

**Moodhe v Menken**

2018 NY Slip Op 32261(U)

August 31, 2018

Supreme Court, New York County

Docket Number: 805092/18

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

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SANDRA MOODHE and DAVID MOODHE,

Index No. 805092/18

Plaintiffs,

-against-

FAITH MENKEN, M.D., et al.,

Defendants.

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HON. MARTIN SHULMAN, J.S.C.:

In this medical malpractice action, plaintiffs Sandra Moodhe (Mrs. Moodhe) and David Moodhe (collectively, plaintiffs), move pursuant to CPLR § 602 (a) and (b) to consolidate the above captioned action (Action 2) with a related action entitled *Moodhe, et al v Zwanger-Pesiri Radiology, et al.*, which is now pending before the Supreme Court of the State of New York, Nassau County under Index No. 604023/17. (Action 1).

Plaintiffs request that Action 1 be transferred to New York County for consolidation with Action 2. Defendants in both actions responded to the motion as follows:

- Defendant Faith Menken (Dr. Menken) partially opposes plaintiffs' motion, taking no position with respect to consolidation. However, Dr. Menken, a defendant in Action 2, objects to plaintiffs' proposed caption for the consolidated actions to the extent that she is named as the first defendant. Her counsel states that being listed first in the caption will "burden her with the obligation of conducting depositions and leading the defendants at the time of trial in this matter when the initial action, which did not include [her], has been pending since 2017 in Supreme Court, Nassau County."
- Defendants Grace Monteleone, P.A. (P.A. Monteleone) and Winthrop Surgical Associates (Winthrop), both named as defendants in Action 2, also partially oppose plaintiffs' motion, indicating no objection to consolidation, but objecting to venue in New York County because a Nassau County Justice has been assigned in Action 1, discovery conferences have taken place and discovery orders have

been issued accordingly. These defendants also note that a motion is pending in Action 1 seeking consolidation and transfer of Action 2 to Nassau County.<sup>1</sup>

- Defendants Zwanger-Pesiri Radiology Group, LLP s/h/a Zwanger-Pesiri Radiology (Zwanger), Patricia Kelly, M.D. (Dr. Kelly), Nina Vincoff, M.D. (Dr. Vincoff) and Jennie Brodsky, M.D. (Dr. Brodsky), all named in Action 1, and Zwanger and Stephen Kremer, M.D. s/h/a Steven Kremer, M.D. (Dr. Kremer), who are named in Action 2, also do not oppose consolidation, but request that venue remain in Nassau County.<sup>2</sup>
- Defendants Zwanger & Dr. Kremer (named in Action 2) cross-move pursuant to CPLR § 602 (a) and § 510 (1) and (3) to consolidate the two actions and place venue in Nassau County, and upon granting consolidation, for an order dismissing Zwanger from Action 2 as there is a prior action (Action 1) pending against it (see CPLR 3211 [a] [4]).
- Defendants Jeffrey Miller, M.D. (Dr. Miller) and Square Care Medical Group, LLP d/b/a Complete Women's Healthcare, P.C. (CWH), who are named in Action 2, oppose plaintiffs' motion and cross-move pursuant to CPLR § 602 (a) to consolidate the two actions and pursuant to CPLR § 510 (1) and (3) to place venue of the consolidated actions in Nassau County.

**FACTUAL & PROCEDURAL BACKGROUND**

Plaintiffs, both residents of Texas, claim that both cases involve the defendants' alleged failure to timely and properly diagnose Mrs. Moodhe's breast cancer. On May 9, 2017, plaintiffs commenced Action 1 in Nassau County against Zwanger, Dr. Kelly,

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<sup>1</sup> P.A. Monteleone and Winthrop state that plaintiffs do not appear to have served the instant motion on notice to the defendants in Action 1 other than Zwanger-Pesiri Radiology, which is named as a defendant in both actions. They further note that plaintiffs brought this motion before all defendants in Action 2 had appeared, thus depriving them of the opportunity to respond.

