

By Elaine Colavito

## SUFFOLK COUNTY SUPREME COURT

## Honorable Paul J. Baisley, Jr.

*Complaint and amended complaint dismissed; costs awarded.*

In *Marie Guerrera Tooker v. David A. Schwartzberg, Richard Handler, Ryan McKeon, Windles, Marx, Lane & Mittendorf, LLP, Vincent Ferro, David Reilly, Raymond Grasing, Ernest Ranalli and John and Jane Does 1-10*, Index No.: 9463/2014, dated August 17, 2015, the court granted the defendants' motions to dismiss the complaint and amended complaint.

The court reviewed the complaint and amended complaint and concluded that the allegations failed to assert a claim. The court also noted that the record and submissions established that plaintiff had no individual interest in the foreclosed properties. Accordingly, plaintiff had no standing to assert the claims therein. Also, all of the claims asserted by plaintiff were also asserted in a foreclosure action and were barred by the principles of res judicata and/or collateral estoppel. Finally, in granting the motions to dismiss, the court noted that plaintiff's action was jurisdictionally defective. Where a summons and complaint are timely filed but not served, service of a substantively similar amended summons and complaint may be proper when it is served during

the 120-day period when service of the original pleadings was required under CPLR §306-b. The court noted that the records reflected that plaintiff commenced this action on May 8, 2014 by filing of a summons and complaint. Plaintiff's filing of the amended complaint, without leave of court on September 9, 2014 was outside the 120-day period of CPLR §306-b. Further, the court clerk's records indicated that plaintiff never filed affidavits of service of the original complaint and the amended complaint.

In light of the foregoing, defendants' motions were granted and plaintiff's complaint and/or amended complaint was dismissed. In addition, the court found that the actions of plaintiff in commencing and continuing this action when the lack of legal or factual basis was apparent, or was brought to the attention of the plaintiff as frivolous within the meaning of 22 NYCRR §130-1.1. The court awarded the moving defendants costs in the form of reimbursement for actual expenses.

*Pre-answer motion to dismiss denied; factual issues not properly determined on pre-answer motion to dismiss.*

In *In the Matter of the Petition and application of the Tuckahoe Common*



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*School District, and the Board of Trustees of the Tuckahoe Common School District v. Town of Southampton, Tiffany Scarlato, Town Attorney for the Town of Southampton, and Kathryn Santiago, Former Assistant Town Attorney for the Town of Southampton*, Index No.: 24111/2014, decided on November 5, 2015,

the court denied the respondents pre-answer motion to dismiss.

The court noted that the petitioners commenced this Article 78 proceeding to vacate the denial of the Freedom of Information Law ("FOIL") request dated June 3, 2014 by respondent Town of Southampton and its then-designated FOIL officers. Petitioners' FOIL request sought records and documents pertaining to requests by National Golf Links of America, Southampton Golf Club, Shinnecock Hills Golf Club and Sebonack Neck Property for reductions of assessed evaluations of their golf course properties located within the Tuckahoe Common School District for the tax years 2006 to the present. In its verified petition, petitioners alleged that the respondents failed to timely and properly respond to its FOIL request, and that such failure was arbitrary, capricious, and irrational and in violation of law and of duties owed by respondents and in excess of respondents' lawful authority.

In deciding the motion, the court

noted that where dismissal is sought under CPLR §3211(a)(7) for failure to state a cause of action, the only issue the court must determine is whether the facts alleged by the petitioner fit within any cognizable legal theory. In denying the motion, the court noted that the entity subject to the Freedom of Information Law was required upon receipt of a demand for production of documents and the payment of the proper fee therefore to provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. The issue of whether a diligent search was actually conducted is a factual issue not properly determined on this motion. Accordingly, the pre-answer motion to dismiss was denied.

*Motion for summary judgment granted; Allstate failed to provide it's insured with proper notice pursuant to Insurance Law §3211(a).*

In *Marco Rivera v. Allstate Life Insurance Company of New York*, Index No.: 63509/2014, decided on June 16, 2015, the court granted the plaintiff's motion for summary judgment on his claims. The court noted the facts as follows: On June 20, 2005, Joanne Corless purchased a \$100,000.00 term life insurance policy from defendant. The

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policy called for an annual premium, but Ms. Corless selected an alternate payment plan providing for monthly premium payments to be withdrawn electronically. The electronic payment agreement provided that the agreement may be ended automatically by Allstate if any debit entry has been refused by the bank and further provided that Allstate would not send premium notices. In August of 2013, when Ms. Corless was terminally ill with cancer, she closed the bank account and the bank refused the August premium. This action was commenced by the beneficiary of the plan to recover the proceeds of the policy on the grounds that defendant failed to give proper notice of the premium due and the risk of policy lapse pursuant to Insurance Law §3211; breach of contract; and equitable principals of Insurance Law. In granting the motion for summary judgment in favor of the plaintiff, the court found that as a matter of law that Allstate failed to provide its insured with proper notice pursuant to Insurance Law §3211(a). Accordingly, the policy was still in effect when the insured died on September 28, 2013 and plaintiff was entitled to summary judgment on his claim of entitlement to the policy proceeds, less any premiums due.

