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

PRESENT: ALICE SCHLESINGER Justice

IA PART 16

LANDON, THOMAS, ET AL.

-v-

STEPHEN D. SIEGAL, M.D., P.C., ET AL.

INDEX NO. 100886/10

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

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

FILED

SEP 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

SEP 27 2011

Dated: September 27, 2011

ALICE SCHLESINGER, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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THOMAS LANDON and CATHERINE LANDON,

Plaintiffs,

Index No. 100886/10
Motion Seq. No. 003

-against-

STEPHEN D. SIEGEL, M.D., P.C., STEPHEN D. SIEGEL, M.D., P.C., NYU HOSPITALS CENTER, NEW YORK UNIVERSITY SCHOOL OF MEDICINE, NYU MEDICAL CENTER and NYU LANGONE MEDICAL CENTER,

Defendants.

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STEPHEN D. SIEGEL, M.D., P.C, and STEPHEN D. SIEGEL, M.D.,

Third-Party Plaintiffs,

-against-

Index No. 590757/11

NYU HOSPITALS CENTER, NEW YORK UNIVERSITY SCHOOL OF MEDICINE, NYU MEDICAL CENTER, NYU LANGONE MEDICAL CENTER and ELLIOT NEWMAN, M.D.,

Third-Plaintiff Defendants.

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SCHLESINGER, J.:

On September 17, 2006, Thomas Landon went to the emergency room at New York University Langone Medical Center ("NYU"). Based on certain complaints he made with regard to abdominal symptoms, an examination was conducted and he was admitted to the hospital. He remained there for three days and was assigned an attending physician, Dr. Elliot Newman, to be his doctor. While there, on September 18, 2006, a contrast CT

of his abdomen and pelvis was taken. This generated a report by radiologist Dr. Stewart Bakst which showed a 3.3 cm heterogeneously enhancing mass in the inferior pole of the right kidney. Dr. Bakst recommended a further evaluation with an MR.

Mr. Landon was discharged on September 19, 2006, his symptoms having been resolved. He was not given an MR scan, nor was such a test scheduled for him. He did not seek any further treatment from NYU after this, or from Dr. Newman for the rest of 2006, 2007 or 2008.[1]

On or about August 23, 2007, Mr. Landon went to see his private physician, Dr. Stephen Siegel. Also around that time, Dr. Siegel received a faxed copy of the report of the CT scan referenced above. It is alleged by the plaintiff's counsel that Dr. Siegel failed to recommend or schedule any radiologic tests or an MR evaluation as specifically recommended in Dr. Bakst's report.

In the Fall of 2009, Mr. Landon was diagnosed with Stage IV renal cell carcinoma allegedly growing from the untreated mass identified in September 2006 at NYU.

An action naming NYU and Dr. Stephen Siegel as defendants was begun with a summons with notice on January 22, 2010, followed by a verified complaint filed on May 19, 2010. Both defendants answered and discovery began. Because of the seriousness of the plaintiff's illness and its terminal nature, discovery was expedited. It was also agreed by counsel, memorialized in a Stipulation, that plaintiff would file a Note of Issue by the end of May but discovery by way of depositions would continue after that.

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[1]On November 6, 2009, Mr. Landon again came under the care of NYU after a diagnosis of renal cell carcinoma had been made.

On June 13, 2011, defendant NYU, via an Order to Show Cause, moved for summary judgment asking that the action be dismissed against it on Statute of Limitations grounds. On July 13, 2011, this Court granted that motion as it was not contested that after the September 17, 2006 admission which concluded on September 19, 2006, there was no further contact between Mr. Landon and NYU until November 2009, more than the two and one-half years allowed for the commencement of a medical malpractice action. After announcing my decision on the record on that date, I noted that counsel for the hospital had agreed to completely cooperate in any and all outstanding discovery needed by counsel. This meant that NYU's counsel would provide the names and addresses of all medical personnel who had had any connection with the September 2006 admission. In this regard, it should be noted that on July 5, 2011, eight days before my decision to dismiss was announced, non-party Dr. Elliot Newman was deposed. He is a gastrointestinal surgical oncologist and is still associated with NYU (its medical school).

