

Noonan v Long Is. Home Found.

2010 NY Slip Op 30873(U)

April 14, 2010

Supreme Court, Suffolk County

Docket Number: 034690/2009

Judge: Paul J. Baisley

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

INDEX NO. 034690/2009

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

DALE NOONAN, as Administrator of the Estate of SEAN R. NOONAN, Deceased, and DALE NOONAN, Individually; KRISTEN DANZI, as Administrator of the Estate of JACOB DANZI, a/k/a JACOBSEN DANZI, Deceased, and KRISTEN DANZI, Individually; JAMES P. MEEHAN, as Administrator of the Estate of MARGARET MEEHAN, Deceased, and JAMES P. MEEHAN, Individually.

Plaintiff(s),

-against-

THE LONG ISLAND HOME FOUNDATION,
 THE LONG ISLAND HOME and SOUTH OAKS
 HOSPITAL

Defendant(s).

ORIG. RETURN DATE: March 5, 2010

FINAL RETURN DATE: April 9, 2010

MTN. SEQ. #: 001-MG

CROSS MTN. SEQ. #: 002-MotD

PLTF'S ATTORNEY:

ROBERT F. DANZI, ESQ.
 900 MERCHANTS CONCOURSE, ST214
 WESTBURY, NY 11590

DEFT'S ATTORNEY:

FUREY, KERLEY, WALSH, MATERA
 & CINQUEMANI, P.C.
 2174 JACKSON AVENUE
 SEAFORD, NY 11783

Upon the following papers numbered 1 to 31 read on this motion and cross motion: Notice of Motion and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 23; Affirmation in Reply/Opposition and supporting papers 24 - 31; it is,

ORDERED that the motion (001) by the defendants for an order severing this action into three separate actions is granted pursuant to CPLR 603; and it is further

ORDERED that the plaintiffs KRISTEN DANZI, as Administrator of the Estate of JACOB DANZI a/k/a JACOBSEN DANZI, Deceased, and KRISTEN DANZI, Individually, and JAMES P. MEEHAN, as Administrator of the Estate of MARGARET MEEHAN, Deceased, and JAMES P. MEEHAN, Individually are severed from this action and said plaintiffs (each as administrator and individually) may commence two separate actions as to them, respectively, with new index numbers, paying the required fees; may indicate the three cases as "related" on any applicable requests for judicial intervention, subject to the final discretion of the IAS justice assigned thereto; and it is further

Page 2

Index No. 34690/2009

Noonan vs Long Island Home Foundation

ORDERED that the instant action (Index No. 34690/09) shall continue only as to the plaintiffs DALE NOONAN, as Administrator of the Estate of SEAN R. NOONAN, Deceased, and DALE NOONAN, Individually; and it is further

ORDERED that the cross motion (002) by the plaintiffs for an order directing the preservation of certain records is granted only to the extent that the defendants are directed to preserve the following records for trial of all the plaintiffs' decedents in this action as originally commenced:

- 1) All hospital charts;
- 2) all written hospital policies and procedures for the periods of admissions of the three decedents and thereafter;
- 3) all documentation pertaining to the work schedules and employment of the employees and attending physicians on duty during the respective periods of admittance as well as of those employed by the defendants during said periods;
- 4) all video surveillance, in whatever form maintained by the defendants, if any, with regard to the three decedents and their respective periods of admittance; and
- 5) any references to the respective "911" calls in the hospital charts or in any other documents kept by the defendants;

and it is further

ORDERED that the remaining parties to the instant action are directed to appear for a Preliminary Conference on May 14, 2010 in the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York, at 10:00 a.m.; said date allowing for the defendants to respond to the amended verified complaint.

This action arises out of three separate medical malpractice claims, each against the same defendants, which are linked, according to the plaintiffs, based upon "a pattern and practice by defendants of wide-spread systematic institutionally-sanctioned medical neglect and fraudulent medical record keeping practices" (Plaintiffs' attorney's Affirmation in Opposition and In Support of Cross Motion, ¶1).

