held that Leisure Village waived any objection to the plaintiff's choice of counsel. The court continued and stated that even if the motion was timely made, the defendant failed to demonstrate that the two matters were substantially related. In addition, the court noted that the movant failed to set forth the nature of any confidential information allegedly obtained by counsel or show that there was a reasonable probability that such information would be disclosed during the present litigation.

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.*