<sup>2</sup> These defendants are the movants in Action 1. They theorize that plaintiffs' counsel, who filed the instant consolidation motion after they filed their consolidation motion in Action 1, is attempting to avoid Justice Leonard Steinman's March 22, 2018 order directing Mrs. Moodhe to appear in New York for her deposition rather than by electronic means as plaintiffs' counsel had requested. A review of the electronically filed documents in Action 1 indicates that plaintiffs subsequently cross-moved in that action for the same relief sought herein.

Dr. Vincoff, Dr. Brodsky and Frank A. Monteleone, M.D. (Dr. Monteleone). All five defendants named in Action 1 have places of business in Nassau County. Action 1 is based upon treatment defendants rendered to Mrs. Moodhe between November 2014 and June 2015.

Shortly after commencing Action 1, plaintiffs discharged their counsel and retained their present counsel. As previously stated, on March 22, 2018 counsel for the parties in Action 1 participated in a telephone conference with the Hon. Leonard Steinman, J.S.C., at which time he denied plaintiffs' counsel's request to conduct Mrs. Moodhe's deposition via electronic means and directed her to appear in New York to be deposed. This order was entered in the Nassau County Clerk's Office on March 27, 2018.

On March 27, 2018 (the same day Justice Steinman's foregoing order was entered), plaintiffs filed Action 2 in this court naming Dr. Menken, Sandra J. Shin, M.D. (Dr. Shin), Tessa Cigler, M.D. (Dr. Cigler), Dr. Miller, Dr. Kremer, P.A. Monteleone, CWH, Zwanger, Winthrop and New York-Presbyterian Hospital/Weill Cornell Medical Center (NYPH). As indicated in the summons filed in Action 2, plaintiffs chose New York County based upon "defendants' place of business."<sup>3</sup> The complaints in both actions allege failure to timely diagnose and treat breast cancer and a derivative claim on behalf of plaintiff David Moodhe.<sup>4</sup> However, the allegations in Action 2 arise from

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<sup>3</sup> Six of the ten named defendants in Action 2 are listed in the summons as having places of business in Nassau County. Defendant Dr. Shin is listed as having addresses in both New York County and Albany County.

<sup>4</sup> The complaint in Action 2 also alleges a cause of action for lack of informed consent.

treatment rendered to Mrs. Moodhe from 2011 through 2015. Zwanger is the only defendant named in both actions.

#### DISCUSSION

Under CPLR § 602(a), “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion . . . may order the actions consolidated . . .” Here, none of the parties objects to consolidating Actions 1 and 2 for all purposes and those branches of the motion and cross-motions are granted. Consolidation of the two actions is appropriate in this instance where there is no dispute that common questions of fact and/or law exist and plaintiffs seek recovery for the same injury. See *Pipitone v Zweig*, 163 AD2d 4, 4 (1<sup>st</sup> Dept 1990) (“consolidation was proper since both actions seek damages for same injury; both allege misdiagnosis, incorrect treatment and negligence; all defendant doctors involved are alleged to have acted in similar incorrect manner...”).

The primary disputed issue is whether the consolidated actions should be consolidated for all purposes in New York County or Nassau County. Under CPLR § 510, “[t]he court, upon motion, may change the place of trial of an action where . . . (3) the convenience of material witnesses and the ends of justice will be promoted by the change.” As stated in *Harrison v Harrison*, 16 AD3d 206, 207 (1<sup>st</sup> Dept 2005), “[w]here two actions involving identical issues are pending in separate counties, the actions should be consolidated pursuant to CPLR 602 in the county where the first action was commenced absent special circumstances (citation omitted).” See also *Ferolito v Vultaggio*, 115 AD3d 541, 542 (1<sup>st</sup> Dept 2014).

**A. Plaintiffs' Arguments in Favor of Venue in New York County**

Plaintiffs argue in their motion that venue of the consolidated actions is proper in New York County for the following reasons:

- Action 1 was commenced by plaintiffs' prior counsel, and present counsel, upon receipt of the case file and his "independent consultations with medical experts", learned that the alleged malpractice in Action 2 predated the allegations of malpractice in Action 1, as Mrs. Moodhe first sought treatment from Drs. Menken, Cigler and Shin at NYPH (collectively, the NYPH defendants) in New York County in 2011 for a mass in her breast; and
- venue is proper in New York County pursuant to CPLR § 503, and it is plaintiff's right to choose venue.

