

Scott v Slifkin

2007 NY Slip Op 33853(U)

November 20, 2007

Supreme Court, Nassau County

Docket Number: 6078-06/

Judge: Leonard B. Austin

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INDEX
No. 6078/06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 8-20-07
Submission Date: 8-20-07
Motion Sequence No.: 001/MOT D

DAVID SCOTT, III, M.D.,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Abrams, Fensterman, Fensterman,
Eisman, Greenberg, Formato & Einiger,
LLP
1111 Marcus Avenue, Suite 107
Lake Success, New York 11042

**ROBERT F. SLIFKIN, M.D., ANDRES
BAEZ, M.D., EVELYN AMARGA, M.D.,
SURENDRA GUPTA, M.D., SOUTH
QUEENS DIALYSIS CENTER, SOUTH
QUEENS NEPHROLOGY ASSOCIATES,
NEW YORK DIALYSIS SERVICES, INC.
and RENAL RESEARCH INSTITUTE,
LLC,**

Defendants.

COUNSEL FOR DEFENDANT
Arent Fox, LLP
1675 Broadway
New York, New York 10019

x

ORDER

The following papers were read on the motion of Plaintiff David Scott, III, M.D. to consolidate this action with an action pending in New York County:

- Notice of Motion dated July 6, 2007;
- Affidavit of Sarah C. Lichtenstein, Esq. sworn to on July 6, 2007;
- Plaintiff's Memorandum of Law;
- Affirmation of Michael S. Cryan, Esq. dated July 27, 2007;

SCOTT v. SLIFKIN, *et al.*
Index No. 6078-06

Defendants' Memorandum of Law;
Affidavit of Sarah C. Lichtenstein, Esq. sworn to on August 20, 2007;
Reply Memorandum of Law.

Plaintiff, David Scott, III, M.D. ("Scott"), moves to consolidate the within action with an action presently pending in New York County.

BACKGROUND

Defendant, Renal Research Institute, LLC ("Renal"), commenced an action in Supreme Court, New York County captioned, *Renal Research Institute, LLC, Plaintiff against David Scott, III, M.D., Surya Viriya, M.D. and Gary Catus, Defendants*. This action bears New York County Index No. 111121/05 ("New York County Action").

The New York County Action has been assigned to the Hon. Charles Ramos in the Supreme Court, New York County's Commercial Division.

The New York County Action is based upon a loan agreement dated October 25, 2002 ("Agreement") and promissory note between Renal and KCTC, Inc. ("KCTC"). Scott, Surya Variya, M.D. ("Viriya") and Gary Catus ("Catus") guaranteed KCTC's obligations under the Agreement and promissory note.

KCTC had a Certificate of Need issued by the New York State Department of Health to operate a chronic dialysis center in Brooklyn. KCTC wanted to develop and open a dialysis center in Laurelton, New York.

Catus was the sole shareholder in KCTC. The Agreement provides that KCTC had made application to the Department of Health to amend the Certificate of Need to

SCOTT v. SLIFKIN, *et al.*
Index No. 6078-06

add Scott and Viriya as shareholders and to change the approved location for the facility to Laurelton.

Renal loaned money to KCTC for the purposed of constructing, furnishing and equipping the Laurelton facility.

The Agreement provided for Renal, Scott, Viriya and Catus to use their best efforts to obtain the amendment to the Certificate of Need.

Renal commenced the New York County Action alleging that KCTC defaulted on its obligations under the Agreement and promissory note. Renal seeks to recover from Scott, Viriya and Catus on their guarantees.

The New York County Action was commenced in August 2005 when Renal moved against Scott, Viriya and Catus for summary judgment in lieu of complaint. CPLR 3213. Justice Ramos denied the motion.

The New York County Action has proceeded to the point where discovery has been completed. A Note of Issue and Certificate of Readiness were filed in the New York County Action on July 9, 2007. A trial date has not yet been set.

In April 2006, Scott commenced this action ("Nassau County Action").

Scott is a physician duly licensed to practice medicine in New York specializing in nephrology, hypertension and internal medicine. Defendants Robert Slifkin ("Slifkin"), Andres Baez ("Baez") Evelyn Amarga ("Amarga") and Surendra Gupta ("Gupta") are also physicians duly licensed to practice medicine in New York.

SCOTT v. SLIFKIN, *et al.*
Index No. 6078-06

Slifkin and Baez are partners in Defendant, South Queens Dialysis Center ("Dialysis Center"), which owns and operates kidney dialysis centers in Jamaica and St. Albans.

Amarga and Gupta are partners in Defendant, South Queens Nephrology Associates ("Nephrology Associates"). Nephrology Associates served as the medical services directors for Dialysis Center.

Defendant New York Dialysis Services, Inc. ("New York Dialysis") provides or provided administrative and management services for Dialysis Center.

Renal Research Institute, LLC ("Renal") holds itself out as owning or providing consulting and administrative services for Dialysis Center.

Scott had admitting privileges at Dialysis Center's Jamaica facility from 1993 until March 2005.

In 1999, Dialysis Center opened its St. Albans facility. In 1999, Dialysis Center entered into an Administrative Consulting Services Agreement with Scott pursuant to which Scott was to serve as the medical director of the St. Albans facility for a period of six years with an option to renew for an additional term of five years. This agreement provided for Scott to be paid a salary of \$75,000 a year as the medical director of Dialysis Center's St Albans facility for the first two years of the agreement. His compensation would be renegotiated after the first two years.

