

Wharton v Vaynschelbaum

2010 NY Slip Op 33890(U)

June 15, 2010

Sup Ct, NY County

Docket Number: 114976/2009

Judge: Alice Schlesinger

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

ALICE SCHLESINGER

PA 1A PART 16

PRESENT

Index Number: 114976/2009

WHARTON, DEBORAH

vs

VAYNSHELBAUM, YEFIM

Sequence Number : 001

CONSOLIDATION/JOINT TRIAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by plaintiffs to consolidate this action with a Suffolk County action commenced against Deborah Wharton is denied in accordance with the accompanying memorandum decision.

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

FILED

JUN 21 2010

NEW YORK COUNTY CLERK'S OFFICE

JUN 15 2010

Dated: June 15, 2010

Alice Sch
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
DEBORAH WHARTON, as Executrix of the Estate of
DORIS MAZZA, and DEBORAH WHARTON, on
behalf of decedent's distributees,

Plaintiffs,

-against -

Index No. 114976/2009

YEFIM VAYNSHELBAUM, M.D., PRECISION HEALTH,
INC., PARK AVENUE MEDICAL IMAGING, P.C., and
ROSS HEALTH CARE CENTER, INC.,

Motion Seq. No. 001

Defendants.

-----X
SCHLESINGER, J:

Plaintiffs have moved herein to consolidate the instant medical malpractice action with a collection action which defendant Ross Health Care Center commenced in Suffolk County against the Deborah Wharton, the plaintiff herein, under index number 25844/2009. In the Suffolk County action, Ross Health Care Center, the nursing home where the decedent was treated, seeks to recover from Ms. Wharton monies billed for the care and treatment provided.

Plaintiffs seek to consolidate the two actions, claiming they involve common issues of law and fact. Specifically, plaintiffs claim that they intend to assert a defense in the Suffolk County action that the bills were not paid because the services were negligently provided, a claim that overlaps with the claim here that the defendant is liable for medical malpractice in connection with the care and treatment provided to the decedent.

All the defendants oppose the motion, disputing sufficient commonality of the issues. They further assert that the consolidation of this medical malpractice action with the breach of contract action in Suffolk County would cause jury confusion, as the plaintiff

here is the defendant in Suffolk County and the defendant here is the plaintiff in Suffolk County, each party having a different burden of proof and different elements to its cause of action in each case.

Ross Health Center has submitted two sets of opposition papers urging this position, one from defense counsel here and the other from counsel for Ross as the plaintiff in the Suffolk County contract action. In addition to opposing consolidation, both counsel oppose any change of venue of the collection action to New York County. In addition to noting that Ross resides in Suffolk County and provided the services at issue there, the rule is that if two actions from separate counties are consolidated, venue should be placed in the county where the first action was commenced, absent special circumstances. *Harrison v Harrison*, 16 AD3d 206, 207 (1st Dep't 2005). Here, the first action commenced was the Suffolk County action, and no circumstances exist justifying deviation from the general rule.

Defendants Dr. Vaynschelbaum and his P.C. also oppose consolidation, citing the same reasons as Ross. However, they disagree with Ross that venue should be transferred to Suffolk County. Whereas Dr. Vaynschelbaum apparently provided radiological services to the decedent while she was at Ross, he apparently is based in New York County, as his counsel contends that the transfer of venue to Suffolk County would result in inconvenience to material witnesses.

Plaintiffs offer no reply to the opposition. What is more, their claim of common issues of law and fact is unsupported by the pleadings in the Suffolk County action; the only defenses asserted in that answer are failure to state a cause of action and that Ms. Wharton is not liable for the debts of the decedent. Counsel for Ms. Wharton in that action has not submitted any affidavit from his client (who resides in Maryland), nor an affirmation

of his own or a bill of particulars supporting counsel's claim herein. In any event, while this Court could order a joint trial with each case retaining a separate caption and identity, consolidation would be inappropriate and confusing to the jury where, as here, Ms. Wharton is the plaintiff in one action and the defendant in the other. *See, e.g., Geneva Temps, Inc. v New World Communities*, 24 AD3d 332 (1st Dep't 2005); *Bass v France*, 70 AD2d 849 (1st Dep't 1979).

Accordingly, it is hereby

ORDERED that plaintiffs' motion to consolidate the above-captioned action with the Suffolk County action entitled *Ross Health Care Center v Wharton*, Index No. 25844/09, is denied; and it is further

ORDERED that counsel for all parties shall appear before this Court in Room 222 on June 30, 2010 as previously scheduled for a status conference. The movant shall notify all parties.

This constitutes the decision and order of this Court.

Dated: June 15, 2010

JUN 15 2010



J.S.C.

ALICE SCHLESINGER

FILED

JUN 21 2010

**NEW YORK
COUNTY CLERK'S OFFICE**