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Case Review /Legal Alert *January 2011*

Service Matters-no automatic extension to plaintiff

While it is true that in many cases, pursuant to CPLR 306-b a plaintiff may seek permission for re-service, one must look at the circumstances for the failure to serve in the first place to determine and argue if it is permissible. We moved for dismissal in the case entitled Calloway v Wells (Westchester Co, Justice Leibowitz) 2010 NY Slip Op 09206, _____ AD 2d _____, (2d Dept, December 14, 2010)based on lack of service and expiration of the statute of limitations. The plaintiff cross moved for permission to extend her time to serve the defendant with a summons and complaint. The court granted our motion for dismissal for lack of service. The Court also denied the plaintiff's motion for an extension of time to re-serve the client. We had opposed the extension of time since it was our position that the plaintiff had failed to demonstrate reasonable diligence in attempting service after the purchase of the index number while there was still time left on the statute of limitations. The lower court adopted our reasoning in its denial of the plaintiff's motion. The Appellate Division, in appeal, as argued by this office, found that the plaintiff failed to demonstrate reasonable diligence in attempting service which was necessary to establish a good cause under CPLR 306-b. The Appellate Division pointed out some factors that are good to use when making an argument against an extension. The court point out the late point that the plaintiff started the action. The plaintiff "waited until the statute of limitations had nearly expired." The Court also pointed out that the plaintiff failed to demonstrate its efforts to locate the client and did not seek an extension prior to the expiration of the statute of limitations. Instead, the plaintiff waited until the defendant made a motion to dismiss. The Court also looked at the merits of the case and said the plaintiff "failed to establish that she had a potentially meritorious case" (This was a case where the client however struck the plaintiff in the rear. The facts as we argued them demonstrated that the plaintiff did not have a reason to stop short as both the client and she were making a right turn).

Tara Moran has joined the firm as one of our paralegals. She works with Chris Lanigan Esq. and Linda Chetkof, Esq. on their cases.

She is an experienced paralegal having worked in both plaintiff and defendants litigation firms over the past 8 years.

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Lien on the Property:
The Court granted out motion to lift a lis pendence or lien on the client's property in the action entitled **Cons v Smith**. It is alleged that the client started to erect a chain link fence that strayed across the plaintiff's property boundary. The client was given notice of it and removed the fence back to what his surveyor plotted as a property boundary. Despite the removal the plaintiff brought suit and served on the County Clerk a notice of pendence or lis pendence on the property. This is a notice to all who may have an interest in the property that there is a potential claim to the a part or all of the property. It effectively makes it difficulty if not impossible to transfer the property or in this case, for the client, re-finance the property. Strategically, it is a means to put pressure on the party since the lien effects the property value. Our motion was granted and the lis pendence on the title was removed since we demonstrated that whatever was left of the encroachment was so minor as to be deemed deminimus by the court.

Location, Location, Location

The location or venue of the case and its trial is as important in litigation as location is in real estate. Through the use of good research into public records we have been able to object to plaintiff's selection of venue or place of trial in a number of case. We look at such things as utility records, voter registration , DMV records, judgments and other court records at the outset of a case while review it for our appearance and answer on behalf of the client. In various cases the plaintiff attorney has selected a venue that may be more convenient for them or perceived as more favorable to one party versus another. The plaintiff attorney will use the address for the client that appears on the police report. Sometimes, this address is 1-2 years old. We have been able to secure agreements to change venue to a proper venue or make motions to change venue.

A good example of the analysis process arose in Astillero v Abramov. This case was started in New York County. This county is a unified trial county. The client operator was Asia Abramov. Ms. Abramov had married Mr. Abramov at or near the time of the accident. She did not change her license from her NYC apartment to her home with her husband in Queens. (*Vehicle and Traffic Law requires a driver to change their license with the Department of Motor Vehicles within 10 days of the change. Failure to change the address allows for service, without objection , on the old address. See, Stillman v City of New York, 39 AD 3d 301 (1str Dept, 2007).* Her failure to change her license prevented us from objecting to service at her address listed, for NYC, on her license. It did not prevent us from arguing for a change of venue. The court granted our motion to the extent that the venue was transferred from New York County to Queens County.

Our motion for summary judgment was granted in the case of an emergency situation in the case of **Trama v Visconti (Supreme Ct, J Mayer)**. The case involved an incident on Carleton Avenue at 6:30 pm on December 21, 2008. Ms. Visconti was driving northbound and hit a patch of ice. It caused her to cross over a concrete median into the opposing lanes of travel where she collided head on with the plaintiff vehicle. The plaintiff was traveling southbound on the left lane. The plaintiff's vehicle was caused to collide with the client's vehicle, Kaitlin Lycke. The client was traveling in the middle lane going southbound on Carelton Avenue. We argued that the client was confronted with an emergency situation not of her own making when the Visconti vehicle struck the Trama vehicle head on. The testimony supported, and the court agreed, that the client was traveling within seconds of the plaintiff Trama vehicle when the accident occurred between plaintiff and Visconti. The Court found, despite the client's testimony that there were a few seconds between when she saw the accident and when the Visconti vehicle came into her lane that she was entitled to a judgment as a matter of law that she was faced with an emergency situation. The assertions by the co-defendant and plaintiff that Ms. Lycke could have avoided the accident or evaded the plaintiff's vehicle were mere speculation. The action against Lycke was severed and dismissed.

The Court granted our motion for summary judgment on the issue of serious injury in the action entitled **Gutierrez v Harris** (Supreme Ct, Bronx Co). The plaintiff claimed that he sustained traumatic bursitis, impingement of a supraspinatus muscle in the shoulder, a disc herniations at C5-6 and disc bulges at C2-C6. The plaintiff testified at his deposition that he was only confined to his bed or home for a few days and was out for maybe two days per week for a total of three weeks after the accident. The plaintiff testified that he was no longer able to play baseball with his son. Dr. DeJesus examined the plaintiff and found no objective evidence of a disability or range of motion deficits. Dr. Sapan Cohen completed films reviews and opined that no rotator cuff injury presented itself and that the cervical spine presented only mild disc bulges that were unrelated to trauma and otherwise attributable to degenerative disc disease that pre-existed the accident. The Court found that we demonstrated a prima facie entitlement to summary judgment on the issue of serious injury. The plaintiff failed to come forward with objective evidence tending to support plaintiff's claim. The plaintiff's treating physician failed to disclose his testing methods that were used to determine plaintiff's range of motion. The Court noted that the ranges of motion were essentially normal. The matter was dismissed.