## Honorable Peter H. Mayer

*Petition which sought an order pursuant to RPAPL §1931 discharging the subject mortgage of record or alternatively pursuant to RPAPL §1921 discharging the subject mortgage after payment of record principal amount of \$89,372.00 denied; without a copy of the subject mortgage, the court was unable to ascertain whether or not the mortgage, or any provisions therein, survived any alleged payment in full; no assertion that mortgage paid in full.*

In *Clifford James Distler, Jr. and*

*Diane Distler v. Home Credit Corporation, Home Loan & Investment Association, Provident Savings Bank, Fidelity National Title Insurance Services, LLC and Suffolk County Clerk*, Index No.: 13095/2014, decided on April 8, 2015, the court denied the petition which sought an order pursuant to RPAPL §1931 discharging the subject mortgage of record or alternatively pursuant to RPAPL §1921 discharging the subject mortgage after payment of record principal amount of \$89,372.00.

Initially, the court noted that the petition did not include a copy of the mortgage, which the petitioners sought to have discharged. It was well settled that a mortgage may be kept alive, even after payment in full, if such was the intention of the parties, provided innocent third persons are not prejudiced thereby. Here, without a copy of the subject mortgage, the court was unable to ascertain whether or not the mortgage, or any provisions therein, survived any alleged payment in full. Consequently, the petition had to be denied. Further, the court noted that in relevant part, RPAPL §1921 authorizes any person having an interest in a mortgage to apply for an order discharging the mortgage where the mortgagee, after payment of all outstanding principal and interest has been made, refuses to execute a satisfaction of mortgage. Where there was no proper evidentiary proof to corroborate the petitioner's assertion that he or she tendered full payment of the mortgage obligation to the mortgagee, the petition for discharge of the mortgage under RPAPL §1921 must be denied. In addition, the court cited that RPAPL §1931 sets forth the requirements for a petition seeking discharge of mortgage on the grounds that it is an ancient mortgage presumed paid. In this regard, RPAPL §1931(2) states, "such petition shall be veri-

fied...and shall allege that such mortgage is paid.

Here, although the petition was verified, neither the petition nor the affidavit in support alleged that the subject mortgage had been paid. Based upon the above, the petition was denied.

*Motion to serve a late notice of claim granted; overall circumstances warranted excusing the delay in the interests of justice.*

In *Maya Khalil, an infant, by Nawal Ibrahim, the person having legal custody, and Nawal Ibrahim, individually v. The Sheriff of Suffolk County, Suffolk County, and Sheriff Deputy R. David Diem*, Index No.: 14671/2014, decided on June 17, 2015, the court granted plaintiff's motion which sought an order for permission to serve a late notice of claim upon the defendants.

In determining whether to grant an application for leave to serve a late notice of claim, a court should consider whether a public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter; whether the claimant demonstrated a reasonable excuse for the delay in filing a notice of claim; and whether the delay would substantially prejudice the public corporation in maintaining its defense on the merits.

Here, the court found that the overall circumstances warranted excusing the delay in the interests of justice. Therefore, plaintiff's motion was granted.

*Motion for default judgment denied; insufficient submission.*

In *Matthew Kwas v. Christopher J. Marr, Linda Marr, Jane and John Doe #1-10*, Index No.: 15241/2014, decided on October 16, 2015, the court denied plaintiff's motion for a default judgment pursuant to CPLR §3215.

In denying the application, the court noted that the application was denied for failure to include a copy of the summons and complaint, failure to establish a basis for venue of the action in Suffolk County, failure to submit proof of proper service of the summons and complaint, as required by CPLR §308, sufficient to establish jurisdiction over the defendants; and failure to submit an affidavit stating whether or not the defendants are in military service and showing necessary facts to support the affidavit.

Further, to the extent that the plaintiff was claiming a breach of contract, the court denied the application for failure to submit evidentiary proof, including an affidavit of service from one with personal knowledge, of compliance with CPLR §3215(g)(3) regarding additional notice required when a default judgment is sought against an individual in an action based upon non-payment of a contractual obligation; and for failure of the movant to present prima facie proof of a valid cause of action upon which the court may grant a judgment by default pursuant to CPLR §3215. As such, the motion for a default was denied.

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