

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

HONORABLE PAUL J. BAISLEY, JR.

Motion to quash non-party subpoena to depose non-party witness prior to deposition of any party denied; no authority cited that party discovery must be completed before non-party witness deposition

In *Anna Kahl*, as Administrator and Representative of the Estate of *Andrew Costanzo and Anna Kahl*, individually v. *MDC Tavern Corp. d/b/a The Carousel Lounge*, Index No.: 45825/08, decided on August 24, 2009, the court denied defendant's motion seeking an order pursuant to CPLR §2304 quashing the subpoena dated May 11, 2009. The court noted that defendant's sole objection to plaintiff's facially valid subpoena was that is sought to depose a non-party witness prior to the deposition of any party to the action and prior to the completion of party discovery. The court reasoned that the defendant had not cited to any provision of the CPLR or any other authority for its position that party discovery must be completed before the deposition of a non-party may be taken. As such, the court declined to impose such a rule.

HONORABLE JOSEPH FARNETI

Motion for leave to enter default judgment denied; no opposition to motion however, papers were procedurally defective

In *Stephanie Davis and Ernestine Williams v. Stephanie Jaffe*, Index No.: 42843/08, decided on June 30, 2009, the court denied plaintiffs' motion for an order pursuant to CPLR §3215, granting leave to enter a default judgment in favor of plaintiffs. In denying the motion, the court noted that although the defendant had not interposed any opposition to the motion, the plaintiffs failed to submit the summons and complaint and an affidavit of service of same. Accordingly, the court found this application procedurally defective and insufficient.

HONORABLE PETER H. MAYER

Motion for a default judgment granted; opposition failed to make the requisite showing of a meritorious defense or reasonable excuse for the default, and failed to include a cross motion with a proposed answer

In *David M. Masters v. Chad Trimis*, Index No.: 39644/07, decided on May 15, 2009, the court granted plaintiff's motion for a default judgment. The court noted that the defendant's initial opposition to the plaintiff's motion consisted solely of an affidavit from defense counsel. The defendant then submitted a "sur reply," which included an affidavit from the defendant. The court found that the "sur reply" which was almost identical to the recitation of the attorney's affirmation, failed to set forth facts that warranted denial of the plaintiff's motion. For example, the defendant only vaguely asserted that he thought that his

unidentified criminal attorney would be handling this action, and that it "appeared" that the failure of that attorney was the result of law office failure or an attorney-client misunderstanding. Further the defendant stated, in a conclusory fashion that he had a "meritorious defense." Finally, the defendant failed to cross move for leave to serve a late answer and failed to include a proposed answer. In so much as defendants' opposition failed to make the requisite showing of a meritorious defense or reasonable excuse for the default, and failed to include a cross motion with a proposed answer, the plaintiff's motion was granted as to liability, with the issue of damages to be heard at inquest.

HONORABLE EMILY PINES

Motion to reargue granted; upon reargument motion for summary judgment denied, issue of fact existed

In *Stacey Ann Hill and Robert Hill v. Fence Man Inc., The Town of Huntington, and the Town of Huntington Highway Department*, Index No. 8281/07 the court granted defendant's motion for leave to reargue the motion by co-defendant Fence Man, Inc. for summary judgment dismissing all claims against it. The court pointed out that a motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, and may not be used to advance arguments different than those presented on the prior motion.

The court reasoned that upon further review of the evidence submitted by the parties on the prior summary judgment motion, an issue of fact existed as to whether or not defendant Fence Man negligently created a dangerous condition. Thus upon reargument, defendant Fence Man's application for summary judgment dismissing plaintiff's complaint was denied.

Motion for summary judgment denied; insufficient opportunity to establish facts which would warrant the summary determination sought

In *Aileen Rankin v. Richard Kern, ADK Mechanical, Inc., Sharon Kern, Alan H. Kirk, Inc., Alan H. Kirk and AM Sutton Associates, Inc., and Richard and Sharon Kern v. Elegant Stair and Rails*, Index No.: 13714/06, decided on June 4, 2009, the court denied defendant's motion for summary judgment dismissing the action by plaintiff. The court noted that a motion for summary judgment is a procedural equivalent of a trial, and therefore, warranted sparing use. The court reasoned that there were occasions on which opponents of a motion may be unable to present the existence of material facts because the course of discovery had not been sufficiently advanced to have collected the requisite evidence. In those instances, the motion for dismissal must be deemed premature. Here the court found that the central question was whether further discovery would reveal existence of such evidence. Depositions had not been conducted. To date there had not been a suf-

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APPELLATE LITIGATION

Constitutionality of the Appointment of Lieutenant Governor

Lawyers and Community Groups File Amici Brief

By: Ricardo Montano

On September 22, 2009, the Court of Appeals issued a landmark decision in the case of *Skelos v. Paterson*, reversing a unanimous decision of the Appellate Division, Second Department, and finding that the New York State Constitution gives the Governor the right to appoint an interim Lieutenant Governor. Until this decision, most assumed that the Governor did not have this authority, and many considered Governor Paterson's case a long shot. In fact, before Governor Paterson appointed Richard Ravitch Lieutenant Governor, Attorney General Andrew Cuomo issued an opinion advising that the New York State Constitution prohibited such an appointment.