Plaintiffs' counsel elaborates in reply and in opposition to the various cross-motions as follows:

- Mrs. Moodhe's main care and treatment was rendered in New York County;
- at the time Action 1 was commenced, "Lavern's Law"<sup>5</sup> had not been passed, and plaintiffs' claims against the defendants in Action 2, which date back to 2011, would have been time barred but are now timely;
- the primary focus of this medical malpractice action is on NYPH and the doctors who treated Mrs. Moodhe there and who are the first providers to misdiagnose her and cause the four year delay in diagnosis; and
- crucial evidence (pathology slides) is located in New York County at NYPH's facilities and NYPH likely will not allow such evidence to be removed for examination by any experts retained in this matter, who will be required to travel to New York County for that purpose.

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<sup>5</sup> Effective January 31, 2018, CPLR § 214-a was amended to extend the statute of limitations for medical malpractice actions involving an alleged failure to diagnose cancer or a malignant tumor. Known as "Lavern's Law", the amendment provides that such actions may be commenced "within two years and six months of the later of either (i) when the person knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition."

**B. Defendants' Arguments in Favor of Venue in Nassau County**

Those defendants<sup>6</sup> who argue that venue should remain in Nassau County rely upon "the longstanding rule that actions should be consolidated in the venue of the first action, here Nassau County." Freidlin Aff. in Opp., ¶ 3. They further dispute that any "special circumstances" exist which would warrant consolidation of these actions in New York County. Defendants also note the following:

- plaintiffs fail to allege that any material nonparty witnesses would be inconvenienced by trial in Nassau County (see CPLR § 510 [3]; *Nicholas v Brini*, 204 AD2d 194, 195 [1<sup>st</sup> Dept 1994]);
- plaintiffs are "forum shopping" in an attempt to circumvent Judge Steinman's March 22, 2018 discovery order (discussed above); and
- the majority of defendants named in Action 2 either reside in and practice in or have their places of business in Nassau County rather than in New York County.

For the following reasons, consolidation of Actions 1 and 2 in New York County is granted. Special circumstances exist which warrant venue being fixed in New York County. The defendants named in Action 2 could not have been named in Action 1 because plaintiffs' claims against them were time barred. The enactment of Lavern's Law has now enabled plaintiffs to pursue their claims dating back to 2011.

The NYPH defendants are the first providers to allegedly fail to diagnose Mrs. Moodhe's breast cancer. Plaintiffs allege that these providers treated Mrs. Moodhe from April 1, 2011 through October 20, 2015, and that her breast cancer should have

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<sup>6</sup> Dr. Menken does not object to venue in New York County, while defendants NYPH, Sandra J. Shin, M.D. and Tessa Cigler, M.D. have not interposed any opposition to plaintiffs' motion.

been diagnosed in 2011.<sup>7</sup> The complaints in each action support plaintiffs' assertion that the NYPH defendants are likely to be the primary focus of this litigation. Had Lavern's Law been in effect at the time plaintiffs commenced Action 1, it stands to reason that one action would have been brought in New York County against the defendants named in both actions. Finally, defendants fail to establish that they will be prejudiced by transferring Action 1 to New York County.

The foregoing suggests that this action's commencement in New York County was not undertaken in bad faith and that "the ends of justice will be promoted by the change." See CPLR § 510 (3). Addressing the defendants' forum shopping accusations, and particularly the claim that plaintiffs are attempting to skirt Justice Steinman's March 22, 2018 order, this court fully intends to honor that determination and any other rulings or orders made in Action 1. Parenthetically, this court would, like Justice Steinman, direct Mrs. Moodhe to appear in New York to be deposed.