Despite Scott's position as medical director of Dialysis Center's St. Albans facility, Scott wanted to develop, own and operate his own kidney dialysis center. In the

SCOTT v. SLIFKIN, *et al.*
Index No. 6078-06

hope of doing so, Catus, Viriya and he sought to change the location of the Certificate of Need previously issued to KCTC.

KCTC needed consulting, advisory, management and administrative services and to borrow the money for the construction, furnishing and equipping the facility.

New York Dialysis introduced Scott to Renal and advised him that Renal could provide the services KCTC needed. In October 2002, KCTC, Scott, Catus and Viriya entered into a Loan Agreement, a Promissory Note, a Guaranty, a Start-Up Consulting and Administrative Service Agreement and a Consulting and Administrative Service Agreement (collectively the "KCTC Agreements").

Before entering into the KCTC Agreements, Renal and Scott entered into negotiations to restructure Scott's contract as medical director of Dialysis Center's St. Albans facility.

In January 2003, Scott entered into Medical Services Directors Agreement with New York Dialysis and Dialysis Center. This agreement provided for Scott to be the medical director of Dialysis Center's St. Albans facility for an eight year period running from March 1, 2003 to February 28, 2003. This agreement further provided for renewals for three additional terms of two years. This agreement provided for Scott to be paid an annual salary of \$175,000 per year for the first year. Scott's compensation would be increased annually by 4% of the fees generated by the operation of Dialysis Center's St. Albans facility. The purpose of this agreement was to permit Scott to earn sufficient money from his position as medical director so that he would not have any out

SCOTT v. SLIFKIN, *et al.*
Index No. 6078-06

of pocket costs in connection with his obligations on the KCTC Agreements..

In December 2003, the New York State Department of Health commenced proceedings against the dialysis facilities at which New York Dialysis and Renal were providing administrative and management services. Scott was also advised that even if New York Dialysis and Renal resolved the issues with the Department of Health, it would not approve any new applications in which Renal was going to provide such services.

As a result, in December 2003, KCTC advised Renal that it was terminating their relationship.

In April 2004, Nephrology Associates advised Scott it was revoking his admitting privileges for Dialysis Center.

In March 2005, even though Scott was still the medical services director of Dialysis Center's St. Albans facility, he was excluded from participating in any decisions regarding the operation of the facility. At the same time, the patients at the facility were advised that Scott had been replaced as medical services director.

Based upon these factual allegations, Scott alleges causes of action against Renal for tortious interference with contract, *prima facie* tort, tortious interference with contract and business relationship and fraud. In regard to these causes of action, Scott claims that once KCTC terminated its relationship with Renal, Renal used its relationship with Slifkin, Baez, Amarga, Gupta and their business entities to cause them to breach their contracts with Scott.

SCOTT v. SLIFKIN, *et al.*
Index No. 6078-06

DISCUSSION

CPLR 602(b) permits the Supreme Court to remove to itself a case pending in another court and direct consolidation or joint trial of those actions if the actions involve common questions of law or fact.

Consolidation or a joint trial should be ordered when the actions involve common questions of law and fact so as to avoid unnecessary duplication of trials, save unnecessary costs and to avoid the possibility of inconsistent decisions based upon the same facts. Gutman v. Klein, 26 A.D.3d 464 (2nd Dept. 2006); and 3-6 New York Civil Practice: CPLR ¶ 602.04. The party seeking consolidation or a joint trial must establish the existence of common questions of law or fact. Beerman v. Morhaim, 17 A.D.3d 302 (2nd Dept. 2005).

The enforceability of KCTC Agreements are at issue in both the New York County and Nassau County Actions.

The causes of action Scott alleges against Renal in the Nassau County Action could have been asserted as counterclaims in the New York County Action. Thus, any recovery Scott obtains against Renal in the Nassau County Action could be an off-set to any recovery Renal might obtain against Scott in the New York County Action.

This Court believes that all disputes arising out of the relationship between Scott and Renal should be decided in one action.

Since Scott is a defendant in the New York County Action and a plaintiff in the Nassau County Action, joint trial is the appropriate method for trying these cases. City

SCOTT v. SLIFKIN, et al.
Index No. 6078-06

of New Rochelle v. American Fidelity Fire Ins. Co., 89 A.D.2d 917 (2nd Dept. 1982); and Siegel, New York Practice 4th §127. Therefore, a joint trial of these actions is appropriate.

Absent a showing of special circumstances, the venue of the action should be placed in the county where the first action was commenced. Manshul Construction Corp. v. Sawyers Glass Corp., 242 A.D.2d 262 (2nd Dept. 1997) The New York County Action was commenced prior to the Nassau County Action. Therefore, the Nassau County Action should be transferred to New York County.

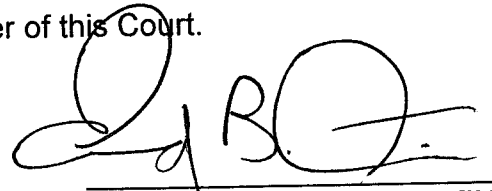
Accordingly, it is,

ORDERED, that the motion of David Scoot, III, M.D. Defendant in the New York County Action and Plaintiff in the Nassau County Action to consolidate these actions is **granted** to the extent of directing a joint trial of these actions in New York County in the discretion of the Justice presiding; and it is further,

ORDERED, that the venue of the Nassau County Action is transferred to New York County; and it is further,

ORDERED, that upon payment of the required fees, the County Clerk, Nassau County is directed to transfer the file in the Nassau County Action to the County Clerk, New York County forthwith.

This constitutes the decision and order of this Court.



Dated: Mineola, NY
November 20, 2007

LEONARD B. AUSTIN, J. S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**