Along with Ivan E. Young, Chairman, Islip Town Democratic Committee, Voces Latinas Marcando La Diferencia, Inc.; Tutor Time Day Care and Pre-School Center of North Amityville; Puerto Rican Coalition for a Better Community, Inc.; Central Islip Civic Council; and the Salvadoran Alliance of New York, Inc, we filed a motion to appear as amici curiae and filed a brief in support of Governor Paterson's position. During the Legislative stalemate of the past summer, several home rule messages from the Suffolk County Legislature and numerous funding requests from the agencies in question were held in limbo. Furthermore, two Senators claimed to be the temporary president of the Senate leaving no clear line of succession. We appeared as amici curiae in order to give voice to minority

and underprivileged communities that would be among the most affected by another legislative stalemate.

In our brief we acknowledged that the New York State Constitution was unclear as to how to fill a vacancy in the office of Lieutenant Governor. We also acknowledged that both the Governor and Senator Skelos' arguments presented potential conflicts with other provisions of the Constitution. We demonstrated, however, how the Governor's approach could be reconciled with the rest of the Constitution to ensure that all provisions were given full force and effect. We also argued that such an interpretation was consistent with the Court of Appeals prior decision in *Ward v. Curran* (291 N.Y. 642 [1943]), amendments to the Constitution following *Ward*, and why our interpretation was in the public's best interest.

Mr. Ravitch's appointment had come in response to a 31-31 split between the Democrats and Republicans in the State Senate earlier this year. Each party had nominated a Temporary President of the Senate leading to a political deadlock. The deadlock stalled the Senate's business and left undetermined which political party was in control. Hoping to resolve the deadlock, Governor Paterson appointed Richard Ravitch Lieutenant Governor.

In making the appointment, the Governor relied on §43 of the Public Officers Law. Senators Dean G. Skelos and Pedro Espada filed suit in Nassau County



Ricardo Montano

Supreme Court, and the Court ruled in their favor. (Senator Espada subsequently withdrew from the action). The Appellate Division unanimously affirmed and sua sponte granted leave to appeal to the Court of Appeals.

At issue were New York State Constitution Article IV, Sec. 6, Article XIII, Sec. 3, and Public Officers Law Sec. 43. Article IV, Sec. 6, states, in relevant part, that "the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected." Article XIII, Sec. 3 then empowers the Legislature to determine how vacancies in public offices are filled. Pursuant to that authority, the Legislature passed Public Officers Law Secs. 41, 42 and 43. Section 41 prescribes the means to fill vacancies in the Office of Attorney General and Comptroller. Section 42 relates to vacancies in elective offices, but specifically exempts the office of Lieutenant Governor. Section 43 is a catch-all that specifies how to fill vacancies in public offices not otherwise provided for.

Consistent with these arguments and those by Governor Paterson and the other amici appearing on Governor Paterson's behalf, the Court of Appeals held that Art. XIII, Sec. 3 mandates that the Legislature provide for the filling of vacancies. If it is to be given its full force and effect, Art. IV, Sec. 6 cannot be read to mean that the vacancy may not be filled. Nor does Art. XIII, Sec. 3's limitation on the duration of the appointment prevent the Governor

from appointing a Lieutenant Governor. The temporal limitation was only intended to ensure that the appointment did not last longer than was reasonably necessary. In contrast an extended vacancy, which would result from the Appellate Division's interpretation, would be inconsistent with the purpose of Art. XIII, Sec. 3, the Court's prior decision in *Ward*, and post-*Ward* Constitutional amendments requiring that the Governor and Lieutenant Governor be elected together.

As the Court of Appeals stated, whether

"We appeared as amici curiae in order to give voice to minority and underprivileged communities that would be among the most affected by another legislative stalemate."

it would be better for a vacancy in the office of Lieutenant Governor to be filled by election, or appointment subject to Legislative confirmation is a question for another day. That will be debated in the months and years ahead. For now though, the Constitution gives the Governor the power to appoint a Lieutenant Governor. That approach was not only the right decision under the Constitution and well-

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Collaborative Law - Here it Comes Ready or Not! (Continued from page 1)

more likely in Collaborative Law. Here is how.

