

Gulino v Kwai

2019 NY Slip Op 32423(U)

August 6, 2019

Supreme Court, New York County

Docket Number: 805048/16

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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KAREN GULINO,

INDEX NO. 805048/16

Plaintiff,

-against-

ANDREW KWAI, M.D., LENOX HILL RADIOLOGY &
MEDICAL IMAGING ASSOCIATES, P.C., JAMIE
KRAMER, M.D. and DOWNTOWN WOMEN OB/GYN
ASSOCIATES, LLP,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff moves for an order (I) amending the caption to reflect her resumption of her maiden name, (ii) lifting the stay of the action against Andrew Kwai, M.D. (“Dr. Kwai”) and Lenox Hill Radiology & Medical Imaging Associates, P.C.(“LHR”)(together “the Kwai defendants”) and compelling the Kwai defendants to proceed with discovery, (iii) severing the claims against defendants Andrew Kwai, M.D. and Lenox Hill Radiology & Medical Imaging Associates, P.C. from the action against defendants Jamie Kramer, M.D. (“Dr. Kramer”) and Downtown Women OB/GYN Associates, LLP (“Downtown Women”) (together “the Kramer defendants”).¹ The Kramer defendants oppose the motion to the extent plaintiff seeks to sever all claims against the Kwai defendants. The Kwai defendants oppose the motion to the extent plaintiff moves to compel discovery as against them.

In this medical malpractice action, plaintiff alleges that defendants negligently delayed in diagnosing her with Stage II(b) breast cancer during the period between July 31, 2013 through

¹Plaintiff also sought an order scheduling a discovery conference for the completion of outstanding discovery. That request is moot since after the motion was submitted, a discovery conference was held no July 11, 2019, and another conference is scheduled for August 29, 2019.

January 8, 2015. Dr. Kramer was plaintiff's gynecologist at Downtown Women, while Dr. Kwai was the radiologist who interpreted breast imaging studies at LHR.

On October 27, 2017, the Kwai defendants informed the court that their insurance carrier Fairway Physicians Insurance Company ("Fairway") was liquidating. Thereafter, between November 30, 2017 and October 27, 2018 several conference calls were held with the court, and the action was stayed against the Kwai defendants.

Plaintiff now moves to lift any stay and to compel the continuation of discovery as to the Kwai defendants or, in the alternative, to sever the action as against the Kwai defendants.

In opposition to the motion to lift the stay and to compel discovery, the Kwai defendants submit an order of the Superior Court of the District of Columbia dated October 25, 2017 (hereinafter "the Liquidation Order"), granting a consent petition authorizing the appointment of the Commission of Insurance to conduct liquidation proceedings with respect to Fairway. Moreover, of relevance here, the court directed that "all litigation against any Fairway policyholder is hereby stayed and that all persons and entities are enjoined from commencing or continuing any litigation against a Fairway policyholder until further order of the court."

The Kramer defendants oppose the motion to sever, asserting that it should be denied in the interest of judicial economy as severance would result in duplicative litigation and potentially inconsistent verdicts and unduly prejudice them as they would be required to proceed to trial without the benefit of depositions and other discovery from the Kwai defendants. In this connection, they assert that their defense includes the assertion Dr. Kramer relied on Dr. Kwai's interpretation of a 2013 mammogram to corroborate plaintiff's physical exam findings and rule of the possibility of malignancy. In addition, they argue that plaintiff will not be prejudiced if

severance is denied, particularly as there is no claim that plaintiff has had any recurrence of her cancer or any need for ongoing medical treatment.

In reply, plaintiff refers to case law supporting her argument that severance is appropriate when, as here, a defendant's insurance company is in liquidation.

At issue on this motion is whether the stay with respect to the Kwai defendants should be lifted and, if not, whether severance of the claims against these defendants is warranted.

As for plaintiff's motion to lift the stay and to compel the Kwai defendants to comply with discovery, this aspect of the motion is denied. The court notes that the Liquidation Order expressly provides for the stay of all actions against Fairway's policyholders. See generally CPLR 2201 (providing that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms that are just"). In addition, plaintiff provides no legal basis for lifting the stay, which the courts have held is entitled to full faith and credit. Dambrot v. REJ Long Beach, LLC, 39 AD3d 797, 799 (2d Dept 2007)(finding that "[a] stay by a court in another state enjoining and restraining all claims against insureds of an insolvent liability insurer is entitled to full faith and credit, and has the effect of suspending all proceedings against the insured as of its effective date")(internal citation omitted); see also, A.J. Pegno Const. Corp/Tully Const. Co., Inc. v. Highlands Ins. Co., 39 AD3d 273 (1st Dept 2007)(lower court should have granted a stay as the order of the Texas court, which restrained and enjoined all litigation against insolvent insurance company, is entitled to full faith and credit).

