

**Anonymous v Wyckoff Hgts. Med. Ctr.**

2008 NY Slip Op 33108(U)

September 25, 2008

Supreme Court, Suffolk County

Docket Number: 08978-2001

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. TERM, PART 23, SUFFOLK COUNTY**

**Present:**

**HON. EMILY PINES**  
J. S. C.

Original Motion Date: 07-31-2008  
 Motion Submit Date: 07-31-2008  
 Motion Sequence No's.: 009 MD

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**ANONYMOUS and MRS. ANONYMOUS,**

**Plaintiffs,**

**-against-**

**WYCKOFF HEIGHTS MEDICAL CENTER, DR.  
 NAGENDRA SAGAR KATARI, SOUTH SHORE  
 MEDICAL ASSOCIATES, P.C. and DR. CARY  
 LEVINE,**

**Defendants.**

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**SOUTH SHORE MEDICAL ASSOCIATES, P.C.,  
 and DR. CARY LEVINE, M.D. s/h/a DR. CARY  
 LEVINE,**

**Third Party Plaintiffs,**

**-against-**

**CHARLES MICHAEL MARTINEZ, M.D. and  
 MYRON J. JACOBSON, M.D.,**

**Third Party Defendants.**

\_\_\_\_\_  
**X**

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**ORDERED**, that the motion (motion sequence number 009) by third-party defendants, Charles Michael Martinez, M.D., and Myron J. Jacobson, M.D., for an Order pursuant to CPLR §603 and Rule 1010, dismissing the third-party complaint without prejudice to recommence in Queens County, or in the alternative, severing the third-party action and, pursuant to CPLR §504(3), transferring it to Queens County, is denied in its entirety.

In this medical malpractice action, third-party defendants move for an Order dismissing the third-party complaint without prejudice to recommence in Queens County, or in the alternative,

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severing the third-party action and transferring it to Queens County. The parties familiarity with the facts underlying the action is assumed and a detailed recitation is contained in the Order (PINES, J.) dated July 31, 2008. Plaintiff commenced this action against defendants by the filing of a Summons and Verified Complaint on or about April 11, 2001, alleging medical malpractice as a result of defendants' failure to properly diagnose his medical condition and in failing to administer the proper drug therapy program, as a result of which, he alleges, he is now infected with human immunodeficiency virus (HIV). Plaintiff, a New York City police officer, was treated by defendants on November 6, 1998, November 9, 1998, November 13, 1998 and/or November 30, 1998.

Defendants South Shore Medical Associates, P.C. ("South Shore") and Dr. Cary Levine, M.D. ("Levine"), commenced a third-party action against third-party defendants, Charles Michael Martinez, M.D. and Myron J. Jacobson, M.D.<sup>1</sup>, by filing a Third-Party Summons and Complaint on or about February 27, 2008 and personal service on third-party defendants on April 28, 2008 and May 13, 2008. Third-party plaintiffs allege that third-party defendants rendered medical care arising out of the November 5, 1998 incident to plaintiff from November 6, 1998 through June 15, 1999. Third-party plaintiffs assert that if the plaintiff suffered injuries because of the alleged malpractice set forth in the Verified Complaint, then said injuries were brought about by third-party defendants.

Third-party defendants now move to dismiss the Third-Party Complaint without prejudice to recommence in Queens County, or in the alternative, severing the third-party action and transferring it to Queens County. Third-party defendants assert that dismissal of the Third-Party action is warranted because third-party plaintiffs, South Shore and Dr. Levine, inexcusably delayed in bringing the third-party action because they were aware of the existence of third-party defendants as early as April of 2003. Specifically, third-party defendants allege that as early as April of 2003, third-party plaintiffs possessed documents indicating that plaintiff had visited a police surgeon during the weekend after the incident in question and several times thereafter. Such substantial delay third-party-defendants assert, requires, at a minimum, severance of the third-party action. Additionally, third-party defendants assert that failure to sever the third-party action will deprive them of the "extensive discovery necessary to defend themselves against a claim that accrued almost ten years ago." **Bonitatibus Affirmation at ¶13.** Third-party defendants argue that at a minimum,

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<sup>1</sup>Third-party defendants are police surgeons employed by the City of New York.

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they will have to depose both plaintiffs and conduct depositions of the medical witnesses previously produced, resulting in substantial delay and prejudice, given that the treatment occurred almost ten years ago.

In the event the Court denies severance, third-party defendants urge the Court to transfer venue of this action to Queens County pursuant to CPLR §504(3), since it is an action against employees of the City of New York and the treatment of plaintiff occurred in a New York Police Department facility in Queens County. Third-party defendants assert that since they and their counsel are located in New York City, there will be an increased use of public resources to defend this action in Suffolk County. Thus, they argue, the Court should exercise its discretion and transfer venue to Queens County.

Third-party plaintiffs oppose the motion to dismiss or in the alternative to transfer venue. Third-party plaintiffs assert that there are complex and unique allegations of medical malpractice in this case which are inextricably linked to the main action, as well as common principles of law and fact, which militate in favor of a single trial in a single venue. With regard to the claim by third-party defendants that third-party plaintiffs inexcusably delayed in bringing the third-party action, third-party defendants state that they did not have any proof of plaintiff's treatment by third-party defendants until they received responses to discovery demands by defendants in December of 2007. Third-party plaintiffs further argue that there will not be any prejudice since counsel for third-party defendants has already received copies of all discovery produced in the main action. Therefore, any burden on third-party defendants with regard to discovery has been minimized and third-party plaintiffs will provide any additional discovery requested by third-party defendants. On the venue issue, third-party plaintiffs argue that CPLR §504(3) does not mandate venue in New York City in the instant case, but rather same is discretionary with the Court. Thus, third-party plaintiffs request that the Court deny third-party defendants' motion in its entirety.