The defendants move (001) to sever the three distinct claims on the basis of there being no common issues of fact or law and that the plaintiffs are merely joining the three claims (fourteen causes of action in all) in this one action for their cumulative and prejudicial effects rather than upon any good faith basis supported by facts for such a consolidation of claims.

The plaintiffs, in addition to opposing this motion (001), cross-move (002) for an order directing the preservation of certain records by the defendants. In opposition to the motion to sever, the plaintiffs not only contend that there a basis for linking the three claims based upon the allegations of "systematic"

Page 3

Index No. 34690/2009

Noonan vs Long Island Home Foundation

neglect but also, noting this motion to sever is made pre-answer¹ and urging the acceptance of the allegations in the complaint as true, it is too early to consider an application for severance before discovery is undertaken on the issues allegedly linking the claims.

In support of the motion to sever (001), the defendants argue that the three claims are separate and distinct from each other: three different patients; admitted at different times; for different medical problems; treated differently; in different areas of the hospital (South Oaks); treated by different doctors; different nurses; provided different treatments; different medications; and, different individual issues as to the medical malpractice claims. The only common thread among the three, according to the defendants, is that each of the patients died while a patient at South Oaks Hospital.

Specifically, the patient Margaret Meehan, age 70, was admitted to the SE 1 unit on December 10, 2008 for a major depressive disorder having overdosed on drugs and having had a prior suicide attempt. She died twelve days later.

The patient Jacob Danzi, age 28, was admitted on May 28, 2009 to the detoxification unit as a multiple substance abuser. He died three days later.

The patient Sean Noonan, age 19, was admitted on July 1, 2009 to the psychiatric unit (SE 2) due to a drug overdose having a history of depression and suicidal tendencies. He died the next day.

In opposition to the motion to sever (001), the plaintiffs point to their amended complaint which has at least 18 allegation paragraphs mentioning the “pattern” and “systematic” medical and record keeping abuses which are “common to all these plaintiffs’ decedents and [to] as yet unknown others...” (Plaintiffs’ counsel’s affirmation, ¶1). On this basis, they argue that there are a “myriad” of common questions of law and fact justifying the combination of these claims in this single action. In any event, the plaintiffs contend that since this action is in a pre-answer stage, it is premature to consider a motion to sever until discovery is undertaken. They also argue that there is no prejudice to the defendants to deny the motion to sever at this time.

The plaintiffs point to other “common” facts among the three claims, for example; each of the three decedents was a patient at South Oaks Hospital; each was there within a “discreet period of time” (December 10, 2008 to July 2, 2009 - almost seven months); each was found dead in the morning, hours after actually expiring; each death occurred at the end of a weekend or as part of a holiday period. Aside from these similarities, no specifics are provided with regard to the hospital’s record keeping or treatment policies. In this regard, the plaintiffs merely make general allegations unsupported by any facts but which they hope to uncover through discovery.

1

The parties stipulated to extending the time to answer until after the motion to sever (001) is decided.

The plaintiffs also state, in conclusory form, that there is no issue of jury confusion if all three claims are kept together.

In further opposition to the severance motion (001), the plaintiffs cite certain cases which are inapplicable. For example, in support of their contention that where there are “systematic patterns and practices spanning the deaths of multiple individual...[which] cannot, by definition, be reduced to individual cases,” there is no basis for severance, they cite *Global Surgical Supply v GEICO Ins. Co.* (59 AD3d 129, 871 NYS2d 263 [2d Dept 2008]). But the *Global Surgical Supply* case did not address the issue of severance. Rather, the *Global Surgical Supply* case dealt with the issue of certifying a class action case. It was in that regard that the court wrote about patterns.

The plaintiffs cite *Blake v Bronx Lebanon Hosp.* (2003 WL 21910867 [SDNY 2003][not reported in F.Supp2d]) in support of this same contention but that case was decided in the context of a statute of limitations issue and whether there was a pattern of conduct versus isolated incidents in terms of applying the accrual date for the applicable statute of limitations. The *Bronx Lebanon Hospital* case did not address the matter of common issues of fact and law in the context of a severance analysis.

