

Eldi v Mack

2007 NY Slip Op 34117(U)

December 10, 2007

Supreme Court, Nassau County

Docket Number: 5502-06/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**BEVERLY ELDI and KENNETH ELDI,
Plaintiff,**

**Motion Sequence #2
Submitted September 18, 2007**

-against-

INDEX NO: 5502/06

**ALISON MACK,
Defendant.**

The following papers were read on this motion:

ELDI Notice of Motion.....1
SLATER Defendants Affirmation in Partial Opposition.....2
MACK Affirmation in Opposition.....3
ELDI Reply Affirmation.....4
YEH and ALDORISIO Affirmation In Partial Opposition.....5
SLATER Defendants Sur-Reply Affirmation.....6

Plaintiffs, BEVERLY ELDI and KENNETH ELDI, move for an order, pursuant to CPLR §602, joining the above captioned action, under Index No. 5502/06, with an action entitled BEVERLY ELDI v. MARK SLATER, BERYL SLATER, DAVID J. ARDORISIO and HUICHEE YEH, under Index No 2033/07, both venued in Nassau County, and to amend the caption to reflect said joinder. The SLATERS and defendants, HUICHEE YEH and DAVID J. ARDORISIO, partially oppose the motion, which is opposed by defendant, MACK. The motion is determined as follows:

Plaintiff, BEVERLY ELDI, was involved in an automobile collision with the vehicle owned and operated by defendant, ALLISON MACK, on August 23, 2004. The collision (collision #1) occurred at or near Southern State Parkway at Exit 28 in Nassau County, and plaintiff alleged that she sustained injuries to, *inter alia*, her neck. Thereafter, on November 24, 2004, plaintiff was involved in a subsequent collision (collision #2) that occurred on the Cross Island Parkway, at or near its intersection with Union Turnpike in Queens County, New York, in which plaintiff alleged that she again sustained injuries to her neck. In collision #2, plaintiff alleged that the collision involved defendants, MARK SLATER, as lessee of one vehicle, BERYL SLATER, as the driver of the SLATER vehicle, and HUICHEE YE, the driver of a vehicle owned by defendant DAVID J. ARDORISIO. In connection thereto, plaintiff commenced an action against the defendants in collision #2 (Exhibit "D" annexed to plaintiff's motion). Counsel for plaintiff states that a review of the Verified Bill of Particulars for each lawsuit reflects that plaintiff is claiming injury to her neck as a result of each accident. An MRI of her cervical spine was taken two days after collision #2 and reflects a small to moderate disc herniation at C4-C5 (*Exhibit "H" annexed to plaintiff's motion*). It is counsel's position that, because the injuries in collision #1 and collision #2 were to the same part of the body, it is necessary for the sake of judicial economy and to avoid inconsistent results, for a joint trial to be held. He urges that the similarity of injuries, as well as the issue of causation, warrants the requested relief.

In opposition to the motion, defendant MACK contends that plaintiffs are not entitled to a joint trial. She claims there are different claims and different parties in each action and that plaintiff's second claim could confuse a jury if both actions are joined. Additionally, the SLATERS, defendants in the second action, point out that the Note of Issue in the first

action was to be filed in September, 2007. They contend that they need and require full discovery in their action but that discovery in the two (2) actions are at different stages. Additionally, the SLATERS state that co-defendants, HUI CHEI YEH and DAVID ALDORISIO, have commenced a separate action against them, entitled YEH v. SLATER, under Nassau Index No. 9090/07, and have made a motion to consolidate said action with the ELDI v. SLATER action. The SLATERS contend that if the first and second ELDI actions are joined with the YEH action, the result would be prejudicial to the SLATERS' defense. Counsel for plaintiffs states that, as of late August, 2007, no depositions had been scheduled in the first action and that discovery is not near completion.

A motion for consolidation is addressed to the sound discretion of the court, and absent a showing of substantial prejudice by the party or parties opposing the motion, consolidation is proper where there are common questions of law and fact (*RCN Construction Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 825 NYS2d 140 [2nd Dept. 2006]). Consolidation is favored by the courts as serving the interests of justice and judicial economy (*Zupich v Flushing Hospital & Medical Center*, 156 AD2d 677, 549 NYS2d 441 (2nd Dept. 1989)).