Collaborative Law is a relatively new process that is gaining much favor around the country and the world.¹ It is being utilized extensively in Matrimonial and Family Law, but is also suitable for Corporate Law, Commercial Law, Surrogate Law and others.² In Collaborative Law, each party hires an attorney who is experienced in the particular area of the law and trained in Collaborative Law. The process rests on three foundational elements: the parties, as well as the attorneys, agree that they will not seek court intervention but will resolve all issues by negotiation in the Collaborative Process; the parties and their attorneys agree that if the process should break down, the attorneys will not represent their clients in court; and all parties and attorneys agree to the open exchange of all pertinent information with the goal of reaching an agreement that meets the important priorities of both parties.

The parties in Collaborative Law will also hire neutral professionals whenever necessary to foster the process. These are, of course, the same types of professionals that would be appointed in a litigation setting. In Collaborative Law, however, each ancillary professional involved, as well as each attorney, has been trained in Mediation and Collaborative Law techniques, and none of the professionals will represent the parties in court if the parties fail to reach an agreement.³

Professionals and parties alike are finding that Collaborative Law offers the best aspects of litigation and mediation: each party is represented by independent counsel throughout the process; the parties remain in control of their process; the entire team focuses on each party's highest

priorities and goals; and all issues are resolved without court intervention. Parties are also finding that the process, although generally more expensive than mediation, can be much less expensive than litigation.

Attorneys are finding that a Collaborative Agreement is more durable than an agreement reached in a traditional litigation setting, which they attribute to the fact that the parties themselves are involved in every phase of the process and resolve the issues in light of their individual priorities and goals: the parties each have the benefit of experienced attorneys and other professionals throughout the process who are able to point out future consequences of each possible solution; and the process itself gives the parties tools to use in the event a future issue may arise. In this way, the parties are able to fashion an agreement that tends to be far less litigious through the years. In case of a subsequent dispute, the parties can use the tools they have learned in the Collaborative Process or simply return to their Collaborative Team to resolve the issue.

In short, the Collaborative Process has been found to lessen the adversarial nature of a dispute; lessen the financial and emotional cost of resolving the dispute; and produce more durable resolutions.⁴

In some areas of the United States and Canada, Collaborative Law has changed the practice of law for attorneys, clients and even courts. Why not consider how you might integrate Collaborative Law into your practice. Clients across the nation are increasingly seeking alternative methods to resolve disputes. Why not expand your client base and have more flexibility in every facet of the case, including payment options. You might

even move yourself closer to the very reason that you entered our profession. At the very least, you need to know more about a process that is increasingly changing the practice of law in many areas of our country. Long Island may be next - ready or not!

For more information, attend the CLE Seminar to be presented at the Suffolk County Bar Association on November 9 at 6:00 p.m., or consult the web site of the International Association of Collaborative Professionals at www.collaborativepractice.com.

Note: Amel R. Massa, Esq. is a Matrimonial and Family Law litigator of 20 years, and an experienced Collaborative Lawyer and Mediator. He served four years as an Officer of the Suffolk County Academy of Law, and has coordinated and/or served as faculty for many presentations in the area of Matrimonial and Family Law, both in Suffolk and Nassau Counties. He is a Facilitator for the Suffolk County P.E.A.C.E. Program; an Arbitrator for the Suffolk County District Court; a Mediator for the Nassau County Matrimonial ADR Program; and a Neutral Evaluator for the Nassau County Matrimonial ADR Program. He is a member of the Suffolk County Bar Association and the New York Family Law American Inn of Court, which meets in Nassau County. He maintains offices in Suffolk and Nassau Counties, and can be most easily contacted at (631) 470-9662.

Note: Rosemarie Bruno, Esq. is a practicing Collaborative Lawyer and Mediator whose office is located in Holbrook, New York. Ms. Bruno's matrimonial and family law practice is currently limited to

Collaborative Law, Mediation and uncontested matrimonial cases. Ms. Bruno has an active bankruptcy practice. Additional information about Ms. Bruno and her practice can be found at www.rosemariebruno.com.

¹ Since its origination in 1990, California, North Carolina and Texas have enacted statutes to recognize and regulate Collaborative Law, and California, Florida, Louisiana, Minnesota and Utah have enacted Court Rules governing the practice. On July 15, 2009 the Uniform Collaborative Law Act was passed by the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission), and the Act is being circulated to national and state bar organizations for review and comment (See, Schepard, Andrew, *The Uniform Collaborative Law Act: A Mission*, 71(10)2009 NYLJ 3, (col. 1)). Importantly for us, on September 1, 2009, the New York State Unified Court System announced the opening, in Manhattan, of the first court-based Collaborative Family Law Center in the country (See, http://www.nycourts.gov/press/pr2009_15.shtml).

