

## BENCH BRIEFS

By Elaine Colavito

**Suffolk County Supreme Court  
Honorable Peter H. Mayer**

*Motion for default judgment denied; notwithstanding the defendant's alleged default, county failed to establish a prima facie case.*

In *Dennis M. Brown, County Attorney for the County of Suffolk v. a2011 Ford Vin.No. 1FAHP3FN0BWI40087, and Kathleen Antonson and RBS Citizens NA, a lienholder and potential claimant with interest in the vehicle*, Index No.: 21968/2013, decided on September 11, 2015, the court denied plaintiff's motion, which sought a default judgment against the noncriminal defendant, Kathleen Antonson, and forfeiture of Ms. Antonson's vehicle pursuant to Suffolk County Code, Chapter 420.

In support of the motion, the county failed to produce clear and convincing evidence that the noncriminal defendant engaged in affirmative acts which aided, abetted or facilitated the conduct of the criminal defendant, as required by SCC §420-7G. In deciding the motion, the court noted that a plaintiff seeking a default

judgment under CPLR §3215 must present prima facie proof of a cause of action, and while a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions, which are reserved for the court's determination. Where a valid cause of action is not stated, the party moving for judgment is not entitled to the request relief, even on default. Accordingly, here, notwithstanding the defendant's alleged default, the county's failure to establish a prima facie case pursuant to the burden of proof set forth in its own code precluded a judgment of default and forfeiture in favor of the county. Based upon the foregoing, the noncriminal defendant was entitled to maintain ownership and possession of her vehicle, and the county was directed to take all measures necessary to remove all interlock device mechanisms from her vehicle.

*Motion for default judgment denied; failure to annex a copy of*



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*the summons and complaint; failure of the movant to submit an affidavit; failure to submit evidentiary proof of compliance with the personal service provisions of CPLR §308(4); failure of the movant to annex a copy of the subject deed.*

In *Barbara Guenzel v. Mary F. Boone*, Index No.: 17577/2013, decided on February 11, 2015, the court denied the motion for a default judgment. In this action, the plaintiff alleged that she was entitled to a partition of a property located at 948 Karshick Street, Bohemia, New York, which the parties allegedly held as tenants in common. The plaintiff sought a default judgment against the defendant(s), for failure to answer or otherwise appear in the action.

The plaintiff's motion was denied for the following reasons: failure to annex a copy of the summons and complaint; failure of the movant to submit an affidavit stating whether or not the defendant is in military service and showing necessary facts

to support the affidavit; or if the plaintiff is unable to determine whether the defendant is in military service, stating that the plaintiff is unable to determine same, not merely a statement "upon information and belief;" failure to submit evidentiary proof of compliance with the personal service provisions of CPLR §308(4), sufficient to establish jurisdiction over the defendant(s), not merely a showing of several attempts to serve a defendant at his or her residence without a showing that there was first a genuine inquiry about the defendant's whereabouts and place of employment; and failure of the movant to annex a copy of the subject deed and thereby present prima facie proof of a valid cause of action upon which the court may grant a judgment by default pursuant to CPLR §3215.

*Cross-motion to dismiss Article 78 petition granted; petitioner sought same relief as in prior petition; petition denied in prior proceeding due to statute of limitations issue.*

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In *Ralph Oyague v. County of Suffolk*, Index No.: 14033/2013, decided on May 1, 2015, the court granted respondent's cross-motion to dismiss the petitioner's Article 78 petition on the grounds of res judicata and statute of limitations. In rendering its decision, the court noted that res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if there is a judgment on the merits rendered by a court of competent jurisdiction, and if the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was.

With regard to the statute of limitations issue, the court pointed out that pursuant to CPLR §217(1), a petitioner who seeks Article 78 review of a determination must commence the proceeding within four months after the determination to be reviewed becomes final and binding upon the petitioner. In granting the cross-motion, the court found that in the prior Article 78 proceeding, the petitioner sought the same relief sought in this proceeding, and that in the prior proceeding, the court dismissed the petition based upon statute of limitations grounds. Accordingly, the current petition had to be likewise dismissed on the grounds that the proceeding was barred by the statute of limitations and in accordance with the doctrine of res judicata.

**Honorable William B. Rebolini**

*Motion to set aside jury verdict denied; jury verdict not against weight of evidence.*

In *David Gagnon v. Catherine Nicoletti, and Suffolk County Water*

*Authority*, Index No.: 11328/2012, decided on July 22, 2015, the court denied the motion by plaintiffs, for an order setting aside the jury verdict on the issue of damages as inadequate and contrary to the weight of the evidence.

The court noted that the plaintiffs commenced this action to recover damages for personal injuries sustained by David Gagnon as the result of a motor vehicle accident. Following a damage trial, he was awarded \$100,000 for conscious pain and suffering and \$75,000 for lost earnings up to the date of trial. He was awarded \$75,000 for future lost earnings for a 3-year period and \$10,000 for future medical expenses and \$0 for future pain and suffering. In rendering its decision, the court reasoned that a jury verdict is contrary to the weight of evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached in any fair interpretation of the evidence. The court continued and stated that it is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses. Here, the court concluded that the jury verdict was not against the weight of evidence.

*Motion to compel granted to limited extent; Facebook postings attributed to defendant allegedly containing admissions of his intent to commit an assault and therefore, such statements were relevant to plaintiff's case in chief as well as to the affirmative defenses asserted by defendant; private one-on-one messages made through Facebook account not subject*

*to disclosure since they were not readily available for public viewing.*

In *Tobias Monaco v. Michael Ammirati*, Index No.: 10405/2013, decided on June 9, 2015, the court granted the motion to compel to the extent that the defendant was directed to print out and to retain all photographs and videos, whether posted by others or by defendant himself, as well as status postings and comments posted on defendant's Facebook and other special media accounts, including all deleted materials. Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on January 14, 2013, while plaintiff was on duty as a security officer at the Patchogue-Medford High School and the defendant was a student at the school. In support of his request for disclosure, plaintiff produced copies of what purports to be defendant's Facebook page from January 14 on which appears numerous postings allegedly by the defendant. In granting the motion to the extent provided within, the court found that plaintiff demonstrated that the Facebook postings attributed to defendant allegedly containing admissions of his intent to commit an assault and therefore, such statements were relevant to plaintiff's case in chief as well as to the affirmative defenses asserted by defendant. Furthermore, the court stated that to the extent that the postings were made to be seen by others, there was no reasonable expectation of privacy that attached to the postings. Plaintiff's private one-on-one messages made through his Facebook account were not subject to disclosure since they were not readily available for public viewing.

*Motion to appoint receiver denied; no clear evidentiary showing that the property was in danger of being removed from the state, or lost, materially injured or destroyed.*

In *Niki Mouzakiotis v. Stryliani Mouzakiotis*, Index No.: 11682/2013, decided on September 21, 2015, the court denied defendant's motion for an order appointing a temporary receiver to sell certain real property. The court noted that the appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without adjudication on the merits. Here, no evidence of the value of the property was submitted to the court, nor was there sufficient evidence to support defendant's claim that a foreclosure sale was inevitable. The defendant had not made a clear evidentiary showing that the property was in danger of being removed from the state, or lost, materially injured or destroyed. Accordingly, the motion to appoint a receiver was denied.

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*Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent 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.*