

Lazarus v Nicolas

2018 NY Slip Op 32807(U)

October 31, 2018

Supreme Court, New York County

Docket Number: 805012/2017

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Debra Lazarus, as the Administrator of the
Estate of Stephanie Lazarus, and
Deborah Lazarus Individually,

Index No.
805012/2017

Plaintiff(s),

**DECISION
and ORDER**

- against -

Mot. Seq. #001

Stephen J Nicolas MD PC d/b/a
NY Orthopedics, and
Benjamin Bedford, M.D.,

Defendant(s).

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Debra Lazarus (“Lazarus”) commenced this medical malpractice action (“Action #1”) on behalf of Decedent Stephanie Lazarus (“Decedent”), by Summons and Complaint on January 11, 2017. Defendants in Action #1 are Benjamin Bedford M.D. (“Bedford”), Stephen J. Nicholas, M.D., P.C. d/b/a (“Nicholas”) and NY Orthopedics. Lazarus alleges that the carelessness, negligence, and gross negligence of the Defendants, their agents, servants and/or employees, caused Decedent to sustain severe and serious personal injuries, physical pain, and mental anguish through the time of her death. Pursuant to the Complaint, the alleged malpractice occurred between November 19, 2015 and February 6, 2016 while Decedent was under post-operative outpatient care. Defendants interposed their Answers on March 8, 2017. This action bears the Index Number 805012/2017 and is venued in New York Supreme Court, New York County.

On July 10, 2018, Lazarus commenced a second medical malpractice action by Summons and Complaint (“Action #2”) against Defendant Meredith Stapleton, P.A.-C. (“Stapleton”). This action bears the Index Number 60502/2018 and is venued in New York Supreme Court, Westchester County. In Action #2, Lazarus alleges that Stapleton’s carelessness, negligence, and gross negligence caused Decedent to sustain severe and serious personal injuries, severe physical pain, and mental anguish through the time of her death. Pursuant to the Complaint, the alleged

malpractice occurred between November 19, 2015 and February 6, 2016 while under post-operative outpatient care. Stapleton interposed her Answer on August 3, 2018.

Presently before the court is Defendants Bedford, Nicholas and NY Orthopedics' motion, pursuant to CPLR § 602, to consolidate Action #1 and Action #2 in Westchester County. Lazarus does not oppose consolidation. Rather Lazarus opposes the venue, wherein Defendants seek to consolidate the two actions. Lazarus cross moves to consolidate Action #2 with Action #1 in New York County.

Consolidation

The trial court has the discretion under CPLR § 602(a) to consolidate actions where a common question of law or fact exists. The separate actions merge into one action and join all the parties into a single group of plaintiffs and a single group of defendants. *Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 497 [1st Dept 1968]. "A consolidation in an appropriate case is not only a saving in time, trouble, and expense to the parties and the state, but a preventive of the injustice which may result from divergent decisions in each separate case." *Philip Shlansky & Bro., Inc. v. Grossman*, 273 A.D. 544, 546, [1948].

"[T]here is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right." *Progressive Ins. Co. v. Countrywide Ins. Co.*, 10 A.D.3d 518, 519 [2004] (quoting *Raboy v. McCrory Corp.*, 210 A.D.2d 145, 147 [1994]; *Firequench, Inc. v. Kaplan*, 256 A.D.2d 213 [1998]). The nonmoving party has the burden of demonstrating how consolidation will prejudice a substantial right. *Progressive Ins. Co. v. Countrywide Ins. Co.*, 10 A.D.3d 518, 519 [2004].

"Where 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". *Harrison v. Harrison*, 16 A.D.3d 206, 207 [2005] (quotes omitted). Special circumstances can include the presence of evidence and the convenience of witnesses. *id.*

Discussion

It is not disputed in the motion and the cross-motion that there are common questions of law and fact with respect to the alleged malpractice by Defendants between November 19, 2015 and February 6, 2016. *Progressive Ins. Co. v.*

Countrywide Ins. Co., 10 A.D.3d 518, 519 [2004]. None of the parties establish that consolidation will prejudice a substantial right because no opposition is submitted in regards to consolidation. *id.*

Defendants in their motion argue that the consolidated actions should be venued in Westchester County where the later action was commenced, because “special circumstances” exist. Defendants state that the initial injury, medical care and surgery, subsequent surgical care, and place of death occurred were in Westchester County. Defendants also argue the non-party witnesses, inclusive of family, friends, ambulance technicians, emergency room nurses, physicians’ assistants, physicians and other medical providers are located in Westchester County. Plaintiff argues that the consolidated actions should be venued in New York County, where the first action was commenced.

Here, as Plaintiff points out, Action #1 has been proceeding with discovery for almost a year. There has been a preliminary conference, a compliance conference and four status conferences. At no time prior to the Plaintiff’s commencement of Action #2 did Defendants make a motion to change venue of Action #1 to Westchester County. Consolidation in Westchester County would cause only delay. Defendants do not demonstrate the hardships the non-party witnesses would face having to travel to New York County. Defendants have not provided proof of “special circumstances” in their pleadings.

Wherefore, it is hereby

ORDERED that Plaintiff Debra Lazarus’ Cross-Motion to consolidate Action 2 bearing Index Number 60502/2018 venued in Westchester County into Action 1 bearing Index Number 805030/2017 venued in New York County is granted with opposition and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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805012/2017

Plaintiff(s),

- against -

Stephen J Nicolas MD PC d/b/a
NY Orthopedics, Benjamin Bedford, M.D.,
and Meredith Stapleton, P.A.-C

Defendant(s).

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and it is further;

ORDERED that the Clerk of Supreme Court, Westchester County, shall transfer the papers on file under Index No. 60502/2018 to the Clerk of this Court upon service of a certified copy of this order and payment of appropriate fee, if any; 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 Plaintiff Debra Lazarus is directed to serve a copy of this order with notice on the County Clerk (Room 141B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that Plaintiff Debra Lazarus is directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158) who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that counsel are directed to appear for a conference in Room 205, 71 Thomas Street, on December 18, 2018, at 9:30 AM.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: OCTOBER 31, 2018



Eileen A. Rakower, J.S.C.