BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for summary judgment denied. While it appeared from reading his deposition testimony that he suffered from significant cognitive impairment at the time of his deposition, Mr. Liuzzi evidently experienced lucid intervals when describing the accident in question.

In *Karen A. Butts, as Administrator of the Estate of John Liuzzi, deceased, v. SJF, LLC, Advanced Dermatology, P.C., South Country Plaza Condominium, Inc., J.M. Iaboni Landscaping, Inc., and J.M. Iaboni SC Enterprises, Inc.*, Index No.: 366791/10, decided on September 22, 2016, the court denied the defendants' motions for summary judgment.

Defendants, South Country and Iaboni moved for summary judgment dismissing all claims against them on the grounds that plaintiff was unable to articulate what caused his fall, and that plaintiff failed to show that South Country had notice of any alleged dangerous or defective conditions. In determining a motion for summary judgment, the court pointed out that a party moving for summary judgment must make a showing of entitlement of judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact, which require a trial of the action. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue.

Elaine Colavito

In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party. The court further stated that the owner or possessor of real property has a duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries. The court noted that moving defendants contended that Mr. Liuzzi was unable to identify the cause of his fall. The court found that while it appeared from reading his deposition testimony that he suffered from significant cognitive impairment at the time of his deposition, Mr. Liuzzi evidently experienced lucid intervals when describing the accident in question. Though much of his testimony was confused and occasionally contradictory, his lucidity with regard to his fall was apparent during both examinations before trial. However obtuse his description of the cause of his fall was, he was able to specify the cause of it, namely a slippery condition caused by the pebbles strewn on the entranceway's inclined concrete surface. Thus, the court concluded that moving defendants failed to establish entitlement to summary judgment.

Pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) denied; documentary evidence submitted did not utterly refute the factual allegations as a matter of law.

In *23 Three Mile Harbor, LLC v. ACB REO, Corp.*, Index No. 17283/15, decided on October 24, 2016, the court denied the defendant's pre-answer motion to dismiss pursuant to CPLR 3211(a)(1).

In denying the application, the court noted that where a motion to dismiss is predicated on documentary evidence pursuant to CPLR 3211(a)(1), the motion may be granted only if the documentary evidence submitted utterly refuted the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law.

Here, the court found that the defendant's selective and self-serving interpretation of the contract provisions failed to meet the foregoing standard. The court continued and states that it is well established that in determining the meaning of contractual language, a court should not read a contract to render any term, phrase or provision meaningless or superfluous, but should construe it to give effect to all of the contract's provisions. The defendant in interpreting the agreement renders paragraph 7 and 37 as conflicting, and claims that paragraph 7 is superfluous. Consequently, the defendant's submissions failed to utterly refute plaintiff's claim that the representations in paragraph 7 of the agreement required the defendant to correct any preexisting violations survive delivery of the deed, notwithstanding plaintiff's agreement to purchase the property "as is."

Honorable Ralph T. Gazzillo

Motion for an order pursuant to CPLR 3025(b), granting leave to add

(Continued on page 24)

Bench Briefs *(Continued from page 4)*

Evelyn Castillo as a party defendant and amend the complaint to add a cause of action for fraud and concealment; no prejudice or surprise.

In *Harleysville Worcester Insurance Company v. Juan Jose Castillo and Jorge Castillo-Fernandez, et.al.*, Index No.; 1210/13, decided on October 24, 2016, the court granted the motion by plaintiff for an order pursuant to CPLR 3025(b), granting leave to add Evelyn Castillo as a party defendant and amend the complaint to add a cause of action for fraud and concealment. The court noted that leave to amend will generally be granted provided the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious. It is also established that the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt. Thus, the party opposing the motion to amend, must overcome a heavy presumption of validity in favor of the movant and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are not sufficient.

Here, the court noted that the defendants did not allege prejudice or supruise on their part regarding the proposed amendment. In addition, Juan Castillo and Fernandez could not claim surprise because Juan and evelyn castillo were questioned about the salient facts regarding the issues of fraud and concealment in their depositions, which were attended by counsel for said defendants. Moreover, the court found that the defendants failed to establish that the facts alleged in the moving papers were not reliable or were legally insufficient to plead a cause of action. Accordingly, the motion was granted.

Motion to dismiss denied; based upon the applicable statutes, neither the Town code of East Hampton nor the New York State Legislature intended for the statute to protect speculative builders from the subcontracctors that they hire on their jobs.

In *Kristeel, Inc. v. Seaview Development Corp., et al.*, Index No.: 609220/15, decided on July 19, 2016, the court denied the defendant's motion to dismiss.

The action was commenced by plaintiff, a steel construction contractor primarily engaged in the business of commerical construction. This action was commenced against defendant, the general contractor, when the defendant allegedly defaulted in making payments to the palintiff for its work, labor and services performed. Defendant's claimed that the action should be dismissed because the East Hampton Town bars recovery since the plaintiff does not have a home improvement contractor's liscense issued by the town. In rendering its decision, the court noted that based upon the applicable statutes, neither the Town Code of East Hampton nor the New York State Legislature intended the statute to protect speculative builders (who should be aware of the applicable home improvement contractor liscensing requirements in the muncicipalities where they do business) from the subcontractors that they hire on their jobs. Rather, these statutes were intended to protect the average homeowner from unscrupulous home improvement contractors. As a careful reading of the applicable statute shows that this is the intended effect, the motion was denied.

Honorable William B. Rebolini

Tax returns discoverable; plaintiff self employed and loss of earnings claims arising out of underlying accident.

In Robert Vozzella and Anna Marie Vozzella v. Current Holdings Group, Inc. d/b/a/ Air Trampoline Sports, 3 Atoms, LLC, Trampoline Park Equiptment, Fun Spot Trampolines and Fun Spot Manufacturing, LLC, Index No.: 64047/14, decided on November 14, 2016, the court granted the defendants' motion to the extent that defendant was entitled to discovery of plaitniff's tax returns. In rendering its decision, the court noted that while generally tax returns are not discoverable, in the absence of a strong showing that the infromation is indespensible and not obtaineable from other sources, here the defendant was entitled to such information. The court reasoned that the defendant was entitled to such information because the plaintiff was self employed and had a claim for loss of earnings arising out of the underlying accident.

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 an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.