In *Gottlieb v Budget Rent-a-Car*, 18 AD3d 429, 794 NYS2d 425 (2nd Dept. 2005), the Second Department found that a trial court properly exercised its discretion in granting plaintiff's motion to consolidate her two actions arising out of two separate automobile collisions where plaintiff supported her allegation with a physician's affirmation that the second collision exacerbated injuries sustained by her first collision. Herein, the plaintiffs offer an MRI taken only two days after the second collision which refers to a small to

moderate disc herniation at C4/C5. In their bill of Particulars with respect to the first action (Exhibit "C" annexed to plaintiff's motion), plaintiffs indicate a disc herniation at C4/C5 (¶ 7). In their Bill of Particulars in the second action, (Exhibit "G" annexed to plaintiff's motion), plaintiffs claim "exacerbation and aggravation" of C4/C5 (¶ ¶ 6 & 7).

After a careful reading of the submission herein, it is the judgment of the Court that, in view of the plaintiffs contention that the second collision aggravated the injuries allegedly sustained by the plaintiff in the first collision, consolidation would best serve the interests of justice and judicial economy (*Romandetti v County of Orange*, 289 AD2d 386, 734 NYS2d 629 [2nd Dept. 2001]). The potential delay in the trial of one action pending completion of discovery in a second related action will not cause prejudice sufficient to justify denial of the motion to consolidate (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 494, 783 NYS2d 620 [2nd Dept. 2001]; *Francen v Maniscalco*, 256 AD2d 305, 681 NS2d 310 [2nd Dept. 1981]). A court may take adequate steps to insure that discovery in the two related actions is expeditiously completed (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, *supra*; *Francen v Maniscalco*, *supra*). Thus, defendant's contention that the discovery in the first action is far ahead of discovery in the second action is unavailing.

Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation of actions for trial should be granted where common questions of law or fact exist (*Perini Corp. v WDF, Inc.*, 33 AD3d 605, 822 NYS2d 295 [2nd Dept. 2006]; *McDutchess Bldrs, Inc. v Dutchess Knolls*, 244 AD2d 534, 665 NYS2d 579 [2nd Dept. 1997]). Defendants have not shown such prejudice. Trial court direction and charges can

virtually remove jury confusion as to the separate incidents.

As to defendant's comment that plaintiffs have a third action pending, entitled ELDI v. ELLENBERGER, under Index No. 2565/07 (Exhibit "D" annexed to MACK opposition), that concerns a third automobile collision that occurred on July 28, 2006, plaintiffs state that, as of August 20, 2007, issue in that action has not been joined. Moreover, the Court notes that said collision occurred two (2) years after the first collision, and the plaintiffs have not made any request to join the first and second actions with the newly filed third action. While the third action may be an appropriate candidate for consolidation with the first and second actions, whether it is or is not should not prevent the court from allowing joinder of the two (2) actions under consideration herein. In the absence of demonstrable prejudice to the defendants, consolidation will best serve the interests of justice and judicial economy (*Gottlieb v Budget Rent-A-Car, supra*). It is therefore

ORDERED, that plaintiff's motion is granted to the extent that the first and second ELDI actions shall be tried jointly in the Supreme Court, Nassau County; and it is further

ORDERED, that the caption shall hence forth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

BEVERLY ELDI and KENNETH ELDI,
Plaintiff,

**-against-
ALISON MACK,**

Defendant.

**INDEX NO: 5502/06
Action #1**

BEVERLY ELDI,

Plaintiff,

-against-

MARK SLATER, BERYL SLATER, DAVID J.
ARDORISIO and HUICHEE YEH,
Defendants.

INDEX NO: 2033/07
Action #2

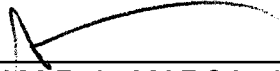
and it is further

ORDERED, that parties in Action # 1 and Action # 2 shall appear for a status conference on January 30, 2008, at 9:30 A.M. before the undersigned and all further proceedings in Action #1 and Action #2 shall be had before Justice LaMarca. Accordingly, it is respectfully requested that the file in Action # 2, presently pending before Justice Daniel Palmieri, be transferred to the undersigned.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 10, 2007



WILLIAM R. LaMARCA, J.S.C.

ENTERED
DEC 17 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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eldi-mack,#2/consolidation