

**Reynolds v Beth Israel Med. Ctr.**

2010 NY Slip Op 33658(U)

December 20, 2010

Supreme Court, New York County

Docket Number: 800037/10

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis  
Justice

PART 6

STAFFORD Reynolds,  
Et Al.

INDEX NO. 800037/10

MOTION DATE 12/14/10

MOTION SEQ. NO. 001

- v -  
Beth Israel Medical  
Center, Et Al.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 32 were read on this motion to dismiss

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-15

16-21; x-mot. 22-30

31; 32

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross motion are  
decided in accordance with the accompanying  
decision and order.

**FILED**

DEC 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/20/10

JBL  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
STAFFORD REYNOLDS, Executor of the Estate of  
MICHAEL SLATER, deceased,

Plaintiff,

Index No. 800037/10

-against-

**Decision and Order**

BETH ISRAEL MEDICAL CENTER, PAUL L. KUFLIK, M.D., PAUL M. YANG, M.D., NEIL A. TAYYAB, M.D., DAVID J. FRIEDMAN, M.D., AZRIEL HAIMOWITZ, M.D., BRIAN R. SALTZMAN, M.D., DANIEL S. MILANO, JULIEANE MILO, BETH A. SWEBERG, TERRENCE CARDINAL COOK HEALTH CARE CENTER, DR. MICHAEL TAITT, M.D., PULMONARY & CRITICAL CARE GROUP, DR. STANLEY WINNICK, M.D., and DR. INDIRA KAIRAM, M.D.,

**FILED**

DEC 22 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant(s).

-----X  
JOAN B. LOBIS, J.S.C.:

Beth Israel Medical Center, Paul L. Kuflik, M.D., Paul M. Yang, M.D., Neil A. Tayyab, M.D., David J. Friedman, M.D., Brian R. Saltzman, M.D., Daniel S. Milano, Julieanne Milo, and Beth A. Sweberg (collectively the "moving defendants") move, by order to show cause, for an order dismissing this action as against these defendants pursuant to C.P.L.R. Rule 3211(a)(4), and for an order dismissing this action as against Beth A. Sweberg pursuant to C.P.L.R. Rule 3211(a)(5). Plaintiff cross-moves for an order consolidating this action with another action in this court, Stafford Reynolds v. Beth Israel Med. Ctr., et al, Index Number 109208/2008 (the "2008 Action"). As a preliminary matter, plaintiff does not oppose an order dismissing the case against Beth A. Sweberg. The papers reveal that the parties entered into a so ordered stipulation dated February 2, 2010, agreeing to dismiss the 2008 Action against her. The complaint for the 2010

001

Action is, therefore, dismissed as against Beth A. Sweberg. The remainder of the motion and the cross motion are decided as follows.

On July 3, 2008, plaintiff's decedent, Michael Slater, commenced the 2008 Action, asserting claims of medical malpractice against the moving defendants and others. Mr. Slater died on August 20, 2008. In November 2009, the parties stipulated to amend the caption to reflect the substitution of plaintiff herein, Stafford Reynolds, the executor of Mr. Slater's estate. On or about August 16, 2010, plaintiff commenced the instant action (the "2010 Action"), asserting a cause of action for wrongful death against the moving defendants and others. Both actions against the moving defendants concern the same medical treatment.

Although the existence of an action between the same parties for the same cause of action is grounds to dismiss a separate action, the court may also order a consolidation of the two actions. See C.P.L.R. Rule 3211(a)(4); MediaAmerica, Inc. v. Rudnick, 156 A.D.2d 174 (1st Dep't 1989). Indeed, plaintiff moved for that relief in his cross motion. In anticipation of plaintiff's application for an order of consolidation, the moving defendants maintain that consolidation is not warranted without an affirmation from a physician demonstrating a casual connection between the alleged malpractice and plaintiff-decedent's death. The cases on which the moving defendants rely to support their position were decided prior to the First Department's recent endorsement of the Second Department's holding in Lucido v. Mancuso, 49 A.D.3d 220, 227 (2d Dep't 2008). MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499 (1st Dep't 2010). In Lucido, the Second Department overruled a fifty-year-old line of cases which had required "an evidentiary showing by

competent medical proof that a defendant's conduct caused the decedent's death" before a complaint could be amended to add a cause of action for wrongful death, and instead applied the more general standard of "palpably insufficient or patently devoid of merit[.]" Lucido, at 222 (internal quotations omitted). In citing to Lucido, the First Department held that "[o]n a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." MBIA, 74 A.D.3d at 499 (citations omitted). Plaintiff, herein, has sufficiently demonstrated that the wrongful death claim is not palpably insufficient or clearly devoid of merit, and, even though not required under MBIA, plaintiff has submitted a physician's affirmation that satisfies the standard of "competent medical proof" as set forth in Gambles v. Davis, 32 A.D.3d 224 (1st Dep't 2006). Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the complaint against Beth A. Sweberg and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the remainder of defendants' motion to dismiss is denied and the action is severed and continued against the remaining defendants; and it is further

ORDERED that plaintiff's cross motion to consolidate is granted and the above-captioned action, not including Beth A. Sweberg who was herein dismissed as a defendant, is consolidated in this Court with Michael Slater v. Beth Israel Med. Ctr., et al, Index Number

109208/2008, under Index Number 109208/2008, and the consolidated action shall bear the following caption:

-----X  
STAFFORD REYNOLDS, Executor of the Estate of MICHAEL SLATER, Deceased

Plaintiff,

- against-

BETH ISRAEL MEDICAL CENTER, CONTINUUM HEALTH PARTNERS, INC., PAUL L. KUFLIK, M.D., PAUL M. YANG, M.D., NEIL A. TAYYAB, M.D., DAVID J. FRIEDMAN, M.D., AZRIEL HAIMOWITZ, M.D., BRIAN R. SALTZMAN, M.D., DANIEL S. MILANO, JULIEANNE MILO, "JOHN DOE #1", "JOHN DOE #2", "JOHN DOE #3", "JANE DOE #1", "JANE DOE #2", and "JANE DOE #3", the real names of the last six defendants are unknown to the plaintiff and said fictitious names are intended to designate certain individuals whose names are illegible and were affiliated with and/or were employed by BETH ISRAEL MEDICAL CENTER and/or CONTINUUM HEALTH PARTNERS, INC. from January, 2006 through May 1, 2006, and participated in the services and treatment rendered to the plaintiff during said dates at the BETH ISRAEL MEDICAL CENTER located on First Avenue at 16th Street, New York, New York 10003, TERRENCE CARDINAL COOK HEALTH CARE CENTER, DR. MICHAEL TAITT, M.D., PULMONARY & CRITICAL CARE GROUP, DR. STANLEY WINNICK, M.D., and DR. INDIRA KAIRAM, M.D.,

Defendants.

-----X

; 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 plaintiff is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry 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 it is further

ORDERED that the parties are directed to appear for a status conference in Part 6, Room 345, 60 Centre Street, New York, New York on January 11, 2011 at 10:00 a.m.

Dated: December 20, 2010

  
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JOAN B. LOBIS, J.S.C.