Defendant, Wyckoff Heights Medical Center ("Wyckoff") submits an affirmation by its counsel in opposition/response to the motion. Defendant Wyckoff opposes the severance of the third-party action but does not oppose a discretionary change of venue. However, defendant Wyckoff would seek to transfer venue of this action to Kings County for the convenience of certain witnesses and experts in this case. Defendant Wyckoff asserts that a single trial is more appropriate

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in the interest of judicial economy and because there are common factual and legal questions in the main action and third-party action. Wyckoff asserts that since the Court has already agreed to afford third-party defendants time to complete discovery before a trial date is set, third-party defendants cannot demonstrate prejudice sufficient to outweigh the convenience of a single trial.

Defendant Nagendra Sagar Katari, M.D. (“Dr. Katari”) submits an affirmation in response to third-party defendants’ motion. Dr. Katari supports the motion seeking to transfer venue from Suffolk County to Queens County but opposes the motion to sever the third-party action. Dr. Katari asserts that forcing defendants to travel to Suffolk County is inconvenient and a waste of resources and thus, asserts that venue should be in Queens County. Dr. Katari opposes the severance of the third-party action however, on the ground that it would hinder the interest of judicial economy because it would burden the Court with two separate actions involving common questions of law and fact. Thus, Dr. Katari states, the Court should not sever the third-party action.

In reply, third-party defendants dispute that third-party plaintiffs only recently discovered that plaintiff was treated by third-party defendants. Additionally they assert that the fact that the main action and third-party action involve common issues is not dispositive of the severance. Third-party defendants reiterate the difficulties involved in reconstructing both what occurred and the HIV protocols in effect in 1998 and the discovery provided comprises thousands of pages of medical records, deposition transcripts, etc., which must be analyzed and reviewed by experts. Finally, third-party defendants argue that the interest and convenience of the public officers and employees should be given disproportionate weight and thus the change of venue must be granted.

CPLR §603 states:

**Severance and separate trials**

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

CPLR Rule 1010 states:

**Dismissal or separate trial of third-party complaint**

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The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Finally, CPLR §504(3) provides:

**Actions against counties, cities, towns, villages, school districts and district corporations**

Notwithstanding the provisions of any charter heretofore granted by the state and subject to the provisions of subdivision (b) of Section 506, the place of trial of all actions against counties, cities, towns, villages, school districts and district corporations or any of their officers, boards or departments shall be, for:

3. the City of New York, in the county within the city in which the cause of action arose, or if it arose outside of the city, in the county of New York.

It is beyond cavil, that a determination to grant or deny a request for severance is a matter of judicial discretion. *Lelekakis v. Kamamis*, 41 A.D.3d 662, 839 N.Y.S.2d 773 (2d Dept. 2007). However, the courts have recognized that such discretion to grant a motion to sever should be exercised sparingly. *Schein v. Sea Shore Marina Properties*, 118 A.D.2d 767, 500 N.Y.S.2d 157 (2d Dept. 1986), *citing*, *Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 444 N.Y.S.2d 585, 429 N.E.2d 104. Additionally, although CPLR §504(3) requires an action brought against the City of New York to be commenced in the County within the City of New York where the cause of action arose, such does not apply to a third-party action commenced against the City. *See, e.g., Murphy v. Long Island Rail Road*, 239 A.D.2d 472, 657 N.Y.S.2d 206 (2d Dept. 1997).

In the case at bar, the Court agrees with third-party plaintiff that the complex issues of medical malpractice, present in both the main action and the third-party action, and the common questions of law and fact strongly militate against severing the third-party action. *Egan v. Ariens Co.*, 108 A.D.2d 894, 485 N.Y.S.2d 776 (2d Dept. 1985); *Leavitt v. New York City Transit Authority*, 111 A.D.2d 907, 490 N.Y.S.2d 611 (2d Dept. 1985). Although the Court recognizes what appears to be an inordinate delay in commencing the third-party action, it will address the delay by way of an expedited discovery schedule at the next conference. *Charet v. Man-Dell Food Stores*,

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*Inc.*, 208 A.D.2d 489, 616 N.Y.S.2d 1017 (2d Dept. 1994). Moreover, it appears that the bulk of the discovery documents provided in the main action has been provided to third-party defendants. In light of the foregoing, the Court finds that a single trial of the main action and third-party action is appropriate, and the motion to sever the third-party action is denied. Likewise, in consideration of the fact that this action has been pending in Suffolk County for seven (7) years and third-party defendants have failed to demonstrate any substantial prejudice in venue remaining in Suffolk County, the request for a change of venue is also denied.

Counsel are reminded that a compliance conference is scheduled before the undersigned on October 16, 2008 at 9:30 a.m.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: September 25, 2008  
Riverhead, New York

**HON. EMILY PINES**

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EMILY PINES  
J. S. C.