

Spivak v Diaz

2013 NY Slip Op 34240(U)

May 28, 2013

Supreme Court, Queens County

Docket Number: 700619/12

Judge: Robert J. McDonald

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PS 6/5/13

ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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ALBERT C. SPIVAK,

Action No. 1

Plaintiff,

Index No.: 700619/

- against -

Motion Date: 5/9/13

AIDA DIAZ,

Motion No.: 128

Defendant.

Motion Seq.: 2

----- x

ALBERT C. SPIVAK,

Plaintiff,

Action No. 2

- against -

Index No. 701616/2

SHI LIN QIN,

Defendant.

----- x

The following papers numbered 1 to 11 on this motion:

	<u>Papers Numbered</u>
Defendant Diaz's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	5-8
Defendant's Reply Affirmation-Exhibit(s)	9-11

Defendant in Action No. 1, Aida Diaz, by notice of motion, seeks an order of the Court, pursuant to CPLR 602, consolidating Actions No. 1 with Action No. 2 for joint trial. Pursuant to section 602 of the CPLR, the court is authorized to consolidate two actions for joint trial where the actions "involve a common question of law or fact." Plaintiff in Actions No. 1 and 2,

Albert C. Spivak, submits an affirmation in opposition and defendant Diaz submits a reply.

Action No. 1 is for personal injuries allegedly sustained by plaintiff, Albert C. Spivack, as a result of an automobile accident which occurred on March 19, 2012. A summons and complaint in Action No. 1 was filed on April 11, 2012 and issue was joined on or about June 11, 2012.

Action No. 2 is for personal injuries allegedly sustained by plaintiff, Albert C. Spivack, as a result of a second automobile accident which occurred on July 23, 2012. A summons and complaint in Action No. 2 was filed on August 14, 2012 and issue was joined on or about September 25, 2012.

In support of the motion, defendant Diaz submits the affirmation of Eva B. Cohen, Esq.; a copy of the summons and verified complaint; defendant Diaz' verified answer and demand for a verified bill of particulars and combined demands; a copy of the summons and verified complaint in Action No. 2; defendant Qin's verified answer and demand for a verified bill of particulars and combined demands; a copy of plaintiff's bill of particulars regarding Action No. 1; a print out of ISO Claim Search for Action No. 2; and, a copy of the preliminary conference order in Action No. 2.

In his bill of particulars in Action No. 1 , the plaintiff claims that as a result of his accident on March 19, 2012, he sustained inter alia, herniated discs of the lumbar spine, and meniscal tears of the right and left knee. Defendant maintains that regarding Action No. 2 an ISO Claim for Action No. 2 indicates claims to plaintiff's "head, neck, shoulders, back and knee."

Defendant Diaz submits that the plaintiff's claims of injuries in each of the two accidents which occurred approximately 3 months apart are the same or similar, and therefore, the two accidents should be consolidated due to the overlapping of the injuries and treatment from the first accident and the second accident.

In opposition to the motion, plaintiff's counsel Jung H. Choi, Esq., submits his own affirmation as well as a copy of the pleadings in Action No. 1; a copy of the pleadings in Action No. 2; a copy of the police report in each action; and, a copy of plaintiff's bill of particulars in Action No. 1 and Action No. 2.

Plaintiff's verified bill of particulars in Action No. 2 indicates that as a result of the rear-end collision with defendant, Zhi Lin Qin, on July 23, 2012, the plaintiff sustained a tear of the right shoulder.

Plaintiff's counsel argues in opposition to the motion to consolidate that because the accidents are separate, and the injuries sustained in each accident are different, that there are no questions of law or fact which are common to both actions.

In reply, defendant Diaz submits that the claimed injuries in both matters are so intertwined that it is only fair to the defendants in both matters that the cases be consolidated for a joint trial. Counsel submits the plaintiff's treatment records from the Sanford Medical Center which refer to the plaintiff's injuries sustained in the second accident of July 23, 2012.

On July 26, 2012, an "Initial Comprehensive Examination" was conducted of plaintiff by Dr. Sea Hyun Chung of the Sanford Medical Center regarding the July 23, 2012 accident and subsequent follow-up examinations were conducted on September 6, 2012, October 17, 2012, November 28, 2012 and January 2, 2013.

In the Initial Comprehensive Examination conducted by Dr. Chung on July 26, 2012, plaintiff's primary complaint was sharp and stabbing pain "radiating from neck to right shoulder, and from low back to right knee."

In a follow-up examinations conducted by Dr. Chang on September 6, 2012, plaintiff complained of "right shoulder pain, with radiation to the right arm, forearm, elbow" and "right shoulder pain which have been aggravated lately." Any other complaints were noted to be minimal in nature.

On October 17, 2012 and November 28, 2012 and January 2, 2013, follow-up examinations were conducted by Dr. Tae Gyun Kim. On the dates of those examinations, plaintiff complained of "moderate right shoulder pain, with radiation to the right arm, forearm, elbow" in the examination conducted on October 17, 2012 and "mild right shoulder pain, with radiation to the right arm, forearm, elbow" in the examinations conducted on November 28, 2012 and January 2, 2013. Any other complaints including lower back pain were noted to be minimal in nature.

It is clear from these reports that all of the plaintiff's complaints of pain relating to the accident of July 23, 2012 as set forth in his bill of particulars are due only to the injury to his right shoulder.


The discretion of the trial court is undeniably wide in assessing the propriety of a motion for a joint trial pursuant to CPLR 602(a) Glussi v Fortune Brands, 276 AD2d 586 (2d Dept. 2000) and "absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law and fact" (see RCN Constr. Corp. v Fleet Bank, N.A., 34 AD3d 776 (2d Dept. 2006); Flaherty v. RCP Assoc., 208 AD2d 496 [2d Dept. 1994]; Stephen v Allstate Ins. Co., 185 AD2d 338 [2d Dept. 1992]; Zupich v Flushing Hosp. & Med Ctr., 156 AD2d 677 [2d Dept. 1989]).

Although the courts have consolidated cases where a plaintiff was involved in separate accidents if the injuries claimed to have been sustained in each accident are essentially the same or involve an exacerbation of an injury from a prior accident (see Nellegar v. Cote, 255 AD2d 82 [3d Dept. 1998]; Millington v. Williams, 250 AD2d 977 [3d Dept. 1998]; McIver v Canning, 204 AD2d 698 [2d Dept. 1994]; Gabran v. O & Y Liberty Plaza Co., 174 A.D.2d 708 [2d Dept. 1991]; Heck v. Waldbaum's Supermarkets, Inc., 134 AD2d 568 [2d Dept. 1987]), here the plaintiff failed to make a sufficient showing that the injuries sustained in each action were similar or overlapped (see Stuckhardt v New York City Bd. of Educ., 29 Misc. 3d 127(A) [App.Term 2d Dept. 2010]). The first accident involved an injury to his knees and back whereas the second accident involved an injury only to his right shoulder.

Therefore, this Court finds that Action No. 1 and Action No. 2 do not involve common questions of law or fact (CPLR 602[a]), as there is no commonality between the two actions other than both actions being automobile accidents involving the plaintiff. Each accident occurred on a separate date, at a separate location with two separate defendants, and resulted in two completely separate injuries to plaintiff. Thus, this Court finds that consolidation for joint trial of both actions would be prejudicial to plaintiff.

Accordingly, defendant Diaz' motion for joint trial consolidation is denied.

Dated: Long Island City, NY
May 28, 2013



ROBERT J. McDONALD
J.S.C.