On August 3, 2011, counsel for the plaintiffs and Dr. Siegel entered into a Stipulation setting an expedited trial date of October 3, 2011. What happened next is the predicate for the motions now before this Court. On or about September 6, 2011, counsel for Dr. Siegel filed a third-party summons and complaint naming NYU Hospital and its Medical School and Dr. Elliott Newman as third-party defendants. Dr. Siegel demanded contribution and/or indemnification from these parties in the event he was found responsible for the injuries suffered by the plaintiffs (¶¶29-32).

The plaintiff then moved to sever the third-party action, and Dr. Siegel opposed. NYU and Dr. Newman cross-moved to dismiss the third-party action or in the alternative to sever it. Dr. Siegel opposed that request as well . After receiving papers from all

concerned, oral argument was held in the late afternoon of September 23. The Court reserved decision, but promised one by the early part of the week of September 26. Here is that decision.

Though the plaintiffs' motion for severance chronologically came first in this motion practice, it makes sense to first decide the third-party defendants' cross-motion to dismiss since the severance is requested based on an understandable fear by the plaintiff that if NYU and Dr. Newman remain a part of the action, the trial will be unduly delayed, possibly until after Mr. Landon's death. Obviously, if the cross-motion is granted and the third-party action is dismissed, the problem goes away. But if not, the plaintiff is right to be fearful because not surprisingly the third-party defendants are imploring the Court to grant a severance or alternatively to delay the trial so that they can do further discovery. The Court is particularly sensitive to this request made by Dr. Newman, who has just been brought into the action as a defendant and who has not participated to date in any discovery, except his own deposition, or performed any investigation via counsel.

The cross-motion to dismiss relies on the off-cited rule that Dr. Siegel, as a subsequent tortfeasor, may not seek contribution from NYU and Dr. Newman, who are alleged prior tortfeasors. The rationale for this rule, as explained in such cases as *Zillman v Meadowbrook Hospital,* 45 AD2d 267 (2nd Dep't 1974), is that the prior tortfeasor, here arguably NYU, is responsible for all injuries dating from the time of its negligence, including any aggravation of that injury by a subsequent tortfeasor. While such a prior tortfeasor can sue all subsequent tortfeasors for contribution, the subsequent tortfeasor, arguably Dr. Siegel here, cannot look back and seek contribution or indemnification from the prior tortfeasor because he is only responsible for the injury he creates and its aftermath, not for anything that happened before.

However, there are exceptions to the above rule and this action, I find, falls under one such exception. *Ravo v Rogatnick*, 70 NY2d 305 (1987) explains this exception. It occurs when the injury alleged is a single indivisible injury and it would be difficult, if not impossible, to figure out which defendant was responsible for which part of such injury. In *Ravo*, the defendants were Dr. Rogatnick, an obstetrician, who cared for the pregnant mother and delivered her baby, and Dr. Harris, a pediatrician who cared for the baby Josephine after her birth. Josephine was brain damaged. While both doctors were found negligent for various reasons, no one, including the plaintiff's doctors, could delineate which aspects of the injury had been caused by the respective negligence of the doctors. Thus, simultaneous conduct was not necessary for joint and several liability.

Wiseman v 374 Realty Corp., 54 AD2d 119, 121 (1st Dep't 1976), a case cited by *Ravo*, cites CPLR §1401 which provides that "two or more persons who are subject to liability for damages for the same personal injury ... may claim contribution among them." The sole requirement for contribution is that two people or entities, whenever their liability occurred, be held responsible for the same personal injury, property damage, or wrongful death.

In *Wiseman*, the decedent sustained severe injuries as a result of a fall caused by a defective stairway and handrail. He was taken to Presbyterian Hospital where he was given a drug, Decatron, known to cause stomach bleeding. He died. The defendants included the building owner, the hospital, the two treating doctors, and the drug manufacturer. All of the latter defendants cross-claimed against the first tortfeasor, the building owner, who moved to dismiss under the authority of *Zillman*. That motion was denied because the complaint alleged liability against all the defendants for the same injury — death — an obviously single, indivisible injury.