### **C. Caption/EBT Priority**

In response to Dr. Menken's request regarding the caption of the consolidated action, plaintiffs' counsel asserts that the request is "pretext" in that Dr. Menken is merely attempting to obtain priority with respect to the scheduling of depositions. Plaintiffs claim priority with respect to taking Dr. Menken's deposition, claiming to have noticed her deposition prior to her noticing plaintiffs' depositions. Dr. Menken's counsel

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<sup>7</sup> Plaintiffs allege that Dr. Cigler, a pathologist, interpreted specimens from an April 1, 2011 biopsy which Dr. Menken performed, and noted a "malignant neoplasm of breast." Despite this notation, oncologist Dr. Shin did not administer any adjuvant therapy. Dr. Menken performed a second biopsy in 2014. All of these tests, examinations and diagnoses occurred at NYPH in New York County from 2011 through 2015.

subsequently submitted a letter to this court advising that plaintiffs' counsel was incorrect, which included a copy of their deposition notice with an affidavit of service. The affidavit of service indicated that Dr. Menken served her notice to take deposition prior to plaintiffs. As plaintiffs did not object or respond to the letter, the court will consider it even though it was received after this motion and cross-motions were marked fully submitted. Plaintiffs also do not dispute Dr. Menken's counsel's representation that Dr. Menken does indeed have priority in deposing plaintiff prior to being produced herself.

As to the consolidated action's caption, since the actions are being consolidated under the index number in Action 2, the defendants named in Action 2 shall be the first named defendants (see below). Dr. Menken's claimed burden of being the first named defendant is unavailing. Notwithstanding the order in which defendants are named in the caption, the order in which they are deposed will be discussed at a preliminary conference (see below), taking into account the preliminary conference order in Action 1 and whether or not any depositions have commenced.

#### **D. Zwanger's Dismissal Request**

Zwanger's request to be dismissed as a defendant in Action 2 is moot in light of the consolidation. As plaintiffs' counsel notes, Zwanger will simply be named once in the caption.

For the foregoing reasons, it is

ORDERED that plaintiffs' motion is granted and the action entitled *Moodhe, et al. v Zwanger-Pesiri Radiology, et al.*, Index No. 604023/17, pending in the Supreme

Court, Nassau County, shall be consolidated in this court with the action entitled *Moodhe, et al. v Menken, et al.*, New York County Index No. 805092/18 for all purposes; and it is further

ORDERED that the cross-motions are granted to the extent that consolidation is granted, and are otherwise denied; and it is further

ORDERED that the consolidation shall take place under New York County Index No. 805092/18 and the consolidated action shall bear the following caption:

SANDRA MOODHE and DAVID MOODHE,

Plaintiffs,

-against-

FAITH MENKEN, M.D., SANDRA J. SHIN, M.D.,  
TESSA CIGLER, M.D., JEFFREY MILLER, M.D.,  
STEVEN KREMER, M.D., GRACE MONTELEONE, P.A.,  
COMPLETE WOMEN'S HEALTHCARE, P.C.,  
ZWANGER-PESIRI RADIOLOGY, NEW YORK-  
PRESBYTERIAN HOSPITAL/WEILL CORNELL  
MEDICAL CENTER, PATRICIA KELLY, M.D., NINA  
VINCOFF, M.D., JENNIE BRODSKY, M.D. and  
FRANK MONTELEONE M.D.

Defendants.

And it is further

ORDERED that, within 30 days from entry of this order, plaintiffs' counsel shall serve a certified copy of this order upon the Clerk of the Supreme Court, Nassau County, and shall pay the appropriate fee, if any, for such transfer and shall contact the staff of said Clerk to arrange for the effectuation of the transfer in an efficient manner; and it is further

ORDERED that service upon the Clerk of the Supreme Court, Nassau County, shall be made in accordance with any applicable protocol or other procedures of said county; and it is further

ORDERED that the Clerk of the Supreme Court, Nassau County, shall transfer the documents on file under Index No. 604023/17 to the Clerk of this Court for the purpose of consolidation; and it is further

ORDERED that the Clerk of the Supreme Court, Nassau County and the Clerk of this court shall coordinate the transfer of the documents being transferred so as to ensure an efficient transfer and to minimize insofar as practical the reproduction of such documents, including with regard to any documents that may be in digital format; 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, within 30 days from entry of this order, plaintiffs' counsel shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents transferred from the Supreme Court, Nassau County in the

consolidated case file under the New York County Index Number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, plaintiffs' counsel shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 325, 60 Centre Street, New York, New York, on October 30, 2018, at 9:30 a.m.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York  
August 31, 2018



Hon. Martin Shulman, J.S.C.