In light of the stay, severance of the claims against the Kwai defendants is warranted as plaintiff will be prejudiced by the substantial delay involved in awaiting the resolution of the

liquidation proceedings against these defendants, which prejudice outweighs any of the factors cited by the Kramer defendants in opposition to severance. See Drir v. U-9 Restaurant Association, Inc., 168 AD3d 445 (1st Dept 2019)(trial court providently exercised its discretion in severing third-party actions where plaintiff would be prejudiced by delay in discovery due to liquidation/ reorganization of insurers for the second third-party defendants); Kharmah v. Metropolitan Chiropractic Center, 288 AD2d 94, 94 (1st Dept 2001)(court properly exercised discretion in granting severance to prevent “any prejudice to plaintiff stemming from the delay in terminating chiropractic defendants’ bankruptcy proceeding”); Moy v. St Vincents Hosp. & Medical Center, 92 AD3d 651, 652 (2d Dept 2012)(holding that in medical malpractice action, severance of claims against hospital in bankruptcy was warranted finding that any prejudice to the plaintiff “in being required to await the conclusion of the bankruptcy proceeding before obtaining any remedy outweighs any potential inconvenience to the defendant [doctor]”).²

In view of the above, it is

ORDERED plaintiff’s motion to lift the stay and to compel discovery as against defendants Andrew Kwai, M.D. and Lenox Hill Radiology & Medical Imaging Associates, P.C is denied; and it is further

ORDERED plaintiff’s motion to sever the action as against defendants Andrew Kwai, M.D. and Lenox Hill Radiology & Medical Imaging Associates, P.C is granted; and

ORDERED that the action shall continue as against defendants Jamie Kramer, M.D. Downtown Women OB/GYN Associates, LLP; and it is further.

²The cases cited by the Kramer defendants to support their argument that severance would prejudice their defense and that the interest of justice requires a single trial are not controlling here as they do not involve circumstances where an action is stayed against the defendant due to bankruptcy or a liquidation proceeding. See e.g. Guilford v. Netter, 179 AD2d 801, 802 (2d Dept 1992)(holding that court erred in severing ordinary negligence claim from malpractice claim where causes of action against defendants were sufficiently related).

ORDERED defendants Andrew Kwai, M.D. and Lenox Hill Radiology & Medical Imaging Associates, P.C , shall notify the court, plaintiff's counsel and counsel to the Kramer defendants in the event that the stay issued in the Fairway matter is lifted and/or modified; and it is further

ORDERED that in the event the stay is lifted or modified, the court will consider an application to restore the severed claims against Andrew Kwai, M.D. and Lenox Hill Radiology & Medical Imaging Associates, P.C to the remaining claims in this action; and it is further

ORDERED that plaintiff's motion to amend the caption is granted without opposition; and it is further

ORDERED that Karen Nercessian shall be substituted as plaintiff in the above entitled action in the place and stead of Karen Guilino; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting Karen Nercessian in the place and stead of plaintiff Karen Gulino, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption is amended to read as follows:

KAREN NERCESSIAN, Index No. 805048/16
Plaintiff,

-against-

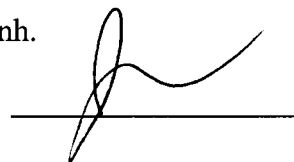
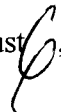
ANDREW KWAI, M.D., LENOX HILL RADIOLOGY &
MEDICAL IMAGING ASSOCIATES, P.C., JAMIE
KRAMER, M.D. and DOWNTOWN WOMEN OB/GYN
ASSOCIATES, LLP,
Defendants.

and it is further

ORDERED that within 20 days of e-filing of this order, plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the General Clerk's Office (room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service on the County Clerk and the Clerk of the General Clerk's office 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 the court's website at the address (www.nycourts.gov/supctmanh).

DATED: August 6, 2019



J.S.C.

**HON. JOAN A. MADDEN
J.S.C**