Finally, in *Helmrich v. Lilly & Co.*, 89 AD2d 441 (4th Dep't 1982), the plaintiff suffered from vaginal cancer as a result of her mother's ingestion of DES during pregnancy. Syracuse University treated the cancer by performing a hysterectomy. Ms. Helmrich sued the manufacturer of the drug and the University under different theories of liability. The University, the subsequent tortfeasor like Siegel here, asserted a claim against Lilly & Co. Lilly & Co., like NYU here, moved to dismiss. The Appellate Division reversed the lower court, which had granted Lilly's motion. Citing to CPLR §1401, the appellate court said that if tortfeasors are responsible for the same harm, whatever the theory or time the liability occurred, they can seek contribution against each other.

Here, the plaintiff has always made the same claim against NYU and Dr. Siegel, that each party failed to properly follow-up with necessary tests when arguably this cancer could have been successfully dealt with, NYU in September 2006 and Dr. Siegel in August 2007. The same injury is claimed, stage IV kidney cancer.

At oral argument, I specifically inquired of counsel for Mr. Landon whether he was prepared at trial to show any difference in the degree of cancer that his client had at those two times; in other words, was the injury divisible. Counsel said "NO", that at both times the disease was at an early, treatable form. His oncologist would state as much.

Therefore, since this case has an indivisible claimed injury, it falls into the exception where contribution is available to each liable tortfeasor against the other. The cross-motion to dismiss is therefore denied and the third-party action will stand.

As for severance, certainly it would be best for this case to be tried at one time with all defendants present. If it is not because a severance is granted and Dr. Siegel is found responsible, Dr. Siegel presumably would need to proceed with the third-party action separately.

In balancing the prejudice, I must consider as well whatever fault each party bears for the circumstances. In this situation, it is true that NYU was a direct defendant until recently and arguably could have better investigated its own people, even those residents who have moved on.

But on the other hand, Dr. Siegel waited from July 13 (when I dismissed the case against NYU) to September 6, 2011 to begin the third-party action, a period of almost two months. This delay occurred in spite of knowing about NYU's motion when it was made a month earlier, a motion very straightforward and one the plaintiff did not oppose! Also, the delay occurred despite the fact that on August 3, 2011, counsel for Dr. Siegel and the plaintiff stipulated to a trial date of October 3, 2011. So one could understand the accusation that the third-party action was made virtually on the eve of trial.

But Dr. Elliot Newman, who was never a defendant before September 6 and who because of a conflict just days ago obtained new counsel, bears no fault. His attorney, both in papers and at oral argument, explained that significant discovery must take place in order for Dr. Newman to properly defend himself in this action. Counsel then elaborated what had to be done and why it could not be accomplished by October 3.

In a conference call with all counsel held on September 27, 2011, it was confirmed that all counsel, except counsel for the newly added defendant Dr. Newman, would be ready to proceed to trial on October 14, 2011 and that the plaintiff would consent to an adjournment to that date. Counsel for Dr. Newman confirmed his assertion at oral argument that Dr. Newman would be prejudiced should he be directed to proceed at this time due to insufficient discovery and time to investigate. And plaintiff's counsel confirmed that his client's dire medical condition would not allow him to agree to postpone the trial beyond October 14.

Therefore, on balance, I am granting a severance as to Dr. Newman only in the third-party action so that all claims against Dr. Newman will be tried separately in the event Dr. Siegel is found negligent in the first trial. All other counsel are directed to appear in Room 222 on Thursday, October 13, 2011, ready to select a jury and begin a trial as to the main action and the third-party claims against NYU only.

Accordingly, it is hereby

ORDERED that the motion by the third-party defendants to dismiss is denied; and it is further

ORDERED that the motion by the plaintiff and the cross-motion by the third-party defendants to sever is granted only to the extent of severing the claims against Elliot Newman, M.D., and the Clerk is directed to sever those claims in the third-party action so they may proceed separately under Index No. 590757/11.

Dated: September 27, 2011

SEP 27 2011

J.S.C.

ALICE SCHLESINGER