² While application to Matrimonial and Family Law may be obvious, for a general discussion of the applicability of Collaborative Law to other civil cases, see, Solvay, Norman, *The Future of Collaborative Law*, New York Dispute Resolution Lawyer, pp. 63-64 (Fall 2008).

³ Experience to date shows that parties reach an agreement in all but a small percentage of cases. For more detailed information regarding the process of Collaborative Law, see, Tessler, Pauline H., *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*, Second Edition (ABA 2008), see also, Schepard, Andrew, *supra*.

⁴ For an expanded list of benefits of Collaborative Law, see, Solvay, Norman, *supra*, note 2 at pp. 62-63.

The Road Ahead (Continued from page 1)

enges, which we have never before confronted, but which we should, and will address.

It has been said that "[a]ll the world is a narrow bridge. The main things is, do not be afraid to cross it."¹ Hence, the Bar Association will move forward this year, as we have on so many countless occasions, with an agenda that resonates with resilience, and the tenacity to develop programs and enhance its goals in order to accommodate the needs and aspirations of its membership during these rough economic times, and well into the future.

Towards that end, we have established a Diversity Committee. The chairs, Luis Pagan and Bronwyn Black, are committed to reaching out to all of our colleagues to further the committee's mission - the critical need for inclusion and participation. Indeed, a membership and leadership of varying views, ethnicities and backgrounds can only promote the growth and perspective of our organization, and insure its continuing utility to all attorneys.

A Community Outreach Committee has also been formed, chaired by Allison Shields and Jaclene D'Agostino. With the need of every attorney, no less solo and small practitioners, for referral sources, networking opportunities, and community service, the committee will provide this information to our membership

through *The Suffolk Lawyer* and a newly designed web page. Our Strategic Planning Committee, chaired by the undersigned and Matthew Pachman, will be focusing on the needs of our Association, as reflected in our membership survey, for webcasts, an improved website, greater accessibility to and reduced cost of CLE, and public relations. A new website is indeed in the making through the efforts of the undersigned, Allison Shields and Barry Smolowitz.

Membership Services and Benefits is another focal point of this year's agenda, and steps have already been taken by the committee, chaired by Robert M. Harper and Andrew Ellsworth, to increase the services provided by the Bar at discounted rates or no charge to our members. In furtherance of this goal, the Bar Association is sponsoring two membership and networking cocktail receptions free of charge to our members. At publication, the first of these receptions will have already been held at Wolfer Vineyards, on September 22, 2009; the second reception will be held at Blackstone Steakhouse, on October 26, 2009.

Enhanced communication with, and participation by our East End colleagues, is a continuing concern. We hope to address this to a greater extent this year through an increased number of East End

CLE programs, and the development of webcasting. This will enable our East End members to view CLE programs from their office, as well as participate in membership meetings from afar. A newly created President's Council will meet twice a year with the Executive Committee. It will garner a continual participation and support from our past presidents who will discuss the progress of the association and recommendations for its continuing growth and development. Indeed, our past presidents bring a wealth of history, good council, and camaraderie to our Association, and we look forward

to working with them.

"It takes effort to make something of your life when other people are making do with less. Have courage to make change. Indecision prevents action... Routine decays."² And so, with this thought in mind, I look forward to your support during my term as your President, and hope that we will move forward with the foregoing initiatives, with a positive, upward view, and much success.

¹ Prayers and Meditations, at p. 18

² Wood, Nancy, *Dancing Moons*, at p. 43.

Appellate Litigation (Continued from page 17)

accepted principles of Constitutional interpretation, but it is the right thing for this Sstate. The public is best served by fully functioning Legislative and Executive branches and with clear lines of gubernatorial succession. The Ccourt's decision does just that.

I want to thank the parties that joined with me in this action as amici, and in particular our counsel, Richard J. Montes, Esq., and Matthew W. Naparty, Esq. from the firm of Mauro Goldberg & Lilling LLP, New York State's premiere appellate litigation firm, who represented us *pro bono* on this matter.

Note: Ricardo Montano is an attorney in Brentwood and member of the Suffolk County Legislature, representing the 9th Legislative District. Mauro Goldberg & Lilling LLP is the largest law firm in New York that dedicates its practice to the specialized area of Litigation Strategy and Appellate Advocacy. Matthew W. Naparty is a partner with the firm. Richard J. Montes is a senior associate and was the chairperson of the Suffolk County Bar Association's Appellate Committee from 2007-2009. Thanks also to David Beatty of St. John's Law School for his contributions.