In support of the plaintiffs’ contention that the severance motion is premature because the “record is not developed with regard to the commonalities and unique elements of the various claims of the various plaintiff,” the plaintiffs cite *Allen v Gen. Elect. Co.* (11 AD3d 993, 994, 782 NYS2d 330 [4th Dept 2004]). The *Allen* case, however, was a case alleging exposure to toxic substances discharged by the defendant company and affecting numerous plaintiffs. There is a major distinction between the toxic discharge case where the alleged offending conduct is the same and the different plaintiffs are all affected by the same acts and the instant case where the claims of medical malpractice are each separate and distinct for each of the three decedents.

On the other hand, the cases cited by the defendants are applicable and persuasive. In one case, medical malpractice claims were combined in one action and severance was granted because the court found that the predominance of individual issues as to each plaintiff required the severance of the claims (*Gittino v LCA Visions, Inc.*, 301 AD2d 847, 753 NYS2d 579 [3d Dept 2003]).

This reasoning was also followed in *Abbondandola v Hitzig* (282 AD2d 224, 724 NYS2d 26 [1st Dept 2004]) where 65 medical malpractice claims were joined in one action. The court stated that “individual issues predominated concerning particular circumstances applicable to each plaintiff,” thus, precluding the trying of the individual claims in one action (*see also Soule v Norton*, 299 AD2d 827, 828, 750 NYS2d 692 [4th Dept 2002] [multiple malpractice claims]; *Reid v Haher*, 88 AD2d 873, 451 NYS2d 775 [1st Dept 1982] [two separate medical malpractice claims; different plaintiffs; arising out of two wholly separate transactions; same doctor; same hospital]).

Another case cited by the defendants is *Bender v Underwood* (93 AD2d 747, 461 NYS2d 301 [1st Dept 1983]). In *Bender*, a motion to consolidate six personal injury actions arising out of a certain hair

implantation process was denied. The court actually found that there were common questions of law and fact but denied consolidation because:

“[I]ndividual issues predominate, concerning particular circumstances applicable to each plaintiff so as to preclude the direction of a joint trial [E]ach treatment was separate and distinct, involving different plaintiffs, each with individual medical histories [U]nder the circumstances of this case, the resulting and cumulative prejudice to [the defendants] by permitting the jury, in one trial, to determine the multiple claims of malpractice at issue here, far outweighs the benefit derived from the conduct of a joint trial [citations omitted]. In addition, . . . of further relevance on the issue is the possibility of confusion for the jury [citation omitted]” (at 748; see also *Glussi v Fortune Brands, Inc.*, 276 AD2d 586, 714 NYS2d 516 [2d Dept 2000], *lv denied* 96 NY2d 730, 722 NYS2d 796 [2001]).

In this case, the language from *Bender* is directly on point. The court is not saying there are not necessarily common issues of fact and law with regard to the claims of “systematic patterns” but the individual issues involved with the underlying and distinct medical malpractice claims so predominate that allowing them to be tried together has the profound potential to confuse a jury having to consider three distinct malpractice claims, different sets of facts, different experts, different witnesses and different circumstances. In addition, the burden of conducting discovery on three distinct medical malpractice claims in one action would be unduly onerous and costly.

Accordingly, the benefits, if any, of trying these three claims in one action are far outweighed by having separate discovery and separate trials focusing on the three distinct claims of medical malpractice. Severance, thus, is granted.

Turning now to the cross motion (002) seeking the preservation of certain records, the court notes that the defendants have conceded that most of the requests for preservation have been acceded to and such preservation is being done. Accordingly, the application for preserving records is decided as provided in the decretal paragraphs herein.

This constitutes the decision and order of the court.

Dated:

April 14, 2010

HON. PAUL J. BAISLEY, JR.
HON. PAUL J. BAISLEY, JR., J.S.C.