

Gulizia v Good

2011 NY Slip Op 30517(U)

February 23, 2011

Supreme Court, Nassau County

Docket Number: 13838/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

CELIA GULIZIA,

Plaintiff,

TRIAL / IAS PART 30
NASSAU COUNTY

Action No. 1

- against -

Index No. 13838/09

LARRY GOOD, MD and SOUTH NASSAU
COMMUNITIES HOSPITAL,

Motion Sequence No. 001, 002

Defendants.

CELIA GULIZIA,

Action No. 2

Third Party Plaintiff,

Index No. 17609/10

- against -

ALL ISLAND GASTROENTEROLOGY and
LIVER ASSOCIATES, PC and HAROLD
LIPSKY, MD,

Third Party Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves, in motion sequence number 001, pursuant to CPLR 602 (a) to consolidate the instant action number 1, index number 13838/09 with action number 2,

index number 17609/10, both in Nassau County Supreme Court, or alternatively combining these actions for a joint trial. These are actions for medical malpractice. The plaintiff contends the defendants were negligent in failing to timely and appropriately monitor, test, and diagnose plaintiff's condition resulting in the amputation of plaintiff's leg. Counsel submits the actions should be joined for trial since there are common questions of fact and law and requests amendment of the caption of number 1, index number 13838/09 to include the defendants from action number 2 to reflect all of the parties in one caption.

The defendants in action number 2, All Island Gastroenterology & Liver Associates, P. C. and Harold Lipsky, M. D., partially oppose that motion, and request all matters be consolidated utilizing index number 17609/10, or in the alternative allow time for the newly added defendants to conduct full and proper discovery and request a court ordered scheduling, a court conference to permit these defendants to enter into a discovery schedule with respect to the consolidated matters. The defendants concedes consolidation of both actions is appropriate since the actions involve the same injuries, and common issues of fact and it is in the best interest of all of the parties, as well as judicial economy. The defendants assert, however, it is unfair and will materially prejudice these defendants, if they are directed to proceed under action number 1 where they did not participate in discovery and point out there has been no preliminary conference nor depositions in action number 2. They submit it would make sense to utilize index number 17609/10 under action number 2 to afford a more realistic time

parameter to complete outstanding discovery. They also object to the plaintiff's "stacking" or "preferences" in this action.

The plaintiff's attorney points out, in an October 27, 2010 reply affirmation to the defense partial opposition, the 90 year old plaintiff filed a note of issue in action number 1 on October 8, 2010 pursuant to an early trial preference under CPLR 3403 (a) (4). He contends, contrary to the defense assertions, there is no outstanding discovery. The plaintiff's attorney notes the eighty authorizations, involved those authorizations some 40 years ago, were provided to the defense in both actions for health care providers and collateral source records, but no employment nor tax records were provided because the plaintiff had long been retired and there was no claim for loss of earnings. The plaintiff's attorney asserts the plaintiff waived depositions in action number 2, and the plaintiff and two family members testified at depositions in action number 1 and that those deposition transcripts were exchanged with the defense in action number 2, and the plaintiff's testimony shows the plaintiff has limited recollection and no memory of the events at South Nassau Community Hospital which forms the basis of the actions. He states all discovery in action number 2 has been served on the defendants in action number 1 and defense in action number 2 fails to set forth precisely what else could be obtained by further discovery.

The defendant Larry Good, M.D., in action number 1, cross moves under motion sequence No, 002 pursuant to CPLR 3402 and the Uniform Rules of the New York State Trial Courts Rule 202.21 (e) to vacate the note of issue filed on October 8, 2010 under

Index No. 13838/09. The attorney for Dr. Good also submits, in this cross motion, partial opposition to the plaintiff's motion for consolidation of both actions, but has no opposition to these matters being consolidated nonetheless requests the actions be consolidated under action number 2, index number 17609/10. The defendant states the addition of All Island Gastroenterology & Liver Associates, P. C. and Dr. Lipsky to action number 1 requires a considerable amount of additional discovery to be exchanged between the parties. Counsel further argues the second supplemental bill of particulars served by plaintiff's counsel on October 8, 2010 pursuant to CPLR 3042 should be declared a nullity because it was served after the note of issue, and it alleges a new type of injury not previously claimed by the plaintiff, to wit post traumatic stress disorder. The attorney for Dr. Good submits this second supplemental bill of particulars is an amendment of the bill of particulars originally alleged by the plaintiff without leave of the court. He asserts the plaintiff's counsel took steps to bring new defendants into action number 1 at the time he filed the note of issue, and without an opportunity for any discovery between the defendants in both actions. Counsel maintains an award of costs should be imposed against the plaintiff's counsel pursuant to CPLR 8106 because plaintiff's counsel filed the note of issue with knowledge additional discovery would be anticipated by virtue new defendants, but also the plaintiff would allege new psychiatric injuries and treatment with new medical providers.

The attorney for the defendant South Nassau Communities Hospital, in action number 1, states, in a November 3, 2010 affirmation, this defendant adopts and supports

the case law and arguments advanced by Dr. Good in the cross motion pursuant to CPLR 3402 and the Uniform Rules of the New York State Trial Courts Rule 202.21 (e) to vacate the note of issue filed on October 8, 2010

The plaintiff's attorney states, in an October 28, 2010 opposing affirmation to the defense cross motion, action number 1 should remain on the trial calendar with a special trial preference, and both actions should be consolidated. The plaintiff's attorney argues Dr. Good's cross motion should be denied. The plaintiff's attorney contends Dr. Good's cross motion is untimely, and procedurally defective since it fails to include action number 2.

A motion to consolidate actions pursuant to CPLR 602 (a) rests in the sound discretion of the trial court (*see Pitney Bowes Credit Corp. v Biometrics/Seafield Center*, 302 A.D.2d, 508; *Rogers v Warrell* 214 A.D. 2d 553). Where common questions of law or fact exist, a motion to consolidate pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (*Mas-Edwards v. Ultimate Services, Inc.* 45 A.D.3d 540 ; *Perini Corp. v. WDF, Inc.*, 33 A.D.3d 605). Here, both actions arise from the same medical case and involve common questions of law and fact and consolidation will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts (*Gutman v. Klein*, 26 A.D.3d 464)

Accordingly, since no party opposes consolidation, both actions are consolidated under Action No. 2 under Index No. 17609/10 to permit discovery to be completed in a timely fashion. The argument by the plaintiff that the newly added defendants in Action No. 2 are not in need of any further discovery is presumptive and unpersuasive. Further, consistent with the consolidation under Index No. 17609/10 the cross motion to vacate the Note of Issue filed under Index No. 13838/09 is granted.

So ordered.

Dated: **February 23, 2011**

ENTER:



J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION xxx

ENTERED
FEB 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE