

Olinsky v Bauer

2007 NY Slip Op 30461(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0105454/2006

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART **IA** Part 16

Index Number : 105454/2006

OLINSKY, BEATRICE

vs

BAUER, JOEL M.D.

Sequence Number : 002

CONSOLIDATION/JOINT TRIAL

X NO. _____

ION DATE _____

ION SEQ. NO. _____

ION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

[FILED]

APR 02 2007

COUNTY CLERK'S OFFICE
NEW YORK

MAR 23 2007

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

[* 1]

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
BEATRICE OLINSKY, as Executrix of the Estate of
FRED OLINSKY, and BEATRICE OLINSKY,
Individually,

Plaintiff,

-against -

Index No. 105454/06

Motion Seq. No. 002

Joel Bauer, M.D., Manhattan Surgical Associates, L.L.P.,
Robert W. Dillon, M.D., Sanghyun A. Kim, M.D.,
Andrew D. Horowitz, M.D., The Mount Sinai Hospital,
The Mount Sinai Medical Center, Inc., Nyack Hospital
Home Health Care,

Defendants.
-----X

SCHLESINGER, J:

Plaintiff moves to consolidate the instant action with another she filed in Rockland County against Arthur Mark Kozin, MD and Rockland Renal Associates, LLP under index number 6873/06, alleging common issues of law and fact. Plaintiff further seeks to have the consolidated action venued here in New York County.

Defendants herein have not opposed the motion. However, the Rockland defendants have vigorously opposed the motion, insisting that the actions involve separate claims of malpractice which lack sufficient commonality to merit consolidation.

In the event the Court orders consolidation, the Rockland defendants have cross-moved, urging the Court to venue the action in Rockland County for the convenience of the defense witnesses who practice there, adding that the treatment was also provided in Rockland County where the decedent resided at the time.

This Court finds that the actions involve sufficiently common allegations of fact and law to merit consolidation. Beatrice Olinsky, the plaintiff, commenced both actions as Executrix of the Estate of Fred Olinsky and individually. Both actions allege claims of medical malpractice and wrongful death for overlapping periods of time. The New York County action was commenced first, in April 2006, based on treatment which began on July 6, 2004. The claims continue through the decedent's death on August 29, 2004. The Rockland County action was commenced in August 2006, shortly before the expiration of the statute of limitations, based on treatment which began on July 29, 2004 and continued through the decedent's death. Plaintiff claims that departures by the New York County defendants caused injury and that departures by the Rockland defendants exacerbated those injuries. Although the hospitalizations were separate, the Court finds that common issues of law and fact exist which warrant consolidation.

Turning to the issue of venue, the approved practice is to consolidate under the earlier number in the County where the first action was commenced, absent special circumstances. An appropriate discovery schedule can be devised by the Court to protect the interests of all parties. Citing *Perinton Associates v. Heicklen Farms, Inc.*, 67 AD2d 832 (4th Dep't 1979), the Rockland defendants assert that the Court has broad discretion to determine venue with witness convenience and calendar congestion in mind.

The Court agrees that its discretion is broad, but no reason exists to exercise that discretion to order venue in Rockland County. Defendants have not presented any affidavits from the individual defendants attesting to witness inconvenience. Rockland County is a nearby location, and travel to New York County is not unduly burdensome. Further, most of the defendants in the first action reside in New York County where the

decedent's treatment began. Further, since this action is already scheduled for a preliminary conference on March 28, 2007, no reason exists why the consolidated action cannot proceed expeditiously. The Rockland defendants have failed to present any proof that the matter would proceed more expeditiously in Rockland County.

Accordingly, it is hereby

ORDERED that the motion is granted and the above-captioned action is consolidated in this Court with *Beatrice Olinsky, as Executrix of the Estate of Fred Olinsky, and Beatrice Olinsky, Individually v. Arthur Mark Kozin, M.D. and Rockland Renal Associates, L.L.P.*, Index No. 6873/06 (Rockland County), under New York County Index No. 105454/06, and the consolidated action shall bear the following caption:

Beatrice Olinsky, as Executrix of the
Estate of FRED OLINSKY, and
BEATRICE OLINSKY, Individually,

Plaintiff,

-against-

Joel Bauer, M.D., Manhattan Surgical
Associates, L.L.P., Robert W. Dillon, M.D.,
Sanghyun A. Kim, M.D., Andrew D.
Horowitz, M.D., The Mount Sinai
Hospital, The Mount Sinai Medical
Center, Inc., Nyack Hospital Home
Health Care, Arthur Mark Kozin, M.D.,
and Rockland Renal Associates, L.L.P.,

Defendants.

and it is further

ORDERED that the Clerk of Supreme Court, Rockland County, shall transfer the papers on file under Index No. 6837/06 to the Clerk of this Court upon plaintiff's service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service by the movant on the Clerk of the Court of a copy of this order with notice of entry and proof of filing of any required RJI, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

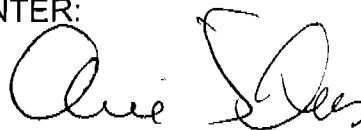
ORDERED that a copy of this order with notice of entry shall also be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation and the amendment of the caption.

This constitutes the decision and order of this Court.

Dated: March 23, 2007

MAK 23 2007

ENTER:



J.S.C.
ALICE SCHLESINGER

FILED

APR 02 2007

COUNTY CLERK'S OFFICE
NEW YORK